TOWN OF GRISWOLD *v.* PASQUALE CAMPUTARO ET AL.
(AC 38889)

Lavine, Mullins and Mihalakos, Js.*

Syllabus

In a zoning enforcement action, the plaintiff town sought, inter alia, injunctive relief prohibiting the defendants, C and S Co., from operating an asphalt plant. Simultaneously, the plaintiff had issued a cease and desist order against the defendants to cease operation of the plant, and the defendants appealed from that order to the plaintiff's zoning board of appeals, which sustained the order. Thereafter, the defendants appealed from the decision on the cease and desist order to the trial court, and that zoning appeal was consolidated with the plaintiff's zoning enforcement action. Subsequently, the trial court granted the motion to substitute P, as executor of the estate of C, as a party defendant. Before trial, in 1997, the parties settled their disputes by way of a stipulated judgment. Following numerous complaints about the asphalt plant's operations with regard to the stipulated judgment, on October 28, 2015, P, as executor of C's estate, filed a motion to cite in A Co. as a defendant and a second motion to be substituted as a party defendant. Those motions were scheduled to be heard at the short calendar on November 23, 2015, and the calendar was posted on the Judicial Branch website. On November 9, 2015, the parties negotiated modifications to the stipulated judgment in an executive session of the plaintiff's board of selectmen, which was not open to the public. Subsequently, on November 12, 2015, the parties filed a joint motion to open and modify the judgment, and counsel for the defendants filed a caseflow request to be added to the November 16, 2015 short calendar in order to expedite judicial approval of a stipulated judgment modification, which the court approved. At the November 16, 2015 short calendar, the trial court opened the judgment, granted the motion to cite in, and accepted the stipulated judgment modifications. Thereafter, one of the proposed intervenors, L, relying on the online short calendar posting, appeared on November 23, 2015, seeking to intervene pursuant to statute (§ 22a-19 [a] [1]) to raise claims of environmental harm. At that time, L learned that the court had accepted the stipulated judgment on November 16, 2015, but nonetheless filed her motion to intervene. Another proposed intervenor, R, filed a motion to intervene on December 9, 2015. Following a hearing, the trial court denied L and R's motions, and L and R appealed to this court. They claimed that it was improper for the trial court to deny their

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

motions to intervene on the ground that there was no pending proceeding because the plaintiff and the defendants had manipulated the timing of the short calendar proceedings to their detriment, thereby denying them their vested statutory rights to be heard under § 22a-19. They also claimed that the stipulated judgment at issue was not rendered in compliance with the statute (§ 8-8 [n]) that requires that the trial court hold a hearing and approve such settlement. *Held*:

1. This court had jurisdiction to consider the appeal of L and R, even though they did not file a petition for certification to appeal: the matter was a consolidated proceeding that involved both a zoning appeal and a zoning enforcement action, L and R could intervene in the zoning enforcement action as a matter of right, and that right was inextricably intertwined with the zoning appeal; furthermore, although a stipulated judgment was rendered before L and R filed their motions to intervene, if this court agreed with the claims that L and R were prevented from timely filing their motions to intervene in contravention of the rules of practice, there was relief that could be afforded to them and, therefore, the appeal was not moot.

2. The trial court improperly denied L and R's motions to intervene:

   a. The plaintiff and the defendants, by filing a request for an earlier hearing without a reasonable explanation, violated our rules of practice and L and R's right to timely, accurate notice: pursuant to the applicable rule of practice (§ 11-15), the motion to open and modify the judgment filed on November 12, 2015, could not properly be placed on the short calendar before November 17, 2015, five days after the motion was filed, although the parties' caseflow request stated that the parties had agreed to have the motions written onto the November 16, 2015 short calendar, it did not state which motions were to be heard, that the settlement involved a zoning matter, or a factual basis for the need to expedite the proceeding, and there was no evidence in the record that L, R or the general public were notified of the November 16, 2015 short calendar proceedings, nor did the parties cite to any legal authority that the public was not entitled to rely on the online November 23, 2015 short calendar posting; accordingly, because the motions were heard on November 16, 2015, seven days earlier than originally noticed, L and R were denied the opportunity to file their motions to intervene and were not permitted to participate in the § 8-8 (n) hearing on the stipulated judgment, and the trial court violated the rules of practice by granting the defendants' request to have the matter be written on the November 16, 2015 short calendar.

   b. L and R, who did not have timely notice of the date that the motion to open and modify the stipulated judgment was to be heard, were deprived of their right to file motions to intervene in a pending action and, thus, were denied their right to intervene pursuant to § 22a-19 (a), under which they had a right to participate for the purpose of raising environmental concerns: L and R would have filed their motions in a

pending proceeding but for the parties' manipulation of the date of the short calendar hearing, and where, as here, any person or other legal entity did not have notice that the modified judgment was being presented for judicial review, the public nature of the hearing was not adequate for the purposes of § 22a-19 (a), and, therefore, L and R should have been permitted to file their motions to intervene; moreover, although the motions to intervene were not filed in a pending action, given the violation of the rules of practice, the judgment denying the motions to intervene could not stand.

Argued April 26—officially released November 7, 2017

Procedural History

Action for, inter alia, a temporary and permanent injunction prohibiting the defendants from operating an asphalt plant, and for other relief, brought to the Superior Court in the judicial district of New London and transferred to the Superior Court in the judicial district of New London at Norwich; thereafter, the court, *Hendel*, *J.*, granted the defendants' motion to consolidate this action with an appeal filed by the defendants from a decision of the plaintiff's Zoning Board of Appeals denying an appeal from a cease and desist order; subsequently, the court, *Booth*, *J.*, granted the defendants' motion to substitute Pasquale Camputaro, Jr., executor of the estate of Pasquale Camputaro, as a defendant; thereafter, the court, *Handy*, *J.*, rendered judgment in accordance with a stipulation of the parties; subsequently, the matter was transferred to the Superior Court in the judicial district of New London; thereafter, the court, *Cosgrove*, *J.*, granted the defendants' motion to open and modify the judgment; subsequently, the court, *Cosgrove*, *J.*, granted the defendants' motion to cite in American Industries, Inc., as a defendant; thereafter, the court, *Vacchelli*, *J.*, denied the motions to intervene filed by Kathryn B. Londé and Jeffrey Ryan, and the proposed intervenors appealed to this court. *Reversed*; *further proceedings*.

Derek V. Oatis, for the appellants (proposed intervenors).

Harry B. Heller, for the appellees (defendants).

Mark K. Branse, for the appellee (plaintiff).

LAVINE, J. "The court . . . has continuing jurisdiction to determine any claim of a vested right acquired during the pendency of an action and prior to its withdrawal, but . . . it must first reinstate it on the docket before granting the relief sought. . . . There is no reason why the trial court does not have jurisdiction to restore a case that has been voluntarily withdrawn to the active docket, just as it can open a judgment or restore to the docket a case that has been erased." (Internal quotation marks omitted.) *Diamond 67, LLC* v. *Planning & Zoning Commission*, 117 Conn. App. 72, 79, 978 A.2d 122 (2009).

The would-be intervenors, Kathryn B. Londé and Jeffrey Ryan (intervenors) appeal from the judgment of the trial court rendered when the court, *Vacchelli, J.*, denied their respective motions to intervene that were filed pursuant to General Statutes § 22a-19 (a) (1).[1] On appeal, the intervenors claim that it was improper for the court to deny their motions to intervene on the ground that there was no pending proceeding because (1) the plaintiff and the defendants[2] manipulated the timing of the short calendar proceedings to their detriment, (2) they were denied their vested statutory rights under § 22a-19 to be heard, and (3) the stipulated judgment at issue was not rendered in compliance with General Statutes § 8-8 (n). Under the somewhat unusual

[1] General Statutes § 22a-14 provides: "Sections 22a-14 to 22a-20, inclusive, shall be known and may be cited as the 'Environmental Protection Act of 1971'."

[2] The plaintiff, the town of Griswold, did not submit a brief on appeal but adopted the brief of the defendants Pasquale Camputaro, Jr., executor of the estate of Pasquale Camputaro, and American Industries, Inc., and joined on the supplemental brief of those defendants. It appears that American Sand & Gravel, Inc., is still a defendant, as the action against it has not been withdrawn, but it is not a party to this appeal. In this opinion, our references to the defendants are to Pasquale Camputaro, Jr., and American Industries, Inc.

procedural circumstances of this case in which our rules of practice were violated, we agree with the intervenors and, therefore, reverse the judgment of the trial court denying the motions to intervene and remand the matter for further proceedings.

I

Before we consider the intervenors' claims, we must determine whether this court has jurisdiction to consider the appeal. "Subject matter jurisdiction is the power of the court to hear and determine cases of the general class to which the proceedings in question belong. . . . That determination must be informed by the established principle that every presumption is to be indulged in favor of jurisdiction. . . . Where the court's jurisdiction to hear a case is challenged, the court must fully resolve the issue of subject matter jurisdiction before proceeding with the case." (Citation omitted; internal quotation marks omitted.) *Savoy Laundry, Inc.* v. *Stratford*, 32 Conn. App. 636, 639, 630 A.2d 159, cert. denied, 227 Conn. 931, 632 A.2d 704 (1993). We conclude that there is no jurisdictional infirmity to our resolving the merits of the appeal.

A

The defendants claim that this court lacks jurisdiction to consider the appeal because the intervenors failed to file a petition for certification to appeal pursuant to § 8-8 (o). Section 8-8 (o) requires that a party obtain certification from the Appellate Court in order to appeal from the judgment of the trial court. There is no requirement, however, that a party obtain certification to appeal from the trial court's judgment in a zoning enforcement action brought pursuant to General Statutes § 8-12.

In the present appeal, the intervenors challenge the court's denial of their motions to intervene in a consolidated proceeding that involved both a § 8-8 zoning

appeal and a § 8-12 zoning enforcement action. The intervenors may intervene in the zoning enforcement action as a matter of right; see General Statutes § 8-8 (n) and (p); and that right is inextricably intertwined with the zoning appeal. See *Santorso* v. *Bristol Hospital*, 308 Conn. 338, 354 n.9, 63 A.3d 940 (2013) (jurisdiction where factual and legal arguments of appeals inextricably intertwined). We therefore conclude that we may consider the appeal without a grant of certification.

B

The second jurisdictional question is whether the matter is moot because the underlying action had gone to judgment at the time the motions to intervene were filed and there is no relief that can be granted.[3] We conclude that the matter is not moot.

"Mootness implicates [this] court's subject matter jurisdiction and is thus a threshold matter for us to resolve. . . . It is a well-settled general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction . . . . 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.) *AvalonBay Communities, Inc.* v. *Zoning Commission*, 87 Conn. App. 537, 542, 867 A.2d 37 (2005), aff'd, 280 Conn. 405, 908 A.2d 1033 (2006).

Although a stipulated judgment was rendered before the intervenors were able to file their motions, we conclude nonetheless that there is relief that we can grant

[3] The intervenors and the defendants did not address mootness in their briefs. Prior to oral argument, we ordered them to "be prepared to address . . . whether the trial court was bound to dismiss the motions to intervene as moot where the underlying actions had already gone to judgment at the time the motions were filed."

them. See *Diamond 67, LLC* v. *Planning & Zoning Commission*, supra, 117 Conn. App. 79. "Section 22a-19 permits any person, on the filing of a verified pleading, to intervene in any administrative proceeding [and in any judicial review thereof] for the limited purpose of raising environmental issues. . . . [Section] 8-8 (n) requires the approval by the trial court of any settlement of an administrative appeal. Because the agreement of all parties is required to effectuate a settlement of an administrative appeal . . . environmental intervenors may oppose approval of a settlement agreement on the basis of the environmental concerns to which they have statutory standing." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Batchelder* v. *Planning & Zoning Commission*, 133 Conn. App. 173, 175–76, 34 A.3d 465, cert. denied, 304 Conn. 913, 40 A.3d 319 (2012).

If we agree with the intervenors' claims that they were prevented from timely filing their motions to intervene in contravention of our rules of practice, there is relief that we can grant them and, therefore, the appeal is not moot. "The court . . . has continuing jurisdiction to determine any claim of a vested right acquired during the pendency of an action and prior to its withdrawal, but . . . it must first reinstate it on the docket before granting the relief sought." (Internal quotation marks omitted.) *Diamond 67, LLC* v. *Planning & Zoning Commission*, supra, 117 Conn. App. 79.

II

The present appeal has its genesis in 1994 and concerns real property located at 630 Plainfield Road in Jewett City (property), where the original defendants, as stated in the summons, Pasquale Camputaro[4] doing

[4] Pasquale Camputaro died in October, 1996. Pasquale Camputaro, Jr., executor of the estate of Pasquale Camputaro, was substituted as a party defendant in May, 1997. For some reason, a second motion to substitute Pasquale Camputaro, Jr., as executor of the estate of Pasquale Camputaro, in lieu of Pasquale Camputaro was filed on October 28, 2015, and granted by the court, *Cosgrove*, *J.*, on November 16, 2015.

business as American Sand & Gravel, Inc., and American Sand & Gravel, Inc., operated an earth products excavation, processing, and sales operation, as well as a bituminous manufacturing facility (asphalt). The zoning enforcement officer of the plaintiff town issued a cease and desist order to cease operation of the asphalt facility on the property. The original defendants contended that the asphalt facility is a legally existing nonconforming use and appealed from the cease and desist order to the zoning board of appeals, which sustained the order. The town also commenced an action against the original defendants seeking an injunction and statutory damages, claiming that the original defendants were in violation of its zoning regulations.[5] The original defendants appealed from the cease and desist order to the Superior Court, where the appeal was consolidated with the town's zoning action. Before trial, however, the parties settled their disputes by way of a stipulated judgment that was accepted by the court, *Handy*, *J.*, on August 4, 1997.

The following timeline is relevant to the present appeal. In 2014 and 2015, the town received numerous complaints about the asphalt facility and that its operation did not comply with the 1997 stipulated judgment. On October 28, 2015, the estate of Pasquale Camputaro (estate), filed a motion to cite in American Industries, Inc., (business) as a party defendant in the consolidated action that had gone to judgment in 1997, and a second motion to substitute Pasquale Camputaro, Jr., as executor of the estate, as a party defendant. See footnote 4 of this opinion. The motion to cite in states that the business operates the "aggregate processing and bituminous concrete manufacturing facility," located on the

[5] The town alleged that the original defendants violated the town zoning regulations by operating an asphalt facility in a residential zone and that the business created a dangerous condition and objectionable noise, smoke, dust, and fumes.

property, and "has been an integral party responsible for the compliance with the orders set forth in the stipulation to judgment in the above entitled matter dated June 20, 1997, and therefore should be added as a party defendant." At the time, the motions were filed, there was no action pending.[6] The clerk scheduled the motions to be heard at short calendar on November 23, 2015, and the calendar was posted on the Judicial Branch website. On November 5, 2015, the matter was transferred from the Superior Court for the judicial district of Norwich to the Superior Court for the judicial district of New London.

At 10:30 a.m., on Monday, November 9, 2015, the town board of selectmen (board) held a special meeting.[7] The minutes of the meeting state that the board immediately adjourned the public meeting to go into executive session with the parties and their counsel to discuss ongoing litigation. The executive session ended at 10:46 a.m. When the meeting was reconvened, a motion was made, seconded, and carried unanimously "to authorize and delegate to the First Selectman with the assistance of the Town Attorney, to negotiate and approve on behalf of the Town of Griswold, modifications to the Stipulated Judgment dated June 20, 1997, in the case of the Town of Griswold v. Camputaro." The meeting was adjourned at 10:49 a.m. The desired negotiated modifications to the stipulated judgment are not contained in or attached to the minutes of the board's November 9, 2015 meeting.

On November 12, 2015, the plaintiff, Pasquale Camputaro, Jr., and American Industries, Inc.,[8] filed a joint

[6] This court may take judicial notice of the files of the trial court in the same or other cases. *Disciplinary Counsel* v. *Villeneuve*, 126 Conn. App. 692, 703 n.15, 14 A.3d 358 (2011).

[7] The minutes of the special meeting indicate that the following individuals were present: Kevin Skulczyck, first selectman; Steve Mikutel, second selectman; Philip Anthony, third selectman; Mark Branse, town counsel; Eliza Heinz, town counsel; Harry Heller, counsel for the business; Pat Camputaro and John Versalone, for the business.

[8] At the time the motion to open was filed, American Industries, Inc., was not yet a party to the proceeding.

motion to open and modify the judgment; a fee of $125 was also paid at that time. In addition, on that date, Harry Heller, counsel for the defendants, filed a caseflow request, stating in relevant part "by consent of the parties, the request is made to be added to [the] Monday, November 16, 2015 short calendar in order to expedite judicial approval of a stipulated judgment modification." The court, *Cosgrove, J.*, approved the request by order of November 16, 2015. Also, on November 16, 2015, Judge Cosgrove granted the motion to open and modify the 1997 stipulated judgment. At that time, Judge Cosgrove ordered that on or before December 17, 2015, the complaint be amended to state facts showing the interest of the plaintiff. He also ordered that the plaintiff summon the business to appear as a defendant in the action on or before the second day following December 29, 2015. In other words, the court opened the judgment, granted the motion to cite in, and accepted a stipulated judgment involving an entity that had not yet been served with process. An amended complaint and return of service were filed on December 1, 2015.

Londé, relying on the calendar posting on the Judicial Branch website, appeared at short calendar on November 23, 2015, prepared to file her motion to intervene pursuant to § 22a-19 (a) (1).[9] At that time, she learned that Judge Cosgrove had accepted the stipulated judgment on November 16, 2015. Londé nonetheless filed her motion to intervene to raise claims of environmental harm. On December 9, 2015, Ryan also filed a motion to intervene pursuant to § 22a-19 (a) (1). The parties

[9] General Statutes § 22a-19 (a) (1) provides in relevant part: "In any administrative . . . proceeding, and in any judicial review thereof made available by law . . . any person . . . may intervene as a party on the filing of a verified pleading asserting that the proceeding or action for judicial review involves conduct which has, or which is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state."

filed joint objections to the motions to intervene. On January 19, 2016, Judge Vacchelli heard argument from the intervenors and the parties regarding the motions to intervene.

The following colloquy between Judge Vacchelli and Attorney Heller is significant:

"Q: I'm just trying to understand what the window is and how you analyze that. The intervenors are alleging that the window was—that you had a very tiny window within which to act and the parties made it even smaller by their manipulation of the system. Is it your position that there's no proceeding pending now that they can intervene in because the court entered judgment?

"A: That's correct, Your Honor.

"Q: Okay. And the court—you moved to open the judgment on November 12, [2015,] okay. The case wasn't opened yet but the matter was scheduled for a hearing on November [16, 2015]. So isn't it true that it was opened and closed on the same day? It was opened and then a new judgment entered and closed; is that right? . . .

"A: Yes, correct, Your Honor.

"Q: So there was really nothing open until the court opened it.

"A: No, but there was a motion pending.

"Q: Okay. The filing of the motion didn't open the case though and make it—

"A: Correct. Only the court can open the case.

"Q: So it was almost instantaneous. It was opened and closed."

In his memorandum of decision, Judge Vacchelli stated that the court was "not persuaded that the parties unfairly manipulated the court's calendar to avoid notice to and participation by the [intervenors]. The court agrees with the [intervenors] that a hearing on the motion to open and modify judgment was necessary, as it was in the nature, at least in part, of a settlement of a land use appeal. General Statutes § 8-8 (n); cf. *Brookridge District Assn.* v. *Planning & Zoning Commission*, 259 Conn. 607, 618, 793 A.2d 215 (2002). Such a hearing was held in this case on November 16, 2015, albeit it was *held earlier than ordinarily permitted.* Practice Book § 11-15. However, the early hearing was consented to and requested by all appearing parties and approved by the court. . . . The hearing was public, and the parties had notice and opportunity to be heard, and that is all that § 8-8 (n) requires. See *Dietzel* v. [*Planning Commission*], 60 Conn. App. 153, 161, 758 A.2d 906 (2000). If the [intervenors] had called the parties' counsel, or the clerk's office, or looked at the court file, they would have known when the hearing was taking place. Their failure to attend or file their [motions] in a pending case was due to their own lack of timely action. Ordinarily, basic fairness dictates that the painstaking work by the parties and the court to settle and resolve the case should not be disrupted by intervention. *Rosado* v. *Bridgeport* [*Roman*] *Catholic Diocesan Corp.*, 276 Conn. 168, 229, 884 A.2d 981 (2005). There is no legal or equitable argument that persuades the court to undo the settlement in this case at this time due to the way the matter was scheduled for court action." (Citation omitted; emphasis added.)

The court concluded that it could not consider the motions to intervene because they were not timely filed in a pending proceeding, and denied each motion. The intervenors appealed.

III

On appeal, the intervenors claim that they did not receive meaningful notice of the hearing on the parties' motions, including the motion to modify the stipulated judgment, in violation of our rules of practice; see Practice Book § 11-1 et seq.; and, therefore, they were denied their vested right to intervene pursuant to § 22a-19 (a) and to participate in the hearing on the modified settlement as required by § 8-8 (n). We agree.

To resolve the claim, we must address the relevant statutes and rules of practice, which implicate the right to be heard. "The interpretation and application of a statute, and thus a Practice Book provision, involves a question of law over which our review is plenary." *Wiseman* v. *Armstrong*, 295 Conn. 94, 99, 989 A.2d 1027 (2010).

A

The intervenors claim that the town and the defendants manipulated the scheduling of the parties' motions to a short calendar date, i.e., November 16, 2015, earlier than that posted on the Judicial Branch website, i.e., November 23, 2015, and earlier than ordinarily permitted pursuant to our rules of practice. See Practice Book § 11-15. However one chooses to characterize it, the impact on the intervenors was the same—it kept them in the dark about the proceeding.

Practice Book § 11-13 (a) provides in relevant part: "Unless otherwise provided in these rules or ordered by the judicial authority . . . all motions and objections to requests when practicable, and all issues of law must be placed on the short calendar list. No motions will be heard which are not on said list and ought to have been placed thereon . . . ." Practice Book § 11-15 provides in relevant part: "Matters to be

placed on the short calendar shall be assigned automatically by the clerk without written claim . . . . No such matters shall be so assigned unless filed *at least five days before* the opening of court on the short calendar day. . . .'' (Emphasis added.) Practice Book § 11-14 provides in relevant part: ''Short calendar sessions shall be held in each judicial district and geographical area at least once each month, the date, hour and place to be fixed by the presiding judge upon due notice to the clerk. . . . Notice of the assigned date and time of the motion shall be provided to attorneys and self-represented parties of record.''

''It is the settled rule of this jurisdiction, if indeed it may not be safely called an established principle of general jurisprudence, that no court will proceed to the adjudication of a matter involving conflicting rights and interests, *until all persons directly concerned in the event* have been actually or constructively notified of the pendency of the proceeding, and *given reasonable opportunity to appear and be heard*.'' (Emphasis altered; internal quotation marks omitted.) *Udolf* v. *West Hartford Spirit Shop, Inc.*, 20 Conn. App. 733, 736, 570 A.2d 240 (1990).

''The design of the rules of practice is both to facilitate business and to advance justice; they will be interpreted liberally in any case where it shall be manifest that a strict adherence to them will work surprise or injustice. . . . Rules are a means to justice, and not an end in themselves . . . .'' (Internal quotation marks omitted.) *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, 257 Conn. 1, 16, 776 A.2d 1115 (2001). ''These rules [of practice] implement the fundamental principle of judicial administration [t]hat no matter shall be decided unless the parties have fair notice that it will be presented in sufficient time to prepare themselves upon the issue.'' (Internal quotation marks omitted.) *Fattibene* v. *Kealey*, 18 Conn. App. 344, 353, 558 A.2d 677 (1989).

In *Fattibene*, the trial court imposed an award of attorney's fees as a sanction before the plaintiff could file an objection to the motion for sanctions, which was never placed on the short calendar. This court reversed and remanded the issue for a new hearing. Id., 363.

There is no question that the motion to cite in and the second motion to substitute party were filed on October 28, 2015, and placed on the short calendar for November 23, 2015.[10] Londé noted the November 23, 2015 short calendar on the Judicial Branch website and planned to attend. There also is no question that the motion to open and modify the judgment was filed on November 12, 2015. Pursuant to Practice Book § 11-15 that motion could not properly be placed on the short calendar before November 17, 2015, five days after the motion was filed. Heller, however, filed a request on behalf of the defendants that the case be written on the short calendar of November 16, 2015, which was not five days subsequent to the filing of the motion to open and modify the judgment. In the request to the clerk, Heller stated that the parties had agreed to have the motions written on the November 16, 2015 short calendar, but did not state which motions were to be heard or that the settlement involved a zoning matter. The request also notably lacked a factual basis for the need to expedite the proceeding.

We acknowledge that Practice Book § 11-13 (a) provides in relevant part that "[u]nless otherwise provided in these rules or ordered by the judicial authority . . . all motions and objections to requests when practicable . . . must be placed on the short calendar list." See *Countrywide Home Loans Servicing, L.P.* v. *Peterson*, 171 Conn. App. 842, 846, 158 A.3d 405 (2017). Thus,

[10] No court, however, could rule on those motions as there was no action pending. The underlying consolidated zoning matters had been settled by stipulated judgment in 1997. No action was pending until the court granted the motion to open.

§ 11-13 (a) "allows for the expeditious, alternative, discretionary hearing of motions. The court need not place a motion on a short calendar list if to do so would delay the proceedings." *Udolf* v. *West Hartford Spirit Shop, Inc.*, supra, 20 Conn. App. 736. The present case is distinguishable from *Udolf*, a summary process action, in which the trial court refused to hear the defendant's motion for an extension of time to contest whether a default had occurred. Id., 734. This court held that the trial court erred by failing to hear the motion for an extension of time and subsequently rendering a judgment of possession for the plaintiff. Id., 734, 736–37. A trial court need not place a motion on a short calendar if "to do so would delay the proceedings." Id., 736. See also *Countrywide Home Loans Servicing, L.P.* v. *Peterson*, supra, 171 Conn. App. 844 (placing motion to open on calendar would delay foreclosure proceeding; court properly heard motion to open before law day ran).

In the present case, Judge Cosgrove approved the request to place the matter on the November 16, 2015 short calendar. The request stated that the matter should be added to the Monday, November, 16, 2015 short calendar "to expedite judicial approval of a stipulated judgment modification." That statement falls short of a factual explanation as to why a week's time would delay the proceedings in which a stipulated judgment was rendered more than eighteen years earlier, the town had been receiving complaints about the business for approximately two years, and when only on November 9, 2015, did the board agree to stipulate to a settlement that had not yet been negotiated with at least one entity that was not yet a party.

We are unable to find evidence in the record, and the parties have not directed us to any, that the matter having been written on the November 16, 2015 short calendar was brought to the attention of Londé or the

public in general. Nor have the parties cited any legal authority that Londé, Ryan, other would-be intervenors, and the public generally were not entitled to rely on the November 23, 2015 short calendar posting on the Judicial Branch website. Because the motions were heard on November 16, 2015, seven days earlier than originally noticed, the intervenors were denied the opportunity to file their motions to intervene and they and others were not permitted to participate in the § 8-8 (n) hearing on the stipulated judgment. By granting the defendants' request that the matter be written on the November 16, 2015 short calendar, the court violated our rules of practice.

We disagree with the defendants' argument that the burden was on the intervenors to find out when their motions were to be heard by the court. "Because of the public impact of land use decisions, Connecticut's governing statutory scheme promotes public participation in such decision making, and particularly provides for public hearings with substantial procedural safeguards. We have recognized that, [h]earings play an essential role in the scheme of zoning and in its development." (Internal quotation marks omitted.) *Willimantic Car Wash, Inc.* v. *Zoning Board of Appeals*, 247 Conn. 732, 739, 724 A.2d 1108 (1999). "The statutory scheme provides for substantial procedural protections at the [zoning board of appeals hearing] including notice requirements, time limits for commencing the hearing and for rendering all decisions, and requirements that a record be made." (Footnote omitted.) Id., 740. We note that the minutes of the board meeting at which the town agreed to settle the zoning matter by means of a negotiated settlement do not include a record of the proposed settlement. We also note that any discussion of the settlement took place in executive session, which the public was not permitted to attend.

Our Supreme Court agreed with this court when it stated in the context of our statutory zoning scheme that the general public and parties interested in a zoning change are not expected to "employ the skills of a research librarian to determine" the location of a particular piece of property. (Internal quotation marks omitted.) *Bridgeport* v. *Planning & Zoning Commission*, 277 Conn. 268, 279, 890 A.2d 540 (2006). "[T]he purpose of the notice requirement is to provide *all* interested parties with *full* notice of *all* aspects of the proposed modification." (Emphasis in original.) Id. Although the motions at issue were placed on the court's short calendar for November 23, 2015, which provided notice to the public, including Londé, who appeared at that calendar, by filing their request for an earlier hearing without reasonable explanation, the parties violated our rules of practice and violated the intervenors' right to timely, *accurate* notice.

B

The intervenors claim that due to the violation of our rules of practice addressed in part III A of this opinion, they were denied their statutory right to intervene pursuant to § 22a-19 (a). We agree.

"Section 22a-19 (a) provides in relevant part: In any administrative, licensing or other proceeding, and in any judicial review thereof . . . *any person* . . . or other legal entity may intervene as a party on the filing of a verified pleading asserting that the proceeding or action for judicial review involves conduct which has, or which is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state. Section 22a-19 (a) is in derogation of the common-law right to intervention. . . . [S]tatutes in derogation of common law should receive a strict construction and [should not] be extended, modified, repealed or

enlarged in [their] scope by the mechanics of construction. . . . Environmental statutes, such as § 22a-19 (a), however, are considered remedial in nature and are to be construed liberally to accomplish their purpose. . . . Bearing in mind these contradictory principles of statutory construction, we must apply § 22a-19 (a) so as to serve its legislative purpose and avoid absurd consequences and bizarre results." (Citations omitted; internal quotation marks omitted.) *Diamond 67, LLC* v. *Planning & Zoning Commission*, supra, 117 Conn. App. 80.

This court has held that § 22-19 (a) permits intervention in a civil action for injunctive relief because an action fell within the ambit of the "other proceeding" language of the statute. See *Zoning Commission* v. *Fairfield Resources Management, Inc.*, 41 Conn. App. 89, 115–16, 674 A.2d 1335 (1996). If a person not a party has an interest or title which the judgment will affect, the court, on his or her application, shall direct him or her to be made a party. See *State Board of Education* v. *Waterbury*, 21 Conn. App. 67, 70 n.4, 571 A.2d 148 (1990). Would-be intervenors have a right to intervene pursuant to § 22a-19 (a), which permits intervention only for the purpose of raising environmental issues. See *Connecticut Fund for the Environment, Inc.* v. *Stamford*, 192 Conn. 247, 248 n.2, 470 A.2d 1214 (1984).

In the present matter, save for the fact that the short calendar hearing on the parties' motions, including the motion to open and modify the stipulated judgment, was manipulated by the parties' request to change the date of the short calendar hearing, the intervenors would have filed their motions in a pending proceeding. The intervenors had no notice that the subject motions in the present matter were to be heard on November 16, 2015, rather than on November 23, 2015. Moreover, as Judge Vacchelli stated during the hearing on the motions to intervene, the opening and closing of the

action was almost instantaneous, hardly the sort of "hearing" our law contemplates. He also stated during the course of the hearing that a case is not opened merely by filing a motion to open. A case is not opened until the motion to open is granted by the court. We agree.

The defendants argue that the parties agreed to have the motions considered on November 16, 2015. That well may be, but § 22a-19 (a) permits *any person* to intervene. Without accurate notice of the date the motion to open and modify the stipulated judgment was to be heard, the intervenors were deprived of the right to file motions to intervene in a pending action. In its memorandum of decision, the trial court stated that the hearing on the motion was public. That finding is factually correct, but legally inaccurate in the context of the present appeal. If any person or other legal entity did not have notice that the modified judgment was being presented for judicial review, the public nature of the hearing was not adequate for the purposes of § 22a-19 (a). We therefore conclude that because the intervenors did not have timely notice of a pending action in which they could intervene, the case on remand should be reopened and the intervenors permitted to file their motions to intervene.[11]

[11] We note that Judge Cosgrove ordered the plaintiff to amend its complaint and serve the business on or before the second day following December 29, 2015. Following oral argument in this court, we issued the following order:

"All parties are hereby ordered to submit simultaneous supplemental briefs of no more than ten pages . . . to address the following questions:

"1. Did the trial court, *Cosgrove, J.*, have personal jurisdiction over American Industries, Inc., on November 16, 2015, when it opened the judgment and accepted the modified stipulated judgment?

"2. If not, did the trial court have authority to accept the stipulated judgment on November 16, 2015?

"3. If not, has a valid judgment entered?

"4. If no valid judgment was entered on November 16, 2015, and because the 1997 stipulated judgment was open, was the case pending at the time the would-be intervenors filed their petitions to intervene pursuant to General Statutes § 22a-19 and at the time the trial court, *Vacchelli, J.*, denied their petitions to intervene?"

C

The intervenors also claim that because their motions to intervene were denied they could not participate in the hearing on the stipulated settlement that failed to conform to § 8-8 (n). We agree.

Section 8-8 (n) requires the approval by the Superior Court of any settlement of any zoning board appeal brought to the court. "Because the agreement of all parties is required to effectuate a settlement of an administrative appeal; see *AvalonBay Communities, Inc.* v. *Zoning Commission*, [supra, 87 Conn. App. 556]; environmental intervenors may oppose approval of a settlement agreement on the basis of the environmental concerns to which they have statutory standing." *Batchelder* v. *Planning & Zoning Commission*, supra, 133 Conn. App. 175–76.

"Under §§ 8-8 (n) and 22a-19, environmental intervenors have standing to raise environmental concerns regarding settlements of administrative appeals and can block the approval of settlements on that basis." Id., 181. A § 8-8 (n) hearing "is the statutorily prescribed method for satisfying the public concerns raised by the settlement of land use appeals." *Brookridge District Assn.* v. *Planning & Zoning Commission*, supra, 259 Conn. 618.

Our Supreme Court has had the opportunity to consider what constitutes a hearing and judicial approval of settlement agreements in land use and zoning disputes. "[A]ny person aggrieved by a decision of a municipal zoning or planning board has a right to appeal to the Superior Court. Should the parties to such a dispute wish to settle the dispute once such an appeal has been

In resolving this appeal, we need not decide whether the court had personal jurisdiction over the business. We also need not determine whether the court effectively retained jurisdiction over the matter pending the return of service as to the business.

filed, § 8-8 (n) requires that the settlement be approved by the Superior Court after a hearing has been held." (Footnote omitted.) *Willimantic Car Wash, Inc.* v. *Zoning Board of Appeals*, supra, 247 Conn. 734. "Section 8-8 (n) requires that no such appeal 'shall be withdrawn and no settlement between the parties to any such appeal shall be effective unless and until a hearing has been held before the Superior Court and such court has approved such proposed withdrawal or settlement.' " Id., 736.

According to a legal dictionary definition, a hearing is a "proceeding of relative formality . . . generally public, with definite issues of fact or of law to be tried, in which witnesses are heard and evidence presented, and in which parties to a dispute have a right to be heard." (Footnote omitted; internal quotation marks omitted.) Id., 737–38. "Hearings feature prominently in the zoning process because land use decisions are quintessentially decisions impacting the public. . . . Zoning regulation represents the common decision of the people to serve the common social and economic needs . . . for their mutual advantage and welfare . . . ." (Citation omitted; internal quotation marks omitted.) Id., 738.

This court "has recognized the policy of protecting the public interest by holding open hearings prior to Superior Court approval of a settlement of a land use appeal." Id., 741. "The purpose of the statute is to ensure that zoning matters can be scrutinized by the public by means of a public record. . . . The requirements of a hearing and of court approval serve to protect the integrity of the land use planning process by prohibiting side or secret settlements by parties once there has been an appeal to the Superior Court. . . . If, after appealing to the Superior Court, the parties could settle their dispute without the participation of the board and without a public hearing with formal procedural protections,

the underlying statutory policy of protecting the public interest would be at risk." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 742.

"[A] hearing held pursuant to § 8-8 [n] provides a forum for a presentation of any challenges to a settlement, including any allegations of bad faith, collusion or other improper conduct by the parties to a settlement." *Brookridge District Assn.* v. *Planning & Zoning Commission*, supra, 259 Conn. 616. A hearing held pursuant to §8-8 (n) must be open to the public. See *Willimantic Car Wash, Inc.* v. *Zoning Board of Appeals*, supra, 247 Conn. 743. It requires that parties be permitted to present evidence and to confront and cross-examine witnesses. Id. "In approving a settlement affecting the public interest . . . a trial court must be satisfied of the fairness of the settlement." (Internal quotation marks omitted.) Id., 744.

In the present matter, because the parties' motions, including the motion to open and modify the stipulated judgment, were written onto the November 16, 2015 short calendar, the intervenors, as well as the general public, were deprived of notice of the hearing. The defendants argue that the hearing was open to the public, but there was no notice to the public that the hearing was occurring on November 16, 2015. The intervenors and the general public were entitled to rely on the notice provided by the Judicial Branch website that posted the November 23, 2015 short calendar.

This court previously reviewed a case in which the Superior Court denied a § 22a-19 (a) motion to intervene in a consolidated action. See *Diamond 67, LLC* v. *Planning & Zoning Commission*, supra, 117 Conn. App. 72, 77. In that case, the motion to intervene had been filed in a pending proceeding. Id. The court, however, denied the motion on different procedural grounds. Id., 76–77. This court concluded that the grounds on which the

court denied the motion were improper and reversed the judgment denying the motion to intervene and remanded the case "to the Superior Court with direction to open the judgment that was rendered in accordance with the settlement and to grant [the] motion to intervene. On remand, before rendering judgment in accordance with a settlement between the plaintiffs and the defendant, the court must conduct a hearing compliant with § 8-8 (n) to review the settlement, in which [the intervenor] is entitled to participate for the purpose of raising environmental issues." Id., 85. Although the intervenors' motions in the present case were not filed in a pending action, given the violation of our rules of practice as discussed in part III A of this opinion, we conclude that the judgment should be reversed and the case remanded in accordance with *Diamond 67, LLC*.[12]

The judgment denying the motions to intervene is reversed and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

21ST CENTURY NORTH AMERICAN INSURANCE COMPANY *v.* GLENDA PEREZ ET AL.
(AC 39060)

Prescott, Beach and Mihalakos, Js.

Syllabus

The plaintiff automobile insurer commenced this action for a declaratory judgment determining whether it had validly cancelled an automobile insurance policy that it had issued to the insured defendants, P and S, and, thus, that it had no duty to defend or indemnify them following S's subsequent involvement in an automobile accident that resulted in a fatality. The defendant N, as the administrator of the estate of L,

[12] On appeal, the defendants claim that (1) the trial court did not have authority to entertain environmental issues which exceeded the administrative jurisdiction of the plaintiff in the underlying administrative proceeding and (2) the petitions filed by the intervenors failed to satisfy the statutory requirements of § 22a-19 (a) (2). Judge Vacchelli did not reach the merits of the petitions to intervene, and therefore, the defendants' claims are not properly before us.

raised several special defenses and filed a counterclaim alleging that the cancellation notice sent by the plaintiff to P and S was fatally defective. The trial court found that P and S had failed to send the installment payment required for the month of June and had received a notice of cancellation, which indicated that they could cure the default by making both the June payment and the July payment within fifteen days, or else their coverage would expire. The court, which found that P and S had failed to make the full payment required by the notice prior to the expiration of coverage, but that they had made a partial payment in an amount slightly less than the amount of the June payment, concluded that the amount stated in the notice as the amount due, which was the equivalent of two monthly installments, was inaccurate, as the amount actually due was the amount of the June payment only, and that P and S had substantially complied with their obligations under the policy by sending the partial payment. The trial court rendered judgment in favor of the defendants on the complaint and counterclaim, and the plaintiff appealed to this court. *Held*:

1. The trial court's finding that the amount that was actually due when the plaintiff sent its notice of cancellation was the amount of the June payment, and not the amount listed on the cancellation notice, was clearly erroneous; the testimony and documentary evidence adduced at trial indicated that the cancellation notice provided P and S with the opportunity to cure their default for failing to timely make the June payment by making a payment equivalent to two installments before the cancellation date in order to remain current on their regular installment billing schedule, and there was no evidentiary support for a contrary finding nor any authority for the proposition that the amount specified as necessary to resume regular installment payments cannot exceed the initial amount of the default.
2. The trial court improperly applied the doctrine of substantial compliance to excuse the default by P and S in light of the partial payment that they had made following their receipt of the notice of cancellation; the defendants provided no authority for the proposition that the doctrine of substantial compliance or performance applies in the context of the payment of automobile insurance premiums due on a monthly installment basis, and although the substantial compliance doctrine was an equitable rule that excused technical contractual breaches in certain contexts, it had no application in the context of automobile insurance payments due on a monthly installment basis and could not excuse the failure of P and S to make full payment of the monthly installment due under the policy under the circumstances here, where the timely payment of the automobile insurance premiums due on a monthly installment basis was an essential and material condition to coverage under the policy and the contractual breach was material in nature, as there could be no substantial performance where the performance owed was the payment of money and time was of the essence.
3. This court declined to review N's unpreserved claims that the cancellation notice violated the Connecticut Unfair Insurance Practices Act (§ 38a-815 et seq.), the Connecticut Unfair Trade Practices Act (§ 42-110a et

seq.), and the Creditors' Collection Practices Act (§ 36a-645 et seq.), as N failed to allege any such violations in his counterclaim and those claims were not raised before, or decided by, the trial court.

4. The trial court improperly rendered judgment in favor of the defendants, as the plaintiff demonstrated that it had validly cancelled the automobile insurance policy it had issued to P and S: an insurer is authorized by statute (§ 38a-342) to cancel an insurance policy due to nonpayment of premium provided that, pursuant to statute (§ 38a-343), the insurer sends notice of cancellation in a certified manner, provides notice within a proscribed period of time with respect to nonpayment of the premium due, provides a statement of the reason for cancellation, and advises the insured of possible ramifications involving the Commissioner of Motor vehicles, and the record in the present case indicated that the plaintiff complied with those requirements; moreover, the plaintiff offered P and S an opportunity to avert cancellation and thereby resume regular installment payments by making a payment equivalent to two installment payments by the date of cancellation, which they failed to do.

Argued May 23—officially released November 7, 2017

Procedural History

Action for a declaratory judgment that, inter alia, an insurance policy issued to the named defendant et al. had been cancelled for nonpayment of premiums, brought to the Superior Court in the judicial district of Hartford, where the defendant Gregory C. Norsiegian, the administrator of the state of Leoner Negron, filed a counterclaim; thereafter, the matter was tried to the court, *Hon. Constance L. Epstein*, judge trial referee; judgment for the defendants on the complaint and for the defendant Gregory C. Norsiegian, the administrator of the estate of Leoner Negron, on the counterclaim, from which the plaintiff appealed to this court; thereafter, the court, *Hon. Constance L. Epstein*, judge trial referee, denied the plaintiff's motion for an articulation. *Reversed; judgment directed.*

Yelena Akim, for the appellant (plaintiff).

Adam F. Acquarulo, for the appellee (defendant PV Holding Corp.).

John-Henry M. Steele, for the appellee (defendant Gregory C. Norsiegian, Administrator [Estate of Leoner Negron]).

Opinion

BEACH, J. This appeal concerns the cancellation of an automobile insurance policy. The plaintiff, 21st Century North America Insurance Company, appeals from the judgment of the trial court in favor of the defendants, Glenda Perez, Ariel Seda,[1] Gregory C. Norsiegian, the administrator of the estate of Leoner Negron (administrator), Orlando Soto, Carmello Pacheco, Edgardo Contreras, Eric Valentin, John Skouloudis, and PV Holding Corporation (corporation). Because it allegedly complied with all applicable cancellation requirements contained in both the insurance policy and the General Statutes, the plaintiff claims that the court improperly failed to conclude that it validly had cancelled that policy. The plaintiff further claims that the court improperly applied the doctrine of substantial compliance to excuse nonpayment of the amount due to avert cancellation. We agree and, accordingly, reverse the judgment of the trial court.

The relevant facts are not in dispute. The insured defendants purchased an automobile liability insurance policy from the plaintiff for a term of six months (policy). They made payments on an installment basis; the payments included a monthly "installment fee" of $5. The insured defendants renewed the policy in May, 2012, and paid their first installment on May 10, 2012.

The second installment of $62.24 was due before June 11, 2012.[2] When the insured defendants failed to make

[1] Glenda Perez and Ariel Seda were the insureds under the automobile insurance policy at issue in this appeal. We refer to them collectively as the insured defendants in this opinion.

[2] A copy of the May 15, 2012 billing invoice furnished to the insured defendants was admitted into evidence. It defines "Amount Due" in relevant part as "[t]he amount that must be paid in order to maintain regular installment billing. . . . If we do not receive the amount by the date shown, your policy will be terminated. Please Note: the payment must be received by 12:01 a.m. (one minute after midnight) Standard Time on the Payment due date to avoid cancellation." That invoice further specified an "Amount Due" of $62.24.

any payment on that installment, the plaintiff on June 19, 2012, sent them a certified notice of cancellation (cancellation notice).[3] That notice conveyed two important messages. First, it advised the insured defendants "that your insurance will cease at and from [12:01 a.m. on July 4, 2012] due to nonpayment of premium." Second, the cancellation notice provided the insured defendants with the opportunity to avert cancellation by making payment of $124.48 prior to the cessation of coverage on July 4, 2012.[4] The plaintiff at that time also sent the insured defendants a billing invoice stating that $124.48 was due before July 4, 2012.

On June 26, 2012, the insured defendants made a partial payment of $62. In response, the plaintiff sent the insured defendants another billing invoice. That invoice acknowledged receipt of their partial payment and indicated that the remaining balance of $62.48 was "due before" July 4, 2012. The invoice advised the insured defendants in relevant part that "if we do not receive the [remaining balance] by the date shown, your policy will be terminated. . . . [T]he payment must be received by 12:01 a.m. (one minute after midnight) Standard Time on [July 4, 2012] to avoid cancellation." It is undisputed that the insured defendants made no further payment to the plaintiff prior to that date.

The "Statement of Account" admitted into evidence, which documents activity on the policy, states that the policy was cancelled on July 4, 2012, due to "[n]on

[3] In accordance with General Statutes § 38a-344, a certificate of mailing was admitted into evidence. At trial, the court took judicial notice of the Domestic Mail Manual and the certificate's compliance therewith. See *Echavarria* v. *National Grange Mutual Ins. Co.*, 275 Conn. 408, 416 n.8, 880 A.2d 882 (2005).

[4] The cancellation notice stated in relevant part: "Cancellation can be avoided if premium due is paid prior to the effective date of the cancellation. There will be no extension of coverage unless the cancellation is specifically rescinded by the company and the policy will be reinstated." The notice further indicated that the "premium amount" due was $124.48.

[p]ayment [e]ffective 07/04/12." On July 11, 2012, the plaintiff issued a refund of $5.01 to the insured defendants with respect to coverage that had been provided under the policy until July 4, 2012.

On July 18, 2012, the insured defendants sent an additional payment of $62 to the plaintiff. On July 25, 2012, the plaintiff returned that payment to the insured defendants because the policy already had been cancelled.

In the early morning hours of July 28, 2012, Seda was operating a 1996 Honda Accord previously covered under the policy. At approximately 2:26 a.m., Seda's vehicle collided with a 2013 Lincoln MKT near the intersection of Broad Street and Allen Place in Hartford. As a result of that collision, a passenger in the 2013 Lincoln was killed.

On May 15, 2014, the plaintiff filed the present declaratory judgment action, in which it requested a declaration that (1) the policy "had been cancelled by virtue of the non-payment of premiums as of July 4, 2012"[5]

[5] Although the plaintiff's prayer for relief avers that the policy was cancelled due to "non-payment of premiums," paragraph five of its complaint alleges in relevant part that the cancellation notice advised the insured defendants "that the [p]olicy would be cancelled unless payment of the required monthly installment payment was received on or before July 4, 2012. . . ." On appeal, the corporation contends that the foregoing amounts to a judicial admission "that a single monthly payment was due to avoid the cancellation, not twice that amount." The corporation did not advance such a claim before the trial court. Indeed, in its April 23, 2015 motion for summary judgment, the corporation averred that "[t]his is an action for declaratory judgment by the plaintiff for orders that [the policy] had been cancelled by virtue of nonpayment of *premiums* as of July 4, 2012 . . . ." (Emphasis added.) In its appellate brief, the administrator likewise states that "the plaintiff sought in its complaint a declaration that the [p]olicy had been cancelled by virtue of the nonpayment of *premiums* as of July 4, 2012 . . . ." (Emphasis added.) Moreover, we note that, in its order denying the respective motions for summary judgment filed by the parties, the court specifically indicated that "[t]here are several questions of fact that preclude the entry of any of the parties' motions for summary judgment," including those pertaining to the proper amounts due to the plaintiff. We therefore reject the corporation's contention that the plaintiff's complaint contains a

and (2) the plaintiff had no duty to indemnify or to defend the insured defendants. On August 25, 2015, the administrator filed a counterclaim alleging that the cancellation notice was "fatally defective," in that it specified an "amount due" in excess of the $62.24 installment amount that triggered that notice. The administrator also alleged, as a special defense, that the insured defendants "substantially performed all of their obligations under the policy." In answering the administrator's counterclaim, the plaintiff denied all allegations. The plaintiff, the administrator, and the corporation thereafter filed motions for summary judgment, which the court denied.

A trial was held on October 7, 2015. The plaintiff submitted a dozen documents that were admitted into evidence. Among them was a copy of the policy, which provides in relevant part that the plaintiff may cancel the policy due to nonpayment of premiums. The plaintiff also offered the testimony of Diana Yeager, the plaintiff's underwriting staff consultant, who was familiar with the plaintiff's business records and general billing practices. During her testimony, Yeager detailed how the plaintiff arrived at the $124.48 figure as the amount necessary to cure the default and avoid cancellation of the policy, noting the distinction in the plaintiff's billing practices between installment billing cycles and cancellation billing cycles.[6] Following the conclusion of Yea-

judicial admission that a single monthly installment payment was due to avoid cancellation of the policy.

[6] At trial, the following colloquy transpired:

"[The Plaintiff's Attorney]: [W]hat happened when [the plaintiff] did not receive a payment from [the insured defendants] on June 11, [2012]?

"[Yeager]: We have an automated billing system [that] looks at the policy and determines whether or not the policy would stay in an installment billing cycle or be switched to a cancellation billing cycle . . . . [A]t that point [the policy] was switched to a cancellation billing cycle. . . .

"[The Plaintiff's Attorney]: Can you tell us what a cancellation [billing cycle] means?

"[Yeager]: Sure. What that means is that when it switches from an installment to a cancellation billing cycle the policy is . . . no longer in that

ger's testimony, the plaintiff rested. The defendants did not offer evidence of any kind at trial.

In its subsequent memorandum of decision, the court acknowledged Yeager's explanation of the amount specified on the cancellation notice.[7] The court nevertheless found that "[t]he [$124.48] amount stated in the [cancellation notice] was not the amount due . . . ." Rather, the court found that $62.24 "was actually due . . . ."

installment [cycle] and it goes into that cancellation phase to where it looks for mailing notice requirements based on the state that it's in, when the next payment is due based off of when the policy is looked at, what's not received and by the date, the amount not received and the date not received by. . . .

* * *

"[The Plaintiff's Attorney]: [Y]ou told us . . . that as soon as the policy is in cancellation mode, okay, it's gone from the installment . . . pay dates. Correct?

"[Yeager]: That's correct.

"[The Plaintiff's Attorney]: All right; so can you tell the court why the insured was [asked] to pay two times the premium in order to avoid cancellation on July 4, [2012]?

"[Yeager]: Sure. The reason—our internal system . . . is an automated system. . . . [T]he system [examines] the policy, and it determines [whether] the payment [has] been made by the due date and then also based off of the next installment payment—this is a monthly payment. It looks at also the equity in the policy to make sure that, you know, we are within . . . a twenty-one day mailing which means that . . . we send our customers this billing invoice twenty-one days prior to their next current installment. For the [insured defendants] their next current installment after they missed the June payment is July 11, [2012]. And with the notice of cancellation we would [require] both payments because we are outside of or past that twenty-one days prior to the [July 11, 2012] installment. . . .

"[The Court]: So . . . when you send the amount that's due you include not only the last installment but the next installment.

"[Yeager]: Right. We include the past due amount that we didn't receive and then because of where the policy is at the monthly payment then [the internal system] automatically [determines whether] we need to include that next installment based off of the equity and where the policy is."

[7] The court stated: "As an explanation regarding the $124.48 listed as the amount not paid in the [cancellation notice], rather than the $62.24 that was actually due, [the plaintiff's representative] advises the court that this was an amount 'calculated internally by the plaintiff's automated premium com-

The court found that the insured defendants failed to make a payment of $62.24 prior to the expiration of coverage on July 4, 2012. It also found that they made a partial payment of $62 on June 26, 2012. On that basis, the court found that the insured defendants had substantially complied with their obligations under the policy, noting that "incorrect and misleading notices should not be construed to provide an insurer with absolute power that obliterates any rights of the insureds to the coverage for which they had contracted and paid. . . . [T]he ability to mislead an insured and then revoke coverage for a premium payment that is twenty-four cents less than the amount due does not comport with the fairness our law attempts to extend to all parties in such transactions." (Citations omitted.) Accordingly, the court rendered judgment "against the plaintiff and in favor of the defendants in this declaratory judgment action." From that judgment, the plaintiff appealed to this court.

I

We first address the court's determination that the installment payment of $62.24, rather than the $124.48 listed on the cancellation notice, was the amount "that was actually due" to avoid cancellation of the policy. On appeal, the plaintiff challenges the propriety of that determination. When the trial court has resolved factual disputes that underlie insurance coverage issues, those findings are reviewable on appeal subject to the clearly erroneous standard. *National Grange Mutual Ins. Co.* v. *Santaniello*, 290 Conn. 81, 90, 961 A.2d 387 (2009). "Such a finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [A] finding is clearly erroneous when there is no evidence in the record to

putation system' that somehow calculates an amount the company believes would restore 'premium equity.' "

support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) Id.

It is undisputed that the installment payment due before June 11, 2012 was $62.24. It also is undisputed that the insured defendants did not make that payment. The plaintiff subsequently sent the cancellation notice to the insured defendants on June 19, 2012. In that notice, the plaintiff advised them that the policy would be cancelled in fifteen days on July 4, 2012. The cancellation notice also provided the insured defendants with the opportunity to cure their default by making payment of $124.48 prior to July 4, 2012. The corresponding billing invoice sent to the insured defendants explained that payment of that amount was necessary "in order to maintain regular installment billing." At trial, the court heard testimony from the plaintiff's underwriting staff consultant that the $124.48 amount listed on the cancellation notice was necessary to maintain regular installment billing under the policy. In other words, the amount due reflected the $62.24 installment payment that was past due and an additional $62.24 that the insured was obligated to pay for the July installment in order to be current on premiums due pursuant to the installment billing cycle. The defendants did not present any evidence to the contrary.

The court nevertheless found that the amount "that was actually due" by July 4, 2012, to cure the insured defendants' default on their June installment was $62.24. There is no evidence in the record to substantiate that determination. Moreover, the court provided no authority, and we are aware of none, for the proposition that the amount specified as necessary to resume regular installment payments cannot exceed the initial

amount of default. In response to the court's memorandum of decision, the plaintiff requested an articulation of the factual and legal bases for the court's finding as to the actual amount due to avert cancellation and its conclusion "that the cancellation premium as stated in the cancellation notice was required to mirror the regular installment premium that had not been paid." The court summarily denied that request.

Our review of the record reveals no evidentiary support for a finding that $62.24, rather than the $124.48 listed on the cancellation notice, was the amount actually due to the plaintiff to avoid cancellation of the policy. The cancellation notice, the June 15, 2012 billing invoice, the subsequent billing invoice sent on June 26, 2012, following the partial payment by the insured defendants, and Yeager's testimony at trial all indicate otherwise. The record reflects that the insured defendants did not pay $124.48 by July 4, 2012, which was the amount of premiums due by that date to remain current on the installment billing cycle. The court's finding, therefore, was clearly erroneous.

II

The plaintiff further claims that, irrespective of whether the amount due to cure the default was $62.24 or $124.48, the undisputed evidence is that the insured defendants failed to tender such payment and that the court improperly applied the doctrine of substantial compliance to excuse their nonpayment. We agree.

"The substantial compliance rule is an equitable doctrine";[8] *In re Eagle-Picher Industries, Inc.*, 285 F.3d

[8] Although "[i]n an action seeking a declaratory judgment, the sole function of the trial court is to ascertain the rights of the parties under existing law"; *Middlebury* v. *Steinmann*, 189 Conn. 710, 715, 458 A.2d 393 (1983); our Supreme Court has recognized that "the trial court may, in determining the rights of the parties, properly consider equitable principles in rendering its judgment." Id.

522, 529 (6th Cir.), cert. denied sub nom. *Baltimore* v. *West Virginia*, 537 U.S. 880, 123 S. Ct. 90, 154 L. Ed. 2d 137 (2002); that has been applied in limited circumstances in this state. As our Supreme Court has observed, "[t]he substantial compliance doctrine has its genesis in Connecticut as a narrow exception to the requirement that the owner of an insurance policy could change the beneficiary only by strictly complying with the terms of the policy." *Engelman* v. *Connecticut General Life Ins. Co.*, 240 Conn. 287, 295, 690 A.2d 882 (1997). In *Engelman*, the court formally affirmed the substantial compliance doctrine "as the law of this state"; id., 298; and concluded that "the owner of a life insurance policy will have effectively changed the beneficiary if the following is proven: (1) the owner clearly intended to change the beneficiary and to designate the new beneficiary; *and* (2) the owner has taken substantial affirmative action to effectuate the change in the beneficiary." (Emphasis in original.) Id. Throughout this country, numerous jurisdictions have applied the substantial compliance doctrine in that context.[9]

[9] See, e.g., *Metropolitan Life Ins. Co.* v. *Johnson*, 297 F.3d 558, 564 (7th Cir. 2004) ("[t]he Illinois doctrine of substantial compliance applies generally to life insurance policy beneficiary designations"); *Green* v. *Jackson National Life Ins. Co.*, 195 Fed. Appx. 398, 402 (6th Cir. 2006) ("[u]nder Ohio law, where the insured has an unconditional right to change the beneficiary of an insurance policy, a change may be effected even if the provisions of the policy setting forth the manner of effecting the change were not complied with exactly" [internal quotation marks omitted]); *Haste* v. *The Vanguard Group, Inc.*, 502 S.W.3d 611, 614 (Ky. App. 2016) ("[t]he substantial compliance doctrine has commonly been applied when the only question concerns the identity of a beneficiary under a life insurance policy"), review denied sub nom. *Haste* v. *Moore*, Docket No. 2016-SC-00380-D (2016 Ky. LEXIS 607) (Ky. December 8, 2016); *Bowers* v. *Kushnick*, 774 N.E.2d 884, 887 (Ind. 2002) ("[w]hen the terms of the [life insurance] policy have not been met, substantial compliance is an equitable doctrine employed to aid in completing an incomplete change of beneficiary in an insurance policy" [internal quotation marks omitted]); *Kentucky Central Life Ins. Co.* v. *Vollenweider*, 844 S.W.2d 460, 462 (Mo. App. 1992) ("Missouri does recognize the equitable doctrine of substantial compliance to carry out the intent of a person with authority to change beneficiaries under an insurance policy where said person has not strictly complied with the method provided by an insurance

Although the court here cited to *Engelman* in its memorandum of decision, that precedent is plainly distinguishable from the present case, as it involved neither an automobile insurance policy nor nonpayment of insurance premiums.

Our Supreme Court also has applied the substantial compliance doctrine in the context of a contractual option to purchase real estate conditioned on a lessee's compliance with a lease. *Pack 2000, Inc.* v. *Cushman*, 311 Conn. 662, 680, 89 A.3d 869 (2014). Although the present case does not arise in that context, that decision nevertheless merits attention.

In *Pack 2000, Inc.*, the court noted that "[t]he doctrine of substantial *compliance* is closely intertwined with the doctrine of substantial *performance*." (Emphasis added; internal quotation marks omitted.) Id., 675. The court explained that "[t]he doctrine of substantial performance shields contracting parties from the harsh effects of being held to the letter of their agreements. Pursuant to the doctrine of substantial performance, a *technical* breach of the terms of a contract is excused, not because compliance with the terms is objectively impossible, but because actual performance is so similar to the required performance that any breach that may have been committed is *immaterial*." (Emphasis added; internal quotation marks omitted.) Id. The court

policy to change a beneficiary"); *Adams* v. *Jefferson-Pilot Life Ins. Co.*, 148 N.C. App. 356, 360, 558 S.E.2d 504 (substantial compliance doctrine "has evolved over time to address situations such as the present one, in which an insured completes a change of beneficiary form, only to die before recordation and filing of the document is completed"), review denied, 356 N.C. 159, 568 S.E.2d 186 (2002); *Empire General Life Ins. Co.* v. *Silverman*, 379 N.W.2d 853, 856 (Wisc. App. 1985) ("[t]he substantial compliance doctrine, followed in the majority of jurisdictions, states that when an insured has substantially complied with policy requirements for a beneficiary change by doing all in his or her power to conform to policy formalities, but dies before completion, the change will be deemed effective"), modified on other grounds, 135 Wis. 2d 143, 399 N.W.2d 910 (1987).

then stated that "the present case does not involve a material breach of the terms of the parties' agreements." Id., 680 n.10. Accordingly, the court concluded that "when an option is conditioned on a lessee's compliance with a lease, in the absence of explicit contractual language to the contrary, a substantial rather than strict compliance standard applies so that, if the lessee *is not in material breach* of the lease when he seeks to exercise the option and has not previously been defaulted under the terms of the lease, the option is enforceable against the lessor." (Emphasis added.) Id., 680.

Thus, the proper application of the doctrine of substantial performance requires a determination as to whether the contractual breach is material in nature. As one commentator has observed, "[s]ubstantial performance is the antithesis of material breach; if it is determined that a breach is material, or goes to the root or essence of the contract, it follows that substantial performance has not been rendered . . . ." 15 R. Lord, Williston on Contracts (4th Ed. 2014) § 44:55, p. 271; see also 2 Restatement (Second), Contracts § 237, comment (a), p. 215 (1981) ("a material failure of performance, including defective performance as well as the absence of performance, operates as the non-occurrence of a condition"). For that reason, the doctrine of substantial performance applies only "where performance of a *nonessential* condition is lacking, so that the benefits received by a party are far greater than the injury done to him by the breach of the other party." (Emphasis added; internal quotation marks omitted.) *Officer* v. *Chase Ins. Life & Annuity Co.*, 541 F.3d 713, 718 (7th Cir. 2008).

The doctrine of substantial performance arises "in many guises"; 8 C. McCauliff, Corbin on Contracts (J. Perillo ed., Rev. Ed. 1999) § 36.5, p. 342; including "contracts for the sale of land or of goods, contracts for

the rendering of personal service, and contracts for manufacture and transportation, as well as contracts for the building of buildings or for other creative construction." (Footnotes omitted.) Id., § 36.2, pp. 336–37; accord 15 R. Lord, supra, § 44:52, pp. 248–51 (doctrine of substantial performance "applies to construction contracts, service agreements, settlement agreements, and employment contracts, among others" [footnotes omitted]). The doctrine has been applied frequently by the courts of this state in the context of construction contracts. See, e.g., *Vincenzi* v. *Cerro*, 186 Conn. 612, 617, 442 A.2d 1352 (1982); *Absolute Plumbing & Heating, LLC* v. *Edelman*, 146 Conn. App. 383, 399, 77 A.3d 889, cert. denied, 310 Conn. 960, 82 A.3d 628 (2013); *Clem Martone Construction, LLC* v. *DePino*, 145 Conn. App. 316, 341, 77 A.3d 760, cert. denied, 310 Conn. 947, 80 A.3d 906 (2013); *DuBaldo Electric, LLC* v. *Montagno Construction, Inc.*, 119 Conn. App. 423, 437–39, 988 A.2d 351 (2010).

At the same time, resort to the doctrine has been expressly foreclosed in certain contexts. For example, in *Fidelity Bank* v. *Krenisky*, 72 Conn. App. 700, 715, 807 A.2d 968, cert. denied, 262 Conn. 915, 811 A.2d 1291 (2002), the defendants claimed that "by timely making their mortgage payments for nine years, they had substantially performed their obligations despite their failure to make timely payments of property taxes and to send receipts of property tax payments to the plaintiff." This court disagreed, stating in relevant part: "The defendants have failed to show . . . that the doctrine of substantial performance applies in the context of a mortgagor's obligation to make payments to a mortgagee pursuant to a note and mortgage. . . . [T]he present case does not involve circumstances under which the traditional contract principles of strict compliance should yield. Here, the defendants failed to make tax payments as required by the terms of their note and

mortgage, which resulted in foreclosure; they have suffered no prejudice and do not bear the burden of a disproportionate forfeiture by strictly enforcing the terms of their contract." (Citations omitted.) Id., 715–16. The court further noted the practical implications of the defendants' proposed reliance on the doctrine of substantial performance, noting that "to allow mortgagors to make partial payments on their mortgages, and then avoid foreclosure by way of a claim of substantial performance, would result in the unsettling of the real estate market and an increase in litigation." Id., 716. The court thus concluded "that the doctrine of substantial performance does not apply to the present situation." Id.; accord *Gibson* v. *Neu*, 867 N.E.2d 188, 195 (Ind. App. 2007) (concluding that "[t]he doctrine of substantial performance does not apply" in mortgage context where "timely payment of the debt was an essential condition of the promissory note [and] mortgage").

The defendants in the present case have furnished no authority for the proposition that the doctrine of substantial performance applies in the context of the payment of automobile insurance premiums due on a monthly installment basis. Our research likewise has uncovered no such authority. As with mortgage payments, the timely payment of insurance premiums is an essential and material condition to automobile insurance policies issued throughout this state. See *Panizzi* v. *State Farm Mutual Automobile Ins. Co.*, 386 F.2d 600, 604 (3d Cir. 1967) ("[t]he agreed exchange for the insurer's promise is the payment of the premium"). The doctrine of substantial performance has no application in such instances, as "there can be no substantial performance when the performance owed is the payment of money and time is of the essence . . . ." 15 R. Lord, supra, § 44:52, pp. 253–54. As the United States Court of Appeals for the Eleventh Circuit recently noted, "[t]here is almost always no such thing as substantial

performance of payment . . . when the duty is simply the general one to pay. . . . Payment is either made in the amount and on the date due, or it is not." (Citation omitted; internal quotation marks omitted.) *Cafaro* v. *Zois*, Docket No. 16-15522, 2017 WL 2258535, *4 (11th Cir. May 23, 2017).

The policy at issue in the present case provides in relevant part that "[s]ubject to the limit of liability stated on your Declaration Page, if *you* pay the premium for Liability Coverage, *we* will pay damages for which an insured becomes legally liable . . . ." (Emphasis in original.) The policy further provides that "[w]e have no duty to provide coverage under this policy unless *you* have paid the required premium when due . . . ." (Emphasis in original.) Under the policy, then, timely payment is an essential and material condition to the contract between the parties. Because timely payment under the policy goes to the root and essence of the contract, the doctrine of substantial performance cannot excuse an insured's failure to make full payment of the monthly installment due under the policy.

To conclude otherwise would fundamentally upend the nature of automobile insurance in this state. "If the insured could force the insurer to accept premium payments in whatever portion of the total premium that the insured felt like paying at any given time, insurers would do business in a world of financial chaos that would adversely affect both insurers and insureds: with budgeting impossible, it would be a matter of pure chance whether a given insurer has sufficient funds available to pay major losses. As a consequence, it is universally acknowledged that an insurer cannot be forced to accept less than the premium due . . . . [W]hen the insurer has agreed to installment payments . . . an insurer cannot be compelled to accept a sum less than the full installment due at a given time." 5 S. Plitt et al., Couch on Insurance (3d Ed. Rev. 2012) § 72:1,

pp. 724–25. We therefore conclude that the doctrines of substantial performance and substantial compliance have no application in the context of automobile insurance payments due on a monthly installment basis.[10]

III

In his appellate brief, the administrator attempts to raise what he characterizes as "alternative grounds" of affirmance, arguing that the cancellation notice violates the Connecticut Unfair Insurance Practices Act (CUIPA), General Statutes § 38a-815 et seq., the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and the Creditors' Collection Practices Act (CCPA), General Statutes § 36a-645 et seq. It is undisputed that those grounds never were raised before, or decided by, the trial court. See *Connecticut Ins. Guaranty Assn.* v. *Fontaine*, 278 Conn. 779, 784 n.4, 900 A.2d 18 (2006) (alternative grounds for affirmance must be raised before trial court); *New Haven* v. *Bonner*, 272 Conn. 489, 497–99, 863 A.2d 680 (2005) (declining to consider alternative ground for affirmance that was not raised before trial court). "It is fundamental that claims of error must be distinctly raised and decided in the trial court." *State* v. *Faison*, 112 Conn. App. 373, 379, 962 A.2d 860, cert. denied, 291 Conn. 903, 967 A.2d 507 (2009). Our rules of practice require a party, as a prerequisite to appellate review, to distinctly raise such claims before the trial court. Practice Book § 60-5; see Practice Book § 5-2 ("[a]ny party intending to raise any question of law which may be the subject of an appeal must . . . state the question distinctly to the judicial authority"); see also *Remillard* v. *Remillard*, 297 Conn. 345, 351, 999 A.2d 713 (2010) (raised distinctly means party must bring to attention of trial court precise matter on which decision is being asked).

[10] We do not imply that the insured defendants' payment obligation would have been satisfied even if the doctrines did apply.

As our Supreme Court has explained, "[t]he reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." (Internal quotation marks omitted.) *Travelers Casualty & Surety Co. of America* v. *Netherlands Ins. Co.*, 312 Conn. 714, 761–62, 95 A.3d 1031 (2014). For that reason, Connecticut appellate courts generally "will not address issues not decided by the trial court." *Willow Springs Condominium Assn., Inc.* v. *Seventh BRT Development Corp.*, 245 Conn. 1, 52, 717 A.2d 77 (1998); see also *Crest Pontiac Cadillac, Inc.* v. *Hadley*, 239 Conn. 437, 444 n.10, 685 A.2d 670 (1996) (claims "neither addressed nor decided" by trial court are not properly before appellate tribunal). Moreover, we note that although the administrator filed a counterclaim in the present case, he did not raise any claim regarding CUIPA, CUTPA, or CCPA therein. We therefore decline to consider such claims in this appeal.

IV

The remaining question is whether the court improperly rendered judgment in favor of the defendants. The plaintiff maintains that it complied with every cancellation requirement set forth in both the General Statutes and the policy. As such, the plaintiff claims that the court improperly failed to conclude that it validly cancelled that policy. We agree.

At the outset, we note that "when written notice of cancellation is required, an insurer must comply strictly with policy provisions and statutory mandates." *Majernicek* v. *Hartford Casualty Ins. Co.*, 240 Conn. 86, 95, 688 A.2d 1330 (1997). Our analysis begins with the requirements contained in the General Statutes, the applicability of which presents a question of law over

which our review is plenary. *Dairyland Ins. Co.* v. *Mitchell*, 320 Conn. 205, 210, 128 A.3d 931 (2016).

General Statutes § 38a-342 authorizes an insurer to cancel an insurance policy due to "[n]onpayment of premium," which is defined in relevant part as the "failure of the named insured to discharge when due any of his obligations in connection with the payment of premiums on the policy, or any installment of such premium . . . ." General Statutes § 38a-341 (3). General Statutes § 38a-343 specifically delineates the requirements of a notice of cancellation furnished to an insured.[11] It requires the insurer to (1) send the notice

[11] General Statutes § 38a-343 (a) provides in relevant part: "No notice of cancellation of a policy to which section 38a-342 applies shall be effective unless sent, by registered or certified mail or by mail evidenced by a certificate of mailing, or delivered by the insurer to the named insured, and any third party designated pursuant to section 38a-323a, at least forty-five days before the effective date of cancellation, except that (1) where cancellation is for nonpayment of the first premium on a new policy, at least fifteen days' notice of cancellation accompanied by the reason for cancellation shall be given, and (2) where cancellation is for nonpayment of any other premium, at least ten days' notice of cancellation accompanied by the reason for cancellation shall be given. . . . The notice of cancellation shall state or be accompanied by a statement specifying the reason for such cancellation. . . ."

Section 38a-343 (b) provides: "Where a private passenger motor vehicle liability insurance company sends a notice of cancellation under subsection (a) of this section to the named insured of a private passenger motor vehicle liability insurance policy, or a third party designee, such company shall provide with such notice a warning, in a form approved by the Commissioner of Motor Vehicles and the Insurance Commissioner, that informs the named insured that (1) the cancellation will be reported to the Commissioner of Motor Vehicles; (2) the named insured may be receiving one or more mail inquiries from the Commissioner of Motor Vehicles, concerning whether or not required insurance coverage is being maintained, and that the named insured must respond to these inquiries; (3) if the required insurance coverage lapses at any time, the Commissioner of Motor Vehicles may suspend the registration or registrations for the vehicle or vehicles under the policy and the number plates will be subject to confiscation and any person operating any such vehicle will be subject to legal penalties for operating a motor vehicle with a suspended registration; (4) the named insured will not be able to have the registration restored or obtain a new registration, or any other registration or renewal in the insured's name, except upon

of cancellation in a certified manner; (2) provide fifteen days' notice with respect to nonpayment of the first premium of a new policy, and ten days' notice with respect to nonpayment of all other premiums; (3) provide a statement of the reason for cancellation; and (4) advise the insured of possible ramifications involving the Commissioner of Motor Vehicles. See General Statutes § 38a-343 (a) and (b). The policy in the present case contains similar requirements.

The plaintiff submits, and we agree, that the record indicates that it complied with the foregoing requirements. At trial, a certificate of mailing was admitting into evidence. See footnote 3 of this opinion. That mailing was sent to the insured defendants on June 19, 2012—fifteen days prior to the July 4, 2012 cancellation date.[12] In addition, the cancellation notice stated in relevant part: "You are hereby notified . . . that your insurance will cease at and from the hour and date mentioned above due to nonpayment of premium. . . ." The cancellation notice also warned the insured defendants of possible ramifications involving the Commissioner of Motor Vehicles.[13] That undisputed evidence demon-

presentation to the Commissioner of Motor Vehicles of evidence of required security or coverage and the entering into of a consent agreement with the commissioner in accordance with the provisions of section 14-12g."

[12] Because the cancellation notice did not pertain to the first premium of a new policy, the plaintiff was required to provide ten days' notice of cancellation to the insured defendants pursuant to § 38a-343.

[13] The notice stated in relevant part: "WARNING—Enforcement of Mandatory Insurance Requirements for Private Passenger Motor Vehicles: This cancellation will be reported to the Commissioner of Motor Vehicles. If you do not immediately return your registration marker plates you may receive one or more written inquiries from the Commissioner concerning whether or not the required minimum insurance has been maintained. You must respond to these inquiries. If your insurance coverage lapses, the Commissioner may suspend the registration(s) for the vehicle(s) covered under the policy. Your registration marker plates will be subject to confiscation. If you continue to operate the vehicle after the registration has been suspended, you will be subject to penalties for operating a motor vehicle with a suspended registration. You will not be able to have the registration restored or obtain a new registration or any other registration or renewal in your

strates that the plaintiff strictly complied with the applicable statutory and policy requirements.[14]

Under Connecticut law, an insurer is not obligated to provide an insured who has failed to pay his or her premium with an opportunity to cure that default, nor is the insurer obligated to specify the amount of the insured's payment delinquency. At the same time, "[t]o be effective, a notice of cancellation must be definite and certain." *Travelers Ins. Co.* v. *Hendrickson*, 1 Conn. App. 409, 412, 472 A.2d 356 (1984). The cancellation notice here meets that standard, as it plainly apprised the insured defendants that the policy would be cancelled due to their nonpayment of the June installment unless they tendered payment of $124.48 before July 4, 2012.

The undisputed facts of this case indicate that the insured defendants failed to make their June installment payment, which served as a proper basis for the cancellation of the policy. In addition to properly notifying

name until you: (1) present evidence of the required insurance coverage to the Commissioner of Motor Vehicles; (2) enter into a consent agreement with the Commissioner of Motor Vehicles which will include payment of a civil penalty of $200; (3) pay a fee of $50 if your plates have been confiscated."

[14] In its memorandum of decision, the court suggested that the cancellation notice misled the insured defendants. Such a determination is clearly erroneous, as there is no evidence in the record to substantiate that finding. The defendants did not present any evidence at trial and neither of the insured defendants testified.

Furthermore, at no time since the commencement of this litigation have the insured defendants maintained that they were misled by the cancellation notice provided by the plaintiff. We note that, in moving for summary judgment, the plaintiff submitted the April 15, 2013 deposition of insured defendant Perez as an exhibit thereto. In that deposition testimony, Perez made no claim that she was confused or misled by the cancellation notice provided by the plaintiff. Rather, she repeatedly stated that she understood that if she did not make payment of $124.48 by July 4, 2012, the policy would be cancelled. Perez further admitted that she did not make "full payment" by that date. Apart from that deposition testimony, the record before us contains no other statements by the insured defendants regarding the cancellation notice.

them that their policy would be cancelled due to that nonpayment, the notice furnished by the plaintiff offered the insured defendants an opportunity to avert cancellation and thereby resume regular installment payments. The record demonstrates, and the defendants do not dispute, that the insured defendants did not make the payment necessary to avert cancellation by July 4, 2012. We therefore agree with the plaintiff that it validly cancelled the policy in the present case.

The judgment is reversed and the case is remanded with direction to render judgment in favor of the plaintiff on its complaint and on the counterclaim filed by the administrator.

In this opinion the other judges concurred.

ELIZABETH BURKE *v.* GREGORY MESNIAEFF
(AC 38350)

Lavine, Keller and Bishop, Js.

Syllabus

The plaintiff brought this action for assault and battery against the defendant to recover damages for personal injuries she sustained during an incident involving the defendant. At the time of the incident, the parties, who were married, were residing in New York and had been experiencing marital problems. The defendant previously had purchased a house in Sharon and recorded the deed in his name only. The incident at issue occurred at the Sharon house, when a tour involving guests was being conducted at the house. The plaintiff learned of the tour and drove to Sharon to surprise and confront the defendant. When she entered the house she was enraged and screaming, and the tour guests were fearful of her conduct and concerned for their safety. The defendant told the plaintiff to leave, grabbed her upper arm, and escorted her from the house and down the driveway, but the plaintiff resisted the defendant's escort and attempted to strike him and to break loose from his hold to return to the house. The plaintiff thereafter commenced this action, and the defendant filed an answer and a number of special defenses, including justification, wrongful conduct and defense of others. The plaintiff did not file a request to revise or a motion to strike any of the amended special defenses. After a trial, the jury returned a verdict in favor of

the defendant, finding that his conduct toward the plaintiff constituted intentional assault and battery and was a substantial factor in causing her injuries, but that the plaintiff's recovery was barred by the special defenses of justification and defense of others. The court rendered judgment in accordance with the verdict, and the plaintiff appealed to this court. *Held*:

1. The plaintiff could not prevail on her claim that the trial court improperly charged the jury with respect to the defendant's special defense of justification by incorporating a charge on criminal trespass:

   a. The plaintiff could not prevail on her claim that the charge was improper because, as a matter of law, she could not have been trespassing on the subject premises, which she claimed was marital property; the jury did not find that the plaintiff had trespassed on the premises, and even if this court were to assume that the jury had been misled by the criminal trespass charge, the plaintiff was not harmed by it because the jury found that her recovery was not barred by the doctrine of wrongful conduct, which necessarily relates to trespassing.

   b. The plaintiff's claim that the charge of criminal trespass was improper because she did not have notice of the statute on which the defendant had grounded his justification special defense was unavailing; despite the defendant's failure to identify the pertinent statute (§ 53a-20) specifically by number as required by the rules of practice (§ 10-3 [a]), the plaintiff had sufficient notice of the defendant's criminal trespass special defense, as trespass had been alleged several times in the defendant's special defenses and her counsel had made a strategic decision not to file a request to revise or a motion to strike any of the defendant's special defenses, and the plaintiff failed to demonstrate that the jury had been misled or that she was harmed by the court's use of the term trespass in its charge, as the jury, in finding that the plaintiff's claims were not barred by the defendant's wrongful conduct special defense, necessarily found that the plaintiff had not committed criminal trespass.

   c. The trial court properly did not charge the jury with regard to whether the defendant had a duty to retreat during the subject incident, as the duty to retreat exception pertains to the use of deadly physical force, which was not an issue in the present case.

2. There was sufficient evidence in the record on which the jury reasonably could have relied in determining that the defendant was acting in defense of others during the subject incident; the record revealed that the plaintiff unexpectedly entered the Sharon house and began shouting in a loud and aggressive manner, causing the tour guests to be concerned for their safety, that, in response, the defendant took the plaintiff by the arm and escorted her from the house, and that the plaintiff resisted the defendant's escort and attempted to strike him and to break loose from his hold to return to the house, and, therefore, under those circumstances, the jury reasonably could have found that the defendant's

response was reasonable and that he had used reasonable physical force in the defense of others when he escorted the plaintiff from the house. (*One judge dissenting*)

Argued February 15—officially released November 7, 2017

Procedural History

Action to recover damages for, inter alia, assault and battery, and for other relief, brought to the Superior Court in the judicial district of Litchfield and transferred to the judicial district of Stamford-Norwalk, where the matter was tried to the jury before *Lee*, *J.*; verdict and judgment for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

Campbell D. Barrett, with whom were Johanna Katz and, on the brief, *Anne C. Dranginis*, *Jon T. Kukucka*, *Gabrielle Levin* and *Naomi Takagi*, pro hac vice, for the appellant (plaintiff).

Charles S. Harris, with whom was *Stephanie C. Laska*, for the appellee (defendant).

Opinion

LAVINE, J. In this personal injury action, the plaintiff, Elizabeth Burke, appeals from the judgment of the trial court, rendered after a jury trial, in favor of the defendant, her former husband Gregory Mesniaeff. On appeal, the plaintiff claims that (1) the court improperly charged the jury on the defendant's special defense of justification and (2) the special defense of defense of others was legally and factually barred. We affirm the judgment of the trial court.

The following relevant evidence was presented to the jury. The plaintiff and the defendant married one another in 1989. On December 5, 2009, the date of the incident that is the subject of the present appeal (incident), the parties resided together in their home in New Rochelle, New York. The defendant, however, purchased a house in Sharon in 1998 and recorded the

deed in his name alone. According to the defendant, the plaintiff never lived in the Sharon house, except for two weeks in August, 2002. The plaintiff, however, testified that the parties spent extensive amounts of time at the Sharon house. She testified that she had painted the interior of the house in a color scheme that she had selected, had a key to the house, and kept clothing and other personal belongings there.

The defendant was a member of a historic preservation organization called The Questers. The Questers facilitated a tour of the Sharon house that the defendant arranged to take place between 2:30 and 4 p.m. on December 5, 2009. The defendant intentionally did not tell the plaintiff about the tour, did not invite her to attend, and did not want her to attend because she was not a member of The Questers. He also was "afraid that there could be some problems if she was there."[1] The plaintiff, however, learned of the tour the morning of December 5, 2009, when she went online to find out when the Sharon Christmas tree lighting ceremony was to take place. While she was online, she saw The Questers' posting regarding the tour of the Sharon house. The plaintiff was concerned about the cleanliness of the Sharon house because the defendant set cleaning limits. She telephoned the defendant at his Manhattan office, but was unable to reach him. According to the plaintiff, the parties had plans to attend a Christmas party in Manhattan that evening, but the defendant denied having such plans.

Although it snowed on December 5, 2009, the plaintiff drove to Sharon because the defendant had been "lying to [her] about everything and [she] knew that when

[1] The parties had been experiencing marital difficulties for approximately one year prior to the incident. In the week before to the incident, the plaintiff consulted a divorce attorney. Subsequent to the incident, the defendant commenced an action for the dissolution of the parties' marriage; the parties were divorced at the time of trial in the present matter.

[she] met him in Manhattan later that night, he would deny that such a tour took place. And [she] couldn't take the lying anymore and he would deny it and [she] was hoping to talk to him and figure out why he was lying to [her] about everything." On her way to Sharon, the plaintiff called some of her friends to advise them that she was going to surprise and confront the defendant about his alleged lying. She also stopped at Powers' greenhouse and told Laurel Powers and Eddie Powers that the defendant "had been physically violent with [her] before and there was a possibility that that could happen again so [she] wanted them to make sure that they heard from [her] and to check on [her]." As a safety precaution, the plaintiff planned to arrive at the end of the tour when people were still in the house.

The plaintiff arrived at the Sharon house at approximately 4:15 p.m. Three women, Anne Teasdale, Suzanne Chase Osborne, and Lauren Silberman, were taking part in the tour when she arrived. The plaintiff did not park her car in the driveway, but near the guest cottage and walked down the driveway to the Sharon house. She entered the house by the back entry. Teasdale testified that, when the plaintiff walked into the house, she was yelling. According to one of the guests, the plaintiff was out of control when she entered the house, shrieking and yelling, "who is that woman and what is she doing in my house." One guest "didn't know if our lives were in danger [or if the plaintiff] had a gun and she was going to go after [the defendant]."

The defendant testified that when the plaintiff entered the house, she was enraged, repeatedly screaming in a shrill voice: "Who is that woman? Why is she in my house?" The defendant confronted the plaintiff and stated, "you are leaving now." The plaintiff admitted that the defendant asked her to leave. The defendant took the plaintiff by the upper right arm and walked her down the driveway. Out a window, one of the guests

saw the defendant holding the plaintiff by the arm. While they were walking down the driveway, the plaintiff attempted to break from the defendant's grasp and return to the house. The plaintiff was screaming, and one of the guests "was really worried about our safety, my safety, everyone's safety."

According to the defendant, while he and the plaintiff were walking down the driveway, the plaintiff resisted and attempted to strike him in the face. He admitted that he restrained the plaintiff from returning to the Sharon house where the guests remained. He also admitted that he caused bruises to the plaintiff's upper arm, but he denied that he caused other injuries to the plaintiff.

The plaintiff's version of the incident differs from that of the defendant. She denied that she tried to strike the defendant. According to her, the defendant grabbed her by the arm, pulled her away from the Sharon house, put her in a headlock, and dragged her down the driveway and up the sidewalk toward the Sharon Center School. While he was dragging her, the defendant forcefully threw the plaintiff to the ground several times and pulled her up by her arm. The plaintiff screamed: "Help, help! Call the police!" The defendant denied throwing the plaintiff to the ground but testified that the plaintiff slipped once or twice on the snow and that he helped her up.

At the time, Pierce Kearney and his wife were driving by on their way to the Christmas tree lighting ceremony on the Sharon green. Kearney saw the plaintiff being pushed into the snow. He slowed down, opened the window, and heard the plaintiff calling for someone to call the police. Kearney thought that the defendant was handling the plaintiff in an aggressive fashion. He got out of his vehicle and approached the parties, who then separated. The defendant stated to him, "It's okay, she's

my wife." Kearney got between the parties and stated, "No, this is over." Kearney's wife called the police. The defendant left the sidewalk, returned to the Sharon house, and departed with the tour guests.

The plaintiff commenced the present action on December 6, 2011.[2] Trial commenced on August 4, 2015. Following the presentation of evidence, the court held a charge conference on the record, at which time the court heard considerable argument from the parties' counsel with respect to its proposed instructions. The parties, however, agreed on the interrogatories that were submitted to the jury.[3] The jury returned a defendant's verdict on August 18, 2015. Although the jury

[2] The plaintiff placed the writ of summons and complaint in the hands of a marshal on December 2, 2011, pursuant to General Statutes § 52-593a.

[3] The court submitted the following interrogatories to the jury. The jury's responses to the interrogatories are key to our resolution of the plaintiff's claim that the court's instruction misled the jury. The plaintiff's verdict form included, in part, the following questions; the jury's answers are in brackets.

"1. Assault and Battery (Answer All)

"a. We find that the conduct of [the defendant] on December 5, 2009 constituted intentional assault and battery.

"Yes __[X]___ No _____

"b. We find that the conduct of [the defendant] on December 5, 2009 constituted reckless assault and battery.

"Yes _____ No __[X]___

"c. We find the conduct of [the defendant] on December 5, 2009 constituted negligent assault and battery.

"Yes _____ No __[X]___

"2. Infliction of Emotional Distress (Answer All)

"a. We find that the conduct of [the defendant] on December 5, 2009 constituted intentional infliction of emotional distress.

"Yes _____ No __[X]___

"b. We find that the conduct of [the defendant] on December 5, 2009 constituted negligent infliction of emotional distress.

"Yes _____ No __[X]___

"3. Proximate Cause

"We find that the conduct of [the defendant] on December 5, 2009 was a substantial factor in causing or aggravating the injuries and damages of [the plaintiff].

"Yes __[X]___ No _____

"(If you answered no, you must render a Defendant's Verdict, using the Defendant's verdict form.)

found that the defendant's conduct toward the plaintiff on December 5, 2009, constituted intentional assault and battery and was a substantial factor in causing the plaintiff's injuries, it also found that the plaintiff's recovery was barred by the special defenses of justification and defense of others. See footnotes 3 and 6 of this opinion. The court rendered judgment in favor of the defendant, and the plaintiff appealed.[4]

The plaintiff's claims on appeal center on the court's jury charge. We therefore set forth the applicable standard of review. "Our standard of review concerning claims of instructional error is well settled. [J]ury instuctions must be read as a whole and . . . are not to be judged in artificial isolation from the overall charge. . . . The whole charge must be considered from the standpoint of its effect on the jurors in guiding them to a proper verdict . . . and not critically dissected in a microscopic search for possible error. . . . The instruction must be adapted to the issues and may not mislead the jury but should reasonably guide it in reaching a verdict. . . . We must review the charge as a whole to determine whether it was correct in law and sufficiently guided the jury on the issues presented at trial. . . .

"Our standard of review on this claim is whether it was reasonably probable that the jury was misled. . . .

"4. Defendant's Defenses (Answer all)

"a. We find Plaintiff's recovery is barred by the doctrine of justification

"Yes __[X]___ No _____

"b. We find Plaintiff's recovery is barred by the doctrine of self-defense

"Yes _____ No __[X]___

"c. We find Plaintiff's recovery is barred by the doctrine of defense of others

"Yes __[X]___ No _____

"d. We find Plaintiff's recovery is barred by the doctrine of wrongful conduct

"Yes _____ No __[X]___ . . . ."

[4] The plaintiff did not file a motion to set aside the verdict.

The test of a court's charge is not whether it is as accurate upon legal principles as the opinions of a court of last resort but whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . Therefore, jury instructions need not be exhaustive, perfect, or technically accurate. Nonetheless, the trial court must correctly adapt the law to the case in question and must provide the jury with sufficient guidance in reaching a correct verdict." (Internal quotation marks omitted.) *Opotzner* v. *Bass*, 63 Conn. App. 555, 558–59, 777 A.2d 718, cert. denied, 257 Conn. 910, 782 A.2d 134 (2001), cert. denied, 259 Conn. 930, 793 A.2d 1086 (2002).

To determine whether the court properly charged the jury, we look to the law regarding a court's instructions. "Jury instructions should be confined to matters in issue by virtue of the pleadings and evidence in the case." (Internal quotation marks omitted.) *Cooks* v. *O'Brien Properties, Inc.*, 48 Conn. App. 339, 350, 710 A.2d 788 (1998). "[P]leadings have their place in our system of jurisprudence. While they are not held to the strict and artificial standard that once prevailed, we still cling to the belief, even in these iconoclastic days, that no orderly administration of justice is possible without them. . . . The purpose of a complaint, special defense or counterclaims is to limit the issues at trial, and such pleadings are calculated to prevent surprise." (Citation omitted; internal quotation marks omitted.) *Shapero* v. *Mercede*, 77 Conn. App. 497, 503, 823 A.2d 1263 (2003). We therefore briefly review the allegations of the parties' pleadings as they form the framework of the court's jury charge.

The plaintiff amended her complaint several times. Although she filed the operative complaint at the close of evidence to conform her alleged injuries to the evidence, the relevant allegations are consistent with her

March 20, 2015 amended complaint. It alleges six counts against the defendant: intentional assault and battery, reckless assault and battery, negligent assault and battery, intentional infliction of emotional distress, negligent infliction of emotional distress, and reckless infliction of emotional distress. The plaintiff also alleged that, as a direct and proximate result of the defendant's assault and battery, she sustained numerous injuries, including injuries to her left arm, neck, lower back, hip, and leg, and experienced depression, anxiety, and an aggravation of her lupus condition.[5] The allegations that are relevant to the plaintiff's instructional claim are that the defendant was the owner of the Sharon house and that she was married to him on the date of the incident.

On May 1, 2015, the defendant filed an amended answer and special defenses in response to the plaintiff's amended complaint dated March 20, 2015. He admitted that he was the owner of the Sharon house and that he was married to the plaintiff on the date of the incident. He denied the allegations as to his conduct and that he caused the plaintiff's alleged injuries. He also alleged thirteen special defenses, some of which were equitable in nature. The plaintiff moved to strike the equitable special defenses, and on May 28, 2015, the defendant filed nine amended special defenses. In four of his special defenses, the defendant alleged that at the time of the incident the plaintiff was *trespassing*.[6]

[5] The plaintiff presented evidence that she incurred damages of $267,512.95 for medical care and treatment.

[6] The defendant's relevant special defenses alleged in part:

"Fourth Special Defense: Wrongful Conduct

"The plaintiff is barred, in whole or in part, from pursuing her claims under the doctrine of wrongful conduct. On December 5, 2009, the plaintiff was *trespassing* on the premises. The plaintiff exhibited disorderly conduct and/or was creating a public disturbance. In addition, the plaintiff was assaulting and/or battering the defendant. . . .

"Seventh Special Defense: Self Defense

"With respect to the allegations of December 5, 2009, any actions taken by the defendant were in self-defense. The plaintiff was *trespassing* at the time of the incident and was assaulting and/or battering the defendant.

The plaintiff did not file a request to revise or a motion to strike the trespassing allegations, but merely filed a single general denial of all of the special defenses.

I

The plaintiff claims that the court improperly charged the jury with respect to the defendant's special defense of justification by incorporating a charge on criminal trespass.[7] More specifically, the plaintiff claims that (1)

"Eighth Special Defense: Defense of others

"With respect to the allegations of December 5, 2009, any actions taken by the defendant were in defense of others. The plaintiff was *trespassing* at the time of the incident and was acting in a disorderly manner.

"Ninth Special Defense: Justification

"At the time of the incident, the plaintiff was *trespassing* on the defendant's property. The plaintiff, knowing that she was not licensed or privileged to do so, entered and remained on the property. Despite the defendant, who is the owner of the property, directing her to leave, the plaintiff refused to do so. The plaintiff then continued to exhibit disorderly conduct and/or create a public disturbance. As such, the defendant was justified in using reasonable force in escorting the plaintiff from the premises." (Emphasis added.)

[7] The following portion of the court's charge is at the center of the plaintiff's claims on appeal: "Justification is a general defense to the use of physical force. The use of physical force upon another person that results in actual injury, while usually a criminal assault, is not criminal if it is permitted or justified by a provision of law or statute.

"Therefore, when one is accused of committing an assault claims that he or she acted under a legal justification, the jury must examine the circumstances and discover whether the act was truly justified. The court's function in instructing the jury is to tell the jury the circumstances which the use of physical force against another person is legally justified.

"Justification defenses focus on the defendant's reasonable beliefs as to circumstances and the necessity of using force. The jury must view the situation from the perspective of the defendant. However, the defendant's belief ultimately must be found to be reasonable. *For example, a person in possession or control of premises is justified in using reasonable physical force upon another person when and to the extent that he reasonably believes such to be necessary to prevent or terminate the commission or attempted commission of a criminal trespass by such other person in or upon such premises. A person commits criminal trespass when, knowing that such person is not licensed or privileged to do so, such person enters or remains in a building or any other premises, after an order to leave, or after an order not to enter, that was personally communicated to such person by the owner of the premises.*

"The claim focuses on what the defendant reasonably believes under the circumstances and presents a question of fact. The jury's initial determina-

tion requires the jury to assess the veracity of witnesses, often including the defendant, and to determine whether the defendant's account of his belief at the time of the confrontation is in fact credible. The jury must make a further determination as to whether that belief was reasonable, from the perspective of a reasonable person in the defendant's circumstances.

"The defendant's conduct must be judged ultimately against that of a reasonably prudent person. It is not required that the jury find that the victim, was in fact, using or about to use physical force against the defendant. . . .

"The defendant raised the issues of self-defense and defense of others as to the incident on December 5, 2009. After you have considered all of the evidence in this case, if you find that the plaintiff has proved her claims you must go on to consider whether or not the defendant acted in self-defense of himself or of others.

"A person is justified in the use of force against another person that would otherwise be illegal if he is acting in the defense of himself or others under certain circumstances. The statue defining self-defense reads in pertinent part as follows:

" '[A] person is justified in using reasonable physical force upon another person to defend himself from what he reasonably believes to be the use or imminent use of physical force, and he may use such degree of force which he reasonably believes to be necessary for such purpose.'

"The statute requires that, before a defendant uses physical force upon another person to defend himself, he must have two 'reasonable beliefs.' The first is a reasonable belief that physical force is then being used or about to be used upon him. The second is a reasonable belief that the degree of force he is using to defend himself from what he believes to be an ongoing or imminent use of force is necessary for that purpose.

"A defendant is not justified in using any degree of physical force in self-defense against another if he provokes the other person to use physical force against him. Also, a defendant is not justified in using any degree of physical force in self-defense against another if he is the initial aggressor. A defendant cannot use excessive force in his self-defense or defense of others. . . .

"The defendant has also raised the defense of 'wrongful conduct,' claiming that the plaintiff is barred, in whole or in part, from pursuing her claims under the doctrine of wrongful conduct.

"The defendant alleges that on December 5, 2009, the plaintiff was trespassing on the premises and exhibiting disorderly conduct and/or creating a disturbance. The parties agree that the defendant did not invite the plaintiff to the historic tour. In addition, the defendant alleges the plaintiff entered and/or remained on the property after she was directed to leave by him, the owner of the property, and that she refused to do so, among other claims asserted with respect to trespassing. The plaintiff does not dispute that she was told to leave. The defendant also alleges that the plaintiff was exhibiting disorderly conduct and/or creating a public disturbance. The defendant also alleges that the plaintiff was assaulting and/or battering him during the incident of December 5, 2009.

"Under Connecticut law, a plaintiff may not maintain a civil action for injuries allegedly sustained as the direct result of her knowing and intentional participation in a criminal act. The wrongful conduct defense does not apply

as a matter of law, she could not have been trespassing on marital property, (2) the defendant failed to plead that his special defenses relied on a criminal statute, and (3) it was plain error for the court not to include an instruction on the duty to retreat and the mere words doctrine. We conclude that the jury was not misled by the court's instruction, and, therefore, the plaintiff's claim fails.

The plaintiff takes issue with the following portion of the court's charge. "The defendant has also raised the defense of 'wrongful conduct,' claiming that the plaintiff is barred, in whole or in part, from pursuing her claims under the doctrine of wrongful conduct.

"The defendant alleges that on December 5, 2009, the plaintiff was trespassing on the premises and exhibiting disorderly conduct and/or creating a disturbance. The parties agree that the defendant did not invite the plaintiff to the historic tour. In addition, the defendant alleges the plaintiff entered and/or remained on the property after she was directed to leave by him, the owner of the property, and that she refused to do so, among other claims asserted with respect to trespassing. The plaintiff does not dispute that she was told to leave. The defendant also alleges that the plaintiff was exhibiting disorderly conduct and/or creating a public disturbance. The defendant also alleges that the plaintiff was assaulting and/or battering him during the incident of December 5, 2009.

"Under Connecticut law, a plaintiff may not maintain a civil action for injuries allegedly sustained as the direct result of her knowing and intentional participation in a criminal act. The wrongful conduct defense

if you find that the plaintiff sustained injuries and damages independent of any wrongful conduct of the plaintiff. It further applies only if the plaintiff has violated the law in connection with the very transaction as to which she seeks redress or relief." (Emphasis added.)

does not apply if you find that the plaintiff sustained injuries and damages independent of any wrongful conduct of the plaintiff. It further applies only if the plaintiff has violated the law in connection with the very transaction as to which she seeks redress or relief."

A

The plaintiff claims that the court improperly gave a criminal trespass charge because, as a matter of law, she could not trespass at the Sharon house because it was marital property.[8] The gist of the plaintiff's claim is that because on the date of the incident she was married to the defendant, who owned the Sharon house, she had a right to be on the premises and, therefore, could not trespass. We need not determine whether the plaintiff had a right to be on the premises because the jury did not find that she was trespassing. The portion of the charge to which the plaintiff takes exception pertains to the defendant's fourth special defense: wrongful conduct. See footnotes 6 and 7 of this opinion. The jury found that the plaintiff's recovery was not barred by the doctrine of wrongful conduct. See footnote 3 of this opinion. In common parlance, trespassing is understood to be a form of wrongful conduct. We therefore construe the jury's findings to indicate it decided that the plaintiff was not trespassing. Even if we were to assume, which we do not, that the jury was misled by the inclusion of the criminal trespass charge in the court's instruction, the plaintiff was not harmed because the jury found that her recovery was not barred by the doctrine of wrongful conduct.

[8] "Marital property" is a term of art reserved for the distribution of assets in an action for marital dissolution. General Statutes § 46b-81 provides in relevant part that the court may assign to either party "all or any part of the estate of the other spouse" in a marital dissolution proceeding. See also General Statutes §§ 46b-36 and 46b-37; *Porter* v. *Thrane*, 98 Conn. App. 336, 342 n.6, 908 A.2d 1137 (2006) (neither husband nor wife acquires by virtue of marriage interest in real property of other during other's lifetime). We need not determine whether the Sharon house was marital property.

B

The plaintiff claims that it was improper for the court to include the charge of criminal trespass in its instruction because she did not have notice of the statute on which the defendant was relying. We agree with the plaintiff that our rules of practice provide that when a special defense is "grounded on a statute, the statute shall be specifically identified by its number." Practice Book § 10-3 (a). The plaintiff, however, has not demonstrated that she was harmed by the court's instruction that used the term criminal trespass. As discussed, the jury did not find that her claims were barred by the defendant's wrongful conduct special defense.

As previously noted, there was considerable disagreement between the parties with respect to the court's proposed jury instruction. During the charge conference, counsel for the plaintiff informed the court that the defendant's justification special defense was grounded in the defense of premises statute, which includes criminal trespass.[9] The plaintiff's counsel, therefore, objected to the court's proposed trespass charge on the ground that a spouse cannot trespass on marital property and that the defendant had failed to allege the statute number in his special defense as required by the rules of practice.

The following colloquy then took place between the court and counsel for the plaintiff:

"The Court: [Y]ou know . . . I wish there had been a motion to strike. I mean . . . look at some of these things and I'm saying that's . . . but you know . . .

[9] Defense counsel cited General Statutes § 53a-20, which provides in relevant part: "A person in possession or control of premises . . . is justified in using reasonable physical force upon another person when and to the extent that he reasonably believes such to be necessary to prevent . . . the commission or attempted commission of a criminal trespass by such other person in or upon such premises . . . ."

we're late in the day. . . . [W]e've had a trial. We've had pleadings now that have survived all that.

"[The Plaintiff's Counsel]: And it was late, and I didn't want . . . I was going to have to go and . . . and wait another six months to a year to get a new trial date if I pursued the motion to strike. That was . . . and so a decision was made and . . . my decision was made but that it's now up to . . . the court to charge the things out. Okay. So, I had . . . to go, and I had to make a tactical decision of delaying this trial for an extended period of time to be able to go and . . . have motions for summary judgment, motions [to] strike, and things like that, or to go to trial and have the trial judge at this moment in time have to make the tough calls on the fly as opposed to . . . in your chambers with . . . the leisure of four months to be able to go and do it."[10]

Counsel for the defendant argued that it was disingenuous of the plaintiff's counsel to make an issue of the statute number when the plaintiff failed to file a request to revise or a motion to strike. The defendant's counsel stated: "I think they have a duty to raise it, Your Honor . . . previously . . . if they're going to raise it today. They amended their complaint yesterday mid-trial, and now they're saying, well, we couldn't put in the statute that for months now we've been saying the same thing. And with respect to marital property, I think that is incorrect. This isn't marital property. The property was bought in his name, titled in his name."

The court was not persuaded by the arguments of the plaintiff's counsel, noting that although it was the

[10] The record discloses that the defendant first pleaded trespass in his answer and special defenses dated March 27, 2015. Trespass appears in four of his special defenses. The plaintiff filed a general denial of the special defenses on July 15, 2015, without having moved to strike any of the special defenses.

defendant's duty to plead the statute number, both parties had offered evidence on the issue of trespass. The court ruled that it was not going to exclude the trespass charge, as trespass was alleged several times in the defendant's special defenses, which was sufficient to put the plaintiff on notice. Despite its concern that the parties had not adhered to the rules of practice,[11] the court observed that the rules of practice are not to be applied so strictly as to work an injustice.[12] The court, therefore, charged the jury on the defendant's special defenses, including criminal trespass.[13]

"Although Practice Book § 10-3 (a) provides that when any claim in a complaint is grounded on a statute, the statute shall be specifically identified by its number, this rule has been construed as directory rather than mandatory. . . . [When] the [opposing party] is sufficiently apprised of the nature of the action . . . the failure to comply with the directive of Practice Book § 10-3 (a) will not bar recovery." (Internal quotation

[11] It is not the role of the trial court to frame the issues for trial but to admit legally and logically relevant evidence in accordance with the pleadings; see, e.g., *State* v. *Hunter*, 62 Conn. App. 767, 775, 772 A.2d 709 (2001); and to assist the jury in applying the law correctly to the facts they might find established. *State* v. *Blango*, 102 Conn. App. 532, 543, 925 A.2d 1186, cert. denied, 284 Conn. 913, 931 A.2d 932 (2007). The issues raised in this appeal are largely of the parties' own making in that they failed to comply with our rules of practice. See *Suntech of Connecticut, Inc.* v. *Lawrence Brunoli, Inc.*, 173 Conn. App. 321, 333–34 n.15, 164 A.3d 36 (2017).

[12] See Practice Book § 60-1; see also *Connecticut Light & Power Company* v. *Lighthouse Landings, Inc.*, 279 Conn. 103–104, 900 A.2d 1242 (2006) (rules are to be interpreted liberally in cases where strict adherence will work surprise or injustice).

[13] In his appellate brief, the defendant has pointed out that his special defenses initially were filed in March, 2015, and that the justification special defense, as well as others, included the words trespass and disorderly conduct. The court found that the plaintiff had notice of the subject statute and that she had failed to file a motion to strike, when she could have brought the issue to the attention of the court before the parties presented evidence as to whether she was trespassing at the Sharon house. The plaintiff does not claim that she objected to the presentation of evidence regarding trespass.

marks omitted.) *Colon* v. *Board of Education*, 60 Conn. App. 178, 188 n.4, 758 A.2d 900, cert. denied, 255 Conn. 908, 763 A.2d 1034 (2000); see also *Spears* v. *Garcia*, 66 Conn. App. 669, 676, 785 A.2d 1181 (2001), aff'd, 263 Conn. 22, 818 A.2d 37 (2003).

Although this is a civil action, the first count of the plaintiff's complaint alleges a criminal act, to wit: "the [d]efendant wilfully, intentionally and maliciously assaulted and battered the [p]laintiff." In response, the defendant alleged trespass in a number of his special defenses and, in his ninth special defense, that the plaintiff exhibited disorderly conduct and/or was creating a public disturbance. See footnote 6 of this opinion. Notably, the plaintiff was on notice of the defendant's defense, and her counsel made a tactical decision not to file a request to revise or a motion to strike any of the defendant's special defenses.

We conclude that the jury was not misled by the use of the word *trespass* in the court's charge. Although the court mentioned the commission of a criminal trespass, which it then defined, as an example of a justification defense permitting the use of reasonable physical force, the court went on to instruct the jury that the three justification defenses that the defendant alleged were self-defense, defense of others, and wrongful conduct as to the incident on December 5, 2009. See footnote 7 of this opinion. The fact that the court only charged on these three special defenses is further supported by the jury interrogatories, as the jury was not asked to determine whether the plaintiff's recovery was barred by the special defense of justification based on the defense of one's premises.

With respect to the court's instruction on the special defenses of defense of others and self-defense, the court properly did not advise the jury that the defendant had to prove that the plaintiff was trespassing as an element

of either of these special defenses. In fact, the court never mentioned the word trespassing in its instructions on these two special defenses.

As to the special defense of wrongful conduct, the court clearly instructed the jury that it would have to find that, during the incident on December 5, 2009, the plaintiff knowingly and intentionally participated in one of four criminal acts by criminally trespassing, exhibiting disorderly conduct, creating a public disturbance, or assaulting the defendant.

The jury answered interrogatories indicating that it had found that the plaintiff's claims were not barred by the special defenses of self-defense and wrongful conduct, but were barred by the special defense of defense of others. Because the court charged that the special defense of wrongful conduct required proof that the plaintiff had knowingly and intentionally participated in a criminal act by either criminally trespassing, exhibiting disorderly conduct, creating a public disturbance or assaulting the defendant, the jury, in finding that the defendant had failed to prove this special defense, concluded that the plaintiff had not violated the law, which necessarily included finding that she had not committed criminal trespass. Therefore, the plaintiff cannot prevail on this claim of an improper jury instruction.

C

The plaintiff claims that the court improperly charged the jury by failing to instruct that the defendant had a duty to retreat in the Sharon house because she was a codweller. See *State* v. *Shaw*, 185 Conn. 372, 382, 441 A.2d 561 (1981), cert. denied, 45 U.S. 1155, 102 S. Ct. 1027, 71 L. Ed. 2d 312 (1982). The plaintiff's claim is predicated on her belief that she dwelled in the Sharon house. We need not determine, however, whether she

dwelled in the Sharon house. The plaintiff did not preserve this claim at trial and seeks reversal of the judgment pursuant to the plain error doctrine. The plaintiff cannot prevail because the duty to retreat exception on which she relies pertains to the use of deadly force, which is not an issue in this case.

General Statutes § 53a-19 provides in relevant part that "(a) . . . a person is justified in using reasonable physical force upon another person to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force, and he may use such degree of force which he reasonably believes to be necessary for such purpose . . . (b) . . . a person is not justified in using deadly physical force upon another person if he or she knows that he or she can avoid the necessity of using such force with complete safety (1) by retreating, except that the actor shall not be required to retreat if he or she is in his dwelling . . . ." "The dwelling exception to the duty to retreat does not apply, however, if the actor is threatened by another person who also dwells in the same place." (Internal quotation marks omitted.) *State* v. *James*, 54 Conn. App. 26, 33, 734 A.2d 1012, cert. denied, 251 Conn. 903, 738 A.2d 1092 (1999). The court, therefore, properly did not charge the jury that the defendant had a duty to retreat.[14]

II

The plaintiff's last claim is that the defense of others special defense was legally and factually barred because there was insufficient evidence that the defendant was acting in defense of others when he assaulted her. When

[14] The plaintiff also claimed that the court should have instructed the jury that mere words cannot justify the use of force in defense of others. The plaintiff admits that she did not request this charge. The claim therefore has not been preserved, and we decline to review it. See *State* v. *Angell*, 36 Conn. App. 383, 393–94, 651 A.2d 263 (1994), aff'd, 237 Conn. 321, 627 A.2d 912 (1996).

reviewing sufficiency of the evidence claims we must determine "*in the light most favorable to sustaining the verdict*, whether the totality of the evidence, including reasonable inferences therefrom, supports the jury's verdict . . . ." (Emphasis in original; internal quotation marks omitted.) *Gaudio* v. *Griffin Health Services Corp.*, 249 Conn. 523, 534, 733 A.2d 197 (1999).

The defense of defense of others is codified in General Statutes § 53a-19 (a). "The defense of others, like self-defense, is a justification defense. These defenses operate to exempt from punishment otherwise criminal conduct when the harm from such conduct is deemed to be outweighed by the need to avoid an even greater harm or to further a greater societal interest." (Internal quotation marks omitted.) *State* v. *Bryan*, 307 Conn. 823, 832–33, 60 A.3d 246 (2013). "[T]he defendant bears the initial burden of producing sufficient evidence to raise the issue[s] of self-defense [and defense of others], this burden is slight." *State* v. *Terwilliger*, 105 Conn. App. 219, 224 n.5, 937 A.2d 735 (2008), aff'd, 294 Conn. 399, 984 A.2d 721 (2009).

"[I]t is not the function of this court to sit as a seventh juror when we review the sufficiency of the evidence . . . rather, we must determine, in the light most favorable to sustaining the verdict, whether the totality of the evidence, including reasonable inferences therefrom, supports the jury's verdict . . . . In making this determination, [t]he evidence must be given the most favorable construction in support of the verdict of which it is reasonably capable. . . . In other words, [i]f the jury *could* reasonably have reached its conclusion, the verdict must stand . . . ." (Emphasis added; internal quotation marks omitted.) *Mann* v. *Regan*, 108 Conn. App. 566, 579, 948 A.2d 1075 (2008).

On the basis of our review of the evidence, we conclude that there was sufficient evidence upon which

the jury reasonably could have reached its verdict that the defendant was acting in defense of others when he escorted the plaintiff from the Sharon house. Prior to arriving at the Sharon house, the plaintiff told some of her friends that she was going to the Sharon house during a house tour to surprise and confront the defendant about his "lying." When she arrived at the Sharon house, she did not park in the driveway but at the guest cottage. She entered the house from the rear and began to scream, "who is that woman and what is she doing in my house." The plaintiff was enraged and tour guests were fearful of her behavior. At least one guest was worried that the plaintiff may have had a gun.[15] The defendant told the plaintiff to leave and escorted her from the house. The plaintiff resisted the defendant's escort and attempted to strike him and to break loose from his hold to return to the house. Under those circumstances, the jury reasonably could have found that the defendant's response was reasonable in the face of the plaintiff's unexpectedly entering the house and shouting in a loud and aggressive manner.[16] Moreover,

[15] We cannot conclude that the guest's concern was unreasonable given the prevalence of gun violence in in our society, including domestic disputes. Jurors do not leave their common sense and life experience at the courthouse door. See *State* v. *Koslik*, 80 Conn. App. 746, 756, 837 A.2d 813, cert. denied, 268 Conn. 908, 845 A.2d 413 (2004).

[16] Plainly, there was sufficient evidence in the form of testimony for the jury to have concluded that the defendant acted in defense of others. He testified that as he escorted the plaintiff from the house, he "felt she was trying to run back into the house and confront the guests," and that his guests "were terrified." According to his testimony, one of the guests had a "look of horror and fear" on her face.

During their deliberations, the jury asked to review the testimony of two of the defendant's guests. The defendant was afraid that the plaintiff was going to do harm to them. Teasdale testified that she "didn't know if [their] lives were in danger. I didn't know if she had a gun and she was going to go after him. . . . I felt trapped in that house, and I didn't know what was going on. I was concerned for our safety. . . . I didn't know what was going on out there, and I was really worried about our safety, my safety, everyone's safety." Osborne testified that she "was scared" of the plaintiff. When the defendant returned to the house, he told the guests that for their "safety I'm taking you to the train now." Osborn also testified that "we were all

the jury reasonably could have found that the defendant took the plaintiff by the arm to escort her from the house and used reasonable physical force in the defense of others. On the basis of our review of the record, notwithstanding the fact that the charge to the jury was less than perfect, we conclude that the jury's verdict is supported by the evidence and by its common sense evaluation of what happened during the incident. The plaintiff's claim of insufficient evidence therefore fails.[17]

The judgment is affirmed.

In this opinion KELLER, J., concurred.

BISHOP, J., dissenting. As noted by the majority, the operative complaint in this matter, filed on August 12, 2015, contains six counts, including one count alleging intentional assault and battery.[1] Following trial, the jury determined, as revealed by answers to interrogatories propounded to them, that the defendant, Gregory Mesniaeff, had, in fact, intentionally assaulted the plaintiff, Elizabeth Burke, and that his assault caused injuries and damages to her. The jury, however, found that the defendant had proven his special defense of justification and that he had acted in defense of others. Accordingly, the jury found in favor of the defendant. On

shaking. We were just kind of recapping how terrifying it was to be just completely ambushed by someone."

[17] The plaintiff also claims that the court's charge subverted Connecticut's well established policy against domestic violence. The plaintiff failed to raise this claim in the trial court; we therefore decline to consider it. "As our Supreme Court has explained, [t]he reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." (Internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Iaquessa*, 132 Conn. App. 812, 815, 34 A.3d 1005 (2012). Nonetheless, it should go without saying that by affirming the judgment of the trial court, this court in no way would ever condone domestic violence or unjustified violence of any sort.

[1] The record reveals that the complaint in this matter was initially filed on January 3, 2012.

appeal, the plaintiff makes two principal arguments: that the court inappropriately instructed the jury on the law of criminal trespass and that the evidence was insufficient to sustain the jury's determination that the defendant's wilful assault against the plaintiff was justified under the theory that he was acting in defense of others. While the majority acknowledges the possibility of some infirmity in the court's trespass instruction, my colleagues conclude that any such imperfection had no bearing on the judgment. Additionally, the majority has concluded that the evidence supports the jury's determination that the defendant was acting in defense of others. I respectfully disagree. In my view, the concept of the plaintiff as a trespasser in a marital residence of the parties had no place in the trial proceedings.[2] That wrong minded notion, however, coursed throughout the evidentiary portion of the trial and was prominent in the court's instructions to the jury as well as in defense counsel's closing argument, likely confusing the jury and, as a result, rendering its verdict unreliable.

Additionally, I part company with my colleagues regarding their conclusion that the evidence was sufficient to warrant the jury's determination that the defendant's need to protect others on the property justified his wilful assault upon the plaintiff. To the contrary, I believe the record is devoid of any objective evidence from which the defendant reasonably could have concluded that others present at the residence were under threat of harm from the plaintiff while he was engaged in his physical assault upon her. Accordingly, I respectfully dissent.

[2] While the plaintiff framed her claim of rightful access to the Sharon house as a spouse's right to marital property, she makes it clear in her briefing that her claim relates more broadly to the notion that the evidence amply demonstrated that the Sharon house was a residence purchased and periodically shared by the parties during the marriage and, thus, a property she was entitled to occupy during the marriage.

In this dissenting opinion, I first discuss the court's instructions on trespass; next, I discuss the adequacy of the evidence supporting the special defense relating to the defense of others.

At the outset, I note that the majority characterizes the plaintiff's instructional claims on appeal as relating only to the court's charge on two of the defendant's special defenses and concludes that because the jury did not find that the plaintiff was a trespasser, her claim was unavailing. I do not so narrowly construe the plaintiff's claims; rather, I understand that the plaintiff has asserted on appeal that the court should not have given any instruction on trespassing. Also, I do not share the majority's conclusion regarding the harmlessness of the court's jury instruction on the basis, as the majority claims, that the jury did not conclude that the plaintiff had been trespassing while under assault by the defendant. Indeed, I believe, respectfully, that the court's instruction on trespassing essentially concluded for the jury that the plaintiff was trespassing when, as an uninvited guest in her husband's home, she refused to leave when told to do so.

A fair analysis of the pleadings, evidence, and oral argument leads me to conclude that the plaintiff's status as an alleged trespasser at the time and place of the incident was bedrock to the defense of this civil assault and battery claim. The following supports this conclusion

During pretrial proceedings, the defendant filed several special defenses premised on the notion that his assault against the plaintiff was justified as self-defense, defense of others, or defense of property. All of these special defenses, as alleged by the defendant, were premised on the claim that the plaintiff was trespassing

on the defendant's property at the time of the incident.[3] In sum, the defendant's claim that the plaintiff was a trespasser when he assaulted her was key to his defense. My conclusion in this regard is further buttressed by reference to the closing argument of the defendant's counsel and to the court's instructions to the jury.

In closing argument, after the evidentiary portion of the trial during which there was considerable, albeit disputed, evidence regarding the plaintiff's status while at the Sharon house, the defendant's counsel stated, in part: "She claimed at one point that she resides or resided at the Sharon house, that it was her house. The marital house is down in New Rochelle. This is complete fabrication. [The defendant] said she lived there two weeks a long time ago. That was it. It's not her—not her home, not her residence, never was. There's . . .

[3] The relevant special defenses are as follows:

"Fourth Special Defense: Wrongful Conduct

"The plaintiff is barred, in whole or in part, from pursuing her claims under the doctrine of wrongful conduct. On December 5, 2009, the plaintiff was trespassing on the premises. The plaintiff exhibited disorderly conduct and/or was creating a public disturbance. In addition, the plaintiff was assaulting and/or battering the defendant. The plaintiff's actions on December 5, 2009, were made knowingly and intentionally. . . .

"Seventh Special Defense: Self-Defense

"With respect to the allegations of December 5, 2009, any actions taken by the defendant were in self-defense. The plaintiff was trespassing at the time of the incident and was assaulting and/or battering the defendant.

"Eighth Special Defense: Defense of others

"With respect to the allegations of December 5, 2009, any actions taken by the defendant were in defense of others. The plaintiff was trespassing at the time of the incident and was acting in a disorderly manner.

"Ninth Special Defense: Justification

"At the time of the incident, the plaintiff was trespassing on the defendant's property. The plaintiff, knowing that she was not licensed or privileged to do so, entered and remained on the property. Despite the defendant, who is the owner of the property, directing her to leave, the plaintiff refused to do so. The plaintiff then continued to exhibit disorderly conduct and/or create a public disturbance. As such, the defendant was justified in using reasonable force in escorting the plaintiff from the premises."

uncontradicted testimony that [the defendant] is the sole owner of the property. It is his house." Later, the defendant's counsel returned to this theme when he claimed to the jury: "No one disputes that [the plaintiff] was told to leave the property. That's an important point. She was told she's got to leave the property. [The plaintiff] said she was told. She told that in—put that in the police report. She refused to leave the property. At that point, she was no longer a welcomed guest at the house. You'll see in our special defenses the legal language that the judge will tell you you need to follow. There's reasons why the laws are written the way they are. And for situations like this, there are laws that apply and you're gonna get those instructions. And you have to decide essentially did [the defendant] handle himself properly that day? Did he act reasonably? Did he not use excessive force to remove her from the property? I think the testimony and the evidence is that he used as much force as he had to use to keep her from getting back into the property. That was a reasonable thing for him to do by any standard."

True to the defendant's counsel's predictions, the court provided the jury with extensive instructions regarding the role of trespassing in the defendant's defenses. Respectfully, from my perspective, the court essentially told the jury that the plaintiff had been a trespasser. In part, the court commented to the jury: "The defendant alleges that on December 5, 2009, the plaintiff was trespassing on the premises and exhibiting disorderly conduct and/or creating a disturbance. The parties agree that the defendant did not invite the plaintiff to the historic tour. In addition, the defendant alleges the plaintiff entered and/or remained on the property after she was directed to leave by him, the owner of the property, and that she refused to do so, among the other claims asserted with respect to trespassing. The plaintiff does not dispute that she was told to leave."

I agree with the majority's observation, albeit in a different legal context, that jurors are not required to leave their common sense at the courthouse door. In this instance, and in the absence of any charge to the jury regarding the plaintiff's entitlement to occupy the premises no matter which spouse held title, I believe, respectfully, that any reasonable juror would have concluded from this charge that the plaintiff's status as a trespasser during the incident in question was a foregone conclusion.[4]

The court's instructions regarding the special defenses continued the theme of the plaintiff as a trespasser. As to the special defense of justification, the court instructed the jury as follows: "[A] person in possession or control of premises is justified in using reasonable physical force upon another person when and to the extent that he reasonably believes such to be necessary to prevent or terminate the commission or attempted commission of a criminal trespass by such other person in or upon such premises." Thus, it is apparent that the notion of the plaintiff as a trespasser was central to the court's charge on the successful defense of justification. Justification, however, is not a stand-alone defense. As a matter of logic and law, the defense of justification must relate to some behavior which is alleged to have been justified. Here, the jury found that the defendant's assaultive behavior was justified and that justification was premised, as instructed

[4] The majority notes that the court did not instruct the jury that the defendant had to prove that the plaintiff was trespassing at the Sharon house. Given the court's marshaling of evidence in this regard and the absence of any countervailing instruction on whether the plaintiff was nonetheless entitled to be on the property, the court may have considered such a question to be unnecessary and that the only worthy questions for the jury regarding the special defenses concerned whether the defendant's conduct in forcibly removing the uninvited plaintiff from his property was proportional to the risk her presence and demeanor created to him, the property, or to others.

by the court, on the notion of the plaintiff as a trespasser on the defendant's property. In short, assuming the jury followed the court's justification charge, the one reasonable conclusion supported by the record is that the defendant was justified in assaulting the plaintiff as a means to eject her from the property titled only in his name and after she had refused to leave when told to do so. Thus, even though the court did not reiterate its instructions concerning trespassing when discussing the special defense relating to the defense of others, the instruction regarding the plaintiff as trespasser in the more general defense of justification cannot fairly be excised from our consideration of the viability of the jury's verdict.

As noted by the majority, at the conclusion of the evidence portion of the trial, the court submitted interrogatories to the jury, including those dealing with each of the defendant's special defenses. The jury's responses to two interrogatories were determinative of the plaintiff's claims. As reflected by their answers to the interrogatories, the jury found that the defendant's conduct toward the plaintiff constituted intentional assault and battery and that his intentional conduct was a substantial factor in causing or aggravating the plaintiff's injuries and damages. The jury found, however, in favor of the defendant on two of his special defenses. Specifically, the jury determined that the doctrines of justification and defense of others barred the plaintiff's recovery.

In determining that the court's instruction on trespass was not harmful to the plaintiff, the majority fastens on the jury's response to the interrogatory related to the plaintiff's special defense regarding wrongful conduct by the plaintiff. The majority concludes that because the jury did not find that the plaintiff's wrongful conduct barred her recovery, the jury must have concluded that the plaintiff was not trespassing when she

was assaulted by the defendant. As noted, I do not believe this conclusion is warranted by the record. With respect to the special defense regarding the plaintiff's alleged wrongful conduct, the court instructed the jury as follows: "The defendant has also raised the defense of 'wrongful conduct,' claiming that the plaintiff is barred, in whole or in part, from pursuing her claims under the doctrine of wrongful conduct. The defendant alleges that on December 5, 2009, the plaintiff was trespassing on the premises and exhibiting disorderly conduct and/or creating a disturbance. The parties agree that the defendant did not invite the plaintiff to the historic tour. In addition, the defendant alleges the plaintiff entered and/or remained on the property after she was directed to leave by him, the owner of the property, and that she refused to do so, among the other claims asserted with respect to trespassing. The plaintiff does not dispute that she was told to leave. The defendant also alleges the plaintiff was exhibiting disorderly conduct and/or creating a public disturbance. The defendant also alleges that the plaintiff was assaulting and/or battering him during the incident of December 5, 2009. Under Connecticut law, a plaintiff may not maintain a civil action for injuries allegedly sustained as the direct result of her knowing and intentional participation in a criminal act. The wrongful conduct defense does not apply if you find that the plaintiff sustained injuries and damages independent of any wrongful conduct of the plaintiff. It further applies only if the plaintiff has violated the law in connection with the very transaction as to which she seeks redress or relief." Thus, the court's reference to wrongful conduct related to the defendant's claim that the plaintiff had been trespassing but also that she had been guilty of disorderly conduct and creating a public disturbance. Significantly, the court's charge in this regard included a component ignored by the majority that there must

be a nexus between the plaintiff's alleged wrongful conduct and the assault for this special defense to prevail. Thus, because the jury found that the defendant wilfully assaulted the plaintiff, it is entirely reasonable to deduce, from this interrogatory, that irrespective of whether the plaintiff was guilty of trespassing or disorderly conduct, the defendant's assault upon her was not sufficiently tied to her criminal conduct for this special defense to prevail.

Accordingly, I do not believe it is reasonable to glean from the jury's answer to the wrongful conduct interrogatory that the jury found that the plaintiff had not been trespassing when she was being assaulted by the defendant. Such a finding is neither compelled nor warranted by the jury's rejection of this special defense.

In sum, from my reading of the court's instructions and the jury's responses to interrogatories, it is reasonable to conclude as an overarching consideration, that the jury was influenced by the court's instruction on trespass and found that the plaintiff could not recover because, as a trespasser, she was susceptible to the defendant's claims regarding justification and the defense of others.[5]

I am troubled by this outcome for two principal reasons. As noted, I do not believe it was appropriate for the court, under these circumstances, to give the jury any instruction premised on the plaintiff being a trespasser. Secondly, even if the court could reasonably have given an instruction on criminal trespass, the court gave an incomplete and flawed trespass instruction by failing to further instruct the jury on the scienter element of trespass and on the question of whether the

[5] Although the court's instructions on the special defense of defense of others was minimal, I am mindful that the defendant tied this special defense, as he did all of his special defenses, to the notion that, at the time of the incident, the plaintiff had been trespassing. See footnote 3 of this dissenting opinion.

plaintiff, as a nontitleholder, was nevertheless privileged to be on the property in light of her marriage to the defendant and the status of the Sharon house as a periodically shared marital residence.

In giving its instruction, the court followed the language of the criminal trespass statute, General Statutes § 53a-107 (a) (1), which states that a person commits criminal trespass when "[k]nowing that such person is not licensed or privileged to do so, such person enters or remains in a building or any other premises after an order to leave or not to enter personally communicated to such person by the owner of the premises . . . ." As I read that statute, it contains multiple parts, each necessary to the conclusion that one is a trespasser. In order to make such a determination, a fact finder would have to conclude (1) that a person knows he or she is not licensed to be on property, (2) that the person must, in fact, not be so licensed or privileged, (3) that the person must be ordered to leave by the owner, and (4) that the person must refuse such an order. In the present case, the court gave no guidance to the jury as to the meaning of the statute's prefatory language concerning whether a person is licensed or privileged to be on property owned by another. And, as noted, the court did not instruct the jury on the trespass statute's scienter requirement of proof that the nonowner must know that he or she is not licensed or privileged to be on the property in order to be guilty of trespassing. See *State* v. *Garrison*, 203 Conn. 466, 474, 525 A.2d 498 (1987) ("[t]he actor's knowledge that he is not privileged or licensed to enter or to remain on the premises is a requirement of criminal trespass"). And yet, whether the plaintiff was privileged or licensed to be on the property and, if not, whether she knew so, are factors at the crux of the question of whether the plaintiff could be considered to have been trespassing under the then

existing circumstances.[6] Rather than provide an explanation of the meaning of these terms, the court dwelled, instead, on the fact that the property was owned by the defendant who had told the plaintiff to leave. The jury was, therefore, left with an incomplete understanding of how one can be found to be a trespasser.

Here, there was no evidence that the plaintiff trespassed on the property. To the contrary, there was considerable undisputed evidence that she was licensed and privileged to be there. The record reflects that the parties were married in 1989 and that approximately ten years later, the defendant purchased the subject property in Sharon and took title in his own name. After the Sharon house was bought, the parties purchased a home in New Rochelle, New York, which became their primary residence.

The record supports the conclusion that, at the time of this incident, the parties were married and living together. During testimony, the defendant acknowledged that the plaintiff had a key to the Sharon house, that she had a right to be on the property, and that she kept clothing, furniture, furnishings, and kitchenware on the premises, which she retrieved from the premises after the incident. Laurel Powers, a friend of the plaintiff, also testified that the plaintiff kept clothing, furnishings, and other personal belongings in the Sharon house, which she assisted the plaintiff in retrieving after the

[6] In this regard, the fact that the plaintiff parked her car away from the main driveway to the house and may have approached the house from the rear does not bear on the question of her license or privilege to be on the property. Neither does the suggestion that she may have known that the defendant did not want her to come to the house that afternoon. A contrary determination would be tantamount to saying that every time a couple's marital residence is titled in one partner's name, the other partner may come to or remain on the premise only at the whim of the title holding spouse. Such a conclusion would defy common sense and finds no support in public policy regarding marital relations.

incident. Moreover, the plaintiff testified, without contradiction, that after the Sharon house was purchased, she selected the interior color scheme and painted the interior of the home. Also, although the defendant disputed the amount of time that the plaintiff had stayed in the Sharon house, he did not deny that she sometimes had occupied the home with him during the marriage.

Importantly, the defendant acknowledged, at trial, that on the date of the assault, he believed that the plaintiff had the right to be at the property because they were married and he did not perceive her as trespassing either when she first arrived or after he told her to leave.[7]

[7] The defendant's notion, newly minted for this case, that the plaintiff was a trespasser on the date of this event can fairly be attributed to the wisdom gained with the passage of time and the ingenuity of counsel in formulating a defense to this intentional assault. The record belies the defendant's present posture that the plaintiff could reasonably have been characterized as a trespasser at the Sharon house on the date of the assault. This conclusion is buttressed by a review of the pleadings in the parties' marital dissolution action filed by the defendant on March 18, 2010, approximately three months after the assault, and approximately two years before this action was commenced. These pleadings contain averments and admissions by the present defendant that contradict the notion of the plaintiff as a trespasser. See *Mesniaeff* v. *Burke*, Superior Court, judicial district of Stamford-Norwalk, Docket No. FA-10-4021756-S (April 17, 2014). At the outset, I note that we may take judicial notice of court files between the same parties. See *In re Jeisean M.*, 270 Conn. 382, 402–403, 852 A.2d 643 (2004); *Carpenter* v. *Planning & Zoning Commission*, 176 Conn. 581, 591, 409 A.2d 1029 (1979); *Guerriero* v. *Galasso*, 144 Conn. 600, 605, 136 A.2d 497 (1957). In the dissolution matter, the defendant herein filed a motion on March 18, 2010, for exclusive possession of the Sharon house in which he averred:

"1. The plaintiff is presently living at the family residence located at 129/135 North Main Street, Sharon, Connecticut.

"2. The defendant has vacated the family residence located at 129/135 North Main Street, Sharon, Connecticut.

"3. There are no children of the parties who reside in the family home with the plaintiff.

"Wherefore, the plaintiff prays the court for an order pursuant to Connecticut General Statutes § 46b-83 prohibiting the defendant from reentering the premises at 129/135 North Main Street, Sharon, Connecticut during the pendency of this action or until a further order of the court."

The defendant's characterization of the Sharon house as a family residence

Finally, it is noteworthy that both parties had Connecticut driver's licenses at the time of this incident. Because there was no trial evidence of any other Connecticut dwellings of the parties, this fact provides some indication that each considered the Sharon house to be a place of his and her residence.

On the basis of these facts, I do not believe there was any basis for the court to instruct the jury on the law of criminal trespass. In doing so, the court dwelled only on the fact that the property had been titled in the defendant's name and that, as the titleholder, he, at some point, told the plaintiff to leave and she refused. Because I believe this partial and incomplete instruction infected the jury's deliberations, the jury's verdict lacks reliability.

My point is best illustrated by the use of an example. Consider the following. John Jones and Mary Jones are married and reside in a home titled solely in John's name. On a Sunday afternoon, John announces to Mary that he has invited several of his male friends to come to the house to watch a sports event on afternoon television. Mary, however, does not like John's friends and detests watching sports. On hearing John's intentions, she strongly voices her displeasure and tells John that his friends are not welcome. She then leaves the residence on an errand. Later when she returns, and upon

in the marital dissolution action belies the notion that the plaintiff could, just three months earlier, have been considered by him to be trespassing on the property subject to his order to leave. The record of the marital dissolution action reveals that the defendant filed two identically worded motions on June 20, 2010, and December 7, 2010. Later, on October 11, 2012, however, after the present action was filed on January 3, 2012, the defendant herein recast, in the dissolution action, his motion for exclusive possession of the Sharon house, in which he newly referred to the property as his residence and averred that his spouse lived in New York. It does not appear from the record that any action was ever taken on any of these motions. That history rebuts any claim, by the defendant herein, that he considered the plaintiff to be a trespasser at the marital residence in Sharon on December 5, 2009.

seeing John's friends at the home, she loudly tells them that they are not welcome and orders them to leave. At that juncture, John reminds Mary that the house is in his own name and tells her to vacate. When she refuses, John calls the police and insists that Mary be arrested for criminal trespass for her refusal to leave the premises when ordered to do so by him. Under these circumstances, I do not believe a serious argument can be advanced that Mary has committed a trespass solely on the basis that John owns the property because, notwithstanding title ownership, Mary is licensed and privileged to be in the marital residence.

To me, the facts of the example are parallel to the circumstances we confront in this appeal, except for a legally insignificant disagreement between the parties as to how much time the plaintiff actually spent in the Sharon house during the marriage leading up to the defendant's assault on the plaintiff. I believe the actual amount of time each party spent at the Sharon house is unimportant because both parties understood the Sharon house to be a marital residence. In sum, the defendant's characterization of the Sharon house as a family residence and his own state of mind that the plaintiff was not a trespasser on the date of the incident should put to rest any notion of the plaintiff as a trespasser. The jury, however, was led to believe from the instructions that ownership was the pivot point for trespass and that the plaintiff's status as a trespasser could justify the defendant's assaultive behavior toward her. The jury was given no instruction concerning the facts and circumstances that could give rise to a nontitleholder's license or privilege to be present. In the absence of that explanation, in this case and beyond, a spouse without title to a marital residence dwells there only at the sufferance of the owner of title spouse, a circumstance ripe for abuse and one that cannot be harmonized with any reasonable public policy.

The plaintiff claims, as well, that there was insufficient evidence to support the jury's determination that, in assaulting the plaintiff, the defendant properly acted in defense of others. I agree.

"The defense of others, like self-defense, is a justification defense . . . [which] operate[s] to exempt from punishment otherwise criminal conduct when the harm from such conduct is deemed to be outweighed by the need to avoid an even greater harm or to further a greater societal interest . . . . Thus, conduct that is found to be justified is, under the circumstances, not criminal." (Internal quotation marks omitted.) *State* v. *Bryan*, 307 Conn. 823, 832–33, 60 A.3d 246 (2013). Furthermore, "in order to submit a defense of others defense to the jury, a defendant must introduce evidence that the defendant reasonably believed [the attacker's] unlawful violence to be imminent or immediate." (Internal quotation marks omitted.) Id., 835. The notion of a reasonable belief has two components: first, the actor must have an actual belief of an imminent danger to others and, second, that belief must be reasonable. Thus, in assessing a defense of others claim, we utilize what has come to be known as a subjective-objective test. See id., 836; *State* v. *DeJesus*, 194 Conn. 376, 389 n.13, 481 A.2d 1277 (1984); *State* v. *Croom*, 166 Conn. 226, 229–30, 348 A.2d 556 (1974). That is, the actor must believe that the danger is actual and imminent and the actor's belief must be reasonable by an objective standard.

In this appeal, the relevant evidence from the record is that when the plaintiff approached the Sharon house, the defendant was inside the residence with three women who were guests on an historic house tour. The evidence supports the conclusion that when the plaintiff arrived on the porch, she yelled out in questioning who the women were and that the defendant immediately

went to the plaintiff, grabbed her by the arm, and forcibly led her away from the house while she continued to loudly demand to know the identities of the women in the house, while also screaming, "Help, help! Call the police." The evidence further reveals that once the defendant had brought the plaintiff close to the road, the plaintiff was either thrown or fell into a snow bank in such a manner that Pierce Kearney, a stranger who was then driving by the property, stopped, exited his vehicle, and ran across the road in an effort to stop the defendant from behavior he thought was assaultive. The defendant assured him that the situation was all right with the statement: "It's okay, she's my wife," to which Kearney responded, "No, this is over." Finally, the record reveals that the women who had remained inside the house were upset and fearful, one testifying that she did not know if the plaintiff might have been armed with a weapon.

In finding this evidence sufficient to support the jury's determination that the defendant acted reasonably in defense of others, the majority appears to rely on the testimony of the tour guests, concluding that their fears were objectively reasonable. Respectfully, I believe this analysis is wide of the mark. The extent of fear and hysteria of the defendant's house tour guests is, in no way, a measure of the reasonableness of the defendant's assaultive behavior. In other words, the issue at hand is not the reaction of the houseguests or the reasonableness of their fears; rather, it is the objective reasonableness of the defendant's claimed belief that the houseguests were in imminent danger of physical harm from the plaintiff.[8] And, in this regard, the record is

[8] By way of illustration of this point, consider this different scenario: While a defendant is dragging a plaintiff along a driveway and while there are houseguests inside a nearby home, the plaintiff tells the defendant in a low but menacing voice that she has a handgun in her purse and she intends, as she struggles to get free, to go into the house to open fire on the women inside. In this scenario, none of the houseguests hear the plaintiff's lethal threat. Their absence of fear would be irrelevant to a consideration as to

bereft of any evidence that, at any time, the plaintiff, by gesture or words, made any threats against the houseguests. Time and time again during the trial, the defendant was given the opportunity to state the objective basis for a reasonable belief that the houseguests were at risk of physical harm and, time and time again, he could offer no evidence except for his subjective belief that his guests were in peril from the plaintiff.[9] As noted, the defendant's belief, alone, that others might be in harm's way is insufficient, as a matter of law, to justify his assault upon the plaintiff. Furthermore, the defendant's own admissions at trial put the denial to his defense of others special defense.[10] Accordingly,

whether the defendant's assaultive behavior against the plaintiff could be justified as a reasonable reaction to the need to protect others.

[9] When given the opportunity to state any objective basis for his subjective belief that his houseguests were in threat of imminent harm from the plaintiff, this exchange took place between the plaintiff's counsel and the defendant:

"Q. And [the plaintiff] never threatened to physically harm any of those three women, isn't that true?

"A. No, that's not true.

"Q. Did she ever verbally say that she was going to hurt any of those women?

"A. I interpreted it that way. There was no direct statement to that effect that I can recall, but I certainly got that impression.

"Q. Did she say she was going to hurt anyone?

"A. I don't recall any such statements.

"Q. Did you ever say that she never threatened them verbally?

"A. I believe I may have."

Later, during the same cross-examination, this exchange took place:

"Q. And, [the plaintiff] never threatened to hurt anyone, she never said she was going to hurt you, isn't that true?"

"A. I believe that's true, yes."

It is noteworthy that the defendant did testify that in addition to his fears about the plaintiff's conduct, he was embarrassed by her behavior as well. Pride, however, is no justification for violence.

[10] During an exchange with the plaintiff's counsel regarding the defendant's forcibly leading the plaintiff down the driveway, the following colloquy took place:

"Q. Okay. She was struggling with you to try to get free; is that correct?

"A. I wouldn't put it that way, but just—there was active resistance on her part.

"Q. Is active—there's resistance, defined by you, as struggling to get free?

"A. It coulda been. It doesn't have to, though, sir.

I believe, that as a matter of law, the evidence was insufficient to warrant a verdict based on the defendant's special defense that he was acting in defense of others when he wilfully assaulted the plaintiff.

For the reasons stated, I would reverse and remand for retrial. Accordingly, I respectfully dissent.

STATE OF CONNECTICUT *v.* PAWEL SIENKIEWICZ (AC 39051)

Keller, Prescott and Beach, Js.

Syllabus

The defendant, who had been convicted, on a plea of guilty, of the crime of assault in the third degree, appealed to this court from the judgment of the trial court dismissing his petition for a writ of error coram nobis. In his petition, the defendant sought to withdraw his guilty plea and to vacate or void his conviction, alleging that, at the time he had entered the plea, he did not understand the immigration consequences that would result from the plea and sentence, and that his attorney's failure to advise him of those consequences constituted ineffective assistance of counsel. Prior to the assault, federal authorities had initiated removal proceedings against the defendant because he had overstayed the term of a tourist visa. Subsequent to his plea and sentence, while the defendant was on a wait list for a certain type of visa that would have provided him relief from removal, federal authorities notified him that he was ineligible for admission to the United States because of the assault. The state filed a motion to dismiss the petition on the ground that the trial court lacked jurisdiction to issue a writ of error coram nobis because the defendant had failed to pursue a writ of habeas corpus while he was in custody. *Held* that the trial court properly dismissed the petition for a writ of error coram nobis, that court having properly determined that it lacked jurisdiction over the petition because the defendant had an adequate remedy at law in the form of habeas corpus relief while

"Q. Well, I'm asking about on December 5, 2009. Did [the plaintiff's] active resistance consist of struggling to get away from you?

"A. I don't believe it did, no."

This admission by the defendant puts to lie his legal claim that his assault was justified as a means of protecting his houseguests from harm. If, as he acknowledged, the plaintiff was not trying to escape from his grasp, she could not have, by any reasonable perspective, have presented any risk of harm to others.

he was in custody on the assault charge; the defendant had the ability to file a petition for a writ of habeas corpus when he was in custody in order to challenge the effectiveness of his counsel and the validity of his plea, and, although the defendant claimed that an action brought prior to his petition here for a writ of error coram nobis would not have been ripe because he did not know that he would be removed from the visa wait list during the time he was in custody, the issue was whether the remedy of habeas relief was available to him when he was in custody, which it was, as he was subject to adverse immigration consequences during the entire period of his custody pursuant to his sentence.

Argued April 18—officially released November 7, 2017

Procedural History

Substitute information charging the defendant with the crime of assault in the third degree, brought to the Superior Court in the judicial district of New Britain, geographical area number fifteen, where the defendant was presented to the court, *Baldini*, *J.*, on a plea of guilty; judgment of guilty; thereafter, the court, *Keegan*, *J.*, granted the state's motion to dismiss the defendant's petition for a writ of error coram nobis, and the defendant appealed to this court. *Affirmed.*

Michael W. Brown, assigned counsel, for the appellant (defendant).

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, and *Jennifer Miller*, assistant state's attorney, for the appellee (state).

Opinion

BEACH, J. The defendant, Pawel Sienkiewicz, appeals from the judgment of the trial court granting the state's motion to dismiss his petition for a writ of error coram nobis. The defendant claims that the court erred in holding that it did not have jurisdiction to consider the merits of his petition and, therefore, erred

in dismissing his petition for a writ of error coram nobis. We affirm the judgment of the trial court.[1]

The following facts and procedural history are relevant to our disposition of this appeal. The defendant is a native and citizen of Poland who legally entered the United States on a tourist visa but unlawfully overstayed that visa's authorized term. By 2009, federal authorities initiated removal proceedings against the defendant, ultimately leading to a final order of removal.[2]

On September 5, 2010, while removal proceedings against the defendant were pending, the defendant assaulted a woman and was charged in a substitute information with assault in the third degree in violation

[1] In its initial brief to this court, the state claimed that this appeal was moot in light of *State* v. *Aquino*, 279 Conn. 293, 901 A.2d 1194 (2006). After this appeal was argued orally in this court, the Supreme Court issued its opinion in *State* v. *Jerzy G.*, 326 Conn. 206, 162 A.3d 692 (2017). We ordered supplemental briefing addressing the effect of *Jerzy G.* on this appeal. Both parties urged that, in light of the intervening authority, this case was not moot. Because the underlying circumstances of this case are strikingly similar to those of *Jerzy G.*, we agree with the parties and hold that the present appeal is not moot. As in *Jerzy G.*, but unlike in *Aquino*, the record clearly established the reason for the defendant's deportation. See *State* v. *Jerzy G.*, supra, 223; *State* v. *Aquino*, supra, 298. Further, there was in *Jerzy G.* and in the present case a reasonable possibility that the defendant would face prejudicial collateral consequences in that the "pending criminal charge against the defendant could be a significant factor in" determining whether the defendant could reenter the country. *State* v. *Jerzy G.*, supra, 223–24.

[2] The record before us indicates that on April 21, 2009, a federal immigration judge denied the defendant's requests for further continuance of previously initiated proceedings and for voluntary departure. *In re Pawel Sienkiewicz*, No. A089 013 624, 2009 WL 3713235, *1 (B.I.A. October 20, 2009), aff'g No. A089 013 624 (Immig. Ct. Hartford, Conn. April 21, 2009). On October 20, 2009, the Board of Immigration Appeals (board) dismissed the defendant's appeal of that decision. Id. On November 17, 2010, the United States Court of Appeals for the Second Circuit denied the defendant's request for review of the board's order and vacated any stay of removal that had been issued. *Sienkiewicz* v. *Holder*, 400 Fed. Appx. 599, 599–600 (2d Cir. 2010); see also *Sienkiewicz* v. *Lynch*, Docket No. 3:15-CV-1871 (VAB), 2016 WL 901567 (D. Conn. March 9, 2016). At oral argument before this court, the defendant's attorney represented that the defendant has since been removed.

of General Statutes § 53a-61. On April 3, 2011, the defendant was arrested on a charge of operating a motor vehicle while under the influence of alcohol or drugs. He was charged as a third offender in violation of General Statutes § 14-227a, which is a felony pursuant to General Statutes § 53a-25. Following a jury trial, the defendant was found guilty of operating a motor vehicle while under the influence, and the defendant pleaded guilty to the part B information charging him with being a persistent offender. On July 12, 2013, the court held a sentencing hearing on the conviction of operating under the influence as a third offender. The court sentenced the defendant to three years incarceration, execution suspended after twenty-two months, to be followed by three years probation, on the conviction of operating under the influence. Also at the July 12, 2013 hearing, the defendant pleaded guilty to assault in the third degree in violation of § 53a-61, in the case arising from the September, 2010 assault. Prior to accepting his plea, the court asked whether he understood that this conviction may have "consequences of deportation, exclusion from readmission or denial of naturalization, pursuant to federal law," to which he responded, "[y]es." The defendant's attorney added that "with regard to the immigration consequences, I've gone over that very thoroughly with the defendant and also spoken to his immigration counsel, so I'm confident that he's been advised with regard to those consequences." The court then sentenced the defendant to one year of imprisonment on the assault charge, to be served concurrently with the three year sentence he had received earlier that day.

Meanwhile, while the criminal charges were pending, the defendant on August 2, 2011, filed a petition for a U nonimmigrant status (U visa)[3] and the accompanying

[3] "U visa" refers to subdivision (U) of the Immigration and Nationality Act's definition of "immigrant." See 8 U.S.C. § 1101 (a) (15) (U) (2012). To be eligible for a U visa, the alien must demonstrate that he is a victim of a

application for advance permission to enter as a nonimmigrant (application for advance entry), which, if granted, would have provided him relief from removal. On February 27, 2014, the defendant was notified that his petition for a U visa and application for advance entry had been placed on a wait list. On March 26, 2015, the United States Citizenship and Immigration Services (immigration services) division of the Department of Homeland Security sent the defendant a letter notifying him that he had been removed from the U visa wait list because he had been placed on the wait list in error, and that he was potentially ineligible for the U visa. Accordingly, immigration services intended to deny his application for advance entry. The letter explained that the defendant is "inadmissible to the United States under section [1182] (a) (2) (A) (i) (I) (crime involving moral turpitude) of the Immigration and Nationality Act (the Act)"; 8 U.S.C. § 1101 et seq. (2012); but that immigration services has discretion to waive this ground of inadmissibility under subdivisions (d) (3) or (14) of § 1182 of the act. Section 1182 (a) (2) (A) (i) of title 8 of the United States Code provides in relevant part that "any alien convicted of . . . (I) a crime involving moral turpitude . . . is inadmissible." Section 1182 (a) of title 8 of the United States Code provides in relevant part that "aliens who are inadmissible under [subsection (a)] are ineligible to receive visas and ineligible to be admitted to the United States . . . ." Regarding a "crime of moral turpitude," the letter noted that "[a]fter a thorough review of the file [immigration services had] determined that [the defendant had] not addressed the fact that by [his] actions [he had] created a victim," then proceeded to describe the September,

crime, has information regarding the crime, and "has been helpful, is being helpful, or is likely to be helpful . . . [in] investigating or prosecuting criminal activity" and that "the criminal activity . . . violated the laws of the United States or occurred in the United States . . . ." 8 U.S.C. § 1101 (a) (15) (U) (i) (III) and (IV) (2012).

2010 assault. The letter concluded by providing the defendant a period of thirty-three days to "submit evidence to demonstrate that [immigration services] should exercise its discretion to approve [his] application for a waiver under [8 U.S.C. § 1182 (d) (3)] or that approving [the defendant's] request for the waiver is in the national or public interest, pursuant to [§ 1182 (d) (14)]." The record does not reflect whether the defendant ever submitted such evidence.

On June 19, 2015, the defendant filed a petition for a writ of error coram nobis, requesting that the court allow him to withdraw his guilty plea as to the charge of assault and to vacate or void the assault conviction. He argued that he had not understood that serious immigration consequences, namely, his removal from the U visa wait list, would result from his plea and sentence, and that his attorney's failure to advise him of these consequences constituted ineffective assistance of counsel. The state moved to dismiss his petition, arguing that the court may issue a writ of error coram nobis only if no adequate remedy is provided by law and that the defendant did not satisfy this requirement "because he failed to timely pursue a writ of habeas corpus." After a hearing, the court issued its March 11, 2016 memorandum of decision, granting the state's motion to dismiss. The court agreed that the defendant could have petitioned for a writ of habeas corpus while in custody. The court held that it did "not have jurisdiction to reach the merits of the petition for a writ of error coram nobis" because an alternative legal remedy had been available to the defendant. This appeal followed.

The defendant claims that the court erred in dismissing his petition for a writ of error coram nobis on the ground that it did not have jurisdiction to hear the merits of his petition. The defendant primarily argues that a writ of habeas corpus had been unavailable to

him because he had been unaware that his guilty plea would cause his removal from the U visa wait list until after he had been released from custody for his assault conviction. The state argues that the trial court lacked jurisdiction to issue the writ because the defendant had had several legal remedies available to him and that pursuant to *State* v. *Stephenson*, 154 Conn. App. 587, 592, 108 A.3d 1125 (2015), the relevant question is not whether the defendant took advantage of those remedies but, rather, whether he could have pursued them. We agree with the state.

We begin our analysis by setting forth the applicable standard of review. Our Supreme Court has long held that "because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . ." (Internal quotation marks omitted.) *Richardson* v. *Commissioner of Correction*, 298 Conn. 690, 696, 6 A.3d 52 (2010).

Preliminarily, the state suggests that the remedy of a writ of error coram nobis is no longer an available remedy under Connecticut law. The state essentially argues that even if the remedy was available in the distant past, its function has long been replaced by other remedies, such as the petition for a new trial and expanded habeas corpus availability. We decline the state's invitation to announce the demise of the writ of error coram nobis. Although the writ has not been invoked successfully in many years, the Supreme Court has continued to describe the writ and its limitations in the present tense, and has never declared it moribund. See, e.g., id., 700 n.8; *State* v. *Das*, 291 Conn. 356, 370, 968 A.2d 367 (2009) ("[a] writ of error coram nobis is an ancient common-law remedy which authorized the trial judge . . . to vacate the judgment of the same

court if the party aggrieved by the judgment could present facts, not appearing in the record, which, if true, would show that such judgment was void or voidable" [internal quotation marks omitted]); *State* v. *Henderson*, 259 Conn. 1, 3, 787 A.2d 514 (2002); *State* v. *Grisgraber*, 183 Conn. 383, 385, 439 A.2d 377 (1981).

We assume, then, as we must, that the remedy of the writ of error coram nobis still exists. Nonetheless, the scope of cases in which the remedy may be available is exceedingly narrow. As we recently stated in *State* v. *Stephenson*, supra, 154 Conn. App. 590, "[a] writ of error coram nobis lies only in the unusual situation where no adequate remedy is provided by law. . . . Moreover, when habeas corpus affords a proper and complete remedy the writ of error coram nobis will not lie. . . . The errors in fact on which a writ of error [coram nobis] can be predicated are few. . . . This can be only where the party had no legal capacity to appear, or where he had no legal opportunity, or where the court had no power to render judgment." (Citation omitted; internal quotation marks omitted.)

The state argues, and we agree, that the defendant had the ability to commence a petition for a writ of habeas corpus at any time that he was in custody on the assault charge in issue. The defendant claims that he did not know that he would be removed from the U visa wait list during some or all of the time he was in custody as a result of the assault conviction, and that an action brought prior to this denial of his request for discretionary relief would not be "ripe . . . ." There can be no doubt, however, that the defendant would have had the ability to contest the effectiveness of counsel and the validity of his plea in a habeas action even if removal from the U visa wait list was not imminent. In *State* v. *Stephenson*, supra, 154 Conn. App. 589, itself, "[t]he record [did] not reflect that any adverse immigration consequences [had] yet occurred" by the time the defendant was no longer in custody on the sentence in issue, and we held that the defendant could have

brought an action seeking a writ of habeas corpus. Id., 592; see also *State* v. *James*, 139 Conn. App. 308, 318, 57 A.3d 366 (2012) (ineffective assistance of counsel claim regarding possible immigration consequences would have been more appropriately raised in habeas corpus proceeding, even though facts did not indicate that removal proceedings had been initiated). The issue is not whether the defendant would have been successful in pursuing a timely action, but whether the remedy was available to him. During the entire period of his custody pursuant to the sentence in question, he was subject to adverse immigration consequences.

There is, then, no meaningful distinction between this case and *State* v. *Stephenson*, supra, 154 Conn. App. 587. In both cases, the defendant had a remedy of habeas corpus available to him, in which he could challenge the effectiveness of counsel in the plea process, and in both cases the opportunity vanished when custody pursuant to the sentence in question terminated. *Stephenson* clearly holds that the prior availability of the writ of habeas corpus defeats the jurisdiction of the trial court to entertain a petition for a writ of error coram nobis. Id., 592.[4]

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* STEPHEN NEARY
(AC 38017)

Keller, Prescott and Bear, Js.

Syllabus

The defendant, who previously had been convicted, on pleas of nolo contendere, of the crimes of interfering with an officer, assault of public safety

[4] Perhaps recognizing the binding precedent of *Stephenson*, the defendant has also urged us to overrule it. Consistent with this claim, the defendant filed a motion requesting that this court hear the appeal en banc. We denied the motion.

personnel and carrying a dangerous weapon, and of violation of probation, appealed to this court from the judgment of the trial court denying his motion to correct an illegal sentence, in which he raised claims regarding the legality of his sentence. *Held* that the defendant having completed his sentence, including the period of conditional discharge, there was no practical relief that could be afforded to him with regard to that sentence, and, therefore, his claims regarding the legality of that sentence were moot; accordingly, the appeal was dismissed.

Argued September 12—officially released November 7, 2017

Procedural History

Information, in the first case, charging the defendant with violation of probation, and information, in the second case, charging the defendant with the crimes of interfering with an officer, breach of the peace in the second degree, assault of public safety personnel, and carrying a dangerous weapon, brought to the Superior Court in the judicial district of New Haven, geographical area number seven, where the defendant was presented to the court, *J. Fischer*, *J.*, on a plea of guilty to violation of probation, and on a plea of nolo contendere to interfering with an officer, assault on a police officer, and carrying a dangerous weapon; thereafter, the court rendered judgments in accordance with the defendant's pleas; subsequently, the state entered a nolle prosequi on the charge of breach of the peace in the second degree; thereafter, the court denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Appeal dismissed.*

David B. Rozwaski, special public defender, for the appellant (defendant).

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *James Turcotte*, supervisory assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, Stephen Neary, appeals from the judgment of the trial court denying

his motion to correct an illegal sentence filed pursuant to Practice Book § 43-22. On February 7, 2013, pursuant to a plea agreement, the defendant pleaded nolo contendere to the charges of interfering with an officer in violation of General Statutes § 53a-167a, assault of public safety personnel in violation of General Statutes § 53a-167c, and carrying a dangerous weapon in violation of General Statutes § 53-206. The defendant also admitted to violating conditions of a previously imposed probation. See General Statutes § 53a-32.[1] On the same day, the court sentenced the defendant to a total effective sentence of seven years of incarceration, execution suspended after two and one-half years to serve, and two years of conditional discharge.

On March 4, 2014, the defendant filed the second of two motions to correct an illegal sentence in which he raised various claims regarding the legality of his sentence and the underlying conviction. The court denied the motion, and this appeal followed.

On August 30, 2017, we ordered the parties to "be prepared to address at oral argument (1) whether the sentence imposed on the defendant on February 7, 2013, has been completed; and (2) if so, whether this appeal from the trial court's denial of the defendant's motion to correct [an] illegal sentence has been rendered moot as a result." At oral argument, the defendant conceded that he had completed the sentence that was imposed by the court on February 7, 2013, including the period of conditional discharge.

In *State* v. *Bradley*, 137 Conn. App. 585, 587 n.1, 49 A.3d 297, cert. denied, 307 Conn. 939, 56 A.3d 950 (2012), this court held that an appeal from a motion to correct

[1] Although §§ 53a-167a, 53a-167c, 53-206, and 53a-32 have been amended by the legislature since the events underlying the present appeal, those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of those statutes.

an illegal sentence is rendered moot if the defendant completes the sentence while the appeal is pending because this court cannot afford the defendant any practical relief as to that sentence. Accordingly, because the defendant has completed his sentence, his claims here regarding the legality of that sentence are moot.[2]

The appeal is dismissed.

MACKENZY NOZE *v.* COMMISSIONER OF CORRECTION
(AC 39233)

Alvord, Sheldon and Mullins, Js.*

Syllabus

The petitioner, a citizen of Haiti, sought a writ of habeas corpus, claiming that his trial counsel had provided ineffective assistance by failing to advise him adequately as to the immigration consequences of his plea of guilty to a certain drug related offense that subjected him to mandatory deportation. The petitioner initially was charged with offenses that exposed him to sixty years imprisonment before he pleaded guilty and received a lesser sentence under a plea agreement offered by the state. The habeas court rendered judgment denying the habeas petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court did not abuse its discretion in denying the petition for certification to appeal: that court properly determined that the petitioner failed to demonstrate that he was prejudiced by his trial counsel's allegedly deficient performance, the petitioner having failed to show that, absent counsel's failure to adequately inform him regarding the immigration consequences of his plea, it was reasonably probable that he would have rejected the plea agreement and insisted on going to trial; moreover, the habeas court's finding that the petitioner was well aware that his conviction of the initial charges was virtually inevitable and that deportation was realistically

[2] To the extent that the defendant here is also attempting to challenge not only the legality of the sentence, but the underlying conviction itself, such a claim is beyond the purview of a motion to correct an illegal sentence. See, e.g., *State* v. *Lawrence*, 281 Conn. 147, 158–59, 913 A.2d 428 (2007).

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

unavoidable was not clearly erroneous, as the court was free to credit his trial counsel's testimony that the petitioner was not concerned about the immigration consequences of the plea and wanted to receive the shortest possible period of incarceration, which he accomplished by accepting the plea agreement, and to reject the petitioner's testimony that he would have rejected the proposed plea agreement and gone to trial had he been advised adequately.

Argued September 11—officially released November 7, 2017

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Sferrazza*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Daniel Fernandes Lage, assigned counsel, for the appellant (petitioner).

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Michael L. Regan*, state's attorney, and *Thomas M. DeLillo*, senior assistant state's attorney, for the appellee (respondent).

Opinion

SHELDON, J. The petitioner, Mackenzy Noze, a citizen of Haiti, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his petition for a writ of habeas corpus. In his amended petition, the petitioner claimed that his right to the effective assistance of counsel under the sixth and fourteenth amendments to the United States constitution was violated by trial counsel's failure to warn him, clearly and unequivocally, of the mandatory deportation consequences of his guilty plea to the charge of possession of narcotics with intent to sell in violation of General Statutes § 21a-277 (a). Before this court, the petitioner claims that the habeas court erred in denying his claim of ineffective assistance of

counsel and later abused its discretion in denying his petition for certification to appeal from that denial. We conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal from its judgment, and thus we dismiss this appeal.

The record reveals the following relevant facts and procedural history. The petitioner initially was charged with three counts of sale of crack cocaine in violation of General Statutes § 21a-278 (b), each of which carried a maximum possible prison sentence of twenty years incarceration.[1] On July 24, 2012, the petitioner appeared before the court, *Kwak*, *J.*, accompanied by his private counsel, Ryan P. Barry of Barry & Barall, LLC, and pleaded guilty, pursuant to a plea agreement, to a substitute information charging him with one count of possession of narcotics with intent to sell in violation of § 21a-277 (a), a lesser offense that carried a maximum possible prison sentence of fifteen years incarceration. Under the terms of the plea agreement, the state agreed to recommend a sentence of seven years incarceration, execution suspended after twenty months, followed by two years probation on terms and conditions to be determined by the court after the preparation of a presentence investigation report, with the petitioner reserving the right to argue for a lesser sentence. Although there was an indication on the record that the court's likely sentence in the event of a guilty plea had been discussed in chambers before the petitioner entered his plea, the particulars of that likely sentence were not recited for the record.

At the plea proceeding, the prosecutor stated the following factual basis for the record. On or about October 21, 2011, within the city of Norwich, the petitioner

[1] Because § 21a-278 provides penalties for sale of cocaine by a nondrug-dependent person, if the petitioner had shown that he was drug-dependent, each charge would have carried a maximum sentence of fifteen years incarceration pursuant to § 21a-277.

sold a small amount of a white substance to a confidential police informant in return for recorded funds. The confidential informant turned the substance over to the police, who submitted a portion of it for chemical testing. The substance tested positive for cocaine. The petitioner later was arrested on a warrant and charged with three counts of sale of narcotics.

The court then canvassed the petitioner in detail about the nature and consequences of his plea. At the end of its canvass, the court inquired of the petitioner as follows as to his general awareness that, if he were not a United States citizen, his plea could have certain adverse immigration consequences:

"The Court: If you're not a [United States] citizen, with this conviction you may face consequences of deportation, exclusion from readmission or denial of naturalization. You understand that, sir? You have to answer verbally so we can hear you.

"[The Petitioner]: No.

"The Court: Okay. Let me ask that question again. If you're not a [United States] citizen, with this conviction you may face consequences of deportation, exclusion from readmission or denial of naturalization. You understand that, sir? Do you understand the question?

"[The Petitioner]: Yes, I do.

"The Court: Okay. You understand that, right, it could have consequences if you're not a [United States] citizen; yes?

"[The Petitioner]: Yes.

"Attorney Barry: Your Honor, we've talked about this before. My notes reflect that, and [I've] reviewed them again this morning. I'm not an immigration lawyer; I advised him to consult with an immigration attorney.

"The Court: Okay."

The court accepted the petitioner's plea after finding, inter alia, that there was a factual basis for his plea and that the plea had been made "voluntarily and knowingly," with the assistance of competent counsel.

On October 3, 2012, after the presentence investigation report was completed, the petitioner appeared before a different judicial authority, *McMahon, J.*, accompanied by Attorney Michael J. Dyer of Barry & Barall, LLC. The court sentenced the petitioner on that date, after a conversation between all counsel and with Judge McMahon in chambers, to four years incarceration, execution suspended after one year, followed by two years probation.

On June 2, 2014, after he had completed the nonsuspended portion of his sentence, the petitioner was detained by immigration authorities. Then, as now, he was subject to mandatory deportation as a result of his guilty plea because the offense of possession of narcotics with intent to sell is an "aggravated felony" under federal law.[2]

On June 30, 2014, the petitioner filed his original petition for a writ of habeas corpus in this case. He later filed an amended petition on December 12, 2014. The amended petition contained one count, alleging that the petitioner's private counsel, Attorney Barry, had not advised him adequately before his plea that a conviction of the offense to which he was pleading guilty would result in his mandatory deportation to Haiti. The petitioner contended that such inadequate

[2] See 8 U.S.C. § 1227 (a) ("[a]ny alien . . . in and admitted to the United States shall . . . be removed . . . [2] [A] . . . [iii] . . . who is convicted of an aggravated felony at any time after admission"). Violation of any law or regulation of a state relating to a controlled substance as defined in 21 U.S.C. § 802 is an aggravated felony, and cocaine is a schedule II drug under federal law. See 21 U.S.C. § 812 (2012). Thus, a conviction under § 21a-277 (a) subjects a defendant to mandatory removal under federal law.

advice violated his constitutional right to the effective assistance of counsel.

The habeas court conducted a trial on the merits of the amended petition on October 27, 2015. In addition to his own testimony, the petitioner presented testimony from Barry and Attorney Anthony Collins, an expert on immigration law. The respondent, the Commissioner of Correction, presented no evidence at the habeas trial.

At the habeas trial, the petitioner testified that Barry never told him that his guilty plea would cause him to be deported. He claimed that he would have gone to trial on the original charges against him, instead of pleading guilty, had he known that his guilty plea would cause him to be deported. When questioned as to whether Barry had discussed with him the strength of the state's case against him, the petitioner first denied that any such conversation had taken place. Instead, he testified that Barry had told him that the plea agreement was a good deal and that he previously had represented other clients charged with the same offense who had not been detained by immigration authorities after they pleaded guilty and were sentenced. When asked whether Barry had attempted to set up an appointment for him with an immigration attorney, and whether he had rejected such a meeting after telling Barry that he was not worried about deportation, but instead wanted to take the good deal that had been offered to him, the petitioner denied both that any appointment with immigration counsel ever had been arranged for him and that he ever had told Barry that he was not concerned about deportation.

Barry testified that he had discussed the immigration consequences of pleading guilty in every conversation he had had with the petitioner concerning his case. He stated that the petitioner had told him that he was not worried about immigration and just wanted to get the

best plea deal that Barry could negotiate for him. Barry recalled telling the petitioner in one conversation that he should not go to trial because, if he were convicted, he could receive a total prison sentence of sixty years incarceration, and thus could be stuck in prison for a long time before being sent out of the country. He also told the petitioner that it would be difficult for him to remain in the United States because the state's evidence against him was very strong. Indeed, he recalled telling the petitioner that the state had him "dead to rights on [his three original charges of] sales [of cocaine]." Barry further testified that he had called two immigration attorneys and e-mailed one of them, asking that attorney to meet with the petitioner, but that the petitioner had not met with any immigration attorney, stating that he did not need such a meeting. Barry stated that he never had any indication from the prosecutor that the petitioner might ever receive a better plea offer than the one he received and thus that the petitioner's only options were to plead guilty to a single count of possession of narcotics with intent to sell under § 21a-277 (a) under the agreement he negotiated or to go to trial on the three original sales charges under § 21a-278 (b).

On April 20, 2016, the court issued a memorandum of decision denying the petition for a writ of habeas corpus. In the decision, the court found credible Barry's testimony that he had discussed the high probability of deportation with the petitioner, and that he had urged the petitioner to seek advice from an immigration lawyer and personally arranged an appointment with such a lawyer for him. The court also credited Barry's testimony that the petitioner had not been concerned about being deported. On that score, the court found that the petitioner's primary goal in seeking a plea bargain was to obtain the shortest possible prison sentence, and that he accomplished this goal by accepting a guilty plea that resulted in a total effective sentence of one

year of confinement. The court expressly rejected the petitioner's testimony that his counsel never had informed him that his guilty plea would result in his mandatory deportation and his claim that, had he understood that deportation would be the mandatory consequence of his plea, he would have rejected the proposed plea bargain and gone to trial.

Rather than analyzing whether Barry's previously described performance was deficient under prevailing federal and state constitutional standards, the court focused its analysis on whether the petitioner had established that he was prejudiced by his counsel's allegedly deficient performance. The court concluded that the petitioner had not satisfied his burden of proving prejudice, finding in relevant part: "Given the overwhelming evidence against him, the petitioner was well aware that conviction for [the] sale of cocaine was virtually inevitable. He consistently dismissed Attorney Barry's admonitions regarding deportation as playing a minimal role in his decision to accept the negotiated plea agreement. This decision was eminently reasonable because deportation was realistically unavoidable. A lighter sentence became of paramount concern. So much so, that the petitioner found that showing up for [the] appointment with an immigration lawyer, which Attorney Barry arranged for him, was unnecessary. The court concludes that the petitioner's habeas testimony to the contrary is unworthy of belief and is the product of his desire to avoid paying the piper."

After the habeas court issued its memorandum of decision, the petitioner petitioned for certification to appeal. On May 3, 2016, the habeas court denied the petition for certification. This appeal followed.

I

The petitioner claims that the habeas court abused its discretion in denying his petition for certification to

appeal from the denial of his petition for a writ of habeas corpus on his claim of ineffective assistance of counsel. "Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, [the petitioner] must demonstrate the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . . To prove that the denial of his petition for certification to appeal constituted an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification." (Internal quotation marks omitted.) *Duncan* v. *Commissioner of Correction*, 171 Conn. App. 635, 644–45, 157 A.3d 1169, cert. denied, 325 Conn. 923, 159 A.3d 1172 (2017), quoting *Sanders* v. *Commissioner of Correction*, 169 Conn. App. 813, 821–22, 153 A.3d 8 (2016), cert. denied,

325 Conn. 904, 156 A.3d 536 (2017); see also *Vazquez* v. *Commissioner of Correction*, 123 Conn. App. 424, 428–29, 1 A.3d 1242 (2010), cert. denied, 302 Conn. 901, 23 A.3d 1241 (2011). With these principles in mind, we turn to the merits of the petitioner's substantive claim that his trial counsel rendered ineffective assistance by failing to warn him, clearly and unequivocally, of the mandatory deportation consequences of his conviction on the charge to which he entered his plea of guilty.

II

The petitioner claims that the habeas court improperly rejected his claim that he received ineffective assistance of counsel in connection with his guilty plea because his counsel failed to advise him adequately as to the mandatory immigration consequences of that plea. Specifically, the petitioner claims that counsel's failure to so advise him prejudiced him because there is a reasonable probability that, but for such allegedly deficient advice, he would not have pleaded guilty but instead would have insisted on going to trial on the original charges against him. Because we conclude not only that the habeas court properly determined that the petitioner failed to demonstrate that he was prejudiced by counsel's allegedly deficient performance, but also that, upon the facts found, there is no issue that could be debatable among jurists of reason, no court could resolve the issues in a different manner and there are no questions adequate to deserve encouragement to proceed further, we find that the habeas court did not abuse its discretion in denying the petition for certification to appeal.

We begin our analysis with the legal principles that govern our review of the petitioner's claim. "A criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of

criminal proceedings. . . .[3] This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . .

"A claim of ineffective assistance of counsel is governed by the two-pronged test set forth in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. Under *Strickland*, the petitioner has the burden of demonstrating that (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense because there was a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance. . . . For claims of ineffective assistance of counsel arising out of the plea process, the United States Supreme Court has modified the second prong of the *Strickland* test to require that the petitioner produce evidence that there is a reasonable probability that, but for counsel's errors, [the petitioner] would not have pleaded guilty and would have insisted on going to trial. . . . An ineffective assistance of counsel claim will succeed only if both prongs [of *Strickland*] are satisfied." (Footnote in original; internal quotation marks omitted.) *Flomo* v. *Commissioner of Correction*, 169 Conn. App. 266, 277–78, 149 A.3d 185 (2016), cert. denied, 324 Conn. 906, 152 A.3d 544 (2017), quoting *Thiersaint* v. *Commissioner of Correction*, 316 Conn. 89, 100–101, 111 A.3d 829 (2015); see also *Hill* v. *Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985) (modifying *Strickland* prejudice analysis in cases in which petitioner entered guilty plea). "It is axiomatic that courts may decide against a petitioner on either prong [of the

[3] It is well settled that "critical stages" include those related to the entering of a guilty plea. See *Missouri* v. *Frye*, 566 U.S. 134, 140, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012).

Strickland test], whichever is easier." *Lewis* v. *Commissioner of Correction*, 165 Conn. App. 441, 451, 139 A.3d 759, cert. denied, 322 Conn. 901, 138 A.3d 931 (2016), citing *Strickland* v. *Washington*, supra, 697 ("a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the [petitioner]").

A claim of ineffective assistance of counsel raised by a petitioner who faces mandatory deportation as a consequence of his guilty plea is analyzed more particularly under *Padilla* v. *Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), a case in which the United States Supreme Court held that counsel must inform clients accurately as to whether a guilty plea carries a risk of deportation. Id., 368–69. *Padilla* recently was analyzed under Connecticut law in *Budziszewski* v. *Commissioner of Correction*, 322 Conn. 504, 507, 142 A.3d 243 (2016), where our Supreme Court concluded that, although "there are no precise terms or one-size-fits-all phrases that counsel must use . . . [i]n circumstances when federal law mandates deportation . . . counsel must unequivocally convey to the client that federal law mandates deportation as the consequence for pleading guilty."

"The [ultimate] conclusions reached by the [habeas] court in its decision [on a] habeas petition are matters of law, subject to plenary review. . . . [When] the legal conclusions of the court are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record. . . . To the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous. . . . [A] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the

entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . A reviewing court ordinarily will afford deference to those credibility determinations made by the habeas court on the basis of [the] firsthand observation of [a witness'] conduct, demeanor and attitude." (Citation omitted; internal quotation marks omitted.) *Flomo* v. *Commissioner of Correction*, supra, 169 Conn. App. 278–79.

To satisfy the prejudice prong, the petitioner had the burden to prove that, absent counsel's alleged failure to advise him in accordance with *Padilla*, it is reasonably probable that he would have rejected the state's plea offer and elected to go to trial. See *Hill* v. *Lockhart*, supra, 474 U.S. 59. In evaluating whether the petitioner had met this burden and evaluating the credibility of the petitioner's assertions that he would have gone to trial, it was appropriate for the court to consider whether "a decision to reject the plea bargain would have been rational under the circumstances." *Padilla* v. *Kentucky*, supra, 559 U.S. 372. The habeas court made an explicit finding that the petitioner "was well aware that conviction for [the] sale of cocaine was virtually inevitable. . . . This decision was eminently reasonable because deportation was realistically unavoidable. A lighter sentence became of paramount concern." That finding is not clearly erroneous because it is supported by Barry's testimony at the habeas trial that he informed the petitioner of the strength of the state's case against him and the petitioner told him that he was not concerned about the immigration consequences of a plea, but instead wanted Barry to get him the shortest possible sentence. The court was free to credit Barry's testimony that the petitioner was not concerned about the immigration consequences of his plea and that he simply wanted to receive the shortest possible period of incarceration—that he in fact requested Barry obtain him a sentence of four years incarceration suspended after one year—which he accomplished by accepting the plea agreement that his attorney negotiated.

The court similarly was free to reject the petitioner's testimony at the habeas trial that he would have rejected the proposed plea agreement and gone to trial had he been advised that he would almost certainly face deportation as a result of his plea. The court could have found that testimony not credible and unreasonable, particularly in light of its rejection of the petitioner's assertions that Barry did not discuss potential immigration consequences of the plea with him or attempt to set up an appointment for him with an immigration attorney, and because the petitioner faced the real possibility, if he had chosen to go to trial and lost, of receiving a much longer sentence before being deported. It is simply not the role of this court on appeal to second-guess credibility determinations made by the habeas court. *Martin* v. *Commissioner of Correction*, 141 Conn. App. 99, 104, 60 A.3d 997, cert. denied, 308 Conn. 923, 94 A.3d 638 (2013).

In the present case, the habeas court elected not to decide whether Barry's performance was deficient. Rather, it denied the habeas petition on the basis of its determination that the petitioner's ineffective assistance claim failed on the prejudice prong of the *Strickland-Hill* test. According to the habeas court, the petitioner failed to satisfy his burden of proving prejudice because he did not show that, but for Barry's allegedly deficient performance, it is reasonably probable that he would have rejected the plea agreement offered by the state and instead insisted on going to trial. On the basis of the habeas court's factual determinations, which are not clearly erroneous, and its credibility determinations, we conclude that no court could resolve the issues presented in this appeal in a different manner.

The appeal is dismissed.

In this opinion the other judges concurred.