# COMMISSIONER OF SOCIAL SERVICES ET AL. *v.* TRAVIS ZARNETSKI
## (AC 38685)

Lavine, Mullins and Mihalakos, Js.

*Syllabus*

The plaintff Commissioner of Social Services appealed to the trial court from the decision of a family support magistrate dismissing the plaintiff's petition for child support, which was filed on behalf of the minor child's mother, B. In the petition, the plaintiff alleged that child support services were being provided to the minor child and that the defendant, Z, was the child's acknowledged father. The magistrate dismissed the support petition for failure to provide a copy of the acknowledgment of paternity signed by Z, which was executed at a hospital in Massachusetts where the child was born. Neither B nor Z contested the issue of paternity, and the plaintiff presented evidence of paternity through a Massachusetts birth certificate and the testimony of both B and Z, but was unable to produce a copy of the acknowledgment of paternity. The trial court rendered judgment affirming the magistrate's decision dismissing the support petition, from which the plaintiff appealed to this court. *Held* that the trial court improperly affirmed the magistrate's order dismissing the support petition: the plaintiff was not required, pursuant to the relevant statutory (§§ 46b-172 and 46b-215) provisions, to produce the Massachusetts acknowledgement of paternity in order to allow the magistrate to proceed on the support petition, as the procedure for a hearing on a support petition merely requires that the acknowledged father be served with a summons, which does not need to be accompanied by a copy of the acknowledgment, it is not necessary for the acknowledgment to be filed for it to be valid, and an out-of-state acknowledgment is given the same full faith and credit as one executed in Connecticut, and, therefore, the trial court acted in contravention of the plain and unambiguous language of §§ 46b-172 and 46b-215 when it found that the magistrate properly dismissed the support petition for the failure to provide a copy of the Massachusetts acknowledgment; moreover, for the magistrate and the trial court to require the petitioner to submit an acknowledgment of paternity when paternity was not at issue was in contravention of the public policy of ensuring that a minor child receive the support to which he or she is entitled without unnecessary difficulty, as Z did not deny his relation to the child and provided testimony that he was the child's father and that he had signed the acknowledgment, the child's birth certificate supported Z's testimony by listing him as the father, and B further corroborated that Z was the father of the child,

all of which was sufficient for the magistrate to proceed on the support petition and to enter an order for child support.

Argued April 26—officially released August 22, 2017

*Procedural History*

Petition for financial and medical support and maintenance, brought to the Superior Court in the judicial district of Litchfield and referred to the family support magistrate, *Jed N. Schulman*; order of dismissal; thereafter, the named plaintiff filed a petition to appeal to the trial court, *Hon. Elizabeth A. Gallagher*, judge trial referee; judgment dismissing the petition and affirming the decision of the family support magistrate; subsequently, the court denied the named plaintiff's motion to reargue, and the named plaintiff appealed to this court; thereafter, the court denied the named plaintiff's motion for an articulation. *Reversed; judgment directed.*

*Steven L. Samalot*, assistant attorney general, with whom were *Sean Kehoe*, assistant attorney general, and, on the brief, *George Jepsen*, attorney general, and *Rochelle Homelson*, assistant attorney general, for the appellant (named plaintiff).

*Opinion*

MIHALAKOS, J. The plaintiff, the Commissioner of Social Services, appeals from the judgment rendered by the trial court affirming the order of the Family Support Magistrate (magistrate) dismissing the plaintiff's support petition for failure to provide a copy of the acknowledgment of paternity. The plaintiff claims that the trial court erred in affirming the order of the magistrate because the plaintiff was not required to provide a copy of the acknowledgment of paternity for the magistrate to proceed on the support petition. We agree with the plaintiff and, accordingly, reverse the judgment of the trial court.

The record discloses the following relevant facts and procedural history. On November 21, 2014, the plaintiff,[1] acting on behalf of Christine Bassett[2] and pursuant to General Statutes §§ 46b-215,[3] 17b-745,[4] and/or 46b-172,[5] initiated an action for child support by filing a support

[1] The plaintiff acted and continues to act through the Department of Social Services—Bureau of Child Support Enforcement.

[2] Although Christie Bassett is also a plaintiff in this action, we refer in this opinion to the Commissioner of Social Services as the plaintiff and to Bassett by name.

[3] General Statutes § 46b-215 (a) provides in relevant part: "(1) . . . A family support magistrate may make and enforce orders for payment of support against any person who neglects or refuses to furnish necessary support to such person's . . . child under the age of eighteen . . . .

"(3) Proceedings to obtain orders of support under this section shall be commenced by the service on the liable person . . . of a verified petition, with summons and order, of the husband or wife, child or any relative . . . or in IV-D support cases, as defined in subdivision (13) of subsection (b) of section 46b-231, the Commissioner of Social Services."

General Statutes § 46b-231 (b) (13) provides in relevant part: " 'IV-D support cases' means cases in which the [Bureau of Child Support Enforcement within the Department of Social Services] is providing child support enforcement services . . . ."

[4] General Statutes § 17b-745 provides in relevant part: "(a) (1) The Superior Court or a family support magistrate may make and enforce orders for payment of support . . . in IV-D support cases, to the state acting by and through the [Bureau of Child Support Enforcement within the Department of Social Services], directed to the husband or wife, and if the . . . person is under the age of eighteen years . . . to any parent of any . . . person being supported by the state . . . . "

[5] General Statutes § 46b-172 provides in relevant part: "(a) (1) . . . A written acknowledgment of paternity executed and sworn to by the putative father of the child when accompanied by (A) an attested waiver of the right to a blood test, the right to a trial and the right to an attorney, and (B) a written affirmation of paternity executed and sworn to by the mother of the child . . . shall have the same force and effect as a judgment of the Superior Court. It shall be considered a legal finding of paternity without requiring or permitting judicial ratification, and shall be binding on the person executing the same whether such person is an adult or a minor, subject to subdivision (2) of this subsection. . . .

"(c) (1) At any time after the signing of any acknowledgment of paternity, upon the application of any interested party, the court or any judge thereof or any family support magistrate in IV-D support cases and in matters brought under sections 46b-301 to 46b-425, inclusive, shall cause a summons, signed by such judge or family support magistrate, by the clerk of the court

petition with the Family Support Magistrate Division. Attached to the petition was a verified statement of facts that alleged, inter alia, that the plaintiff was providing child support services to a minor child and that the defendant, Travis Zarnetski, was the acknowledged father of the child.[6] In support of the allegation that the defendant was the acknowledged father, the plaintiff appended to its petition a copy of the child's Massachusetts birth certificate, which listed Bassett as the mother and the defendant as the father.

On January 12, 2015, the case proceeded before the magistrate. The defendant appeared and testified that, at the time of the child's birth, he admitted that he was the father by signing an acknowledgment of paternity. This occurred at a hospital in Massachusetts, where the child was born. The defendant also testified that he placed his name on the child's birth certificate.

The magistrate determined that it needed a copy of the Massachusetts acknowledgment, which neither the plaintiff nor the defendant had. Accordingly, the magistrate directed the plaintiff to obtain a copy of the Massachusetts acknowledgment and stated that failure to do so may result in the dismissal of the support petition.

or by a commissioner of the Superior Court, to be issued, requiring the acknowledged father to appear in court at a time and place as determined by the clerk but not more than ninety days after the issuance of the summons, to show cause why the court or the family support magistrate assigned to the judicial district in IV-D support cases should not enter judgment for support of the child by payment of a periodic sum until the child attains the age of eighteen years or as otherwise provided in this subsection, together with provision for reimbursement for past-due support based upon ability to pay in accordance with the provisions of section 17a–90 or 17b-81, subsection (b) of section 17b-179 or 17b-223, 46b-129 or 46b-130, a provision for health coverage of the child as required by section 46b-215, and reasonable expense of the action under this subsection. . . ."

Section 46b-172 (c) was amended in 2015 by Public Acts, No. 15-71, § 85. For convenience, we refer herein to the current revision of the statute.

[6] The word "acknowledged" in paternity and child support proceedings refers to a written acknowledgment of paternity executed and sworn to pursuant to § 46b-172. See General Statutes § 7-36 (11) (" '[a]cknowledgment

On April 13, 2015, the plaintiff appeared again before the magistrate. The plaintiff informed the magistrate that the Department of Social Services (department) was unable to obtain a copy of the Massachusetts acknowledgment. An employee of the department testified that she had attempted to obtain a copy, but that the Commonwealth of Massachusetts required a $40 fee, and the department would not pay the fee. The department contacted local child support offices in Massachusetts and inquired whether they had a copy of the acknowledgment on file, but none of the offices had such a copy. Bassett, however, testified that the defendant had signed the acknowledgment of paternity in her presence and that he never rescinded the acknowledgment.

The plaintiff requested that the magistrate proceed on the support petition despite the plaintiff's inability to provide a copy of the acknowledgment because neither Bassett nor the defendant were contesting the issue of paternity, and the plaintiff had presented evidence of paternity through the Massachusetts birth certificate and the testimony of both the defendant and Bassett. The magistrate, however, determined that it still required the Massachusetts acknowledgment and, accordingly, dismissed the support petition without prejudice.

On April 27, 2015, the plaintiff appealed the magistrate's order to the Superior Court pursuant to General Statutes § 46b-231 (n),[7] claiming that the magistrate's

of paternity' means to legally acknowledge paternity of a child pursuant to section 46b-172").

[7] General Statutes § 46b-231 (n) provides in relevant part: "A person who is aggrieved by a final decision of a family support magistrate is entitled to judicial review by way of appeal under this section. . . .

"(6) The appeal shall be conducted by the Superior Court without a jury . . . .

"(7) The Superior Court may affirm the decision of the family support magistrate or remand the case for further proceedings. The Superior Court may reverse or modify the decision if substantial rights of the appellant have been prejudiced . . . ."

dismissal of the support petition was an error of law. In its November 9, 2015 memorandum of decision, the trial court held that the magistrate did not err when it required that the Massachusetts acknowledgment of paternity be entered into evidence before proceeding with the support petition because the acknowledgment had been signed in another state. Accordingly, the trial court dismissed the appeal. This appeal followed. Additional facts will be set forth as necessary.

On appeal, the plaintiff claims that the trial court's judgment affirming the magistrate's order dismissing the support petition was an error of law. Specifically, the plaintiff argues that neither of the relevant statutes, §§ 46b-172 and 46b-215, require a copy of the acknowledgment of paternity to be produced when paternity is not at issue, and when the defendant, the putative father, testifies that he signed the acknowledgment and caused his name to be placed on the birth certificate. Moreover, the plaintiff claims that the trial court's decision is in contravention of the legislative intent and strong state policy to ensure that minor children receive the support to which they are entitled. We agree with the plaintiff.

We first set forth our standard of review. The plaintiff's claim presents a matter of statutory construction, which is a question of law. "The interpretation of a statute, as well as its applicability to a given set of facts and circumstances, involves a question of law and our review, therefore, is plenary." *Commissioner of Social Services* v. *Smith*, 265 Conn. 723, 734, 830 A.2d 228 (2003).

"The principles that govern statutory construction are well established. When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner,

the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy is was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . .'' *Ventura* v. *East Haven*, 170 Conn. App. 388, 404–405, 154 A.3d 1020, cert. granted on other grounds, 325 Conn. 905, 156 A.3d 537 (2017).

''[Our Supreme Court] previously [has] concluded that the statutory scheme regarding child support enforcement evinces a strong state policy of ensuring that minor children receive the support to which they are entitled. . . . Moreover, this scheme also demonstrates unequivocally the legislature's position that this support should be provided, to the extent possible, by the parents of minor children.'' (Citation omitted; internal quotation marks omitted.) *Commissioner of Social Services* v. *Smith*, supra, 265 Conn. 735.

Against this background, we conclude that the relevant statutory provisions do not require the plaintiff to produce the Massachusetts acknowledgment of paternity in order for the magistrate to proceed on the support petition. Pursuant to § 46b-172 (a) (1), ''a written acknowledgement of paternity executed and sworn by the putative father of the child . . . shall have the same force and effect as a judgment of the Superior Court.

It shall be considered a legal finding of paternity without requiring or permitting judicial ratification, and shall be binding on the person executing the same whether such person is an adult or a minor, subject to subdivision (2) of this subsection. Such acknowledgment shall not be binding unless, prior to the signing of any affirmation or acknowledgment of paternity, the mother and the putative father are given oral and written notice of the alternatives to, the legal consequences of, and the rights and responsibilities that arise from signing such affirmation or acknowledgment."

Also relevant to this appeal are two other subsections of § 46b-172. "An acknowledgment of paternity signed in any other state according to its procedures shall be given full faith and credit by this state. General Statues § 46b-172 (a) (H). Additionally, subsection (c) (1) of that statute provides in relevant part: "At any time after the signing of any acknowledgment of paternity, upon the application of any interested party, the court or any judge thereof or any family support magistrate in IV-D support cases and in matters brought under sections 46b-301 to 46b-425, inclusive, shall cause a summons . . . to be issued, requiring the acknowledged father to appear in court at a time and place as determined by the clerk . . . to show cause why the court or the family support magistrate . . . should not enter judgment for support of the child . . . ."

Nowhere in the pertinent language of § 46b-172 is a plaintiff required to provide either the magistrate or the trial court with a copy of an acknowledgment of paternity in order for a support petition to proceed. Indeed, the procedure for a hearing on a support petition merely requires that the acknowledged father be served with a summons to appear in court, and such summons need not be accompanied by a copy of the acknowledgment. Moreover, the acknowledgment need

not be filed in order to be valid.[8] The requirements do not change for an out-of-state acknowledgment; pursuant to § 46b-172, an out-of-state acknowledgment is to be given the same full faith and credit as an acknowledgment executed in Connecticut. Had the legislature intended to require out-of-state acknowledgments to be submitted to the magistrate in order for them to be given the same full faith and credit as a Connecticut acknowledgment, it could have added such a provision. Accordingly, we conclude that, in finding that the magistrate properly dismissed the support petition on the basis that a copy of the Massachusetts acknowledgment was required, the trial court acted in contravention to the plain and unambiguous language of § 46b-172.

Turning now to § 46b-215, subsection (a) (1) provides: "The Superior Court or a family support magistrate may make and enforce orders for payment of support against any person who neglects or refuses to furnish necessary support to such person's spouse or a child under the age of eighteen or as otherwise provide in this subsection, according to such person's ability to furnish such support, notwithstanding the provisions of section 46b-37. If such child is unmarried and a full-time high school student, such support shall continue according to the parents' respective abilities, if such child is in need of support, until such child completes the twelfth grade or attains the age of nineteen, whichever occurs first." Moreover, § 46b-215 (a) (4) provides that "[f]or purposes of this section, the term 'child'

[8] It is also noteworthy that General Statutes (Rev. to 1997) § 46b-172 (a) provided in relevant part: "the written acknowledgement of paternity executed and sworn to by the putative father of the child when accompanied by . . . a written affirmation of paternity executed and sworn by the mother of the child *and filed with Superior Court* for the judicial district in which the mother of the child of the putative father resides shall have the same force and effect of that court . . . ." (Emphasis added.) When that statute was amended by No. 99-193, § 7, of the 1999 Public Acts, the filing requirement was removed.

shall include one born out of wedlock whose father has acknowledged in writing paternity of such child or has been adjudged the father by a court of competent jurisdiction . . . ."

Section 46b-215 (a) (4) creates a duty for parents, married or otherwise, to support their children. An individual who has a child out of wedlock may be subject to this duty if he acknowledged paternity in writing. The statute, however, does not explicitly or implicitly require that the written acknowledgment be submitted as evidence in order for a magistrate to proceed on a support petition. Had the legislature intended such, it would have incorporated into the language of the statute a requirement that the acknowledgment must be submitted. Accordingly, we conclude that the trial court acted in contravention to the plain and unambiguous language of § 46b-215 when it found that the magistrate properly dismissed the support petition for the failure to provide a copy of the Massachusetts acknowledgment.

In addition, for the magistrate and trial court to require the plaintiff to submit an acknowledgment of paternity when paternity was not at issue is in contravention to our public policy of ensuring that a minor child receive the support to which he or she is entitled without unnecessary difficulty. The defendant did not deny his relation to the child. Indeed, the defendant testified not only to signing the acknowledgment, but also to being the father of the child. Moreover, the evidence did not contradict these admissions. Rather, the birth certificate supported the defendant's testimony by listing him as the child's father.[9] Furthermore,

[9] We find it noteworthy that Massachusetts law requires that, when a child is born out of wedlock, paternity must be established before the father may place his name on the child's birth certificate. Specifically, pursuant to Mass. Gen. Laws c. 46, § 1 (2016), "[i]n the record of birth of a child born to parents not married to each other, *the name of and other facts relating to the father shall not be recorded except as provided in section 2 of chapter 209C where paternity has been acknowledged or adjudicated* under the

Bassett's testimony corroborated that of the defendant, as she also testified that the defendant was the father of and had acknowledged the child. Such testimony coupled with the child's birth certificate should have been sufficient for the magistrate to proceed on the support petition and to enter an order for child support. See *Colbert* v. *Carr*, 140 Conn. App. 229, 238, 57 A.3d 878 (paternity not at issue because established by defendant's own admission at time of child's birth and trial court heard no evidence to suggest defendant was unwilling or unable to sign acknowledgment of paternity), cert. denied, 308 Conn. 926, 64 A.3d 333 (2013).

The judgment is reversed and the case is remanded with direction to render judgment for the plaintiff, to reverse the decision of the magistrate and to remand the case to the magistrate for a hearing on the amount of child support to be ordered.

In this opinion the other judges concurred.

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## STATE OF CONNECTICUT *v.* ANTOINE WALTON (AC 38588)

Keller, Prescott and Flynn, Js.

*Syllabus*

Convicted, after a jury trial, of the crimes of robbery in the first degree, larceny in the second degree and assault on an elderly person in the third degree, the defendant appealed to this court. The defendant's conviction stemmed from an incident in which he robbed the victim of her purse in a store parking lot. The victim and two eyewitnesses gave statements to the police at the scene and later to detectives at the police station. During his closing argument to the jury, defense counsel suggested that the investigating detectives had conformed the statements given by the witnesses at the police station to make them consistent with respect to the witnesses' description of the defendant. In response, the prosecutor argued in his rebuttal closing argument that, if the detectives had wanted to fabricate evidence and to testify falsely,

laws of the commonwealth or under the law of any other jurisdiction." (Emphasis added.)

they could have done so in a manner more favorable to the state by stating that the defendant had told them that he had committed the subject crimes. On appeal, the defendant claims that the prosecutor's comments constituted improper vouching and misstatements of the law because they created the false impression that there was nothing to impede the detectives, other than their own honesty, from testifying falsely, when substantial legal hurdles, such as the defendant's fifth amendment right against self-incrimination, precluded the detectives from fabricating their testimony. *Held* that, in light of binding precedent arising out of similar facts, the prosecutor's comments were not improper nor did they misstate the law, as a prosecutor may appeal to the common sense of jurors by arguing that a witness could have told a more damning lie than the witness testified to at trial, and the comments here were a proper request for the jurors to use their common sense and to draw reasonable inferences from the evidence in assessing the credibility of the detectives; moreover, the prosecutor's hypothetical embraced a plethora of scenarios in which the fifth amendment was not implicated, and, therefore, the amendment was not a barrier to the detectives' ability to fabricate a more inculpatory confession by the defendant at trial.

Argued May 18—officially released August 22, 2017

*Procedural History*

Substitute information charging the defendant with the crimes of robbery in the first degree, larceny in the second degree, and assault on an elderly person in the third degree, brought to the Superior Court in the judicial district of Waterbury and tried to the jury before *Crawford*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

*Matthew C. Eagan*, assigned counsel, with whom, on the brief, was *James P. Sexton*, assigned counsel, for the appellant (defendant).

*Bruce R. Lockwood*, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Don E. Therkildsen*, senior assistant state's attorney, for the appellee (state).

*Opinion*

FLYNN, J. The defendant, Antoine Walton, appeals from the judgment of conviction, rendered after a jury

trial, of robbery in the first degree in violation of General Statutes § 53a-134 (a) (4), larceny in the second degree in violation of General Statutes § 53a-123 (a) (3), and assault on an elderly person in the third degree in violation of General Statutes § 53a-61a (a). On appeal, the defendant claims for the first time that the prosecutor engaged in impropriety and misstated the law during rebuttal closing argument when he argued to the jury that, had the investigating detectives wanted to fabricate evidence, they would have done so in a manner that was more favorable to the state's case. The prosecutor made these remarks in response to the defendant's suggestion during his closing argument that certain detectives had conformed witness statements concerning the height, footwear and other identifying characteristics of the defendant to make them consistent. We conclude that because binding precedent arising out of similar facts controls, in light of it, the defendant has failed to show that the prosecutor's remarks were improper. We agree with the state that the prosecutor did not misstate the law, because he did not make a statement of the law, at all, and we accordingly affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are pertinent to this appeal. On January 12, 2013, the defendant snatched the purse of the victim, Mary Cardella, as she was walking into the Rite Aid store on Fairfield Avenue in Waterbury, knocking her down in the process. The store manager, Jason Simpson, went outside to assist the victm, but stopped short of the altercation when the defendant threatened to shoot him. After taking the purse, the defendant then ran off behind Rite Aid. Maureen Giordano, who had witnessed the incident, began following the defendant until he threatened to shoot her. Simpson also followed the defendant, and saw him

enter building eight of 222 Fairfield Avenue, an apartment complex directly behind Rite Aid.

Police arrived on the scene and took statements from Cardella, Simpson and Giordano. At the same time, a state police K-9 officer tracked the defendant from the scene of the incident to the lower level of building eight of 222 Fairfield Avenue, where there was a single apartment. Waterbury Police obtained consent to search the apartment from its occupant, the defendant's girlfriend. Inside, they found the defendant's state identification card.

Cardella, Simpson and Giordano later gave statements at the police department. Both Cardella and Simpson positively identified the defendant as the robber in photographic arrays that detectives prepared. Meanwhile, the defendant's girlfriend alerted him to the search and that the police were looking for him. Thereafter, the defendant voluntarily went to the police station where he was arrested.

The defendant was charged with robbery in the first degree, larceny in the second degree and assault on an elderly person in the third degree. During closing arguments at trial, defense counsel stated: "In [Giordano's] 911 call, she gave a physical description . . . of a tall, black male, black hat, brown, suede jacket and blue jeans . . . and work boots. . . . Now, forty minutes later she reports to the Waterbury Police Department and that physical description changes . . . to black male with a black hoodie. . . . Now, this black hoodie and the physical description are only consistent when these witnesses get to the police department and their statements are typed up by [the detectives]. Their description on the scene is totally different than what is eventually written on that paper and that they signed at the end of the day. How does she go from black hat, brown suede jacket, very specific, blue jeans and work

boots to just a black hoodie? And the answer is, those same two detectives . . . .

"Now, is this a coincidence that all these physical descriptions given on the scene are then changed to be consistent in the police department? They're changed to be consistent with the physical description of [the defendant]. The first description they give on the scene doesn't match [the defendant], but they made sure that by the time they got to that police station that physical description described [the defendant].

"Jason Simpson's 6 foot 4, 175 pound black male with black jeans, black hoodie and black sneakers on the scene becomes a brown skinned black male around 30 [years old] with a medium build at 6 feet tall.

"Maureen Giordano's . . . tall, black male, black hat, brown suede jacket, blue jeans and work boots becomes a dark skinned black male about 30 years old, medium build, around 6 feet wearing a black hoodie.

"Once again, totally different description given on the scene made consistent at the police department by . . . the detectives.

"Mary Cardella's testimony, by the way, not surprisingly, in her statement, also taken by [the detectives], black hoodie, 6 feet tall. Consistent with the other two witnesses whose description was changed."

In response to this argument, the prosecutor stated in his rebuttal: "Now, if [the detectives] had this grand conspiracy and they want to put all this in these statements all they have to do is sit up there when they testify and say, hey, [the defendant] was at the police department, he told me he did it. If they want to lie to you, there's a good lie. Why wouldn't they do that? Think about that when you judge [their] credibility. All they have to do is sit there and say, he told me he did it." Defense counsel did not object to this statement.

The jury returned a verdict of guilty on all counts. The court imposed a sentence of eighteen years imprisonment, execution suspended after twelve years, followed by five years of probation. This appeal followed.

On appeal, the defendant claims that the prosecutor engaged in impropriety and misstated the law during rebuttal closing argument when he argued to the jury that, had the investigating detectives wanted to fabricate evidence, they would have done so in a manner that was more favorable to the state's case. The prosecutor made these remarks in response to the defendant's suggestion during his closing argument that certain detectives had conformed witness statements concerning the height, footwear and other identifying characteristics of the defendant to make them consistent. The defendant asserts that the remarks were improper vouching and misstatements of the law because they created the false impression that "there was nothing stopping the detectives, other than their own honesty, from testifying that 'he told me he did it,' " when in fact "substantial legal hurdles," such as the defendant's fifth amendment rights against self-incrimination, precluded the detectives from fabricating such testimony. We disagree.

"[I]n analyzing claims of prosecutorial [impropriety], we engage in a two step analytical process. The two steps are separate and distinct: (1) whether [impropriety] occurred in the first instance; and (2) whether that [impropriety] deprived a defendant of his due process right to a fair trial. Put differently, [impropriety] is [impropriety], regardless of its ultimate effect on the fairness of the trial; whether that [impropriety] caused or contributed to a due process violation is a separate and distinct question . . . ." (Internal quotation marks omitted.) *State* v. *Stevenson*, 269 Conn. 563, 572, 849 A.2d 646 (2004).

"[I]t is not improper for the prosecutor to comment upon the evidence presented at trial and to argue the

inferences that the jurors might draw therefrom . . . . We must give the jury the credit of being able to differentiate between argument on the evidence and attempts to persuade them to draw inferences in the state's favor, on one hand, and improper unsworn testimony, with the suggestion of secret knowledge, on the other hand." (Citations omitted; internal quotation marks omitted.) Id., 583. "Furthermore, prosecutors are not permitted to misstate the law. . . . [W]hen a defendant raises on appeal a claim that improper remarks by the prosecutor deprived the defendant of his constitutional right to a fair trial, the burden is on the defendant to show . . . that the remarks were improper . . . ." (Internal quotation marks omitted.) *State* v. *Otto*, 305 Conn. 51, 77, 43 A.3d 629 (2012).

Turning to the present case, we conclude that the prosecutor's remarks during rebuttal argument do not constitute an impropriety. Prosecutors may appeal to the common sense of jurors by arguing that a witness could have told a more damning lie than she testified to at trial. See *State* v. *Long*, 293 Conn. 31, 46–47, 975 A.2d 660 (2009). In *Long*, the defendant was convicted based on allegations that he had touched the victim inappropriately. See id., 33–35. During closing arguments, the prosecutor stated: "If you are going to make something up, why not just say he went all the way to sexual intercourse? He made me perform oral sex on him. He made me do this, he made me do that, he made me do this. . . . If you are going to lie, why not just keep on lying and lying and lying?" (Emphasis omitted; Internal quotation marks omitted.) Id., 46. Our Supreme Court found no prosecutorial impropriety, stating: "[T]his argument is a permissible appeal to the common sense of the jurors on the basis of the very limited and specific nature of [the victim's] accusations. It would be reasonable for the jurors to infer that, if [the victim]

had a motive to lie due to her desire to harm the defendant, her accusations would be less specific and would involve more severe conduct. Of course, this is not the only reasonable inference that could be drawn from the nature of the allegations, but it is based on the evidence, and it would be reasonable for the jurors to draw such an inference." (Emphasis omitted.) Id., 46–47.

Likewise, our Supreme Court has determined that a prosecutor's remark that a witness who chose to lie would have told a better lie is not improper vouching. See *State* v. *Ciullo*, 314 Conn. 28, 42–43, 100 A.3d 779 (2014). In *Ciullo*, the prosecutor stated: "Common sense tells us that there is not a conspiracy between [the witnesses] to give false testimony. If people wanted to conspire to give false testimony, they would have made up a little bit better of a story than that." (Internal quotation marks omitted.) Id., 42 n.12. Our Supreme Court held that a prosecutor's remark that if the witnesses were lying, the witnesses could have told a better lie did not "convey [the prosecutor's] personal opinion of the credibility of the witnesses; instead, the prosecutor's statements . . . are reasonable inferences the jury could have drawn from the evidence adduced at trial." (Emphasis omitted.) Id., 43.

Similar to the arguments at issue in *Long* and *Ciullo*, the prosecutor in the present case remarked: "[I]f [the detectives] had this grand conspiracy . . . [a]ll they have to do is . . . say, hey, [the defendant] was at the police department, he told me he did it. If they want to lie to you, there's a good lie." We discern no meaningful difference between the comments the prosecutor made here and those that our Supreme Court did not find improper in *Long* and *Ciullo*. Instead, the prosecutor's remarks were a proper request for the jurors to use their common sense and draw reasonable inferences in assessing credibility.

We reject the defendant's attempts to distinguish *Long* and *Ciullo* from the present case on the ground that the witnesses here are police officers. Although our appellate courts have not addressed the question of whether a different rule applies to police officers, multiple federal courts of appeals have failed to make such a distinction. See *United States* v. *Garcia*, 758 F.3d 714, 723 (6th Cir. 2014), cert. denied, U.S. , 135 S. Ct. 498, 190 L. Ed. 2d 374 (2014); *United States* v. *Isler*, 429 F.3d 19, 28 (1st Cir. 2005), cert. denied sub nom. *Brown* v. *United States*, 547 U.S. 1022, 126 S. Ct. 1591, 164 L. Ed. 2d 303 (2006); *United States* v. *Wilkerson*, 411 F.3d 1, 8 (1st Cir. 2005); *United States* v. *Figueroa-Encarnacion*, 343 F.3d 23, 28–29 (1st Cir. 2003), cert. denied sub nom. *Medina* v. *United States*, 540 U.S. 1140, 124 S. Ct. 1130, 157 L. Ed. 2d 951 (2004). Although not stating a general rule, we do not believe any such distinction is warranted by the facts of this case.

The defendant, however, claims that the prosecutor's remarks misstated the law because they failed to explain that his fifth amendment right against self-incrimination, and not just the detectives' propensity to testify truthfully, could have precluded the admission of his confession. This precise argument is not addressed by any of the federal cases cited previously; however, the fifth amendment protections afforded by *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), only attach when an individual is both in custody and subject to interrogation. See *Rhode Island* v. *Innis*, 446 U.S. 291, 298–302, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). Thus, the prosecutor's hypothetical embraced a plethora of scenarios in which the fifth amendment was not implicated and, thus, not a barrier to the detectives' ability to fabricate a more inculpatory confession at trial. Even though there are some scenarios in which the admission of

such a confession may be suppressed on *Miranda* grounds, this mere possibility does not transform the prosecutor's otherwise proper appeal to the jurors' common sense into improper argument. Nor did it require listing of various hypothetical factual scenarios and legal hurdles pertinent to those facts that might impede admission of any inculpatory statements into evidence that the police might have fabricated.

We therefore conclude that *Long* and *Ciullo* foreclose the defendant's claim that the prosecutor's challenged remarks were improper. Because there was no impropriety, we do not address the defendant's claim of harm to his due process rights.

The judgment is affirmed.

In this opinion the other judges concurred.

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## WINDSOR FEDERAL SAVINGS AND LOAN ASSOCIATION *v.* RELIABLE MECHANICAL CONTRACTORS, LLC, ET AL.
## (AC 38896)

DiPentima, C. J., and Sheldon and Bear, Js.

*Syllabus*

The plaintiff bank, in 2009, brought this breach of contract action against the defendant R Co. in connection with R Co.'s default on a promissory note it had executed and delivered to the plaintiff, and against the defendant E, the sole owner and operator of R Co., whom the plaintiff claimed had executed and delivered to the plaintiff a commercial guarantee as security for the note. After the defendants were defaulted for failure to plead and to disclose assets, the trial court granted R Co.'s motions to open the defaults, and the defendants filed an answer and a special defense, in which they claimed that the plaintiff had fraudulently induced them to enter into the agreement and that E had never personally guaranteed the loan, and a counterclaim alleging, inter alia, fraud. Thereafter, the complaint was withdrawn as to E. The trial court granted the plaintiff's motion for summary judgment on the complaint as to liability only with respect to R Co., and the plaintiff's motion to dismiss the counterclaim as to R Co. Subsequently, at a hearing in damages, the

trial court declined E's request to present evidence on behalf of R Co. in light of a previous denial of his request to be made a party defendant. Thereafter, the trial court granted the plaintiff's motion for judgment against R Co. and rendered judgment thereon, from which R Co. and E appealed to this court. *Held*:

1. Because the plaintiff withdrew its claims against E in May, 2011, and E was no longer a defendant to the plaintiff's complaint when the trial court rendered its final judgment for R Co. on the complaint in February, 2016, E was not aggrieved by that judgment and, therefore, had no standing to appeal from it; moreover, because the judgment of the trial court dismissing the defendants' counterclaim pertained to R Co. only, there was no final judgment on the counterclaim with respect to E, and, therefore, this court lacked jurisdiction over the portion of E's appeal that challenged the trial court's dismissal of the counterclaim.
2. The trial court improperly granted the plaintiff's motion for summary judgment as against R Co., R Co. having raised a genuine issue of material fact as to whether the guarantee was signed by E; in response to the plaintiff's motion for summary judgment, R Co. submitted an affidavit executed by E in which he denied signing the guarantee, as well as portions of the transcript of E's deposition in which E disputed the plaintiff's contention that he had signed the guarantee, and the trial court improperly resolved that contested fact when it found that R Co. had presented no credible opposition to the motion for summary judgment.
3. R Co. could not prevail on its claim that the trial court improperly dismissed its counterclaim on the ground that it was barred by the statute of limitations; because, in addition to finding that the counterclaim was barred by the statute of limitations, the trial court also dismissed the counterclaim on the ground of lack of standing by R Co., which R Co. did not challenge on appeal, there still existed an unchallenged ground on which the trial court based its judgment, and, therefore, there was no practical relief that could be afforded R Co. on its statute of limitations claim, and its appeal challenging the dismissal of its counterclaim was dismissed as moot.

Argued April 13—officially released August 22, 2017

*Procedural History*

Action to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Graham*, *J.*, granted the plaintiff's application for a prejudgment remedy; thereafter, the defendants were defaulted for failure to plead; subsequently, the complaint was

withdrawn as to the defendant Elijah El-Hajj-Bey; thereafter, the court, *Graham*, *J.*, granted the named defendant's motion to open the default judgment; subsequently, the named defendant was defaulted for failure to disclose assets; thereafter, the court, *Graham*, *J.*, granted the plaintiff's motion to cite in Elijah El-Hajj-Bey as a defendant; subsequently, the court, *Graham*, *J.*, granted the named defendant's motion to open the default judgment; thereafter, the defendants filed counterclaims; subsequently, the complaint was withdrawn as to the defendant Elijah El-Hajj-Bey; thereafter, the court, *Hon. Richard M. Rittenband*, judge trial referee, granted the plaintiff's motion for summary judgment on the complaint as to liability only, and granted the plaintiff's motion to dismiss the counterclaims; subsequently, Elijah El-Hajj-Bey appealed to this court, which dismissed the appeal; thereafter, the court, *Sheridan*, *J.*, denied the motion to be made a party defendant filed by Elijah El-Hajj-Bey, and Elijah El-Hajj-Bey appealed to this court, which dismissed the appeal; subsequently, following a hearing in damages, the court, *Elgo*, *J.*, granted the plaintiff's motion for judgment and rendered judgment theron, from which the named defendant and Ellijah El-Hajj-Bey appealed to this court. *Appeal dismissed in part*; *reversed*; *further proceedings*.

*John R. Williams*, for the appellants (named defendant et. al.).

*Deborah L. Dorio*, for the appellee (plaintiff).

*Opinion*

SHELDON, J. The defendants, Reliable Mechanical Contractors, LLC (Reliable Mechanical), and its sole member, Elijah El-Hajj-Bey, appeal from the summary judgment rendered in favor of the plaintiff, Windsor Federal Savings and Loan Association, on its collection

claim, and from the judgment of dismissal of their counterclaims. As to the summary judgment, the defendants claim that the plaintiff failed to prove the nonexistence of any genuine issue of material fact and that it was thus entitled to judgment on its complaint as a matter of law.[1] As to the dismissal of the counterclaims, the defendants argue that the court erred in concluding that their counterclaims were barred by the three year statute of limitations. Because El-Hajj-Bey was not a party to the underlying action at the time final judgment was rendered on the plaintiff's complaint, he does not have standing to appeal from that judgment. Accordingly, we dismiss El-Hajj-Bey's appeal from the summary judgment. As to the dismissal of the counterclaims, that judgment applied only to Reliable Mechanical's counterclaims, not to those advanced by El-Hajj-Bey. There is thus no final judgment on El-Hajj-Bey's counterclaims from which to appeal, and, accordingly, we dismiss El-Hajj-Bey's appeal from the judgment of dismissal as to those counterclaims. We reverse the summary judgment ordered by the trial court against Reliable Mechanical and dismiss as moot the appeal from the judgment of dismissal of its counterclaims.

The following factual and procedural history, as gleaned from the pleadings filed by the parties, is relevant to our consideration of the issues raised on appeal. In May, 2005, Reliable Mechanical executed and delivered to the plaintiff a promissory note in the amount of $25,000. As security for the note, El-Hajj-Bey, the sole owner and operator of Reliable Mechanical, purportedly executed and delivered to the plaintiff a commercial guarantee. Reliable Mechanical subsequently defaulted on the note, and in 2009, the plaintiff commenced the present action against Reliable Mechanical

[1] The defendants also claim that the court erred in not allowing El-Hajj-Bey to be heard on behalf of Reliable Mechanical at the hearing in damages on the plaintiff's complaint. Because we reverse the summary judgment rendered in favor of the plaintiff, we need not address this claim.

and El-Hajj-Bey, seeking money damages, interest, reasonable attorney's fees, and costs of suit.

On April 25, 2011, El-Hajj-Bey filed an affidavit with the trial court indicating that he had filed for bankruptcy. Consequently, on May 11, 2011, the plaintiff withdrew its complaint as to El-Hajj-Bey. On August 18, 2011, however, following the dismissal of El-Hajj-Bey's bankruptcy petition, the plaintiff successfully moved to cite in El-Hajj-Bey as an additional party. On September 6, 2011, the plaintiff served El-Hajj-Bey with an amended complaint.

On December 5, 2011, the defendants filed an answer and a special defense, claiming that the plaintiff had fraudulently induced them to enter into the agreement, in violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a, et seq. (CUTPA), and that El-Hajj Bey had never personally guaranteed the loan in question. They also asserted two counterclaims. In the first counterclaim, alleging fraud, the defendants asserted that the plaintiff had offered them help to finance the expansion of their business, then fraudulently induced them to purchase a property, owned by one of the plaintiff's officers, which turned out not to be zoned for the type of business in which the defendants were engaged, ultimately causing them to suffer various economic losses, including the foreclosure of that property. In their second counterclaim, based upon the same factual allegations, they claimed that the plaintiff, by its actions, had violated CUTPA.

On May 23, 2014, the plaintiff filed a motion for summary judgment as to liability only. The defendants filed an objection to the motion for summary judgment claiming, inter alia, that El-Hajj-Bey's signature on an unrelated document had been transposed in some manner onto the subject note and that the funds they allegedly had borrowed had never been received.

On May 30, 2014, the plaintiff filed a motion to dismiss the defendants' counterclaims on the grounds that the defendants lacked standing to bring said counterclaims and, alternatively, that those claims were barred by the statute of limitations.[2] After El-Hajj-Bey filed for bankruptcy two more times, the plaintiff withdrew its complaint against him individually on October 20, 2014.

On November 3, 2014, the trial court, *Hon. Richard M. Rittenband*, judge trial referee, held a hearing on the plaintiff's motion for summary judgment and its motion to dismiss the defendants' counterclaims. The trial court granted both motions from the bench. The court granted the plaintiff's motion for summary judgment as to liability, finding that there had been "no credible opposition" to the motion. The trial court later clarified that summary judgment as to liability had been rendered as to the $25,000 loan in dispute only. In addition, the court granted the plaintiff's motion to dismiss the defendants' counterclaims, finding that the the defendants did not have standing to bring those counterclaims because they referred to other property not at issue in the plaintiff's complaint and they were barred by the statute of limitations. The court later filed an articulation stating that the dismissal applied only to Reliable Mechanical's counterclaims.

On October 2, 2015, the plaintiff moved for judgment against Reliable Mechanical. Thereafter, on October 9, 2015, the trial court, *Elgo*, *J.*, held a hearing in damages, at which time El-Hajj-Bey appeared and attempted to present evidence on behalf of Reliable Mechanical, again seeking to prove, inter alia, that he had not signed the subject note. The court, however, declined his request, stating that, in light of the court's order denying

[2] On July 1, 2014, the defendants moved for an extension of time to file a response to the plaintiff's motion to dismiss the counterclaims, but no action was ever taken on that motion and no objection to the motion to dismiss the counterclaims was ever filed.

his most recent motion to be made a party defendant, he "[did] not have a right to be heard" at the hearing in damages, which was proceeding only against Reliable Mechanical. On February 10, 2016, the trial court rendered a judgment against Reliable Mechanical, in the amount of $30,382.23, plus attorney's fees of $22,800.00 and costs of $1147.60. This appeal followed.

I

The defendants claim that the trial court erred in granting the plaintiff's motion for summary judgment because the plaintiff failed to prove the nonexistence of a genuine issue of material fact. Specifically, the defendants argue that a genuine issue remained as to whether El-Hajj-Bey had signed the Reliable Mechanical note and his guarantee[3] at issue in this case, and thus that the plaintiff was not entitled to judgment as a matter of law. We agree.

Before addressing the merits of the defendants' challenge to summary judgment, we must address the threshold issue of whether El-Hajj-Bey has standing to challenge that judgment on appeal. General Statutes § 52-263 provides, in relevant part: "Upon the trial of all matters of fact in any cause or action in the Superior Court, whether to the court or jury, or before any judge thereof when the jurisdiction of any action or proceeding is vested in him, *if either party* is aggrieved by the decision of the court or judge upon any question or questions of law arising in the trial . . . he may appeal to the court having jurisdiction from the final judgment of the court or of such judge . . . ." (Emphasis added.) "On its face, the statute explicitly sets out three criteria that must be met in order to establish subject matter jurisdiction for appellate review: (1) the appellant must be a party; (2) the appellant must be aggrieved by the

[3] Although El-Hajj-Bey disputes his signature on the guarantee, that issue is not before us in this appeal.

trial court's decision; and (3) the appeal must be taken from a final judgment." *State* v. *Salmon*, 250 Conn. 147, 153, 735 A.2d 333 (1999).

Here, the plaintiff withdrew its claims against El-Hajj-Bey on October 20, 2014. El-Hajj-Bey, therefore, was no longer a defendant to the plaintiff's complaint when the trial court rendered its final judgment thereon in February, 2016. Because he was not a defendant to the plaintiff's complaint when the final judgment was rendered, he is not aggrieved by the judgment, and thus has no standing to appeal from it.

We now turn to Reliable Mechanical's challenge to the summary judgment. "In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . [I]t is only [o]nce [the] [movant's] burden in establishing his entitlement to summary judgment is met [that] the burden shifts to [the opposing party] to show

that a genuine issue of fact exists justifying a trial." (Citation omitted; internal quotation marks omitted.) *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 319–20, 77 A.3d 726 (2013).

"In ruling on a motion for summary judgment, the court's function is not to decide issues of material fact . . . but rather to determine whether any such issues exist." (Internal quotation marks omitted.) *RMS Residential Properties, LLC* v. *Miller*, 303 Conn. 224, 233, 32 A.3d 307 (2011), overruled on other grounds by *J.E. Robert Co.* v. *Signature Properties, LLC*, 309 Conn. 307, 71 A.3d 492 (2013). "[I]ssue-finding, rather than issue-determination, is the key to the procedure." (Internal quotation marks omitted.) *DiMiceli* v. *Cheshire*, 162 Conn. App. 216, 222, 131 A.3d 771 (2016). In summary judgment, the court's role is not to weigh the credibility of the parties, which falls within the province of the finder of fact. See *Suarez* v. *Dickmont Plastics Corp.*, 229 Conn. 99, 107, 639 A.2d 507 (1994). "When a court, in ruling on a motion for summary judgment, is confronted with conflicting facts, resolution and interpretation of which would require determinations of credibility, summary judgment is not appropriate." *Straw Pond Associates, LLC* v. *Fitzpatrick, Mariano & Santos, P.C.*, 167 Conn. App. 691, 710, 145 A.3d 292, cert. denied, 323 Conn. 930, 150 A.3d 231 (2016). The scope of our review of the trial court's decision to grant or to deny a party's motion for summary judgment is plenary. *Romprey* v. *Safeco Ins. Co. of America*, supra, 310 Conn. 313.

Here, Reliable Mechanical claims, as it did below, that the plaintiff failed to prove that El-Hajj-Bey had signed the note and guarantee for the loan that is the subject of this action, and thus that a genuine issue of material fact exists and the plaintiff was not entitled to summary judgment. In support of its motion for summary judgment, the plaintiff submitted copies of the

note and guarantee that were purportedly signed by El-Hajj-Bey. In response, Reliable Mechanical submitted an affidavit executed by El-Hajj-Bey, in which he averred, inter alia: "While I recognize my signature on the signature pages for the note and [guarantee] for the $25,000 loan, I am unfamiliar with those documents and did not receive all the money listed. During my deposition on May 8, 2014, the [plaintiff] presented me with a document dated May 23, 2005, but the signature sheet, containing my signature, was dated August 23, 2008. It was clear that [the plaintiff] took the signature from another document that I signed." In its memorandum of law in support of summary judgment, the plaintiff quoted portions of El-Hajj-Bey's deposition purporting to demonstrate the nonexistence of a dispute as to whether El-Hajj-Bey signed the documents at issue.[4] Reliable Mechanical submitted a copy of a certain portion of the transcript of El-Hajj-Bey's deposition calling the plaintiff's contention into question. The court granted summary judgment in favor of the plaintiff in a very brief order, consisting only of three lines, on the ground that Reliable Mechanical had presented "no credible opposition" to it. We conclude, on the basis of our plenary review of the record, that Reliable Mechanical raised a genuine issue of material fact, and the court, rather than simply recognizing the existence of that contested fact, impermissibly resolved it. Accordingly, summary judgment was not properly rendered.

II

The defendants also challenge the trial court's judgment dismissing their counterclaims. The court dismissed the defendants' counterclaims for two reasons. It explained: "First [Reliable Mechanical] does not have

[4] The plaintiff did not, however, submit copies of the transcripts of the deposition.

standing because the counterclaim refers to other property and not the instant property. Secondly the claimed harm in the counterclaim is alleged to [have occurred in] March, 2005 and the counterclaim wasn't filed until December 5, 2011. There are two counts, fraud and [CUTPA], each of which has a three year statute of limitations." The court subsequently, on this court's order, articulated its decision, explaining that, because El-Hajj-Bey had filed for bankruptcy, its judgment of dismissal pertained only to the counterclaims advanced by Reliable Mechanical.

Because the court's judgment of dismissal pertained only to Reliable Mechanical's counterclaims, there has been no final judgment on the counterclaims filed by El-Hajj-Bey individually. This court thus lacks jurisdiction over El-Hajj-Bey's appeal, and it must therefore be dismissed. See Practice Book § 61-3.

As for Reliable Mechanical's appeal from the court's judgment of dismissal of its counterclaims, it argues that the court erred in holding that they were barred by the three year statute of limitations. As Reliable Mechanical notes in its brief to this court, however, the statute of limitations is only "[o]ne of the two grounds on which the court dismissed" its counterclaims. "[I]t is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from *the determination of which no practical relief can follow*. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way. . . . Where an appellant fails to challenge all bases for a trial court's adverse ruling on his claim, even if this court were to agree with the appellant on the issues that he does raise, we still would not be able to provide [him] any relief in light of the binding adverse finding[s] [not raised] with respect to those claims. . . . Therefore, when an appellant challenges a trial court's

adverse ruling, but does not challenge all independent bases for that ruling, the appeal is moot." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Lester*, 324 Conn. 519, 526–27, 153 A.3d 647 (2017).

Here, even if we were to determine that Reliable Mechanical's claim regarding the statute of limitations has merit, there still would exist another ground upon which the trial court based its judgment—that Reliable Mechanical lacked standing to assert those counterclaims—which has not been challenged on appeal. There is thus no practical relief we can afford to Reliable Mechanical on the basis of its appeal.

The appeal with respect to El-Hajj-Bey's challenge to the summary judgment and with respect to the defendants' challenge to the dismissal of their counterclaims is dismissed; the summary judgment rendered against Reliable Mechanical is reversed and the case is remanded for further proceedings.

In this opinion the other judges concurred.

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## JPMORGAN CHASE BANK, N.A. *v.* J. MAURICE HERMAN
## (AC 38126)

Lavine, Keller and Bishop, Js.

*Syllabus*

The plaintiff bank, which previously had obtained a judgment against the defendant in Florida that remained unsatisfied, filed an application for an order in aid of execution of the foreign judgment. The plaintiff had served interrogatories on the defendant in aid of execution under Florida law, seeking information concerning any trusts in which the defendant held an interest, and a hearing thereon was held in Florida. Thereafter, the plaintiff registered its Florida judgment in Connecticut pursuant to the Uniform Enforcement of Foreign Judgments Act (§ 52-604 et seq.), and submitted an application for a turnover order to the trial court, in which it alleged that the defendant held an interest in a certain trust

and that the trust's assets were held in a brokerage account located in Stamford, Connecticut. The application also identified UBS Financial Services, Inc., as the garnishee. The plaintiff then requested the trial court to issue an order compelling the defendant and the broker from UBS to transfer to the levying officer, inter alia, the defendant's marketable securities held by UBS, including without limitation, the assets in the trust. The defendant filed an objection to the plaintiff's application, asserting that the court lacked personal jurisdiction over the matter because UBS did not have physical possession of the certificates of the securities held by the trust as they were in the possession of a depository company in New York and, therefore, the plaintiff was not entitled to execute on those assets. In response, the plaintiff asserted that the court had in rem jurisdiction because, pursuant to the statutory provision (§ 42a-8-112 [c]) of the Uniform Commercial Code, the location of the broker rather than the location of the securities certificates determines the situs of the assets. At the hearing on the application for a turnover order, the court admitted an account statement for the trust that listed a Connecticut address for the broker, and the undisputed evidence presented at the hearing identified the broker's Stamford office as UBS. At the conclusion of the hearing, the court orally granted the application and, thereafter, issued a written turnover order, directing UBS, to transfer the defendant's marketable securities to the levying officer. The defendant then filed an appeal with this court. *Held*:

1. The defendant could not prevail on his claim that the trial court improperly exercised personal jurisdiction over him because he had no significant contacts with Connecticut and the mere presence of his broker in the state was insufficient to confer jurisdiction, as the certificates of the subject securities were physically located in New York: under the circumstances of this case, the court's exercise of personal jurisdiction over the defendant was fair because the merits of the underlying action were fully and fairly litigated in Florida and thus the plaintiff was the holder of a valid money judgment, and because the trust account was managed by a financial officer in UBS's Connecticut office, it was reasonable to conclude that the office would readily exercise control over the defendant's assets, it would have been fruitless to direct the turnover order directly to the depository company in New York, and it was the defendant's decision to evade the judgment debt for several years and to employ the services of a Connecticut broker with control over the subject securities; moreover, this court was not persuaded by the defendant's arguments that the plaintiff's evidence showing that a Connecticut broker managed the subject account was stale and that the trial court improperly excluded from evidence an affidavit offered by the defendant to demonstrate the court's jurisdiction, as the defendant had offered no admissible evidence that, at the time the application for a turnover order was submitted, the account was no longer managed by a Connecticut broker, and the court did not abuse its discretion in failing to consider

the defendant's affidavit, as the defendant offered no rationale why his affidavit was not hearsay or why it fell within a hearsay exception.

2. This court found unpersuasive the defendant's claim that the trial court's turnover order improperly deviated from its oral ruling granting the plaintiff's application for the order because the order should have been directed to UBS's Stamford office instead of to UBS in general and should have expressly limited execution to the assets in the trust account; the trial court's turnover order, directing UBS to transfer the defendant's marketable securities was appropriate, as the plaintiff's application identified UBS as the garnishee, the undisputed evidence presented at the hearing on the application identified the broker's Stamford office as UBS, and there was no indication that the broker's office in Stamford was its own corporation or other legally distinct entity, and the court's order in its oral ruling, that service of process be directed to the broker's Stamford office was not inconsistent with the turnover order because the order did not address how and where process was to be served; moreover, although the court's oral ruling directing the broker to transfer the defendant's marketable securities, "including without limitation" those in the trust, was ambiguous, any ambiguity was resolved by the court's written order, which directed UBS to transfer cash and marketable securities.

Argued February 15—officially released August 22, 2017

*Procedural History*

Application for execution and order in aid of a foreign judgment, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Heller*, *J.*; judgment for the plaintiff, from which the defendant appealed to this court. *Affirmed.*

*Jack Kallus*, with whom were *Shivani Desai* and, on the brief, *John W. Cannavino*, *Jr.*, for the appellant (defendant).

*Matthew Triggs*, with whom were *Kelley Franco Throop* and, on the brief, *Lisa Markofsky*, for the appellee (plaintiff).

*Opinion*

KELLER, J. The defendant, J. Maurice Herman, appeals following the trial court's issuance of a turnover order pursuant to General Statutes § 52-356b. The plaintiff, JPMorgan Chase Bank, N.A., applied for the order.

The defendant claims that (1) the court improperly exercised personal jurisdiction over him, and (2) the order improperly deviated from the court's prior oral ruling granting the plaintiff's application.[1] We disagree. Accordingly, we affirm the judgment of the trial court.

On the basis of the evidence presented and the parties' representations, the following facts are not in dispute. The plaintiff was the defendant's broker. Some years ago, that relationship soured, and the parties became embroiled in an action in Florida. The record discloses neither the date of commencement nor the precise nature of the litigation. On April 28, 2011, the Florida court rendered judgment in favor of the plaintiff, and later awarded the plaintiff attorney's fees and costs totaling $259,539.96, with interest continuing to accrue. The defendant thereafter exhausted his appeals in the Florida courts.

On March 26, 2014, while the judgment was still unsatisfied, the plaintiff served on the defendant interrogatories in aid of execution under Florida law. The interrogatories directed the defendant to provide, inter alia, information concerning any trusts in which he held an interest. In his answers to the interrogatories, the defendant indicated that he held an interest in a "bilateral trust" (trust) in which he was settlor, trustee, and beneficiary. He further stated that the trust "[d]oes business under the fictitious name Marstack & Co.," "[the trust's] [a]ssets are owned by Marstack & Co. and are located in Connecticut," and "[t]he broker is David Watkins from UBS [Financial Services, Inc. (UBS)] in Westport, Connecticut."

[1] In his appellate brief, the defendant makes two more claims: that the court improperly excluded from evidence an affidavit offered by him, and that the plaintiff "[was] improperly forum shopping" by seeking relief in Connecticut. We view the former claim as an argument in support of the defendant's first claim rather than as a separate claim, and, therefore, address it as part of the first claim. The latter claim is substantively indistinct from the first claim, and, therefore, our analysis of the first claim disposes of it.

On October 17, 2014, a proceeding in aid of execution was held in Florida Circuit Court. At the hearing, the defendant testified under oath that the trust held assets worth approximately $120 million, and that those assets were still being held in the Connecticut UBS account. The defendant further testified: "I cannot tell you with absolute certainty where [the] securities are registered, but it is a Connecticut account. If you were to look at the [Depository Trust Company],[2] all of their assets are held in New York, and that's where all securities—or virtually all securities are held by the member banks. So, I can't speak to the legal logistics as to how securities are held, but it's Connecticut or—and/or New York."

On February 13, 2015, the plaintiff registered its Florida judgment in Connecticut pursuant to the Uniform Enforcement of Foreign Judgments Act, General Statutes § 52-604 et seq. On May 6, 2015, the plaintiff submitted its application for a turnover order (order) to the trial court. General Statutes § 52-356b, the turnover statute, sets forth a postjudgment procedure permitting a judgment creditor to "(a) . . . apply to the court for an execution and an order in aid of the execution directing the judgment debtor, or any third person, to transfer to the levying officer[3] either or both of the following: (1) Possession of specified personal property that is sought to be levied on; or (2) possession of documentary evidence of title to property of, or a debt owed to, the judgment debtor that is sought to be levied on." "The court may issue a turnover order pursuant to [this

[2] The Depository Trust Company is "a limited purpose trust company organized under New York law for the purpose of acting as a depository to hold securities for the benefit of its participants, some 600 or so broker-dealers and banks." Uniform Commercial Code, art. 8, prefatory note.

[3] General Statutes § 52-350a (12) defines a "leveling officer" as "state marshal or constable acting within such marshal or constable's geographical jurisdiction or in IV-D cases, any investigator employed by the Commissioner of Social Services."

section], after notice and hearing . . . on a showing of need for the order." General Statutes § 52-356b (b). In its application for the order, the plaintiff asserted that the defendant held an interest in the trust and that the trust's assets were held in a UBS brokerage account located in Connecticut. The plaintiff therefore requested that the court issue an order compelling the defendant and UBS to "transfer to the levying officer cash or marketable securities held by UBS in the name of or for the benefit of [the defendant], including without limitation, the assets in the [trust] . . . sufficient to satisfy [the plaintiff's] judgment . . . ."

The defendant filed an objection to the application in which he asserted that the court lacked personal jurisdiction in the matter because UBS's Connecticut branch did not have physical possession of the certificates of the securities held by the trust. The defendant claimed that those certificates were in the possession of the aforementioned Depository Trust Company (Depository Trust); see footnote 2 of this opinion; in New York. He, therefore, argued that the securities had a New York situs[4] and, accordingly, that the plaintiff was not entitled to execute on those assets in Connecticut.

The plaintiff countered that the court had in rem jurisdiction[5] because, under article 8 of the Uniform Commercial Code (UCC); General Statutes § 42a-8-101

[4] Situs is "[t]he location or position (of something) for legal purposes . . . ." Black's Law Dictionary (7th Ed. 1999).

[5] One note about terminology: Traditionally, territorial jurisdiction had three categories: in personam, in rem, and quasi in rem. These terms, however, "have only modest analytic utility in modern context. This is because the specific distinctions between them as bases of jurisdiction have to a large extent been obliterated." Restatement (Second), Judgments § 5, comment b, p. 68 (1982). In the modern context, "[j]urisdiction in personam, in rem, and quasi in rem are forms of personal jurisdiction." Restatement (Fourth), Foreign Relations Law of the United States § 302, comment (2016). Hereinafter, we, therefore, refer to "personal jurisdiction" instead of the traditional categories.

et seq.; the location of the broker—in this case, Connecticut—rather than the location of the securities certificates, determines the situs of the assets. See General Statutes § 42a-8-112 (c).

The court held a hearing on the application on June 22, 2015. During the hearing, the parties relied on the foregoing facts and arguments. The court also admitted evidence at the hearing. In addition to the answers to the interrogatories and a transcript of the proceeding in aid of execution, the court admitted an account statement for the trust. The statement provided a Stamford address for UBS, and also listed Watkins as the financial advisor.

At the conclusion of the hearing, the court orally granted the application. In so doing, the court reasoned: "I don't believe that it is the obligation of [the plaintiff] or any other creditor to [serve the Depository Trust]. [The Depository Trust], frankly, would have to have a legal department of 5000 lawyers if [it] had to litigate every time somebody had to attach a brokerage account by some individual debtor." A written turnover order directed at UBS followed. The defendant then filed the present appeal. Additional facts will be discussed in the context of our analysis.

I

The defendant's first claim is that the court improperly exercised personal jurisdiction over him. We disagree.

At the outset, we need to clarify what the defendant is and is not arguing. The defendant is not attacking the judgment by arguing that the *Florida* court was without personal or subject matter jurisdiction, which is the typical method by which a party defends against the enforcement of a foreign judgment. See, e.g., *Cahaly* v. *Somers*, 89 Conn. App. 816, 820, 877 A.2d 837, cert.

denied, 275 Conn. 910, 882 A.2d 669 (2005). Nor does the defendant dispute that the trial court had jurisdiction over UBS, to the extent that it has offices in Connecticut. Instead, the defendant challenges only the personal jurisdiction of the courts of *this state* over *him*. The defendant argues that Connecticut lacks personal jurisdiction over him because he has never been to this state, owns no property here, and has not otherwise availed himself of the state such that haling him into court here would not violate due process. As previously mentioned, he contends that the mere presence of his broker here, a fact that he also disputes, as discussed later in this opinion, is insufficient to confer personal jurisdiction because the target of the present action—the defendant's securities—have certificates that are physically located in New York. Our review of this claim is plenary. See *Walshon* v. *Ballon Stoll Bader & Nadler, P.C.*, 121 Conn. App. 366, 371, 996 A.2d 1195 (2010).

"The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum-contacts standard elucidated in *International Shoe* [*Co.* v. *Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945)]." *Shaffer* v. *Heitner*, 433 U.S. 186, 207, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977). "[I]f [a defendant] be not present within the territory of the forum, he [must] have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." (Internal quotation marks omitted.) *International Shoe Co.* v. *Washington*, supra, 316.

The preceding standard, however, does not apply in the same manner to postjudgment enforcement proceedings like the one in this case. The United States Supreme Court has stated: "[W]e know of nothing to justify the assumption that a debtor can avoid paying his obligations by removing his property to a State in

which his creditor cannot obtain personal jurisdiction over him. The Full Faith and Credit Clause, after all, makes the valid in personam judgment of one State enforceable in all other States." (Footnote omitted.) *Shaffer* v. *Heitner*, supra, 433 U.S. 210. Accordingly, "[o]nce it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter." Id., 210 n.36. Thus, to the extent that the defendant argues that personal jurisdiction is lacking because his contacts with Connecticut would be insufficient to commence the *original* action here, he is mistaken.

Nevertheless, it seems axiomatic that there at least *be* property in the jurisdiction where postjudgment enforcement is sought. See *Electrolines, Inc.* v. *Prudential Assurance Co.*, 677 N.W.2d 874, 885 (Mich. App. 2003). When that property is real or tangible personal property within the borders of the enforcing jurisdiction, it is presumptively fair for the judgment creditor to attempt to levy that property, even if the property is the judgment debtor's only connection with the jurisdiction. See *Bank of Babylon* v. *Quirk*, 192 Conn. 447, 450, 472 A.2d 21 (1984); *Ruiz* v. *Lloses*, 233 N.J. Super., 608, 611, 559 A.2d 866 (App. Div. 1989); see also A. Simowitz, "Siting Intangibles," 48 N.Y.U.J. Int'l L. & Pol. 259, 297 (2015) (presence of tangible asset in jurisdiction "serves as a prima facie basis on which a court can say that it sets the agenda for . . . that particular asset"). For example, in *Bank of Babylon* v. *Quirk*, supra, 447, the plaintiff secured a default judgment against the defendant in New York. The defendant, a resident of Tennessee, had a boat docked in Connecticut. Id., 449. The plaintiff brought the judgment to Connecticut and, thereafter, attached the boat in order to

satisfy the judgment debt. Id., 447, 449. The defendant moved to dismiss the action for lack of personal jurisdiction, which the trial court granted. Id., 447–48. Our Supreme Court reversed the judgment. Id., 450. Relying in part on *Shaffer*, the court concluded: "Having been given fair notice and an opportunity to defend the action on the merits in the state of New York, the defendant cannot be heard to complain because the plaintiff seeks to enforce that judgment against any of his property situated in this state." Id.

The nature of the property in the present case, however, does not lend itself to as straightforward an analysis. Accordingly, before proceeding with our analysis, we need to present some background on the property at issue, as well as on the statutory scheme governing claims to that property.

As noted previously, the court admitted into evidence an account statement for the trust. The statement showed that, as of May 30, 2014, the assets in the trust had a value of over $130 million, about $118 million of which was in municipal securities. The evidence also showed, in the form of a letter from UBS's Stamford office addressed to the defendant, that UBS observed the following policy: "UBS Customer securities are not held at UBS branches or offices with the exception of physical certificates that are in the process of being transferred to or from a customer. Most securities are held at [Depository Trust] . . . in 'Street Name', an SEC-approved depository located [in New York]. This means that UBS Financial Services [Inc.] has an account at [Depository Trust], and [Depository Trust] knows UBS Financial Services as the owner of the securities, while UBS Financial Services keeps the record of the customers who are the beneficial owners of the securities." The defendant represents on appeal, as he did before the trial court, that the trust assets are, and

always have been, "physically located" at the Depository Trust in New York. For purposes of this appeal, we assume the same.

This manner of holding securities is known as the indirect holding system. See Uniform Commercial Code, art. 8, prefatory note. "Holding securities indirectly means 'ownership' is evidenced by book-entries in accounts maintained by securities intermediaries. It is often referred to as holding securities in 'street name.' An intermediary holds such securities directly by being the person in possession of the security certificate or the person to whom the security is registered on the books of the issuer. The owners holding indirectly are sometimes referred to as beneficial owners . . . ." R. Hakes, "UCC Article 8: Will the Indirect Holding of Securities Survive the Light of Day?," 35 Loy. L.A. L. Rev. 661, 664 n.2 (2002). In part because of the complexities posed by the claims of creditors to such indirectly held securities, the drafters of the UCC in 1994 revised article 8, which deals with investment securities. Uniform Commercial Code, art. 8, prefatory note. Connecticut has adopted the UCC's revised article 8. See General Statutes § 42a-8-101 et seq.

The provision of revised article 8 relevant to this case is codified in General Statutes § 42a-8-112 (c), which provides in relevant part: "The interest of a debtor in a security entitlement may be reached by a creditor only by legal process upon the securities intermediary with whom the debtor's securities account is maintained . . . ." Put simply, "[i]f Debtor holds securities through Broker, and Broker in turn holds through Clearing Corporation, Debtor's property interest is a security entitlement against Broker. Accordingly, Debtor's creditor cannot reach Debtor's interest by legal process directed to the Clearing Corporation." Uniform Commercial Code, art. 8, § 8-112, comment 3. Instead, process must be directed "to the debtor's own security intermediary." Id.

In the context of this case, the defendant holds a "security entitlement" in the securities in the UBS account because the Depository Trust holds the securities certificates, which are in the name of UBS. See General Statutes § 42a-8-102 (a) (16). The defendant is therefore an "entitlement holder;" see General Statutes § 42a-8-102 (a) (8); and UBS a "securities intermediary." See General Statutes § 42a-8-102 (a) (13). Thus, under § 42a-8-112 (c), process must be directed to UBS, not to the Depository Trust. The reason for this is readily apparent: as confirmed by UBS's own policy, the Depository Trust knows only *UBS*, not the defendant, as the legal owner of the securities.

Article 8 of the UCC does not purport to address the personal jurisdiction issues associated with creditors' claims to indirectly held securities. Nevertheless, we conclude that the operation of article 8 in this case satisfies the requirements of personal jurisdiction. The test for whether a court properly invokes personal jurisdiction is essentially one of "reasonableness or fairness." (Internal quotation marks omitted.) *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 292, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980). "[T]he defendant's contacts with the forum [s]tate must be such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." (Internal quotation marks omitted.) Id. In other words, the defendant "must reasonably anticipate being haled into court there . . . ." (Internal quotation marks omitted.) *Calder* v. *Jones*, 465 U.S. 783, 790, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984). Recall also that "the requirement of contacts may be greatly relaxed . . . where a plaintiff is suing a nonresident defendant to enforce a judgment procured in another State." *World-Wide Volkswagen Corp.* v. *Woodson*, supra, 309 n.14 (Brennan, J., dissenting), citing *Shaffer* v. *Heitner*, supra, 433 U.S. 210–11 nn.36

and 37. Under the circumstances of this case, the court's exercise of jurisdiction over the defendant was fair.

We conclude so for several reasons. The merits of the underlying action were fully and fairly litigated in Florida. Consequently, the plaintiff is the holder of a valid money judgment. The defendant has, for several years and notwithstanding his substantial means, evaded the judgment debt. Indeed, at the aforementioned proceeding in aid of execution in Florida, the defendant pledged to "do everything I possibly can to make sure [the plaintiff] never [gets] paid legally." The defendant then essentially directed the plaintiff to obtain relief in Connecticut. Not only was UBS's Stamford office a "securities intermediary" under § 42a-8-102 (a) (13) by virtue of the fact that UBS in general was a securities intermediary, but the trust account was managed personally by a financial advisor working out of UBS's Stamford office.[6] It is reasonable to conclude that that office would be able to readily exercise control over the defendant's assets, and, therefore, to comply with a turnover order. We also observe that, as previously explained, directing a turnover order directly to the Depository Trust would be fruitless. The defendant objects to being haled into what he deems an inconvenient jurisdiction, but it was his decision to evade the

[6] It is not our conclusion that UBS's status as a securities intermediary under § 42a-8-102 (a) (13) is enough, in and of itself, to confer personal jurisdiction in any state in which UBS has an office. Cf. *Aurelius Capital Partners, LP* v. *Republic of Argentina*, Docket No. 07 CIV. 11327 (TPG), 2010 WL 768874, *4 (S.D.N.Y. March 5, 2010) ("[T]he question remains under the UCC, as to how to interpret 'securities intermediary' in a situation of an international bank with the home office in New York and branches abroad. The term is not self-defining."). It may very well not be fair, for instance, to hale the defendant into court in a postjudgment enforcement proceeding in a state where the only connection is the fact that there is a UBS branch office there. By contrast, that is not an issue in the present case because of the undisputed evidence that the trust account was managed directly out of the Stamford UBS office.

judgment debt and to employ the services of a Connecticut broker with control over the defendant's leviable property.

As a final matter, we may briefly dispose of the defendant's remaining arguments in support of this claim. We are not persuaded that the plaintiff's evidence showing a Connecticut broker was, as the defendant contends, "stale." At the October 17, 2014 proceeding in aid of execution in Florida, the defendant confirmed that the account had a Connecticut broker. The plaintiff filed its application for a turnover order on May 6, 2015. It is reasonable to conclude that, at the time of the application's submission, the account was still managed by a Connecticut broker. The defendant, moreover, offered no admissible evidence to controvert that fact.

We must also reject the defendant's argument that the court improperly excluded an affidavit executed by him from evidence. The following evidence is relevant to this argument. The defendant did not personally appear at the hearing on the plaintiff's application. His attorney, however, sought to introduce as an exhibit an affidavit executed by the defendant attesting that, subsequent to the Florida hearing in aid of execution in which the defendant represented that the trust account had a Connecticut broker, he "decided to transfer the management of the [t]rust account to the Goodhue Advisory Group [located in New York] within UBS." The plaintiff objected to the affidavit as hearsay. The defendant did not dispute that the affidavit was hearsay, nor did he contend that it fell within an exception to the hearsay rule. See Conn. Code Evid. § 8-1 et seq. Consequently, the court did not admit the affidavit as an exhibit.

On appeal, the defendant does not dispute that the affidavit was hearsay and that it did not fall within an exception to the rule excluding such evidence. Rather,

he argues that "[i]n determining whether a court has personal jurisdiction over a defendant, it is proper to consider affidavits submitted in demonstrating jurisdiction or lack thereof." To the extent that the defendant's argument depends on the interpretation of law, our review is plenary. See *DeLeo* v. *Nusbaum*, 263 Conn. 588, 593, 821 A.2d 744 (2003).

The defendant cites two cases, *Pitruzello* v. *Muro*, 70 Conn. App. 309, 798 A.2d 469 (2002), and *Villager Pond, Inc.* v. *Darien*, 54 Conn. App. 178, 734 A.2d 1031 (1999), in support of his argument. Those cases are, however, inapposite, as they illustrate that, in the context of a motion to dismiss; see Practice Book § 10-30; the court will admit undisputed facts set forth in supporting affidavits. See *Pitruzello* v. *Muro*, supra, 312; cf. *Villager Pond, Inc.* v. *Darien*, supra, 182. If, in light of those affidavits and other evidence, "a jurisdictional determination is dependent on the resolution of a critical factual dispute," the court will conduct an evidentiary hearing in connection with the motion to dismiss in order to determine jurisdictional facts. *Conboy* v. *State*, 292 Conn. 642, 652, 974 A.2d 669 (2009).

Those procedures, however, were inapplicable to the present case because the court was not proceeding on a motion to dismiss. The court, therefore, was not required to consider, much less credit, the defendant's affidavit.

It was within the court's discretion to conduct an evidentiary hearing; see *State* v. *Nguyen*, 253 Conn. 639, 653, 756 A.2d 833 (2000); and the defendant does not argue that the court abused its discretion by doing so. He also, as previously mentioned, offers no rationale for why the affidavit was not hearsay or why it fell within a hearsay exception. We, therefore, do not disturb the court's decision to exclude the affidavit from

evidence on the basis of hearsay. Accordingly, this argument is not persuasive.

For the foregoing reasons, we reject the defendant's claim that the trial court was without personal jurisdiction in this matter.

II

The defendant's second claim is that the turnover order improperly deviated from the court's prior oral ruling granting the plaintiff's application for that order. See *Sanzo* v. *Sanzo*, 137 Conn. App. 216, 220, 222, 48 A.3d 689 (2012) (substantive alteration of judgment constitutes opening of judgment; court may not, sua sponte, open judgment). We disagree.

The following evidence is relevant to this claim. In its application for the turnover order, the plaintiff requested that the court order the defendant and UBS to "transfer to the levying officer cash or marketable securities held by UBS in the name of or for the benefit of [the defendant], including without limitation, the assets in the [trust] . . . sufficient to satisfy [the plaintiff's] judgment . . . ." At the conclusion of the hearing, the following exchange occurred:

"The Court: . . . [J]ust so we're clear, the execution that the [plaintiff] is looking for is an execution that you want to serve on UBS here in Connecticut to execute on whatever account is held either for [the defendant or] for the benefit of [the defendant], including the account under the name of Marstack & Company as a trade name?

"[The Plaintiff's Counsel]: That's correct, Your Honor.

"The Court: All right. . . . I am going to grant the application and—so the execution will issue on UBS in Stamford on whatever account there is held in—

for the benefit of [the defendant] under the name of Marstack & Company as the trade name. . . .

"[The Defendant's Counsel]: Just to clarify your ruling, Your Honor, this is solely for any UBS accounts for [the defendant] under the trust of Marstack & Co. held in Stamford, Connecticut?

"[The Court]: Well, it's going to be served on UBS. . . . [S]o, the execution is being served here. . . . So, for our purposes, I've granted the application for an execution. It will be served on UBS at their offices in Stamford . . . ."

Later on the same day, the court issued its written order, which, tracking the language in the plaintiff's application, directed UBS to "forthwith transfer to the levying officer cash or marketable securities held by UBS in the name of or for the benefit of [the defendant], including without limitation, the assets in the [trust] d/b/a Marstack & Co., sufficient to satisfy [the plaintiff's] Judgment . . . ." Thereafter the defendant filed an emergency motion for a stay of execution and a motion for clarification on the ground that the court's written order differed substantively from its oral ruling. Specifically, the defendant contended that the written order "enlarges UBS' responsibilities to other accounts aside from Marstack & Co. In addition, the order directs UBS in general to take action against the accounts of [the defendant]. However, the court specifically limited its order to UBS in Stamford. As such, the court was limiting its ruling to accounts in Connecticut and not UBS in its entirety." The court granted the motion for clarification and clarified its written order as follows: "The court's written order, entered following the hearing on June 22, 2015, is consistent with the court's ruling from the bench granting, without limitation, the plaintiff's application for an execution and order in aid of execution." The court, without providing its reasoning, denied the defendant's motion for a stay.

On appeal, the defendant asserts that the turnover order improperly deviated from the court's oral ruling in two ways. First, he argues that the order should have been directed specifically to UBS's Stamford office, instead of to UBS in general. Second, he argues that the order should have expressly limited execution to assets in the trust account, instead of, as the order provides, "marketable securities held by UBS in the name of or for the benefit of [the defendant], *including without limitation*, the assets in the [trust] d/b/a Marstack & Co. . . . ." (Emphasis added.) Our review of this issue is plenary. See *State* v. *Denya*, 294 Conn. 516, 529, 986 A.2d 260 (2010).

We disagree with the defendant for the following reasons. With respect to his argument that the court erred by not directing the turnover order specifically to UBS's Stamford office, the defendant misunderstands the contents of the oral ruling and written order. The plaintiff's application for the order identified "UBS Financial Services, Inc.," as the garnishee. The undisputed evidence presented at the hearing identified UBS's Stamford office as "UBS Financial Services Inc.," with an address at 677 Washington Boulevard in Stamford. Accordingly, the court's turnover order lists the garnishee as "UBS Financial Services, Inc." There is no indication that UBS's office *in Stamford* is its own corporation or other legally distinct entity. Ordering "UBS Financial Services, Inc.," to turn over the defendant's property therefore was appropriate. To the extent that, in its oral ruling, the court ordered that *service of process* be directed at "UBS in Stamford," that is not inconsistent with the order because the order did not address how and where process was to be served. The defendant was free to file a motion for articulation with respect to the service of process issue, but failed to do so. See Practice Book § 66-5. Accordingly, there is no inconsistency between the court's oral ruling and the turnover order with respect to this issue.

We likewise find unpersuasive the defendant's argument that the court improperly deviated from its oral ruling by ordering the turnover of the defendant's securities "including without limitation" those in the trust account. We observe that the oral ruling was ambiguous as to this particular matter. On the one hand, the court understood that the plaintiff was requesting the turnover of assets, including but not limited to the trust account because it asked, just prior to granting the application: "[J]ust so we're clear, the execution that the [plaintiff] is looking for is an execution . . . on whatever account is held either for [the defendant or] for the benefit of [the defendant], *including* the account under the name of Marstack & Company as a trade name?" (Emphasis added.) On the other hand, the court shortly thereafter stated that "the execution will issue on UBS in Stamford on whatever account there is held in—for the benefit of [the defendant] under the name of Marstack & Company as the trade name." Any ambiguity, however, was resolved by the written turnover order, which, as previously mentioned, directed UBS to "forthwith transfer to the levying officer cash or marketable securities held by UBS in the name of or for the benefit of [the defendant], including without limitation, the assets in the [trust] . . . ." "[S]ubstantial deference is accorded to a court's interpretation of its own order. . . . Accordingly, we will not disturb a trial court's clarification of an ambiguity in its own order unless the court's interpretation of that order is manifestly unreasonable." (Citations omitted.) *State* v. *Denya*, supra, 294 Conn. 531. The court's interpretation of the ambiguous oral ruling adhered to one reasonable construction of it. Accordingly, we conclude that the order did not improperly deviate from the court's oral ruling in this manner.[7]

[7] The defendant also argues that, irrespective of whether the written order deviated from the oral ruling, the order was contrary to law because it "directs UBS to transfer the assets contained in the [trust] into [Connecticut] regardless of the assets' location outside the [s]tate." (Emphasis omitted.)

For the foregoing reasons, the defendant's second claim fails.

The judgment is affirmed.

In this opinion the other judges concurred.

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## RENAISSANCE MANAGEMENT COMPANY, INC. *v.* ANDRE BARNES ET AL.
## (AC 38879)

Lavine, Mullins and Bear, Js.

*Syllabus*

The plaintiff landlord sought, by way of a summary process action, to obtain possession of an apartment that had been rented to the defendant tenant. The plaintiff served the defendant with a notice to quit possession of the apartment and soon thereafter commenced this action. The defendant filed a special defense claiming that the retaliatory eviction statute (§ 47a-20) barred the plaintiff's action because the defendant had complained to a municipal authority about housing code violations related to certain repairs in the apartment and that authority had found violations of the housing code within six months of the commencement of the action. The defendant then filed a motion for summary judgment on that ground. The trial court granted the motion, concluding that § 47a-20 barred the action and that the plaintiff had failed to demonstrate that any of the statutory (§ 47a-20a) exceptions to § 47a-20 applied. The trial court specifically determined that the fitness and habitability requirements enunciated in *Visco* v. *Cody* (16 Conn. App. 444), wherein this court held that the defects alleged to be in need of repair must materially affect a leased unit's fitness and habitability to be a violation of § 47a-20 (3), did not apply in the circumstance of a municipal agency's finding of housing code violations as set forth in § 47a-20 (2). Thereafter, the defendant appealed to this court, claiming, inter alia, that the trial court erred in determining that *Visco* was inapplicable to his defense of retaliatory eviction under § 47a-20. Following oral argument before this court, but before the court rendered its judgment, the defendant vacated and relinquished possession of the subject apartment to the plaintiff, and the court ordered supplemental briefing on the issue of mootness and any possible exception thereto because the sole remedy

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In part I of this opinion, we concluded that the court had authority to order UBS to turn over the defendant's securities, even though the certificates for those securities may be in New York. For the reasons provided in support of that conclusion, we reject this argument.

available to the plaintiff in its summary process action was possession of the apartment. In their briefs, both parties argued that the issue raised on appeal, that *Visco* applied to retaliatory eviction defenses brought under § 47a-20 (2), satisfied the capable of repetition, yet evading review exception to the mootness doctrine. *Held* that the plaintiff's appeal was dismissed because it was moot and no exception to the mootness doctrine was applicable to the facts and circumstances of the appeal: in the specific context of this appeal and in light of the limited factual record regarding the mootness issue and the recent procedural history of the case, the parties failed to satisfy the first prong of the capable of repetition, yet evading review exception to the mootness doctrine, which pertains to the length of the challenged action, as this court was not persuaded that this court or our Supreme Court would not be able to resolve in a later appeal, with a more complete factual record concerning the fitness and habitability aspect of each of the subject health code violations, whether the fitness and habitability requirements enunciated in *Visco* are applicable to a finding of municipal code violations pursuant to § 47a-20 (2); furthermore, there was no merit to the plaintiff's assertion that the failure of this court to determine in this appeal whether the fitness and habitability gloss previously applied to § 47a-20 (3) in *Visco* was applicable to § 47a-20 (2) would give rise to prejudicial collateral consequences to landlords in future summary process cases, our appellate courts having applied the collateral consequences doctrine only to instances in which the decision of the trial court gave rise to consequences specific to a party to the case.

Argued March 16—officially released August 22, 2017

*Procedural History*

Summary process action brought to the Superior Court in the judicial district of New Haven, Housing Session, where the court, *Foti*, *J.*, denied the named defendant's motion to dismiss; thereafter, the court, *Ecker*, *J.*, granted the named defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court; subsequently, the court, *Ecker*, *J.*, issued a corrected memorandum of decision. *Appeal dismissed.*

*Hugh D. Hughes*, with whom was *David E. Schancupp*, for the appellant (plaintiff).

*Wesleigh Anderson*, certified legal intern, with whom was *Jeffrey Gentes*, for the appellee (named defendant).

*Opinion*

BEAR, J. In this summary process action for possession of an apartment in New Haven, the plaintiff, Renaissance Management Co., Inc., appeals from the summary judgment of the trial court rendered in favor of the defendant Andre Barnes.[1] The court granted the defendant's motion for summary judgment on the ground that the plaintiff was prohibited by the retaliatory eviction statute; General Statutes § 47a-20; from initiating the action and that the exceptions claimed by the plaintiff under General Statutes § 47a-20a, which would preclude application of § 47a-20 and thereby allow it to initiate the action, did not apply. On appeal, the plaintiff claims that the trial court erred when it (1) determined that this court's holding in *Visco* v. *Cody*, 16 Conn. App. 444, 547 A.2d 935 (1988), was inapplicable to the defendant's special defense of retaliatory eviction under § 47a-20; (2) determined that its complaint did not allege nonpayment of rent; and (3) interpreted the definition of rent in § 47a-20a to include the United States Department of Housing and Urban Development's payment of its share of the agreed total rent for the premises such that the total amount of money received by the plaintiff was unaffected by the defendant's alleged underpayment. Following oral argument before this court, but before this court rendered its judgment, the plaintiff obtained possession of the apartment. Notified of this fact, we ordered the parties to submit supplemental briefs on the issue of mootness. Following our review of the parties' supplemental briefs, we dismiss the appeal because it is moot and no exception to the mootness doctrine is applicable to the facts and circumstances of this appeal.

[1] The plaintiff brought this action against Barnes, Jane Doe, and John Doe. Jane Doe and John Doe are not parties to this appeal and, therefore, all references to the defendant herein are to Barnes.

The following facts and procedural history are not in dispute. The defendant was served with a notice to quit possession of the apartment on September 3, 2014. This summary process action was commenced on September 15, 2014. The defendant filed a special defense claiming that the retaliatory eviction statute, § 47a-20, barred the plaintiff's summary process action because he had complained to a municipal authority about housing code violations and such authority had found violations of the housing code within six months of the commencement of the action.

On August 10, 2015, the defendant moved for summary judgment on the ground that § 47a-20 prohibited the plaintiff from maintaining a summary process action within six months of a complaint to, or notice by, a government agency of a housing code violation. On September 8, 2015, the plaintiff submitted its memorandum in opposition to the motion for summary judgment, arguing that the reason for the action was the "fraud committed by the defendant in failing to report his income, which constitut[ed] a material violation of his lease." The plaintiff also argued that *Visco* required that the claimed defects constituting a violation of the housing code materially affect health and safety, and that the defendant failed to submit detailed information regarding the requested repairs. The court granted the defendant's motion for summary judgment on February 5, 2016.

In its corrected memorandum of decision, the court determined that § 47a-20 barred the plaintiff's action, and that the plaintiff had failed to demonstrate that any exception under § 47a-20a to the § 47a-20 bar applied. Specifically, the court concluded that, contrary to the plaintiff's assertion, the fitness and habitability requirements enunciated in *Visco*, relating to requested "repairs" as set forth in § 47a-20 (3), did not apply in the circumstance of a municipal agency's finding of

housing code violations as set forth in § 47a-20 (2). The court determined that § 47a-20 (2) required an actual finding by a municipal agency of a code violation, and concluded that New Haven's Livable City Initiative, the relevant municipal agency in the present case, found the existence of such code violations in the defendant's apartment, thereafter entering an order requiring remediation by the plaintiff within twenty-one days under threat of criminal liability. The court also determined that the exception claimed by the plaintiff under § 47a-20a (a) (1) was inapplicable to the facts of this case. Accordingly, the court granted the defendant's motion for summary judgment. This appeal followed.

The parties agree that, following oral argument before this court on March 16, 2017, the defendant vacated and relinquished possession of the plaintiff's property on May 10, 2017. After the parties apprised this court of this fact, we ordered supplemental briefing on the issue of mootness and any possible exceptions thereto because the sole remedy sought by, and available to, the plaintiff in its summary process action was possession of the premises. The parties have since submitted supplemental briefs, and each argues that the "capable of repetition, yet evading review" exception to mootness applies to this case. The plaintiff also argues in its supplemental brief that collateral consequences to the plaintiff will continue without a decision and, thus, the appeal is not moot.

"Mootness is a question of justiciability that must be determined as a threshold matter because it implicates this court's subject matter jurisdiction." *Wendy V.* v. *Santiago*, 319 Conn. 540, 545, 125 A.3d 983 (2015). "Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the

determination of the controversy will result in practical relief to the complainant." (Internal quotation marks omitted.) *State* v. *McElveen*, 261 Conn. 198, 217, 802 A.2d 74 (2002). "An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Internal quotation marks omitted.) *In re Emma F.*, 315 Conn. 414, 423–24, 107 A.3d 947 (2015). "This court has consistently held that an appeal from a summary process judgment becomes moot where, at the time of the appeal, the defendant is no longer in possession of the premises." (Internal quotation marks omitted.) *Friedman* v. *Gomez*, 172 Conn. App. 254, 260, A.3d (2017).

As the defendant is no longer in possession of the property, the appeal is clearly moot, unless an exception applies and the parties do not contest this conclusion. Recognizing this, the parties argue that the issue raised on appeal, that this court's holding in *Visco* applies to retaliatory eviction defenses brought under § 47a-20 (2), satisfies the capable of repetition, yet evading review exception to the mootness doctrine. The plaintiff also argues that the collateral consequences doctrine applies because the court's interpretation of § 47a-20 (2) will allow other tenants to utilize it as a defense, and, therefore, the appeal is not moot. We determine that neither of the claimed exceptions applies and, thus, the appeal is moot.

"To qualify under the capable of repetition, yet evading review exception, three requirements must be met. First, the challenged action, or the effect of the challenged action, by its very nature must be of a limited duration so that there is a strong likelihood that the substantial majority of cases raising a question about

its validity will become moot before appellate litigation can be concluded. Second, there must be a reasonable likelihood that the question presented in the pending case will arise again in the future, and that it will affect either the same complaining party or a reasonably identifiable group for whom that party can be said to act as surrogate. Third, the question must have some public importance. Unless all three requirements are met, the appeal must be dismissed as moot." (Internal quotation marks omitted.) *Wendy V.* v. *Santiago*, supra, 319 Conn. 545–46.

"The first element in the analysis pertains to the length of the challenged action. . . . The basis for this element derives from the nature of the exception. If an action or its effects is not of inherently limited duration, the action can be reviewed the next time it arises, when it will present an ongoing live controversy. Moreover, if the question presented is not strongly likely to become moot in the substantial majority of cases in which it arises, the urgency of deciding the pending case is significantly reduced. Thus, there is no reason to reach out to decide the issue as between parties who, by hypothesis, no longer have any present interest in the outcome. . . . [A] party typically satisfies this prong if there exists a functionally insurmountable time [constraint] . . . or the challenged action had an intrinsically limited lifespan." (Citations omitted; internal quotation marks omitted.) *In re Priscilla A.*, 122 Conn. App. 832, 836–37, 2 A.3d 24 (2010).

The present appeal fails to meet the first requirement of the capable of repetition, yet evading review exception. The action challenged in this case is that the plaintiff commenced a summary process action in violation of § 47a-20 (2) within six months of a finding by a municipal agency of a housing code violation. The specific legal issue raised by the plaintiff is whether the holding in *Visco*, that the defects alleged to be in need

of repair must materially affect a leased unit's fitness and habitability to be a violation of § 47a-20 (3) (repairs), was also applicable in the circumstance of a municipal agency's finding of housing code violations pursuant to § 47a-20 (2).

Our Supreme Court recently has reached the merits of appeals in summary process cases, including the residential summary process cases of *Presidential Village, LLC* v. *Phillips*, 325 Conn. 394, A.3d (2017), and *Fairchild Heights, Inc.* v. *Dickal*, 305 Conn. 488, 45 A.3d 627 (2012). This court recently also has reached the merits of appeals in summary process cases, including the residential cases of *Holdmeyer* v. *Thomas*, 167 Conn. App. 544, 144 A.3d 1052 (2016) (reversing trial court and holding that plaintiff failed to meet any exceptions to § 47a-20), *Housing Authority* v. *Weitz*, 163 Conn. App. 778, 134 A.3d 749 (2016) (judgment of possession reversed and trial court ordered to vacate default judgment), *136 Field Point Circle Holding Co., LLC* v. *Razinski*, 162 Conn. App. 333, 131 A.3d 1213 (2016) (defendants entitled to hearing on merits of motion for judgment of possession), *Kenosia Commons, Inc.* v. *DaCosta*, 161 Conn. App. 668, 129 A.3d 730 (2015) (defendant subject to summary process proceedings as resident of mobile home park), and *Konover Residential Corp.* v. *Elezazy*, 148 Conn. App. 470, 87 A.3d 1114 (judgments of possession affirmed), cert. denied, 312 Conn. 908, 93 A.3d 592 (2014).

In the present case, as previously noted in this opinion, the appeal was argued in March, 2017, approximately two and one-half years after the service of the September 3, 2014 notice to quit. When the defendant vacated the premises in May, 2017, this appeal was under consideration by this court. In light of this recent history, we are not persuaded that this court or our Supreme Court will not be able to resolve in a later appeal, with a more complete factual record concerning

the fitness and habitability aspect of each of the code violations, whether the *Visco* fitness and habitability gloss to the meaning of repairs, as set forth in § 47a-20 (3), is applicable to a finding of code violations, pursuant to § 47a-20 (2). Accordingly, in the specific context of this appeal, after review of the parties' arguments in support of the application of the capable of repetition, yet evading review mootness exception, and in light of the somewhat limited contents of the factual record on which we must rely in part to resolve the *Visco* issue, we conclude that the first prong of that exception has not been satisfied by the parties. See *In re Priscilla A.*, supra, 122 Conn. App. 832.

The plaintiff also argues that it faces collateral consequences from the decision of the trial court such that the appeal is not moot. "Our Supreme Court . . . has allowed us to retain jurisdiction where the matter being appealed creates collateral consequences prejudicial to the interests of the appellant, even though developments during the pendency of the appeal would otherwise render it moot. . . . [T]o invoke successfully the collateral consequences doctrine, the litigant must show that there is a reasonable possibility that prejudicial collateral consequences will occur. Accordingly, the litigant must establish these consequences by more than mere conjecture, but need not demonstrate that these consequences are more probable than not. This standard provides the necessary limitations on justiciability underlying the mootness doctrine itself. Whe[n] there is no direct practical relief available from the reversal of the judgment . . . the collateral consequences doctrine acts as a surrogate, calling for a determination whether a decision in the case can afford the litigant some practical relief in the future." (Citation omitted; internal quotation marks omitted.) *Iacurci* v. *Wells*, 108 Conn. App. 274, 277, 947 A.2d 1034 (2008).

The plaintiff argues that the failure of this court in this appeal to determine whether the *Visco* fitness and habitability gloss previously applied to § 47a-20 (3) is also applicable to § 47a-20 (2) would give rise to prejudicial collateral consequences to landlords in future summary process cases.[2] The plaintiff, however, argues for an overbroad application of the collateral consequences doctrine.

Our appellate courts have applied the doctrine to instances in which the decision of the trial court gave rise to collateral consequences specific to a party to the case. In *Putman* v. *Kennedy*, 279 Conn. 162, 175, 900 A.2d 1256 (2006), our Supreme Court applied the doctrine in a mooted case where the trial court's decision would harm the defendant's reputation. Although there are a diverse "array of collateral consequences that will preclude dismissal on mootness grounds"; id., 169; we are not aware of our courts having applied the doctrine to collateral consequences that do not directly and specifically affect the appealing party. See, e.g., *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 489, 497 n.17, 970 A.2d 570 (2009) (contempt finding has collateral consequences on party as case continues); *Office of the Governor* v. *Select Committee of Inquiry*, 271 Conn. 540, 549–50, 858 A.2d

[2] The plaintiff also argues that other tenants may report minor potential housing code violations to authorities rather than to their landlord when the tenant is in violation of its lease to prevent eviction for six months. Without opining on the meaning of the provisions of § 47a-20 (2), we note that this may be one of those instances where the plaintiff's sought after remedy lies with the General Assembly because the current statutory language omits any requirement that a health code violation must implicate a leased unit's fitness and habitability. Additionally, the alleged consequences that are of concern to the plaintiff are general consequences potentially applicable to any residential landlord, not specific consequences unique to the plaintiff. We see this argument, therefore, as addressed to the capable of repetition and public interest prongs of the capable of repetition, yet evading review exception to mootness rather than the collateral consequences exception.

709 (2004) (appeal not rendered moot by investigative committee statement that it would not enforce subpoena directly "because of the collateral consequence of the potential for an article of impeachment on the basis, at least in part, of the governor's noncompliance with the subpoena"); *Wallingford* v. *Dept. of Public Health*, 262 Conn. 758, 769–70, 817 A.2d 644 (2003) (appeal not rendered moot by passage of special act addressing issue in case because administrative ruling that town is "water company" for purposes of possible construction of golf course on watershed land "potentially subjects" town to collateral consequences of Department of Public Health's jurisdiction and other statutory obligations); *Williams* v. *Ragaglia*, 261 Conn. 219, 227–31, 802 A.2d 778 (2002) (appeal from revocation of plaintiff's special study foster care license as consequence for violating foster care regulations was not rendered moot by grant to plaintiff of permanent custody of foster children at issue because of revocation's effect on her reputation and fact that revocation could be used against her in future Department of Children and Families proceedings if she wanted to become foster parent again); *State* v. *McElveen*, supra, 261 Conn. 212–16 (appeal from conviction of violation of probation was not rendered moot by defendant's completion of sentence because conviction could impact his reputation and ability to obtain employment or preconviction bail in future); *Crest Pontiac Cadillac, Inc.* v. *Hadley*, 239 Conn. 437, 439–40 n.3, 685 A.2d 670 (1996) (outcome of other case party had pending affected by court's determination in appeal); *Housing Authority* v. *Lamothe*, 225 Conn. 757, 765, 627 A.2d 367 (1993) (potential prejudicial consequences to defendant in summary process action resulting from eviction, including ability to obtain future housing).

In summary, the defendant has vacated and surrendered possession of the premises to the plaintiff. In the

absence of either party demonstrating the application of a recognized exception to the mootness doctrine, the appeal is moot.[3]

The appeal is dismissed.

In this opinion the other judges concurred.

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## JAMES M. PROCACCINI, ADMINISTRATOR (ESTATE OF JILL A. PROCACCINI) *v.* LAWRENCE AND MEMORIAL HOSPITAL, INC., ET AL.

(AC 38380)

Prescott, Mullins and Beach, Js.

*Syllabus*

The plaintiff administrator of the estate of the decedent sought to recover damages from the defendant E Co. for medical malpractice in connection with the death of the decedent by a methadone overdose. On November, 29, 2008, the decedent was found unresponsive and was brought to a hospital emergency department, where she was treated for a suspected drug overdose by M, the attending emergency department physician. After the decedent's vital signs improved and stabilized, she was discharged and returned to the home of a friend, where she was found unresponsive the next morning and pronounced deceased. The plaintiff alleged that E Co. was vicariously liable for the medical malpractice of M in treating the decedent for a suspected drug overdose. The plaintiff claimed that M's discharge of the decedent after only four and one-half hours of observation was premature in that M should have kept the decedent under medical monitoring for twenty-four hours, which is the period of time during which the fatal side effects of methadone toxicity may occur, and that if the decedent had remained under medical monitoring for the full twenty-four hours, the fatal overdose side effects she experienced after her discharge would have been treated and her eventual death from methadone toxicity would have been averted. The jury returned a verdict for the plaintiff, and the trial court rendered judgment

[3] The parties' arguments regarding the exceptions to mootness concern only the court's determination of the nonapplicability of *Visco* to § 47a-20 (2). Neither party has argued that the other claims raised on appeal are not moot or that an exception to mootness applies to them. The other claims also became moot when the defendant vacated and surrendered possession of the apartment to the plaintiff.

in accordance with the verdict, from which E Co. appealed to this court. E Co. claimed, inter alia, that there was no direct evidence as to when the decedent consumed the fatal dose of methadone, and that the undisputed scientific evidence established that if she had actually overdosed on methadone on November 29, 2008, she would have had a recurrence of overdose symptoms before she was discharged from the hospital's emergency department. *Held*:

1. There was sufficient evidence to support the jury's finding that E Co.'s negligence caused the decedent's death:

a. The jury had before it sufficient evidence from which it could have inferred, without resorting to speculation, that the decedent had consumed the fatal dose of methadone before she was brought to the emergency department on November 29, 2008: although the jury was presented with conflicting expert testimony as to how soon a methadone overdose patient would experience recurring overdose symptoms after receiving a certain medication that is used as an antidote for opiate and opioid overdoses, the jury was free to believe the opinion of the plaintiff's expert witness, S, on the standard of care, that delayed, recurring respiratory depression can occur in methadone overdoses, even if such a phenomenon defied certain undisputed and settled toxicology principles, and to disbelieve those portions of the testimony of E Co.'s expert witness, P, on causation, that attempted to refute that phenomenon, and E Co.'s claim that it was improper for the jury to consider S's testimony concerning the concept of delayed, recurring respiratory depression as it related to causation was unavailing because even if S's testimony was offered strictly for standard of care purposes, E Co. failed to pursue any preemptive or remedial measures that would have precluded or limited S's testimony on the issue of delayed, recurring respiratory depression, and the court never instructed the jury that it should disregard S's testimony thereon or that it should consider such testimony only for standard of care purposes, and, therefore, the evidence regarding delayed, recurring respiratory depression was before the jury to use for any purpose, including causation; moreover, the fact that the decedent did not immediately experience recurring overdose symptoms one hour after the overdose medication was administered did not require the jury to conclude that the decedent's overdose on November 29, 2008, was caused by a narcotic other than methadone, as the jury could have concluded, instead, that the delayed, recurring respiratory depression that the decedent eventually experienced was consistent with her ingestion of a toxic dose of methadone before her visit to the emergency department on November 29, 2008.

b. E Co. could not prevail on its claim that because the plaintiff failed to present evidence demonstrating that the decedent would have been admitted to the hospital had M not discharged her from the emergency department, the jury could not reasonably have found that E Co. caused the decedent's death: although the plaintiff's expert, S, initially testified

that the standard of care applicable to possible methadone overdoses required M to admit the decedent to the hospital for continuous monitoring, S subsequently clarified that the applicable standard of care required only that M monitor the decedent for twenty-four hours for signs of recurrent opiate overdose, and the jury reasonably could have accepted that portion of S's testimony indicating that monitoring was required and rejected that portion of his testimony suggesting that admittance was required; accordingly, to prove causation, the plaintiff needed to show only that the decedent could have been monitored sufficiently for twenty-four hours, and the jury reasonably could have inferred that from the evidence presented.

2. The trial court did not abuse its discretion in denying E Co.'s motion to set aside the jury's award of $150,000 in damages for the destruction of the decedent's capacity to carry on and enjoy life's activities; the jury reasonably could have forecast the decedent's life expectancy from its own knowledge and from the substantial evidence presented by the plaintiff of the decedent's age, health, physical condition and habits, all of which were relevant to determine life expectancy, and, therefore, the jury's award of damages for the destruction of the decedent's capacity to carry on and enjoy life's activities was not unreasonable or speculative.

Argued March 21—officially released August 22, 2017

*Procedural History*

Action to recover damages for medical malpractice, and for other relief, brought to the Superior Court in the judicial district of New London, where the action was withdrawn as against the named defendant et al.; thereafter, the plaintiff filed an amended complaint as against the defendant Emergency Medicine Physicians of New London County, LLC; subsequently, the matter was tried to the jury before *Hon. Joseph Q. Koletsky*, judge trial referee; verdict for the plaintiff; thereafter, the court denied the motions to set aside the verdict and for a directed verdict filed by the defendant Emergency Medicine Physicians of New London County, LLC, and rendered judgment in accordance with the verdict, from which the defendant Emergency Medicine Physicians of New London County, LLC, appealed to this court. *Affirmed.*

*Daniel J. Krisch*, with whom were *Frederick J. Trotta, Sr.*, and, on the brief, *Logan A. Forsey* and

*Jennifer S. Mullen*, for the appellant (defendant Emergency Medicine Physicians of New London County, LLC).

*Matthew E. Auger*, with whom, on the brief, was *Eric W. Callahan*, for the appellee (plaintiff).

*Opinion*

MULLINS, J. In this medical malpractice action, the defendant[1] Emergency Medicine Physicians of New London County, LLC, appeals from the judgment of the trial court, after a jury trial, rendered in favor of the plaintiff, James M. Procaccini, administrator of the estate of Jill A. Procaccini (decedent). On appeal, the defendant claims that there was insufficient evidence supporting the jury's verdict and award of noneconomic damages. Specifically, it claims that the plaintiff failed to present sufficient evidence for the jury (1) to find that the defendant's negligence caused the death of the decedent, and (2) to award $150,000 in damages for the destruction of the decedent's capacity to carry on and enjoy life's activities. We affirm the judgment of the trial court.

The following facts, as reasonably could have been found by the jury, and procedural history are relevant to this appeal. On November 30, 2008, the decedent, who was thirty-two years old, died from a methadone

[1] Lawrence & Memorial Hospital, Inc., Lawrence & Memorial Corporation, and Thomas E. Marchiondo, a physician, were initially named as defendants in this action. Prior to trial, the plaintiff withdrew the action as against Lawrence & Memorial Hospital, Inc., and Lawrence & Memorial Corporation, and filed an amended complaint naming Emergency Medicine Physicians of New London County, LLC, as a defendant. After filing this appeal, but before oral argument was heard, the plaintiff withdrew the claims as against Marchiondo, who died before trial began. Accordingly, because those three other defendants are not involved in this appeal, we refer to Emergency Medicine Physicians of New London County, LLC, as the defendant throughout this opinion.

overdose. In the years leading up to her death, the decedent had struggled with polysubstance abuse.

After achieving a period of sobriety early in 2008, the decedent relapsed on November 16, 2008. On that date, the decedent admitted herself to Saint Francis Hospital and Medical Center in Hartford (Saint Francis), seeking treatment for a heroin overdose. On the next day, November 17, 2008, the decedent was transferred to Cedarcrest Hospital, Blue Hills Substance Abuse Services (Blue Hills), in Newington.

The decedent remained at Blue Hills from November 17, 2008, until her discharge on November 28, 2008. During her stay at Blue Hills, the decedent was administered varying doses of methadone for treatment of her opiate withdrawal symptoms. Methadone, an opioid,[2] frequently is used by clinicians to alleviate the withdrawal symptoms that patients experience while undergoing opiate detoxification. Although methadone commonly is used in the clinical setting and, thus, administered under a clinician's supervision or pursuant to a prescription, it also can "be purchased [illegally] on the streets as street methadone." The decedent's last dose of methadone, five milligrams, was administered at Blue Hills at 7:45 a.m. on November 21, 2008. The decedent was discharged from Blue Hills on November 28, 2008.

After leaving Blue Hills on November 28, 2008, the decedent made at least two phone calls. One of those calls was to a person from whom the decedent had purchased drugs in the past. Another call was to Charles Hope, a substance abuse counselor and a recovering

[2] The jury heard expert testimony explaining the differences between opiates and opioids. An opiate is a "naturally occurring" narcotic that is derived from poppy plants. There are four opiates: opium, heroin, codeine, and morphine. An opioid is a "synthetic or semisynthetic narcotic . . . ." Examples of well-known opioids include oxycodone, hydrocodone, fentanyl, and methadone.

drug addict with whom the decedent was friendly. Hope agreed to let the decedent stay at his house in New London on the condition that she not use drugs. Hope picked up the decedent from West Hartford on the evening of November 28, 2008, and brought her to his home in New London. Upon their arrival at Hope's home, Hope and the decedent talked briefly and then retired for the night. Hope heard the decedent use the microwave in his kitchen at some point during the night.

On the morning of November 29, 2008, Hope woke up the decedent and noticed that she was "feeling a little sick." Hope left his home sometime in the late morning or early afternoon of November 29. Hope later called the decedent sometime that afternoon and had a conversation with her. When Hope returned to his home at approximately 6:45 p.m., however, he found the decedent lying unconscious on his living room couch. Hope began performing cardiopulmonary resuscitation, which restored the decedent's breathing. At approximately 6:47 p.m., Hope called 911.

Emergency medical technicians (EMTs) from the New London Fire Department arrived at Hope's house on November 29, 2008, at approximately 6:51 p.m. The EMTs found the decedent unresponsive, lying in a supine position in Hope's living room with pinpoint pupils and agonal respirations. Hope told the EMTs that the decedent "had been on methadone," that the decedent "had a history of addiction," and that he was unsure if she used drugs that day. Because she was unconscious, however, the EMTs were unable to obtain any medical history from the decedent. The EMTs administered oxygen to the decedent via an oral airway and bag valve mask. Hope and the EMTs briefly searched Hope's house for drugs, drug paraphernalia, and other evidence of drug use. They did not find any such evidence.

Shortly thereafter, at approximately 6:55 p.m., paramedics from Lawrence & Memorial Hospital (Lawrence & Memorial) arrived on the scene. The paramedics placed the decedent in their ambulance. At some point between 6:55 p.m. and 7:03 p.m., the paramedics intravenously administered the decedent 1.4 milligrams of Narcan.

Narcan is used as an "antidote" for opiate and opioid overdoses. Narcan, like opiates and opioids, attaches to the opioid receptors located in the body's central nervous system. Narcan, however, does not cause any of the effects that opiates and opioids produce, such as pain relief, a "high" feeling, and respiratory depression. Instead, because opioid receptors have a "stronger affinity for the Narcan molecule than [they do] for [opiates and opioids]," Narcan "just knocks [opiates and opioids] out and takes residency in the receptor[s] . . . ." "[Once] [t]he Narcan displaces the opiate [or opioid] from the receptor[s] . . . the person's opiate effects evaporate . . . the person wakes up and [he or she is] breathing and . . . alert . . . ." In other words, "intravenous administration of Narcan . . . produce[s] a near-instantaneous reversal of the narcotic effect . . . within a minute or two at the most . . . ."

By the time the ambulance arrived at Lawrence & Memorial at 7:03 p.m., the dose of Narcan had revived the decedent. The decedent was conscious and answering questions asked by the paramedics. The paramedics were able to determine that the decedent was taking several medications, including methadone, Topamax, Seroquel, insulin, and Ambien. In their written report, the paramedics indicated that the "chief complaint" was an "[overdose] on Heroin" and that the decedent was "found in respiratory arrest due to [overdose]."

Upon arriving at Lawrence & Memorial, the decedent was taken to the emergency room, where her condition

was triaged. In examining the decedent, the triage nurse, Sarah Zambarano, created an electronic report detailing the decedent's condition at 7:13 p.m. Zambarano indicated in the electronic report that the paramedics informed her that Hope told them that the decedent "took methadone, ? of heroin."

At approximately 7:15 p.m., the decedent was assessed by another emergency room nurse, Pamela Mays. At 7:36 p.m., Mays recorded the following in her treatment notes: "[the decedent] admits to using heroin toni[ght] . . . states off methadone for several months after detox . . . now using again." Mays also indicated that the decedent "appear[ed] comfortable" and was "cooperative," "alert" and "oriented . . . ." Contrary to May's notes, Hope, who had arrived at the emergency room between 7:30 p.m. and 8 p.m., recalled that the decedent was "very adamant that she did not take any heroin . . . ." According to Hope, the decedent told Mays that "I did not take any heroin, I took methadone."

At approximately 7:45 p.m., the attending emergency room physician, Thomas E. Marchiondo, examined the decedent. At the time he began treating the decedent, Marchiondo had access to the paramedics' report, which indicated that the decedent had a suspected overdose on heroin, that the decedent also was taking methadone, and that the decedent had been found in respiratory arrest. Marchiondo detailed his examination of the decedent in his own written report. In his report, Marchiondo noted that the decedent's "chief complaint" was an "unintentional heroin overdose." Although the decedent apparently denied any "other co-ingestion," Marchiondo's report indicated that the decedent's "current medications" included methadone.

Marchiondo's report also indicated that a urine toxicology screen had been ordered. The results of the screen, of which Marchiondo was aware when treating

the decedent, revealed that the decedent's urine tested positive for the presence of methadone, an unidentified opiate, and unidentified benzodiazepines. Because that screen merely was qualitative, it could not identify the specific type of opiate ingested by the decedent or the exact concentration of that substance or methadone in the decedent's system.

As a result of his review of the drug screen results, as well as his examination of the decedent and review of the treatment notes prepared by the nurses and emergency responders, Marchiondo concluded that the decedent had ingested both methadone and heroin. Regarding the methadone, although he could not determine specifically when or in what manner the decedent ingested it, Marchiondo concluded that the decedent ingested some quantity of methadone "within the past couple of weeks." In so concluding, Marchiondo relied on the fact that methadone was listed as a medication in her medical history, which caused him to believe that the decedent was taking the methadone "under a doctor's prescription . . . ." Marchiondo consequently "would have expected [methadone] to come out positive in her urine." Accordingly, he concluded that the overdose symptoms that the decedent was experiencing "were due to a heroin overdose" and agreed with a statement by the plaintiff's counsel that the decedent's symptoms "[were] in no way related to the methadone that was in her system."[3]

The decedent remained in the Lawrence & Memorial emergency room from 7:13 p.m. to approximately 11:53 p.m. on November 29, 2008. "All throughout her stay . . . [the decedent] remained awake, alert, and aware, nontoxic. And through time . . . her vital signs had improved." Hope, who had stayed with the decedent at her bedside, also observed that, although initially the

[3] Marchiondo also diagnosed the decedent with pneumonia.

decedent seemed, as characterized by the defendant's counsel, "sluggish," her condition continued to improve and she was "laughing and making jokes." During her hospitalization at Lawrence & Memorial, the decedent was not administered any Narcan. Marchiondo had determined that it was not necessary to treat the decedent with Narcan because her vital signs had improved while she was at Lawrence & Memorial.

Throughout her stay, the decedent was monitored by Mays, who noted in her report that the decedent's vital signs improved and stabilized. At approximately 8 p.m., the decedent was "awake and alert and asking to leave . . . [but was] told that she was here for the night." At this point, the decedent's respiration rate had improved to sixteen breaths per minute, and her oxygen saturation level had risen to 99 percent. These levels were "basically normal." The decedent also had been taken off supplemental oxygen.

At 9 p.m., the decedent was "resting soundly" and her "[respiration was] easy/even." Her respiration rate and oxygen saturation level had not changed since 8 p.m. At 10 p.m. and 11:30 p.m., the decedent's respiration rate still was sixteen breaths per minute, and her oxygen saturation level still was 99 percent. At some point between 11:35 p.m. and 11:53 p.m., the decedent was discharged and was provided instructions for a "narcotic overdose," which advised the decedent to "[r]eturn to the ER if [her condition] worse[ned]."

Upon being discharged from Lawrence & Memorial, the decedent left with Hope. Hope and the decedent stopped for food and coffee before returning to Hope's home. At Hope's home, Hope and the decedent conversed until approximately 1:30 a.m. on November 30, 2008, at which point, Hope went to bed. When Hope left the decedent to go to bed, the decedent was kneeling on

the corner of the bed in Hope's guest bedroom, watching television and looking at photographs. Hope did not hear any activity during the night.

After waking up at approximately 9:45 a.m. later that morning, Hope found the decedent unresponsive. The decedent's body was "frozen stiff" and kneeling in the same position in which she had been on Hope's guest bed when Hope last saw her at 1:30 a.m. earlier that morning. Hope called 911 at approximately 10:39 a.m.

New London police, accompanied by New London Fire Department EMTs, arrived at Hope's home on November 30 at approximately 11 a.m. The decedent was pronounced deceased by the EMTs at approximately 11:05 a.m. Thereafter, Hope assisted the police in searching his entire house for drug paraphernalia and other evidence of drug use. Neither Hope nor the five law enforcement officers searching the scene found anything relating to drug activity.

At approximately 1:34 p.m., Penny Geyer, an investigator with the Office of the Chief Medical Examiner, arrived at Hope's home. At the scene, Geyer performed an external examination of the decedent's clothed body. She did not find any illicit drugs or drug paraphernalia on or around the decedent's body, and she did not observe any signs of drug ingestion on the decedent's body, such as needle marks or residue in the decedent's nose or mouth.

Deputy Chief Medical Examiner Edward T. McDonough III performed the decedent's autopsy on December 1, 2008. A toxicology screen ordered by McDonough detected the presence of methadone in the decedent's blood. Specifically, the report indicated that the concentration of methadone in the decedent's blood was 0.39 milligrams per liter. The postmortem toxicology screen did not detect any opioids or opiates other than methadone.

As a result of his review of the toxicology report and his examination of the decedent, McDonough concluded that the final cause of the decedent's death was "methadone toxicity." In so concluding, McDonough determined that the postmortem concentration of methadone in the decedent's blood, 0.39 milligrams per liter, was "within the fatal range." McDonough also determined that the decedent died sometime between 5 a.m. and 7 a.m. on November 30, 2008, although this was merely a "crude" approximation because the time of death could have been "much earlier."

In November, 2010, the plaintiff, acting as the administrator of the decedent's estate, brought this medical malpractice action seeking damages for the decedent's death. The plaintiff's initial complaint asserted one count against Marchiondo, one count against Lawrence & Memorial Hospital, Inc., and Lawrence & Memorial Hospital Corporation, and one count against the defendant. Following the plaintiff's withdrawal of the separate counts against Marchiondo and Lawrence & Memorial Hospital, Inc., and Lawrence & Memorial Hospital Corporation; see footnote 1 of this opinion; the plaintiff amended his complaint to seek recovery from only the defendant.

The plaintiff's operative complaint alleges that the defendant is vicariously liable for the medical malpractice that its employee,[4] Marchiondo, committed in treating the decedent for a suspected drug overdose on

[4] The parties stipulated at trial that Marchiondo was "an employee, agent, representative, or servant of [the defendant] and acting within and pursuant to the scope of his employment, agency, representation, and authority with [the defendant]." Accordingly, the court instructed the jury: "If you find that . . . Marchiondo's treatment of [the decedent] was negligent, that is, deviated from the applicable standard of care, and that negligence was a substantial factor in bringing about her death, then [the defendant] is responsible for . . . Marchiondo's conduct and, in that event, you should find against [the defendant]."

November 29, 2008. The gravamen of the plaintiff's complaint is that Marchiondo's discharge of the decedent after only four and one-half hours of observation at Lawrence & Memorial was premature. According to the plaintiff, because the decedent presented with a possible methadone overdose, Marchiondo should have kept her under medical monitoring for twenty-four hours, which is the period of time during which the fatal side effects of methadone toxicity may occur. Accordingly, the plaintiff alleges, if the decedent had remained under medical monitoring for the full twenty-four hours, the fatal overdose side effects she experienced after her discharge would have been treated and her eventual death from methadone toxicity would have been averted.

In his complaint, the plaintiff sought both economic and noneconomic damages resulting from the decedent's death. The claim for economic damages included medical expenses and funeral costs, and the claim for noneconomic damages sought compensation for the decedent's permanent loss of her ability to carry on and enjoy life's activities.

After the plaintiff rested, the defendant moved for a directed verdict. Specifically, the defendant argued that "the plaintiff [had] not submitted sufficient evidence to establish a prima facie case *with respect to causation*." (Emphasis added.) The defendant did not challenge the sufficiency of the evidence regarding the appropriate standard of care and the defendant's breach thereof. The court reserved decision on the defendant's motion for a direct verdict.

The jury returned a plaintiff's verdict and awarded $12,095 in economic damages and $500,000 in noneconomic damages. The award consisted of $350,000 for the decedent's death and $150,000 for the destruction

of the decedent's capacity to carry on and enjoy life's activities.

After the jury returned its verdict, the defendant renewed its motion for a directed verdict.[5] As in its initial motion, the defendant challenged the sufficiency of the evidence only with respect to causation: "[T]he evidence presented by the plaintiff during his case-in-chief [was] insufficient to support a conclusion that any alleged negligence on the part of the defendant was the cause in fact of the death of [the decedent]." Specifically, the defendant argued that there were "two missing links in the plaintiff's chain of causation: (1) that [the decedent] overdosed on methadone on [November 29, 2008]; and (2) that [the decedent] met the criteria for admission to [Lawrence & Memorial]."

Regarding the first "missing link," the defendant contended that "the jury had no basis—other than conjecture—to find that [the decedent] overdosed on methadone on November 29, [2008]. To the contrary, science and the chronology of events point only to the 'reasonable hypothesis' that [the decedent] took the lethal dose of methadone *after* Dr. Marchiondo discharged her." (Emphasis in original.)

Regarding the second "missing link," the defendant contended that "the jury could only guess about another critical piece of the puzzle: admission to [Lawrence & Memorial]. . . . [T]here was no evidence about [Lawrence & Memorial's] criteria for admission, or whether [the decedent] met those criteria." According to the

[5] The court reserved decision on the defendant's renewed motion for a directed verdict when it granted the defendant's motion for an extension of time to file other postverdict motions. Subsequent to the court's granting of the motion for an extension of time, the defendant filed a motion to set aside the jury's verdict, wherein the defendant again renewed its motion for a directed verdict. The trial court denied both the motion to set aside and the motion for a directed verdict, the latter of which was denied nunc pro tunc.

defendant, the applicable standard of care required Marchiondo to admit the decedent to Lawrence & Memorial. Thus, the defendant posited, the plaintiff could not prove that Marchiondo's breach of that standard of care caused the decedent's death without evidence that the decedent likely would have been admitted to Lawrence & Memorial.

After holding a hearing on the defendant's renewed motion for a directed verdict, the court denied the motion. This appeal followed. Additional facts will be set forth as necessary.

I

SUFFICIENCY OF EVIDENCE ON CAUSATION

The defendant's first claim on appeal is that the plaintiff failed to present sufficient evidence from which the jury reasonably could have found that the defendant caused the decedent's death. Specifically, the defendant argues that "there are two gaping holes in the evidence: (1) proof that the decedent consumed the fatal dose of methadone *before* her discharge from the emergency room on November 29, [2008], and (2) proof that she met the criteria for admission to [Lawrence & Memorial]." (Emphasis in original.) We consider the defendant's two causation challenges seriatim.

A

In its first challenge to the sufficiency of the evidence on causation, the defendant contends that there "was no direct evidence [regarding] *when* the decedent consumed the fatal dose of methadone. . . . [O]nly creative guesswork supports the jury's inference that the decedent did so before, *and not after*, her discharge from the emergency room." (Emphasis added; internal quotation marks omitted.) In particular, the defendant argues that the jury's finding regarding causation is inconsistent with "time and science, i.e., the mechanical

details disclosed by the evidence . . . .'' (Internal quotation marks omitted.) According to the defendant, the ''undisputed'' scientific evidence presented at trial demonstrated that ''[i]f the decedent had actually overdosed on methadone on November 29, [2008], she would have had a recurrence of overdose symptoms *long before* she was discharged [from Lawrence & Memorial].'' (Emphasis added.) Thus, because the decedent did not experience recurring overdose symptoms ''long before'' her discharge, she had not consumed a toxic amount of methadone on November 29. We disagree.

The following additional facts and procedural history guide our resolution of this claim. A substantial part of the evidence presented by both parties at trial came in the form of expert testimony. Both parties presented expert testimony on the issue of causation. McDonough, who was disclosed as the plaintiff's causation expert, also was the medical examiner who performed the decedent's autopsy. He testified that the postmortem level of methadone in the decedent's blood, 0.39 milligrams per liter, was a toxic concentration and caused her death. He further testified that the specific ''mechanism of death'' probably was respiratory depression, in which the methadone intoxication would have ''[shut] down [the decedent's] breathing.'' McDonough's determination of the cause of death called into doubt Marchiondo's diagnosis of the decedent, which was that she had overdosed on heroin, not methadone.

Dr. Steven Pike, the defendant's expert on causation, initially testified that he could not determine within a reasonable degree of medical probability whether the decedent's cause of death was methadone toxicity. He later testified, however, that ''it's probably more likely than not'' that methadone toxicity was the cause of the decedent's death.

The defendant's strategy in contesting causation essentially was to demonstrate that the decedent

ingested the fatal dose of methadone *after* she was discharged from Lawrence & Memorial. According to the defendant, if the plaintiff could not establish that the decedent ingested the fatal dose *before* her discharge, there would be no causal connection between the allegedly negligent treatment she received at Lawrence & Memorial and the methadone toxicity to which she eventually succumbed. Critically, during the defendant's cross-examination of McDonough, McDonough conceded that he could not rule out the possibility that the fatal dose of methadone was ingested *after* the decedent's discharge.

Without direct evidence of when the decedent consumed the fatal dose, the parties largely relied on indirect evidence from which the jury could infer the timing of the decedent's ingestion of methadone. In turn, such indirect evidence required the application of the toxicological concepts and biochemical processes that govern how the human body absorbs, metabolizes, and excretes Narcan and various opiates and opioids. The following evidence relating to those scientific principles was presented through the parties' expert testimony.

For the most part, the parties' experts were in agreement on several fundamental toxicological concepts and biochemical processes. The first important concept about which the experts provided testimony was half-life. A half-life is the time it takes for the concentration of a drug in a person's system to be reduced by one-half. It takes approximately the lapse of five half-lives for a drug to be eliminated completely from a person's system. Because the body does not start to eliminate a drug until it is absorbed, the first half-life of a drug will not begin to run until after the drug is absorbed.

The second concept about which the parties' experts testified was duration of effect. Although related to the

concept of half-life, duration of effect "is not equivalent to the half-life of the drug. In some cases, it may be less than the half-life of the drug. In some cases, it may be longer than the half-life of the drug." While half-life refers to the rate at which an absorbed drug is eliminated from the body, duration of effect refers to how long a drug produces physiologic effects.[6] To illustrate this distinction, it is possible that a small concentration of a drug still is in the body after several half-lives, yet that small concentration has ceased producing any effects. The converse also applies in the case of some drugs: "[A drug] may go through a couple half-lives, [but] still be producing some effect . . . ."

The parties' experts also generally agreed regarding the half-lives and durations of effect of Narcan, long-acting narcotics, and short-acting narcotics. The half-life of Narcan, approximately thirty to eighty minutes, is much shorter than the half-lives of both long-acting narcotics and short-acting narcotics. Additionally, the half-lives of short-acting narcotics are shorter than the

[6] Throughout trial, it appears that the parties, and even their expert witnesses, occasionally blurred the distinction between half-life and duration of effect. Indeed, although he warned against "confus[ing] duration of effect with half-life," Pike himself provided a definition of "half-life" that seemingly incorporated the concept of the duration of effect: "half-life . . . has . . . to do with *how long* th[e] physiologic response that the drug is producing will be *effective* . . . ." (Emphasis added.) As another example, when asked by the defendant's counsel to provide the "durational effect" of Narcan, McDonough replied: "It would be similar to the *half-life* of thirty to eighty minutes." (Emphasis added.)

Nevertheless, it is of little importance whether the technical scientific distinction between half-life and duration of effect was preserved consistently at trial. As explained previously in greater detail, the crucial issue at trial pertained to Narcan's relative *effectiveness* as compared to both long-acting and short-acting narcotics. The parties' experts agreed that "[Narcan's] effectiveness is *much shorter* than the effect of the longer-acting [and] even short-acting narcotic[s] . . . ." (Emphasis added.) Moreover, as also explained previously in greater detail, it was undisputed that the half-lives and durations of effect of short-acting narcotics are shorter than those of long-acting narcotics.

half-lives of long-acting narcotics. For instance, the plaintiff's expert testified that the half-life of methadone, a long-acting narcotic, ranges from fifteen to fifty-five hours, and the defendant's expert testified that it could range from eighteen to sixty hours. In contrast, according to the plaintiff's expert, the half-life of heroin, a short-acting narcotic, is two to five hours, and the defendant's expert stated that it is three to four hours.

The durations of effect of Narcan, short-acting narcotics, and long-acting narcotics largely were undisputed as well. The duration of Narcan's antidotal effect begins almost instantaneously upon administration and lasts for thirty to ninety minutes.[7] Generally, Narcan "wears off much sooner than . . . [opiates and opioids such as] heroin . . . or methadone." Heroin "has an effect of four to six hours," while methadone produces "a[n] . . . effect of twelve to twenty-four hours."

The parties' experts also noted, however, that there are some "interindividual" variations in those durations of effect and half-lives because "each individual metabolizes materials differently." Furthermore, the method of administration, the dosage size, and the individual's tolerance for the drug all affect how quickly after ingestion the drug will begin to produce effects. In particular, because intravenous administration delivers the drug directly into the bloodstream, it causes an individual to absorb the drug faster than oral administration and, therefore, produces effects sooner than oral administration. For instance, because oral administration of methadone is "not an instantaneous absorption," "it takes

[7] The defendant, but not the plaintiff, asserts that the "parties stipulated that the maximum effective duration of the Narcan given to the decedent was *ninety* minutes." (Emphasis added.) Although the record reveals that the plaintiff *offered* to stipulate that the effective duration of Narcan is "twenty to ninety minutes," neither the defendant nor the court accepted this proposed stipulation. Furthermore, the court never submitted any such stipulation to the jury.

time for the methadone to be absorbed . . . .'' Thus, it could take as long as two and one-half hours *after ingestion* for orally administered methadone to be absorbed fully and to reach a peak concentration in the blood.

Having agreed that the effects produced by long-acting and short-acting narcotics generally outlast Narcan's antidotal effects, the parties' experts also agreed that overdose symptoms, including respiratory depression, may return after Narcan wears off. In other words, if the concentration of a narcotic *still is at a toxic level* after Narcan wears off, there will be ''a recurrence of the symptoms that prompted . . . [the initial dose of] Narcan.'' The overdose symptoms reappear because Narcan only temporarily displaces the narcotic from the body's opioid receptors. Once the Narcan has worn off, the remaining concentration of the narcotic reattaches to the opioid receptors.

Despite their agreement on the foregoing principles, the parties' experts disagreed on a critical point. Specifically, their testimony differed with respect to the issue of *how soon* recurring overdose symptoms return after the administration of Narcan. When asked by the defendant's counsel what happens to ''patients if they still have a toxic or rising dose of opiate or opioid after the Narcan wears off,'' Pike answered: ''[A]n *hour* after Narcan, they're going to have a recurrence of the symptoms that prompted the paramedics or . . . physician to give the Narcan.'' (Emphasis added.) Regarding methadone overdoses in particular, Pike further testified that ''patients who do overdose on methadone . . . have to be admitted because you're going to be standing there administering Narcan every hour, hour and a half . . . . [T]hey need a continuous infusion of Narcan . . . until they get below that concentration that was causing the overdose effects, and that could take as long as a day . . . .''

In applying those principles to the decedent's case, Pike made the following three observations. First, if a methadone overdose had caused the initial respiratory depression the decedent was experiencing when Hope found her on November 29 at 6:45 p.m., then the respiratory depression should have returned "at about 8 o'clock," i.e., approximately one hour after the paramedics administered Narcan. This conclusion was predicated on the assumption, acknowledged by both parties' experts, that methadone is a *long-acting* narcotic that has a long half-life and duration of effect. Thus, according to Pike, if the concentration of methadone was sufficiently toxic to cause respiratory depression at 6:45 p.m., then it probably still would have been sufficiently toxic when the Narcan wore off at 8 p.m.

Second, according to Pike, the record revealed that the respiratory depression in fact did not return when the Narcan should have been wearing off. To be sure, the respiratory depression did not return *at any point* during the decedent's hospitalization at Lawrence & Memorial. On the contrary, the decedent's vital signs, including her respiration rate and oxygen saturation levels, stabilized at normal levels hours before her discharge. Furthermore, the decedent's condition did not warrant another administration of Narcan at Lawrence & Memorial.

Third, Pike inferred from those first two observations that the decedent's initial respiratory depression was caused by a *short-acting* narcotic, not a *long-acting* narcotic. According to Pike, a short-acting narcotic, by virtue of having a relatively short half-live and duration of effect, would not have caused a recurrence of overdose symptoms after Narcan wore off. That is, there would have been a "rapid decay" of the short-acting narcotic's concentration during Narcan's period of effectiveness, leaving a nontoxic concentration after

Narcan wore off. Therefore, the absence of any recurring overdose symptoms after Narcan's period of effectiveness is consistent with an overdose on a short-acting narcotic, not a long-acting narcotic like methadone.

On the basis of those three observations, Pike opined that the decedent had not ingested a *fatal* concentration of methadone *before* she was hospitalized at Lawrence & Memorial. Pike attributed the positive methadone finding in the Lawrence & Memorial drug screen to the methadone that the decedent was administered at Blue Hills. He had "[n]o doubt whatsoever" that the Blue Hills methadone caused the positive methadone finding on November 29, 2008, notwithstanding the fact that the last Blue Hills dose was administered to the decedent on November 21, 2008. Pike reasoned that the Blue Hills methadone would have been detected on November 29 because five half-lives had not passed since the November 21 dose. In so reasoning, Pike apparently assumed that the Blue Hills methadone's half-life was substantially longer than twenty-four hours, even though he previously had used twenty-four hours as "a reasonable estimate" of methadone's half-life.

Testimony provided by one of the plaintiff's experts, Eric Schwam, controverted Pike's opinion that recurring respiratory depression always presents approximately one hour after the administration of Narcan. An emergency medicine physician who opined mainly on the standard of care,[8] Schwam testified that the "experience of decades of . . . [caring for] patients [overdosing on] long-acting opiates" has shown that "*delayed*

[8] Although the defendant does not challenge the jury's finding with respect to the standard of care, we note that Schwam opined that Marchiondo's treatment of the decedent deviated from the appropriate standard of care for a possible methadone overdose. Schwam testified that Marchiondo improperly ruled out methadone as a potential cause of the decedent's overdose because there was "sufficient evidence to at least raise the possibility that the overdose was . . . partly methadone." Consequently, having wrongly excluded methadone, Marchiondo also failed to provide the dece-

respiratory depression can occur . . . .'' (Emphasis added.) According to Schwam, ''you *don't know when* [the] return of respiratory depression is going to occur. One *might* think that it would occur when the Narcan wears off, and that's a *widely held misconception* . . . . [T]hat's a very easy thing to assume if you know a *little bit* about opiate toxicology, but decades of experience have shown that if that's the way you think and you discharge a patient, a lot of them will be dead the next day.'' (Emphasis added.)

Schwam also described two specific cases of delayed recurring respiratory depression that he had encountered in his medical practice. In the first case, ''[a] patient took an overdose of methadone, was seen in the emergency department, was monitored for six hours, was discharged by the physician, thinking that everything was okay, and the person had recurrence of respiratory depression. Fortunately, they survived.'' In the second case, which was ''very similar to [the decedent's case],'' a ''patient was discharged home and was found dead the next day.'' According to Schwam, ''these cases . . . have been going on for years, and apparently, they continue to happen.'' For these reasons, Schwam testified, the appropriate standard of care for a suspected methadone overdose is ''monitor[-ing] . . . for *twenty-four hours* for signs of recurrent opiate overdose.'' (Emphasis added.)

Although Schwam was not a causation expert,[9] the defendant never objected to counsel's questions pertaining to delayed recurring respiratory depression on the ground that they were outside the scope of the

dent with the appropriate care for a methadone overdose, which is ''monitor[-ing] . . . for twenty-four hours for signs of recurrent opiate overdose.''

[9] The plaintiff conceded at oral argument before this court that Schwam's testimony was offered only for standard of care purposes.

subject matter of Schwam's testimony.[10] Moreover, the defendant never moved, on that specific ground, to strike Schwam's answers regarding delayed recurring respiratory depression.[11]

The plaintiff's other expert, McDonough, also disagreed with Pike's assertion that the Blue Hills methadone caused the positive methadone finding in the decedent's drug screen at Lawrence & Memorial. He opined that the Blue Hills methadone was not the same methadone that was detected in the drug screen on November, 29, 2008. McDonough reasoned that the amount of methadone the decedent received at Blue Hills on November 21, 2008, "is basically the smallest dosage you can have" and that the drug screen was conducted "eight and one-half days from the last ingestion of that five milligram tablet . . . ." In so reasoning, McDonough apparently refused to assume, like Pike, that the Blue Hills methadone's half-life was substantially longer than twenty-four hours.

[10] The defendant did file two motions in limine regarding the scope of Schwam's testimony. The second, which sought to preclude Schwam from testifying on the "effective duration of Narcan," effectively was granted when the court stated that it would sustain any "objection that fairly implicates . . . [the] effective duration of Narcan." The first motion sought to preclude Schwam from testifying regarding the standard of care with respect to Marchiondo's diagnosis of pneumonia. The plaintiff agreed to not elicit any testimony from Schwam regarding the pneumonia diagnosis. Neither of those two motions, however, sought to preclude or limit in any respect Schwam's testimony regarding delayed recurring respiratory depression.

[11] The defendant did move to strike the following testimony from Schwam's direct examination: "Well, [the belief that respiratory depression would return when Narcan wears off is] a very easy thing to assume if you know a little bit about opiate toxicology, but decades of experience have shown that if that's the way you think and you discharge a patient, a lot of them will be dead the next day." The court, however, denied the motion to strike. Critically, the defendant's stated ground for the motion to strike was that Schwam's answer was *not responsive* to the question asked by the plaintiff's counsel. At no point did the defendant move to strike Schwam's testimony on the ground that it was outside the scope of the plaintiff's offer of Schwam's testimony for standard of care purposes.

In analyzing the defendant's first challenge to the sufficiency of causation evidence, we begin by setting forth our standard of review. "A party challenging the validity of the jury's verdict on grounds that there was insufficient evidence to support such a result carries a difficult burden. In reviewing the soundness of a jury's verdict, we construe the evidence in the light most favorable to sustaining the verdict. . . . Furthermore, it is not the function of this court to sit as the seventh juror when we review the sufficiency of the evidence . . . rather, we must determine . . . whether the totality of the evidence, including reasonable inferences therefrom, supports the jury's verdict . . . . [I]f the jury could reasonably have reached its conclusion, the verdict must stand, even if this court disagrees with it. . . .

"Two further fundamental points bear emphasis. First, the plaintiff in a civil matter is not required to prove his case beyond a reasonable doubt; a mere preponderance of the evidence is sufficient. Second, the well established standards compelling great deference to the historical function of the jury find their roots in the constitutional right to a trial by jury." (Citations omitted; internal quotation marks omitted.) *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 370–71, 119 A.3d 462 (2015).

"[I]t is [the] function of the jury to draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . . Because [t]he only kind of an inference recognized by the law is a reasonable one . . . any such inference cannot be based on possibilities, surmise or conjecture. . . . It is axiomatic, therefore, that [a]ny [inference] drawn must be rational and founded upon the evidence. . . . However, [t]he line between permissible inference and impermissible speculation is not always easy to discern. When we infer, we derive a conclusion from

proven facts because such considerations as experience, or history, or science have demonstrated that there is a likely correlation between those facts and the conclusion. If that correlation is sufficiently compelling, the inference is reasonable. But if the correlation between the facts and the conclusion is slight, or if a different conclusion is more closely correlated with the facts than the chosen conclusion, the inference is less reasonable. At some point, the link between the facts and the conclusion becomes so tenuous that we call it speculation. When that point is reached is, frankly, a matter of judgment. . . .

"[P]roof of a material fact by inference from circumstantial evidence *need not* be so conclusive as to *exclude every other hypothesis*. It is sufficient if the evidence produces in the mind of the trier a reasonable belief in the probability of the existence of the material fact. . . . Thus, in determining whether the evidence supports a particular inference, we ask whether that inference is so unreasonable as to be unjustifiable. . . . In other words, an inference need not be compelled by the evidence; rather, the evidence need only be reasonably susceptible of such an inference. Equally well established is our holding that a jury may draw factual inferences on the basis of already inferred facts. . . . Finally, it is well established that a plaintiff has the same right to submit a weak case as he has to submit a strong one. (Citations omitted; emphasis added; internal quotation marks omitted.) *Curran* v. *Kroll*, 303 Conn. 845, 856–57, 37 A.3d 700 (2012).

We next set forth the legal principles governing medical malpractice actions. "[T]o prevail in a medical malpractice action, the plaintiff must prove (1) the requisite standard of care for treatment, (2) a deviation from that standard of care, and (3) a causal connection between the deviation and the claimed injury." (Internal quotation marks omitted.) *Gold* v. *Greenwich Hospital Assn.*,

262 Conn. 248, 254–55, 811 A.2d 1266 (2002). "Generally, expert testimony is required to establish both the standard of care to which the defendant is held and the breach of that standard." (Internal quotation marks omitted.) Id., 255. Likewise, "[e]xpert medical opinion evidence is usually required to show the cause of an injury or disease because the medical effect on the human system of the infliction of injuries is generally not within the sphere of the common knowledge of the lay person." (Internal quotation marks omitted.) *Milliun* v. *New Milford Hospital*, 310 Conn. 711, 725, 80 A.3d 887 (2013).

The defendant does not argue that there is insufficient evidence supporting the jury's findings regarding the appropriate standard of care and Marchiondo's deviation from that standard of care. Thus, we focus on the principles pertaining to causation. "All medical malpractice claims, whether involving acts or inactions of a defendant physician, require that a defendant physician's conduct proximately cause the plaintiff's injuries. The question is whether the conduct of the defendant was a substantial factor in causing the plaintiff's injury. . . . This causal connection must rest upon more than surmise or conjecture. . . . A trier is not concerned with possibilities but with reasonable probabilities. . . . The causal relation between an injury and its later physical effects may be established by the direct opinion of a physician, by his deduction by the process of eliminating causes other than the traumatic agency, or by his opinion based upon a hypothetical question." (Internal quotation marks omitted.) *Sargis* v. *Donahue*, 142 Conn. App. 505, 513, 65 A.3d 20, cert. denied, 309 Conn. 914, 70 A.3d 38 (2013).

"[I]t is the plaintiff who bears the burden to prove an unbroken sequence of events that tied his injuries to the [defendants' conduct]. . . . This causal connection must be based upon more than conjecture and

surmise." (Citations omitted; internal quotation marks omitted.) *Paige* v. *St. Andrew's Roman Catholic Church Corp.*, 250 Conn. 14, 25–26, 734 A.2d 85 (1999). A plaintiff, however, "is *not* required to disprove all other possible explanations for the accident but, rather, must demonstrate that it is more likely than not that the defendant's negligence was the cause of the accident." (Emphasis added.) *Rawls* v. *Progressive Northern Ins. Co.*, 310 Conn. 768, 782, 83 A.3d 576 (2014). "[T]he issue of causation in a negligence action is a question of fact for the trier . . . ." (Internal quotation marks omitted.) *Burton* v. *Stamford*, 115 Conn. App. 47, 87, 971 A.2d 739, cert. denied, 293 Conn. 912, 978 A.2d 1108 (2009).

With the relevant legal framework in mind, we turn to the present case. As an initial matter, we highlight that the parties' dispute regarding causation revolves around the issue of *when* the decedent ingested the fatal dose of methadone. That issue, in turn, depends principally on the application of the toxicological principles governing the relative half-lives and durations of effect of Narcan and long-acting and short-acting narcotics. Thus, we begin by reviewing the expert evidence relating to those toxicological principles.

The thrust of the defendant's argument is that the *undisputed* "physical facts of human biology" and "settled scientific principles" "permit[ted] only one conclusion: If the plaintiff had consumed the fatal dose of methadone before her discharge from the emergency room, there would have been some sign of the drug's resurgent effect before 1:30 a.m." The fundamental flaw in this argument is that the relevant "physical facts" and "scientific principles" *were* disputed at trial. Our review of the record reveals that, although the parties' experts concurred on much of the relevant science, their testimony diverged on a crucial point. As previously explained in considerable detail, the parties' experts disagreed as to *how soon* after receiving Narcan

a methadone overdose patient experiences recurring overdose symptoms.

The defendant's causation expert, Pike, testified that recurring methadone overdose symptoms should present, if at all, one hour after the administration of Narcan. This testimony, however, was contradicted directly by the testimony of Schwam, the plaintiff's standard of care expert. In particular, Schwam testified that "*delayed* respiratory depression can occur" in cases of overdoses on long-acting narcotics and that "you *don't know when* [the] return of respiratory depression is going to occur." (Emphasis added.) According to Schwam, "[o]ne *might* think that [the return] would occur when the Narcan wears off, [but] that's a *widely held misconception* . . . ." (Emphasis added.) Schwam recalled from his experience two cases in which delayed recurring respiratory depression occurred. Although the defendant correctly points out that these two cases may not be *exactly analogous* to the decedent's case, they still, nonetheless, are illustrative of the broader point that delayed recurring *can* occur in cases of methadone overdose.

Despite some testimony suggesting that delayed recurring respiratory depression violates certain scientific principles, Schwam testified that it is a medical phenomenon that actually has been observed in practice. Indeed, Schwam opined not only that the phenomenon *can* occur, but that it occurs *despite* what the defendant characterizes as "undisputed" and "settled" scientific principles. Specifically, Schwam testified that "a little bit [of knowledge pertaining to] *opiate toxicology*" has given rise to the "*widely held misconception*" that recurring overdose symptoms return "when the Narcan wears off . . . ." (Emphasis added.) In other words, the evidence did not establish, as the defendant suggests, that delayed onset of recurring respiratory

depression was scientifically impossible. On the contrary, the jury heard expert testimony that delayed recurring respiratory depression can occur in methadone overdoses, *even if* such a phenomenon seems to defy the "undisputed" and "settled" toxicological principles of half-life and duration of effect.

"Conflicting expert testimony does not necessarily equate to insufficient evidence." (Internal quotation marks omitted.) *Dallaire* v. *Hsu*, 130 Conn. App. 599, 603, 23 A.3d 792 (2011). Rather, "[w]here expert testimony conflicts, it becomes the function of the trier of fact to determine credibility and, in doing so, it could believe all, some or none of the testimony of either expert." (Internal quotation marks omitted.) *DelBuono* v. *Brown Boat Works, Inc.*, 45 Conn. App. 524, 541, 696 A.2d 1271, cert. denied, 243 Conn. 906, 701 A.2d 328 (1997). It is axiomatic that in cases involving "conflicting expert testimony, the jury is free to accept or reject each expert's opinion in whole or in part." (Internal quotation marks omitted.) *Shelnitz* v. *Greenberg*, 200 Conn. 58, 68, 509 A.2d 1023 (1986).

In the present case, the jury certainly was free to believe and accept the opinion of the plaintiff's expert that the phenomenon of delayed recurring respiratory depression can occur in methadone overdoses. Likewise, it was free to disbelieve and reject the parts of the testimony of the defendant's expert that attempted to refute that phenomenon. Therefore, contrary to the defendant's assertion, the fact that the decedent did not *immediately* experience recurring overdose symptoms one hour after Narcan was administered did not require the jury to conclude that the decedent's overdose on November 29, 2008, was caused by a short-acting narcotic rather than methadone. The jury could have concluded, instead, that the delayed recurring respiratory depression the decedent eventually experienced was

consistent with her ingestion of a toxic dose of methadone before her visit to Lawrence & Memorial on November 29, 2008.

Notwithstanding our conclusion that the parties presented conflicting expert testimony on the concept of delayed recurring respiratory depression, the defendant argues that it is improper to consider Schwam's testimony in reviewing the evidence on that concept. Specifically, the defendant argues that "Schwam testified as an expert on the standard of care, not causation. [Thus] [the jury] had no basis to transplant that standard of care testimony to the foreign soil of causation—and no guidance from an expert on how to make it grow there if [it] did." According to the defendant, "[t]he plaintiff put on Dr. Schwam for one purpose; his testimony cannot be used for another and totally different purpose." (Internal quotation marks omitted.) We find this argument unpersuasive.

As an initial matter, we note that it is unclear from the record whether Schwam's testimony was offered solely for standard of care purposes. The plaintiff's disclosure of Schwam's testimony indicated that Schwam would testify on a wide range of subject matter, including how delayed recurring respiratory depression caused the decedent's death.[12] Additionally, the record

[12] Specifically, the plaintiff stated in the disclosure that Schwam would testify as to (1) "all subject matter arising from his expertise in the field of emergency medicine, including the treatment of patients suspected of suffering from drug overdose"; (2) "all subject matter arising from his education, training, and experience"; (3) "the care and treatment [the decedent] received from the defendant during her emergency department admission on November 29, 2008"; (4) "the decedent's medical history, her presenting symptoms, the course of treatment she received by the defendant, the diagnosis provided, the laboratory results, and the medical course that could and should have occurred, but did not"; and (5) "certain aspects of the testimony provided by the defendant's experts."

In outlining the subject matter of Schwam's testimony, the disclosure also stated: "Please see the attached five page opinion letter . . . that capture[s] the expected subject matter of his expected testimony." In the attached opinion letter, Schwam opined, among other things, that (1) "when Narcan

is silent as to how the plaintiff *actually* offered the testimony and if at that time he in fact limited his offer to standard of care purposes.

Notwithstanding the ambiguity surrounding the plaintiff's proffer of Schwam's testimony, the parties apparently agree that Schwam's testimony was offered only for standard of care purposes.[13] Schwam, nonetheless, was an emergency medicine physician who had experience treating overdose patients and reviewing overdose cases in his capacity as a hospital's director of quality assurance. Thus, his testimony regarding delayed respiratory depression was an "expert" opinion in the sense that it was based on his expertise and experience in practicing emergency medicine, a field apparently requiring knowledge of the toxicological and pharmacological properties of narcotics. The fact that the parties' dispute over the standard of care *and* causation *both* centered primarily on those properties reveals that the issues of standard of care and causation clearly were intertwined in the present case.

Even if Schwam's testimony was offered strictly for standard of care purposes, the defendant failed to pursue any preemptive or remedial measures that would have precluded or limited Schwam's testimony on the issue of delayed recurring respiratory depression. The defendant did not file a motion in limine on that issue; it did not object to questions on that issue asked of Schwam by the plaintiff's counsel;[14] it did not move to

is administered to counteract methadone, the Narcan usually wears off long before the methadone, and patients may seem well for several hours, only to relapse and become unconscious much later"; (2) "when the effects of Narcan [administered to the decedent] wore off, the effects of methadone returned and she suffered unresponsiveness and fatal respiratory depression; and (3) "to a reasonable medical certainty, it can be determined that the delayed toxic effects of the methadone caused [the decedent's] death."

[13] See footnote 9 of this opinion.

[14] See footnote 10 of this opinion.

strike Schwam's testimony regarding that issue;[15] and it did not request a limiting instruction directing the jury to consider Schwam's testimony on that issue only for standard of care purposes. See *State* v. *Dews*, 87 Conn. App. 63, 69, 864 A.2d 59 (rejecting claim that trial court, sua sponte, should have "stricken . . . testimony and offered a limiting instruction as to its use" because "defendant did not object to . . . testimony, he failed to seek to have the testimony stricken . . . he did not request a limiting instruction . . . [and] he [did not] take exception to the court's failure to give a limiting instruction"), cert. denied, 274 Conn. 901, 876 A.2d 13 (2005).

Accordingly, the court never instructed the jury that it should disregard Schwam's testimony on delayed recurring respiratory depression or that it should consider such testimony only for standard of care purposes. In the absence of any such instruction from the court, the evidence regarding delayed recurring respiratory depression was before the jury for it to use for any purpose, including causation. See *Curran* v. *Kroll*, supra, 303 Conn. 863–64 ("We also are not persuaded by the . . . argument that the Appellate Court improperly concluded that evidence of the decedent's telephone call to [the defendant physician] would support an inference that the decedent would have called [the defendant] about her leg pain if she had been warned about it because the evidence was not presented for that purpose . . . . This evidence was admitted in full, without limitation. In the absence of any limiting instruction, the jury was entitled to draw *any* inferences from the evidence that it reasonably would support." [Emphasis added.]); see also *State* v. *Carey*, 228 Conn. 487, 496, 636 A.2d 840 (1994) ("If [inadmissible] evidence is received without objection, it becomes part of the evidence in the case, and is usable as proof to the extent of the

[15] See footnote 11 of this opinion.

rational persuasive power it may have. The fact that it was inadmissible does not prevent its use as proof so far as it has probative value. . . . This principle is almost universally accepted. . . . The principle applies to any ground of incompetency under the exclusionary rules." [Internal quotation marks omitted.]).

The defendant also argues that, even if the jury could consider Schwam's testimony for causation purposes, the combined expert testimony of Schwam and McDonough still was insufficient to establish causation. Specifically, the defendant argues that "[e]ven if the plaintiff could dress up standard of care testimony in causation clothes, Dr. Schwam did not opine that *delayed* respiratory depression caused the decedent's death. No [expert] witness did." (Emphasis altered.) The defendant also contends that McDonough's opinion as to the decedent's cause of death was inadequate because McDonough could not determine if the decedent consumed the fatal dose of methadone before her discharge from Lawrence & Memorial. Thus, the gravamen of the defendant's challenge to the expert evidence on causation is that the opinions of McDonough and Schwam were deficiently unspecific. We are unpersuaded.

The defendant correctly states that a plaintiff in a medical malpractice action generally must prove causation with expert testimony. See *Milliun* v. *New Milford Hospital*, supra, 310 Conn. 725. We disagree with the defendant, however, that the cumulative effect of the expert evidence and other evidence presented in this case did not establish a causal connection between the defendant's negligence and the decedent's death.

First, although McDonough did not testify specifically that the respiratory depression responsible for the decedent's death was "delayed," he did opine that the cause of death was respiratory depression resulting from

methadone toxicity. McDonough also provided subsequent testimony indicating that the "presumed time to onset" of respiratory depression in methadone overdoses "could be *quite long*" because "the *respiratory depression* comes on *much later* than the pain relief." (Emphasis added.) Furthermore, expert testimony provided by Schwam, which we presume the jury credited, described in considerable detail the phenomenon of delayed recurring respiratory depression in methadone overdoses. The occurrence of fatal respiratory depression hours after the decedent's consumption of methadone was consistent with the expert testimony provided by McDonough and Schwam. Thus, when all of the expert testimony is considered together, the jury reasonably could have inferred that the decedent succumbed to delayed respiratory depression.

Second, the fact that McDonough could not determine the specific time at which the decedent consumed the fatal dosage of methadone does not render his opinion inadequate. Rather, the specific timing of the decedent's ingestion of methadone was a fact that the plaintiff could have proven with circumstantial evidence. See *Shelnitz* v. *Greenberg*, supra, 200 Conn. 66 ("[in a medical malpractice action] [c]ausation may be proved by circumstantial evidence *and* expert testimony" [emphasis added; internal quotation marks omitted]). On direct examination, the plaintiff asked McDonough whether it was his opinion that, if the decedent had consumed methadone before her discharge but not afterward, the methadone consumed before her discharge on November 29, 2008, caused the decedent's death. McDonough answered that question in the affirmative. In answering that question, McDonough clearly had to *assume* that the decedent ingested methadone only before, and not after, her discharge. In other words, McDonough offered a conditional opinion that the methadone consumed before the decedent's discharge

caused her death, the condition being that the plaintiff prove that the methadone in fact was consumed before, and not after, her discharge. McDonough's testimony was not the exclusive means of proving that fact.

Having determined that the jury reasonably could have credited expert testimony supportive of the phenomenon of delayed recurring respiratory depression, we now examine the other evidence relating to when the decedent consumed the fatal dose of methadone. Our review of the record leads us to conclude that there was sufficient evidence from which the jury could infer, without resorting to speculation, that the decedent consumed the fatal dose of methadone before her discharge.[16]

[16] The defendant's reliance on *Paige* v. *St. Andrew's Roman Catholic Church Corp.*, supra, 250 Conn. 14, is unavailing. The defendant cites *Paige* as support for its position that the jury in the present case resorted to improper speculation in finding that the defendant caused the plaintiff's death. We are unpersuaded by the defendant's reliance on *Paige* because it is distinguishable from the present case.

In *Paige*, our Supreme Court held that there was insufficient evidence supporting the jury's finding that the defendant caused the plaintiff's injuries. Id., 17. The plaintiff in *Paige* was cleaning a boiler located in the defendant's church when *someone* activated the boiler, causing the plaintiff to sustain serious burn injuries. Id., 16–17. There was no direct evidence presented at trial that affirmatively established that the person who activated the boiler was an employee, servant, or agent of the defendant. Id., 34. Thus, the plaintiff's case relied principally on two alternative theories of negligence: (1) the defendant failed to supervise and instruct *its employees, servants, and agents* with respect to the boiler's operation; and (2) the defendant failed to restrict *public* access to the boiler's controls. Id., 27.

In returning a plaintiff's verdict, the jury answered several interrogatories regarding the plaintiff's theories of negligence. Id., 26–27 n.13. Its responses to the interrogatories indicated that it had found that the defendant was *not* negligent in failing to restrict *public* access to the boiler's controls. Id., 27–28. It did find, however, that the defendant was negligent in failing to supervise and instruct *its employees, agents, and servants* with respect to the boiler's operation. Id., 27. Notwithstanding its finding that the defendant negligently supervised and instructed its employees, agents, and servants, the jury indicated in another interrogatory that the defendant's custodian was not the person who activated the boiler. Id., 27 n.13.

The jury's responses to the interrogatories were central to our Supreme Court's analysis of the sufficiency of the evidence on causation. Id., 28–31.

Specifically, the court reasoned that those responses indicated that the jury's finding of negligence "was limited to the manner in which [the defendant] dealt with *its own employees*, *servants and agents*." (Emphasis added.) Id., 28. Therefore, "[i]n order for there to have been a causal connection between the defendant's negligent conduct and the plaintiff's injuries . . . it would have had to have been an employee, agent or servant of the defendant who activated the [boiler]. . . . [T]he converse [was] equally true . . . . [T]he defendant's conduct [could not have been] causally linked to the plaintiff's injuries if the [boiler] was activated by a person who was *not* an employee, agent or servant of the defendant." (Emphasis in original.) Id., 28–29.

In reviewing the sufficiency of the evidence on causation, the court in *Paige* examined only the evidence relating to whether the person who activated the boiler was an employee, servant, or agent of the defendant. The plaintiff's evidence unquestionably suggested that there was *only one* employee, agent, or servant of the defendant who was near the boiler controls at the time of the accident and who knew how to use those controls—the defendant's custodian. Id., 24, 34. As previously explained, however, the jury's response to an interrogatory indicated that it specifically found that the defendant's custodian was not the person who activated the boiler. Id., 27 n.13. Thus, the Supreme Court held that the "jury could not have concluded that it was an employee of the defendant who had activated [the] boiler . . . ." Id., 34.

The defendant argues that *Paige* guides our resolution of its sufficiency claim. Specifically, it contends that "[l]ike the possibility that a member of the public may have turned on the church boiler [in *Paige*], nothing . . . in this case [eliminated] the possibility that the decedent took the fatal dose [of methadone] after she left the emergency room." We are not persuaded by the defendant's analogy.

We conclude that *Paige* presented a distinct situation involving a logical inconsistency in the jury's verdict. In responding to a set of highly detailed and specific interrogatories, the jury revealed that its finding of negligence was based solely on the defendant's conduct with respect to its employees, agents, and servants. Yet, its responses to those interrogatories also revealed that it exonerated the only employee of the defendant who, according to the plaintiff's evidence, could have activated the boiler. There are no jury interrogatories in the present case that reveal a similar inconsistency in the jury's verdict, nor is any such inconsistency otherwise apparent. Furthermore, the plaintiff in *Paige* failed to present *any* evidence from which the jury reasonably could infer that the person who activated the boiler was an employee, agent, or servant of the defendant. In the present case, however, there is ample evidence from which the jury could infer that the decedent consumed the lethal dose of methadone before her discharge. In particular, there was evidence that the decedent exhibited opioid overdose symptoms prior to her discharge, that her urine tested positive for methadone at the time of her hospitalization, and that the delayed respiratory depression she experienced after her discharge was consistent with the consumption of a toxic dose of methadone prior to her discharge.

In particular, the jury was presented with the following relevant evidence. At approximately 6:45 p.m. on November 29, 2008, the decedent was found to be suffering from symptoms that are consistent with an opiate or opioid induced overdose. The decedent's improvement in response to a dose of Narcan confirmed that she had been experiencing an overdose on an opioid or opiate. The paramedics who treated the decedent were able to determine that the decedent's "current medications" included methadone. Hope searched his home upon finding the decedent overdosing on November 29, and he did not find any drugs, drug paraphernalia, or evidence of drug use.

There were conflicting accounts as to whether the decedent admitted to taking methadone, but the jury certainly was free to credit the account wherein the decedent told the emergency room nurses that she took methadone and not heroin. Critically, a toxicology screen performed in the emergency room on November 29, 2008, detected the presence of methadone in the decedent's urine. The jury heard expert testimony that the positive finding for methadone in that screen could not have been caused by the therapeutic doses of methadone the decedent received eight days earlier.

From the time she was discharged, 11:53 p.m. on November 29, 2008, until 1:30 a.m. on November 30, 2008, the evidence showed that the decedent was in the company of Hope, who did not observe her ingest any more drugs. At some point between 1:30 a.m. and 9:45 a.m., the decedent experienced another episode of respiratory depression, which the jury could have found to be the type of delayed recurring respiratory depression that Schwam opined is consistent with methadone overdoses. Hope testified that he did not hear any movement from the decedent between 1:30 a.m. and 9:45 a.m. on November 30, unlike the night of November 29,

when he had heard the decedent use the microwave in his kitchen. Hope found the decedent's body in the same position in which it had been when he last saw the decedent at 1:30 a.m.

The medical examiner determined that the concentration of methadone present in the decedent's blood at the time of death was at a toxic level. The decedent's death occurred approximately seven to fifteen hours after she initially overdosed on November 29, 2008.

Hope and law enforcement officials searched Hope's home on November 30, 2008, and did not find any evidence relating to drug activity. In addition, Geyer, an investigator with the medical examiner's office, did not find any drugs, drug paraphernalia, or signs of drug use on or near the decedent's body.

Construing all of the evidence in the light most favorable to sustaining the verdict, as we must; *Saint Bernard School of Montville, Inc.* v. *Bank of America*, 312 Conn. 811, 834, 95 A.3d 1063 (2014); we conclude that it is sufficient to support the jury's finding that the decedent consumed a fatal dose of methadone before she was brought to the emergency room at Lawrence & Memorial on November 29, 2008.

B

In its second challenge to the sufficiency of causation evidence, the defendant contends that "there is a [another] missing link in the plaintiff's causal chain. . . . [T]he jury could only guess whether the decedent would have been admitted to [Lawrence & Memorial] if Dr. Marchiondo had not discharged her." According to the defendant, in order to prove that Marchiondo's negligence caused the decedent's death, the plaintiff was required to present evidence regarding "[Lawrence & Memorial's] admission standards . . . and whether the decedent met them." Because the plaintiff

failed to present such evidence, the defendant contends, the jury reasonably could not have found that the defendant caused the decedent's death. We disagree.

The defendant's second sufficiency challenge suffers from the basic flaw of misunderstanding Schwam's testimony regarding the applicable standard of care. As the defendant argues, Schwam did testify initially that the standard of care applicable to possible methadone overdoses required Marchiondo to "*admit* [the decedent] to the hospital for continuous monitoring . . . for a minimum of twenty-four hours." (Emphasis added.) Schwam subsequently clarified, however, that the applicable standard of care only required Marchiondo "to monitor her. He needed to *ideally* admit her to an intensive care unit, *but certainly* to *monitor* her for twenty-four hours for signs of recurrent opiate overdose." (Emphasis added.) The jury, of course, could have accepted the part of Schwam's testimony indicating that *monitoring* was required and rejected the part suggesting *admittance* was required.

Consequently, in order to prove causation, the plaintiff needed to show only that the decedent could have been monitored sufficiently for twenty-four hours, not admitted for that period of time. Zambarano, an emergency room nurse at Lawrence & Memorial, testified that the decedent was monitored in a room called the "observation room" during her hospitalization. Nurses assigned to the observation room monitor the vital signs of patients in that room both in person and through remote telemetric monitoring displays at a nearby nurses' station. Thus, nurses can respond immediately to a crash in the vital signs of an observation room patient. According to Zambarano, patients can stay overnight in the observation room. Alternatively, Zambarano testified, patients can be monitored in less acute areas, such as hallway beds. With that testimony, along with the evidence that the decedent was "told that she

was here for the night," the jury reasonably could have inferred that it was more likely than not that the decedent could have been monitored medically for twenty-four hours at Lawrence & Memorial.

Accordingly, in construing all of the evidence in the light most favorable to sustaining the verdict, as we must; *Saint Bernard School of Montville, Inc.* v. *Bank of America*, supra, 312 Conn. 834; we conclude that there was sufficient evidence supporting the jury's finding that the defendant's negligence caused the decedent's death.

II

SUFFICIENCY OF EVIDENCE SUPPORTING JURY'S AWARD OF DAMAGES

The defendant's second claim is that the plaintiff failed to present sufficient evidence supporting the jury's award of $150,000 in damages for the destruction of the decedent's capacity to carry on and enjoy life's activities. Specifically, the defendant contends that a plaintiff seeking damages for the destruction of a decedent's capacity to carry on and enjoy life's activities must present evidence of the decedent's life expectancy. According to the defendant, the plaintiff failed to present evidence of the decedent's life expectancy in the present case, and, therefore, the jury's award of damages for the destruction of the decedent's capacity to carry on and enjoy life's activities was "speculative and unreasonable." We disagree.

The following additional facts and procedural history are necessary to our resolution of the defendant's second claim. At trial, the plaintiff presented evidence of the decedent's (1) age, (2) health, (3) physical condition, and (4) habits and activities. Regarding the decedent's age, a photograph of the decedent's driver's license,

which contained the decedent's date of birth, was admitted into evidence.

Regarding the decedent's health, the plaintiff offered some of the decedent's medical records. Those records indicated that, in addition to polysubstance abuse, the decedent suffered from diabetes, hypothyroidism, high cholesterol, high blood sugar, anxiety, and depression. The records also indicated that, since 2000, the decedent had completed several inpatient and outpatient substance abuse treatment programs and had been hospitalized several times for diabetes related complications.

Regarding the decedent's physical condition, McDonough's autopsy report, wherein he detailed the observations of his external and internal examinations of the decedent, was admitted into evidence. McDonough testified that he observed "no evidence of acute trauma" as a result of his external examination of the decedent's body. Furthermore, McDonough's internal examination revealed no evidence of disease afflicting the decedent's cardiovascular, hepatobiliary, lymphoreticular, gastrointestinal, genitourinary, and central nervous systems, nor was there evidence of disease afflicting the decedent's head, neck, internal genital organs, or abdominal and chest cavities. McDonough's examination did reveal, however, that the decedent's thyroid exhibited signs of chronic inflammation and that her lungs were congested with fluid.

Regarding the defendant's habits and activities, as previously set forth, there was considerable evidence presented of the decedent's lengthy struggle with polysubstance abuse and her alternating periods of sobriety and relapse. In addition to her drug problems, however, there was evidence presented regarding the decedent's other habits and activities. The decedent's father, James Procaccini, testified that in the summer of 2008 the

decedent was a "very happy person" who was "able to function in life very well." According to her father, the decedent helped him and his wife with household chores, submitted "an awful lot" of job applications, and attended Alcoholics Anonymous meetings. The "bright spot in [the decedent's] life" at that time, however, was helping her father and mother care for her two year old twin niece and nephew. Prior to the summer of 2008, the decedent had graduated from the University of Vermont with a bachelor of science degree and had taken a cross-country trip to Mount Rainier in Washington.

Following the jury's return of a plaintiff's verdict, the defendant filed a motion to set aside the verdict on the ground that the jury's award of damages for the destruction of the decedent's capacity to carry on and enjoy life's activities was "speculative." Specifically, the defendant argued that the plaintiff failed to present evidence of "[h]ow long the plaintiff likely would have lived," and, therefore, "[w]ithout a life expectancy table, or some other evidence on this topic," the jury's award "[could not] stand." The court denied the defendant's motion to set aside the verdict.

We begin our analysis by outlining our standard of review. "The standard of review governing our review of a trial court's denial of a motion to set aside the verdict is well settled. The trial court possesses inherent power to set aside a jury verdict which, in the court's opinion, is against the law or the evidence. . . . [The trial court] should not set aside a verdict where it is apparent that there was some evidence upon which the jury might reasonably reach [its] conclusion, and should not refuse to set it aside where the manifest injustice of the verdict is so plain and palpable as clearly to denote that some mistake was made by the jury in the application of legal principles . . . . Ultimately, [t]he decision to set aside a verdict entails the exercise of a

broad legal discretion . . . that, in the absence of clear abuse, we shall not disturb." (Internal quotation marks omitted.) *Kumah* v. *Brown*, 160 Conn. App. 798, 803, 126 A.3d 598, cert. denied, 320 Conn. 908, 128 A.3d 953 (2015).

We now turn to the legal principles governing damages awards in wrongful death actions. "In actions for injuries resulting in death, a plaintiff is entitled to 'just damages' together with the cost of reasonably necessary, medical, hospital and nursing services, and including funeral expenses.' General Statutes § 52-555. 'Just damages' include (1) the value of the decedent's lost earning capacity less deductions for her necessary living expenses and taking into consideration that a present cash payment will be made, (2) *compensation for the destruction of her capacity to carry on and enjoy life's activities in a way she would have done had she lived*, and (3) compensation for conscious pain and suffering." (Emphasis added.) *Katsetos* v. *Nolan*, 170 Conn. 637, 657, 368 A.2d 172 (1976).

Regarding compensation for the destruction of a decedent's capacity to carry on and enjoy life's activities, our Supreme Court has stated the following: "[T]he parties in a death action are entitled to attempt to present an *over-all picture of the decedent's activities* to enable the jury to make an informed valuation of the total destruction of his capacity to carry on life's activities. . . . So, for example, evidence bearing on *how pleasurable the decedent's future might have been* is admissible . . . as is evidence as to the decedent's *hobbies* and *recreations*." (Citations omitted; emphasis added; internal quotation marks omitted.) *Waldron* v. *Raccio*, 166 Conn. 608, 616–17, 353 A.2d 770 (1974); id., 617 (evidence of "decedent's attachment to his family" relevant to claim for destruction of capacity to carry on and enjoy life's activities); see also *Katsetos* v. *Nolan*,

supra, 170 Conn. 658 (evidence that decedent "was happily married," "had four children," "was a very happy person and in good health," "was a dedicated mother and homemaker," "[was] active in many outside activities," "was a state-licensed hairdresser," and had worked in pizza restaurant and office relevant to her capacity to enjoy life's activities); cf. *Bruneau* v. *Quick*, 187 Conn. 617, 635–36, 447 A.2d 742 (1982) (in personal injury action for surgeon's malpractice, evidence that plaintiff no longer could undertake ice skating, sailing, ballroom and jazz dancing, and gardening as she had before botched surgery was relevant to her "ability to carry on and enjoy certain activities").

A claim for the destruction of a decedent's capacity to carry on and enjoy life's activities requires proof of the decedent's life expectancy. See *Sims* v. *Smith*, 115 Conn. 279, 286, 161 A. 239 (1932) ("damages based upon the loss to the estate of a decedent by his death necessarily involves a consideration of the probable duration of his life"); cf. *Acampora* v. *Ledewitz*, 159 Conn. 377, 384–85, 269 A.2d 288 (1970) (in personal injury action, trial court erred in allowing jury to consider damages for permanent pain and suffering because "no evidence was introduced as to [plaintiff's] life expectancy").

With respect to the *type* of evidence that can be used to prove one's life expectancy, our Supreme Court has stated the following: "A mortality table[17] is *not* the exclusive evidence admissible to establish the expectancy of life, since *age*, *health*, *habits* and *physical condition* may afford evidence thereof." (Emphasis added; footnote added.) *Johnson* v. *Fiske*, 125 Conn. 445, 449, 6 A.2d 354 (1939). "[Mortality] tables only give the average of a large number of lives, and in the individual case

[17] A mortality table, also termed an "actuarial table," is "[a]n organized chart of statistical data indicating life expectancies for people in various categories . . . ." Black's Law Dictionary (10th Ed. 2014).

the expectancy may be higher or lower than the average. While generally held admissible, they are *not conclusive*, *nor are they the exclusive evidence* admissible in proof of that fact, which the jury may determine from other evidence . . . .'' (Emphasis added.) *Donoghue* v. *Smith*, 114 Conn. 64, 66, 157 A. 415 (1931); see also *Tampa* v. *Johnson*, 114 So. 2d 807, 810 (Fla. App. 1959) (''[a] jury is *not bound* by mortality tables, but these constitute *only one of many factors* that *may be* considered in estimating life expectancy'' [emphasis added]); *Glover* v. Berger, 72 Wyo. 221, 250, 263 P.2d 498 (1953) (''[d]irect evidence as to plaintiff's expectancy of life, however, is not essential, but the jury may determine such fact from their own knowledge and from the proof of the age, health, and habits of the person and other facts before them'' [internal quotation marks omitted]).

Use of a mortality table is not the exclusive means of proving life expectancy because ''our rule for assessing damages in death cases gives no precise mathematical formulas for the jury to apply. . . . [T]he assessment of damages in wrongful death actions *must* of necessity represent a *crude* monetary forecast of how the decedent's life would have evolved.'' (Citations omitted; emphasis added; internal quotation marks omitted.) *Katsetos* v. *Nolan*, supra, 170 Conn. 657. Indeed, ''[t]he life expectancy of the deceased, for the purpose of assessing damages in a wrongful death action, is a *question of fact for the jury to decide* . . . .'' (Emphasis added.) 22A Am. Jur. 2d 353, Death § 221 (2013).

Consequently, ''jurors may determine such fact *from their own knowledge* and from the proof of the age, health, and habits of the person and other facts before them.'' (Emphasis added.) 29A C.J.S. 493, Damages § 141 (2012); see also 22A Am. Jur. 2d, supra, § 349, pp. 469–70 (''if age, sex, health, and mental capacity are proven, the jury is entitled to determine from these facts and circumstances . . . in its sound judgment

. . . the decedent's life expectancy, without resort to mortality tables"). "The law does not require the production of . . . life expectancy tables whenever there is an issue of life expectancy, and does not regard them as essential to the establishment of that issue or to the recovery of damages based on life expectancy." 29A Am. Jur. 2d 723, Evidence § 1383 (2013).

Thus, insofar as the defendant argues that the plaintiff's proof of the decedent's destroyed capacity to enjoy life's activities is insufficient because he did not present "government mortality tables," we disagree. As previously addressed in considerable detail, the plaintiff presented substantial evidence of the decedent's age, health, physical condition, and habits, all of which are relevant to determining life expectancy. The decedent's age was established by her driver's license; the decedent's sundry illnesses were established by her medical records; the decedent's physical condition at the time of her death was expounded in McDonough's autopsy report and trial testimony; and the jury was familiar with the decedent's enduring drug habits. Moreover, the jury heard testimony from the decedent's father regarding the activities in which the decedent enjoyed partaking, including her strong attachment to her niece and nephew. *Waldron* v. *Raccio*, supra, 166 Conn. 616–17 (decedent's "attachment to his family" relevant to his capacity to enjoy life's activities). Thus, the jury reasonably could have made a " 'crude . . . forecast' "; *Katsetos* v. *Nolan*, supra, 170 Conn. 657; of the decedent's life expectancy from its own knowledge and from proof of the decedent's age, health, physical condition, and habits.

In light of the foregoing evidence that the plaintiff presented with respect to the decedent's life expectancy and activities that she enjoyed, we conclude that the jury's award of damages for the destruction of the decedent's capacity to carry on and enjoy life's activities

was not unreasonable or speculative. Accordingly we conclude that the court did not abuse its discretion in refusing to set aside the jury's award of damages for the destruction of the decedent's capacity to carry on and enjoy life's activities.

The judgment is affirmed.

In this opinion the other judges concurred.

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## STATE OF CONNECTICUT *v.* LUIS XAVIER SOTO (AC 38612)

Alvord, Prescott and Mullins, Js.

*Syllabus*

The defendant, who was convicted after a jury trial of criminal possession of a pistol and risk of injury to a child on the basis of evidence that was discovered in the execution of a search warrant at his cousin's apartment, appealed to this court. The jury heard conflicting testimony regarding whether the defendant owned the pistol that was seized from the closet of the bedroom in which he had been staying. Police officers who executed the search warrant testified that the defendant made certain inculpatory statements. The defendant also testified, denying that he owned the pistol and that he made any such inculpatory statements. The defendant filed a motion for a judgment of acquittal at the close of the state's case-in-chief, but did not file any postverdict motions. On appeal, the defendant claimed that the jury's verdict was against the weight of evidence presented at trial. *Held* that this court declined to review the defendant's claim, raised for the first time on appeal, that the evidence against him was so weak as to raise a substantial question regarding the reliability of the verdict and that he was entitled to a new trial, as the defendant failed to file a motion to set aside the verdict and for a new trial after the jury returned its verdict and the defendant failed to provide an adequate record to review his claim under *State* v. *Golding* (213 Conn. 233); contrary to the defendant's claim, filing a motion for a judgment of acquittal at the close of the state's case-in-chief did not preserve for appellate review his challenge to the verdict as against the weight of the evidence, and moreover, only the judge who presided over the trial where the verdict was returned was legally competent to decide whether that verdict was against the weight of the evidence, and because the defendant here failed to file a postverdict motion for a new trial, the trial court was not asked to reweigh the

jury's credibility determinations or to make findings regarding the evidence and, consequently, this court could not determine from the record whether the trial court abused its discretion because that court was never called upon to exercise its discretion.

Argued April 19—officially released August 22, 2017

*Procedural History*

Substitute information charging the defendant with the crimes of stealing a firearm, criminal possession of a pistol, possession of narcotics within 1500 feet of a school and risk of injury to a child, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Dennis*, *J.*; verdict and judgment of guilty of criminal possession of a pistol and risk of injury to a child, from which the defendant appealed to this court. *Affirmed.*

*W. Theodore Koch III*, assigned counsel, for the appellant (defendant).

*Linda F. Currie-Zeffiro*, assistant state's attorney, with whom, on the brief, were *Jonathan M. Sousa*, former special deputy assistant state's attorney, *John C. Smriga*, state's attorney, and *Nicholas J. Bove, Jr.*, senior assistant state's attorney, for the appellee (state).

*Opinion*

MULLINS, J. The defendant, Luis Xavier Soto, appeals from the judgment of conviction rendered after a jury trial of one count of criminal possession of a pistol in violation of General Statutes § 53a-217c (a) (1) and one count of risk of injury to a child in violation of General Statutes § 53-21 (a) (1). The defendant's sole claim on appeal is that this court should remand the case for a new trial because the jury's verdict was against the weight of the evidence. We decline to review the defendant's claim because it is unpreserved and not entitled to review under *State* v. *Golding*, 213 Conn. 233, 239–40,

567 A.2d 823 (1989). Accordingly, we affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On June 11, 2014, at approximately 5 a.m., police officers with the Statewide Urban Violence Cooperative Crime Control Task Force (task force) executed a search warrant on the second floor apartment at 217 Hough Avenue in Bridgeport. The task force had obtained the warrant on the basis of a confidential informant's tip that Francisco Pineiro, the defendant's cousin, was in possession of a black semiautomatic handgun. When the task force officers applied for the warrant, they believed that, in addition to Pineiro, Christina Jimenez and her two children resided at the apartment.

Upon entering the apartment, task force officers encountered Pineiro, Jimenez, two children aged ten and five, and the defendant. Some of the task force officers detained the apartment's occupants in the kitchen while other officers searched the apartment. The apartment had three bedrooms, one of which eventually was determined to be the defendant's. In the closet of that bedroom, Detective David Edwards found a leather backpack containing a bag of cocaine, three loose .40 caliber rounds, and a semiautomatic pistol that was fully loaded with twelve rounds. The task force officers eventually determined that the pistol had been stolen several years earlier. Edwards also found the defendant's state identification card on a television stand in that bedroom and some clothes hanging in the bedroom closet.

While being detained in the kitchen, the defendant became aware that task force officers found a pistol in the bedroom. At that point, Officer Ilidio Pereira, who was detaining the apartment's occupants in the kitchen,

overheard the defendant ask Pineiro in Spanish, "quién va a tomar," which means "who's going to take it."

After recovering the pistol, Edwards questioned Pineiro, Jimenez, and the defendant about the pistol. Both Pineiro and Jimenez denied possession and knowledge of the pistol. Additionally, Jimenez was "genuinely concerned and shocked" about the pistol's presence in the apartment and "placed the blame" on the defendant for the pistol. The defendant, who was a convicted felon, stated that the pistol was not his, that he had never seen it before, and that he did not know to whom it belonged. The defendant did indicate, however, that he was staying in that bedroom, that the clothes hanging in the closet belonged to him, and that he had been "in and out of the closet multiple times."

As a result of the search and questioning of the apartment's occupants, task force officers arrested the defendant on several gun and drug offenses. The state charged the defendant with stealing a firearm in violation of General Statutes § 53a-212 (a), criminal possession of a pistol in violation of § 53a-217c (a) (1), possession of a controlled substance within 1500 feet of a school in violation of General Statutes § 21a-279 (b), and risk of injury to a child in violation of § 53-21 (a) (1). The defendant elected a jury trial.

At trial, the state sought to establish that the defendant constructively possessed the pistol, ammunition, and cocaine seized from Pineiro's apartment. Specifically, it sought to link the defendant to those items with statements he had made to Pineiro and to task force officers at Pineiro's apartment. The defendant's statements were introduced through the testimony of several task force officers who had participated in executing the warrant at Pineiro's apartment. In particular, those officers testified that the defendant asked Pineiro "who's going to take it" in reference to the pistol, that

he indicated that he was staying in the bedroom in which the items were found, that he stated that the clothes hanging in the closet belonged to him, and that he admitted that he had been "in and out of the closet multiple times."

In an effort to refute the officers' testimony with his own version of the events as to what had transpired at Pineiro's apartment, the defendant testified on his own behalf. The defendant's decision to do so rendered this case, in large part, a credibility contest between the defendant and the task force officers. The thrust of the defendant's testimony was a blanket denial of the inculpatory statements the task force officers alleged he had made, including his asking Pineiro "who's going to take it" with respect to the pistol that the officers had discovered.

Furthermore, the defendant denied that the officers asked him whether he had been staying in the bedroom in which the pistol was found, whether the backpack in which the pistol was stored belonged to him, whether the cocaine stored in the backpack belonged to him, and whether the clothes in the bedroom belonged to him. According to the defendant, the only question the officers asked him was if the gun belonged to him. The defendant testified that, in response to that question, he stated "that's not my gun, I never saw it."

The jury found the defendant guilty of criminal possession of a pistol and risk of injury to a child, but not guilty of stealing a firearm and possession of a controlled substance within 1500 feet of a school. After the jury returned its verdict, the defendant did not file any postverdict motions challenging the verdict, such as a motion for a judgment of acquittal,[1] a motion to

[1] The defendant did move for a judgment of acquittal after the state had rested. He did not, however, renew that motion after the jury returned its verdict.

set aside the verdict, or a motion for a new trial. The court sentenced the defendant to twelve years incarceration, two years of which were mandatory. This appeal followed.

The defendant's sole claim on appeal is that this court should order a new trial because the jury's verdict was against the weight of the evidence presented at trial. He argues that the "[s]tate's case against [him] was inherently weak." Specifically, the defendant contends that the evidentiary basis supporting the state's theory of constructive possession was a "paltry foundation" because it essentially consisted of a single piece of evidence—proof that the defendant had asked Pineiro "who's going to take it" in reference to the pistol found by police. At trial, the state had asked the jury to infer from the defendant's asking of that question that he knew about the pistol's presence and incriminating nature.

The defendant argues that he undermined this "paltry [evidentiary] foundation" by denying, during his testimony at trial, that he asked Pineiro "who's going to take it." Furthermore, even if the jury believed that the defendant asked Pineiro that question, the defendant contends that the question is not necessarily inculpatory in nature. Thus, according to the defendant, "to have a conviction rest on the foundation of four words . . . [testified to] by a police officer and denied by a defendant creates too great a risk of wrongful conviction."

The defendant also acknowledges that his failure to move to set aside the verdict and for a new trial raises an issue as to whether his claim is preserved and reviewable. The defendant argues, nevertheless, that his claim is preserved because he filed a motion for a judgment of acquittal at the close of the state's case-in-chief. He

further argues in the alternative that even if his claim is unpreserved, *Golding* review is appropriate.

The state's principal response is that the defendant's claim is unpreserved and unreviewable because "the defendant never moved to set aside the jury's verdict." In particular, it argues that a reviewing court cannot consider an unpreserved weight of the evidence claim because it has not had, like the trial court, "the same opportunity as the jury to view the witnesses, to assess their credibility and to determine the weight that should be given to their evidence." (Internal quotation marks omitted.) Furthermore, the state contends that the defendant is not entitled to *Golding* review because the record is inadequate to review his claim in the absence of any findings by the trial court.[2] Because we agree with the state that the defendant's claim is unpreserved and not entitled to *Golding* review, we decline to review it.

We begin our analysis of the defendant's claim with a review of the legal principles governing claims challenging a verdict as against the weight of the evidence. At the outset, we note that a challenge to the *weight* of the evidence is not the same as a challenge to the *sufficiency* of the evidence. A sufficiency claim "dispute[s] that the state presented sufficient evidence, if found credible by the jury, to sustain [the defendant's] conviction." *State* v. *Hammond*, 221 Conn. 264, 267, 604 A.2d 793 (1992), overruled on other grounds by *State* v. *Ortiz*, 280 Conn. 686, 720 n.19 and 722 n.22, 911 A.2d 1055 (2006). In contrast, a weight claim "does not contend that the state's evidence . . . was insufficient, as a matter of law, to establish the defendant's guilt beyond a reasonable doubt. . . . Rather, [it]

[2] The state also argues that the defendant's claim challenging the verdict as against the weight of the evidence also fails under *Golding's* second prong because it is not of constitutional magnitude. Because we conclude that the record is inadequate, we need not reach this issue.

asserts that the state's case . . . was so flimsy as to raise a substantial question regarding the reliability of the verdict [and that there was a] serious danger that [the defendant] was wrongly convicted." (Footnotes omitted.) S*tate* v. *Griffin*, 253 Conn. 195, 200, 749 A.2d 1192 (2000).

Sufficiency claims and weight claims also differ with respect to the remedy they afford. "A reversal based on the insufficiency of the evidence . . . means that no rational factfinder could have voted to convict the defendant." *Tibbs* v. *Florida*, 457 U.S. 31, 41, 102 S. Ct. 2211, 72 L. Ed. 2d 652 (1982). Thus, a defendant convicted on the basis of insufficient evidence is entitled to a judgment of acquittal. *State* v. *Calabrese*, 279 Conn. 393, 401, 902 A.2d 1044 (2006). On the other hand, a reversal based on the weight of the evidence "does not mean that acquittal was the only proper verdict. . . . [Such a] reversal . . . can occur only after the State both has presented sufficient evidence to support [a] conviction and has persuaded the jury to convict. [This type of] reversal simply affords the defendant a second opportunity to seek a favorable judgment." *Tibbs* v. *Florida*, supra, 42–43. Accordingly, "the proper remedy for a successful challenge to a jury's verdict on weight of the evidence grounds is a new trial rather than a judgment of acquittal . . . ." *Sinchak* v. *Commissioner of Correction*, 173 Conn. App. 352, 362, A.3d (2017).

Given that these two types of claims raise fundamentally different issues, the inquiry appropriately undertaken by a court ruling on a sufficiency of the evidence claim differs substantially from that of a court ruling on a weight of the evidence claim. In reviewing the sufficiency of the evidence, a court considers whether there is a reasonable view of the evidence that would support a *guilty* verdict. E.g., *State* v. *Calabrese*, supra, 279 Conn. 402 ("[court] construe[s] the evidence in the

light most favorable to sustaining the verdict" [internal quotation marks omitted]); see also *State* v. *Gemmell*, 151 Conn. App. 590, 612, 94 A.3d 1253 (trial court ruling on motion for judgment of acquittal made pursuant to Practice Book § 42-40 applies sufficiency standard), cert. denied, 314 Conn. 915, 100 A.3d 405 (2014). In doing so, the court does "not sit as a thirteenth juror who may cast a vote against the verdict based upon our feeling that some doubt of guilt is shown by the cold printed record. . . . [It] cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict." (Internal quotation marks omitted.) *State* v. *Morgan*, 274 Conn. 790, 800, 877 A.2d 739 (2005). Thus, a court "will not reweigh the evidence or resolve questions of credibility in determining whether the evidence was sufficient." *State* v. *Lekosky*, 41 Conn. App. 746, 747, 677 A.2d 489 (1996).

In contrast, a court determining if the verdict is against the weight of the evidence does precisely what a court ruling on a sufficiency claim ought not to do. That is, the court "must do just *what every juror ought to do* in arriving at a verdict. The juror must use all his experience, his knowledge of human nature, his knowledge of human events, past and present, his knowledge of the motives which influence and control human action, and test the evidence in the case according to such knowledge and render his verdict accordingly. . . . The trial judge in considering the verdict *must do the same* . . . and if, in the exercise of all his knowledge from this source, he finds the verdict to be so clearly against the weight of the evidence in the case as to indicate that the jury did not correctly apply the law to the facts in evidence in the case, or were governed by ignorance, prejudice, corruption or partiality, then it is his duty to set aside that verdict and to grant a new trial." (Emphasis added; internal quotation marks omitted.) *Sinchak* v. *Commissioner*

*of Correction*, supra, 173 Conn. App. 368–69. In other words, the court specifically is required to act as a "thirteenth juror" because it must independently "assess [the] credibility [of witnesses]" and "determine the weight that should be given to . . . evidence." (Internal quotation marks omitted.) *State* v. *Griffin*, supra, 253 Conn. 201–202.

Thus, because a court is required to independently assess credibility and assign weight to evidence, a weight of the evidence claim necessarily raises the issue of which courts are competent to perform those tasks. It is well settled that "*only the judge who presided over the trial* where a challenged verdict was returned is legally competent to decide if that verdict was against the weight of the evidence . . . ." (Emphasis added.) *Sinchak* v. *Commissioner of Correction*, supra, 173 Conn. App. 362. Consequently, "*a judge in a later proceeding, such as a direct appeal* or a habeas corpus proceeding, *is not legally competent* to decide such a claim on the basis of the cold printed record before it." (Emphasis added.) Id. The rationale behind this rule is sound: "[T]he trial court is uniquely situated to entertain a motion to set aside a verdict as against the weight of the evidence because, unlike an appellate court, the trial [court] has had the same opportunity as the jury to view the witnesses, to assess their credibility and to determine the weight that should be given to their evidence. . . . [T]he trial judge can gauge the tenor of the trial, as [an appellate court], on the written record, cannot, and can detect those factors, if any, that could improperly have influenced the jury." (Citations omitted; internal quotation marks omitted.) *State* v. *Griffin*, supra, 253 Conn. 201–202; see also id., 202 ("[o]nly the trial judge [i]s in a position to evaluate . . . testimony, along with the other relevant evidence, to make . . . a determination [of whether the verdict is against the weight of the evidence]").

The rule that the trial judge is the only authority competent to rule upon weight claims has obvious implications for appellate review of such claims. Our Supreme Court previously has refused to review a claim challenging the jury's verdict as against the weight of the evidence because it was made for the first time on appeal. *State* v. *Griffin*, supra, 253 Conn. 202.

In reviewing the facts underlying *Griffin*, we note that they are analogous to the present case in two important ways. First, like the defendant in the present case, the defendant in *Griffin* moved for a judgment of acquittal after the state rested but did not file a postverdict motion to set aside or motion for a new trial. Id., 200 n.8. Second, the specific claim in *Griffin* was that "the testimony of the state's key witness . . . was not believable"; id., 202; and, therefore, like the defendant's claim in the present case, principally challenged the jury's credibility determinations.

In declining to review the unpreserved weight claim in *Griffin*, our Supreme Court stated that it could not "[o]n a cold record . . . meaningfully assess . . . [the] credibility [of the state's key witness] to determine whether his testimony . . . was so unworthy of belief as to warrant a conclusion that allowing the verdict to stand would constitute a manifest injustice. . . . *Only the trial judge* was in a position to evaluate [that] testimony, along with the other relevant evidence, to make such a determination."[3] (Citations omitted; emphasis added.) Id.; see also *Sinchak* v. *Commissioner of* Correction, supra, 173 Conn. App. 364–72 (affirming habeas court's refusal to review procedurally defaulted claim challenging weight of evidence because only trial court

[3] The parties in *Griffin* did not brief the issue of whether an unpreserved claim challenging a verdict as against the weight of evidence is reviewable under *Golding*. Thus, the court in *Griffin* had no occasion to address the applicability of *Golding* to such a claim.

is in position to determine if verdict was against weight of evidence).

Because an appellate court cannot make an initial ruling on a weight of the evidence claim, appellate review of such a claim is greatly circumscribed. "Appellate review of a trial court's decision granting or denying a motion for a new trial must take into account the trial judge's superior opportunity to assess the proceedings over which he or she has personally presided." *State* v. *Hammond*, supra, 221 Conn. 269. Therefore, "[t]he proper appellate standard of review when considering the action of a trial court granting or denying a motion to set aside a verdict and a motion for a new trial is the abuse of discretion standard. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done. . . . We do not . . . determine whether a conclusion different from the one reached could have been reached. . . . A verdict must stand if it is one that a jury reasonably could have returned and the trial court has accepted." (Citation omitted; internal quotation marks omitted.) *State* v. *Fred C.*, 167 Conn. App. 600, 606, 142 A.3d 1258, cert. denied, 323 Conn. 921, 150 A.3d 1150 (2016).

Thus, if asked to review the trial court's ruling on a weight of the evidence claim presented to it, an appellate court is not to independently make credibility determinations or assign weight to evidence. Furthermore, our task is not to assess the jury's credibility determinations and assignment of weight to evidence. Rather, our task is to review, for an abuse of discretion, the trial court's assessment of the jury's credibility determinations and assignment of weight to evidence. See, e.g., *State* v. *Scott C.*, 120 Conn. App. 26, 40, 990 A.2d 1252

("[When reviewing a weight claim predicated on credibility determinations, the] issue presented to us . . . is whether we should reverse the [*trial*] *court's finding* that the jury reasonably could have credited [the challenged] testimony. . . . [We must decide whether to] reverse the *trial court's assessment* [of the jury's credibility determinations]." [Emphasis added.]), cert. denied, 297 Conn. 913, 995 A.2d 956 (2010).

Having set forth the relevant law, we now turn to the defendant's claim that the verdict is against the weight of the evidence. In addition to arguing the claim's merits, the defendant also contends that the claim is preserved and reviewable. We disagree in light of our Supreme Court's decision in *Griffin*, which we conclude controls the present case. See *State* v. *Griffin*, supra, 253 Conn. 201–202. *Griffin* teaches that a defendant cannot obtain appellate review of his weight of the evidence claim unless it was preserved at trial. Under *Griffin*, moving for a judgment of acquittal at the close of the state's case-in-chief does not preserve a weight claim. Accordingly, we conclude that the defendant's filing of a motion for a judgment of acquittal[4] did not preserve his claim.

[4] Our Supreme Court has noted that a defendant properly preserves a claim challenging the verdict as against the weight of the evidence by raising it in "a motion to set aside the verdict as against the weight of the evidence." *State* v. *Griffin*, supra, 253 Conn. 201–202. This court has noted that such a claim is preserved by raising it in a motion for a new trial made pursuant to Practice Book § 42-53. *State* v. *Franklin*, 162 Conn. App. 78, 93, 129 A.3d 770 (2015), cert. denied, 321 Conn. 905, 138 A.3d 281 (2016). We do not believe this difference in nomenclature is consequential for purposes of preservation. See, e.g., *State* v. *Taylor*, 196 Conn. 225, 228 n.3, 492 A.2d 155 (1985) ("Practice Book § [42-53] . . . replace[d] the motion to set aside a verdict with a motion for a new trial"); *State* v. *Henton*, 50 Conn. App. 521, 523 n.1, 720 A.2d 517 ("[a]lthough the defendant entitled [his motion] a motion to set aside the verdict, the trial court treated it as a motion for a new trial pursuant to Practice Book § 42-53" [internal quotation marks omitted]), cert. denied, 247 Conn. 945, 723 A.2d 322 (1998). In any event, the defendant's claim in the present case is not preserved because it was not raised in *either* a motion to set aside or a motion for a new trial.

Notwithstanding our Supreme Court's holding in *Griffin* that unpreserved weight of the evidence claims are unreviewable, the defendant cites three cases that purportedly permit our review of such claims. We are unpersuaded by the defendant's reliance on these cases.

The defendant first contends that *State* v. *Avcollie*, 178 Conn. 450, 423 A.2d 118 (1979), cert. denied, 444 U.S. 1015, 100 S. Ct. 667, 62 L. Ed. 2d 645 (1980), stands for the proposition that we can review, for error, the trial court's failure to *sua sponte* set aside the verdict. In particular, he relies on certain language from *Avcollie* in isolation, namely, the court's remark that the "trial court has inherent power to set aside the verdict, even though no motion has been made." (Internal quotation marks omitted.) Id., 455. When read as a whole, however, *Avcollie* does not support the defendant's position because it did not involve an *unpreserved weight* of the evidence claim. Id., 454–55. Rather, it involved a *sufficiency* claim that was raised *at trial* in a motion to set aside the verdict. Id., 454–55, 459; see also id., 471 n.5 ("the sole issue in this appeal was whether the evidence before the jury was *sufficient* to support [its] verdict" [emphasis added]).

The second case on which the defendant relies is *State* v. *Franklin*, 162 Conn. App. 78, 129 A.3d 770 (2015), cert. denied, 321 Conn. 905, 138 A.3d 281 (2016). On appeal to this court, the defendant in *Franklin* presented separate sufficiency and weight claims that were "substantively identical" because they both revolved around whether the jury should have believed a particular witness. Id., 81, 93–94. We first rejected the sufficiency claim on its merits, concluding that we could not second-guess the jury's credibility determinations. Id., 85–87. Turning to the weight of the evidence claim, we noted that, although "the defendant did not preserve this [claim] by moving for a new trial"; id., 93; he requested *Golding* review. Id. We apparently assumed,

without deciding, that the defendant's weight claim satisfied *Golding's* reviewability prongs. Id. Then, we noted that "we [were] aware of no reason that prohibited the jury from crediting [the witness's] testimony." Id., 94. Therefore, we simply rejected the weight claim on the same grounds that we rejected the sufficiency claim, namely, that we on appeal declined to second guess the credibility determination made by the jury. Id., 93–94.

We do not read *Franklin* as requiring us to review an unpreserved claim challenging a verdict as against the weight of the evidence, nor does it foreclose our consideration of whether the reviewability prongs of *Golding* can be satisfied when such a claim is made. Rather, *Franklin* presented a unique situation where "substantively identical" weight and sufficiency claims were made. In avoiding adjudicating the issue of whether *Golding* review was appropriate, we simply resolved the defendant's claim by relying on our analysis of the defendant's sufficiency claim. The sufficiency claim, like the weight claim, essentially amounted to no more than an attack on the jury's credibility determinations, and we cannot second-guess such credibility determinations when reviewing either type of claim. *State* v. *Carlos C.*, 165 Conn. App. 195, 200, 138 A.3d 1090, cert. denied, 322 Conn. 906, 140 A.3d 977 (2016); *State* v. *Scott C.*, supra, 120 Conn. App. 40.

The third case on which the defendant relies is *Tibbs* v. *Florida*, supra, 457 U.S. 31. In *Tibbs*, a state appellate court set aside a verdict after performing its own reweighing of the evidence and reassessment of credibility. Id., 35–39, 42–43, 46–47. *Tibbs* is inapposite because a state rule of practice *required* the appellate court to perform its own reweighing of the evidence in any appeal in which the defendant had been sentenced to death. Id., 36 n.8 (rule provided that "[u]pon an appeal

from the judgment by a defendant who has been sentenced to death the appellate court *shall* review the evidence to determine if the interests of justice require a new trial" [emphasis added]). The parties have not identified any comparable rule of practice that requires or permits this state's appellate courts to perform such a review.

Our analysis does not end with concluding that the defendant's claim is unpreserved because the defendant also requests *Golding* review. As previously explained, although *Griffin* stands for the proposition that unpreserved weight of the evidence claims are unreviewable, *Griffin* did not address *Golding*'s applicability to such claims. The defendant argues that his claim satisfies all four *Golding* prongs, and the state counters that his claim fails *Golding*'s first two prongs, which concern reviewability. See, e.g., *State* v. *Gordon*, 69 Conn. App. 691, 695, 796 A.2d 1238 (2002). We agree with the state that the defendant's claim is not entitled to *Golding* review because it fails *Golding*'s first prong.

"Under *Golding*, as modified in *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Mitchell*, 170 Conn. App. 317, 322, 154 A.3d 528, cert. denied, 325 Conn. 902, 157 A.3d 1146 (2017). "The first two prongs of *Golding* address the reviewability of the claim, and the last two involve the merits of the claim." *State* v. *Gordon*, supra, 69 Conn. App. 695.

"[T]he inability to meet any one prong requires a determination that the defendant's claim must fail." *State* v. *Ricketts*, 37 Conn. App. 749, 761, 659 A.2d 188, cert. denied, 234 Conn. 913, 660 A.2d 355, cert. denied, 516 U.S. 977, 116 S. Ct. 481, 133 L. Ed. 2d. 409 (1995). "The appellate tribunal is free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances." (Internal quotation marks omitted.) *State* v. *Gordon*, supra, 69 Conn. App. 695.

Turning to the application of *Golding*'s first prong to the present case, we conclude that the defendant has not provided a record that is adequate to review his claim challenging the verdict as against the weight of the evidence.

We have explained throughout this opinion that the defining characteristic of a weight claim is that "only the judge who presided over the trial where a challenged verdict was returned is legally competent to decide if that verdict was against the weight of the evidence . . . . [A court] in a later proceeding, such as a direct appeal or a habeas corpus proceeding, is not legally competent to decide such a claim on the basis of the cold printed record before it." *Sinchak* v. *Commissioner of Correction*, supra, 173 Conn. App. 362.

A weight claim predicated on a challenge to the jury's credibility determinations, which is the type of claim the defendant presents in this appeal, requires the trial court to make its own assessment of the jury's credibility determinations. See *State* v. *Griffin*, supra, 253 Conn. 201–202. In other words, it is called upon to act as a "thirteenth juror" and "do just *what every juror ought to do* in arriving at a verdict." (Emphasis added; internal quotation marks omitted.) *Sinchak* v. *Commissioner of Correction*, supra, 173 Conn. App. 368. Accordingly, when an appellate court reviews this type

of claim, "[*t*]*he issue presented to* [*it*] . . . is whether [it] should reverse the [*trial*] *court's finding* that the jury reasonably could have credited [the challenged] testimony. . . . [It must decide whether to] reverse the *trial court's assessment* [of the jury's credibility determinations]." (Emphasis added.) *State* v. *Scott C.*, supra, 120 Conn. App. 39–40.

In the present case, the defendant never asked the trial court to set aside the verdict on the ground that it was against the weight of the evidence. The defendant's appellate claim challenging the jury's credibility determinations was never ruled upon by the trial court and, therefore, is presented to this court for the first time on appeal. Given that the trial court is the only authority competent to assess the jury's credibility determinations, we cannot, on appeal, stand in its stead and make such an intricate assessment ourselves on the cold printed record alone.

Indeed, the scope of our review is limited to evaluating, for an abuse of discretion, the *trial court's findings* regarding *its* assessment of the jury's credibility determinations. Since those findings were not made in the present case, there is nothing for us to review, and we are without a basis for determining whether the trial court abused a discretion that it was never called upon to exercise. See, e.g., *State* v. *Padua*, 73 Conn. App. 386, 413, 808 A.2d 361 (2002) ("Had the issue been raised properly by motion, the trial court could have been alerted to what this defendant has raised for the first time on appeal. . . . If in fact the trial court acted upon a motion presented to it, it could have articulated the reasons why it so denied the relief sought. . . . [Thus] there is no adequate record for review nor is there a basis for determining that there was an abuse of a discretion which the court was never called upon to exercise."), rev'd in part on other grounds, 273 Conn. 138, 869 A.2d 192 (2005); see also *State* v. *Brunetti*, 279

Conn. 39, 63, 901 A.2d 1 (2006) ("[This court's] role is not to guess at possibilities . . . but to review claims based on a complete factual record developed by a trial court. . . . Without the necessary factual and legal conclusions furnished by the trial court . . . any decision made by us respecting [the defendant's claims] would be entirely speculative." [Internal quotation marks omitted.]), cert. denied, 549 U.S. 1212, 127 S. Ct. 1328, 167 L. Ed. 2d 85 (2007).

Accordingly, we conclude that the defendant's unpreserved claim is not entitled to *Golding* review because the record is inadequate for review.

The judgment is affirmed.

In this opinion the other judges concurred.

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## TD BANK, N.A. *v.* ANTHONY H. SALCE, JR., ET AL. (AC 39342)

Alvord, Mullins and Bear, Js.

*Syllabus*

The plaintiff bank, in 2014, sought to recover on a promissory note executed by the parties in 2008, claiming that the defendant S had defaulted under the terms of the note. The return of service stated that the marshal left the writ, summons, complaint, affidavit, and direction for attachment at S's usual place of abode in Fairfield. That same day, pursuant to the statute (§ 52-59b [c]) governing service of process over nonresidents, the marshal also left two copies of those same documents with the Secretary of the State, and mailed a copy of them, via certified mail, return receipt requested, to S's Florida residence. In November, 2014, S filed a motion to dismiss for lack of personal jurisdiction, which the trial court denied. The plaintiff thereafter filed a motion for summary judgment, which was granted by the court in March, 2016, as to liability only. In June, 2016, after conducting a hearing in damages, the court rendered judgment for the plaintiff, ordering recovery against S for $548,557.79 in damages, from which S appealed to this court. *Held*:

1. The trial court did not err in denying S's motion to dismiss for lack of personal jurisdiction due to insufficient service of process, the plaintiff having met its burden of demonstrating that service of process was

effectuated pursuant to § 52-59b (c); contrary to S's claim, under § 52-59b (c), there is no requirement that S actually received the documents constituting process, and the marshal's affidavit here stated that service was made upon S, pursuant to § 52-59b (c), by leaving two true and attested copies of the process with the Secretary of the State, and sending, via certified mail, return receipt requested, a true and attested copy of the process to S's Florida address.

2. S could not prevail on his claim that the trial court improperly rendered summary judgment in favor of the plaintiff because S's special defense of promissory estoppel, which alleged that the plaintiff was estopped from prosecuting this action because it had failed or refused to issue promised documents after agreeing to a note modification, raised a genuine issue of material fact: in support of its conclusion that S had not raised genuine issues of material fact concerning the elements of promissory estoppel or reliance, the trial court noted that S had stopped making payments in 2011, that the settlement discussions between the parties held three years later in 2014 were merely a promise to negotiate, and that there was no written document that indicated that the note ever became part and parcel to any settlement, and the defendant having failed to bring forward any evidentiary facts or substantial evidence outside of the pleadings from which the material facts alleged in the pleadings could be inferred, S failed to establish the existence of a disputed issue; furthermore, because S did not dispute the plaintiff's claim that S initially stopped making payments on the note in 2011, he could not successfully assert as a genuine issue of material fact that he stopped making his payments in 2014 in reliance on an alleged loan modification agreement offered or discussed for the first time in that year.

Submitted on briefs May 19—officially released August 22, 2017

*Procedural History*

Action to recover on a promissory note, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the defendant John J. Quinn was defaulted for failure to appear; thereafter, the court, *Radcliffe, J.*, granted the plaintiff's motion for judgment as to the defendant John J. Quinn; subsequently, the court, *Hon. Richard P. Gilardi*, judge trial referee, denied the named defendant's motion to dismiss; thereafter, the named defendant filed a counterclaim and special defenses; subsequently, the court, *Radcliffe, J.*,

granted in part the plaintiff's motion to strike; thereafter, the court, *Radcliffe, J.*, granted in part the plaintiff's motion for summary judgment as to liability on the complaint and the counterclaim; subsequently, following a hearing in damages, the court, *Hon. Edward F. Stodolink*, judge trial referee, rendered judgment for the plaintiff, from which the named defendant appealed to this court; subsequently, the court, *Hon. Richard P. Gilardi*, judge trial referee, issued an articulation of the decision denying the named defendant's motion to dismiss. *Affirmed.*

*James M. Nugent* and *James R. Winkel*, filed a brief for the appellant (named defendant).

*Patrick M. Fryer*, filed a brief for the appellee (plaintiff).

*Opinion*

PER CURIAM. In this action seeking to collect on a promissory note, the defendant, Anthony H. Salce, Jr.,[1] appeals from the judgment of the trial court, *Hon. Edward F. Stodolink*, judge trial referee, rendered in favor of the plaintiff, TD Bank, N.A. On appeal, the defendant claims that (1) the court, *Hon. Richard P. Gilardi*, judge trial referee, erred in denying his motion to dismiss by improperly placing the burden of proof on him to establish a lack of personal jurisdiction due to ineffective service of process; and (2) the court, *Radcliffe, J.*, erred in granting summary judgment as to liability in favor of the plaintiff because the defendant's second special defense was viable. We disagree and, accordingly, affirm the judgment of the court.

A review of the record reveals the following facts. On April 18, 2008, the parties executed a revolving term

[1] The codefendant, John J. Quinn, is a nonappearing party. Throughout this opinion, all references to the defendant are to Salce.

promissory note (note) in which the defendant promised to repay the plaintiff $500,000 with interest. The note contained default and demand provisions. In a letter dated July 11, 2014, the plaintiff stated that the defendant was in default under the terms and conditions of the note and demanded payment in full on the outstanding balance.

On September 18, 2014, the plaintiff commenced the present action with a single count complaint to recover payment, alleging that the defendant had defaulted under the terms of the note. The return of service attests that the marshal left the writ, summons, complaint, affidavit, and direction for attachment at the defendant's usual place of abode in Fairfield (Fairfield property). On the same day, the marshal left two copies of those documents with the Secretary of the State and mailed a copy of them, via certified mail, return receipt requested, to the defendant's Naples, Florida residence.

On November 13, 2014, the defendant filed a motion to dismiss for lack of personal jurisdiction, which was denied by Judge Gilardi on January 20, 2015. On January 27, 2016, the plaintiff filed a motion for summary judgment, which was granted as to liability only, by Judge Radcliffe on March 7, 2016. After conducting a hearing in damages on June 7, 2016, Judge Stodolink rendered judgment for the plaintiff, ordering recovery against the defendant for $548,557.79 in damages. This appeal followed. On August 31, 2016, Judge Gilardi issued an articulation on the denial of the motion to dismiss. Additional facts and procedural history will be set forth as necessary.

I

The defendant claims that the trial court erred in denying his motion to dismiss for lack of personal jurisdiction due to insufficient service of process. The defendant presents two arguments in support of his claim.

First, he asserts that although he owned the real property in Fairfield at which the abode service was made, the Fairfield property was not his usual place of abode. Second, he did not receive the certified mail containing the writ, summons, complaint, affidavit, and direction for attachment at his Florida residence. The plaintiff responds that service of process was properly effectuated by service over a nonresident individual pursuant to General Statutes § 52-59b (c),[2] and by abode service pursuant to General Statutes § 52-57 (a).[3]

We begin by setting forth the applicable standard of review. "A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that

[2] General Statutes § 52-59b (c) provides in relevant part: "Any nonresident individual . . . over whom a court may exercise personal jurisdiction, as provided in subsection (a) of this section, shall be deemed to have appointed the Secretary of the State as its attorney and to have agreed that any process in any civil action brought against the nonresident individual . . . may be served upon the Secretary of the State and shall have the same validity as if served upon the nonresident individual . . . personally. The process shall be served by the officer to whom the same is directed upon the Secretary of the State by leaving with or at the office of the Secretary of the State, at least twelve days before the return day of such process, a true and attested copy thereof, and by sending to the defendant at the defendant's last-known address, by registered or certified mail, postage prepaid, return receipt requested, a like true and attested copy with an endorsement thereon of the service upon the Secretary of the State. The officer serving such process upon the Secretary of the State shall leave with the Secretary of the State, at the time of service, a fee of twenty-five dollars, which fee shall be taxed in favor of the plaintiff in the plaintiff's costs if the plaintiff prevails in any such action. The Secretary of the State shall keep a record of each such process and the day and hour of service."

[3] General Statutes § 52-57 (a) provides: "Except as otherwise provided, process in any civil action shall be served by leaving a true and attested copy of it, including the declaration or complaint, with the defendant, or at his usual place of abode, in this state."

alone. . . . Where, however, as here, the motion is accompanied by supporting affidavits containing undisputed facts, the court may look to their content for determination of the jurisdictional issue . . . .'' (Citation omitted; internal quotation marks omitted.) *Cogswell* v. *American Transit Ins. Co.*, 282 Conn. 505, 516, 923 A.2d 638 (2007). ''Because a challenge to the personal jurisdiction of the trial court is a question of law, our review is plenary.'' *Myrtle Mews Assn., Inc.* v. *Bordes*, 125 Conn. App. 12, 15, 6 A.3d 163 (2010). Moreover, if a challenge to the court's personal jurisdiction is raised by a nonresident defendant, the plaintiff bears the burden of proving the court's jurisdiction. *Knipple* v. *Viking Communications, Ltd.*, 236 Conn. 602, 607, 674 A.2d 426 (1996).

As an initial matter, the defendant did not challenge before the court that § 52-59b (a) authorized personal jurisdiction over him as a nonresident individual so long as its provisions were complied with.[4] In his affidavit, the defendant admitted that he resided in Florida, although he omitted any specific residential address, and that he owned the Fairfield property. He contended, however, that service was not effective because he never received service of process in Florida.[5]

The defendant's claim that he must have received the documents constituting process in order for service to

[4] General Statutes § 52-59b (a) states in relevant part: ''[A] court may exercise personal jurisdiction over any nonresident individual . . . who in person or through an agent . . . (4) owns, uses or possesses any real property situated within the state . . . .''

[5] The defendant has not raised any due process claims in this appeal; see *Cogswell* v. *American Transit Ins. Co.*, supra, 282 Conn. 515 (''this court must determine: first, whether [the applicable state long arm statute] properly applies to the defendant; and, second, if the statutory threshold is met, whether the defendant has the requisite minimum contacts with this state sufficient to satisfy constitutional due process concerns''); therefore, we limit our analysis to whether service of process on the defendant met the requirements of § 52-59b. See *Doyle Group* v. *Alaskans for Cuddy*, 146 Conn. App. 341, 346 n.3, 77 A.3d 880 (2013).

be effective presents a question of statutory construction that requires plenary review. *Doyle Group* v. *Alaskans for Cuddy*, 146 Conn. App. 341, 346, 77 A.3d 880 (2013). "When construing a statute, [a court's] fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, [a court] seek[s] to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs [courts] first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . ." (Internal quotation marks omitted.) Id., 346–47.

Section 52-59b (c) provides in relevant part that, "[t]he process shall be served . . . upon the Secretary of the State . . . at least twelve days before the return day of such process, a true and attested copy thereof, and by sending to the defendant at the defendant's last-known address, by registered or certified mail, postage prepaid, return receipt requested, a like true and attested copy with an endorsement thereon . . . ." In the present case, the statute does not require what the defendant claims, i.e., that he must receive the documents constituting process in order for service to be effective. The marshal's affidavit states that service was

made upon the defendant pursuant to § 52-59b (c) on September 18, 2014, by leaving two true and attested copies of the process with the Secretary of the State and sending, via certified mail, return receipt requested, a true and attested copy of the process to the defendant's Florida address.[6] This is all that § 52-59b (c) requires.

Nonetheless, the marshal's supplemental return included a certified mail return receipt from the delivery of the process to the defendant's Florida address. The return receipt contained a signature in the section designated for the addressee. The plaintiff also submitted a Florida property tax bill and a Florida property appraisal summary, both of which contained the defendant's name and the same Florida address. Additionally, the plaintiff's demand letter dated July 11, 2014, was sent, via certified mail, to this same Florida address, and confirmation of delivery was verified by a signed return receipt.

In his articulation, Judge Gilardi wrote, "[t]he court finds it significant that aside from his two self-serving statements, the defendant did not submit a single affidavit or any documentary evidence in support of his claims not on the record."[7] Furthermore, the court stated, "the plaintiff did submit competent and persuasive evidence . . . in full compliance and satisfaction of the requirements of [§ 52-59b (c)]."[8] We agree with the court that

[6] The plaintiff's summons specified a return date of October 14, 2014; thus, service was made before the twelve day statutory requirement.

[7] The defendant attested that (1) he owned the Fairfield property, but it was not his abode; and (2) he never received service of process at his Florida address.

[8] In making this determination, the court seems to suggest that a factual dispute exists between the plaintiff and the defendant as to whether the evidence submitted by the plaintiff satisfied the jurisdictional requirements under § 52-59b (c). Because § 52-59b (c) does not require proof of actual receipt of service of process so long as its requirements are met, whether the plaintiff received service of process is not necessary to our analysis, although we note that the court's finding that the defendant actually received the process has not been challenged as clearly erroneous.

the plaintiff complied with the requirements set forth in § 52-59b (c) when the marshal left the Secretary of the State with two copies of the writ, summons, complaint, affidavit, and direction for attachment, and mailed a copy of those documents to the defendant's last known address in Florida. On the basis of our review of the record and briefs, we agree with the court that the plaintiff met its burden in demonstrating that service of process was effectuated pursuant to § 52-59b (c).[9]

II

The defendant also claims that the trial court improperly rendered summary judgment in favor of the plaintiff because his second special defense of promissory estoppel raised a genuine issue of material fact. In his second special defense, the defendant alleged that "[t]he [p]laintiff is estopped from prosecuting this lawsuit in that the [p]laintiff agreed to a note modification and stated that appropriate documentation would be prepared and issued to the [d]efendant, however, the [p]laintiff then failed or refused to issue said documents." The plaintiff contends that the defendant has failed to substantiate his claim and failed to present proper evidence establishing the existence of a genuine issue of material fact.

"The standard of review of a trial court's decision to grant summary judgment is well established. [W]e must decide whether the trial court erred in determining that there was no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The test is whether a party would be entitled to a directed verdict

[9] Because we determine that the court properly found that service of process was effectuated pursuant to § 52-59b, we do not address the issue of abode service under § 52-57 (a).

on the same facts. . . . This court's review of the trial court's decision to grant summary judgment in favor of the defendants is plenary." (Citation omitted; internal quotation marks omitted.) *Heisinger* v. *Cleary*, 323 Conn. 765, 776–77, 150 A.3d 1136 (2016).

This court has previously held that "a single valid defense may defeat recovery, [and thus a] claimant's motion for summary judgment should be denied when any defense presents significant fact issues that should be tried." (Internal quotation marks omitted.) *Union Trust Co.* v. *Jackson*, 42 Conn. App. 413, 417, 679 A.2d 421 (1996). Conversely, "[i]t is axiomatic that in order to successfully oppose a motion for summary judgment by raising a genuine issue of material fact, the opposing party cannot rely solely on allegations that contradict those offered by the moving party, whether raised at oral argument or in written pleadings; such allegations must be supported by counteraffidavits or other documentary submissions that controvert the evidence offered in support of summary judgment." *GMAC Mortgage, LLC* v. *Ford*, 144 Conn. App. 165, 178, 73 A.3d 742 (2013). See also *Kazlon Communications, LLC* v. *American Golfer, Inc.*, 82 Conn. App. 593, 596, 847 A.2d 1012 (2004) ("it is appropriate for a court to render summary judgment in favor of a plaintiff when the special defenses asserted by a defendant are either not legally viable or do not present a genuine issue of a material fact").

"[U]nder the doctrine of promissory estoppel, [a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. A fundamental element of promissory estoppel, therefore, is the existence of a clear and definite promise which a promisor could reasonably have expected to induce reliance. Thus, a

promisor is not liable to a promisee who has relied on a promise if, judged by an objective standard, he had no reason to expect any reliance at all. . . . Further, the promise must reflect a present intent to commit as distinguished from a mere statement of intent to contract in the future. . . . [A] mere expression of intention, hope, desire, or opinion, which shows no real commitment, cannot be expected to induce reliance . . . .'' (Citation omitted; internal quotation marks omitted.) *Bellsite Development, LLC* v. *Monroe*, 155 Conn. App. 131, 153A–53B, 122 A.3d 640, cert. denied, 318 Conn. 901, 122 A.3d 1279 (2015). Additionally, ''[a]side from demonstrating the existence of a clear and definite promise, a plaintiff asserting a claim of promissory estoppel must also establish two additional elements: the party against whom estoppel is claimed must do or say something calculated or intended to induce another party to believe that certain facts exist and to act on that belief; and the other party must change its position in reliance on those facts, thereby incurring some injury. . . . It is fundamental that a person who claims an estoppel must show that he has exercised due diligence to know the truth, and that he not only did not know the true state of things but also lacked any reasonably available means of acquiring knowledge.'' (Internal quotation marks omitted.) *Torringford Farms Assn., Inc.* v. *Torrington*, 75 Conn. App. 570, 576 n.8, 816 A.2d 736, cert. denied, 263 Conn. 924, 823 A.2d 1217 (2003).

In the present case, the defendant's affidavit states that he participated in settlement discussions with ''TD Bank and Silverpoint Capital regarding a resolution of all of [his] outstanding obligations to TD Bank.'' He further states that he ''was led to believe that the settlement which was reached encompassed all of [his] loans, including the loan which forms the basis of the lawsuit in this case.'' As support for his assertion, the defendant

provided a copy of a letter that he sent to the plaintiff dated November 12, 2014, listing dates and names of employees whom the defendant spoke with regarding a "note modification for the subject property."

The plaintiff, through an affidavit and business records, countered that the loan modification referred to by the defendant was for a different loan. The plaintiff also asserted that the defendant stopped making payments in 2011, whereas the alleged loan modification was not discussed, and allegedly did not occur, until 2014.

Regarding the second special defense, Judge Radcliffe determined as a matter of law that "the elements of promissory estoppel have not been met," and that there was, with respect to the claims advanced by the defendant, no genuine issue of fact as to such elements of promissory estoppel or to the defendant's lack of reliance. The court noted in support of its conclusion that the defendant had not raised genuine issues of material fact concerning the elements of promissory estoppel or reliance, that the defendant had stopped making payments in 2011, that the settlement discussions held three years later in 2014 were "merely a promise to negotiate, not a promise to do something concrete," and that "there [was] no written document which indicate[d] that this note ever became part and parcel to any global or, perhaps more accurately, hemispheric settlement." In other words, the defendant had not satisfied his burden of establishing a genuine issue of material fact or that there was any disputed question of law concerning the application of promissory estoppel as set forth in his second special defense.

"[I]t is not enough . . . merely to assert the existence of such a disputed issue . . . [instead] the genuine issue aspect requires the party to bring forward before trial evidentiary facts, or substantial evidence

outside of the pleadings, from which the material facts alleged in the pleadings can warrantably be inferred. . . . Mere statements of legal conclusions or that an issue of fact does exist are not sufficient to raise the issue." (Internal quotation marks omitted.) *Himmelstein* v. *Windsor*, 116 Conn. App. 28, 45, 974 A.2d 820 (2009), aff'd, 304 Conn. 298, 39 A.3d 1065 (2012). See also *Cadlerock Joint Venture II, L.P.* v. *Milazzo*, 287 Conn. 379, 395, 949 A.2d 450 (2008) ("[b]are assertions, without evidentiary support, are insufficient to raise a genuine issue of material fact").

We are mindful that, "[g]enerally, appellate courts presume that the trial court knows and has applied the law correctly in the absence of evidence to the contrary. . . . [I]t is the burden of the appellant to show to the contrary." (Citation omitted; internal quotation marks omitted.) *Havis-Carbone* v. *Carbone*, 155 Conn. App. 848, 867, 112 A.3d 779 (2015). See also *Iacurci* v. *Sax*, 139 Conn. App. 386, 396, 57 A.3d 736 (2012), aff'd, 313 Conn. 786, 99 A.3d 1145 (2014).

Moreover, a necessary element of promissory estoppel requires that "the other party must change its position in reliance on those facts, thereby incurring some injury." (Internal quotation marks omitted.) *Torringford Farms Assn., Inc.* v. *Torrington*, supra, 75 Conn. App. 576 n.8. Because the defendant did not dispute, in his affidavit or otherwise, the plaintiff's claim that he initially stopped making payments on the note in 2011, he could not successfully assert as a genuine issue of material fact that he stopped making his payments in 2014 in reliance on an alleged loan modification agreement offered or discussed for the first time in that year.

In summary, we conclude that because the defendant failed to raise a genuine issue of material fact, or to establish that summary judgment was not appropriate

as a matter of law, the court properly granted the plaintiff's motion for summary judgment.

The judgment is affirmed.

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# ROCKSTONE CAPITAL, LLC *v.* JOHN SANZO ET AL.
## (AC 38176)

DiPentima, C. J., and Beach and Bishop, Js.

*Syllabus*

Pursuant to statute (§ 52-352b [t]), a homestead, owner-occupied real property used as a primary residence, is exempt from the enforcement of a money judgment up to the value of $75,000, less the amount of any consensual lien.

The plaintiff, pursuant to a forbearance agreement executed by the parties that included a waiver of the homestead exemption in § 52-352b (t), sought to foreclose judgment liens on certain of the defendants' real property after the defendants had defaulted on their mortgage payments. The plaintiff thereafter amended its complaint to seek foreclosure of the defendants' mortgage instead of the judgment liens. Following a trial, the court issued a memorandum of decision concluding that the forbearance agreement was void as against public policy in that the defendants had a right as a matter of law to file a claim for a homestead exemption, and the plaintiff could not foreclose on the mortgage. The court then rendered judgment for the plaintiff on the judgment liens. The plaintiff appealed to this court claiming that the trial court improperly denied the foreclosure of its mortgage, which was a consensual lien, and allowed the defendants to assert the homestead exemption to its judgment liens that were no longer part of the mortgage foreclosure action. The defendants cross appealed, claiming that the court erred in rendering a judgment of foreclosure on the judgment liens because the plaintiff amended its complaint to seek foreclosure solely on the mortgage. *Held*:

1. The court's judgment denying the plaintiff's request for foreclosure on the mortgage constituted an appealable final judgment, giving the court jurisdiction over the plaintiff's appeal; although the court failed to determine the amount of debt and the method of foreclosing on the judgment liens, it determined that the forbearance agreement was void and refused to render judgment of foreclosure on the mortgage, thus denying the relief requested in the plaintiff's operative complaint.
2. The trial court improperly denied the foreclosure of the plaintiff's mortgage: as the mortgage was a consensual lien in that the defendants

provided it to secure their obligations under the forbearance agreement in exchange for the plaintiff's agreement to forbear collection activities on the judgment liens as long as the defendants complied, the homestead exemption did not apply pursuant to § 52-352b (t); furthermore, the trial court erred in relying on the homestead exemption waiver to determine that the mortgage was void as against public policy because the plaintiff was not relying on the waiver of the homestead exemption in the mortgage, but rather, § 52-352b (t) expressly provides that the homestead exemption is not applicable to consensual liens, which included the mortgage here.

3. The court's judgment foreclosing on the judgment liens constituted an appealable final judgment, giving the court jurisdiction over the defendants' cross appeal; the claim raised in the cross appeal was inextricably intertwined with the claim raised in the plaintiff's appeal, as both parties contended that the court erred in rendering a judgment of foreclosure on the judgment liens since the operative complaint did not seek that relief.

4. The trial court improperly rendered a judgment of foreclosure on the judgment liens in favor of the plaintiff because the plaintiff amended its complaint to seek to foreclosure solely on the mortgage and the judgment liens claim was no longer in the plaintiff's operative complaint; because an amended complaint operates as a withdrawal of an original complaint, neither party pleaded, briefed or argued that the trial court should render judgment of foreclosure on the judgment liens.

Argued March 16—officially released August 22 2017

*Procedural History*

Action to foreclose judgment liens on certain real property owned by the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the named defendant et al. were defaulted for failure to plead; thereafter, the defendant The Housatonic Lumber Company was defaulted for failure to plead; subsequently, the court, *Hon. Michael Hartmere,* judge trial referee, granted the plaintiff's request to file an amended complaint; thereafter, the matter was tried to the court, *Hon. Richard P. Gilardi*, judge trial referee; judgment in part for the plaintiff, from which the plaintiff appealed and the named defendant et al. cross appealed to this court; subsequently, the court, *Hon. Richard P. Gilardi*, judge trial referee, issued an articulation of its decision. *Reversed*; *further proceedings*.

*Houston P. Lowry*, with whom, on the brief, were *Craig S. Taschner* and *Dale M. Clayton*, for the appellant-appellee (plaintiff).

*Matthew K. Beatman*, with whom, on the brief, was *John L. Cesaroni*, for the appellees-appellants (named defendant et al.).

*Opinion*

DiPENTIMA, C. J. The plaintiff, Rockstone Capital, LLC, appeals and the defendants, John Sanzo and Maria Sanzo,[1] cross appeal from the judgment of the trial court. On appeal, the plaintiff claims that the trial court erred in not foreclosing its mortgage on the defendants' property and in applying the homestead exemption to its judgment liens, for which foreclosure was not sought. In their cross appeal, in part agreeing with the plaintiff, the defendants claim that the trial court erred in entering a judgment of foreclosure in favor of the plaintiff as to the judgment liens. As to the plaintiff's appeal, we reverse the judgment of the trial court that determined that the mortgage was void as against public policy and remand the matter for further proceedings in accordance with law. We also reverse the judgment of the trial court with respect to the defendants' cross appeal.

The trial court decided this case in part on the following stipulated facts. "The defendants are individuals with their primary residence located at 59 Crossbow Lane in Monroe . . . ([property]). On or about June 21, 2000, Fleet National Bank (Fleet) commenced an action against the defendants and, on August 9, 2000, Fleet obtained a judgment in the amount of $103,535.57

[1] The Housatonic Lumber Company was also named as a defendant by virtue of its encumbrances on the Sanzos' property both prior and subsequent to the encumbrance sought to be foreclosed, but it was defaulted for failure to plead. All references to the defendants therefore refer to John Sanzo and Maria Sanzo only.

plus costs of $274.40 and lawful interest. Thereafter, on April 19, 2001, Fleet recorded two judgment liens on the [property] against each of the defendants.

"On October 23, 2007, the successor to Fleet, Bank of America, assigned all of its interest in the judgment to the plaintiff. Thus, the plaintiff is the current holder and owner of the judgment and of the liens against the [property]."

On February 28, 2008, after the defendants had defaulted on their payments, the plaintiff commenced this action to foreclose the judgment liens on the property. Thereafter, on April 26, 2009, the parties entered into a forbearance agreement. The forbearance agreement provided that the defendants would pay additional interest and fees as well as the amount of the judgment liens over a period of time in exchange for the plaintiff's agreement to refrain from collection activities. The forbearance agreement also provided that a mortgage would be placed on the defendants' property, securing the defendants' obligations under the forbearance agreement. The agreement further provided that the plaintiff would refrain from continuing its action for foreclosure on the judgment liens as long as the defendants strictly complied with the modified payment schedule.[2]

After the defendants failed to make certain payments under the forbearance agreement, the plaintiff proceeded with its foreclosure action on the judgment liens. Thereafter, the plaintiff requested permission to amend its complaint to foreclose on the mortgage instead of the judgment liens. On May 13, 2014, the

[2] A document entitled "Open-End Mortgage" (mortgage), dated April 26, 2009, was executed by the defendants and secures their obligation due under the forbearance agreement, which includes the judgment liens, fees, costs and additional interest.

defendants filed an objection to the plaintiff's request for leave to amend its complaint.

On May 15, 2014, the trial court, *Hon. Michael Hartmere*, judge trial referee, issued an order granting the plaintiff's request to amend its complaint. At that time, the court also issued an order overruling the defendants' objection to the plaintiff's request for leave to amend its complaint. The plaintiff's amended complaint sought a strict foreclosure of the mortgage and not the judgment liens, hereinafter referred to as the operative complaint. The defendants then filed an answer to the operative complaint and, by way of special defense, claimed that the mortgage was void as against public policy because the forbearance agreement amounted to a waiver of the homestead exemption set forth in General Statutes § 52-352b (t).[3]

On December 12, 2014, the trial court, *Hon. Richard P. Gilardi*, judge trial referee, concluded that the forbearance agreement was valid and rendered a judgment of foreclosure. Both parties moved to reargue and reconsider that ruling. On July 15, 2015, the trial court issued a corrected memorandum of decision concluding that the forbearance agreement was void as against public policy such that the plaintiff could not foreclose on the mortgage. The court also concluded that the defendants had a right as a matter of law to file a claim for a homestead exemption and rendered judgment for the plaintiff on the judgment liens. It did not determine the amount of the debt and whether foreclosure of the judgment liens would be by strict foreclosure or foreclosure by sale.

[3] Connecticut's homestead exemption is codified at General Statutes § 52-352b, which provides in relevant part: "The following property of any natural person shall be exempt . . . (t) The homestead of the exemptioner to the value of seventy-five thousand dollars . . . provided value shall be determined as the fair market value of the real property less the amount of any statutory or consensual lien which encumbers it . . . ."

On July 28, 2015, the plaintiff appealed from the trial court's July 15, 2015 decision, claiming that it improperly denied the foreclosure of its mortgage in order to allow the defendants to assert the homestead exemption against its judgment liens that were not part of the mortgage foreclosure action. Shortly thereafter, on August 7, 2015, the defendants filed a cross appeal claiming that the court improperly rendered judgment on the judgment liens because the plaintiff amended its complaint to seek foreclosure solely of the mortgage.

During the pendency of this appeal, the parties were ordered to appear for a hearing before this court to give reasons, if any, as to why the appeal and cross appeal should not be dismissed for lack of a final judgment because the trial court had not yet determined the amount of debt or whether foreclosure should be strict or by sale. See *Essex Savings Bank* v. *Frimberger*, 26 Conn. App. 80, 81, 597 A.2d 1289 (1991). After that hearing, we ordered the trial court to articulate its ruling as to the following: "1. As the amended complaint sought foreclosure of the mortgage, what was the court's decision on the amended complaint? 2. On what basis did the court hold 'judgment is entered on the judgment lien'? 3. Did the court enter judgment on both judgment lien(s)? 4. In whose favor did the trial court enter judgment on the judgment lien(s)?"

With respect to the first question, the court articulated that it "denied foreclosure of the mortgage pursuant to the foreclosure agreement because the terms of the forbearance agreement included a waiver of the homestead [exemption]." In addressing the second question, the court articulated that once it "voided the forbearance agreement and underlying mortgage, the remaining matter to be resolved involved judgment on the original judgment liens. The court, therefore, turned to the issue of whether judgment should be granted on the judgment liens." Next, in response to the third

question, the court articulated that "[i]t was the court's intention to preserve the defendants' right to the homestead exemption while preserving the plaintiff's right to sue on the original judgment liens. Therefore, the court voided the forbearance agreement and the mortgage within the agreement, but entered judgment in favor of the plaintiff on both of the original judgment liens." (Footnote omitted.) Finally, with respect to the fourth question, the court articulated that it "entered judgment in favor of the plaintiff on both of the judgment liens."

In light of the trial court's articulation, this court ordered the parties to address the final judgment question in their briefs on the merits of the appeal and cross appeal.

## I

## THE PLAINTIFF'S APPEAL

### A

We first must consider whether the court's judgment denying the request for foreclosure on the mortgage constitutes an appealable final judgment. The plaintiff claims that the court's decision is a final judgment in that it denied the relief requested in its operative complaint, namely, the foreclosure of the mortgage. The defendants argue that there was not a final judgment as the court has not determined the amount of the debt and whether foreclosure on the judgment liens should be by strict foreclosure or foreclosure by sale. We conclude that this appeal was taken from a final judgment.

We have long held that "[t]he lack of a final judgment implicates the subject matter jurisdiction of an appellate court to hear an appeal. A determination regarding . . . subject matter jurisdiction is a question of law [over which we exercise plenary review]. . . . As our

Supreme Court has explained: To consider the [plaintiff's] claims, we must apply the law governing our appellate jurisdiction, which is statutory. . . . The legislature has enacted General Statutes § 52-263, which limits the right of appeal to those appeals filed by aggrieved parties on issues of law from final judgments. Unless a specific right to appeal otherwise has been provided by statute, we must always determine the threshold question of whether the appeal is taken from a final judgment before considering the merits of the claim. . . . Further, we have recognized that limiting appeals to final judgments serves the important public policy of minimizing interference with and delay in the resolution of trial court proceedings." (Footnote omitted; internal quotation marks omitted.) *J & E Investment Co., LLC* v. *Athan*, 131 Conn. App. 471, 482–83, 27 A.3d 415 (2011).

Moreover, this court previously has determined that "[a] judgment of foreclosure constitutes an appealable final judgment when the court has determined the method of foreclosure and the amount of the debt." Id., 483; see also *Essex Savings Bank* v. *Frimberger*, supra, 26 Conn. App. 80–81 (in foreclosure action, there is no appealable final judgment until court determines amount of debt and decides whether foreclosure should be strict or by sale). In *Morici* v. *Jarvie*, 137 Conn. 97, 103, 75 A.2d 47 (1950), the court noted: "Any judgment, to be adequate as such, must respond to the prayers for relief. . . . In a foreclosure action, the judgment must either find *the issues for the defendant or determine the amount of the debt, direct a foreclosure and fix the law days*." (Citations omitted; emphasis added.)

In the present case, the plaintiff argues that the court's decision is final in that it denied the relief requested in its operative complaint, namely, the foreclosure of the mortgage, in favor of the defendants. See *Morici* v. *Jarvie*, supra, 137 Conn. 103. In turn, the

defendants rely on *Essex Savings Bank*, to claim that there is not a final judgment because the court has not determined the amount of the debt and the method of foreclosing on the judgment liens.

In *Essex Savings Bank*, supra, 26 Conn. App. 80, the trial court rendered summary judgment against the defendants in favor of a creditor, without determining damages pertaining to the amount of the debt or whether the foreclosure was to be strict or by sale. Id. This court, sua sponte, dismissed the appeal because we determined that a judgment rendered only on the issue of liability without resolving the issue of damages "is interlocutory in nature and is not a final judgment from which an appeal lies." Id., 80–81.

The facts of this case are distinguishable from *Essex Savings Bank*, in that the plaintiff here is challenging the court's failure to render judgment in its favor on the mortgage.[4] The court found the issues for the defendants on the operative complaint. Practice Book § 61-2 ("[w]hen judgment has been rendered on an entire complaint . . . such judgment shall constitute a final judgment."). Specifically, the trial court concluded that the forbearance agreement was void as against public policy such that the plaintiff could not foreclose on the mortgage. Because the court denied the relief requested in the plaintiff's operative complaint, we conclude that there was a final judgment.

B

Having determined that we have jurisdiction over this appeal, we now address the merits of the plaintiff's claims. The plaintiff claims that the trial court improperly denied the foreclosure of its mortgage in order to

[4] Specifically, the plaintiff contends that although the court failed to determine the amount of debt and the method of foreclosing on the judgment liens, it did determine that the forbearance agreement was void and thus refused to render judgment of foreclosure on the mortgage.

allow the defendants to assert the homestead exemption against the judgment liens that were not part of the mortgage foreclosure action.[5] In response, the defendants argue that the mortgage is void on public policy grounds because it is a de facto waiver of the homestead exemption. We agree with the plaintiff.

The following facts and procedural history are relevant to our resolution of this claim. On July 15, 2015, the court issued a memorandum of decision and noted that "this case has a unique procedural history, in that the plaintiff has amended its complaint to take the present dispute out of the ordinary realm of the homestead exemption. The plaintiff instituted this action suing on the unpaid judgment and its attached liens. Only after the defendants filed notice that they intended to claim the homestead exemption did the plaintiff amend its complaint to sue on the forbearance agreement instead. The calculated steps taken by the plaintiff demonstrate that the progression of this action has been to get around the homestead exemption. Had the plaintiff continued to sue on the judgment liens, there would be no question that the homestead exemption applied. It would be an absurd result if the court were to validate the waiver under these set of facts since it appears the purpose of amending the complaint was to evade the goal the legislature sought to achieve when passing the homestead exemption. Given the potential annihilation of [General Statutes] § 52-352b (t) and the plaintiff's attempts to avoid the homestead exemption that our legislature deemed necessary, this court finds the waiver of the homestead exemption, incorporated by reference into the forbearance agreement is void, and against public policy. . . . For all the aforementioned reasons, the court finds that the entire forbearance agreement is void. The defendants have a right as a

[5] In part II B of this opinion, we address the court's error in foreclosing on the judgment liens. Such relief was not sought in the operative complaint.

matter of law to file a claim for a [h]omestead exemption, and, accordingly, judgment is entered on the judgment lien."

In response to our request for articulation, the trial court stated that it "determined that the entire forbearance agreement including the mortgage created by the forbearance agreement was void as against public policy, because it resulted in a waiver of the homestead [exemption]. The court understands that a mortgage is a consensual lien and that the homestead [exemption] does not apply to consensual liens. However, the court determined that as per the facts of this case, the mortgage created pursuant to the forbearance agreement was invalid, and, as a result, judgment was entered as to the judgment liens." The court further articulated that "[i]t was not until [the] defendants raised their claim to the homestead exemption pursuant to . . . § 52-352b (t), that [the] plaintiff sought to amend the complaint. The reason for this, ostensibly, is that while the homestead exemption of $75,000 per owner applies to the value of the property after consensual liens are taken into account (such as mortgages), it is paid to [the] defendants before payment is made to holders of judgment liens. Therefore, [the] plaintiff could avoid having the homestead exemption applied to [the] defendants' interest in [their home], and thus recover more from a foreclosure, if it were to foreclose the purported mortgage, rather than the [j]udgment [l]iens. . . .

"In other words, if [the] plaintiff were to foreclose on the judgment liens, as it had intended to do for several years after it obtained the mortgage, [the] defendants would be entitled to the homestead exemption after any consensual or statutory liens were paid, but before [the] plaintiff received any part of the foreclosure judgment. However, if the mortgage is still valid, [the] plaintiff is entitled to be paid on the foreclosure judgment (in an action on the mortgage), without [the]

defendants receiving the amount of the homestead exemption before [the] plaintiff is paid." (Internal quotation marks omitted.) "To that end, the court determined that the mortgage is invalid and that judgment is entered in favor of the plaintiff as to the judgment liens, but, not the mortgage."

We begin our analysis by setting forth our well established standard of review and the relevant legal principles that govern the issue before us. This court reviews questions of statutory interpretation under the plenary standard of review. *Spears* v. *Elder*, 156 Conn. App. 778, 785, 115 A.3d 482 (2015).

Pursuant to General Statutes § 52-350f, which governs the enforcement of money judgments, a judgment creditor may enforce a money judgment "against any property of the judgment debtor unless the property is exempt from application to the satisfaction of the judgment under section . . . 52-352b . . . ."[6] "Section 52-352b identifies assets that are exempt from postjudgment procedures. Subsection (t) exempts '[t]he homestead of the exemptioner to the value of seventy-five thousand dollars, or, in the case of a money judgment arising out of services provided at a hospital, to the value of one hundred twenty-five thousand dollars, provided value shall be determined as the fair market value of the real property less the amount of any statutory or consensual lien which encumbers it . . . .' " *JP Morgan Chase Bank, N.A.* v. *Zubretsky*, 130 Conn. App.

[6] General Statutes § 52-350f provides: "A money judgment may be enforced against any property of the judgment debtor unless the property is exempt from application to the satisfaction of the judgment under section 52-352a, 52-352b, 52-352d or 52-361a or any other provision of the general statutes or federal law. The money judgment may be enforced, by execution or by foreclosure of a real property lien, to the amount of the money judgment with (1) all statutory costs and fees as provided by the general statutes, (2) interest as provided by chapter 673 on the money judgment and on the costs incurred in obtaining the judgment, and (3) any attorney's fees allowed pursuant to section 52-400c."

115, 116 n.1, 22 A.3d 668 (2011), quoting General Statutes § 52-352b (t). A "[h]omestead means owner-occupied real property . . . used as a primary residence." (Internal quotation marks omitted.) General Statutes § 52-352a (e); see also *Tuxis-Ohr's Fuel, Inc.* v. *Trio Marketers, Inc.*, Superior Court, judicial district of New Haven, Docket No. CV-04-4002067-S (October 26, 2005) (40 Conn. L. Rptr. 203, 204). "Read together, §§ 52-350f and 52-352b (t) set forth a public policy of protecting one's homestead up to a value of $75,000." *Tuxis-Ohr's Fuel, Inc.* v. *Trio Marketers, Inc.*, supra, 205.

Here, the plaintiff contends that it is not relying on any waiver of the homestead exemption, whether in the forbearance agreement or in the mortgage.[7] Rather, the plaintiff argues that under § 52-352b, the homestead exemption does not apply to the mortgage as it is a consensual lien. We agree with the plaintiff.

Although our appellate courts have yet to address the specific question of whether mortgages are consensual liens, our superior court has. See *Garcia* v. *Amaranto*, Superior Court, judicial district of Fairfield, Docket No. CV-98-0355695-S (January 7, 2003) (33 Conn. L. Rptr. 653, 656 n.7) ("[T]he value of the residence for purposes of the homestead exemption was $82,000, which is $142,000 minus the $60,000 *mortgage* taken out on the property by the defendant. The value of the residence shall be determined as the fair market value of the real property less the amount of any statutory or consensual lien which encumbers it . . . [under] General Statutes

[7] We note that the mortgage did in fact include a waiver of the homestead exemption. Specifically, paragraph sixteen of the mortgage states: "The [m]ortgagor waives all rights of homestead exemption in, and statutory redemption of, the [p]roperty and all right of appraisement of the [p]roperty and relinquishes all rights of courtesy and dower in the [p]roperty." We need not further discuss this issue, as the issues raised by the plaintiff on appeal do not involve its reliance on the homestead exemption waiver in the forbearance agreement.

§ 52-352b (t)." [Emphasis added; internal quotation marks omitted.]). These statutory or consensual liens, such as a tax lien or a mortgage, are used to determine the fair market value of the homestead under § 52-352b (t). *L. Suzio Asphalt Co.* v. *Ferreira Construction Corp.*, Superior Court, judicial district of New Haven, Docket No. 351912 (October 19, 1993) (10 Conn. L. Rptr. 264, 265) (According to legislative history, "[t]hese statutory or consensual liens, such as a tax lien or a mortgage, are used to determine the fair market value of the homestead under [§ 52-352b] (t). . . . Thus, mortgages or other statutory or consensual liens that existed prior to the effective date of the act, October 1, 1993, are to be factored into a determination of the value of the homestead under [§ 52-352b] (t)." [Citation omitted.]). We find these cases persuasive for the proposition that mortgages are "consensual liens" under § 52-352b (t). In the present case, the defendants provided a mortgage on their property to secure their obligations under the forbearance agreement in exchange for the plaintiff's agreement to forbear from collection activities as long as there was compliance with the modified payment schedule. This mortgage encumbering the defendants' property is a consensual lien under § 52-352b (t), and therefore the mortgage is exempt from the homestead exemption set forth in that statute.

The defendants, however, claim that the mortgage is void on public policy grounds because it is a de facto waiver of the homestead exemption. In particular, the defendants rely on *Tuxis-Ohr's Fuel, Inc.* v. *Trio Marketers, Inc.*, supra, 40 Conn. L. Rptr. 203, to support their assertion that the mortgage is void because it is the functional equivalent of a waiver of the homestead exemption and against public policy. In *Tuxis-Ohr's Fuel, Inc.*, as summarized by the trial court in this case, "a dispute arose from a breach of a credit sales arrangement between the plaintiff and one of the defendants,

Trio Marketers, Inc. . . . The other defendant, Douglas Wentz, had personally guaranteed Trio's debt. . . . Wentz alleged through a special defense that the guaranty given was voidable, either in whole or in part, because it included a waiver of the homestead exemption, which he argued was against public policy. . . . In ruling that the homestead exemption waiver within the guaranty was void, as it was against public policy, the court reasoned that if it were to uphold the validity of a waiver of the homestead exemption, the result would be an annihilation of the statute since it would encourage the insertion of a waiver in every similar instrument as a matter of routine." Id. (Citations omitted; internal quotation marks omitted.)

Although *Tuxis-Ohr's Fuel, Inc.* does provide that waivers of the homestead exemption are void as against public policy; Id., 205; we are not persuaded that such reasoning applies here. We emphasize that the plaintiff is not relying on the waiver of the homestead exemption in the mortgage.[8] Rather, the plaintiff argues that § 52-352b (t) expressly provides that the homestead exemption is not applicable to consensual liens, which includes the mortgage in this case. We agree. Because the mortgage is a consensual lien, it is exempt from the homestead exemption. The court, therefore, erred in relying on the homestead exemption waiver to determine that the mortgage was void as against public policy, and we reverse its judgment.

II

THE DEFENDANTS' CROSS APPEAL

A

Before addressing the merits of the defendants' cross appeal, we first must consider whether the court's judgment foreclosing on the judgment liens constitutes an

[8] See footnote 7 of this opinion.

appealable final judgment. A judgment of foreclosure on judgment liens is not, ordinarily, an appealable final judgment until "the court has determined the method of foreclosure and the amount of debt." *J & E Investment Co., LLC* v. *Athan*, supra, 131 Conn. App. 483, 484–85 (determination of parties' mortgages was interlocutory order not immediately appealable); see also *Essex Savings Bank* v. *Frimberger*, supra, 26 Conn. App. 80–81; General Statutes § 52-380a (c) ("[a] judgment lien on real property may be foreclosed or redeemed in the same manner as mortgages on the same property"). "Our Supreme Court has held, however, that, in some circumstances, the factual and legal issues raised by a legal argument, the appealability of which is doubtful, may be so *inextricably intertwined* with another argument, the appealability of which is established that we should assume jurisdiction over both." (Emphasis added; internal quotation marks omitted.) *Clukey* v. *Sweeney*, 112 Conn. App. 534, 542, 963 A.2d 711 (2009), citing *Collins* v. *Anthem Health Plans, Inc.*, 266 Conn. 12, 29, 836 A.2d 1124 (2003).

For example, in *Santorso* v. *Bristol Hospital*, 308 Conn. 338, 354 n.9, 63 A.3d 940 (2013), our Supreme Court applied the inextricably intertwined standard to permit review of one of the claims raised on appeal, namely, the denial of a statute of limitations defense. Specifically, the court explained that "[a]lthough the denial of a statute of limitations defense is not itself an appealable final judgment, we nevertheless may review such a claim when it is *inextricably intertwined* with the trial court's denial of a res judicata defense. See *Clukey* v. *Sweeney*, [supra, 112 Conn. App. 542] ('in some circumstances, the factual and legal issues raised by a legal argument, the appealability of which is doubtful, may be so "inextricably intertwined" with another argument, the appealability of which is established that we should assume jurisdiction over both'); cf. *Collins*

v. *Anthem Health Plans, Inc.*, [supra, 266 Conn. 29–30] (permitting interlocutory appeal for certain claims when ' "inextricably intertwined" ' with other claims that were subject to interlocutory appeal pursuant to statute)." (Emphasis in original.) *Santorso* v. *Bristol Hospital*, supra, 354 n.9.

Applying *Santorso* to this case, we determine that the claim the defendants raise in their cross appeal is inextricably intertwined with the claim raised in the plaintiff's appeal. In particular, under the unusual circumstances of this case, both parties contend that the court erred in rendering a judgment of foreclosure on the judgment liens, since the operative complaint did not seek that relief. It is clear that this cross appeal, like the plaintiff's appeal, rests heavily on Judge Gilardi's determination, both in the court's memorandum of decision and articulation, that "[o]nce the court voided the forbearance agreement and underlying mortgage, the remaining matter to be resolved involved judgment on the original judgment liens." Because this cross appeal is related so closely to the issues underlying the plaintiff's appeal, we conclude that it is appropriate for us to assume jurisdiction over the cross appeal.

B

Having assumed jurisdiction, we consider whether the trial court improperly rendered a judgment of foreclosure on the judgment liens in favor of the plaintiff. Specifically, the defendants argue that the court erred in rendering a judgment of foreclosure on the judgment liens because the plaintiff amended its complaint to seek to foreclose solely the mortgage. The defendants, therefore, contend that it was an error for the court to render a judgment of foreclosure on the judgment liens as this claim was no longer in the plaintiff's operative complaint. We agree with the defendants.

We begin by setting forth our well established standard of review and the legal principles that guide our resolution of the defendants' claim. "The defendants' claim requires us to interpret the allegations of the plaintiff's complaint to determine what it fairly alleges and to compare those allegations with the court's judgment, as informed by the trial record. The interpretation of pleadings presents a question of law over which our review is plenary." *Landry* v. *Spitz*, 102 Conn. App. 34, 41, 925 A.2d 334 (2007); see also *Martino* v. *Scalzo*, 113 Conn. App. 240, 245, 966 A.2d 339 ("[t]he construction of a pleading is a question of law, over which we exercise plenary review" [internal quotation marks omitted]), cert. denied, 293 Conn. 904, 976 A.2d 705 (2009).

"The purpose of the complaint is to limit the issues to be decided at the trial of a case and is calculated to prevent surprise. . . . A complaint should fairly put the defendant on notice of the claims against him. . . . Thus, a plaintiff during trial cannot vary the factual aspect of his case in such a way that it alters the basic nature of the cause of action alleged in his complaint. . . . In other words, [a] plaintiff may not allege one cause of action and recover upon another." (Citations omitted; internal quotation marks omitted.) *Landry* v. *Spitz*, supra, 102 Conn. App. 41.

Practice Book § 10-60 (3) permits a party to file a request for leave to file an amended complaint and permits the opposing party to file an objection to any part of such request. In the present case, the court overruled the defendants' objection to the plaintiff's request for leave to amend its complaint. Our Supreme Court previously has concluded that an amended complaint operates as a withdrawal of the original complaint. *Wesley* v. *DeFonce Contracting Corp.*, 153 Conn. 400, 404, 216 A.2d 811 (1966). Specifically, in *Wesley*,

it explained: "The amended complaint, since it is complete in itself and entirely supersedes the original complaint, should more accurately be termed a substitute complaint. . . . As such, its voluntary filing operated as a withdrawal of the original complaint, which thereupon became merely a part of the history of the case." (Citation omitted.) Id.; see also *Wilson* v. *Hryniewicz*, 38 Conn. App. 715, 719, 663 A.2d 1073 ("When an amended pleading is filed, it operates as a waiver of the original pleading. The original pleading drops out of the case and although it remains in the file, it cannot serve as the basis for any future judgment, and previous rulings on the original pleading cannot be made the subject of appeal."), cert. denied, 235 Conn. 918, 665 A.2d 610 (1995).

In the present case, the parties agree that the court rendered a judgment of foreclosure on a claim that was no longer in the plaintiff's operative complaint. Specifically, after the defendants defaulted on their payments in the forbearance agreement, the plaintiff commenced an action to foreclose the judgment liens. Shortly thereafter, the plaintiff requested permission to amend its complaint to seek foreclosure of the mortgage instead of the judgment liens, which the court granted on May 15, 2014. The plaintiff then filed an operative complaint seeking a strict foreclosure on the mortgage and abandoning its request for foreclosure of the judgment liens. See *Wesley* v. *DeFonce Contracting Corp.*, supra, 153 Conn. 404 (amended complaint operates as withdrawal of original complaint). Accordingly, neither party pleaded, briefed or argued that the trial court should render judgment of foreclosure on the judgment liens. The court, however, rendered a judgment of foreclosure on the judgment liens in favor of the plaintiff. Because the court based its decision on a claim that was not advanced by either party, we conclude that it

erred in rendering a judgment of foreclosure on the judgment liens.

The judgment is reversed and the case is remanded for further proceedings according to law.

In this opinion the other judges concurred.