CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

SEAPORT CAPITAL PARTNERS, LLC
v. SHERI SPEER

SEAPORT CAPITAL PARTNERS, LLC
v. SHERI SPEAR

SEAPORT CAPITAL PARTNERS, LLC
v. SHERI SPEER ET AL.

SEAPORT CAPITAL PARTNERS, LLC *v.* 76–78
TRUMAN STREET, LLC, ET AL.
(AC 39315)

DiPentima, C. J., and Lavine and Flynn, Js.

Syllabus

The plaintiff in error, B, who had been appointed the receiver of rents in nine foreclosure actions brought by the defendant in error, S Co., against the defendant in error property owner, S, filed a writ of error, claiming, inter alia, that the trial court lacked subject matter jurisdiction over the foreclosure actions, and that the trial court had improperly granted S Co.'s motions for order to have B pay into court the income that he had documented in his receiver reports. After the trial court had denied B's motion to approve the receiver reports that he had filed, the court provided B with an opportunity to file new reports for purposes of a hearing, at which the court would determine the sufficiency of those reports and reconsider the order of payment. The court denied B's motions to reargue the order for payment to the court and found that the receiver reports B subsequently filed were not satisfactory. B then filed the writ of error in the Supreme Court, which transferred the matter to this court. *Held*:

1. B could not prevail on his claim that because S Co. did not fully fund the loans on eight of the nine properties, S Co. lacked standing to commence the foreclosure actions, which thereby deprived the trial court of subject matter jurisdiction and rendered the receivership void; S Co., which presented the note for each of the nine mortgages, was entitled to a rebuttable presumption that it had standing as the holder of the notes to bring the underlying foreclosure actions, and B did not present any evidence to rebut that presumption, as B's conclusory statement that the loans were not fully funded was insufficient to rebut that presumption.
2. The trial court properly granted S Co.'s motions for order of payment: that court's findings that B, as receiver, was required to pay income that he had collected on the nine properties, that certain capital contributions made by S that supplemented the rental incomes should be included in the determination of the amount of income collected, and concerning the total rent collected with respect to each property were supported by the evidence in the record and were not clearly erroneous, and despite B's claim that the amount of money he collected was significantly less than what he was ordered to pay, the trial court's orders were based on the receiver reports B filed, and it was his burden either to submit accurate reports or subsequently to correct them; moreover, even if, as B claimed, S was collecting rents and documenting the amounts received, that did not absolve B of his obligation as receiver to collect and account for the rents for the properties, and B's claim that the doctrine of judicial estoppel barred S Co. from claiming that B owed the funds that allegedly were collected by S was unavailing, as S Co. never took a clearly inconsistent position in an earlier proceeding, which never took place, and, therefore, the doctrine of judicial estoppel did not apply.
3. The trial court did not abuse its discretion in denying B's motions to reargue, as he failed to demonstrate that the court misapprehended the facts when granting S Co.'s motions for order of payment; the funds B was ordered to pay were admitted by him in the receiver reports, which B had multiple opportunities to correct, and the court stated that it would reconsider the order for payment if satisfactory reports were submitted by B, who failed to file adequate receiver reports.

Argued April 17—officially released October 10, 2017

Procedural History

Writ of error from the orders of the Superior Court in the judicial district of New London, *Hon. Joseph Q. Koletsky*, judge trial referee, granting the motions filed by the defendant in error Seaport Capital Partners, LLC, for order of payment of certain rents and denying the

plaintiff in error's motions to reargue, brought to the Supreme Court, which transferred the matter to this court; thereafter, the court, *Hon. Joseph Q. Koletsky*, judge trial referee, issued an articulation of its decision. *Writ of error dismissed.*

Edward Bona, self-represented, the plaintiff in error.

Lloyd L. Langhammer, with whom was *Donna R. Skaats*, for the defendant in error (Seaport Capital Partners, LLC).

Opinion

FLYNN, J. The plaintiff in error, Edward Bona,[1] brings this writ of error to challenge the decisions of the trial court granting the motions of the defendant in error, Seaport Capital Partners, LLC (Seaport), for order of payment, and denying Bona's motions to reargue the order of payment. Bona claims that the court (1) lacked subject matter jurisdiction, (2) improperly granted Seaport's motions for order of payment, and (3) improperly denied Bona's motions to reargue. We disagree with Bona and, accordingly, dismiss the writ of error.

The following facts and procedural history are relevant to our review. On January 25, 2012, Seaport filed nine foreclosure actions against the defendant in error, Sheri Speer,[2] as to rental properties that she owned in Norwich and New London. In all nine actions, Seaport filed motions for the appointment of a receiver of rents, to which Speer objected. On February 21, 2012, the court, *Devine, J.*, granted Seaport's motions and

[1] Bona, who is a member of the bar of this state, appeared self-represented in bringing this writ of error.

[2] On the basis of the underlying loan documents, various other parties were also named as defendants in the foreclosure actions. Because Speer was named in all foreclosure actions, for purposes of simplicity we refer to her alone. Furthermore, although one action filed used the spelling, "Spear," in this opinion we use the spelling that appears more consistently throughout the record.

appointed Bona[3] as receiver of rents by agreement,[4] with no bond to be posted.[5] On June 7, 2012, Seaport filed motions for order requiring Bona to file receiver reports and to account for and turn over all rents collected on the nine properties. Judge Devine granted the motions and instructed "Speer and/or her agents . . . to turn over any money collected since the date of the order for receiver was granted to today's date . . . . Attorney Bona . . . is to submit quarterly reports for each property accounting for money received and expenditures. Income received from each property is to be used for the debts of that property only."

On December 21, 2012, Bona filed his first receiver report in all nine actions.[6] Shortly thereafter, in March, 2013, Bona's duties as to two of the Norwich properties terminated because the properties were purchased in tax lien foreclosure actions. After Bona indicated that he did not wish to continue as the receiver on the remaining properties, Seaport filed motions to substitute Robert K. Jones as the receiver of rents, and the court, *Cosgrove, J.*, granted the motions on May 6, 2013. In its order, the court ordered Bona to file a final receiver report for each property, including the two Norwich properties that had been sold, by May 13, 2013. On May 13, 2013, Bona filed a final receiver report in all

[3] At the time of his receivership appointment, Bona represented Speer. Shortly after being appointed receiver, Bona withdrew as Speer's attorney.

[4] Speer subsequently appealed from the orders appointing Bona as the receiver of rents. Seaport filed a motion to dismiss the appeal for lack of final judgment, which this court granted on May 16, 2012. On July 25, 2012, Speer again appealed various orders, and again this court granted Seaport's motion to dismiss the appeal for lack of final judgment.

[5] The orders granting Seaport's motions stated: "By agreement Attorney Bona is appointed as receiver of rents, with no bond to be posted. Parties agree to exchange financial information and proof of insurance within two weeks."

[6] Although filed in all nine actions, the receiver report did not contain any information regarding one of the New London properties filed under Docket No. CV-12-6012080-S.

nine actions. In June, 2013, he filed additional receiver reports that accounted for February, 2012 to April, 2013.

In May, 2014, Bona filed motions asking the court to accept his receiver reports, to which Seaport objected. Subsequently, on December 8, 2015, Seaport filed motions in each of the nine actions for orders of payment, requesting the court to compel Bona to pay into court the amount of income he claimed in his receiver reports had been received for each property. In total, Seaport requested $180,044.32. Bona objected to these motions.

The court, *Hon. Joseph Q. Koletsky*, judge trial referee, held a hearing on December 16, 2015, regarding Bona's motions to accept his receiver reports and Seaport's motions for order of payment. At the hearing, Bona argued that the court should not grant the motions for order of payment because he did not have the money requested. Bona claimed that anything he had collected, he deposited and handed over to Jones. Moreover, Bona admitted that Speer also was collecting rent from the properties,[7] but he claimed that Speer gave him any payments that she had collected. The court informed Bona that the motions for order of payment were for funds that had not been accounted for, to which Bona responded that he did not have the funds.

Judge Koletsky granted Seaport's motions for order of payment and set a due date of April 15, 2016. The amount due was $180,094.32,[8] plus any rents that Bona collected from May, 2013, and June, 2013, but had not previously turned over to Jones. The amount due

[7] Seaport further complicated this already complicated matter by sending notice to the tenants of the foreclosed properties to pay it, not Bona, the rent due. This demand was revoked, however, and the tenants were notified before any payments were made to Seaport.

[8] In the foreclosure action filed under Docket No. CV-12-6012080, Seaport's motion for order requested $28,220 and the court ordered Bona to pay $28,270.

included both rent received and capital contributions made by Speer, which, according to the receiver reports, supplemented the rental income.[9]

Moreover, the court denied Bona's motions to approve his receiver reports. According to the court, although Bona admitted in the receiver reports to receiving money, the reports did not give a satisfactory explanation as to where the money went. The court further stated that, should Bona file a complete and accurate accounting by February 11, 2016, it would hold a hearing to determine the sufficiency of the receiver report and, upon request, reconsider the order for payment into court.

On December 31, 2015, Bona filed motions in all nine actions to reargue the December 16, 2015 orders. On January 19, 2016, Judge Koletsky denied the motions to reargue, stating that "[u]nless and until the court has received from Attorney Bona the detailed account of all the monies received by him as receiver and where that money went (with copies of checks and any other documentation justifying all expenditures) the court does not intend to modify the potentially ruinous order to reimburse the court. The apparent failure of Attorney Bona to comprehend the serious difficulty he is facing is puzzling, and there is little more the court can do but to emphasize that there is no more basic duty for a receiver than to completely and honestly account for the funds which the receiver obtained as an officer of the Superior Court."

In February, 2016, Bona filed receiver reports accounting for the nine properties from February, 2012

[9] Specifically, Bona recorded in his receiver reports that "[t]he owner of the properties made capital contributions to supplement rental incomes, if any, sustaining many of the units to ensure code compliance, habitability and taxes, etc. The estimated capital contributions of the property owner toward all nine properties [exceed] $55,000 . . . . The owner was reimbursed when possible from the rent collections."

to May, 2013, the duration of his receivership. In these reports, Bona conceded that he did not begin to collect rents until September, 2012, and that prior to that date, Speer was collecting rents and documenting any expenditures. Moreover, Bona conceded that Speer continued to do so after September, 2012.

Judge Koletsky held a hearing on February 16, 2016, at which he determined that Bona still had not filed satisfactory receiver reports.[10] Judge Koletsky thus ordered Bona to file new reports in three weeks and reiterated its prior orders for Bona to pay the funds to the court. Bona did not file additional receiver reports.

On March 16, 2016, Bona filed this writ of error in the Supreme Court concerning his appointment as receiver of rents and the orders requiring him to pay into court $180,094.32. Pursuant to Practice Book § 65-1, our Supreme Court transferred this writ of error to this court on June 16, 2016. Additional facts will be set forth as necessary.

I

Bona first claims that the court lacked subject matter jurisdiction, and, therefore, the receivership was void. Specifically, he argues that Seaport did not fully fund the mortgages on eight of the nine properties, and, as a result, Seaport did not have standing to commence the underlying foreclosure actions. Consequently, Bona argues, the court did not have subject matter jurisdiction over the underlying foreclosure actions and thus

[10] The February, 2016 reports best illustrate the problem with which the court was faced. Although Bona reported the rents received, he did not, in many cases, receive such rent. Moreover, although the reports list expenses for items such as supplies and labor, and include copies of documents such as receipts and bills, the reports lack any explanation for such documents, and the court had not authorized any expenditures for the maintenance and improvement of the properties.

did not have the authority to name him as receiver of rents. We disagree.

We begin our analysis with the applicable standard of review. "If a party is found to lack standing, the court is without subject matter jurisdiction to determine the cause. . . . A determination regarding a trial court's subject matter jurisdiction is a question of law [over which] . . . our review is plenary . . . .

"Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . .

"Our Supreme Court has held that a holder of a note is presumed to be the owner of the debt, and unless the presumption is rebutted, may foreclose the mortgage under [General Statutes] § 49-17[11] . . . . The production of the note establishes his case prima facie against the makers and he may rest there. . . . It [is] for the [party asserting lack of standing] to set up and prove the facts which limit or change the [note holder's] rights. . . . Put differently, [a] holder of a note has standing to bring an action for strict foreclosure pursuant to § 49-17." (Citations omitted; footnote added; internal quotation marks omitted.) *Mengwall* v. *Rutkowski*, 152 Conn. App. 459, 462–63, 102 A.3d 710 (2014).

In the present case, Seaport presented the note for each of the nine mortgages. As the holder of the note,

[11] General Statutes § 49-17 provides: "When any mortgage is foreclosed by the person entitled to receive the money secured thereby but to whom the legal title to the mortgaged premises has never been conveyed, the title to such premises shall, upon the expiration of the time limited for redemption and on failure of redemption, vest in him in the same manner and to the same extent as such title would have vested in the mortgagee if he had foreclosed, provided the person so foreclosing shall forthwith cause the decree of foreclosure to be recorded in the land records in the town in which the land lies."

Seaport was entitled to a rebuttable presumption that it had standing to commence the underlying foreclosure actions. Bona has not presented any evidence to rebut this presumption. Rather, Bona merely claims that Seaport did not fully fund the mortgage loans on eight of the nine properties, and, therefore, the court lacked subject matter jurisdiction. Such conclusory statements are not sufficient to rebut the presumption that Seaport was the holder of the note and, consequently, owner of the debt.[12] Accordingly, we conclude that the court had subject matter jurisdiction over the underlying foreclosure actions, and, therefore, the receivership was not void.

II

Bona next claims that the court improperly granted Seaport's motions for order of payment of income from the nine properties. Specifically, Bona argues that the record clearly indicates that Speer was collecting rents and documenting how the income was spent on the nine properties. Bona further argues that the majority of the funds were deposited in Speer's account, and any funds collected did not equal the $180,094.32 ordered.[13] Moreover, Bona argues that the doctrine of judicial estoppel barred Seaport from seeking the payment of income that it had alleged Speer collected. Thus, Bona argues that the court improperly granted Seaport's motions ordering Bona to pay $180,094.32 to the court.

[12] We note in passing that Bona incorrectly relies on General Statutes § 49-3, which applies to mortgages securing future advancements of money for construction or repair of buildings or improvements. Nothing in the record indicates that the loans granted to Speer were such open-ended construction loans. Moreover, § 49-3 does not require that a loan be fully funded for the holder of a note to have standing to foreclose, as argued by Bona.

[13] At the December 16, 2015 hearing, Bona claimed that Speer turned over any rents that she had collected on the nine properties. His appellate brief, however, states that "the vast majority of the funds collected were in fact deposited into . . . Speer's bank account."

We disagree with Bona. As we discuss subsequently in this opinion, Bona, as receiver, had a duty to collect the rents on the nine properties. This duty was not one which Bona could delegate to others. Moreover, the transactions involved in this matter were complicated by contributions made by Speer, which arguably were not rents, but for which Bona, in his receiver reports, indicated that Speer was reimbursed from the rents collected. None of the receiver reports indicates the amounts reimbursed to Speer and whether any contributions remained unreimbursed at the time of the orders of payment. Furthermore, although the receiver reports indicate that money was spent on maintenance and improvements to the properties, Bona could not authorize any repairs to the properties without the permission of the court, which was not granted. Consequently, we are not persuaded by Bona's arguments.

A

Bona first claims that the court improperly granted Seaport's motions for order of payment because Bona never collected the income. Specifically, Bona argues that the amount collected was significantly less than the $180,094.32 that he was ordered to pay. Bona further argues that Speer, not Bona, was collecting the rents and documenting how the money was spent on the nine properties, and Bona merely generated the reports based on the information given to him by Speer.

Bona, therefore, challenges the validity of the court's conclusion that he, as receiver, was required to pay income that he had collected on the nine properties. The issue raised by Bona, that he never collected the money, involves the factual basis upon which the court rendered its decision. "[W]here the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light

of the evidence and the pleadings in the whole record, those facts are clearly erroneous." (Internal quotation marks omitted.) *Butler* v. *Hartford Technical Institute, Inc.*, 243 Conn. 454, 467, 704 A.2d 222 (1997).

The record supports the court's findings. "[W]hen a receiver is appointed in a foreclosure action to take charge of the property, he holds it as an arm of the court." (Internal quotation marks omitted.) *Hartford Federal Savings & Loan Assn.* v. *Tucker*, 13 Conn. App. 239, 243, 536 A.2d 962, cert. denied, 207 Conn. 805, 540 A.2d 373 (1988). Bona, as receiver of rent, was obligated to collect rent on the nine properties subject to the foreclosure actions. Such income was then to be turned over to the court. Bona, however, did not collect all of the rents and did not turn over the income. As a result, Seaport asked the court to order payment. Seaport filed nine separate motions, one in each of the foreclosure actions. In each motion, Seaport provided a numerical value that it claimed as the total income received for the named property during Bona's receivership, which spanned from February, 2012 to May, 2013. In support of the stated income, Seaport cited to receiver reports filed by Bona, as well as testimony and additional evidence when necessary.

At the outset, we first must address the capital contributions made by Speer to the properties that were the subject of Docket No. CV-12-6012072-S, Docket No. CV-12-6012076-S, Docket No. CV-12-6012077-S, Docket No. CV-12-6012078-S, and Docket No. CV-12-6012079-S. It appears that both Seaport and the court included as income these capital contributions that supplemented the rental incomes. Although the question may exist as to whether such capital contributions should have been part of the $180,094.32, Bona indicated in his reports that Speer was reimbursed for her contributions from the rents collected. Moreover, he did not provide any account as to how much of the reimbursements were

provided from the rents that he was obligated to collect and remit to the court. Accordingly, we cannot conclude that the court's finding as to the inclusion of Speer's contributions in the income collected was clearly erroneous.

Turning now to the court's findings on the amount owed by Bona to the court, in Docket No. CV-12-6012072-S,[14] Seaport claimed a total income of $11,903.47 for the property. To support its claim, Seaport cited to two different receiver reports filed by Bona, a report dated December 10, 2012, which states a total rental income of $4000, and a report dated June 21, 2013, which states a contribution of $7903.47 by Speer, totaling $11,903.47.[15]

In Docket No. CV-12-6012073-S, Seaport claimed a total income of $25,323 for the property. To support its claim, Seaport cited to a receiver report filed by Bona on October 15, 2013. The October 15, 2013 receiver report provides that a deposit of $2200 is to be delivered to the court, thus accounting for Seaport's claim that the total income collected included a $2200 forfeited security deposit. The receiver report records that $18,644 in rent payments was received, $200 of which was paid directly by the tenants and $18,444 of which was paid by third parties.

In response to that report, Seaport claimed that the total rent collected was $22,178, stating that $3534 in

[14] Although the receiver reports were not in the appendices of either brief, we were able to access all reports filed by Bona through the Superior Court electronic filing system.

[15] A discrepancy between the two reports exists, for the June 21, 2013 report states that the total rent received was $3000, not $4000. The June 21, 2013 report, however, does not provide an explanation for this discrepancy and does not provide documentation as to the $3000, whereas the December 10, 2012 report provides an attached accounting that records a rental income of $4000 for the property. As Bona has not proven, or even suggested, that the rental income was $3000 rather than $4000, we shall follow the December 10, 2012 receiver report stating $4000, as the court did.

rent received was not disclosed in the October 15, 2013 receiver report. It claimed that the rent collected from third parties totaled $22,923 because testimony on May 20, 2013, by the third parties provided that they had paid $22,923 on behalf of the tenants. It is Bona's burden to provide us with a record, and he has failed to provide this court with the transcript of the third parties' purported testimony. See Practice Book § 61-10 (a); *Chester* v. *Manis*, 150 Conn. App. 57, 61, 89 A.3d 1034 (2014) ("[i]t is incumbent upon the appellant to take the necessary steps to sustain [his] burden of providing an adequate record for appellate review" [internal quotation marks omitted]). As discussed subsequently in this opinion, although the court did not provide a memorandum of decision, it did state that it completed the calculations for the motions for order of payment. This court gives great deference to the findings of the trial court, whose function it is to weigh and interpret the evidence before it. *Lyme Land Conservation Trust, Inc.* v. *Platner*, 325 Conn. 737, 755, 159 A.3d 666 (2017). Nothing in the record that Bona has provided to us on appeal supports the conclusion that the court erroneously found that the total rent collected from third parties was $22,923, which, with the $200 also collected from the tenants, provides for a total collected rent of $23,123. Consequently, we shall not disturb the court's findings as to Docket No. CV-12-6012073-S. Therefore, the court's finding that the total income collected on the property was $25,323 was not erroneous.

In Docket No. CV-12-6012074-S, Seaport claimed a total income of $2750 for the property. To support its claim, Seaport cited to a receiver report filed by Bona, in which Bona recorded that the rent received was $2750.

In Docket No. CV-12-6012075-S, Seaport claimed a total income of $17,950 for the property. To support its claim, Seaport cited to a receiver report filed on June

24, 2013, in which Bona recorded that the rent received for the property was $17,950.

In Docket No. CV-12-6012076-S, Seaport claimed a total income of $21,672.44. To support its claim, Seaport cited to a receiver report filed on June 24, 2013, in which Bona recorded that he received $12,924.97 in rent and that Speer contributed $8747.47 to the property, totaling $21,672.44 in income.

In Docket No. CV-12-6012077-S, Seaport claimed a total income of $22,347.06. To support its claim, Seaport cited to a receiver report filed on June 11, 2013, in which Bona recorded that the rent received for the property was $16,325 and that Speer contributed $6912.06 to the property.[16]

In Docket No. CV-12-6012078-S, Seaport claimed a total income of $26,647.12. To support its claim, Seaport cited to the receiver report filed on June 11, 2013, in which Bona recorded that he received $19,775 in rent and that Speer contributed $6872.12 to the property, totaling $26,647.12 in income.

In Docket No. CV-12-6012079-S, Seaport claimed a total income of $23,231.23. To support its claim, Seaport cited to a receiver report filed on June 11, 2013, in which Bona recorded that he received $19,074 in rent and that Speer contributed $4157.23, totaling $23,231.23 in income.

In Docket No. CV-12-6012080-S, Seaport claimed a total income of $28,220. To support its claim, Seaport cited to a receiver report filed on June 24, 2013, in which Bona recorded that he received $28,220 in rent.

[16] The total of $16,325 and $6912.06 is $23,237.06, not $22,347.06. On the receiver report, however, the total of $16,325 and $6912.06 is given as $22,347.06. It appears that Bona made a calculation error on the receiver report, on which Seaport and the court subsequently relied.

Nearly every numerical value provided by Seaport as the income collected and subsequently ordered by the court for Bona to pay is supported by a receiver report that Bona filed with the court. Although the court did not provide an accompanying memorandum of decision in its order, in response to Bona's subsequent motion for articulation it stated that it had calculated the rents due during the period of Bona's receivership and thus determined, independent of Seaport's claims, the amount to be paid by Bona. The total income stated in the court's nine orders equals $180,094.32.

Bona's claim that the properties did not generate this amount of income is without merit. Bona provided the income collected to the court through the receiver reports that he filed. If the stated income did not accurately reflect the income collected, Bona could have corrected the amounts in one of the numerous opportunities that he had to file new, satisfactory reports. His failure to do so does not excuse him from liability for the income that he reported. See *Hartford Federal Savings & Loan Assn.* v. *Tucker*, 196 Conn. 172, 178, 491 A.2d 1084, cert. denied, 474 U.S. 920, 106 S. Ct. 250, 88 L. Ed. 2d 259 (1985).

Moreover, Bona's claim that he did not collect much of the money, but rather that Speer did, is not persuasive because it was the duty of the receiver to collect the rents for the properties for which he was receiver. Even if Speer were collecting rents and documenting the amounts received, this does not absolve Bona of his obligations as receiver. As receiver, Bona, not Speer, was responsible for the collecting and accounting of rents. Therefore, the evidence and pleadings in the whole record do not support the conclusion that the court's finding of facts was clearly erroneous, and, accordingly, we conclude that the court properly granted the motions for order of payment.

B

Bona next claims that the court improperly granted Seaport's motions for order of payment because the doctrine of judicial estoppel barred Seaport from claiming that Bona owed funds that Seaport also alleged Speer had collected. As a result, Bona claims that the court abused its discretion in granting the motions.

"[J]udicial estoppel prevents a party in a legal proceeding from taking a position contrary to a position the party has taken in an earlier proceeding. . . . [J]udicial estoppel serves interests different from those served by equitable estoppel, which is designed to ensure fairness in the relationship between parties. . . . The courts invoke judicial estoppel as a means to preserve the sanctity of the oath or to protect judicial integrity by avoiding the risk of inconsistent results in two proceedings." (Internal quotation marks omitted.) *MacDermid, Inc.* v. *Cookson Group, PLC*, 149 Conn. App. 571, 578, 89 A.3d 447, cert. denied, 312 Conn. 914, 93 A.3d 597 (2014).

The doctrine of judicial estoppel does not apply to the circumstances of the present case. Seaport never took a position that was clearly inconsistent with one in an earlier proceeding. In fact, there was no earlier proceeding. Therefore, judicial estoppel does not apply.

III

Bona further claims that the court improperly denied his motions to reargue the court's orders for payment. Specifically, Bona argues that the court abused its discretion when it denied his motions to reargue because the total sum that the court had ordered Bona to pay was not collected by Bona, nor was it produced by the properties. We disagree.

"The standard of review for a court's denial of a motion to reargue is abuse of discretion. . . . When

reviewing a decision for an abuse of discretion, every reasonable presumption should be given in favor of its correctness. . . . As with any discretionary action of the trial court . . . the ultimate [question for appellate review] is whether the trial court could have reasonably concluded as it did. . . .

"The purpose of a reargument is . . . to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts. . . . It also may be used to address . . . claims of law that the [movant] claimed were not addressed by the court. . . . [A] motion to reargue [however] is not to be used as an opportunity to have a second bite of the apple . . . ." *Mengwall* v. *Rutkowski*, supra, 152 Conn. App. 466.

Our review of the record reveals that the court did not abuse its discretion in denying Bona's motions to reargue. In support of his motions to reargue, Bona claimed that the court "ordered payments to be made, based solely on undocumented conjecture by [Seaport], of amounts of money that no one alleges or admits ever existed or were collected. No reports to date reflect any such sums as claimed by [Seaport] in the aggregate in the nine [foreclosure] actions." The funds ordered to be paid by Bona, however, were admitted by him in his receiver reports, and the total income listed in those reports totaled the amount that Bona was ordered to pay. Had the income reported in the receiver reports been incorrect, Bona could have corrected the numerical values in the multiple opportunities given to him to present satisfactory receiver reports. In fact, even when the court granted Seaport's motions for order of payment, it again gave Bona the opportunity to submit complete and accurate reports and informed Bona that, if such reports were satisfactory, the court, upon

request, would consider revisiting the orders for payment. Bona, however, failed to file adequate receiver reports.[17] In turn, Bona has failed to demonstrate that the court misapprehended the facts when granting Seaport's motions to order payment of funds. We therefore conclude that the court did not abuse its discretion in denying Bona's motions to reargue.[18]

The writ of error is dismissed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* SOLOMON TAYLOR (AC 39659)

Alvord, Sheldon and Prescott, Js.

Syllabus

Convicted, after a trial to a three judge court, of the crimes of murder, robbery in the first degree, conspiracy to commit robbery in the first degree, hindering prosecution in the second degree and tampering with physical evidence, the defendant appealed. The defendant's conviction stemmed from an incident in which he and a coconspirator, W, allegedly shot and killed the victim during an alleged drug transaction. On appeal, the defendant claimed that the evidence was insufficient to support his conviction of murder, robbery in the first degree and conspiracy to commit robbery in the first degree, and that the trial court improperly disqualified his first court-appointed attorney, H, on the basis of an alleged potential conflict of interest related to H's representation of J, a potentially material witness for the state in the present case, in a prior criminal case. *Held*:

1. The defendant could not prevail on his claim that the evidence was insufficient to support his conviction of murder, robbery in the first degree and conspiracy to commit robbery in the first degree on the

[17] Bona filed a final receiver report in February, 2016, in each of the foreclosure cases. The court, however, determined that the filed documents did not resemble receiver reports and were unsatisfactory. As a result of Bona's failure to account for funds, the court reiterated its order that he reimburse the court for the income listed in the orders for payment.

[18] Bona also argues that Seaport's claims previously had been settled before Judge Cosgrove on April 3, 2014. Bona failed to raise this claim in the trial court, and, therefore, it was not preserved for appellate review. See Practice Book § 60-5.

ground that there was no evidence that a robbery had occurred, and, therefore, there also was no proof of a conspiracy to commit robbery or of murder under the doctrine of *Pinkerton* v. *United States* (328 U.S. 640), pursuant to which a coconspirator may be found guilty of a crime that he did not commit if the state can establish that a coconspirator did commit the crime and that the crime was within the scope and in furtherance of the conspiracy, and a reasonably foreseeable consequence of the conspiracy; on the basis of the evidence presented and the inferences reasonably drawn therefrom, which established that W agreed to buy drugs from the victim and told the defendant about it, that the defendant was a passenger in the car when W drove to the victim's home while armed, and that they convinced the victim to bring the drugs to the car and then struggled with the victim, who fought back, ultimately shooting him in the head and arm and driving away with the drugs in the car, the court reasonably could have found that the defendant and W robbed the victim, that they did so in furtherance of an agreement to commit a robbery while at least one of them was armed with a deadly weapon, and that the murder of the victim was committed in furtherance of that conspiracy and was a reasonably foreseeable consequence thereof.

2. The trial court did not abuse its discretion in granting the state's motion to disqualify H: the defendant, who was indigent, had no constitutional right to select his appointed counsel, and the court did not act arbitrarily in disqualifying H and appointing new counsel when, as in the present case, a potential conflict of interest existed that could have compromised the integrity of the trial if H continued to represent the defendant, the court having determined that J was expected to provide key testimony regarding the firearm used in the robbery in the present case by connecting it to the prior shooting incident for which H had represented J, and, therefore, H could have experienced great difficulty in cross-examining J about the facts and circumstances surrounding the incident in which she represented J without violating J's rights; moreover, the fact that J did not ultimately testify about the defendant's use of the firearm in question could not be considered, as the trial court could not have known that J would not so testify when it ruled on the motion to disqualify, and the defendant was not prejudiced as a result of H's disqualification.

Argued March 9—officially released October 10, 2017

Procedural History

Substitute information charging the defendant with the crimes of murder, conspiracy to commit murder, felony murder, robbery in the first degree, conspiracy to commit robbery in the first degree, attempt to commit robbery in the first degree, hindering prosecution in the

second degree and tampering with physical evidence, brought to the Superior Court in the judicial district of Waterbury, where the court, *Fasano*, *J.*, granted the state's motion to disqualify defense counsel; thereafter, the matter was tried to a three judge court, *Crawford*, *Roraback* and *Moll*, *Js.*; finding of guilty of murder, felony murder, robbery in the first degree, conspiracy to commit robbery in the first degree, attempt to commit robbery in the first degree, hindering prosecution in the second degree and tampering with physical evidence; subsequently, the court, *Crawford*, *Roraback* and *Moll*, *Js.*, vacated the finding of guilty on the charges of felony murder and attempt to commit robbery in the first degree, and rendered judgment of guilty of murder, robbery in the first degree, conspiracy to commit robbery in the first degree, hindering prosecution in the second degree and tampering with physical evidence, from which the defendant appealed. *Affirmed.*

Lisa J. Steele, assigned counsel, for the appellant (defendant).

Harry Weller, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, *Amy Sedensky*, senior assistant state's attorney, and *Dana Tal*, legal intern, for the appellee (state).

Opinion

SHELDON, J. The defendant, Solomon Taylor, appeals from the judgment of conviction, rendered after a trial before a three judge court, on charges that included murder, under the *Pinkerton* doctrine,[1] in violation of General Statutes § 53a-54a (a), robbery in the

[1] See *Pinkerton* v. *United States*, 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946). "[U]nder the *Pinkerton* doctrine, a conspirator may be found guilty of a crime that he or she did *not* commit if the state can establish that a coconspirator *did* commit the crime and that the crime was within the scope of the conspiracy, in furtherance of the conspiracy, and a reasonably foreseeable consequence of the conspiracy." (Emphasis in original.) *State* v. *Patterson*, 276 Conn. 452, 483, 886 A.2d 777 (2005).

first degree in violation of General Statutes § 53a-134 (a) (2), and conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134 (a) (2).[2] On appeal, the defendant claims that (1) there was insufficient evidence to support his conviction for murder, robbery in the first degree and conspiracy to commit robbery in the first degree because the evidence does not support the court's findings that he and his alleged coconspirator committed or conspired to commit robbery, and (2) the court improperly disqualified his first attorney approximately twenty months before the start of his trial. We affirm the judgment of the trial court.

The following facts were found by the trial court. The defendant and his alleged coconspirator,[3] Joseph Walker,[4] were long-standing and close acquaintances. They had known each other for years, and Walker and the defendant's sister have a child together. On May 12, 2012, between 7 and 8 p.m., the defendant, Walker and some other friends went to the apartment of Alexia Bates, the defendant's girlfriend, stayed for approximately half an hour to forty-five minutes, and then left.

That same day, the victim, David Caban, called his cousin, Angelo Caban (Angelo), and informed him that

[2] The defendant was also found guilty of felony murder in violation of General Statutes § 53a-54c, attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-134 (a) (2), hindering prosecution in the second degree in violation of General Statutes § 53a-166, and tampering with physical evidence in violation of General Statutes § 53a-155 (a) (1).

At sentencing, the court vacated its finding of guilt as to the charges of felony murder and attempted robbery in the first degree. The defendant does not contest his conviction of hindering prosecution in the second degree or tampering with physical evidence. The defendant was acquitted of conspiracy to commit murder in violation of §§ 53a-48 and 53a-54a (a).

[3] Although Walker was tried in a separate trial, the court refers to him as the defendant's codefendant.

[4] We note that the court variously referred to Walker as "Gutter" or "Gudda." For clarity, this opinion will refer to him as Walker.

he had money he owed Angelo and that Angelo could come to his home that evening to pick it up. The victim lived at 127 Proctor Street in Waterbury with his girlfriend, Lourdes Santana. Santana overheard the victim on his cell phone, saying something about "G's." She knew this was a reference to grams and that the victim's nickname, Yayo, meant cocaine. Santana saw that the victim received a phone call that evening from Walker. She recognized the name on the phone from a call that the victim had received two or three days prior. The earlier call had come while the victim was in the shower. He had asked her to answer the phone and give Walker directions to the house.[5] The victim told her that he had been in jail with Walker, and Santana knew that he had been in jail for selling cocaine. After that earlier phone call, Walker had come by the house, and Santana had seen the white Mitsubishi Galant that he was driving. The victim had gone outside to the car for five to ten minutes.

On May 12, 2012, Angelo arrived between 8 and 8:30 p.m., and saw the victim's friend, Anthony Jackson, outside the victim's home. The victim told Jackson that he was waiting for someone. Inside, Angelo saw the victim pacing while the victim was talking on the phone. The victim told Angelo that he was going to "bust a trap," meaning he was going to make a drug transaction. Angelo knew that the victim sold narcotics and that his repayment by the victim would come from a drug sale. Shortly after Angelo arrived at the house, after the phone call from Walker to the victim, Angelo was looking out the kitchen window when he saw a four door Mitsubishi Galant pull up with two black males in it, one in the driver's seat and one in the front passenger seat. This car later was identified as the white Mitsubishi

[5] The court found that the phone call that occurred when the victim was in the shower took place on May 12, 2012. The record reflects, however, that this call took place two or three days prior.

Galant owned by Bates, which the defendant used more than she did.

The victim went outside, saying he was going to talk to "his boy." He went to the Mitsubishi, greeted the occupants of the car and got halfway into the car through the rear passenger side door. Then the victim got out of the car and went inside the house. After entering the bedroom for fifteen to twenty seconds, he came out with something in his hand, which he held "cupped" to his side. As he walked downstairs, he told Angelo to stay where he was and watch over him. He returned to the Mitsubishi and sat in the rear passenger side.

Angelo looked out the window and saw the victim give "dap" (a greeting or locking of hands). Angelo then went outside, where he had a clear view of the Mitsubishi. He saw the victim struggle with someone in the front seat. He also heard muffled gunshots and saw sparks from a gun. Angelo saw the victim grab one of the males in the front seat of the car by the wrist after the victim had been shot in the arm. The other occupant then reached around and shot the victim in the head. Angelo went to the backseat and tried to pull the victim out of the car. He then went around the back of the car, and Walker, who was in the driver's seat, got out of the car and put a dark metal gun in his face. The person in the passenger seat got out of the car and said to Walker, "[y]o, forget it." When Walker turned toward the passenger, Angelo smacked his hand and ran back to his own car, which was parked behind the Mitsubishi.

Jackson, still sitting outside the victim's home, also saw the Mitsubishi Galant pull up with two black males in it. He saw the victim come outside and get in the backseat. Jackson then saw tussling, heard gunshots and saw sparks in the middle of the back of the car.

He got up, grabbed a scooter and ran to the passenger side. He broke the front window with the scooter and leaned in and tried to hit the man in the passenger seat. When he saw a chrome shiny object in the passenger's hand, he ran. The Mitsubishi was gone when he returned.

Santana was in the bedroom when her mother came in and told her that they were shooting at the victim outside. Santana ran to the door, looked outside and saw the victim in the back trying to get out of the Mitsubishi and someone trying to pull him back into the car, then saw the car take off. She tried several times to reach the victim on his cell phone. The first time she called, a man answered. She asked for the victim and the person hung up. She called again and yelled into the phone, and the person hung up. Angelo and Santana tried to follow the Mitsubishi in Angelo's car. They found the victim at the side of the curb on Sylvan Avenue near the intersection with Proctor Street, lying on the ground on his stomach with blood coming from his head.

The defendant and Walker returned to Bates' house in the Mitsubishi at approximately 9:30 p.m. Walker went into the bathroom and would not let anyone in with him. The defendant called Bates into the bedroom. He was pacing and rambling. The defendant told Bates that "crap went wrong" and that Walker had been shot. Bates saw blood on the top of the defendant's underwear. The defendant had a phone in his possession that kept ringing, and when he answered it, Bates could hear a girl screaming on the other end. The defendant looked confused.

The defendant ordered Bates to get his gun from the car. She described the gun as small and dark colored. She had seen it two or three times within one month and knew the defendant kept it in the baseboard heater.

She retrieved the gun from the car and gave it to the defendant, who put it in his waistband.

The defendant then told her to go clean the car. She collected some cleaning supplies, and she and the defendant went down to the car. When Bates and the defendant got to the car, she saw the front passenger window smashed out, a hole in the roof and blood on the front passenger seat, back passenger seat and floor. She found both of the defendant's phones on the floor under the seat. One was a red phone, identical to the one he had in his possession that had been ringing. The defendant, on Bates' discovery of both of his phones in the car, realized the phone that had been ringing in the bedroom was not his. The defendant then said it was "Son's"[6] phone, and he smashed Son's phone in the driveway. Someone across the street returned it to him, but he smashed it a second time and threw it away. Bates also saw crack on the floor of the car. Some of the pieces of crack had blood on them. She collected the crack, placed it in a sandwich bag and gave it to the defendant. He then put the crack in his pocket. She and the defendant removed all the items from the car and placed them in several Epic bags.[7] Bates then cleaned the car thoroughly with Windex and Clorox. She scrubbed the seats and cleaned up the blood.

Bates asked the defendant what happened, and he told her they had been in New Britain and that someone had tried to rob them and shot up the car. He told her that someone named "Son" had been shot in the shoulder and the leg, which explained the blood, and they took him home.

Later that night, Miguel Rivera showed up at Bates' apartment. He saw the defendant in the kitchen standing by a table, on which was crack that looked like it

[6] The trial court did not identify Son. The phone was later identified as belonging to the victim.

[7] "Epic" refers to the name of a store in a shopping mall.

had blood on it. The defendant said he had spilled juice on it. He asked Rivera if he knew anyone who wanted to trade an eight ball, a .38 special and two hundred dollars. Rivera described the defendant as moving around, mad and frustrated. Bates heard the defendant talking to Rivera about selling the crack for a cheaper price because of the blood and also discussing trading a gun for drugs.

At approximately 10 p.m., Walker called the defendant's friend, Julian Warren, and asked him to come to Bates' apartment. When Warren arrived, he saw the defendant and Bates cleaning the car. He saw the broken front window, blood, broken glass and two bullet holes in the roof. When he went upstairs, he saw Walker with his hand bleeding and wrapped in a white shirt, and crack with blood on it in the bathroom sink. Warren and his friend, Calvin, drove Walker to New York and dropped him off close to a hospital. Warren returned to Connecticut, dropped Calvin off and returned to Bates' apartment between 5 and 6 a.m. on May 13, 2012.

The defendant had a second girlfriend, Quantashay Nealy, who was staying at the Motor Lodge on South Main Street in Waterbury from May 12–13, 2012. In the morning on May 13, 2012, the defendant drove Warren in Warren's car to the Motor Lodge. The defendant went to Nealy's room and told her something was wrong. He paced back and forth and said he had been with Walker and something happened. She asked if someone got hurt and he said yes. Nealy saw the defendant take crack out of his pocket, one big piece the size of a baseball and several little pieces that looked like rocks. Some of the pieces had blood on them. He stayed for five or six minutes, then left, leaving the drugs and his iPhone behind.

Still in Warren's car, the defendant and Warren returned to the Motor Lodge later that morning, but

Nealy was not there, and they left. The defendant asked Warren to drive him to New York. Within three to four minutes, they were pulled over by a police officer, and the defendant was taken into custody.

On May 12, 2012, Brian Juengst, then a crime scene technician, went to Bates' apartment and saw the Mitsubishi in the driveway. He saw two bullet holes in the roof of the car and blood-like stains in the car. He smelled cleaning products, and it appeared to him that someone had tried to wipe or destroy evidence. He retrieved several samples of the blood-like stains.

Juengst found the red backing to a cell phone in the driveway and the main body of the phone in the vacant lot next door. The phone was identified as the victim's cell phone. Juengst also found an Epic bag inside of Bates' apartment with cleaning supplies and the defendant's underwear in the refuse on the back porch. The underwear had blood-like stains on it.

Juengst took many blood samples and sent them to be processed. Most of the samples taken from the car, in particular from the backseat, were from the victim. The blood-like stain on the defendant's underwear was the victim's blood.

Additionally, the court noted that it considered (1) the call detail reports relating to the cell phones used by the defendant, Walker and the victim; and (2) the testimony of representatives from the cell phone providers, Verizon Wireless, Sprint and AT&T, relating to such reports. The call detail reports reflected text messages and/or telephone calls on and around May 12, 2012, between, among others, Walker and the victim, Walker and the defendant, Bates and the defendant, and Walker and Warren. The court also noted that it considered the testimony of Special Agent Kevin Horan of the Federal Bureau of Investigation, who analyzed the call detail reports of Walker, the defendant and the victim, and

who presented an analysis reflecting the times of certain communications among them, the respective locations of the cell phone towers in Waterbury and the proximity of those towers to, among other locations, Bates' apartment, the victim's home and place of the shooting, and the Motor Lodge. The court concluded that this evidence corroborated the locations and movements of the defendant on May 12 and 13, 2012.

In the operative information, the defendant was charged with murder, conspiracy to commit murder, felony murder, robbery in the first degree, conspiracy to commit robbery in the first degree, attempted robbery in the first degree, hindering prosecution in the second degree and tampering with physical evidence. After a bench trial, the defendant was found guilty of seven of the eight charges against him. See footnote 2 of this opinion. The court sentenced the defendant as follows: (1) on the charge of murder, fifty-five years incarceration, twenty-five of which were mandatory; (2) on the charge of robbery in the first degree, twenty years incarceration, five of which were mandatory; (3) on the charge of conspiracy to commit robbery in the first degree, twenty years incarceration, five of which were mandatory; (4) on the charge of hindering prosecution in the second degree, ten years incarceration; and (5) on the charge of tampering with physical evidence, five years incarceration. The court ordered all sentences to run concurrently, resulting in a total effective sentence of fifty-five years of incarceration, twenty-five years of which were mandatory. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the evidence was insufficient to support his conviction for murder, robbery in the first degree and conspiracy to commit robbery in the first degree. Specifically, he claims: "[t]here

was no evidence that Walker or [the defendant] had robbed [the victim]." He argues: "[W]hile there was evidence that Walker was involved in a drug deal with [the victim], even if [the defendant] was there, there was no evidence offered to the trial court that a robbery occurred. [The defendant] had a quantity of crack afterward, but there was no evidence that it was stolen from [the victim]." By the same logic, the defendant argues that because there was no proof of a robbery, there was no proof of a conspiracy to commit robbery or of murder under the *Pinkerton* doctrine.[8] We disagree.

"In considering the defendant's challenge, we undertake the same limited review of the panel's verdict, as the trier of fact, as we would with a jury verdict." *State* v. *Bennett*, 307 Conn. 758, 763, 59 A.3d 221 (2013).

"In reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the [court's finding of guilt]. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"We note that the [finder of fact] must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the [finder of fact] to conclude that a basic fact or an inferred fact is true, the [finder of fact] is permitted to consider the

[8] See footnote 1 of this opinion. (A defendant cannot be found guilty of murder under doctrine of *Pinkerton* v. *United States*, 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 [1946], if there was no conspiracy to commit a robbery.)

fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Internal quotation marks omitted.) *State* v. *Bush*, 325 Conn. 272, 285–86, 157 A.3d 586 (2017).

The defendant argues that the state failed to introduce any evidence that he intended to take drugs from the victim without paying for them. He contends: "Walker and [the victim] agreed to a drug deal, and [the victim] was shot after that transaction. Obviously, something went wrong after the transaction, but the state did not present any evidence that [the defendant] agreed or intended to take drugs from [the victim] without paying for them." We disagree.

"A person commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of: (1) Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or (2) compelling the owner of such property or another person to deliver up the property or to engage in other conduct which

aids in the commission of the larceny." General Statutes § 53a-133. "A person is guilty of robbery in the first degree when, in the course of the commission of the crime of robbery . . . he or another participant in the crime . . . is armed with a deadly weapon . . . ." General Statutes § 53a-134 (a) (2). "A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner . . . ." General Statutes § 53a-119.

"To establish the crime of conspiracy under § 53a-48 . . . it must be shown that an agreement was made between two or more persons to engage in conduct constituting a crime and that the agreement was followed by an overt act in furtherance of the conspiracy by any one of the conspirators. The state must also show intent on the part of the accused that conduct constituting a crime be performed. . . . Conspiracy is a specific intent crime, with the intent divided into two elements: (a) the intent to agree or conspire and (b) the intent to commit the offense which is the object of the conspiracy. . . . Thus, [p]roof of a conspiracy to commit a specific offense requires proof that the conspirators intended to bring about the elements of the conspired offense." (Citations omitted; internal quotation marks omitted.) *State* v. *Danforth*, 315 Conn. 518, 531–32, 108 A.3d 1060 (2015).

"[T]he existence of a formal agreement between the conspirators need not be proved [however] because [i]t is only in rare instances that conspiracy may be established by proof of an express agreement to unite to accomplish an unlawful purpose. . . . [T]he requisite agreement or confederation may be inferred from proof of the separate acts of the individuals accused as coconspirators and from the circumstances surrounding the commission of these acts. . . . Further, [c]onspiracy can seldom be proved by direct evidence. It may be

inferred from the activities of the accused persons. . . . Finally, [b]ecause direct evidence of the accused's state of mind is rarely available . . . intent is often inferred from conduct . . . and from the cumulative effect of the circumstantial evidence and the rational inferences drawn therefrom." (Citation omitted; internal quotation marks omitted.) Id., 532–33.

Construing the evidence in the light most favorable to sustaining the court's finding of guilt, we conclude that there was sufficient evidence to support the defendant's conviction of the crimes of robbery in the first degree and conspiracy to commit robbery in the first degree. The defendant challenges the larceny and agreement elements of these charges, arguing that there was no evidence he took or intended to take drugs or money from the victim, or that he agreed to do so.

In the present case, the court, acting as the trier of fact, found that there were multiple calls and text messages on the evening of May 12, 2012, between Walker and the victim and Walker and the defendant. Walker and another black male drove to the victim's home in the car of the defendant's girlfriend. The victim went to the car, briefly spoke with the occupants, returned to his home and came back out to the car with something cupped in his hand. After the victim got back into the car, he struggled with the occupants in the front seat, which resulted in a shooting inside the car. The car then drove away. Walker and the defendant returned to Bates' home, where the defendant had Bates collect his gun and some bloody crack from the car. The defendant then attempted to sell or trade the crack at a discount. He was visibly upset and pacing, telling both of his girlfriends that something had gone wrong that night. At Bates' home, the defendant learned that he had two identical red phones in his possession, and he destroyed the one that he told her belonged to "Son."

From those findings and from the court's statements that it noted and credited regarding the call detail reports and the testimony of Horan, it reasonably could be inferred that Walker made an agreement to buy drugs from the victim and told the defendant about it. The defendant was the passenger in the car when Walker drove to the victim's home. The victim was expecting to sell Walker drugs for cash, which he would then use to repay Angelo. Instead, Walker and the defendant showed up at the defendant's home armed. They convinced the victim to bring the drugs to the car and then struggled with the victim, ultimately shooting him in the head and arm and driving away with the drugs in the car. The defendant's statements that something had gone wrong indicated that there had been a plan. He did not expect to be in possession of the victim's phone, and he attempted to destroy it when he realized that it belonged to the victim.

Viewing the evidence in the light most favorable to sustaining the court's finding of guilt, as we must, we conclude that the court reasonably found, on the basis of the evidence presented and the reasonable inferences drawn therefrom, that the defendant and Walker robbed the victim, who fought back, and that they did so in furtherance of an agreement to commit a robbery while at least one of them was armed with a deadly weapon. Because the murder of the victim was committed in furtherance of that conspiracy, and was a reasonably foreseeable consequence thereof, such proof of conspiracy also supported the defendant's conviction for murder under the *Pinkerton* doctrine. Accordingly, we find no merit to the defendant's claim.

II

The defendant next claims that "[t]he trial court (*Fasano*, *J.*) abused its discretion and violated [his] sixth amendment right to counsel when it disqualified

[his] first attorney." Specifically, the defendant claims that, in determining whether to disqualify his court-appointed attorney based upon an alleged potential conflict of interest, the court failed to consider his constitutional right to continued representation by that attorney. The state counters that the defendant, who was indigent, had no constitutional right to choose his appointed counsel, and, further, that the court did not act arbitrarily when it disqualified the defendant's assigned counsel, and thus did not abuse its discretion in so doing. In his reply brief, the defendant acknowledged, as the state argued, that an indigent defendant does not have a constitutional right to his choice of assigned counsel, but reiterated his argument that "once that counsel has been assigned and the defendant has begun a relationship with his counsel, the defendant has a constitutional protection against the state or the courts interfering with that relationship absent a showing that the likelihood and dimensions of any conflicts of interest are substantial. We agree with the state.

The following facts are relevant to this claim. Approximately two years before his trial, the defendant was represented by assigned counsel, Attorney Vicki Hutchinson. On May 31, 2013, the state filed a motion to disqualify Hutchinson on the ground that she previously had represented Warren, potentially a major and material state's witness in the case against the defendant to whom she owed a duty of loyalty and whose interests were adverse to the defendant's. Although the defendant waived any conflict of interest, Warren did not. The defendant objected to the motion to disqualify.

At a hearing regarding the matter on May 31, 2013, Hutchinson represented that she was appointed by the public defender's office to represent Warren on a different matter on November 29, 2011. She formally was appointed to represent him by the court on November 30, 2011. She received discovery from the state and

met with Warren once in jail. Warren's charges were interfering with an officer, attempt to commit assault in the first degree, reckless endangerment in the first degree, illegal discharge of a firearm and carrying a pistol without a permit, but no firearm was ever recovered. She did not do any "legwork" on the case and spoke to Warren once in jail and to his mother a few times. She did not anticipate a conflict in cross-examining Warren because the only information she had was from public records and any attorney could cross-examine him on conflicting statements from his original case.

The court found: "Here the defendant is charged in concert with a co-defendant Walker in a homicide. An incident that resulted in the death of a David Caban during the course of what appeared to be, at least factually appears to be a drug deal gone bad. I did hear much of the testimony in the [probable cause hearing]. Mr. Warren, who is the witness in question, testified in the [probable cause hearing]. Based on that testimony alone if the decision were being made, based only on the testimony I heard in the course of the [probable cause hearing], frankly, it wasn't the key evidence in the state's case with respect to Mr. [Warren] who is basically seeing the vehicle after the incident. The defendant—the witness was not a particularly strong witness, not a particularly effective witness. And under the circumstances I think the equities would favor the defendant retaining counsel under the circumstances of the testimony I heard.

"Now the claim is totally different. The witness takes on a different role. He's now a witness—key witness and I'm going—at least be a chain in the link that connects this defendant to a specific firearm. A firearm that, apparently, other witnesses will testify fits the description of the firearm used in the homicide. And so now that this defendant is not just placed in the car with a co-defendant at the time of the homicide but

now—which was the testimony at the hearing in probable cause, but now his gun, the gun that this witness Julian Warren will identify as the gun, he has seen the defendant in possession of. He's seen the defendant actually use this gun. Now [it's] going to be allegedly connected to the gun used in the homicide. That he was with the defendant when the defendant actually used the gun. That's the specific case that Attorney Hutchinson represented [Warren] on. That he was with the defendant when he used the gun and that prior shooting for which the witness was arrested—Mr. Warren was apparently arrested, represented by Attorney Hutchinson, who represented him from November 29, 2011 to March 8, 2012. And, ultimately, resulting in a nolle on that date, March 8, 2012.

"So it is certainly a different circumstance from the testimony I heard during the course of the [probable cause hearing]. Now claiming that this witness is a key witness connecting the weapon to the defendant, this defendant, and to the weapon used in the homicide, which means that Attorney Hutchinson would necessarily be in the compromised position at trial of cross-examining the state's key witness, her former client, about facts and circumstances that will encompass the incident in which she represented the witness. Involving the same gun alleged to have been used in both the homicide and the earlier shooting. Her goal would necessarily be to discredit the testimony of her prior client and she would have to accomplish that goal without jeopardizing privileged communications, privileged communication she received by Mr. Warren during the course of her representation of him. The problem—if this were an unrelated matter in which Attorney Hutchinson represented Mr. Warren, I think I again find the equities in favor of sustaining her appearance in this case on behalf of the defendant. But this is—this goes right to the heart of the trial. It goes to a key witness

who she would have to cross-examine in connection with an incident where she actually represented the witness.

"So under the circumstances I am satisfied that despite the defendant's voluntary waiver of any conflict that the motion to disqualify Attorney Hutchinson has to be granted. I'm satisfied that it [affects] the very integrity of the trial. I think the integrity of the trial would be compromised by her continued representation in this case."

"[T]he sixth amendment right to counsel of choice . . . commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best." *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 146, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006). "To overcome the presumption in favor of a defendant's choice of counsel, a disqualification decision by the trial court must, therefore, be based upon a reasoned determination on the basis of a fully prepared record . . . . Because the interest at stake is nothing less than a criminal defendant's sixth amendment right to counsel of his choice, the trial court cannot vitiate this right without first scrutinizing closely the basis for the claim. Only in this way can a criminal defendant's right to counsel of his choice be appropriately protected." (Citation omitted; internal quotation marks omitted.) *State* v. *Peeler*, 265 Conn. 460, 474–75, 828 A.2d 1216 (2003), cert. denied, 541 U.S. 1029, 124 S. Ct. 2094, 158 L. Ed. 2d 710 (2004).

Although it is generally structural error for a court to disqualify a defendant's attorney of choice, "the right to counsel of choice is circumscribed in several important respects. . . . Significantly, a defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant. . . . [T]he right to counsel of

choice does not extend to defendants who require counsel to be appointed for them. . . . Nor may a defendant insist on representation by a person who is not a member of the bar, *or demand that a court honor his waiver of conflict-free representation*. . . . We have recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness . . . and against the demands of its calendar . . . . The court has, moreover, an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Peeler*, 320 Conn. 567, 579, 133 A.3d 864, cert. denied, U.S. , 137 S. Ct. 110, 196 L. Ed. 2d 89 (2016).

Although "[a]n attorney [facing a possible conflict] in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial"; (emphasis omitted; internal quotation marks omitted) *State* v. *Crespo*, 246 Conn. 665, 696, 718 A.2d 925 (1998), cert. denied, 525 U.S. 1125, 119 S. Ct. 911, 142 L. Ed. 2d 909 (1999), quoting *Cuyler* v. *Sullivan*, 446 U.S. 335, 347, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); see *Willis* v. *United States*, 614 F.2d 1200, 1206 (9th Cir. 1980); this consideration does not "[transfer] to defense counsel the authority of the trial judge to rule on the existence or risk of a conflict . . . ." (Internal quotation marks omitted.) *State* v. *Cruz*, 41 Conn. App. 809, 814, 678 A.2d 506, cert. denied, 239 Conn. 908, 682 A.2d 1008 (1996), quoting *Holloway* v. *Arkansas*, 435 U.S. 475, 486, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978). "When a defendant's selection of counsel seriously endangers the prospect of a fair trial, a trial court justifiably may refuse to agree to the choice. Thus, a trial court may, in certain situations, reject a defendant's choice of

counsel on the ground of a potential conflict of interest, because a serious conflict may indeed destroy the integrity of the trial process." *State* v. *Peeler*, supra, 265 Conn. 473. "There are many situations in which a . . . court can determine that disqualification of counsel is necessary. The most typical is where the . . . court finds a potential or actual conflict in the chosen attorney's representation of the accused, either in a multiple representation situation . . . or because of the counsel's prior representation of a witness or co-defendant . . . ." (Internal quotation marks omitted.) *State* v. *Crocker*, 83 Conn. App. 615, 627, 852 A.2d 762, cert. denied, 271 Conn. 910, 859 A.2d 571 (2004), quoting *United States* v. *Locascio*, 6 F.3d 924, 931 (2d Cir. 1993).

"[A trial] court must pass on the issue whether or not to allow a waiver of a conflict of interest by a criminal defendant not with the wisdom of hindsight after the trial has taken place, but in the murkier pretrial context when relationships between the parties are seen through a glass, darkly. . . . [T]he [trial] court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses." *Wheat* v. *United States*, 486 U.S. 153, 162–63, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988).

Indigent defendants are entitled to the appointment of adequate, competent counsel with undivided loyalty. Indigent defendants, however, have no right to select appointed counsel. Arbitrary denial of appointed counsel can be a due process violation. In situations in which trial courts in other states have changed counsel appointed for indigent defendants over the wishes of the defendants, it has been held to be the trial court's duty to protect the defendant's right to effective counsel

while balancing the defendant's right to retain the counsel he prefers. See *McKinnon* v. *State*, 526 P.2d 18, 22 (Alaska 1974); *Smith* v. *Superior Court of Los Angeles County*, 68 Cal. 2d 547, 559, 440 P.2d 65, 68 Cal. Rptr. 1 (1968). We agree with the California Supreme Court, which stated: "[O]nce counsel is appointed to represent an indigent defendant, whether it be the public defender or a volunteer private attorney, the parties enter into an attorney-client relationship which is no less inviolable than if counsel had been retained. To hold otherwise would be to subject that relationship to an unwarranted and invidious discrimination arising merely from the poverty of the accused." *Smith* v. *Superior Court of Los Angeles County*, supra, 562; accord *Stearnes* v. *Clinton*, 780 S.W.2d 216, 221–22 (Tex. Crim. App. 1989). Factors that have been found *not* to outweigh an indigent defendant's right to continued representation by his appointed counsel include the judge's subjective opinion that the counsel is " 'incompetent' " because of ignorance of the law to try the case before him; *Smith* v. *Superior Court of Los Angeles County*, supra, 549; a judge's view that there was an inexcusable lack of preparation by the public defender's office; *McKinnon* v. *State*, supra, 21; and mere disagreement by the trial judge as to the conduct of the defense. *Harling* v. *United States*, 387 A.2d 1101, 1105 (D.C. App. 1978).

A court may, however, change a defendant's appointed counsel for a nonarbitrary reason. Factors that have been found to outweigh an indigent defendant's right to continued representation by appointed counsel include a potential conflict of interest because a defendant's appointed attorney previously represented a person whom the defense suspected of committing the murder of which the defendant was accused, notwithstanding the defendant's offer to waive the potential conflict; *People* v. *Jones*, 33 Cal. 4th 234, 240–42, 91 P.3d 939, 14 Cal. Rptr. 3d 579 (2004); and a

potential conflict of interest that a trial court refused to allow a defendant to waive where the public defender whose office was representing the defendant was also representing a witness the state possibly intended to call in the case against the defendant. *People* v. *Moore*, 71 Ill. App. 3d 451, 453–54, 389 N.E.2d 944 (1979).

In support of disqualifying Hutchinson, the state argued that an actual conflict existed between her representation of the defendant and her ability to cross-examine Warren during any of the proceedings in the case. She represented Warren on a shooting charge, and, at the time this issue arose, the court reasonably believed that Warren would testify that the firearm from that shooting belonged to the defendant and was used in the murder of the victim.

The defendant argues on appeal that there was no reason to disqualify Hutchinson because after reviewing the discovery from the state and listening to the state's oral representations, Hutchinson did not believe she had a conflict of interest; that he was properly canvassed about any potential conflict of interest and expressly waived it; and that the state did not ask the witness, Warren, about the incident that allegedly gave rise to the conflict of interest either at the probable cause hearing or at trial.

The court determined that Hutchinson's potential conflict of interest risked compromising the integrity of the trial if she continued to represent the defendant in this matter and thus granted the state's motion to disqualify her. In light of the great difficulty Hutchinson could have experienced in cross-examining Warren without violating *his* rights, we cannot find that the court abused its discretion in concluding that her removal as the defendant's counsel was essential to protect the integrity of the trial. The state represented to the court that Warren would be providing key testimony

regarding the firearm used in the robbery that was unavailable from any other witness, and the court relied on this representation as presenting a likely and substantial conflict. The fact that Warren did not later testify about the defendant's use of the firearm in question cannot be considered now because the court could not have known that at the time that it ruled on the motion to disqualify. Disqualifying Hutchinson, moreover, cannot be found to have prejudiced the defendant because no reason has been advanced as to why the defendant specially needed her personal services as a lawyer, and fully twenty months remained after her disqualification before the start of the defendant's trial. In sum, we conclude that the court did not abuse its discretion by granting the state's motion to disqualify.

The judgment is affirmed.

In this opinion the other judges concurred.

DANIEL PELLET ET AL. *v.* KELLER WILLIAMS REALTY CORPORATION ET AL.
(AC 38236)

Prescott, Beach and Mihalakos, Js.

Syllabus

The plaintiff, as guardian for his brother, S, appealed to this court from the judgment of the trial court directing a verdict for the defendants, S's former real estate agents, the agents' employer and a broker, in connection with the sale of S's home to the defendant purchasers, K and her husband. The plaintiff claimed, inter alia, that the trial court improperly directed the verdict in favor of the defendants because it erroneously equated all of the allegations in his substitute complaint to claims of professional negligence and determined that, as such, they failed for lack of expert testimony as to the applicable standard of care. *Held*:

1. The trial court improperly directed a verdict for the defendants on the ground that all eight counts of the substitute complaint were based on breaches of professional standards of care regarding the selection and recommendation of the listing price for the plaintiff's home:

a. Although all eight counts of the substitute complaint incorporated the allegations that the defendant real estate agents had set the list price for the property at $318,000, when they knew, or should have known, that the fair market value of the property was substantially greater, it did not necessarily follow that all of the counts summarily could be characterized as one general claim of professional negligence; the first count sounded in breach of contract, the claims in the second and third counts, which alleged the breach of a fiduciary duty of an agent and the breach of the implied covenant of good faith and fair dealing, stemmed from the contractual relationship between the parties, the entirety of the fourth count did not necessarily equate to a claim of professional negligence, as certain of its allegations did not require the use of specialized skills or professional judgment on the part of the defendants, the fifth and seventh counts, which alleged intentional misrepresentation and conspiracy to defraud, involved intentional rather than negligent action by the defendants, and did not involve the question of whether the defendants exercised the same degree of care as would a reasonably prudent real estate professional, the eighth count alleged acts against the defendants that could be construed as unfair or deceptive in nature, and the plaintiff's claim as to count six, which alleged negligent supervision, was deemed abandoned as inadequately briefed.

b. The trial court improperly concluded that the plaintiff's failure to tender an expert witness resulted in a lack of evidence on the professional standard of care: although the plaintiff did not present expert testimony from a real estate agent or broker regarding the standard of care with respect to the allegations in the substitute complaint that were based on breaches of professional standards of care, such testimony was provided by the defendants through the testimony of two licensed real estate agents, and, therefore, the jury was provided with expert testimony as to the applicable standard of care required of real estate professionals; moreover, although those real estate agents did not expressly opine that the defendants had breached the standard of care and the expert testimony did not specifically come from the plaintiff, the jury had before it testimony from which it could have inferred that the standard of care was breached by the defendants.

2. The trial court improperly granted the defendants' motions for a special finding, pursuant to statute (§ 52-226a), that the plaintiff's action was brought without merit and in bad faith: because, with respect to the five defendants who participated in this appeal, the court's granting of their motion for a special finding pursuant to § 52-226a was tied directly to the merits of its granting of the motion for a directed verdict, which this court found to be improper, the trial court's special finding pursuant to § 52-226a could not stand with respect to those defendants; moreover, with respect to the motion for a special finding filed by K, who did not participate in this appeal, the court's ruling granting that motion lacked a high degree of specificity in its findings, as the court did not analyze

the counts of the substitute complaint as they applied to K, and did not indicate at which point in time it should have become clear to the plaintiff that the action against K was without merit.

Argued May 23—officially released October 10, 2017

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the action was withdrawn as against the defendant Ward Kilduff Mortgage Corporation; thereafter, the matter was tried to the jury before *Swienton, J.*; subsequently, the court granted the motion for a directed verdict filed by the named defendant et al. and rendered judgment for the named defendant et al., from which the plaintiff appealed to this court; thereafter, the court granted the motions filed by the named defendant et al. for a special finding that the action was without merit and was not brought in good faith, and the plaintiff filed an amended appeal. *Reversed in part; new trial.*

Austin Berescik-Johns, with whom was *David V. DeRosa*, for the appellant (plaintiff).

Michael C. Conroy, for the appellees (named defendant et al.).

Opinion

PRESCOTT, J. The named plaintiff, Daniel Pellet, acting in his capacity as guardian for his brother, Stephen Pellet,[1] appeals from the judgment of the trial court directing a verdict in favor of the defendants Keller Williams Realty Corporation (Keller Williams), Michael Ladden, David Olson, Pina Jenkins, Jason Kilduff, and

[1] We refer in this opinion to Daniel Pellet as the plaintiff and to Stephen Pellet by name.

Kimberly Kilduff[2] as to all eight counts of the plaintiff's substitute complaint, and from the trial court's granting of the defendants' motions for a special finding pursuant to General Statutes § 52-226a.[3] The plaintiff argues that the court improperly (1) directed the verdict in favor of the defendants because it erroneously (a) equated all of the plaintiff's allegations to claims of professional negligence and (b) determined that, as such, they must fail for lack of expert testimony as to the applicable standard of care; and (2) found that the plaintiff brought the action without merit and in bad faith pursuant to § 52-226a. We reverse the judgment and special finding of the court, and remand the case for a new trial.

The following procedural history is relevant to this appeal, which arises out of the 2008 sale of 59 Paper Chase Trail in Avon (property) from Stephen Pellet to Kimberly Kilduff. The underlying action was commenced on September 9, 2011, against the defendants, who are Stephen Pellet's former real estate agents with respect to the sale of the property (Olson and Jenkins), the agents' employer/realty agency (Keller Williams),

[2] At trial, the plaintiff did not oppose the court's granting of a directed verdict in favor of Kimberly Kilduff. Therefore, although it is not entirely clear whether the plaintiff now appeals from the court's judgment with respect to that individual defendant, to the extent that he does, none of his claims against Kimberly Kilduff were properly preserved for appellate review, and, thus, we decline to review them. See *State* v. *Diaz*, 94 Conn. App. 582, 586–87, 893 A.2d 495, cert. denied, 280 Conn. 901, 907 A.2d 91 (2006). Accordingly, any reference to the defendants, collectively, in this opinion does not include Kimberly Kilduff. We also note that prior to trial, the plaintiff withdrew the action as against the defendant Ward Kilduff Mortgage Corporation.

[3] General Statutes § 52-226a provides in relevant part: "In any civil action tried to a jury, after the return of a verdict and before judgment has been rendered thereon, or in any civil action tried to the court, not more than fourteen days after judgment has been rendered, the prevailing party may file a written motion requesting the court to make a special finding to be incorporated in the judgment or made a part of the record, as the case may be, that the action or a defense to the action was without merit and not brought or asserted in good faith. . . ."

Keller Williams' broker of record (Ladden), and the spouse of Kimberly Kilduff, Jason Kilduff. In his eight count substitute complaint dated February 20, 2015, the plaintiff alleges the following claims: breach of contract, breach of fiduciary duty of an agent, breach of the implied covenant of good faith and fair dealing, negligent misrepresentation, intentional misrepresentation, negligent supervision, conspiracy to defraud, and violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.

A jury trial commenced on July 8, 2015. On July 10, 2015, the defendants filed a written motion for a directed verdict, accompanied by a memorandum of law, and that same day, the plaintiff filed a memorandum of law in opposition.[4] On July 15, 2015, after the close of evidence in the trial but before the parties' closing arguments, the court, *Swienton*, *J.*, granted the defendants' motion for a directed verdict, ruling, in relevant part: "[T]he court has carefully considered the counts against the defendants, and viewed in the light most favorable to the plaintiff, the court grants the motion [for a] directed verdict as to all defendants on all counts. . . . I am going to state my reasons on the record at this time. . . .

"[Stephen Pellet] was the owner of property located at 59 Paper Chase Trail in Avon. The property was built in 1971 and other than minor renovations had never been updated or renovated. Furthermore, the house was full of clutter. The defendants David Olson and Pina Jenkins, real estate salespersons affiliated with Keller Williams agency, were contacted by [Stephen Pellet] and [his brother] Daniel Pellet. The evidence showed that [Stephen Pellet] was anxious to sell the

[4] The plaintiff's memorandum of law in opposition was directed to the defendants' *oral* motion for a directed verdict, which had been presented to the court on July 10, 2015. In addition to his written memorandum of law, the plaintiff also presented oral argument in opposition to the motion.

property and, further, that he wished to net $90,000 from the sale of the property. The listing price was established accordingly, after discussions with the realtors and [Stephen Pellet], and after the realtors performed a comparative market analysis, which was reviewed with and furnished to [Stephen Pellet]. A listing agreement was executed.

"Kimberly Kilduff learned from a neighbor that the property was being sold, and the real estate agents, Olson and Jenkins, were contacts. Olson and Jenkins, after obtaining permission from [Stephen Pellet] to show the house, showed the property to the defendants Kimberly Kilduff and Jason Kilduff. An offer was placed by Kimberly Kilduff, which was accepted, and the house was sold for $100 more than the listing price. [Stephen Pellet] netted almost $89,000. The buyers of the property,[5] the defendants Jason Kilduff and Kimberly Kilduff, performed extensive renovations to the property, exceeding some $100,000 in expenses. They subsequently sold the property for $462,000 and netted, in profits, approximately $16,000.[6]

"The operative complaint is in eight counts . . . . The underlying basis for each of these counts is based upon breaches of professional standards of care on the part of the real estate agent, broker, and salespersons regarding selection and recommendation of the listing price.

"In an action based upon professional negligence, expert testimony will be [required] if the determination of that standard of care requires knowledge that is beyond the experience of a normal fact finder . . . . [T]he plaintiff in this case has failed to produce any

[5] We note that contrary to the court's assertion, the evidence shows that the sole record buyer in the 2008 sale of the property was Kimberly Kilduff.

[6] Subsequent to the sale of the property, the plaintiff was appointed guardian for Stephen Pellet.

expert testimony and therefore fails on [his] burden of proof of negligence. . . . Although the plaintiff presented an expert in the field of appraisals, this does not satisfy the requirement of an expert to testify as to the standard of care of a realtor in the determination and recommendation of a listing price." (Footnotes added.) Judgment in favor of the defendants was rendered on that same day. On July 22, 2015, the defendants filed a motion for a special finding pursuant to § 52-226a, which the court granted on February 25, 2016.[7] This appeal followed.

As a preliminary matter, in reviewing the court's reasoning for granting the defendants' motion for a directed verdict, we highlight our concern with whether it applied the correct standard of review to the evidence presented at trial. "Directed verdicts are not favored. . . . A trial court should direct a verdict only when a jury could not reasonably and legally have reached any other conclusion. . . . A directed verdict is justified if . . . the evidence is so weak that it would be proper for the court to set aside a verdict rendered for the other party. . . . This court has emphasized two additional points with respect to motions to set aside a verdict that are equally applicable to motions for a directed verdict: First, the plaintiff in a civil matter is not required to prove his case beyond a reasonable doubt; a mere preponderance of the evidence is sufficient. Second, the well established standards compelling great deference to the historical function of the jury find their roots in the constitutional right to a trial by jury." (Citation omitted; internal quotation marks omitted.) *Curran* v. *Kroll*, 303 Conn. 845, 856, 37 A.3d 700 (2012). This standard also requires the trial court

[7] Likewise, Kimberly Kilduff filed a motion for a special finding pursuant to § 52-226a on July 17, 2015, which the court also granted on February 25, 2016.

to consider the evidence, including reasonable inferences, in the light most favorable to the plaintiff. *Beckenstein Enterprises-Prestige Park, LLC* v. *Keller*, 115 Conn. App. 680, 693, 974 A.2d 764, cert. denied, 293 Conn. 916, 979 A.2d 488 (2009).

In the present case, it is not entirely clear from the record whether the court made findings of fact in ruling on the defendants' motion. As previously indicated, such findings would be improper in the context of a motion for a directed verdict, given that "litigants have a constitutional right to have factual issues resolved by the jury"; (internal quotation marks omitted) id.; and that the court must view the evidence in the light most favorable to the plaintiff.[8] Id. Although the court expressly stated that it "viewed [the evidence] in the light most favorable to the plaintiff," certain aspects of its decision suggest it did not.

For instance, the court stated at one point that it "cannot *find* that the defendants' actions were proven to be the proximate cause of the plaintiffs' harm." (Emphasis added.) Moreover, in its recitation of the evidence supporting its ruling, certain statements were clearly viewed in the light most favorable to the *defendants*, rather than to the plaintiff. For example, the court stated that "[t]he evidence showed that [Stephen Pellet] . . . wished to net $90,000 from the sale of the property," even though the plaintiff testified at trial that he and Stephen Pellet never told Olson and Jenkins that they wanted to make a specific profit from the sale of the property, instead desiring to "maximize" the

[8] We note that, in their brief, the defendants categorize the court's recitation of the evidence in support of its ruling as "findings of fact," which are reviewed "only for clear error." Because it would have been improper for the court to make findings of fact in ruling on a motion for a directed verdict; see *Beckenstein Enterprises-Prestige Park, LLC* v. *Keller*, supra, 115 Conn. App. 693; the notion that we must review the court's recitation of the evidence "only for clear error" is without merit.

profit to its fullest potential. The court also stated that Olson and Jenkins "obtain[ed] permission from [Stephen Pellet] to show the house . . . to . . . Kimberly Kilduff and Jason Kilduff," even though the plaintiff testified at trial to the contrary.

Accordingly, we conclude that the court, in fact, did not view all of the evidence in the light most favorable to the plaintiff, pursuant to the applicable standard of review. Because the issue of "[w]hether the evidence presented by the plaintiff was sufficient to withstand a motion for a directed verdict is a question of law, over which our review is plenary";[9] *Curran* v. *Kroll*, supra, 303 Conn. 855; we need not afford deference to the court's recitation of evidence and exercise plenary review over the record in the present appeal. In conducting our review of the court's decision to direct a verdict in favor of the defendants, we, too, are required to view the evidence in the light most favorable to the plaintiff. See id., 856. Additional evidence and procedural history will be set forth as necessary to address the plaintiff's individual claims.

I

DIRECTED VERDICT

The plaintiff first claims on appeal that the court's directed verdict in favor of the defendants is fatally

[9] We note that a line of cases out of this court has stated that we review a trial court's granting of a motion for a directed verdict for an abuse of discretion. See *Summerhill, LLC* v. *Meriden*, 162 Conn. App. 469, 474, 131 A.3d 1225 (2016). In tracing the origins of this assertion, it is clear that this standard improperly became conflated at one point with the standard of review for challenges to the grant or denial of motions to set aside a verdict. See *Malloy* v. *Colchester*, 85 Conn. App. 627, 632, 858 A.2d 813, cert. denied, 272 Conn. 907, 863 A.2d 698 (2004), citing *Arnone* v. *Enfield*, 79 Conn. App. 501, 505–506, 831 A.2d 260, cert. denied, 266 Conn. 932, 837 A.2d 804 (2003). In any event, because we are bound by the precedent of our Supreme Court as the ultimate arbiter of state law; see *Stuart* v. *Stuart*, 297 Conn. 26, 45–46, 996 A.2d 259 (2010); we apply the standard of review that it has held proper for a challenge to a trial court's granting of a motion for a directed verdict. That standard is plenary. See, e.g., *Curran* v. *Kroll*, supra, 303 Conn. 855.

flawed in two respects: (1) the eight counts alleged by the plaintiff in his substitute complaint do not each equate to a claim of professional negligence; and (2) even if that were the case, the plaintiff's claims should not fail for lack of expert testimony presented at trial. In response, the defendants argue that each of the eight theories of recovery advanced in the plaintiff's complaint "centers upon the foundational allegation that the defendant realtors negligently or intentionally recommended a list price for the . . . property that was substantially below fair market value," and, thus, those eight theories of recovery presented, at their core, claims for professional negligence. As a result, the defendants argue, the plaintiff was required to present expert testimony to establish the applicable standard of care and any breach thereof, which he failed to do. We reject the defendants' arguments and agree with the plaintiff in both respects.

A

Professional Negligence

The plaintiff first argues that the court improperly concluded that "[t]he underlying basis for each of [the plaintiff's eight] counts is based upon breaches of professional standards of care on the part of the real estate agent, broker and salespersons regarding selection and recommendation of the listing price." Although all eight counts of the substitute complaint incorporate the allegation that Olson and Jenkins set the list price for the property at $318,000 when they knew, or should have known, that the fair market value of the property was, in fact, substantially greater, we agree with the plaintiff that it does not necessarily follow that all of the counts summarily can be characterized as one general claim of professional negligence.

"The interpretation of pleadings presents a question of law over which our review is plenary." (Internal

quotation marks omitted.) *Oxford House at Yale* v. *Gilligan*, 125 Conn. App. 464, 469, 10 A.3d 52 (2010). Furthermore, "in determining the nature of a pleading filed by a party, we are not bound by the label affixed to that pleading by the party." (Internal quotation marks omitted.) *Selimoglu* v. *Phimvongsa*, 119 Conn. App. 645, 651–52, 989 A.2d 121, cert. denied, 296 Conn. 902, 991 A.2d 1103 (2010). "In order for a claim to sound in professional negligence, it must be alleged that (1) the defendant is sued in his or her capacity as a professional, (2) the alleged negligence is of a specialized professional nature that arises out of the professional relationship, and (3) the alleged negligence is substantially related to the professional conduct and involved the exercise of professional judgment." (Emphasis omitted.) *Cammarota* v. *Guerrera*, 148 Conn. App. 743, 748, 87 A.3d 1134, cert. denied, 311 Conn. 944, 90 A.3d 975 (2014).

1

Counts One, Two and Three

We first address whether counts one, two, and three of the substitute complaint, which sound, respectively, in breach of contract, breach of fiduciary duty of an agent, and breach of the implied covenant of good faith and fair dealing, are solely based on breaches of professional negligence. With regard to the first count, the plaintiff argues that because the breach of contract claim is directly tied to the terms of the written "exclusive right to sell listing contract" (listing contract) into which the parties entered, it, in fact, sounds in contract law rather than tort law.

"Whether [a] plaintiff's cause of action is one for malpractice [or contract] depends upon the definition of [those terms] and the allegations of the complaint. . . . Malpractice is commonly defined as the failure of one rendering professional services to exercise that

degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services . . . . The elements of a breach of contract claim are the formation of an agreement, performance by one party, breach of the agreement by the other party, and damages. . . . In other words, [a]n action in contract is for the breach of a duty arising out of a contract . . . [whereas] an action in tort is for a breach of duty imposed by law. . . .

"In determining whether a claim sounds in breach of contract or in tort, we are mindful of the well established principle that an independent claim of tortious conduct may arise in the context of a contractual relationship. . . . Accordingly, [for example] the fact that [a] contract . . . [may require a] defendant to provide [a] plaintiff with legal representation and that the plaintiff was dissatisfied with the defendant's performance does not necessarily mean that her claim of improper representation sounds in breach of contract. . . .

"[W]e previously have concluded that a claim alleging that the defendant attorney violated the specific instructions of his client sounded in breach of contract. . . . Other Connecticut courts similarly have determined that an attorney's failure to comply with the specific provisions of a contract sounded in breach of contract. . . . Correspondingly, Connecticut courts have concluded that claims alleging that the defendant attorney had performed the required tasks but in a deficient manner sounded in tort rather than in contract. . . . The decisions in [such] cases are consistent with the well established principle that an action in tort is for a breach of duty imposed by law." (Citations omitted; internal quotation marks omitted.) *Meyers* v. *Livingston, Adler, Pulda, Meiklejohn & Kelly, P.C.*, 311 Conn. 282, 291–95, 87 A.3d 534 (2014).

In the present case, count one of the plaintiff's substitute complaint alleges that Olson, Jenkins, Keller Williams, and Ladden breached the listing contract in the following ways: they "were not honest in their representation of the value of the property"; they "were not honest . . . in their role as dual or designated agents [for both the plaintiff and Kimberly Kilduff]"; they "showed the property before it was cleaned out"; they "showed the property without written permission"; they "did not make reasonable efforts to sell the property"; and they "did not exercise the degree of care, skill and expertise common to the profession."

In comparing the allegations in count one to the language of the listing contract, which was admitted into evidence at trial, the listing contract expressly provides that in the event the seller's agent becomes a dual agent for the property, thereby representing both the seller and the buyer, the agent "will promptly disclose all relevant information to [the seller] and give [the seller] any disclosure notices and consent agreements required by law, for my/our review and signature" (dual agency provision). It also expressly provides under "other terms" that the property is "on temp status till [the] seller gives written [e-mail] permission to put on active" (written permission provision).

Accordingly, in analyzing whether count one sounds in breach of contract, as the plaintiff asserts, or professional negligence, as the court concluded, it is clear that at least *some* of the particular allegations therein reference Olson's, Jenkins', Ladden's, and Keller Williams' failure to comply with the *specific provisions* of the listing contract, namely, the dual agency provision and the written permission provision. Under our case law, such allegations sound in breach of contract, not professional negligence. See *Meyers* v. *Livingston, Adler, Pulda, Meiklejohn & Kelly, P.C.*, supra, 311 Conn. 292. In contrast, other allegations in count one that

reference these defendants' valuation of the property, their "reasonable efforts," and their "degree of care, skill and expertise," i.e., those that allege that the required tasks were performed but in a deficient manner, appear to sound in professional negligence rather than breach of contract.[10] See *Meyers* v. *Livingston, Adler, Pulda, Meiklejohn & Kelly, P.C.*, supra, 294. Nevertheless, because the court summarily deemed the *entirety* of count one to be solely a claim of professional negligence, this was improper as a matter of law.[11]

Similarly, count two, which alleges breach of a fiduciary duty of an agent, and count three, which alleges breach of the implied covenant of good faith and fair dealing, are both claims that stem from the contractual

[10] By so concluding, we do not mean to suggest that this was an appropriate way for the plaintiff to plead. To the extent that count one raised both contractual claims and claims of professional negligence, the defendants could have filed a request to revise in an effort to separate the improperly combined causes of action. See Practice Book § 10-35 ("[w]henever any party desires to obtain . . . [3] separation of causes of action which may be united in one complaint when they are improperly combined in one count . . . the party desiring any such amendment in an adverse party's pleading may file a timely request to revise that pleading").

[11] We note that in its ruling on the motion for a directed verdict, the court made the following conclusory determination: "Which leads me to the final reason for the court's decision to direct the verdict: the plaintiff did not establish [that] any damages actually were incurred. Certainly, no damages were established to substantiate the cause of action for breach of contract or fraud." "The determination of damages involves a question of fact" for the jury; (internal quotation marks omitted) *Gianetti* v. *Norwalk Hospital*, 304 Conn. 754, 780, 43 A.3d 567 (2012); and, thus, in order for the court to properly grant the motion for a directed verdict on this ground, the evidence on this element must be so weak that it would be proper for the court to set aside a verdict in favor of the other party. See *Curran* v. *Kroll*, supra, 303 Conn. 856. We cannot conclude that this standard was met here. Viewing the evidence in the light most favorable to the plaintiff, the jury could have reasonably concluded that the plaintiff's evidence that he suffered damages, which included a second offer on the property, two days after Kimberly Kilduff's offer, that was for $42,000 more than the first, and testimony from certified real estate appraiser Daniel LaPorte that the market value of the property in October, 2008, was $92,000 higher than the sale price, was sufficient to meet his burden of proof.

relationship between the parties. With regard to count two, our Supreme Court has expressly held that "[p]rofessional negligence alone . . . does not give rise automatically to a claim for breach of fiduciary duty. . . . [Thus] not every instance of professional negligence results in a breach of [a] fiduciary duty. . . . Professional negligence implicates a duty of care, while breach of fiduciary duty implicates a duty of loyalty and honesty." (Internal quotation marks omitted.) *Sherwood* v. *Danbury Hospital*, 278 Conn. 163, 196, 896 A.2d 777 (2006). Although professional negligence and breach of a fiduciary duty may arise from the same operative facts, they are not, legally speaking, one and the same claim. Thus, the court's determination that count two could be reduced merely to a claim of professional negligence was improper as a matter of law. Moreover, in reviewing the allegations contained in count two, the plaintiff clearly takes issue with Olson's, Jenkins', Ladden's, and Keller Williams' duty of loyalty and honesty by asserting, among other things, that these defendants had not disclosed conflicts of interest arising from their dual representation of both the plaintiff and Kimberly Kilduff or disclosed their preexisting outside relationships with Kimberly Kilduff and Jason Kilduff that predated the sale of the property.

With regard to count three, our Supreme Court has held that a claim brought pursuant to a contract, alleging a breach of the implied covenant of good faith and fair dealing, sounds in contract because "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. . . . To constitute a breach of [that duty], the acts by which a defendant allegedly impedes the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract must have been taken in bad faith." (Citation omitted; internal quotation marks omitted.) *Collins* v. *Anthem Health Plans, Inc.*, 275

Conn. 309, 333–34, 880 A.2d 106 (2005). Thus, this claim falls under the umbrella of contract law and not tort law, under which professional negligence exists. Moreover, the plaintiff alleges in count three that Olson, Jenkins, Ladden, and Keller Williams acted in bad faith in performing under the contract by, inter alia, not disclosing their divided loyalties between the plaintiff and Kimberly Kilduff in this transaction, and not disclosing other offers on the property. For these reasons, we conclude that the court improperly determined that count three equates to a claim of professional negligence.

2

Count Four

We next address count four of the substitute complaint, which alleges negligent misrepresentation. "Traditionally, an action for negligent misrepresentation requires the plaintiff to establish (1) that the defendant made a misrepresentation of fact (2) that the defendant knew or should have known was false, and (3) that the plaintiff reasonably relied on the misrepresentation, and (4) suffered pecuniary harm as a result." (Internal quotation marks omitted.) *Coppola Construction Co.* v. *Hoffman Enterprises Ltd. Partnership*, 309 Conn. 342, 351–52, 71 A.3d 480 (2013). "The classification of a negligence claim as either [professional] malpractice or ordinary negligence requires a court to review closely the circumstances under which the alleged negligence occurred." (Internal quotation marks omitted.) *Boone* v. *William W. Backus Hospital*, 272 Conn. 551, 562, 864 A.2d 1 (2005).

Here, count four of the substitute complaint alleges in relevant part that "the defendants, jointly and severally, negligently misrepresented, by commission and/or omission, the value of the subject property, the interest of other purchasers in the subject property, and the

relationships among and between the defendants." Although the specific allegation that the defendants misrepresented the value of the property arguably sounds in professional negligence because the "alleged negligence is of a specialized professional nature" arising out of the client-real estate agent relationship and "involved the exercise of professional judgment"; (emphasis omitted) *Cammarota* v. *Guerrera*, supra, 148 Conn. App. 748; the remaining allegations contained in the count do not. If the defendants did, in fact, misrepresent, by omission, the fact that there were other purchasers interested in the property and that the defendants had long-standing, outside relationships with each other that predated the sale transaction of the property,[12] such allegations do not require the use of specialized skills or professional judgment on the part of the defendants. Accordingly, we disagree with the court that the entirety of count four necessarily equates to a claim of professional negligence.

3

Counts Five and Seven

We next address counts five and seven together, which allege, respectively, intentional misrepresentation and conspiracy to defraud. With regard to the former, "[a] claim of intentional misrepresentation requires the same elements as negligent misrepresentation except that the plaintiff also must prove that the

[12] On this point, the plaintiff contended elsewhere in the complaint, and incorporated into count four, the following allegations: "[Stephen Pellet] was unaware, and was not informed, that Olson and Jenkins had already discussed selling the subject property, prior to the September 10, 2008 showing, with . . . buyer Kimberly Kilduff"; "[Stephen Pellet] was also unaware, and was not informed, that Kimberly Kilduff was married to Jason Kilduff, who was an associate of Olson and Jenkins and an agent in the same Keller Williams Agency office"; and "[t]he fact that . . . Kimberly Kilduff was also a licensed real estate agent, affiliated with the same Keller Williams Agency office as defendants Jenkins, Olson and Jason Kilduff, was never disclosed to the plaintiff."

defendant made the misrepresentation to induce the other party to act upon it . . . .'' (Footnote omitted; internal quotation marks omitted.) *Brown* v. *Otake*, 164 Conn. App. 686, 706, 138 A.3d 951 (2016). With regard to the latter, the ''essential elements of an action in common law fraud . . . are that: (1) a false representation was made as a statement of fact; (2) it was untrue and known to be untrue by the party making it; (3) it was made to induce the other party to act upon it; and (4) the other party did so act upon that false representation to his injury''; (internal quotation marks omitted) *Sturm* v. *Harb Development, LLC*, 298 Conn. 124, 142, 2 A.3d 859 (2010); and ''[t]he [elements] of a civil action for conspiracy are: (1) a combination between two or more persons, (2) to do a criminal or an unlawful act or a lawful act by criminal or unlawful means, (3) an act done by one or more of the conspirators pursuant to the scheme and in furtherance of the object, (4) which act results in damage to the plaintiff.'' (Internal quotation marks omitted.) *Macomber* v. *Travelers Property & Casualty Corp.*, 277 Conn. 617, 635–36, 894 A.2d 240 (2006).

In the present case, count five alleges in relevant part that ''the defendants, jointly and severally, intentionally misrepresented, by commission and/or omission, the value of the subject property, [the] interest of other purchasers in the subject property, and the relationships among and between the defendants.'' Count seven then alleges in relevant part that ''[t]he allegations [in paragraphs 1 through 40 of the substitute complaint] demonstrate that the defendants . . . conspired together to deceive [Stephen Pellet] as to the value of the subject property, to keep the subject property from being shown to prospective purchasers other than . . . Kimberly Kilduff, to conceal from [Stephen Pellet] the relationships between . . . Kimberly Kilduff and the other defendants, and to conceal from [Stephen Pellet]

the fact that the defendants were representing both the seller and purchaser of the subject property."[13]

Significantly, both counts five and seven allege that the defendants acted *intentionally*, not negligently, in committing these torts. Moreover, neither claim involves the question of whether the defendants exercised the same degree of care as would a reasonably prudent real estate professional, which is an integral

[13] With regard to the specific allegation that the defendants failed to inform the plaintiff of Olson's and Jenkins' dual representation of both him and Kimberly Kilduff in the sale of the property, which was incorporated into all eight counts of the substitute complaint, the court stated the following in its ruling on the motion for a directed verdict: "General Statutes § 20-325d sets forth the requirement that . . . whenever any real estate broker or real estate salesperson intends to act as an agent for the prospective purchaser he shall disclose such intended representation to the seller at the beginning of the first personal meeting with the seller. General Statutes § 20-325g states that there is a conclusive presumption that a person has been given informed consent to a dual agency relationship with the real estate broker if that party executes a written consent.

"First, the statute, § 20-325d, does not state that the transaction fails for the lack of any dual agency agreement. Second, there was never any allegation of a violation of this statute, and even if the court stretched this even further and accepted the plaintiff's argument that this is negligence per se, the violation of a statute has to be proven to be a substantial factor in causing the plaintiff's damages before the plaintiff can recover. There is not a scintilla of evidence to indicate that the failure to have such a document signed was a substantial factor in the plaintiff's damages."

"Ordinarily, it is a question of fact whether the negligence of a defendant was the proximate cause of a plaintiff's injuries. . . . The test is whether the defendant's conduct was a substantial factor in causing the plaintiff's injuries." (Citation omitted.) *Ferndale Dairy, Inc.* v. *Geiger*, 167 Conn. 533, 538, 356 A.2d 91 (1975). In the present case, there was evidence presented, through the parties' joint stipulation and through the plaintiff's testimony, that the dual agency was never disclosed to Stephen Pellet. Accordingly, the jury reasonably could have inferred from this evidence that, had the dual agency been disclosed, the plaintiff would have chosen another agent/broker who did not have divided loyalties, and that that new agent/broker, in turn, would have obtained a higher sales price for the property. Thus, viewed in the light most favorable to the plaintiff, there was enough evidence at trial that the question of causation should have gone to the jury, and the issue was, therefore, improper for the court to resolve in the context of a motion for a directed verdict.

element of a professional malpractice claim. See *Meyers* v. *Livingston*, *Adler*, *Pulda*, *Meiklejohn & Kelly*, *P.C.*, supra, 311 Conn. 291 (issue whether defendant law firm breached contract or failed to render professional services to "that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession" [internal quotation marks omitted]). For the court to have concluded otherwise, therefore, was improper as a matter of law.[14]

4

Count Six

With regard to count six, which alleges negligent supervision against Keller Williams and Ladden, the plaintiff has failed to provide any analysis on this individual count in his brief. Because "[i]t is well settled

[14] We note that the court also directed the verdict in favor of the defendants on count seven specifically on the ground that "the plaintiff has not met [his] burden of proof to sustain such a claim or to support the claim that he suffered substantial harm." "The party claiming fraud . . . has the burden of proof. . . . Whether that burden has been met is a question of fact . . . ." (Internal quotation marks omitted.) *Duplissie* v. *Devino*, 96 Conn. App. 673, 680, 902 A.2d 30, cert. denied, 280 Conn. 916, 908 A.2d 536 (2006). Viewing the evidence in the light most favorable to the plaintiff, we conclude that the jury could have reasonably determined that the elements of conspiracy to defraud were proven here. More specifically, evidence was presented at trial that the defendants all were professionally affiliated with Keller Williams at some point in time and had personal relationships with each other; that Olson and Jenkins showed the property to Kimberly Kilduff and Jason Kilduff while the property was still listed as "temp" status, thus prohibiting other real estate agents from seeing the property or presenting offers on it on behalf of their clients; that Olson and Jenkins never discussed their role as dual agents with the plaintiff; and that Jason Kilduff served as the listing agent and Keller Williams as the broker in the resale of the property in 2009. On the basis of this evidence, the jury reasonably could have inferred that because the defendants were concerned with helping their other client, the purchaser, obtain the property at the lowest price possible, as well as with lining their own pockets via a second, future sale once the property had been flipped by the Kilduffs, this affected their representation of the plaintiff in the 2008 sale of the property and caused the alleged damages at issue here.

that [w]e are not required to review claims that are inadequately briefed" and that "[a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly"; (internal quotation marks omitted) *Lucarelli* v. *Freedom of Information Commission*, 136 Conn. App. 405, 407 n.1, 46 A.3d 937, cert. denied, 307 Conn. 907, 53 A.3d 222 (2012); we deem the plaintiff's claim, as it relates to count six, inadequately briefed and, thus, abandoned.

5

Count Eight

Finally, we address count eight of the plaintiff's substitute complaint, which alleges violations of CUTPA. The essential elements to pleading a cause of action under CUTPA are: (1) the defendant committed an unfair or deceptive act or practice; (2) the act complained of was performed in the conduct of trade or commerce; and (3) the prohibited act was the proximate cause of harm to the plaintiff. See *Stevenson Lumber Co.-Suffield, Inc.* v. *Chase Associates, Inc.*, 284 Conn. 205, 213–14, 932 A.2d 401 (2007).

In the present case, count eight alleges in relevant part that "[t]he practices engaged in by the defendants, jointly and severally, as alleged [previously], were deceptive, unethical and unscrupulous . . . offend public policy . . . [and] were conducted in the conduct of the trade or commerce of real estate brokerage, purchase and sales." Significantly, this count incorporates the first forty paragraphs of the substitute complaint.[15]

[15] In the first forty paragraphs of the substitute complaint, the plaintiff alleges that the defendants acted improperly in some of the following ways that do not directly encompass the list price of the property: Jenkins and Olson showed the house to Kimberly Kilduff without written permission that the property could be moved from "temp status" to "active," and in derogation of Stephen Pellet's express instructions not to show the house until it was cleaned; none of the defendants informed Stephen Pellet of Olson's and Jenkins' dual representation of both Stephen Pellet and Kimberly

Ultimately, a cause of action brought pursuant to CUTPA requires the plaintiff to go beyond simply alleging that the defendants negligently breached the applicable standard of care that applies to professionals in the field of real estate; it requires the plaintiff to prove that the acts in questions were "unfair or deceptive." For the same reasons discussed in parts I A 1 and 3 of this opinion, we conclude that count eight, likewise, alleges acts against the defendants that can be construed as "unfair or deceptive" in nature. Accordingly, we conclude that the court improperly interpreted count eight to be a claim for professional negligence.[16]

B

Expert Testimony

The plaintiff next argues that even if the plaintiff's claims were based upon breaches of professional standards of care, the claims should not have failed for lack of expert testimony because (1) expert testimony is

Kilduff prior to the sale of the property, nor was a written dual agency disclosure notice and consent agreement executed; the defendants failed to disclose that there were other offers on the property; and the deceptive practices of some or all of the defendants working in concert with one another "deprived and excluded all other prospective buyers from even bidding on the subject property before the September 10, 2008 purchase contract was signed."

[16] The court also directed the verdict in favor of the defendants on count eight specifically on the ground that "the plaintiff premises his allegation of a violation of CUTPA on the purported breaches of unspecified professional standards of care and the allegedly artificially low listing price recommendation and subsequent sale of the home. CUTPA requires that the defendant must have engaged in unfair or deceptive acts in the conduct of any trade or commerce. In the absence of such unfair or deceptive acts, in this case, breach of professional standards of care with the intent to defraud, the claim cannot be found in favor of the plaintiff."

In our review of count eight, the plaintiff's CUTPA claim clearly incorporates a myriad of allegations of unfair or deceptive acts, as set forth in paragraphs 1 through 40 of the substitute complaint, that do not all necessarily implicate a professional standard of care. See footnote 15 of this opinion. Accordingly, we reject this conclusion of the court.

not a categorical requirement to prove the applicable standard of care for a claim of professional negligence, and (2) if expert testimony was required here, it was presented at trial by the defendants. As previously discussed in parts I A 1 and 2 of this opinion, we conclude that some of the plaintiff's allegations were based upon breaches of professional standards of care. To the extent that expert testimony was required to prove such allegations,[17] however, we agree with the plaintiff that expert testimony was, in fact, presented here.

"[W]e note that the [trial] court's determination of whether expert testimony was needed to support the plaintiff's claim of negligence against the defendant was a legal determination, and, thus, our review is plenary." (Internal quotation marks omitted.) *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 373, 119 A.3d 462 (2015). "It is well established that, [i]f the determination of the standard of care requires knowledge that is beyond the experience of an ordinary fact finder, expert testimony will be required. . . . Nevertheless, [a]lthough expert testimony may be admissible in many instances, it is required only when the question involved goes beyond the field of the ordinary knowledge and experience of the trier of fact. . . . The trier of fact need not close its eyes to matters of common knowledge solely because the evidence includes no expert testimony on those matters." (Citation omitted; internal quotation marks omitted.) *Allison* v. *Manetta*, 284 Conn. 389, 405–406, 933 A.2d 1197 (2007).

Moreover, our Supreme Court "previously [has] determined that a plaintiff may prove the standard of

[17] The plaintiff has failed to provide any analysis for his broad assertion that expert testimony was not required in the present case because "the questions presented in each of [his] eight counts did not require expertise 'beyond the field of . . . ordinary knowledge and experience.' " Therefore, because it is inadequately briefed, we decline to reach the merits of this argument. See *Lucarelli* v. *Freedom of Information Commission*, supra, 136 Conn. App. 407 n.1.

care through the testimony of a defendant. . . . [A]s an expert witness, the defendant is not required specifically to have expressed as an opinion that [she] breached the standard of care in order for the [plaintiff] to prevail. . . . Rather, the [plaintiff] need only have produced sufficient expert testimony to permit the [trier of fact] reasonably to infer, on the basis of its findings of fact, that [the defendant] breached the standard of care." (Citations omitted; internal quotation marks omitted.) *LePage* v. *Home*, 262 Conn. 116, 132, 809 A.2d 505 (2002).

The trial court addressed the issue of expert testimony in the context of the defendants' motion for a directed verdict as follows: "As lay people, we do not know the standards of real estate brokers or their methods. Thus, it is not easily determined what are the demands of proper treatment. It is for this reason that expert testimony is required to define the standard of care or the duty owing from the real estate broker to his or her client and whether that duty has been breached so that one may reasonably and logically conclude what the standard of care is and whether or not it has been violated . . . . [T]he plaintiff in this case has failed to produce any expert testimony and therefore fails on [his] burden of proof of negligence. Because the underlying complaint in this case is . . . the marketing and undervaluation of the subject property, specifically the recommendation and assessment of the listing price. This knowledge is not one that can be simply discerned from a course of conduct or from some document that sets forth the care that is required under these circumstances. Expert testimony is required . . . and no testimony was offered to establish said standard. . . .

"Although the plaintiff presented an expert in the field of appraisals, this does not satisfy the requirement of an expert to testify as to the standard of care of a

realtor in the determination and recommendation of a listing price. The appraiser was not a real estate agent. His appraisal was a retrospective appraisal of the value of the property and did not perform a comparative market analysis.'' (Internal quotation marks omitted.)

In the present case, although the plaintiff did not present expert testimony from a real estate agent and/or broker[18] regarding the standard of care for these professionals' selection and recommendation of a list price, such testimony was provided by the defendants through Olson and Barbara Fairfield. First, Olson, a licensed real estate agent in Connecticut for more than twenty-three years, testified as to how a professional in the field arrives at a recommended list price. For example, Olson explained how data is obtained through the multiple listing service database and how a comparative market analysis (CMA) is generated for a client's property.

Next, Fairfield, a real estate agent licensed in Connecticut and/or Florida for thirty-five years who also was previously licensed as a broker for nearly thirty years, was tendered by the defendants as an expert witness on their behalf, and the court designated her as such. Fairfield testified that she understood that she was, as counsel stated, "disclosed as an expert witness in this matter to opine as to whether or not the defendants met the applicable standard of care of reasonable real estate professionals with respect to this particular transaction'' and that she had reviewed all of the documents and deposition testimony in the present case.

[18] The plaintiff argues in his brief that the testimony of Daniel LaPorte, a certified residential real estate appraiser who testified on the plaintiff's behalf, did, in fact, satisfy any requirement of expert testimony as to the standard of care of a realtor and/or broker in the determination and recommendation of a list price. Because we determine that expert testimony was adequately provided by Olson and Fairfield, we need not decide whether LaPorte's testimony also satisfied this requirement.

Fairfield testified as to how real estate agents generate a CMA for a particular property in order to choose an appropriate list price, stating that the agents "look at the property itself, the condition of the property inside and outside, any cosmetic things that need to be changed or updated and then we look at properties that have sold around the same square footage. We try to do the same number of bedrooms, bathrooms, same structure, colonial to colonial, for instance. We couldn't compare a colonial to a ranch.

"And so we look at solds and what we try to do with the solds is, we try to stay within a very close area to the subject property and we look at solds. We don't want to go back further than a year before the property date and we definitely don't—we don't have any way to forecast what something would sell after the date. Good comparables will be like kind property, best to about six months in arrears, so we look at those solds because that's what buyers were willing to pay for that property based on its condition. Then we also . . . look at the market. So, we look and see what the competition is at the same time. So, we look at the properties that are out there for sale right now and how they stack up to the subject property, and so we look at those two areas specifically."

Fairfield also testified as to other variables that competent real estate professionals should take into account when determining the list price, such as the age and condition of the property and its features, as well as the time of year at which the property is put on the market. She ultimately opined that, having reviewed Olson's CMA for the property, the $317,900 list price recommended to the plaintiff in September, 2008, was within the range of price "where the property should have its greatest market appeal."

On the basis of the foregoing testimony of Olson and Fairfield, we conclude, contrary to the court's determination, that the jury was provided with expert testimony as to the applicable standard of care required of real estate professionals. Significantly, Olson and Fairfield were "not required specifically to have expressed as an opinion that [the defendants] breached the standard of care in order for the [plaintiff] to prevail," as all that was required was sufficient testimony for the jury "reasonably to infer, on the basis of its findings of fact, that [the defendants] breached the standard of care." (Internal quotation marks omitted.) *LePage* v. *Home*, supra, 262 Conn. 132.

Thus, it of no importance that Olson and Fairfield did not expressly opine that the defendants breached that standard here or that this expert testimony did not specifically come from the plaintiff. See id. Rather, what is significant is that evidence regarding this particular element of professional negligence was, in fact, presented at trial. From the other facts presented in this case, the jury reasonably could infer that the standard of care was breached by the defendants. Because the court improperly concluded that the plaintiff's failure to tender an expert witness resulted in a lack of evidence on the professional standard of care, it improperly directed a verdict in favor the defendants. Accordingly, we reverse the court's judgment.

II

SPECIAL FINDING

The plaintiff also claims on appeal that the court improperly found that the underlying action was brought without merit and in bad faith within the meaning of § 52-226a because the two requirements for upholding a bad faith award were not met here.[19] We agree.

[19] The plaintiff also argues, with respect to this claim, that the procedural requirements of the statute must be met before the trial court can make a

Some additional procedural history is necessary to address this claim. Following the court's granting of the defendants' motion for a directed verdict on their behalf, the plaintiff filed with this court an appeal from that judgment. Subsequently, there were two motions for a special finding pursuant to § 52-226a that were filed with the trial court—one on behalf of Kimberly Kilduff, and one on behalf of the remaining five defendants. Following the court's granting of *both* motions for a special finding via a single memorandum of decision filed February 25, 2016, the plaintiff properly filed an amended appeal with this court, assigning as error that February 25, 2016 decision of the trial court. Although that amended appeal did not explicitly reference the underlying judgment for a directed verdict as it applied specifically to Kimberly Kilduff, the plaintiff's preliminary statement of issues for the amended appeal, dated March 31, 2016, clearly shows that he appealed from the court's granting of the special finding as it applied to her.[20] Although Kimberly Kilduff, through counsel, was served with notice of the amended appeal, she did not ultimately participate in the appeal before this court.

"To ensure . . . that fear of an award of attorneys' fees against them will not deter persons with colorable

§ 52-226a finding; they were not met here, he argues, because the action was tried to a jury and, thus, the special findings had to have been made "after the return of a verdict and before judgment has been rendered thereon," which did not occur. General Statutes § 52-226a. Because we reverse the court's § 52-226a findings on other grounds, we need not address the merits of this argument.

[20] Specifically, the plaintiff presented the following issue: "Did the trial court err in making a finding pursuant to General Statutes § 52-226a when the [plaintiff's] causes of action both had merit and were brought in good faith because [Kimberly] Kilduff was a licensed real estate agent, affiliated with the Keller Williams Agency, who represented [Stephen Pellet] as [his] real estate agent, suggesting a conflict of interest that rose to the level of negligent misrepresentation, intentional misrepresentation, and conspiracy to defraud?"

claims from pursuing those claims, we have declined to uphold awards under the bad-faith exception absent both [1] clear evidence that the challenged actions are entirely without color and [are taken] for reasons of harassment or delay or for other improper purposes . . . . [and] [2] a high degree of specificity in the factual findings of [the] lower courts." (Citations omitted; internal quotation marks omitted.) *Rinfret* v. *Porter*, 173 Conn. App. 498, 508–509, 164 A.3d 812 (2017).

As to the five remaining defendants who *did* participate in this appeal, the court's granting of the motion for a special finding pursuant to § 52-226a is tied directly to the merits of its granting of the motion for a directed verdict. Because we conclude that the court improperly granted that motion, as discussed fully in part I of this opinion, the court's special finding pursuant to § 52-226a as to these five defendants must be reversed.

With respect to Kimberly Kilduff, we agree with the plaintiff's argument in his brief that the court did not issue its ruling with "a high degree of specificity in the findings," as is required by our case law. (Internal quotation marks omitted.) Id., 509. In particular, the court did not analyze the various counts of the substitute complaint as they apply to Kimberly Kilduff,[21] and the court did not specifically indicate, in accordance with its memorandum of decision,[22] at which point in

[21] To the extent that the court supported its special finding as to Kimberly Kilduff by concluding that "the plaintiff offered *no* evidence to prove"; (emphasis in original); his allegation that Kimberly Kilduff was a real estate agent affiliated with Keller Williams, we note that Kimberly Kilduff testified at trial that she was a licensed real estate agent twelve years prior and that she carried her license with Keller Williams. (Emphasis in original.)

[22] The court concluded in its memorandum of decision that "[w]hether or not the plaintiff had probable cause to bring the action against [Kimberly] Kilduff at the commencement of the suit is questionable. However, once she provided him with a full package of documents sometime in October, 2012, through discovery, and participated in numerous pretrial[s] over the four years the case was pending, there would have been sufficient evidence to indicate that his claims were totally without merit and unwarranted."

time it should have become clear to the plaintiff that the action against Kimberly Kilduff was, indeed, without merit. Without such necessary findings, we must also reverse the court's special finding pursuant to § 52-226a as it applies to Kimberly Kilduff.

The judgment is reversed as to all defendants except Kimberly Kilduff, the special findings are reversed as to all defendants, and the case is remanded for a new trial as to all defendants except Kimberly Kilduff.

In this opinion the other judges concurred.

HOWARD BYRD *v.* COMMISSIONER OF CORRECTION (AC 38491)

Lavine, Mullins and West, Js.

Syllabus

The petitioner sought a writ of habeas corpus, claiming, inter alia, that an ex post facto law passed after he was sentenced improperly invalidated the application of risk reduction credits toward his parole eligibility date. Following cross motions for summary judgment filed by the parties, the habeas court rendered judgment dismissing the petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. He claimed that the habeas court abused its discretion in denying his petition for certification to appeal because it committed a number of procedural errors in rendering its decision and improperly concluded that it lacked subject matter jurisdiction over the petition. *Held*:

1. The habeas court properly dismissed count one of the petition for a writ of habeas corpus, which alleged the improper application of an ex post facto law, for lack of subject matter jurisdiction: the petitioner made no claim that legislation regarding eligibility for parole consideration became more onerous after the date of his criminal behavior, but rather claimed that new legislation enacted in 2011, one year after his criminal conduct, conferred a benefit on him that was taken away in 2013, which did not implicate the ex post facto prohibition because the changes that occurred between 2011 and 2013 had no bearing on the punishment to which the petitioner's criminal conduct exposed him when he committed the crime for which he was convicted in 2010; accordingly, the habeas

court did not abuse its discretion in denying the petition for certification to appeal as to count one.

2. The habeas court properly dismissed count two of the habeas petition, in which the petitioner alleged that he suffered from a heart condition and that, due to the stress of litigating count one, he was entitled to additional credits and conditional medical parole: parole eligibility under statute (§ 54-125a) does not constitute a cognizable liberty interest sufficient to invoke habeas jurisdiction, the claim in count two was wholly dependent on count one, over which this court lacked subject matter jurisdiction, and it was unclear what relief was sought in count two by the petitioner, who asked the court for medical compensation and an early release due to his failing health, but did not assert that he was illegally confined or that he had been wrongly deprived of his liberty; accordingly, the habeas court properly determined that it lacked subject matter jurisdiction over count two and did not abuse its discretion in denying the petition for certification to appeal as to that count.

Argued May 24—officially released October 10, 2017

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Fuger*, *J.*, denied the petitioner's motion for summary judgment, and granted the respondent's motion for summary judgment and rendered judgment dismissing the habeas petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court; subsequently, the court issued an articulation of its decision. *Dismissed.*

Temmy Ann Miller, assigned counsel, for the appellant (petitioner).

Madeline A. Melchionne, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Terrence O'Neill*, assistant attorney general, for the appellee (respondent).

Opinion

LAVINE, J. The petitioner, Howard Byrd, appeals following the denial of his petition for certification to

appeal from the judgment of the habeas court dismissing his second amended petition for a writ of habeas corpus (petition).[1] He asserts a number of claims on appeal, but his primary claim is that the habeas court improperly concluded that it did not have subject matter jurisdiction over his ex post facto claim alleged in count one of his petition. We conclude that the habeas court properly determined that it lacked subject matter jurisdiction over both counts of his petition[2] and, therefore, did not abuse its discretion by denying the petitioner's petition for certification to appeal.[3] Accordingly, we dismiss the appeal.[4]

[1] This appeal arises from the habeas court's oral decision issued following the August 17, 2015 hearing held for both the petitioner's motion for summary judgment and the respondent's cross motion for summary judgment. Both parties contend on appeal that the habeas court granted the respondent's motion for summary judgment at the hearing. Notwithstanding some confusion within the record, a review of the habeas court's subsequent articulation ordered by this court reveals that it did not rule on either party's motion for summary judgment but dismissed count one of the petition for lack of subject matter jurisdiction and count two for lack of subject matter jurisdiction and for failure to state a claim upon which habeas corpus relief could be granted. We conclude that because the court dismissed the case for lack of jurisdiction, it did not have the authority to rule on the merits of the respondent's motion. See *State* v. *Bozelko*, 154 Conn. App. 750, 766, 108 A.3d 262 (2015) ("[o]nce the court determined that it lacked subject matter jurisdiction, it had no authority to decide the case").

[2] In his petition, filed on August 7, 2014, the petitioner alleges two counts. Count one is labeled "Risk Reduction Earned Credit," and count two is labeled "Health Issue."

[3] The petitioner claims that the habeas court committed a number of procedural errors in rendering judgment in favor of the respondent in violation of his constitutional right to due process. In light of our conclusion that the habeas court lacked subject matter jurisdiction, we need not address these claims. See, e.g., *Arriaga* v. *Commissioner of Correction*, 120 Conn. App. 258, 265, 990 A.2d 910 (2010), appeal dismissed, 303 Conn. 698, 36 A.3d 224 (2012); *Gonzalez* v. *Commissioner of Correction*, 107 Conn. App. 507, 516, 946 A.2d 252, cert. denied, 289 Conn. 902, 957 A.2d 870 (2008).

[4] During oral argument before this court, counsel for the petitioner raised the issue of mootness because the Board of Pardons and Parole approved the petitioner for placement in a halfway house. This court ordered supplemental briefing on the issue of mootness. We conclude that this case falls within an exception to the mootness doctrine because the issue presented is capable

The facts and procedural history of this case present us with a tangled web of litigation. On September 13, 2010, the petitioner was arrested and was held in presentence confinement by the respondent, the Commissioner of Correction, for a crime that took place on that same day. On January 27, 2012, he pleaded guilty to burglary in the first degree in violation of General Statutes § 53a-101 (a) (1), and the trial court, *Kavanewsky, J.*, sentenced him to eight years imprisonment, five years of which was mandatory, followed by eight years of special parole.

In 2010, the year in which the petitioner committed the criminal act underlying his conviction, there was no statutory provision that permitted inmates to earn "good time credits" to reduce the length of their sentences. In addition, due to the violent nature of the offense for which he was convicted, the petitioner was not eligible for parole consideration before serving 85 percent of his sentence. See General Statutes (Rev. to 2013) § 54-125a (b).

In 2011, after the petitioner committed the criminal act but before he was sentenced, the General Assembly passed Number 11-51 of the 2011 Public Acts (P.A. 11-51), codified at General Statutes § 18-98e. Section 18-98e (a) provides that certain inmates who were convicted of crimes committed after October 1, 1994, "may be eligible to earn risk reduction credit toward a reduction of such person's sentence, in an amount not to exceed five days per month, at the discretion of the Commissioner of Correction . . . ." At the same time, the General Assembly amended § 54-125a (b), providing that a person convicted of a violent crime would not be eligible for parole consideration "until such person has served not less than [85 percent] of the definite

of repetition, yet evades review. See, e.g., *In re Angel R.*, 157 Conn. App. 826, 835–7, 118 A.3d 117, cert. denied, 317 Conn. 923, 118 A.3d 549 (2015).

sentence imposed *less any risk reduction credit earned* under the provisions of [section 18-98e]." (Emphasis added.) P.A. 11-51, § 25.

Thus, when the petitioner was sentenced in 2012, he was entitled to earn and be awarded, within the discretion of the respondent, risk reduction credits that would reduce the length of his sentence *and also* advance the date of his first eligibility for parole consideration. See *Petaway* v. *Commissioner of Correction*, 160 Conn. App. 727, 730, 125 A.3d 1053 (2015), appeal dismissed, 324 Conn. 912, 153 A.3d 1288 (2017). In fact, the respondent credited the petitioner with risk reduction credits for each month that he was eligible to earn such credits.

In 2013, however, the General Assembly again amended § 54-125a (b) by removing the phrase "less any risk reduction credit earned under the provisions of section 18-98e." See Pubic Acts 2013, No. 13-3, § 59. The 2013 version, which is in effect today, requires inmates who were convicted of a violent offense to serve 85 percent of their sentences before they become eligible for parole consideration. In the present case, therefore, the petitioner may earn and be awarded risk reduction credits, but such credits can no longer be used to advance the date on which he is eligible to be considered for parole. Notably, the petitioner has not lost any risk reduction credits he has earned, and he may still reduce the total length of his sentence of incarceration.

On August 7, 2014, the petitioner, self-represented, filed the operative petition. In count one, he alleged that even though the 2013 version of § 54-125a (b) prevents "risk reduction earned credit(s) to be applied toward parole eligibility dates, his sentence . . . must be [commutated] under [the 2011 version of § 54-125a (b)], as that was the enforceable law at the time he

became sentenced." In count two, he alleged that he suffered from a heart disease and that "[d]ue to [the] . . . stress . . . [stemming] from the petitioner having to struggle with his disease and litigation . . . [t]he petitioner not only seeks the return of all [risk reduction credits] to be properly calculated toward his parole eligibility date but . . . respectfully moves this court to grant relief [and] remedy by the granting of additional credits, and conditional medical parole."

On August 11, 2014, before the respondent responded to the petitioner's petition, the petitioner filed a motion for summary judgment.[5] In the motion, he alleged that (1) there was no issue of material fact that his "claim is entirely based on the language of the sovereign law that was in effect at the time [he] became sentenced," (2) there was no issue of material fact that he was "entitled to have all 'earned risk reduction credits' be applied toward [his] parole eligibility," and (3) "[a]s the new law was passed after [he] was sentenced," applying the 2013 version of § 54-125a (b) to him violated "Article I, section 10 of the United States Constitution . . . ."

On November 3, 2014, the respondent filed a cross motion for summary judgment. In his motion, he argued that the respondent was entitled to a judgment as a matter of law because "there exists no constitutional right to receive [risk reduction credits] or to have these credits applied to reduce an inmate's parole eligibility date . . . [and] there exists no constitutional right to parole." The respondent also filed a memorandum of law in support of his motion for summary judgment, in which he relied heavily on the decision of the habeas court, *Kwak, J.*, in *Petaway* v. *Commissioner of Correction*, Superior Court, judicial district of Tolland, Docket

[5] The petitioner did not articulate whether the motion for summary judgment was directed at both counts of his petition or whether it was only for count one.

No. CV-13-4005684 (April 7, 2014), aff'd, 160 Conn. App. 727, 125 A.3d 1053 (2015). The respondent attached Judge Kwak's order to his motion.[6]

On August 17, 2015, the habeas court, *Fuger*, *J.*, held a hearing to address both parties' motions for summary judgment. Following argument from both parties, the habeas court issued its oral decision. In ruling for the respondent, the habeas court wholly adopted and relied on Judge Kwak's reasoning in *Petaway*.

On August 24, 2015, the petitioner filed a petition for certification to appeal, which the habeas court denied. On April 27, 2016, the petitioner filed in this court a motion for permission to file a late motion for articulation of the habeas court's ruling. On May 25, 2016, this court denied the petitioner's motion but, sua sponte, ordered that the habeas court "articulate whether it

[6] In *Petaway*, the petitioner, who also was classified as a violent offender, alleged that "his parole eligibility date [was] illegal because it violate[d] the ex post facto clause of the constitution." *Petaway* v. *Commissioner of Correction*, supra, Superior Court, Docket No. CV-13-4005684, *1. Judge Kwak, "declined to issue the writ pursuant to Practice Book § 23-24a (1)" and because "[p]arole . . . is not a valid habeas claim." (Internal quotation marks omitted.) Id., *2. The petitioner filed a petition for certification to appeal, which Judge Kwak denied. The petitioner subsequently filed a motion for reconsideration, in which he argued that the habeas court did have subject matter jurisdiction because his claim was "an ex post facto claim" as opposed to a "parole eligibility" claim. Judge Kwak agreed with the petitioner that the issue of whether it had subject matter jurisdiction over the petitioner's ex post facto claim was a question in which "reasonable jurists could disagree . . . ." Id. He concluded, however, that the habeas court did not have subject matter jurisdiction because "[i]t [was] uncertain and highly speculative whether the wholly discretionary awarding of risk reduction credits creates a 'genuine risk' of petitioners such as . . . Petaway being incarcerated longer under the [2013 version of § 54-125a (b)] versus the [2011 version of § 54-125a (b)]." Id., *5. Judge Kwak vacated his previous order, and he dismissed the petitioner's petition but granted his petition for certification to appeal limited to the following question: "[W]hether retroactive application of [Public Act] § 13-3, and changes impacting parole eligibility dates as established by the wholly discretionary award of risk reduction credits, and not by pure operation of statute, gives rise to a colorable claim sufficient to establish subject matter jurisdiction?" Id.

intended to dismiss the petition . . . for lack of jurisdiction or whether it intended to render summary judgment in favor of the [respondent], and the factual and legal basis for the court's decision." In addition, this court, sua sponte, ordered the habeas court to "articulate whether it has disposed of the second count of the petitioner's . . . petition."

On June 21, 2016, the habeas court filed its articulation. It clarified that when it made its oral ruling on August 17, 2015, it intended to dismiss count one of the petition for lack of subject matter jurisdiction. It also stated that it disposed of count two for lack of subject matter jurisdiction because the petitioner failed to state a claim upon which relief could be granted.

On July 5, 2016, the petitioner filed in this court a motion for review of the habeas court's articulation. On July 19, 2016, this court granted the petitioner's motion for review but denied his relief requested. This appeal followed.

On appeal, the petitioner argues that the habeas court abused its discretion in denying his petition for certification to appeal because it committed a number of procedural errors in rendering its decision and improperly concluded that it lacked subject matter jurisdiction. Before we proceed on the merits of the petitioner's claims on appeal, however, it is the obligation of this court to first determine whether the habeas court abused its discretion by denying the petitioner's certification to appeal because it did not have subject matter jurisdiction over the petitioner's petition.

"Faced with the habeas court's denial of certification to appeal . . . a petitioner's first burden is to demonstrate that the habeas court's ruling constituted an abuse of discretion. . . . A habeas appeal . . . warrants appellate review if the appellant can show: that the issues 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. . . .

"[B]ecause [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary." (Citations omitted; internal quotation marks omitted.) *Rodriguez* v. *Commissioner of Correction*, 159 Conn. App. 162, 164–65, 122 A.3d 709 (2015).

We will, therefore, conduct a plenary review of the petitioner's petition to determine whether the habeas court properly concluded that it lacked subject matter jurisdiction to consider the petition.

I

The petitioner argued in count one of his petition that the application of the 2013 version of § 54-125a (b) violated his constitutional right against ex post facto laws. In dismissing count one, the habeas court stated in relevant part: "This court explicitly adopted Judge Kwak's reasoning as articulated in his April 7, 2014 order, which the respondent attached as exhibit F to the motion for summary judgment. This court, upon reconsideration of the entire matter, articulates that it intended to dismiss the petition for lack of subject matter jurisdiction."[7]

[7] The petitioner argues on appeal that the habeas court improperly failed to consider his second claim in support of count one of his petition. Relying on *Johnson* v. *Commissioner of Correction*, 258 Conn. 804, 786 A.2d 1091 (2002), he argued in his petition that "the 2013 changes to [risk reduction earned credit] could not be applied retroactively to him because the legislature did not express an intention to apply the changes retroactively," which was distinct from his ex post facto claim. On the basis of our liberal reading of the language in his petition; see *Mourning* v. *Commissioner of Correction*, 120 Conn. App. 612, 624–25, 992 A.2d 1169, cert. denied, 297 Conn. 919, 996 A.2d 1192 (2010); we agree that the petitioner made two claims in support of count one. This reading, nevertheless, does not change our overall conclusion for two reasons. First, the petitioner's second claim misconstrues our Supreme Court's analysis in *Johnson*. In that case, the court concluded it did have subject matter jurisdiction and that the legislature did not intend

"[F]or a law to violate the prohibition [against ex post facto laws], it must feature some change from the terms of a law in existence at the time of the criminal act. That feature is entirely sensible, as a core purpose in prohibiting ex post facto laws is to ensure fair notice to a person of the consequences of criminal behavior. . . . [L]aws that impose a greater punishment after the commission of a crime than annexed to the crime at the time of its commission run afoul of the ex post facto prohibition because such laws implicate the central concerns of the ex post facto clause: the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." (Internal quotation marks omitted.) *Petaway* v. *Commissioner of Correction*, supra, 160 Conn. App. 731–32. Thus, to determine whether a habeas court has subject matter jurisdiction over a petitioner's ex post facto claim, "[t]he controlling inquiry . . . [is] whether retroactive application of the change in [the] law create[s] a sufficient risk of increasing the measure of punishment attached to the covered crimes. . . . [A] habeas petitioner need only make a colorable showing that the new law creates a genuine risk that he or she will be incarcerated longer under that new law than under the old law." (Citations omitted; internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 258 Conn. 804, 818, 786 A.2d 1091 (2002).

for Number 95-225, § 1, of the 1995 Public Acts to have a retroactive effect. *Johnson* v. *Commissioner of Correction*, supra, 819, 829. Its conclusion, however, was not addressing a separate "legislative intent" claim but, rather, was part of the court's analysis as to whether the retroactive application of the law violated the petitioner's right against ex post facto laws. Second, to the extent that the petitioner's argument was a "parole eligibility" or "due process" claim, our jurisprudence expressly provides that parole eligibility is not a cognizable liberty interest sufficient to invoke a habeas court's jurisdiction. See *Baker* v. *Commissioner of Correction*, 281 Conn. 241, 252–62, 914 A.2d 1034 (2007); *Fuller* v. *Commissioner of Correction*, 144 Conn. App. 375, 378–80, 71 A.3d 689, cert. denied, 310 Conn. 946, 80 A.3d 907 (2013). Thus, the habeas court lacked subject matter jurisdiction over the petitioner's second claim.

Just as in *Petaway*, the petitioner in the present case "makes no claim that legislation regarding eligibility for parole consideration became more onerous *after the date of his criminal behavior*. Rather, he claims that new legislation enacted in 2011, [a year] after his criminal conduct . . . conferred a benefit on him that was then taken away in 2013. Such a claim, however, does not implicate the ex post facto prohibition because the changes that occurred between 2011 and 2013 have no bearing on the punishment to which the petitioner's criminal conduct exposed him when he committed" the robbery in 2010. (Emphasis added.) *Petaway* v. *Commissioner of Correction*, supra, 160 Conn. App. 732.

We conclude that the habeas court properly concluded that it did not have subject matter jurisdiction over count one of the petitioner's petition. Therefore, we also conclude that the habeas court did not abuse its discretion in denying the petitioner's petition for certification to appeal count one.

II

The petitioner alleged in count two of his petition that he suffered from a heart condition, and due to the "stress" of litigating count one, he was entitled to additional credits and conditional medical parole. In dismissing count two, the habeas court stated in relevant part: "The court notes that count two does not really state a claim at all. Instead, the petitioner makes various allegations that his health has suffered as a result of his efforts in litigating his claims and not receiving the [risk reduction] credits he believes he is entitled to. At the beginning of count two the petitioner indicates that he is seeking compensatory relief, but later it becomes apparent that count two in reality is seeking an early release through the application of [risk reduction] credits, additional credits or the granting of medical parole. Count two does not allege that the petitioner's

medical treatment somehow violates the Eighth Amendment's prohibition against cruel and unusual punishment. Therefore, count two fails to invoke a habeas court's subject matter jurisdiction . . . ."

"The principal purpose of the writ of habeas corpus is to serve as a bulwark against convictions that violate fundamental fairness. . . . [I]n order to invoke successfully the jurisdiction of the habeas court, a petitioner must allege an interest sufficient to give rise to habeas relief. . . . In order to invoke the trial court's subject matter jurisdiction in a habeas action, a petitioner must allege that he is illegally confined or has been deprived of his liberty." (Internal quotation marks omitted.) *Anthony A.* v. *Commissioner of Correction*, 159 Conn. App. 226, 235, 122 A.3d 730 (2015), aff'd, 326 Conn. 668, A.3d (2017). "In order . . . to qualify as a constitutionally protected 'liberty' . . . the interest must be one that is *assured* either by statute, judicial decree, or regulation." (Emphasis in original; internal quotation marks omitted.) *Baker* v. *Commissioner of Correction*, 281 Conn. 241, 252, 914 A.2d 1034 (2007). Specifically, "parole eligibility under § 54-125a does not constitute a cognizable liberty interest sufficient to invoke habeas jurisdiction." Id., 261–62.

In the present case, it appears that count two is wholly dependent on the success of count one, and because we conclude that the habeas court properly concluded that it lacked subject matter jurisdiction over count one, it follows that count two must fail as well. Moreover, it is unclear what relief the petitioner sought in count two; it seems as though he asked the habeas court for medical compensation while simultaneously asking for an early release due to his failing health. What is clear, however, is that he did not assert that he was illegally confined or that he had been wrongly deprived of his liberty.

We conclude that the habeas court properly concluded that it lacked subject matter jurisdiction over count two. Therefore, we also conclude that the habeas court did not abuse its discretion in denying the petitioner's petition for certification to appeal count two.

Because the petitioner failed to allege a liberty interest sufficient to invoke the subject matter jurisdiction of the habeas court, we conclude that the habeas court properly dismissed his petition. Furthermore, we conclude that the habeas court did not abuse its discretion in denying the petitioner's petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

ELLEN MCFARLINE *v.* PATRICK W. MICKENS, JR., ADMINISTRATOR (ESTATE OF JANET MICKENS) (AC 39339)

Lavine, Keller and Bishop, Js.

Syllabus

The plaintiff sought to recover damages from the defendant administrator of the estate of M for injuries she sustained when she tripped and fell on a public sidewalk that was adjacent to property owned by M. She alleged that a dangerous, defective and unsafe condition existed, namely, a broken and cracked concrete sidewalk with grass growing wildly through the crack, and that the crack was concealed by the wildly growing grass, which hindered her ability to safely use the sidewalk. Under the common law, an abutting landowner is under no duty to keep a public sidewalk in front of his property in a reasonably safe condition, except where a municipality confers liability on the abutting landowner through a statute or ordinance, or where the defect or unsafe condition was created by a positive act of the abutting landowner. The defendant filed a motion for summary judgment, claiming that, under the facts as alleged by the plaintiff, M owed no duty to the plaintiff to maintain the sidewalk. Specifically, he claimed that the city of Meriden was bound to keep the sidewalk in repair pursuant to the municipal highway defect statute (§ 13a-149), and that the positive act exception to the general rule absolving landowners of liability for defective sidewalks did not

apply because M did not create the unsafe condition on the public sidewalk. The trial court granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Held*:

1. The trial court properly rendered summary judgment in favor of the defendant: the plaintiff's claim that issues of material fact remained that precluded the granting of the motion for summary judgment was unavailing, as a resolution of the issue of whether the plaintiff was injured because the wildly growing grass obstructed her view of the crack in the sidewalk was not material to the disposition of the motion for summary judgment because the defendant did not dispute that the plaintiff's injury was caused by the broken concrete sidewalk with grass growing through it; moreover, because municipalities have the primary duty to maintain public sidewalks in a reasonably safe condition and such liability cannot be shifted to the abutting landowner absent an express charter provision, statute, or ordinance, and the plaintiff had abandoned any claim before the trial court that a city ordinance concerning grass cutting had shifted liability to the abutting landowner, M owed no duty to the plaintiff to maintain the sidewalk absent evidence of a positive act that caused or contributed to the plaintiff's accident, and the pleadings and other documents filed in the summary judgment proceeding did not suggest that an affirmative act by M caused the grass to grow on the sidewalk.
2. The plaintiff could not prevail on her claim that the trial court, by citing in its memorandum of decision on the motion for summary judgment to its prior decision in an unrelated case, erroneously considered facts outside the record of this case and thereby violated her right to due process of law; although the court cited its prior decision in the unrelated case for the proposition that growing grass was not a positive act by the property owner because grass grows by itself, there was no indication that it considered the facts in that prior case in lieu of the facts presented by the parties, it was not improper for the court to look to the facts of that similar case for legal guidance in resolving the case before it, and the plaintiff's claim that her right to due process was violated because the court did not give her notice that it intended to rely on that prior case was frivolous and unavailing.
3. The trial court did not abuse its discretion by denying the plaintiff's motion to reargue the motion for summary judgment: although that court, in ruling on the motion for summary judgment, noted that the plaintiff had alleged an incorrect date of her fall in her complaint, the court expressly stated that the incorrect date was not the subject of the defendant's motion for summary judgment, and did not render summary judgment on the basis of that erroneous date, and, therefore, reargument on the basis of the correct date of the plaintiff's fall would not have affected the court's judgment; moreover, to the extent that the plaintiff challenged the trial court's denial of her motion to amend her complaint

to correct the date of the fall and other errors, the trial court never ruled on that motion and, by denying the motion to reargue, let the judgment in favor of the defendant stand, which eliminated any possible basis for granting the motion to amend.

Argued April 19—officially released October 10, 2017

Procedural History

Action to recover damages for the alleged negligence of the defendant's decedent, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Blue*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon; thereafter, the court denied the plaintiff's motion for reconsideration, and the plaintiff appealed to this court. *Affirmed.*

Richard M. Franchi, for the appellant (plaintiff).

Maciej A. Piatkowski, for the appellee (defendant).

Opinion

KELLER, J. In this negligence action, the plaintiff, Ellen McFarline, appeals from the summary judgment rendered by the trial court in favor of the defendant, Patrick W. Mickens, Jr., administrator of the estate of Janet Mickens (Mickens). The plaintiff claims that the court, in granting the defendant's motion for summary judgment, erred by (1) failing to consider the pleadings, affidavits and other proof submitted in deciding that there is no genuine issue as to any material fact; (2) considering facts outside the confines of this case; (3) violating her right to due process of law by failing to allow her to review evidence from other cases that the court utilized in deciding the motion for summary judgment; (4) failing to apply the "test" set forth in *Sanzone* v. *Board of Police Commissioners*, 219 Conn. 179, 592 A.2d 912 (1991), when determining if there was a chain of causation that included the defendant's negligence in sequence with a highway defect; and (5)

denying her postjudgment motions to amend her revised complaint and to reargue the motion for summary judgment.[1] We affirm the judgment of the court.

The facts underlying this action, which the plaintiff commenced on January 2, 2015, are neither complicated nor, for purposes of summary judgment, in dispute. The action arises out of injuries that the plaintiff sustained while she was walking on a public sidewalk in Meriden on May 14, 2013. The sidewalk was adjacent to premises owned by Mickens.[2] In her revised complaint of April 29, 2015, the plaintiff alleged that, "a dangerous, defective and unsafe condition existed on the aforementioned sidewalk . . . namely, a broken and cracked concrete sidewalk and adjacent curb with grass growing wildly through the crack and broken sections. . . . [The plaintiff] was walking on the aforementioned sidewalk when she came in contact with the defective, dangerous and unsafe condition, that being the broken and cracked concrete and a section of the broken concrete under her foot did break away from the curb causing her to slip and fall and causing her injuries and damages . . . ." The plaintiff alleged that the sidewalk "is used by the public to transgress over." The plaintiff alleged that she sustained physical injuries, principally to her right leg, that necessitated medical treatment and that interfered with her employment and normal life pursuits.

The plaintiff alleged that Mickens was negligent in that she "allowed and permitted the . . . [defect] to exist and remain . . . failed to repair and or remedy the . . . [defect] in a timely manner . . . allowed and permitted individuals to use the sidewalk although she

[1] As several of the plaintiff's claims are interrelated, we address the plaintiff's first and fourth claims in part I of this opinion, the second and third claims in part II, and the fifth claim in part III.

[2] Mickens died on January 4, 2014. On March 15, 2014, the defendant became the administrator of her estate.

knew or reasonably should have known of the presence of the . . . [defect] . . . failed to properly maintain the . . . premises including the sidewalk and curb . . . failed to inspect the premises including the sidewalks and curbs . . . failed to warn those upon said premises, including the plaintiff, of the presence of the aforementioned [defect] . . . failed to place devices, signs and or tape, so that as to make the [defect] visible and readily apparent to individuals . . . she failed to place devices, signs and or tape, so as to physically prevent individuals from using said sidewalk . . . failed to cut the grass on the sidewalk and/or remove any grass that was hiding defects on the sidewalk . . . [and] failed to have the curb properly constructed . . . pursuant to building ordinances in . . . Meriden."

Following discovery, the defendant moved for summary judgment. In his memorandum of law in support of his motion, the defendant argued that he was entitled to judgment as a matter of law because, under the facts as alleged by the plaintiff, Mickens owed no duty to the plaintiff to maintain the sidewalk. The defendant asserted that "Connecticut law is clear that an abutting landowner is not liable for the unsafe condition of an adjacent public sidewalk unless the unsafe condition is actually caused by the abutting landowner. See *Robinson* v. *Cianfarani* . . . 314 Conn. [521, 529, 107 A.3d 375 (2014)] . . . ." The defendant observed that because the plaintiff did not assert in her complaint that Mickens caused the sidewalk defect by any "positive actions," Mickens did not owe a duty to the plaintiff to repair or warn of the defect. The defendant further reasoned that to the extent that Meriden ordinances imposed responsibilities on abutting landowners to maintain sidewalks, in the absence of state statutory authority, such ordinances cannot be interpreted as

having shifted liability from Meriden and onto the defendant.[3] Even if the city of Meriden could shift liability by ordinance, the defendant argued, those ordinances did not sufficiently express the intent to shift liability.

In her memorandum in support of her objection to the motion for summary judgment, the plaintiff argued that the defendant's motion for summary judgment addressed only one of the causes of the plaintiff's injuries, specifically, the crack in the sidewalk. She argued that grass growing on the sidewalk, as alleged, was not a defect under our municipal defective highway statute, General Statutes § 13a-149[4] and, therefore, it was "the responsibility of the landowner to remove . . . [it] and to make the property safe for pedestrians . . . ." The plaintiff argued § 180-42 of the Meriden City Code, which requires the abutting landowner to keep grass or weeds properly cut or removed in the area of the

[3] Section 180-42 of the Meriden City Code provides: "Whenever a sidewalk has been laid in the city, the occupant or, if there is no occupant, the owner of any premises abutting upon such sidewalk shall keep the grass or weeds properly cut or removed in the area between the property line of such premises and the curbline."

Section 180-41 of the Meriden City Code provides in relevant part:

"A. After having been notified by the department of public works so to do, it shall be unlawful for any person not to properly repair any portion of a sidewalk adjoining his property within the time specified in such a notice.

"B. Upon the default or neglect of any person to comply with such notice . . . the department may construct or repair such sidewalk, and the expense thereof shall be chargeable to the person whose duty it was to repair said sidewalk and shall be collectible by the city in the same manner that other debts due the city are collected, and said expense shall be a lien upon the premises adjoining such sidewalk. . . ."

[4] General Statutes § 13a-149 provides in relevant part: "Any person injured in person or property by means of a defective road or bridge may recover damages from the party bound to keep it in repair. . . . No action for any such injury shall be maintained against any town, city, corporation or borough, unless written notice of such injury and a general description of the same, and of the cause thereof and of the time and place of its occurrence, shall, within ninety days thereafter be given to a selectman or the clerk of such town, or to the clerk of such city or borough, or to the secretary or treasurer of such corporation."

sidewalk, was controlling and that it shifted the burden of sidewalk maintenance to Mickens.[5] The plaintiff also asserted that there was a genuine issue of material fact as to whether the defendant's failure to remove the "wildly growing grass" on the sidewalk was a proximate cause of her injury.

The court agreed with the defendant and granted the motion for summary judgment. The court reasoned that Mickens owed no duty to the plaintiff because "the positive act exception to the general rule absolving property owners of liability for defective sidewalks cannot be established in the case of growing grass, since grass grows by itself." The court also observed that the "Meriden grass-cutting ordinance [on which the plaintiff relied] . . . does not shift liability to the individual with the specificity required by *Willoughby* v. *New Haven*, 123 Conn. 446, 451, 197 A. 85 (1937), and [that, in any event, the plaintiff] . . . expressly abandoned her reliance on the ordinance at argument."

The plaintiff thereafter filed motions to amend her revised complaint and to reargue the motion for summary judgment, the contents of which we discuss in part III of this opinion. The court denied the motion to reargue. The record does not reflect that the court rendered a disposition on the motion to amend the revised complaint. This appeal followed. Additional facts will be provided as necessary.

I

We first address the plaintiff's related claims that the court erred in granting the defendant's motion for summary judgment (1) by failing to consider the pleadings, affidavits and other proof submitted in deciding

[5] In its memorandum of decision, however, the court noted that the defendant at oral argument, "expressly abandoned" her claim that Meriden Ordinance § 180-42, requiring abutting landowners to cut or remove grass or weeds from public sidewalks, effectively shifted liability to the landowner.

that there was no genuine issue as to any material fact, and (2) by failing to apply the definition of a highway defect as set forth in *Sanzone* v. *Board of Police Commissioners*, supra, 219 Conn. 179, when determining whether there was a chain of causation that included the defendant's negligence in sequence with a highway defect. We disagree.

We observe the following principles relating to motions for summary judgment. Summary judgment shall be granted "if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Practice Book § 17-49. A fact is material when it will make a difference in the outcome of a case. *DiPietro* v. *Farmington Sports Arena, LLC*, 306 Conn. 107, 116, 49 A.3d 951 (2012). The party moving for summary judgment bears the burden of demonstrating the absence of any genuine issue of material fact. *Lopes* v. *Farmer*, 286 Conn. 384, 388, 944 A.2d 921 (2008). The trial court must view the evidence in the light most favorable to the nonmoving party. Id.

Appellate review of the trial court's decision to grant summary judgment is plenary. *Bozelko* v. *Papastavros*, 323 Conn. 275, 282, 147 A.3d 1023 (2016). "[W]e must [therefore] decide whether [the trial court's] conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Mirjavadi* v. *Vakilzadeh*, 310 Conn. 176, 191, 74 A.3d 1278 (2013).

We dispose of each of these related claims as follows.

A

The plaintiff repeatedly asserts in a conclusory manner that, despite the court's judgment, two genuine issues of material fact remain. First, the plaintiff claims

that there is a genuine issue of material fact with respect to whether the wildly growing grass that concealed the crack in the sidewalk hindered her ability to safely use the sidewalk and that, if it did not hinder her, the condition of the sidewalk did not meet the definition of a highway defect so as to confer liability exclusively on the city of Meriden. Whether the plaintiff was injured because the grass *obstructed* her view of the crack, or whether, for instance, the grass came into contact with her foot, causing her to slip and fall, however, is simply not material to a disposition of the motion for summary judgment in this case. See *DiPietro* v. *Farmington Sports Arena, LLC*, supra, 306 Conn. 116 (fact is material if it makes difference in outcome of case). In part I B of this opinion, we discuss why the issue is not material and is therefore not a barrier to granting summary judgment in the defendant's favor.

Second, the plaintiff asserts that a genuine issue of material fact exists with respect to whether the grass was a proximate cause of her alleged injuries. She argues that there is a genuine dispute as to whether "the wildly growing grass prevented the plaintiff from seeing the broken part of the sidewalk and this caused her to step on the broken sidewalk because she could not see it and it gave way causing her to fall." The defendant, however, for purposes of summary judgment, did not dispute that the plaintiff was injured after falling on the public sidewalk adjacent to Mickens' property, or that her fall was caused by "a broken and cracked concrete sidewalk and adjacent curb with grass growing wildly through the crack and broken sections."

Accordingly, the claim that the trial court failed to consider the pleadings and other proof submitted in determing that there were no genuine issues of fact is without merit.

B

The plaintiff next argues that the court erred as a matter of law by failing to apply the definition of a highway defect as set forth in *Sanzone* v. *Board of Police Commissioners*, supra, 219 Conn. 179. We disagree.

As previously mentioned, the defendant argued, and the trial court agreed, that, absent proof of a positive act by Mickens that caused or contributed to the plaintiff's fall, Mickens owed no duty to the plaintiff to maintain the sidewalk, specifically, by keeping it free of wildly growing grass. We agree.

"The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury." *RK Constructors, Inc.* v. *Fusco Corp.*, 231 Conn. 381, 384, 650 A.2d 153 (1994). Our analysis in this case begins and ends with the first element, duty. "The existence of a duty is a question of law and only if such a duty is found to exist does the trier of fact then determine whether the defendant violated that duty in the particular situation at hand. . . . Because the court's determination of whether the defendant owed a duty of care to the plaintiff is a question of law, our standard of review is plenary. . . . Our Supreme Court has stated that the test for the existence of a legal duty of care entails (1) a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result, and (2) a determination, on the basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case. . . . The first part of the test invokes the question of foreseeability, and the second part invokes the question of policy." (Citations omitted;

internal quotation marks omitted.) *Abramczyk* v. *Abbey*, 64 Conn. App. 442, 445, 780 A.2d 957, cert. denied, 258 Conn. 933, 785 A.2d 229 (2001).

It has long been established that municipalities have the primary duty to maintain public sidewalks in a reasonably safe condition. *Robinson* v. *Cianfarini*, supra, 314 Conn. 525. General Statutes § 13a-99 further provides in relevant part that "[t]owns shall, within their respective limits, build and repair all necessary highways and bridges except when such duty belongs to some particular person. . . . " When a sidewalk "along a public street in a city [has] been constructed and thrown open for public use, and used in connection with the rest of the street, [it] must, as a part of the street," be maintained by the city, and kept in such repair "as to be reasonably safe and convenient for . . . travelers . . . ." *Manchester* v. *Hartford*, 30 Conn. 118, 121 (1861). "[This] duty is by law imposed primarily upon the city, and to the city the public and individuals have a right to look for security against accidents, as well as for indemnity for injury occasioned by its neglect." Id.

This primary duty cannot ordinarily be delegated to or imposed upon a third party by contract or ordinance. "An abutting landowner, in the absence of statute or ordinance, ordinarily is under no duty to keep the public sidewalk in front of his property in a reasonably safe condition for travel." *Wilson* v. *New Haven*, 213 Conn. 277, 280, 567 A.2d 829 (1989). Abutting landowners, therefore, are generally not liable for injuries caused by defects on public sidewalks adjacent to their property. See *Robinson* v. *Cianfarani*, supra, 314 Conn. 529. The common-law rule is that the abutting landowner is under no duty to keep a public sidewalk in front of his property in a reasonably safe condition for travel. Id. Moreover, shifting liability cannot be accomplished

by inference or by alleging alternative theories of common-law negligence. Id., 528. There are two exceptions. First, municipalities, in limited circumstances, can confer liability onto the abutting landowner through a charter provision, statute, or ordinance.[6] Id. Second, landowners may be liable for injuries caused by defects they created by their own actions. Id. Specifically, our courts have long recognized "an exception to the general rule, in that the abutting landowners can be liable in negligence or public nuisance for injuries resulting from an unsafe condition of a public sidewalk caused by positive acts of the defendant." *Gambardella* v. *Kaoud*, 38 Conn. App. 355, 358–59, 660 A.2d 877 (1995). Examples of this exception include a landowner who maintained a gasoline pump inches away from a sidewalk which would spill gasoline onto the sidewalk, rendering it unsafe for travel; *Hanlon* v. *Waterbury*, 108 Conn. 197, 198–99, 142 A. 681 (1928); and a defendant who allowed grease from his restaurant to seep from

[6] Our legislature has enacted enabling legislation to permit municipalities to promulgate rules and regulations concerning sidewalks encompassed within municipal highway rights of way. Municipalities may require property owners to remove debris and other obstructions from abutting sidewalks. See General Statutes § 7-148 (c) (6) (C) (v). Pursuant to § 7-148, municipalities also may levy penalties against abutting landowners for their failure to remove such debris and obstructions. Id. Accordingly, the city of Meriden requires property owners to keep grass or weeds properly cut or removed in the area between the property line of the landowner's premises and the curbline. Meriden City Code § 180-42. But there is no language in this ordinance or in any statute that imposes upon the abutting property owner any liability to a third party for his injuries. Under General Statutes § 7-163a, municipalities may transfer to abutting property owners liability solely for injuries caused by ice and snow on public sidewalks. Section 7-148 is the only other source under which a municipality may delegate duties to abutting landowners with respect to sidewalks. Although § 7-148 authorizes municipalities to require abutting property owners to remove debris and other obstructions from public sidewalks, unlike § 7-163a, it does not authorize a municipality to shift liability for injuries to adjacent landowners. See *Dreher* v. *Joseph*, 60 Conn. App. 257, 261, 759 A.2d 114 (2000) (general rule of construction that even where ordinance imposes on property owners duty normally performed by municipality, there is no private cause of action unless plainly expressed in ordinance).

the front of his building onto the public walk. *Perkins* v. *Weibel*, 132 Conn. 50, 51, 42 A.2d 360 (1945).

Therefore, without a statute that confers liability[7] or the creation by the abutting landowner of the cause of the injury to the plaintiff, the landowner owes no duty to members of the public traversing the public sidewalk. See *Wilson* v. *New Haven*, supra, 213 Conn. 280–81.

In her objection to the defendant's motion for summary judgment, the plaintiff did not attempt to argue that the defendant was liable to her on the basis of the cracked condition of the public sidewalk and curb. Instead, she maintained that, unlike the crack, the wildly growing grass that she alleges contributed to her injuries by concealing the crack is not a defect covered by the municipal highway defect statute, § 13a-149, because the grass, in and of itself, did not hinder her from walking on the sidewalk. She argued that abutting landowners, regardless of the lack of any ordinance or statute that shifted liability or proof of a positive act on the part of the landowner, are liable for "nonsidewalk defects."[8]

Similarly, on appeal, the plaintiff does not address the preceding authority regarding exceptions to the common-law rule that would shift liability for an unsafe public sidewalk from the municipality to an abutting property owner either by statute or ordinance or the

[7] As noted previously, during the hearing on the motion for summary judgment, the plaintiff abandoned any claim that § 180-42 of the Meriden City Code conferred liability on Mickens or her estate.

[8] It appears that, by using this terminology, the plaintiff may be referring to nonstructural sidewalk defects, which would exclude a lot of other conditions on or adjacent to public sidewalks that may constitute highway defects under § 13a-149, including ice and snow; *Bellman* v. *West Hartford*, 96 Conn. App. 387, 900 A.2d 82 (2006); loose gravel; *Hickey* v. *Newtown*, 150 Conn. 514, 517, 192 A.2d 199 (1963); defects such as holes in the traveled right of way that are not part of the actual concrete sidewalk; *Angelillo* v. *Meriden*, 136 Conn. 553, 555–56, 72 A.2d 654 (1950); and intrusive tree limbs; *Comba* v. *Ridgefield*, 177 Conn. 268, 270, 413 A.2d 859 (1979).

positive act of the property owner. Rather, the plaintiff argues that because the grass did not constitute a "highway defect" under § 13a-149, as defined in S*anzone* v. *Board of Police Commissioners*, supra, 219 Conn. 179, the defendant is liable for the plaintiff's injury due to Mickens' failure to remove the grass that concealed the crack in the sidewalk.

The plaintiff's argument is flawed. In *Sanzone*, the estate of a person injured in a motor vehicle accident sued a municipality, alleging that the accident was caused by the existence of simultaneous green traffic lights in perpendicular directions. Id., 181. The issue was whether the traffic light was a "highway defect" for the purpose of § 13a-149. Under § 13a-149,[9] municipalities can be held liable for injuries caused by highway defects on public roads. Our Supreme Court in *Sanzone* reiterated longstanding case law that a highway defect is defined as "[a]ny object in, upon, or near the traveled path, which would necessarily obstruct or hinder one in the use of the road for the purpose of traveling thereon, or which, from its nature and position, would be likely to produce that result . . . ." (Internal quotation marks omitted.) *Sanzone* v. *Board of Police Commissioners*, supra, 219 Conn. 202.

Even if we were to assume, arguendo, that the growing grass failed to meet the definition of a highway defect,[10] the outcome of this case would not be different.

[9] General Statutes § 13a-149 provides: "Any person injured in person or property by means of a defective road or bridge may recover damages from the party bound to keep it in repair. . . . No action for any such injury shall be maintained against any town, city, corporation or borough, unless written notice of such injury and a general description of the same, and of the cause thereof and of the time and place of its occurrence, shall, within ninety days thereafter be given to a selectman or the clerk of such town, or to the clerk of such city or borough, or to the secretary or treasurer of such corporation."

[10] We do not necessarily agree with the plaintiff that grass growing over the crack in the public sidewalk was not a part of her description in her revised complaint of the defective, dangerous and unsafe *condition* on the sidewalk alleged to have caused her slip and fall. "Whether a highway is

The main issue affecting summary judgment in this case is whether Mickens owed a duty to the plaintiff. *Sanzone* and §13a-149 address municipality liability; neither are pertinent to whether Mickens owed a duty to the plaintiff and they are therefore inapplicable to this case. The plaintiff has not identified any authority in support of the contention that when dangerous "nonsidewalk" defects or naturally occurring conditions not created by an abutting landowner are present on a public sidewalk, the abutting landowner has an affirmative duty to rectify such defects and is subject to liability to third parties for any injuries if he or she fails to do so.

Again, the controlling longstanding rule is that abutting landowners are not liable for injuries due to the lack of public sidewalk maintenance, unless there is a statute conferring liability or the landowner contributed to the creation of the accident-causing condition by positive act. See *Hartford* v. *Talcott*, 48 Conn. 525, 534 (1881) (landowner owes no duty to public for defects resulting wholly from operations of nature). The revised complaint does not allege, nor does the plaintiff claim,

defective may involve issues of fact, but whether the facts alleged would, if true, amount to a highway defect according to the statute is a question of law . . . ." *Sanzone* v. *Board of Police Commissioners*, supra, 219 Conn. 201. "If in the use of the traveled portion of the highway . . . a condition exists which makes travel not reasonably safe for the public, the highway is defective." (Internal quotation marks omitted.) *Ferreira* v. *Pringle*, 255 Conn. 330, 344, 766 A.2d 400 (2001). As the plaintiff alleged in her affidavit accompanying her objection to the motion for summary judgment, the "wildly growing grass" contributed to the defective nature of the sidewalk because she averred that she "could not see the crack when I stepped on it because it was hidden by the grass." Since the grass was obstructing her ability to see the crack, the grass, by its nature and position, was as much a hindrance to her safe travel on the sidewalk as the crack beneath it. Photographs submitted by the plaintiff as exhibits accompanying her objection might have indicated to a trier of fact that if the grass had not been concealing the crack, the plaintiff might have seen it and been able to avoid the accident. See *Parker* v. *Hartford*, 122 Conn. 500, 503–504, 190 A. 866 (1937) (town liable under defective highway statute for foot-deep gulley partially concealed by grass in public street.)

either that Mickens had possession of, or control over the sidewalk abutting her property. There also is no allegation in the plaintiff's revised complaint or in the documents she submitted in opposition to summary judgment that Mickens created the wildly growing grass on the sidewalk through any positive act.[11] Rather, it alleges that Mickens failed to take affirmative steps to remediate an existing condition on what was indisputably a public sidewalk. See *Robinson* v. *Cianfarani*, supra, 314 Conn. 528. As was noted previously in this opinion, the court observed that the plaintiff abandoned any claim that a Meriden ordinance had shifted liability to the defendant. Whether the plaintiff sustained the injury because the clump of grass obstructed her view of the crack or the grass caused her to trip or slip; see part I A of this opinion; the fact remains that the pleadings and other documents do not remotely suggest that Mickens through any positive act caused the grass to grow on the sidewalk.[12] Grass is naturally occurring. As the court aptly noted, "grass grows by itself."

Therefore, the plaintiff's alternative theory of common-law liability based on the Mickens' negligence for "nonsidewalk" defects is governed by the settled common-law rule that, in the absence of statute or ordinance, an abutting landowner ordinarily is under no duty to keep the public sidewalk in front of her property in a reasonably safe condition for travel. Accordingly there is no basis to impose liability on the defendant.

II

We next consider the plaintiff's related claims that in granting summary judgment, the court erroneously

[11] In fact, the allegation that the grass was "wildly growing" would be contrary to any claim that Mickens placed seeds or grass over the cracked area of the sidewalk.

[12] Compare the present matter with *Gambardella* v. *Kaoud*, supra, 38 Conn. App. 359, in which the plaintiffs won reversal of summary judgment in favor of abutting landowners in a defective sidewalk case not because sand, sticks and debris had naturally accumulated on the sidewalk, but

considered facts outside the confines of this case and in so doing, violated the plaintiff's right to due process of law by failing to allow her to review evidence from other cases that the court utilized in deciding the motion for summary judgment. The plaintiff claims that the court, by citing to its prior decision in *Marino* v. *Branford*, Superior Court, judicial district of New Haven, Docket No. 431477 (Oct. 12, 2000) (28 Conn. L. Rptr. 297), in its memorandum of decision on the motion for summary judgment, relied on facts outside the record and violated the plaintiff's rights. These claims are entirely without merit.

In *Marino*, the injured party fell when she stepped on a sidewalk defect that was concealed by weeds and grass. Id., 297. The court determined that the abutting landowner was not liable, however, because grass grows naturally and, thus, the condition at issue was not created by a positive act. Id., 298. In its memorandum of decision, the court in the present case reasoned: "For the reasons set forth in [*Marino*] . . . the objection to the motion for summary judgment must be overruled. As explained in *Marino*, 'the positive act exception to the general rule absolving abutting property owners of liability for defective sidewalks cannot be established' in the case of growing grass, since grass grows by itself. . . . The operative facts of *Marino* cannot be distinguished from the operative facts of this case, and, despite frequent entreaties by the court at argument, [the plaintiff] was unable to articulate any such distinction."

There is no indication that the court considered the facts in *Marino* in lieu of the facts presented by the parties at summary judgment. A court may look to an opinion from a factually similar case, or any reported

because the plaintiffs had alleged that the defendants caused the condition by a positive act.

case, in fact, even if such case is nonbinding, for legal guidance in resolving the case before it. Cf. *Turner* v. *Frowein*, 253 Conn. 312, 341, 752 A.2d 955 (2000). The court here merely applied the "[r]easons set forth in *Marino*" because of the plaintiff's inability to distinguish "[t]he operative facts *Marino*" from the "operative facts of this case." In any event, for the reasons provided in parts I A and I B of this opinion, we conclude under a plenary standard of review that the defendant was entitled to judgment as a matter of law.

The plaintiff's due process claim merits little discussion. Whether a party was deprived of his due process rights is a question of law to which appellate courts grant plenary review. *Gagne* v. *Vaccaro*, 154 Conn. App. 656, 671, 109 A.3d 500 (2015). The core interests protected by procedural due process concern the opportunity to be heard at a meaningful time and in a meaningful manner. *Jones* v. *Connecticut Medical Examining Board*, 309 Conn. 727, 736, 72 A.3d 1034 (2013). The plaintiff does not assert rights of this nature. Instead, the plaintiff argues that the court did not provide notice that it would cite to the *Marino* decision. The argument is wholly frivolous, and we further note that the defendant cited to *Marino* in his motion for summary judgment.

For all of the foregoing reasons, we conclude that the court did not err in granting the defendant's motion for summary judgment.

III

The plaintiff's final claim is that the court erred by denying the plaintiff's postjudgment motions to amend her revised complaint and to reargue the motion for summary judgment. We disagree.

We note the following additional facts relevant to this claim. The plaintiff's revised complaint alleges that

she fell on May 14, 2014, and it refers to the defendant's decedent as *Janice* Mickens, rather than *Janet* Mickens. Through discovery, however, it was determined that the incident had in fact occurred on May 14, *2013*. It is undisputed that Mickens died on January 4, 2014. The plaintiff did not correct these errors in her revised complaint prior to the granting of summary judgment. In its memorandum of decision granting summary judgment, the court observed that the plaintiff incorrectly referred to *Janice* Mickens and that Mickens had been dead for over four months at the time of the incident in question, thus leaving "the identity of the person actually responsible for the condition complained of . . . in considerable doubt." The court, however, acknowledged the incorrect date was "not the subject of the defendant's motion for summary judgment."

After the court granted summary judgment, the plaintiff filed the two motions previously identified. The plaintiff sought to amend her revised complaint to fix the error as to the date of the incident and sought to reargue the motion for summary judgment because she argues the court rendered its decision "based upon [the] . . . erroneous facts" her amendment sought to cure. The court summarily denied the motion to reargue. The record does not indicate that the court ruled on the motion to amend.

As she did before the trial court, the plaintiff argues that the court looked to incorrect details when deciding whether to grant summary judgment for the defendant. Therefore, the plaintiff argues that the record should be modified to allow for a "proper decision upon the facts."

"[T]he purpose of a reargument is . . . to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been

a misapprehension of facts. . . . It also may be used to address alleged inconsistencies in the trial court's memorandum of decision as well as claims of law that the [movant] claimed were not addressed by the court." (Citation omitted; internal quotation marks omitted.) *Opuku* v. *Grant*, 63 Conn. App. 686, 692, 778 A.2d 981 (2001). It is not meant for a second bite at the apple. Id. Denial of the motion to reargue is within the discretion of the trial court, and an appellate court applies abuse of discretion review. *Weiss* v. *Smulders*, 313 Conn. 227, 261, 96 A.3d 1175 (2014). The trial court's decision is affirmed if there is a reasonable basis for its conclusions. *Biro* v. *Hill*, 231 Conn. 462, 465, 650 A.2d 541 (1994).

In ruling on the motion for summary judgment, the court merely acknowledged the confusion created by the incorrect date alleged in the complaint. The court expressly stated that the incorrect date was "not the subject of the defendant's motion for summary judgment." The principal issue on summary judgment was whether the owner of the property adjacent to the sidewalk in question owed the plaintiff a duty to maintain the sidewalk. The court concluded that the abutting landowner at the time of the plaintiff's accident, whether it was Mickens or her estate, could not be held liable. We are not persuaded that reargument based on the correct date of the plaintiff's fall, as argued, would have affected the court's judgment. Whether Mickens or her estate was the abutting landowner at the time of the incident in question was irrelevant to the court's analysis. For the foregoing reasons, the court did not abuse its discretion in denying the plaintiff's motion to reargue.

To the extent that the plaintiff challenges the court's denial of her motion to amend, we observe that "[w]e cannot pass on the correctness of a trial court ruling that was never made." *Fischel* v. *TKPK, Ltd.*, 34 Conn.

App. 22, 26, 640 A.2d 125 (1994). Additionally, we observe that, having denied the motion to reargue, the court let the judgment in favor of the defendant stand and, thus, eliminated any possible basis for granting the motion to amend.

The judgment is affirmed.

In this opinion the other judges concurred.

CLAUDIA PUFF *v.* GREGORY PUFF
(AC 37640)

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

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from certain postjudgment orders of the trial court modifying alimony and finding her in contempt. The plaintiff had filed a motion seeking an upward modification of alimony on the basis of, inter alia, a diagnosis of multiple sclerosis. At a subsequent hearing, counsel for the defendant orally presented an agreement between the parties. Pursuant to the agreement, the defendant was to pay $10,000 per month for 120 months in periodic alimony and the plaintiff could, in turn, choose to assign those payments to a special needs trust. The agreement indicated that the defendant was to be named a residual beneficiary to the trust and that the plaintiff was required to secure, or endeavor to secure, a legal opinion that such an arrangement would not affect the defendant's federal tax deductions. Finally, the agreement contained a nondisparagement clause and required the defendant to retract certain statements. The parties also indicated that, after consulting with experts on trust formation and taxation, they intended to submit a written document embodying the agreement to the court. The court then canvassed the parties, entered a finding that the terms presented were fair and equitable under the circumstances, and approved the oral agreement. The plaintiff subsequently filed a motion to open the court's order on the agreement, arguing that the trust contemplated by the parties would not qualify as a special needs trust under the law and that the defendant would not be able to deduct payments from his taxable income as alimony. Following certain subsequent disagreements between the parties, the court reviewed the transcript of the hearing and reduced the terms of the parties' previous oral agreement into a written decision. The defendant subsequently filed a motion for contempt asserting, inter alia, that the plaintiff had failed to obtain an

opinion letter regarding the tax deductibility of the defendant's alimony payments as required by the agreement. In response, the plaintiff argued that she had tried but was unable to obtain such a letter because the defendant's status as a residual beneficiary likely jeopardized his right to deduct alimony payments. The trial court subsequently granted the motion for contempt, concluding that the plaintiff had wilfully violated its order. On the plaintiff's appeal to this court, *held*:

1. The trial court did not err in concluding that the parties' oral agreement was an enforceable, binding agreement and not merely an agreement to agree: the parties had expressed an intent to resolve the matter at the hearing and, notwithstanding the provision requiring consultation with experts, sought to have the court approve their oral agreement as an enforceable order; moreover, the parties had reached an agreement on the relevant material terms including the amount of alimony, the method of payment, the retraction of statements by the defendant, and the nondisparagement clause.
2. The plaintiff could not prevail on her claim that the trial court improperly modified the parties' oral agreement when reducing it to a written decision; the court's written decision did not modify or improperly rewrite the oral agreement between the parties, but simply memorialized the terms expressed at the hearing, and the court did not act improperly by not including in its written decision a term requiring the plaintiff to receive tax free alimony because such a term was not included in parties' original oral agreement.
3. The plaintiff could not prevail on her claim that the trial court did not adequately canvass her, as required by statute (§ 46b-66), at the hearing at which the parties presented the oral agreement and at the proceeding at which the court had reduced the oral agreement to a written order: the court's canvass following presentation of the oral agreement was sufficient to satisfy the requirements of § 46-66, which required the court to ensure that the terms were fair and equitable under the circumstances, as the financial affidavits were set forth in the record, the transcript of the hearing was replete with references to the plaintiff's disability, the plaintiff's counsel had the opportunity to present additional information to the court, and the court's canvass revealed that the plaintiff had knowingly entered into the agreement; moreover, the court was not required by § 46-66 to conduct an additional canvass after issuing its written decision, which merely summarized the parties' previous oral agreement and did not alter its terms.
4. The trial court improperly granted the defendant's postjudgment motion for contempt; given that the plaintiff was required under the agreement to secure, or endeavor to secure, an opinion letter regarding the tax deductibility of the defendant's alimony payments, and given the undisputed fact that the plaintiff had made at least some effort to secure the opinion letter required under the agreement, this court was left with

the definite and firm conviction that the trial court's finding of contempt was clearly erroneous.

Argued March 16—officially released October 10, 2017

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Grogins*, *J.*, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Emons*, *J.*, granted the plaintiff's motion for modification; subsequently, the court, *Emons*, *J.*, granted the plaintiff's motion to open; thereafter, the court, *Heller*, *J.*, issued certain orders in accordance with the parties' stipulation; subsequently, the court, *Heller*, *J.*, denied the plaintiff's motion to reargue, and the plaintiff appealed to this court; thereafter, the court, *Tindill*, *J.*, granted the defendant's motion for contempt, and the plaintiff filed an amended appeal. *Reversed in part; judgment directed.*

Samuel V. Schoonmaker IV, with whom, on the brief, was *Wendy Dunne DiChristina*, for the appellant (plaintiff).

Edward M. Kweskin, with whom were *Sarah Gleason* and, on the brief, *Zachary J. Phillipps* and *Leonard M. Braman*, for the appellee (defendant).

Opinion

BEACH, J. The plaintiff, Claudia Puff, appeals from the orders of the trial court entered in connection with various motions following the dissolution of her marriage to the defendant, Gregory Puff. The plaintiff claims that the court erred in (1) approving a stipulated agreement between the parties, (2) modifying the parties' agreement, (3) approving the parties' agreement without first conducting an adequate canvass pursuant

to General Statutes § 46b-66, and (4) granting the defendant's motion for contempt. We agree with the plaintiff's fourth claim and disagree with her other claims. Accordingly, we affirm in part, and reverse in part, the judgment of the trial court.

The following facts, as they appear in the record, and procedural history are relevant. The parties were married in 1988. There were no children issue of the marriage. In September, 2002, the plaintiff commenced an action for dissolution of the marriage. On December 19, 2002, the court, *Grogins*, *J.*, rendered judgment dissolving the parties' marriage. The judgment of dissolution incorporated by reference a separation agreement, which provided that the defendant was to pay the plaintiff periodic alimony of $5900 per month, and an additional $5000 each August and December, for ten years, subject to earlier termination for reasons not relevant here.

In March, 2009, the plaintiff filed a motion for an upward modification of alimony as to amount and duration, on the bases of increases in the defendant's income and in her living expenses. In June, 2010, the plaintiff filed an amended motion for modification of alimony on the additional basis of her deteriorating health; she recently had received a diagnosis of multiple sclerosis. On February 28, 2012, the court, *Emons*, *J.*, granted the motion for modification, but ordered that the increase in duration and amount was nonmodifiable. The plaintiff filed a motion to open and set aside the February 28, 2012 decision. On April 9, 2013, the court, *Emons*, *J.*, granted the plaintiff's motion to open and vacated its February 28, 2012 decision for the purpose of hearing additional evidence.

On February 19, 2014, a hearing was held before Judge Heller. During that hearing, the defendant's attorney stated the terms of a stipulated agreement regarding

the plaintiff's motion to modify and other motions. The plaintiff's attorney stated that the parties were relying on experts to create a special needs trust into which the defendant would pay alimony, but that "[there are] some terms that we are just unfamiliar with . . . so the concept will be put on the record, but the actual term of how that's [going to] take place is not [going to] be put on the record." He explained that the parties would "work on the details of the writing, and . . . submit it at a later date." The defendant's attorney said, "This is . . . a postjudgment stipulation. It comes upon the plaintiff's motion for modification of alimony. And so the agreement is as follows . . . ." He proceeded to state the agreement, which contained twelve paragraphs, on the record.

The court then canvassed both parties. The plaintiff indicated that she had reviewed the terms of the agreement with her attorney, that she understood all of the provisions and that she believed the agreement to be fair and equitable. The court stated that it found the stipulated agreement to be fair and equitable and approved the agreement.

The defendant filed a motion on May 16, 2014, requesting the court to approve his proposed draft reducing, into writing, the terms of the oral stipulation presented at the February 19, 2014 hearing. The court, *Heller*, *J.*, held a hearing on the defendant's motion on June 17, 2014. The plaintiff objected on the ground that the stipulation presented at the February 19, 2014 hearing should be vacated because it was impossible to execute. The court stated that it would compare the draft of the agreement with the transcript of the February 19, 2014 proceedings, and it continued the matter to a later date.

On June 18, 2014, the plaintiff filed a motion to open and vacate the February 19, 2014 order. In that motion,

the plaintiff argued that the trust contemplated in the February 19, 2014 oral stipulation could not qualify under the law as a special needs trust in the circumstances presented and that the defendant would not be able to deduct the $10,000 monthly payment required under the agreement from his gross income for the purpose of reducing his taxes.

The defendant's attorney presented a revised draft of the stipulation at a hearing before Judge Heller on August 18, 2014. The plaintiff's attorney argued that the revised draft stipulation was inconsistent with the February 19, 2014 oral stipulation, and that the terms of the February 19, 2014 oral stipulation could not be implemented according to trust and tax law. The court stated: "I think what the parties believed at the time [of the February 19, 2014 hearing] may not be what they believe today. But what I will do is enter an order and turn the stipulation into a written order of the court. . . . And then we'll proceed with [the plaintiff's motion to open and vacate the February 19, 2014 order]."

On November 17, 2014, the court, *Heller*, *J.*, reduced the February 19, 2014 oral stipulation to a written order entitled "memorandum of decision on postjudgment motions resolved by stipulation approved and so ordered on February 19, 2014." The document set forth the terms of the stipulated agreement stated on the record at the February 19, 2014 hearing. Several paragraphs are especially germane to the issues on appeal. Paragraph one provided that the defendant was to pay to the plaintiff as periodic alimony $10,000 per month for 120 months and that the plaintiff had the right to assign the alimony to a special needs trust, subject to the defendant's ability to deduct the alimony from his gross income under the Internal Revenue Code. Paragraph six provided that the defendant was to be a residual beneficiary of the special needs trust in the same proportion as the sum of the alimony payments made

or assigned to the special needs trust was to the total contributions to the special needs trust from all sources. Paragraph eight provided that the plaintiff was to prepare a list of the defendant's statements that she deemed "hurtful or nasty," that the defendant was to retract those statements, that those retractions would not be deemed admissions, and that neither party was to disparage the other personally or professionally. Paragraph nine provided that the plaintiff "shall immediately secure, or endeavor to secure, a legal opinion to the effect that any action taken by the plaintiff to assign the alimony payments to the special needs trust does not affect the deductibility of such payments by the defendant under the tax laws of the United States." Paragraph ten gave the defendant the ability to recoup certain amounts from the special needs trust in the event that he was unable to deduct the alimony payments from his gross income. Paragraph eleven provided that the parties' February 19, 2014 oral stipulation was to supersede all prior orders in the case.

The court's recitation of the agreement was made available to the parties at a hearing on November 18, 2014, in connection with the plaintiff's motion to open and vacate the February 19, 2014 order. At the hearing the court stated the following: "I thought it would be helpful to the parties to have a written opinion of the court that tracked all of the orders that were put on the record on February [19, 2014]." The court said that "there was a binding agreement that was approved and ordered by the court on February [19, 2014]. It was not contingent. There were provisions that needed to be addressed relating to the terms of the special needs trust. But the parties had put the terms of their agreement on the record, and that agreement was approved and so ordered by the court." At the hearing, the plaintiff said that, on further consideration, her motion to open was "superfluous" and that she would

not proceed with it. In her view, there had been no meeting of the minds on February 19, 2014, sufficient to form a settlement agreement on which a stipulation could be based. The plaintiff asserted that there was, then, no valid postjudgment order and, thus, nothing to open. The court disagreed with the plaintiff. This appeal followed.

On December 22, 2014, the defendant filed a motion seeking sanctions and a finding of contempt. On March 23, 2015, the court held a hearing on the defendant's motion. On March 27, 2015, the court, *Tindill*, *J.*, granted the defendant's motion. The plaintiff then filed an amended appeal.[1]

I

The plaintiff claims that on February 19, 2014, the court misapplied § 46b-66[2] when it approved the parties' stipulated agreement as an order of the court. The plaintiff claims that the stipulation did not create an enforceable agreement, but only an "agreement to agree." We are not persuaded.

We begin by setting forth the following general principles. "A stipulated judgment constitutes a contract of the parties acknowledged in open court and ordered to be recorded by a court of competent jurisdiction. . . . A stipulated judgment allows the parties to avoid litigation by entering into an agreement that will settle

[1] The defendant argues that the portion of the plaintiff's appeal challenging the merits of the February 19, 2014 order should be dismissed. The defendant filed two motions in this court seeking to dismiss the appeal, in which he raised the same grounds as he now does on appeal. This court denied both motions.

[2] General Statutes § 46b-66 (a) provides in relevant part: "In any case under this chapter where the parties have submitted to the court an agreement concerning . . . alimony . . . the court shall inquire into the financial resources and actual needs of the spouses . . . in order to determine whether the agreement of the spouses is fair and equitable under all the circumstances. . . ."

their differences once the court renders judgment on the basis of the agreement. . . . A stipulated judgment, although obtained through mutual consent of the parties, is binding to the same degree as a judgment obtained through litigation. . . .'' (Internal quotation marks omitted.) *Housing Authority* v. *Goodwin*, 108 Conn. App. 500, 506–507, 949 A.2d 494 (2008).

''The well settled standard of review in domestic relations cases is that this court will not disturb trial court orders unless the trial court has abused its legal discretion or its findings have no reasonable basis in the facts. . . . As has often been explained, the foundation for this standard is that the trial court is in a clearly advantageous position to assess the personal factors significant to a domestic relations case . . . . [U]nless the trial court applied the wrong standard of law, its decision is accorded great deference because the trial court is in an advantageous position to assess the personal factors so significant in domestic relations cases . . . .'' (Citation omitted; internal quotation marks omitted.) *Mundell* v. *Mundell*, 110 Conn. App. 466, 472, 955 A.2d 99 (2008).

''The rules governing contract formation are well settled. To form a valid and binding contract in Connecticut, there must be a mutual understanding of the terms that are definite and certain between the parties. . . . To constitute an offer and acceptance sufficient to create an enforceable contract, each must be found to have been based on an identical understanding by the parties. . . . If the minds of the parties have not truly met, no enforceable contract exists. . . . [A]n agreement must be definite and certain as to its terms and requirements. . . . So long as any essential matters are left open for further consideration, the contract is not complete. . . . A contract requires a clear and definite promise.'' (Citation omitted; internal quotation marks omitted.) *Geary* v. *Wentworth Labs., Inc.*, 60 Conn. App. 622, 627,

760 A.2d 969 (2000); see also id., 628 (duration, salary, fringe benefits and other conditions of employment deemed essential to employment contract). "An agreement to agree to a material term at a later time is no agreement at all." (Internal quotation marks omitted.) *Kominski* v. *O'Keefe*, Superior Court, judicial district of Danbury, Docket No. FA-05-4001578-S (January 10, 2007) (42 Conn. L. Rptr. 650, 652); see *Geary* v. *Wentworth Laboratories, Inc.*, supra, 627 ("[a] contract requires a clear and definite promise").

The following additional facts are relevant. At the February 19, 2014 hearing, prior to stating the terms of the agreement on the record, the parties expressed their understandings as to the nature and effect of the agreement. The agreement was somewhat complex, as the defendant lived in Hong Kong and the plaintiff desired a special needs trust. The defendant's attorney noted the following: "[S]ubject to the court's permission, we'd like to put on . . . an oral stipulation. We've negotiated at some length, and . . . I think that we would like to make sure that the points are in the record today. And if the court sees fit to approve it, then at least we'll have an order." The plaintiff's attorney responded: "And then it's going to require some doing . . . in terms of drafting because the agreement contemplates the creation of a special needs trust . . . and the right to receive alimony into that trust. And the mechanics and logistics of that are being handled by people who are experts in those particular fields. . . . [W]hat we intend to do is encompass what we put on the record today within a written document that we're [going to] submit. But we want to make sure . . . that this matter [is] resolved. [The defendant] doesn't live in the area. He's going to be released and he's [going to] go back home. And we will work on the details of the writing, and we'll submit it at a later date." The defendant's attorney clarified: "But the understanding will be . . .

that the writing will be consistent with what we're saying here today. And in the event that there were a dispute, that would be decided by a judge, consistent with the points raised today . . . without the necessity of the parties being here because it would just be a matter of working out the wording." The plaintiff's attorney agreed.

The court inquired as follows: "And this agreement, the stipulation that you want to put on the record is resolving all of the issues subject to there being a writing? Is that the intent?" The defendant's attorney responded: "Well, actually it's not [subject to a writing]. The writing will be the embodiment of . . . what we're saying today. . . . *So this would be the order*, *and an enforceable order today*. . . . [J]ust as a judgment file, for example, confirms the terms of the judgment. . . . If we had a dispute . . . we'd say here were the terms . . . that everybody stipulated to . . . . [If] for some reason we were unable to work out the wording, the court would help us through that then." The plaintiff's attorney agreed and added the following: "However, with that . . . being said, there're some . . . terms that we are just unfamiliar with . . . for example the specific logistics of how the alimony is [going to] get assigned into the special needs trust. So the concept will be put on the record, but the actual terms of how that's [going to] take place is not [going to] be put on the record." The defendant's attorney further explained: "That's correct. But the further understanding . . . is that [the writing] . . . would still have to be consistent with what [we] are speaking about today." (Emphasis added).

The defendant's attorney then stated the terms of the agreement. He prefaced the recitation by saying that "this is a postjudgment stipulation. It comes upon plaintiff's motion for modification of alimony. And so the agreement is as follows, Your Honor."

Regarding paragraph nine, the defendant's attorney stated the following: "The plaintiff immediately shall secure or endeavor to secure a legal opinion that the deductibility by the defendant of the alimony is not impacted by any action taken by the plaintiff to assign the alimony to the trust." The plaintiff's attorney stated that "the linchpin of this whole deal is that [the defendant] wants the income tax deduction on the $10,000 a month . . . and that [the plaintiff] wants to actually receive the $10,000 a month. . . . So it's really, really important to each of these people to have the tax treatment that we believe, and that we both have been advised, exists." The defendant's attorney continued by stating that "paragraph nine also continues that in order to accomplish the deductibility, it may be a matter of assigning the right to receive the alimony, or simply . . . directing the payments be made to the trust or some mechanism that the parties, though counsel, will work in good faith to achieve with the result that the defendant shall have the right under the Internal Revenue [Code] to deduct the alimony on his income taxes, and income taxes are paid in accordance with [federal tax] law." The plaintiff's attorney again stated the following: "[T]he linchpin of the whole deal is that [the defendant] gets to deduct the payments that he's making pursuant to paragraph one, and that [the plaintiff gets] to actually receive [those] payments . . . ."

Following the parties' recitation of the agreement on the record,[3] the court stated the following: "[W]e'll note that this disposes of all open issues, and the only thing that is left to do is to have the parties prepare your agreement that's going to track . . . the agreement that you've put on the record." The court then canvassed the parties. Both reported that they understood the agreement, had reviewed it completely with their

[3] The parties recited and discussed, on the record, each of the twelve paragraphs in the stipulated agreement.

attorney, and thought the agreement was fair and equitable. Following the canvass, the court stated: "So we will put on the record that I find the [parties'] oral stipulation that was put on the record today to be fair and equitable. And it will be approved and so ordered." The parties agreed that the "order is today," though a written version was to be submitted.

At the November 18, 2014 hearing, when the enforceability of the February 19, 2014 stipulation was being considered, the court found that "there was a binding agreement that was approved and ordered by the court on February [19, 2014]. It was not contingent. There were provisions that needed to be addressed relating to the terms of the special needs trust. But the parties had put the terms of their agreement on the record, and that agreement was approved and so ordered by the court."

The plaintiff argues that in order for an agreement to be enforceable pursuant to § 46b-66, there must be a contract between the parties and that the court erred in applying that statute because no contract existed. She contends that the February 19, 2014 oral agreement was an "agreement to agree" rather than an enforceable contract. She argues that the "extremely complex oral understanding" placed on the record "was replete with tentativeness and ambivalence" and that the purpose of the February 19, 2014 hearing was only to place a concept on the record. She argues that, because essential terms of the proposed agreement—that the alimony payments would be tax deductible for the defendant and the plaintiff would receive the alimony payments tax free—were unresolved and required expert opinions, there was no meeting of the minds and, accordingly, no valid contract. She further argues that there were additional "unresolved and important terms,"

including the future retraction by the defendant of certain remarks and the defendant's ability to recoup contributions to the special needs trust. The plaintiff argues as well that, on February 19, 2014, the parties had not yet drafted the written agreement and had not obtained legal and tax opinions on essential contract terms and, therefore, there was no meeting of the minds and no enforceable contract.

The defendant argues that the February 19, 2014 oral stipulation was an enforceable agreement. He contends that this oral agreement was not "a mere placeholder pending fulfillment of conditions precedent" and that if the plaintiff had such subjective intent, that intent was not expressed to the court on February 19, 2014. The defendant argues that the parties and the court stated that the order was binding and final. Furthermore, he argues that the parties were free to enter into a contract that contained a term requiring the parties to refer to a professional's opinion regarding the technical provisions of the special needs trust without creating a condition precedent or a contingency. We agree with the defendant.

No intent contrary to the creation of an enforceable order was expressed at the February 19, 2014 hearing, and the court's finding of such was not clearly erroneous. Both parties expressed the intent to resolve the matter on February 19, 2014, and sought to have the court approve the agreement as an enforceable order. The plaintiff's attorney agreed with the defendant's attorney that the contemplated written document would simply embody the agreement stated on the record, and that they considered the agreement to be "an enforceable order today."

The provisions concerning the special needs trust, were, according to both parties, the "linchpin[s]" of the agreement. Although the plaintiff's attorney noted that

the parties needed to consult with experts to draft the special needs trust and that the concept of the trust was being placed on the record, neither the plaintiff nor her attorney expressed any desire not to create an immediately enforceable order; indeed, they expressed the contrary intent.

Although the intent as expressed may be useful, the critical question is whether the essential terms were actually agreed upon. The plaintiff argues on appeal that one term essential to her was that the plaintiff would receive $10,000 per month that would not be subject to taxation, and this term, as matters developed, was not agreed upon. No such term, however, was expressly stated on the record at the February 19, 2014 hearing. Describing paragraph one of the agreement, the defendant's attorney stated that "the defendant shall pay to the plaintiff the sum of $10,000 per month for a term of 120 months, *as taxable alimony*, tax deductible to the defendant." (Emphasis added.) The plaintiff's attorney agreed, stating the importance of the defendant's being able to deduct the amount of $10,000 and the plaintiff "actually receiv[ing] the $10,000 a month." Receiving $10,000 a month is different from receiving it tax free; there is nothing in the February 19, 2014 record expressing a term that the plaintiff would not pay taxes on the amount received.[4] The essential term of the defendant's alimony payments was objectively agreed upon at the hearing: the plaintiff would receive $10,000 in presumptively taxable alimony.

The plaintiff further argues that the "agreement" left unclear how much maintenance she would receive net

[4] The agreement *did* contain, in paragraph ten, a mechanism by which the defendant's payments could be modified if, because of the intricacies of the arrangement, his payments were determined not to be deductible *by him*. In that event, he could reduce his alimony payments by the amounts of the disallowed deductions. The plaintiff's expression that she needed to "actually receive" $10,000 per month is, then, consistent with the ability of the *defendant* to deduct the amount of alimony he paid.

of taxes, in light of the recoupment provisions in paragraph ten. As previously noted in this opinion, paragraph ten allowed the defendant to deduct certain amounts from future alimony payments, should he not be allowed to deduct his alimony payments. There was indeed uncertainty, but the parties expressly agreed to a very specific method of adjusting payments in the event of a contingency. The plaintiff's attorney expressed an identical understanding of paragraph ten. He stated, in response to the placement of paragraph ten on the record, that: "what [the defendant's attorney] has said is accurate with just a clarification: we are talking about [United States] law only, okay [United States] tax law only. This is an international situation."

The plaintiff further argues that there were other material unresolved terms, such as the requirement that the defendant retract "hurtful and nasty things that were said," the plaintiff's eligibility for Medicaid and other state and federal assistance programs, and the terms of the nondisparagement clauses. The agreement provided in paragraph eight that the plaintiff was to provide a list of comments that she deemed hurtful by March 15, 2014, and that the defendant was to issue retractions. This term was not unresolved; rather, the parties were simply required to perform at a later date. Additionally, at the February 19, 2014 hearing, the plaintiff's attorney expressed his understanding that "the intention of all of this is . . . to try to make sure that [the plaintiff] qualifies under both the income and the assets thresholds for the services available to people with her types of disabilities." The discussion of state and federal assistance programs was not a missing or unresolved material term, but rather expressed the plaintiff's motivation for entering into the agreement—namely, trying to integrate substantial payments by the defendant while remaining qualified for public assistance. Paragraph

eight included a nondisparagement clause, whereby neither party would disparage the other personally or professionally. The plaintiff's attorney further clarified this provision at the February 19, 2014 hearing, stating that the parties "can't circumvent the nondisparagement [provision] by getting someone else to do it for [them]." The nondisparagement term was stated clearly on the record, thus, and was not unresolved.

The plaintiff additionally argues that the complex scheme was unworkable and therefore there was no contract. The formation of a binding contract requires a mutual understanding of the terms that are definite and certain between the parties. See *Geary* v. *Wentworth Labs., Inc.*, supra, 60 Conn. App. 627–28. The material terms, including the amount of alimony and method of payment, were agreed upon. If one or more subordinate aspirations later proved unworkable, this event would not negate the existence of a present agreement on the essential terms. For the foregoing reasons, we conclude that the court did not err in concluding that the parties' agreement was enforceable and not merely an agreement to agree.

II

The plaintiff claims, in the alternative, that even if the February 19, 2014 agreement was enforceable, the court improperly modified that agreement when it promulgated its November 17, 2014 decision, substituting that document for the transcript of the previous oral agreement of the parties. She contends that the November 17, 2014 decision included the defendant's "linchpin" term, that he would be able to deduct the amount of alimony payments, but eliminated the plaintiff's "linchpin" term, which was that she would actually receive $10,000 per month tax free. She also argues that the court eliminated from its November 17, 2014 decision certain statements made at the February 19,

2014 hearing to the effect that the agreement was a "concept," that creating the trust documents was "going to require some doing," that there were "some terms that we are just unfamiliar with," and that the written "agreement is really [going to] be the controlling thing," that paragraph six of the written agreement would be "augmented by provisions of paragraph eight, ten and eleven," and that the parties should return to court with the "full agreement with the terms of the trust . . . ." We do not agree.

In the court's November 17, 2014 "memorandum of decision on postjudgment motions resolved by stipulation approved and so ordered on February 19, 2014," it explained that at the February 19, 2014 hearing, the parties entered an oral stipulation on the record resolving all outstanding postjudgment motions. The court stated that the plaintiff's counsel had explained at the hearing that the parties "were putting the concept of the special needs trust—but not its actual terms—on the record at that time, because the trust instrument had to be prepared by an attorney who was an expert in the law of special needs trusts. In particular, the special needs trust counsel would have to address the mechanics of paying or assigning alimony to a special needs trust so that the plaintiff would qualify for Medicaid and other services and programs available to individuals with disabilities while receiving the benefit of the alimony paid by the defendant, and the defendant would receive a federal income tax deduction for the alimony that he paid." (Footnote omitted.) The court then stated that defendant's attorney had recited the specific terms of the agreement, and listed them in twelve numbered paragraphs. The court concluded by stating that, after canvassing both parties, it had approved the oral stipulation, entered it as an order, and that it had directed the parties to prepare and execute a written agreement that included the relevant terms.

The equitable powers of a trial court in a dissolution action do not include the power to rewrite an agreement made by the parties. See *Eckert* v. *Eckert*, 285 Conn. 687, 696, 941 A.2d 301 (2008). In this case, however, the court's written recitation set forth in its November 17, 2014 decision did not modify or improperly rewrite the terms of the February 19, 2014 oral agreement. The November 17, 2014 decision memorialized the February 19, 2014 oral agreement. At a hearing on November 18, 2014, the court gave counsel a copy of the November 17, 2014 decision and stated, "I prepared a memorandum of decision that put, in the context of a memorandum, the stipulation and the orders that were entered on February 19. . . . I thought that it would be helpful to the parties to have a written opinion of the court that tracked all of the orders that were put on the record on February [19, 2014]. So that's what this is." The court further explained that "the [November 17, 2014] decision embodies, basically restates, the oral stipulation and those terms that were put on the record, just not in the course of a colloquy among counsel, the parties, and the court. So there's nothing new in [the November 17, 2014] decision. The stipulation was entered on February [19, 2014]."

The plaintiff claims that the court modified several provisions of the February 19, 2014 agreement in its November 17, 2014 decision. The court simply memorialized the previously expressed terms of the February 19, 2014 agreement on the record. Cf. *Sisk* v. *Meagher*, 82 Conn. 376, 377, 73 A. 785 (1909) (preparation of judgment file constitutes clerical action). For example, the court did not act improperly by not including a term that the plaintiff was to receive the $10,000 per month tax free, as the plaintiff claims, because, as stated in part I of this opinion, the February 19, 2014 agreement did not include such a term. The court did not unfairly eliminate the plaintiff's statements regarding certain

terms being placed on the record as "concepts."[5] The court specifically stated that the plaintiff's attorney had "explained that they were putting the *concept* of the special needs trust—but not its actual terms—on the record." (Emphasis added).

We have examined the transcript of the February 19, 2014 proceedings and the court's November 17, 2014 decision and find the remainder of the plaintiff's claims regarding the court's summary of the agreement to be without merit.

III

The plaintiff next claims that the court's canvasses of the plaintiff regarding (a) the February 19, 2014 agreement and (b) the November 17, 2014 order did not satisfy the requirements of § 46b-66. We do not agree.

Section 46b-66 (a) provides in relevant part: "In any case under this chapter where the parties have submitted to the court an agreement concerning . . . alimony . . . the court shall inquire into the financial resources and actual needs of the spouses . . . in order to determine whether the agreement of the spouses is fair and equitable under all the circumstances. . . ." According to § 46b-66, "a court has an affirmative obligation, in divorce proceedings, to determine whether a settlement agreement is fair and equitable under all the circumstances. . . . The presiding judge has the obligation to conduct a searching inquiry to make sure that the settlement agreement is substantively fair and has been knowingly negotiated. . . . With such judicial supervision, private settlement of the financial affairs of estranged marital partners is a goal that courts should support rather than undermine." (Citations omitted;

[5] To the extent that the plaintiff argues the court erred in modifying the February 19, 2014 "agreement to agree" into a contract with clear and definite terms, that argument fails because the February 19, 2014 agreement was, in fact, an enforceable agreement. See part I of this opinion.

internal quotation marks omitted.) *Baker* v. *Baker*, 187 Conn. 315, 321–22, 445 A.2d 912 (1982).

A

The plaintiff claims that the court did not conduct an adequate inquiry pursuant to § 46b-66 before approving the agreement on February 19, 2014. She claims that the court (1) did not have the entire file before it and, therefore, was unable to review the underlying motions and the February 28, 2012 memorandum of decision, which included a finding that the plaintiff had been severely impacted by her diagnosis of multiple sclerosis, (2) failed to inquire into the plaintiff's health or the medications she was taking on the day of the canvass, (3) did not inquire into the actual needs of the parties or their respective financial resources, and (4) failed explicitly to find that the plaintiff knowingly negotiated the complicated oral agreement. We do not agree.

The court's inquiry was sufficient to satisfy the requirements of § 46b-66. Section 46b-66 requires an inquiry into the parties' financial circumstances and the actual needs of the parties. The court had before it the financial affidavits of both parties. The plaintiff's argument that the court was not aware of the plaintiff's medical condition is not supported by the record. The plaintiff's attorney stated at the February 19, 2014 hearing that a special needs trust was contemplated in order to ensure that the plaintiff would qualify for federal and state assistance programs for individuals with disabilities. The finding of the court, *Emons*, *J.*, in its February 28, 2012 memorandum of decision that the plaintiff had a diagnosis of multiple sclerosis was in the court file and there was no indication that this information was missing from the court file when the court determined that the agreement was fair and equitable.[6] See *Brash*

[6] Following the court's canvass of the parties, the court indicated that it would "grab the file and the financial affidavits." The courtroom clerk indicated that the file was with Judge Emons, but then stated "Oh, no, it's not. I take it back." The court stated that it only had "part of the file here."

v. *Brash*, 20 Conn. App. 609, 612, 569 A.2d 44 (1990) (judge presumed to have performed duties correctly in absence of evidence to contrary). More critically, the transcript is replete with references to her disability; indeed, her disability was the impetus for the complicated stipulated agreement. If the plaintiff's attorney wanted the court to know more details about the plaintiff's condition or medication, he could have placed that information on the record. See *Grayson* v. *Wofsey, Rosen, Kweskin & Kuriansky*, 231 Conn. 168, 175–76, 646 A.2d 195 (1994) ("lawyers who represent clients in matrimonial dissolutions have a special responsibility for full and fair disclosure, for a searching dialogue, about all of the facts that materially affect the client's rights and interests" [internal quotation marks omitted]).

The court's obligation pursuant to § 46b-66 is to ensure that the agreement is fair and equitable, after becoming familiar with the circumstances; there is no explicit requirement in that section that the court find that a party has knowingly entered into the agreement, though that will likely be the case. Here, the court's canvass of the plaintiff nonetheless revealed that she knowingly entered into the agreement. During her canvass, the plaintiff indicated that she had heard the defendant's attorney recite the terms of the agreement, that she understood what the defendant's attorney was describing, that she had an opportunity thoroughly to review the terms of the agreement completely with her attorney and that she believed the agreement was fair and equitable under the circumstances. The court did not err by declining to conduct a more exhaustive canvass.

There was no indication from the record that the court was not aware of the portions of the record relevant to this issue.

B

The plaintiff argues alternatively that, even if the court's November 17, 2014 decision did not improperly rewrite the February 19, 2014 agreement, the November 17, 2014 decision was nonetheless improper because the court failed to conduct a contemporaneous inquiry pursuant to § 46b-66. We are not persuaded.

On February 19, 2014, the parties presented the agreement to the court, the court conducted an inquiry pursuant to § 46b-66 and the court found the agreement to be fair and equitable. The court's November 17, 2014 decision did not alter the February 19, 2014 agreement, but rather summarized it. See part I of this opinion. The court was not required pursuant to § 46b-66 to conduct an additional inquiry before memorializing the oral agreement.

IV

The plaintiff finally claims that the court, *Tindill*, *J.*, erred in granting the defendant's postjudgment motion for contempt.[7] We agree.

"[O]ur analysis of a judgment of contempt consists of two levels of inquiry. First, we must resolve the threshold question of whether the underlying order constituted a court order that was sufficiently clear and unambiguous so as to support a judgment of contempt. . . . This is a legal inquiry subject to de novo review. . . . Second, if we conclude that the underlying court order was sufficiently clear and unambiguous, we must then determine whether the trial court abused its discretion in issuing, or refusing to issue, a judgment of contempt, which includes a review of the trial court's

[7] The plaintiff also claims that the court's award of attorney's fees to the defendant on his motion for contempt was unreasonable. Because we determine that the court erred in granting the defendant's motion for contempt, we need not address this claim.

determination of whether the violation was wilful or excused by a good faith dispute or misunderstanding. . . .

"A finding of contempt is a question of fact, and our standard of review is to determine whether the court abused its discretion in [finding] that the actions or inactions of the [party] were in contempt of a court order. . . . We review the court's factual findings in the context of a motion for contempt to determine whether they are clearly erroneous. . . . A factual finding is clearly erroneous when it is not supported by any evidence in the record or when there is evidence to support it, but the reviewing court is left with the definite and firm conviction that a mistake has been made. . . . The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . We cannot retry the facts or pass on the credibility of the witnesses." (Citation omitted; internal quotation marks omitted.) *Mekrut* v. *Suits*, 147 Conn. App. 794, 799, 84 A.3d 466 (2014).

The following additional facts are relevant. On December 22, 2014, the defendant filed a motion for contempt and sanctions. In this motion, he argued that paragraph nine of the February 19, 2014 agreement required the plaintiff to " 'secure or endeavor to secure' " a legal opinion that the tax deductibility of the defendant's alimony payments was not affected by an assignment of the alimony payments to the trust. He argued that the plaintiff wilfully violated that order by failing to produce any legal opinion regarding the tax deductibility and failing to draft the special needs trust, but instead "placed every obstacle she could in the way of reducing to writing the oral stipulation," including the filing of a motion to open that she later withdrew.

At the February 19, 2014 hearing, the defendant's attorney stated, when discussing paragraph nine, that

"in order to sign off on paragraph ten, which is coming up, [the plaintiff] in and—I don't even think it's abundance of caution, just . . . in prudent practice, is going to get an opinion letter from a special needs and a tax person, who will opine that yes, [the defendant's] deducibility is not impacted at all by the scheme that we contemplate." The court then asked the plaintiff's attorney the following: "And you expect you're going to get that letter?" The plaintiff's attorney responded by stating that "[w]e expect we're [going to] get that [letter]." In the November 17, 2014 decision memorializing the February 19, 2014 agreement, the court stated under paragraph nine that "[t]he plaintiff shall immediately secure, or endeavor to secure, a legal opinion to the effect that any action taken by the plaintiff to assign the alimony payments to the special needs trust does not affect the deductibility of such alimony payments by the defendant under the tax laws of the United States."

At the November 18, 2014 hearing, the issue of whether the plaintiff obtained the opinion letter was discussed and the plaintiff's attorney stated that "it was done in good faith and . . . the letter was obtained," and she explained that "[the plaintiff] did not get a letter that said it would be . . . deductible." The plaintiff's attorney had, in fact, attached a draft opinion letter to her June 18, 2014 motion to open.

A hearing was held on the defendant's motion for contempt on March 23, 2015. At the hearing, the plaintiff's attorney argued that the plaintiff did not wilfully violate the February 19, 2014 order because it was impossible to comply with paragraph nine of the agreement, stating that the inclusion of the defendant as a residual beneficiary was a complication which likely jeopardized his ability to deduct his payments. The plaintiff's attorney stated that on March 6, 2014, the plaintiff's former attorney stated in a letter to the defendant's attorney that the preliminary research of his tax

attorney suggested this difficulty with deductibility. The defendant's attorney stated that the opinion to which the plaintiff referred was a draft letter from an accountant for discussion purposes only. The court inquired whether there was a final opinion. The plaintiff's attorney stated that no further research was conducted, as the plaintiff's former attorney had filed a motion to withdraw in the interim. The defendant's attorney stated that he had a witness available who was prepared to say that the scheme was viable. In its written order granting the defendant's motion for contempt, the court found "by clear and convincing evidence that a court order was entered on February 19, 2014, that the plaintiff violated that court order, and that the plaintiff's violation of the order was wilful." The court awarded the defendant attorney's fees and fees for expert witnesses in the amount of $169,225.61.

The plaintiff argues on appeal that the February 19, 2014 and November 17, 2014 court orders were interlocutory in nature and were ambiguous as to whether the plaintiff would be in violation of the order if she was unable to obtain the requisite legal opinion. The plaintiff further argues that the failure to follow the order was not wilful.

The November 17, 2014 decision memorializing the February 19, 2014 order provided that the plaintiff was to "secure or endeavor to secure" an opinion letter. It is undisputed that the plaintiff made some effort to secure such a letter. Relying on the draft opinion letter, she contends that it was impossible to obtain a correct opinion that the defendant's tax deductibility was not jeopardized by his putative status as residual beneficiary. The defendant counters that not only was it possible to obtain such a letter, but that he had obtained such an opinion. In light of the undisputed fact that the plaintiff made at least some effort to secure the opinion

letter, we are left with a definite and firm conviction that the court's finding of contempt was clearly erroneous.

The judgment is reversed only as to the finding of contempt and the case is remanded with direction to deny the defendant's motion for contempt; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* PATRICK S. REDMOND (AC 39725)

Keller, Prescott and Harper, Js.

Syllabus

The plaintiff in error, C, who is the father of S, the defendant in the underlying criminal proceeding, brought a writ of error following the trial court's denial of C's motion for the return to him of certain property he claimed to own. The writ of error concerned various firearms and ammunition that were seized by police pursuant to a valid search warrant issued in the course of a narcotics investigation. S was arrested and later charged with various drug and weapons offenses. After engaging in negotiations, the state and S entered into a plea agreement, pursuant to which the state agreed to nolle six of the eight charges against S, and, in return, S agreed to, inter alia, forfeit the seized property to the state for destruction. Although C was not a party to the criminal action, C's awareness of both the plea negotiations and the contemplated forfeiture of the weapons was made clear to the court and the state through S's attorney. During the sentencing hearing, C did not object to the court's order for the forfeiture and destruction of the seized property. Subsequently, C filed a motion for stay of order of destruction and return of seized property with the criminal court. The trial court denied C's motion, and C appealed to this court, which dismissed his appeal on the ground that this court lacked subject matter jurisdiction to consider the claims in a direct appeal of the criminal conviction because C was not a party to the underlying criminal proceeding. Thereafter, C filed a petition for a writ of error in the Supreme Court, which transferred the matter to this court. C claimed, inter alia, that the trial court improperly ordered the forfeiture of the seized property pursuant to the statute (§ 54-36a [c]) that governs the disposition of seized property, which he claimed applied only to seized contraband and certain cash linked to illegal drug transactions, and not to firearms. C claimed that the trial court, instead, should have conducted in rem forfeiture proceedings pursuant to statute ([Rev.

to 2013] § 54-33g) in order to effectuate the forfeiture of his seized firearms. *Held*:

1. The trial court properly acted pursuant to § 54-36a (c) in ordering the forfeiture of the seized property; that statute was not limited to contraband and certain cash linked to illegal drug transactions as claimed by C, but rather empowers courts presiding over criminal actions to dispose of seized property, provided a nexus exists between the seized property and the crimes charged, and, thus, so long as a nexus exists between the seized property and the crimes charged, it is irrelevant whether the property was contraband, and, in the present case, the court's determination that the requisite nexus existed between the seized firearms and S's narcotics business was logical and supported by the record, which showed that S was selling narcotics from a residence owned and co-occupied by C, that the weapons were found throughout the residence, and that S either possessed or had easy access to all of the weapons for use in his illicit business dealings.
2. C could not prevail on his claim that the trial court improperly entered the forfeiture order without providing him with notice and an opportunity to be heard, in violation of the in rem forfeiture procedures set forth in § 54-33g: that court properly ordered the forfeiture under § 54-36a (c), which does not require the court or the state to provide formal notice to any individual that may have an interest in seized property that is to be forfeited, and C was not deprived of an opportunity to be heard on the disposition of the property, as the record indicated that he was aware of the proposed disposition of the property and chose not to file a timely motion pursuant to the applicable rule of practice (§ 41-13) for the return of the seized property during the pendency of the criminal action and, instead, chose to assert his claim to the seized property after the final disposition of the criminal action; accordingly, the writ of error was dismissed.

Argued January 17—officially released October 10, 2017

Procedural History

Writ of error from an order of the Superior Court in the judicial district of Litchfield, *Ginocchio*, *J.*, denying the motion for the return of certain property filed by the plaintiff in error, brought to the Supreme Court, which transferred the matter to this court. *Writ of error dismissed.*

Mitchell Lake, for the plaintiff in error.

James A. Killen, senior assistant state's attorney, with whom, on the brief, was *David S. Shepack*, state's attorney, for the defendant in error.

Opinion

HARPER, J. This case comes before the court on a writ of error brought by the plaintiff in error, Patrick C. Redmond, who is the father of Patrick S. Redmond, the defendant in the underlying criminal proceeding.[1] In his writ of error, Redmond alleges that the trial court improperly (1) ordered the forfeiture of certain seized property pursuant to General Statutes § 54-36a and (2) entered its forfeiture order without providing him notice and an opportunity to be heard in violation of the in rem forfeiture procedures set forth in General Statutes (Rev. to 2013) § 54-33g.[2] For the reasons that follow, we disagree and dismiss the writ of error.[3]

The following relevant facts and procedural history are apparent on the record.[4] This writ of error concerns

[1] The defendant, Patrick S. Redmond, did not participate in this writ of error. For purposes of clarity, we refer to Patrick S. Redmond as the defendant and to the plaintiff in error as Redmond.

[2] Hereinafter, all references to § 54-33g in this opinion are to the 2013 revision of the statute.

[3] Although Redmond also argues in this writ that the forfeiture order contravened the strictures of General Statutes § 54-36h, he did not raise that claim before the trial court. We, therefore, decline to review any such claims in this writ of error. See *State* v. *Pagan*, 158 Conn. App. 620, 632–33, 119 A.3d 1259 ("This court is not bound to consider claims of law not made at the trial. . . . Once counsel states the authority and ground of [her argument], any appeal will be limited to the ground asserted." [Internal quotation marks omitted.]), cert. denied, 319 Conn. 909, 123 A.3d 438 (2015).

[4] The trial court did not make any factual findings, with the exception of the finding of a nexus between the seized property and the criminal activity, in this matter because the underlying criminal trial was resolved pursuant to a plea agreement, and no evidentiary hearing was held on Redmond's motion for the return of the seized property. The facts recounted regarding the underlying criminal activity are primarily inferred from the prosecutor's summary at the sentencing hearing, to which neither the defendant nor Redmond, or their attorneys, objected. The remaining inferred facts are gleaned from statements made during the hearings on Redmond's motion for return of the property, where those statements indicate substantial agreement between the court, the state's attorney, and Redmond's attorney as to factual matters. Any instance of disagreement regarding factual matters that is apparent on the record is noted herein. See *Young* v. *Commissioner of Correction*,104 Conn. App. 188, 190 n.1, 932 A.2d 467 (2007) ("Although

sixteen firearms,[5] at least one magazine, and an unknown quantity of ammunition that were seized by the police on February 13, 2013, pursuant to a valid search warrant issued in the course of a narcotics investigation.[6] That investigation revealed that the defendant was selling drugs from a residence owned by Redmond, and occupied by both Redmond and the defendant. The residence was not subdivided, and Redmond and the defendant had equal access to all areas of the residence.

During their search of the residence, the police found nine of the sixteen firearms "scattered about the living quarters, hidden in the seat cushions, in a dresser, leaned up against the walls," hidden under a couch in the living room, as well as in the defendant's bedroom. The remaining seven weapons were found in a safe on the second floor of the residence, which the defendant opened using a key in order to surrender the weapons to the police. Alongside these weapons, the police also seized various narcotics and narcotics paraphernalia. Redmond was not present for the search of the residence.

Later that day, the defendant was arrested. After receiving *Miranda*[7] warnings, the defendant provided the police with a sworn statement in which he admitted his ownership of many of the seized weapons, and

the court made no findings of fact on the record . . . it is clear from the transcript of the hearing and from the ruling of the court [what the relevant factual issues are] . . . . From the transcript of the hearing, we are able to infer the facts on which the court's decision appears to have been predicated."), cert. denied, 285 Conn. 907, 942 A.2d 416 (2008); *State* v. *MacNeil*, 28 Conn. App. 508, 515, 613 A.2d 296, cert. denied, 224 Conn. 901, 615 A.2d 1044 (1992) (Appellate Court may resort to evidence in the record that supports trial court's rulings when trial court does not make detailed factual findings on the record in support of its decision).

[5] Five of the weapons were handguns and the remainder were various types of long guns, including rifles and shotguns.

[6] The police also seized other property that is not at issue here.

[7] See *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

asserted that Redmond consented to his possession and use of the remaining weapons. The defendant also told the police that Redmond knew that he was selling narcotics from the residence and had previously asked him to cease doing so. Nothing in the record suggests that Redmond took steps to limit the defendant's access to the weapons.

The defendant thereafter was charged with eight counts of drug and weapon offenses,[8] for which he faced a significant term of imprisonment if convicted. Over the next four months, the defendant engaged in plea negotiations with the state in which the court, *Ginocchio*, *J.*, actively participated. During those negotiations, the defendant was represented by Attorney Anthony F. DiPentima. At that time, DiPentima also provided counsel to Redmond, though Redmond was not a party to the criminal action.[9] Redmond's awareness of both the plea negotiations and the contemplated forfeiture of the weapons was made clear to the court and the state through DiPentima, and it appears that Redmond was present for at least some of those negotiations. From the outset, the plea negotiations involved

[8] The defendant was charged with three counts of illegal transfer of a pistol or revolver in violation of General Statutes (Rev. to 2013) § 29-33; one count of attempted sale of a controlled substance in violation of General Statutes §§ 53a-49 and 21a-277 (b); one count of use of drug paraphernalia in violation of General Statutes § 21a-267 (a); one count of possession with intent to sell in violation of § 21a-277 (b); one count of possession of narcotics in violation of General Statutes (Rev. to 2013) § 21a-279 (a); and, one count of possession of a hallucinogen in violation of § 21a-279 (b).

[9] Although the record supplied by the defendant does not contain an express statement from DiPentima concerning this dual representation, it contains enough information to infer that the court and the state viewed his role as representing both the defendant and Redmond due to the conduct or statements of DiPentima. We further note that representation by an attorney is not limited to appearances in court. Although it is true that the defendant's plea deal ultimately cost Redmond his weapons, his son was permitted to plead to fewer charges and received a significantly more lenient sentence than was likely had the case gone to trial. This plea agreement may not have served Redmond's interest in the weapons, but it did serve his interest in the welfare of his son.

leveraging the disposition of the seized property to obtain a more favorable disposition of the charges against the defendant.

On March 18, 2013, Redmond executed an affidavit, witnessed by DiPentima in his capacity as a commissioner of the Superior Court, claiming ownership of the seized weapons, ammunition, and magazine. This affidavit, however, was never submitted to the court or the state. The prosecutor also indicated that the agreement to surrender all of the disputed property in return for favorable treatment was suggested by DiPentima.

On May 31, 2013, the state agreed to nolle six of the eight charges against the defendant. In return, the defendant agreed to (1) forfeit the seized property to the state for destruction; (2) plead guilty to one count of possession with intent to sell in violation of General Statutes § 21a-277 (b); and (3) enter an *Alford* plea[10] to one count of illegal transfer of a pistol or revolver in violation of General Statutes (Rev. to 2013) § 29-33.[11] At that time, the terms of the plea agreement were put on the record, including the forfeiture and destruction of the disputed property.[12] The agreement contemplated a total effective sentence of eight years, execution suspended after three years, with three years of probation, and the defendant retained the right to argue for a lesser sentence at the sentencing hearing on December 10, 2013.

[10] See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

[11] Hereinafter, all references to § 29-33 in this opinion are to the 2013 revision of the statute.

[12] Redmond has not provided this court with the transcript of the defendant's May 31, 2013 plea hearing. It therefore is not possible to determine precisely what transpired beyond the summary provided on the record by the state's attorney at the December 10, 2013 sentencing hearing. In the absence of an objection by the defendant or a correction by the court, we presume that the state's summary at sentencing was accurate.

At that hearing, DiPentima argued for a suspended sentence for the defendant, as the defendant had already been incarcerated for approximately four months. He also offered the following argument regarding Redmond's interest in the seized firearms: "We've talked about the weapons. There's been a lot of angst and concern, especially from [Redmond], a devout hunter, a man who has owned firearms responsibly for a number of years, [about] the ownership of those firearms, despite the fact as to where in the house the firearms were located, even though it was not a separate apartment, per se, where [the defendant] resided with his fiancé." At the conclusion of that hearing, the court imposed a total effective sentence of eight years of imprisonment, execution suspended, with three years of probation. The court also ordered the forfeiture and destruction of the weapons, magazine, and ammunition. At the sentencing hearing, Redmond did not object to the forfeiture and destruction of the disputed property.

The leniency of the defendant's sentence is apparent when compared with the maximum sentence allowed by the General Statutes that the defendant would have potentially faced had he proceeded to trial under these charges. The total effective sentence, for the charges the defendant entered pleas on, was twelve years of imprisonment.[13] Additionally, had the defendant proceeded to trial on the charges the state agreed to nolle pursuant to this agreement, he would have potentially faced an additional twenty-nine years and three months of imprisonment.[14] Redmond subsequently hired new

[13] This maximum sentence consists of consecutive sentences of seven years of imprisonment on the drug charge and five years of imprisonment on the weapons charge.

[14] This additional time consists of consecutive maximum sentences allowed by the General Statutes of: Five years of imprisonment on each of the two counts of illegal transfer of a pistol or revolver in violation of § 29-33; seven years of imprisonment on one count of attempted sale of a controlled substance in violation of General Statutes § 53a-49 and § 21a-277 (b); five years of imprisonment on one count of possession of a hallucinogen in violation of General Statutes (Rev. to 2013) § 21a-279 (b); three months

counsel who filed on his behalf a "Motion for Stay of Order of Destruction and Return of Seized Property" with the criminal court, in which he claimed to be the owner of the firearms and argued that § 54-33g gave him a right to notice of any forfeiture proceeding. See *State* v. *Redmond*, 161 Conn. App. 622, 624–25, 128 A.3d 956 (2015), cert. denied, 320 Conn. 918, 132 A.3d 1093 (2016). Redmond made this motion in the concluded criminal matter rather than initiating a separate action. The court held hearings on the motion on March 14, 2014, and April 15, 2014, at which Redmond and the state offered argument, but no evidence or testimony was taken.

The court thereafter denied Redmond's motion. Although the court did not issue a written decision, the grounds on which the court denied the motion were stated during the April 15, 2014 hearing. Specifically, the court indicated that (1) no notice was required because the property was ordered forfeited under § 54-36a (c), as interpreted by *State* v. *Garcia*, 108 Conn. App. 533, 554–55, 949 A.2d 499, cert. denied, 289 Conn. 916, 957 A.2d 880 (2008), and not under § 54-33g, as argued by Redmond, and (2) the nexus between the property and the crimes rendered an in rem forfeiture proceeding unnecessary because, under *Garcia*, that nexus allows the court to order forfeiture pursuant to § 54-36a (c).[15]

of imprisonment on one count of use of drug paraphernalia in violation of General Statutes § 21a-267 (a); and, seven years of imprisonment on one count of possession of narcotics in violation of § 21a-279 (a).

[15] The state also argues that the court articulated a third ground for denying the motion, namely, that Redmond had waived his right to challenge the forfeiture because he had not made a timely motion for the return of the property prior to the court rendering final judgment in the criminal action. Although the record reveals that the trial court discussed this issue with the parties, it is not clear that the trial court considered this a ground for denying the motion. Indeed, the court expressed doubt about whether waiver was a relevant consideration given its clear authority under § 54-36a (c) and *Garcia*, stating that "I'm not even sure if waiver is required based on the *Garcia* case." Neither party sought an articulation from the trial court, and

From that judgment, Redmond appealed to this court, claiming that the court improperly (1) concluded that the seized property met the statutory definition of contraband in § 54-36a and (2) disposed of the property without giving him proper notice and an opportunity to be heard. *State* v. *Redmond*, supra, 161 Conn. App. 624. We dismissed his appeal on the ground that this court lacked jurisdiction to consider these claims in a direct appeal of the criminal conviction because Redmond was not a party to the underlying proceeding. Id. In so doing, we observed that the appropriate vehicle for such claims is a writ of error. Id., 626–27. Redmond then filed this writ of error with the Supreme Court, which transferred the case to our docket pursuant to Practice Book § 65-1.[16]

In his writ of error, Redmond raises two claims. First, he argues that the court improperly ordered the forfeiture of the seized property under § 54-36a (c) because an in rem forfeiture proceeding under § 54-33g was required to effectuate the forfeiture. Second, Redmond

we cannot conclude on the record before us that the trial court considered waiver as a ground for the denial.

[16] We note that we are considering Redmond's writ of error although it was not filed within twenty days of the judgment, as required by Practice Book § 72-3 (a), because of the unusual circumstances of this matter and because our Supreme Court elected to transfer this matter to this court under Practice Book § 65-1, rather than dismissing it pursuant to its authority under Practice Book § 72-3 (a), which provides in relevant part that the Supreme Court may dismiss a writ of error that is untimely brought without cause. The state did not move either the Supreme Court or this court to dismiss this writ as untimely. Additionally, when Redmond brought his direct appeal, we dismissed it because he was a nonparty to the criminal matter, and we stated that he should have raised his claims through a writ of error. Following this suggestion, Redmond initiated the writ of error six days later on December 14, 2015, which is within the twenty day period provided by Practice Book § 72-3 (a). Given these circumstances, it is appropriate that we use our discretion to hear an untimely writ of error. See *State* v. *Reid*, 277 Conn. 764, 777–78, 894 A.2d 963 (2006) (failure to take timely appeal or bring timely writ of error renders the matter voidable, but not void, and court has discretion to hear matter).

argues that the order of forfeiture was improper because the court failed to provide him proper notice and an opportunity to be heard as required by § 54-33g, which requires the court to give notice to any person with an interest in property that is proposed to be forfeited on the ground that it is a nuisance as the instrumentality of a crime, and to hold a hearing on the forfeiture within six to twelve days of such notice.[17] In his claim for relief, he asks this court to reverse and set aside the April 15, 2014 decision on his motion for return of his property.

[17] General Statutes (Rev. to 2013) § 54-33g provides in relevant part: "(a) When any property believed to be possessed, controlled, designed or intended for use or which is or has been used or which may be used as a means of committing any criminal offense . . . has been seized as a result of a lawful arrest or lawful search, which the state claims to be a nuisance and desires to have destroyed or disposed of . . . the . . . court issuing the warrant or before whom the arrested person is to be arraigned shall, within ten days after such seizure, cause to be left with the owner of, and with any person claiming of record a bona fide mortgage, assignment of lease or rent, lien or security interest in, the property so seized, or at his [or her] usual place of abode, if he [or she] is known, or, if unknown, at the place where the property was seized, a summons notifying the owner and any such other person claiming such interest and all others whom it may concern to appear before such . . . court, at a place and time named in such notice, which shall be not less than six nor more than twelve days after the service thereof. Such summons may be signed by a clerk of the court or his [or her] assistant and service may be made by a local or state police officer. It shall describe such property with reasonable certainty and state when and where and why the [property] was seized.

"(b) If the owner of such property or any person claiming any interest in the [property] appears, he [or she] shall be made a party defendant in such case. Any state's attorney or assistant state's attorney may appear and prosecute such complaint and shall have the burden of proving all material facts by clear and convincing evidence.

"(c) If the . . . court finds the allegations made in such complaint to be true . . . [the court] shall render judgment that such property is a nuisance and order the [property] to be destroyed or disposed of . . . .

"(d) If the . . . court finds the allegations not to be true . . . or that [the property] is the property of a person [who is] not a defendant, [the court] shall order the property returned to the owner forthwith and the party in possession of such property pending such determination shall be responsible and personally liable for such property from the time of seizure and shall immediately comply with such order. . . ."

Practice Book § 72-1 (a) (1) provides that a nonparty may bring a writ of error in matters of law from the final judgment of the Superior Court where that judgment is binding on that nonparty and the nonparty is aggrieved by that judgment. Accordingly, our scope of review is circumscribed in such matters and is limited to questions of law only. See E. Prescott, Connecticut Appellate Practice & Procedure (5th Ed. 2016) § 9-1:6, p. 524. "A writ of error . . . necessarily presents a question of law. When the trial court draws conclusions of law, our review is plenary and [an appellate court] must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Sowell* v. *DiCara*, 161 Conn. App. 102, 120, 127 A.3d 356, cert. denied, 320 Conn. 909, 128 A.3d 953 (2015). This standard of review governs both of Redmond's claims.

I

Redmond's first claim, that the court improperly ordered the forfeiture of the seized property under § 54-36a (c), hinges on his claim that this section provides the court with the authority to order the forfeiture of contraband only, including cash linked to illicit narcotics transactions, and that firearms are not contraband under the statute. He contends that § 54-36a (a) (1) defines "contraband" as "any property, the possession of which is prohibited by any provision of the general statutes," and that possession of the disputed property is not prohibited by the General Statutes. He argues that because § 54-36a (c) applies only to contraband and certain cash linked to illegal drug transactions, the court should have conducted in rem forfeiture proceedings under § 54-33g in order to effectuate the forfeiture. Proceeding under § 54-33g would have required notice of the proposed forfeiture and a hearing prior to the court's forfeiture order. Had Redmond received notice

and a hearing, he asserts that the property would not have been ordered forfeited and destroyed. In light of established precedent, we disagree that § 54-36a (c) is limited to contraband and certain cash, and conclude that the court properly acted under this section.

Section 54-36a (c) addresses the final disposition, at the conclusion of a criminal prosecution, of property that was seized by the police in connection with a criminal arrest. It provides in relevant part that "unless the court finds that such property *shall be forfeited or is contraband* . . . it shall, at the final disposition of the criminal action or as soon thereafter as is practical . . . order the return of such property to its owner within six months upon proper claim therefor." (Emphasis added.) General Statutes § 54-36a (c). The pivotal phrase in this section is that the court is not required to return the property to its owner if the court finds that the property "shall be *forfeited or is contraband* . . . ." (Emphasis added.) In *State* v. *Garcia*, supra, 108 Conn. App. 554–55, this court considered that statutory language when faced with arguments substantially the same as Redmond's arguments, and concluded that "§ 54-36a (c) empowers courts presiding over criminal actions to dispose of [seized property] . . . provided that a nexus exists between the [seized property] and the crimes charged."[18] So long as a nexus exists between

[18] We note that the *Garcia* decision somewhat imprecisely uses the word "contraband" in explaining the court's authority under § 54-36a (c), which potentially has led to a misunderstanding of the scope of the court's authority to order forfeiture under this section. It is clear, however, from the court's analysis that the portion of the statute that it was construing included the entire phrase "shall be forfeited *or* is contraband . . . ." (Emphasis added.) *State* v. *Garcia*, supra, 108 Conn. App. 551. Decisions subsequent to *Garcia* show that the *Garcia* holding is understood to not be limited to contraband, but rather applicable to any seized property, other than stolen property, with a nexus to the crimes charged. See, e.g., *State* v. *Perez*, 173 Conn. App. 40, 51, 162 A.3d 76 (2017) (replacing phrase "seized contraband" in quotation of court's holding in *Garcia* with "seized [property]").

the seized property and the crimes charged, it is irrelevant whether the property is contraband.

In the present case, the trial court's determination that a nexus existed between the seized weapons, ammunition, and magazine, and the crimes charged is logical and finds support in the facts that appear in the record. Additionally, Redmond has not challenged the propriety of the trial court's nexus determination. The record reflects that the defendant was selling narcotics from the residence owned by and co-occupied by Redmond, and that the weapons were found throughout this residence, some appearing to be loaded and staged for quick use, and some in proximity to narcotics. The defendant had free access to all areas of the residence, including to the weapons stored in a safe on the second floor of the residence. "Connecticut courts repeatedly have noted that [t]here is a well established correlation between drug dealing and firearms. . . . Federal courts also have recognized this fact of life." (Citations omitted; internal quotation marks omitted.) *State* v. *Clark*, 255 Conn. 268, 284, 764 A.2d 1251 (2001).[19] The defendant either possessed or had easy access to all of the weapons for use in his illicit business dealings. We, therefore, conclude that the court's determination that the requisite nexus existed between the seized firearms and the defendant's narcotics business was logical and supported by the record.[20]

[19] This connection is considered strong enough that our Supreme Court has held that, in narcotics investigations, this link satisfies the reasonable suspicion requirement for an investigatory search specifically for weapons under *Terry* v. *Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). See *State* v. *Clark*, supra, 255 Conn. 284.

[20] In addition, we note that Redmond's quest for in rem proceedings runs contrary to a clear distinction between seized property and unseized property in our statutes governing the forfeiture of property. "[S]eized [property] does not require in rem forfeiture proceedings, as unseized property does." (Internal quotation marks omitted.) *State* v. *Perez*, 173 Conn. App. 40, 51, 162 A.3d 76 (2017). "The distinction in Connecticut statutes delineating the disposition of property seized as evidence, pursuant to § 54-36a, from property subject to [in rem] forfeiture proceedings . . . leads us to conclude

II

Redmond next argues that the court's forfeiture order was improper because it was entered without giving him proper notice and an opportunity to be heard, as required by § 54-33g.[21] Redmond's arguments concerning the requirements of § 54-33g are inapposite because, as previously noted, the court in the present case properly ordered the forfeiture under § 54-36a (c). Section 54-36a (c) does not require the court or the state to

that seized [property] does not require in rem forfeiture proceedings, as unseized property does. [A] careful reading of all of the relevant provisions of [the in rem forfeiture statutes], as well as a search of [the] legislative history, reveal[s] that [the statutes were] only intended to protect from forfeiture that property that has not yet been seized by the state . . . . This exemption was not intended, however, to extend to property that has been seized simultaneously with drugs, incident to a drug sales arrest." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Garcia*, supra, 108 Conn. App. 553.

[21] In his appellate brief, Redmond also alludes to certain due process concerns. He has not, however, briefed a separate due process claim under either the federal or state constitutions. Rather, his argument references due process concerns as support for his position that, because in rem forfeiture proceedings are disfavored in Connecticut, the notice and hearing requirements of the statutes should be strictly construed. He does not argue that the trial court's proceeding under § 54-36a (c), with no notice or hearing required or given, is itself a due process violation. The scent of such a claim nonetheless hovers in this case. "[T]he United States Supreme Court [has] recognized the harshness of many forfeiture statutes but noted only two instances in which such statutes might violate substantive due process. . . . [I]t would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent [for it to be used in the crime]. . . . Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property." (Internal quotation marks omitted.) *State* v. *Connelly*, 194 Conn. 589, 593 n.4, 483 A.2d 1085 (1984), quoting *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 680–90, 94 S. Ct. 2080, 40 L. Ed. 2d 452 (1974). The record in the present case demonstrates that neither situation would apply to Redmond, who allowed the defendant to have free access to the weapons, was aware that the defendant was selling narcotics from Redmond's home in which the weapons were stored, and failed to take reasonably action to prevent his weapons from being used in furtherance of the defendant's narcotics trade.

provide formal notice to any individual that may have an interest in seized property that is to be forfeited. It requires only that, at the final disposition of a criminal action, the court "[find] that such property shall be forfeited or is contraband, or [find] that such property is a controlled drug, a controlled substance or drug paraphernalia," before it can order a forfeiture of the seized property. General Statutes § 54-36a (c).

Moreover, contrary to Redmond's claims, he was not deprived of an opportunity to be heard on the disposition of the property. Rather, the record indicates that Redmond was aware of the proposed disposition of the property and chose not to assert his claim to the property until after the final disposition of the criminal action. Practice Book § 41-13[22] provides a procedure for any person, whether a party or not, who is aggrieved by the seizure of property in the course of a criminal investigation to make a motion in the criminal action for the return of the seized property. Practice Book § 41-15[23] restricts such motions to being made during the pendency of the criminal action. Redmond's choice not to make a timely motion pursuant to Practice Book § 41-13, whatever his reasons may have been, does not render the forfeiture improper.

[22] Practice Book § 41-13 provides in relevant part that "[a] person aggrieved by a . . . seizure may make a motion to the judicial authority who has jurisdiction of the case, or if such jurisdiction has not yet been invoked, then to the judicial authority who issued the warrant or to the court in which the case is pending, for the return of specific items of property and to suppress their use as evidence on the grounds that: (1) [t]he property was illegally seized without a warrant under circumstances requiring a warrant; (2) [t]he warrant is insufficient on its face; (3) [t]he property seized is not that described in the warrant; (4) [t]here was not probable cause for believing the existence of the grounds on which the warrant was issued; or (5) [t]he warrant was illegally executed."

[23] Practice Book § 41-15 provides in relevant part that such motion must be made before trial, unless "the defendant or other moving party was not aware of the grounds of the motion, in which case such motion may be made at any time during the trial or the pendency of any proceeding. The judicial authority in its discretion may entertain such a motion at any time."

For the foregoing reasons, we conclude that Redmond failed to demonstrate that the trial court improperly denied his motion for the return of the seized property.

The writ of error is dismissed.

In this opinion the other judges concurred.

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION *v.* ROGER ESSAGHOF ET AL.
(AC 38736)

Lavine, Mullins and Mihalakos, Js.

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain of the defendants' real property after they had defaulted on a loan that had been modified by agreement. The original adjustable interest rate loan was signed by the defendants in favor of W Co. and provided that the interest rate would be recalculated monthly on the basis of the interest rates listed in a certain monthly yield index. After making one payment, the defendants' monthly payments were insufficient to cover the interest accruing, which increased the principal balance of the loan and resulted in negative amortization. One of the defendants, R, a highly experienced real estate investor, met with W Co. about potentially modifying the terms of the original loan. W Co. represented that, because interest rates were rising, it would be in the defendants' best interest to modify the loan so as to set a fixed interest rate. The defendants executed the modification agreement to set a fixed interest rate, but thereafter defaulted on the loan by failing to make the monthly payments. After the plaintiff acquired W Co. and all of its assets, including the defendants' loan, it commenced this foreclosure action, seeking a judgment of strict foreclosure. The defendants filed special defenses of, inter alia, fraud in the inducement and unclean hands, alleging that W Co. had induced them into executing the modification agreement by making false representations, concealed that its true motivation for encouraging the defendants to sign the modification agreement was to benefit itself financially by reducing its number of negative amortization loans, and insisted that they sign the modification agreement without an attorney present. The trial court rendered judgment of strict foreclosure, from which the defendants appealed to this court. While the appeal was pending, the trial court granted the plaintiff's motion for equitable relief and ordered the defendants to reimburse the plaintiff for the property taxes and

homeowner's insurance premiums that the plaintiff paid during the pending appeal, and the defendants filed an amended appeal. *Held*:

1. The trial court's finding that the defendants were not fraudulently induced into executing the modification agreement was not clearly erroneous: the record provided ample support for the court's finding that W Co.'s representations were not false, as that court correctly found that, on the basis of the monthly yield index, rates had risen during the four month period in which W Co. had told R that they were increasing, and, therefore, notwithstanding the fact that interest rates were in an overall period of decline, W Co.'s representations about rising interest rates were not false; moreover, the record supported the court's finding that the defendants had failed to prove that W Co. was motivated by a policy to convert negative amortization loans, and this court would not disturb the trial court's finding that the defendants' were not pressured into signing the modification agreement, as it was based on that court's determination that R's testimony was not credible given his experience as a real estate investor.
2. The trial court did not abuse its discretion in declining to apply the doctrine of unclean hands to the present case; the defendants' special defense of unclean hands was predicated on the same alleged misconduct on which the defendants relied to establish their fraudulent inducement special defense, which this court already rejected and found did not amount to misconduct, and the trial court properly found that the defendants had failed to establish a factual predicate for a defense of unclean hands.
3. The trial court did not abuse its discretion in determining that a balancing of the equities justified ordering the defendants to pay the real estate taxes during the pending appeal; the defendants would have been required to pay the taxes regardless of the outcome of the appeal, and that court was understandably concerned that the defendants would experience a windfall if they were allowed to live on the property for free until the conclusion of the foreclosure proceedings.

Argued April 26—officially released October 10, 2017

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendant JPMorgan Chase Bank, National Association, was defaulted for failure to appear; thereafter, the matter was tried to the court, *Hon. Kevin Tierney*, judge trial referee; judgment of strict foreclosure, from which the named defendant et al. appealed to this court; subsequently,

the court, *Hon. Kevin Tierney*, judge trial referee, granted the plaintiff's motion for reimbursement of property taxes and insurance payments, and the named defendant et al. filed an amended appeal. *Affirmed.*

Ridgely Whitmore Brown, with whom, on the brief, was *Benjamin Gershberg*, for the appellants (named defendant et al.).

Brian D. Rich, with whom, on the brief, was *Peter R. Meggers*, for the appellee (plaintiff).

Opinion

MULLINS, J. In this foreclosure action, the defendants Roger Essaghof and Katherine Marr-Essaghof[1] appeal from the judgment of strict foreclosure, rendered after a trial to the court, in favor of the plaintiff, JPMorgan Chase Bank, National Association, and from the court's entry of a posttrial financial order. The defendants claim that the court (1) erred in rejecting their special defenses of fraudulent inducement and unclean hands, and (2) abused its discretion in ordering them to reimburse the plaintiff for property taxes paid by the plaintiff during the pendency of this appeal. We affirm the judgment of the trial court.

The following facts, as found by the court in its November 27, 2015 memorandum of decision,[2] and procedural history are relevant to this appeal. On May

[1] The plaintiff, JPMorgan Chase Bank, National Association, acquired Washington Mutual Bank, F.A., the originator of the note and mortgage from which this foreclosure action arises. Washington Mutual Bank, F.A., also held a junior lien with respect to the mortgage that was foreclosed in this action and, therefore, JPMorgan Chase Bank, N.A., also is named as a defendant in this action but is not a party to this appeal. Accordingly, we refer to Roger Essaghof and Katherine Marr-Essaghof as the defendants throughout this opinion.

[2] The court originally set forth its factual findings and legal conclusions in a memorandum of decision dated October 15, 2015. After granting the defendants' motion for reargument and reconsideration, the court issued a corrected memorandum of decision on November 27, 2015.

11, 2006, the defendants executed an adjustable rate promissory note (original note) in favor of Washington Mutual Bank, F.A. (Washington Mutual) in exchange for a loan in the amount of $1,920,000. The original note was secured by a mortgage on the defendants' property located at 19 Bernhard Drive in Weston.

The original note required monthly payments of $7736.90 and provided that, from the date the note was executed until June 1, 2006, any unpaid principal would be subject to a yearly interest rate of 8.856 percent. During the month of June, 2006, the yearly interest rate would be 2.65 percent. On July 1, 2006, and on the first day of every month thereafter (change date), the interest rate would be recalculated to conform to the current interest rates set forth in an index published by Federal Reserve Board entitled "Selected Interest Rates (H.15)" (monthly yield index). On each of these change dates, the new interest rate would be calculated by adding 4.713 percentage points to the applicable rate set forth in the monthly yield index. The original note also provided that on July 1, 2007, and on that date every year thereafter (payment change date), the defendants' monthly payment would be recalculated to reflect the amount necessary to pay the balance of the loan in full by the maturity date—June 1, 2036—at the interest rate that was in effect forty five days prior to the payment change date. The monthly payments, however, could not increase or decrease on any payment change date by more than 7.5 percent.

Given the interest rates, the defendants' first monthly payment of $7736.90 on June 1, 2006, reduced the principal balance by a few thousand dollars. Every month thereafter, however, their payments of $7736.90 were insufficient to cover the interest, causing the principal balance to increase at a compounding rate.[3] To account

[3] The original note provided that if the defendants' monthly payment was insufficient to cover the interest that accrued during that month, then the unpaid interest would be added to the principal balance and interest would

for this negative amortization, the original note provided that the defendants' "unpaid principal can never exceed a maximum amount equal to 110 [percent] of the principal amount [of $1,920,000] original[ly] borrowed." Once the defendants' principal balance reached the cap, which was $2,112,000, their monthly payments would increase to the amount necessary to pay the balance in full by the June 1, 2036 maturity date even if that required their payments to increase by more than 7.5 percent.

In early 2008, Roger Essaghof, a highly experienced real estate investor who had negotiated numerous residential and commercial mortgages, began meeting with Washington Mutual on a regular basis about potentially modifying the terms of the original note. During those meetings, Washington Mutual represented that modifying the note to a fixed interest rate was in his best interest because interest rates were rising. The defendants executed a modification on June 24, 2008 (modification agreement), which provided that, as of May, 2008, the principal balance on the original note was $2,043,190.89. It also changed the loan from an adjustable interest rate to a fixed annual rate of 6.625 percent. The modification also required monthly payments of $11,280.12, which were sufficient to cover the accrued interest but not any principal.

Had the defendants' loan remained subject to the adjustable interest rates as required by the terms of the original note, their principal balance would have reached the $2,112,000 cap no later than August 1, 2009. Once that occurred, their monthly payments would have almost doubled from $7736.90 to $14,061.60—the amount needed to pay the loan in full by the June 1, 2036 maturity date. Because of the modification agreement,

accrue thereon. If their monthly payment exceeded the interest, the excess would be applied towards the principal balance.

however, the defendants' payments remained at $11,280.12.

Shortly after executing the modification agreement on June 24, 2008, the defendants defaulted on the loan by failing to make payments. The plaintiff acquired Washington Mutual and all of its assets, including the defendants' loan, in September, 2008, and commenced this foreclosure action against the defendants in March, 2009.

The defendants filed revised special defenses on July 22, 2011, raising the defenses of, inter alia, fraud in the inducement and unclean hands. Essentially, the defendants alleged that Washington Mutual had induced them into executing the modification agreement, which increased their monthly payments and caused their default, by making false representations that the modification was in their best interest because interest rates were rising. Furthermore, the defendants asserted that Washington Mutual never provided them with a copy of the modification agreement, insisted that they sign the modification agrement at their home without an attorney present, and concealed its true motivation for recommending that they modify their loan, which was to benefit itself financially by reducing the number of negative amortization loans on its books. The defendants argued that these facts amounted to fraudulent inducement and unclean hands, which precluded enforcement of the note and mortgage.

Following a bench trial, the court issued a memorandum of decision on November 17, 2015, finding in favor of the plaintiff on the issue of liability. After concluding that the plaintiff was the holder of the note and mortgage, and that the defendants had defaulted by failing to make payments, the court found that the defendants failed to meet their burden of proof as to either fraud in the inducement or unclean hands. As further explained

subsequently in this opinion, the court found that any representations by Washington Mutual that interest rates were increasing were not false because rates did in fact increase during the months leading up to the June 24, 2008 modification. The court also found that the defendants failed to demonstrate that Washington Mutual secretly was motivated by a desire to eliminate its negative amortization mortgages, and that the fact that the defendants executed the modification agreement at their home without an attorney present did not evince fraud or unclean hands. Accordingly, the court rendered a judgment of strict foreclosure for the plaintiff, found that the amount of the debt was $3,210,145.12, and set the law days for February 23, 2016. The defendants appealed to this court on December 16, 2015.

While the appeal was pending, the plaintiff filed a motion for, inter alia, equitable relief, in which it urged the trial court to invoke its equitable powers to order the defendants to pay for the property taxes and homeowner's insurance premiums that the plaintiff had been forced to incur during the pendency of the appeal.[4] After hearing argument and ordering supplemental briefing, the court issued a memorandum of decision dated February 23, 2016, granting the plaintiff's motion for equitable relief and ordering the defendants to pay for the property taxes and insurance premiums paid by the plaintiff during the pendency of the appeal or any time thereafter until the conclusion of litigation.

The defendants amended their appeal to include a challenge to the court's February 23, 2016 order. Additional facts and procedural history will be set forth where necessary.

[4] In the same motion in which it sought equitable relief, the plaintiff also moved for a termination of the appellate stay pursuant to Practice Book § 61-11 (d). The court treated the motion to terminate the appellate stay as a separate motion, and denied it on February 23, 2016.

I

The defendants first claim that the court erred in rejecting their special defenses of fraud in the inducement and unclean hands. We disagree.

The following additional facts and procedural history are relevant to this claim. As previously set forth, the defendants relied upon the same alleged conduct on the part of Washington Mutual to establish both fraudulent inducement and unclean hands. In particular, the defendants asserted that Washington Mutual (1) lied to them that interest rates were increasing, and, therefore, that the modification would be in their best interest, when in fact interest rates were decreasing; (2) failed to disclose that the real reason it wanted them to modify their loan was to reduce its financial exposure to negative amortization mortgages; and (3) pressured them to sign the modification agreement at their home without an attorney present.

In its November 27, 2015 memorandum of decision, the court found that the defendants failed to prove any of these underlying factual allegations and rejected both special defenses. First, the court found that Washington Mutual's representations about rising interest rates were not false. At trial, Roger Essaghof testified that a representative from Washington Mutual began contacting him around April or May, 2008, and regularly represented that the rising interest rates would cause his monthly payments to increase dramatically if he did not modify the loan to a fixed interest rate. Randall Huinker, an expert in banking practices and mortgage lending, testified for the defendants that, on the basis of his review of the monthly yield index,[5] interest rates

[5] The court found that, although the document admitted into evidence at trial and relied upon in determining the applicable interest rates was not the official index published by the Federal Reserve Board, it accurately reflected the interest rates contained therein.

were in the midst of an overall period of decline around the time that Washington Mutual represented they were increasing. After conducting its own examination of the monthly yield index, however, the court reached the opposite conclusion. Rejecting Huinker's testimony, the court found that, consistent with Washington Mutual's representations, interest rates were indeed increasing in the four months leading up to the defendants' execution of the modification agreement on June 24, 2008. Specifically, the court noted that rates rose from 1.54 percent in March, 2008, to 2.42 percent in June, 2008, an increase of over fifty percent. Thus, the court found that Washington Mutual's representations that the interest rates were increasing "were spot on correct."

Second, the court found unpersuasive the defendants' allegation that Washington Mutual's ulterior motive for encouraging the modification was to benefit itself financially by converting its negative amortization mortgages to fixed rate mortgages. To prove this ulterior motive, the defendants relied exclusively on a document entitled "Form 10-Q," which the entity "Washington Mutual, Inc.," had filed with the United States Securities and Exchange Commission. The defendants cited to the section of Form 10-Q that refers to "fast-track loan modification," which evidently was a method developed by the American Securitization Forum for converting adjustable rate loans into other mortgage products in order to reduce lenders' exposure to widespread defaults. Form 10-Q further states that Washington Mutual, Inc., "elected to apply the fast-track loan modification provisions [developed by the American Securitization Forum] beginning in March 2008 . . . ."

The court found that Form 10-Q did not prove any alleged "system wide" scheme by Washington Mutual to convert its negative amortization loans to fixed rate loans. The court noted that, for one thing, Form 10-Q was filed by Washington Mutual, Inc., not Washington

Mutual, the plaintiff's predecessor-in-interest, and there was no indication that Washington Mutual was a subsidiary of or otherwise connected with Washington Mutual, Inc. Furthermore, the court noted that Form 10-Q did not indicate whether the "fast-track" program applied specifically to negative amortization mortgages, and that the program appeared to have been developed by the American Securitization Forum, an entity that was not related to or controlled by Washington Mutual. Accordingly, the court found that the "fast-track" program "cannot be any evidence of fraud or unclean hands by Washington Mutual . . . ."

Finally, the court rejected the defendants' allegation that Washington Mutual pressured them to execute the modification agreement at their home without an attorney present, finding instead that Roger Essaghof "was an experienced investor in real property having purchased property with multiple residential commercial mortgages. He was well aware of the routine matters involving the execution of mortgage documents and the reading of mortgage documents. The court does not find [Roger] Essaghof's testimony credible that it was an act of . . . fraud . . . or unclean hands that the mortgage documents were executed [in] the comfort of his own home in the presence of his wife [Katherine Marr-Essaghof] and a Washington Mutual . . . representative without the presence of an attorney." On the basis of these findings, the court concluded that the defendants failed to meet their burden of proof with respect their defenses of fraud in the inducement and unclean hands.

With this factual basis in mind, we proceed to resolve the defendants' claims that the court improperly rejected their defenses of fraudulent inducement and unclean hands.

A

The defendants first claim that the court erred in rejecting their defense of fraudulent inducement. "It is well settled that a trial court in foreclosure proceedings has discretion, on equitable considerations and principles, to withhold foreclosure or to reduce the amount of the stated indebtedness." (Internal quotation marks omitted.) *Bank of America, N.A.* v. *Aubut*, 167 Conn. App. 347, 378, 143 A.3d 638 (2016). Fraud, a well recognized special defense in foreclosure actions, "involves deception practiced in order to induce another to act to her detriment, and which causes that detrimental action. . . . The four essential elements of fraud are (1) that a false representation of fact was made; (2) that the party making the representation knew it to be false; (3) that the representation was made to induce action by the other party; and (4) that the other party did so act to her detriment. . . . Because specific acts must be pleaded, the mere allegation that a fraud has been perpetrated is insufficient." (Internal quotation marks omitted.) Id., 378–79; see also *Peterson* v. *McAndrew*, 160 Conn. App. 180, 204, 125 A.3d 241 (2015). A trial court's decision as to the essential elements of fraud is subject to the clearly erroneous standard of review. *Cohen* v. *Roll-A-Cover, LLC*, 131 Conn. App. 433, 450, cert. denied, 303 Conn. 915, 33 A.3d 739 (2011).

The defendants' claim that the court erred in rejecting their defense of fraudulent inducement focuses almost entirely on the court's subsidiary factual findings.[6] Specifically, they assert that the court erroneously found

[6] In addition to contesting the court's factual findings, the defendants argue that the court's "conclusion that [their] special defense of fraudulent inducement did not sufficiently allege the elements of fraud was legally and logically incorrect . . . ." This argument is in reference to a portion of the court's memorandum of decision in which it isolated certain factual allegations that the defendants set forth in support of each of their special defenses, including fraud in the inducement and unclean hands, and stated that those allegations "are insufficient [even if proven] to sustain the defendants' burden of proof as to any of their . . . special defenses." The import

(1) that Washington Mutual's representations that interest rates were increasing were not false, and (2) that they failed to prove that Washington Mutual's efforts to secure the modification were motivated by a policy to reduce the number of negative amortization mortgages on its balance sheet. "The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . We cannot retry the facts or pass on the credibility of the witnesses. . . . 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 . . . ." (Internal quotation marks omitted.) *Jo-Ann Stores, Inc.* v. *Property Operating Co., LLC*, 91 Conn. App. 179, 191, 880 A.2d 945 (2005).

The record provides ample support for the court's findings. With regard to interest rates, Roger Essaghof testified at trial that, around April or May, 2008, Washington Mutual's representatives told him on multiple occasions that interest rates were increasing. The court, on the basis of its review of the interest rates listed in the monthly yield index, found that these representations were not false because rates had indeed risen during that period. Our review of the monthly yield index confirms that finding. Although interest rates were in an

of this statement is unclear. As the defendants correctly point out, they supported their defenses of fraudulent inducement and unclean hands with additional allegations beyond those that the court stated were legally insufficient. In any case, however, our review of the court's memorandum of decision convinces us that the court's rejection of the defendants' special defenses was not based upon an erroneous belief that they failed to sufficiently plead their defenses. Rather, the court carefully considered each of the facts alleged by the defendants and determined either that those facts had not been proven at trial or that they did not amount to fraudulent inducement or unclean hands. In other words, the court's decision was based upon the evidence at trial, not the sufficiency of the defendants' pleadings.

overall period of decline from January, 2006 through September, 2011, there was a four month window of time from March through June, 2008, during which interest rates rose dramatically each month.[7] According to Roger Essaghof's testimony, it was during this window when Washington Mutual told him that interest rates were increasing. Because rates in fact were increasing during this, albeit brief, period of time, the court's finding that Washington Mutual did not make any misrepresentations regarding the state of the defendants' interest rates was not clearly erroneous.

The defendants contend that Washington Mutual's representations that rates were increasing nonetheless were false because interest rates were in an overall period of steady decline from 2007 through 2011, and the four month period in 2008 during which rates increased was merely an aberration in that overall trend. In reviewing factual findings under the clearly erroneous standard of review, however, "[w]e do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached," but, instead, make "every reasonable presumption . . . in favor of the trial court's ruling." (Internal quotation marks omitted.) *In re Jeisean M.*, 270 Conn. 382, 397, 852 A.2d 643 (2004). As previously explained, Washington Mutual told the defendants in April or May, 2008, that interest rates were increasing, and the monthly yield index reflects that those representations were accurate at the time they were made. Accordingly, the record provides adequate support for

[7] Interest rates climbed from 1.54 percent in March, 2008, to 1.74 percent in April, to 2.06 percent in May, to 2.42 percent in June, an overall increase, as the court found, of over fifty percent. Of course, Washington Mutual's representatives could not then have known that interest rates would decline after June, 2008, and the defendants have not identified anything in the record to suggest that Washington Mutual's representatives believed, contrary to their statements to the defendants, that interest rates would decline after June, 2008.

the court's finding, and we are not left with a definite and firm conviction that a mistake has been made.[8]

There also is adequate evidence in the record to support the court's finding that the defendants failed to prove that Washington Mutual's true motivation for obtaining the modification was to benefit itself financially by converting its negative amortization loans to fixed rate loans. To prove this allegation, the defendants relied exclusively on Form 10-Q and the references therein to a "fast-track loan modification" program for converting adjustable rate loans into other mortgage products for the purpose of reducing lenders' financial exposure to risky loans.

As the court found, however, Form 10-Q does not demonstrate Washington Mutual's participation in the "fast-track" program, much less that the program was applied to the defendants in this case. "It is axiomatic that [the] [t]he trier [of fact] is free to accept or reject, in whole or in part, the evidence offered by either party." (Internal quotation marks omitted.) *Olson* v. *Olson*, 71 Conn. App. 826, 833, 804 A.2d 851 (2002). Form 10-Q was filed by Washington Mutual, Inc., a distinct entity from Washington Mutual, and there is no evidence that the policies implemented by Washington Mutual, Inc., were binding upon or otherwise adopted by Washington Mutual. Indeed, Form 10-Q states that the "fast-track" program was developed by the American Securitization Forum, another entity whose connection to Washington

[8] That Huinker, the defendants' expert witness, considered the long-term trends in testifying that interest rates were "decreasing" does not compel a different result. The court did not credit his testimony and, given the evidence, was well within its prerogative to do so. See *Sellers* v. *Sellers Garage, Inc.*, 155 Conn. App. 635, 642, 110 A.3d 521 (2015) ("[I]t is the exclusive function of the finder of fact to reject or accept evidence and to believe or to disbelieve any expert testimony. The trier may accept or reject, in whole or in part, the testimony of an expert witness." [Internal quotation marks omitted.]).

Mutual was not established at trial. Nor does Form 10-Q indicate whether the "fast-track" program applies specifically to negative amortization mortgages, as the defendants claimed it did. Rather, Form 10-Q states that the program was designed to apply to "Segment 2" borrowers—those who are unable to refinance or afford their "reset rates" and for whom "default is considered to be reasonably foreseeable." There was no evidence that the defendants had been classified as "Segment 2" borrowers prior to being approached by Washington Mutual about modifying their loan. Therefore, the court was wholly justified in rejecting the defendants' allegation that Washington Mutual concealed from them an ulterior, financial motive for obtaining the modification.

Finally, the defendants argue in their brief to this court that Washington Mutual pressured them to execute the modification agreement as quickly as possible by having them sign it at their home without an attorney present. The court, however, did not credit Roger Essaghof's testimony that the absence of an attorney or the setting in which the modification agreement was executed contributed to any alleged fraud by Washington Mutual. Because "the trial court is the arbiter of credibility, this court does not disturb findings made on the basis of the credibility of witnesses." *Ruiz* v. *Gatling*, 73 Conn. App. 574, 576, 808 A.2d 710 (2002). As the court noted, Roger Essaghof was an experienced real estate investor, had taken out several residential and commercial mortgages prior to the transaction in question, and was "well aware of the routine matters involving the execution of mortgage documents and the reading of mortgage documents." Accordingly, the court's finding that the defendants were not fraudulently induced into executing the modification agreement was not clearly erroneous.[9]

[9] The defendants do not explicitly challenge the court's finding that they failed to prove their special defense of duress, and it is unclear to us whether the assertion in their appellate brief that Washington Mutual "pressed" them

B

The court also did not err in rejecting the defendants' defense of unclean hands. "Our jurisprudence has recognized that those seeking equitable redress in our courts must come with clean hands. The doctrine of unclean hands expresses the principle that where a plaintiff seeks equitable relief, he must show that his conduct has been fair, equitable and honest as to the particular controversy in issue. . . . For a complainant to show that he is entitled to the benefit of equity he must establish that he comes into court with clean hands. . . . The clean hands doctrine is applied not for the protection of the parties but for the protection of the court. . . . It is applied . . . for the advancement of right and justice. . . . The party seeking to invoke the clean hands doctrine to bar equitable relief must show that his opponent engaged in wilful misconduct with regard to the matter in litigation. . . . The trial court enjoys broad discretion in determining whether the promotion of public policy and the preservation of the courts' integrity dictate that the clean hands doctrine be invoked." (Internal quotation marks omitted.) *Bank of America, N.A.* v. *Aubut*, supra, 167 Conn. App. 380.

As the defendants acknowledge in their appellate brief, they rely on the same alleged misconduct by Washington Mutual to establish their defense of unclean hands as they did to demonstrate fraudulent inducement. Because we already have concluded that the court did not clearly err in finding that the defendants failed to prove that Washington Mutual engaged in any

into executing the modification agreement is an attempt to raise such a challenge. In any case, even if we construed the defendants' brief as challenging the trial court's determination regarding the claim of duress, that claim fails for the same reasons that their challenges to the court's rulings on unclean hands and fraudulent inducement fail.

of the misconduct asserted by the defendants for purposes of their fraudulent inducement special defense; see part I A of this opinion; it follows that their unclean hands defense also must fail. This is so despite the fact that the unclean hands doctrine is subject to different legal standards than fraudulent inducement. Put simply, the court's determination that the defendants failed to establish a factual predicate for a defense under the unclean hands doctrine was not clearly erroneous. Accordingly, the court did not abuse its discretion in failing to apply the doctrine of unclean hands in the present case. See *Monetary Funding Group, Inc.* v. *Pluchino*, 87 Conn. App. 401, 406, 867 A.2d 841 (2005).

II

The defendants next claim that the court abused its discretion in ordering them to reimburse the plaintiff for real estate taxes paid by the plaintiff during the pendency of this appeal because "such an order effectively exposes the [defendants] to a threat of imprisonment for a component of the debt owed to the plaintiff and would be equivalent to the re-creation of debtors' prison." They further assert that the court issued the order "without authority or precedent" to do so and that a provision of the original note "converts these payments to debt and [is] the only remedy in a deficiency proceeding." We are not persuaded.

In its February 23, 2016 memorandum of decision, the court granted the plaintiff's motion for equitable relief and ordered the defendants to reimburse the plaintiff for the property taxes and homeowner's insurance premiums incurred by the plaintiff during the pendency of the appeal and in the future until the conclusion of litigation. The court reasoned that the defendants had been liable to pay property taxes and homeowner's insurance on their property since they mortgaged their property on May 11, 2006, and would

continue to be liable for those costs even were they to prevail in their appeal before this court. The court noted that, despite the onus being on the defendants, the plaintiff had been covering the taxes and insurance expenses since 2010 in order to maintain its priority over other encumbrancers. The court noted that the expenses paid by the plaintiff from March 31, 2010 through January 14, 2016, amounted to $331,232.48. The court further found that the order was warranted notwithstanding the appellate stay because "the obligation of [the defendants] to pay the future real estate taxes . . . is not subject to the automatic stay and will not be affected by the trial court and appellate litigation."

"In an equitable proceeding, the trial court may examine all relevant factors to ensure that complete justice is done. . . . The determination of what equity requires in a particular case, the balancing of the equities, is a matter for the discretion of the trial court." (Internal quotation marks omitted.) *People's United Bank* v. *Sargo*, 160 Conn. App. 748, 754, 125 A.3d 1065 (2015). "Although we ordinarily are reluctant to interfere with a trial court's equitable discretion . . . we will reverse [a judgment] where we find that a trial court acting as a court of equity could not reasonably have concluded as it did . . . or to prevent abuse or injustice." (Internal quotation marks omitted.) *19 Perry Street, LLC* v. *Unionville Water Co.*, 294 Conn. 611, 629–30, 987 A.2d 1009 (2010); see also *Petterson* v. *Weinstock*, 106 Conn. 436, 446, 138 A. 433 (1927) ("[o]ur practice in this [s]tate has been to give a liberal interpretation to equitable rules in working out, as far as possible, a just result"). "[Because] a mortgage foreclosure is an equitable proceeding, either a forfeiture or a windfall should be avoided if possible." *Farmers & Mechanics Savings Bank* v. *Sullivan*, 216 Conn. 341, 354, 579 A.2d 1054 (1990). "[T]he trial court must exercise its . . . equitable powers with fairness not only to the foreclosing

mortgagee, but also to subsequent encumbrancers and the owner." (Internal quotation marks omitted.) Id.

We cannot conceive of any abuse of discretion on the part of the trial court. The court understandably was concerned that, absent an order requiring the defendants to pay for their own property taxes and homeowner's insurance, they would experience a windfall because they would be allowed to live on their property for free at the plaintiff's expense until the conclusion of the foreclosure proceedings.[10] Such a result plainly is within the realm of issues that the court's equitable powers were designed to address. Moreover, in their brief on appeal, the defendants do not challenge the court's reasoning that they would continue to be responsible for paying taxes and insurance on their property regardless of whether they prevailed in their appeal. The court did not abuse its discretion in determining that a balancing of the equities justified ordering the defendants to pay for expenses that they would have been required to pay no matter the outcome of this case.[11]

[10] As the court stated during the February 8, 2016 hearing on the motion, "it's not fair that the [defendants] can live in this house and not pay the real estate taxes that they're obligated to [pay even if] they win this appeal. It's not fair that they live in this house and not pay the insurance on the house that they're living in. When they win the appeal, they have to pay it. It's not fair."

[11] The defendants raise an additional argument in connection with this claim, which consists entirely of the following sentence: "Paragraph 9 of the mortgage converts these payments to debt and [is] the only remedy in a deficiency proceeding." The defendants provide no further analysis, citation to the record or legal authority to support the proposition that this paragraph of the mortgage agreement renders the court's exercise of its equitable power an abuse of discretion. "It is well settled that [w]e are not required to review claims that are inadequately briefed. . . . We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *Benedetto* v. *Dietze & Associates LLC*, 159 Conn. App. 874, 880–81, 125 A.3d 536, cert. denied, 320 Conn. 901, 127 A.3d 185 (2015). Accordingly, we decline to review this argument.

The judgment is affirmed and the case is remanded for the purpose of setting a new law day.

In this opinion the other judges concurred.

DAVID ERIC EDER'S APPEAL FROM PROBATE* (AC 39024)

Lavine, Alvord and Beach, Js.

Syllabus

D, the biological son of the settlor, J, appealed to the trial court from the order and decree of the Probate Court concluding that the remainder beneficiaries of J's irrevocable trust included not only D, but also J's adopted adult children, S and M. J had created the trust in 1991, and it terminated in 2011. The trust provided for distribution of the trust property upon its termination "to each child of the settlor then living." J had one biological child, D, born in 1963, and adopted S and M in 2010. J had established a relationship with S and M as early as 1972 when he first met their mother, R, and began to live with R, S, and M in 1975, when S was six years old and M was four years old. Following J's separation from R in 1985, J continued his relationship with S and M, and provided them with financial and emotional support. J and D had a falling-out in 2009. In 2011, the trustees of the trust filed an application in the Probate Court seeking a determination of the trust's beneficiaries. The Probate Court decreed that D, S, and M were all remainder beneficiaries of the trust. Thereafter, D appealed to the trial court, claiming that by adopting S and M, J improperly added two remainder beneficiaries to the trust to reduce the size of his share of the trust's corpus. Following a hearing, the trial court concluded that the Probate Court had properly construed the trust and it rendered judgment dismissing the appeal, from which D appealed to this court. *Held*:

1. D could not prevail on his claim that the trial court improperly concluded that the intent of J in adopting two adults was not relevant to determining

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* In the Superior Court, the case was captioned *David Eric Eder* v. *Appeal from Probate*. The judgment file, appeal form, and briefs bear the caption *David Eric Eder* v. *John Dennis Eder et al.* The caption of the case that appears here conforms to the convention our appellate courts use for appeals from probate. See, e.g., *Garrett's Appeal from Probate*, 237 Conn. 233, 676 A.2d 394 (1996); *Baskin's Appeal from Probate*, 194 Conn. 635, 484 A.2d 934 (1984); *Davis's Appeal from Probate*, 39 Conn. 395 (1872); *Sanzo's Appeal from Probate*, 133 Conn. App. 42, 35 A.3d 302 (2012); *Nulman's Appeal from Probate*, 13 Conn. App. 811, 537 A.2d 495, cert. denied, 207 Conn. 806, 540 A.2d 374 (1988).

whether the adoptions were a sham: that court, which found that, pursuant to the trust, D's share could be reduced permissibly only if J had another biological child or had adopted a child under circumstances in which the adoption could be viewed as a natural expression of a desire to recognize a preexisting familial bond between the settlor and the adopted children, concluded that the adult adoptions in the present case were not a sham or subterfuge just to hurt D, but were consistent with J's affectionate and long-term relationship with S and M, who at the time of the adoptions could be considered natural objects of the settlor's bounty, and that the adoptions were a recognition of the desire of J, S and M to continue that bond, independent of a desire to harm D; furthermore, J, as the settlor, adopted the two adults and brought them into the class of remainder beneficiaries of the trust, which defined the beneficiaries as J's then living children, either biological or adopted, adopted children are permitted under state law to take under a trust unless it explicitly excludes them, the trust here unambiguously included S and M, and their adoptions did not alter the intent of the trust or do violence to public policy concerning adoption.

2. The trial court properly concluded that because S and M were the natural objects of J's bounty, their adoptions by J did not contravene the purpose or intent of the trust, which had to be determined from the language of the trust, not external factors; the trust provided that a remainder beneficiary was, at the time the trust terminated, a child of the settlor then living, biological or adopted, our statutes permit adult adoptions and adoptees to take under a testamentary instrument, unless they are expressly excluded, which did not occur here, and the trust contemplated that J could have more children after its creation.

Argued May 30—officially released October 10, 2017

Procedural History

Appeal from the decision of the Probate Court for the district of New Haven determining the beneficiaries of a certain trust, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Hon. Thomas J. Corradino*, judge trial referee; judgment dismissing the appeal, from which the plaintiff appealed to this court. *Affirmed.*

David R. Schaefer, with whom, was *Michael T. Cretella*, for the appellant (plaintiff).

Glenn W. Dowd, with whom, were *Seth Morgan Kaplowitz* and *Casey R. Healey*, and, on the brief, *Howard Fetner*, for the appellees (defendants).

Opinion

LAVINE, J. David Eric Eder (David Eder), the biological son of the settlor, John Dennis Eder (settlor), appealed to the Superior Court from a decree of the Probate Court concluding that the remainder beneficiaries of the John Dennis Eder Annuity Trust (trust) include not only the settlor's biological child, but also his adult adopted children.[1] Following a hearing, the Superior Court concluded that the Probate Court properly had construed the trust and dismissed the appeal. David Eder appealed to this court, claiming that, as a matter of law, the Superior Court erred by holding (1) that the settlor's intent in establishing the trust was not relevant to determining whether the subject adoptions were a sham and (2) that the adoptions did not contravene the purpose and intent of the trust because the adoptees were the natural objects of the settlor's bounty. We affirm the judgment of the court.

The root cause of the present appeal appears to be a falling-out between a father and his biological son. The Court of Probate for the district of New Haven succinctly set forth the crux of the appeal in its decree issued on February 12, 2014. "[The settlor created the trust] on October 21, 1991. The trust has terminated as of October 21, 2011. An irrevocable trust, the trust provides for distribution of trust property upon termination to '*each child of the* [*settlor*] *then living*.' Though the settlor has only one biological child, [David Eder], the settlor recently adopted, on June 30, 2010, in the [commonwealth] of Massachusetts, two adults, Sacha [Richter] and Mischa Richter [Richter brothers]. On November 3, 2011, the trustees brought an application for the determination of the trust's beneficiaries. At

[1] The following individuals were served with the appeal: John Dennis Eder, settlor; Mischa B. Richter, adopted son; Sacha A. Richter, adopted son; Gail D'Addio, trustee; and Michael D'Addio, trustee.

issue is whether the settlor's adopted children fall within the trust's class of beneficiaries and may thus benefit from the distribution of trust assets as remainder beneficiaries, or are disqualified outside of such trust by fraud or other cause." (Emphasis added.) The Probate Court determined that the remainder beneficiaries of the trust include both the settlor's biological son and his adopted children. The Probate Court ordered the trustees to distribute the trust in equal shares to David Eder, Sacha Richter, and Mischa Richter.[2]

After the Probate Court issued its decree, on March 11, 2014, David Eder appealed to the Superior Court. As reasons for the appeal, he alleged that he was aggrieved by the Probate Court's decree because "neither adoptee is a 'Child' of John Eder within the meaning of that term contained in the [trust]; and even if the term 'Child' in the [trust] could be interpreted to include adopted children, the adoption of the Richter brothers was a fraud/sham entered into for the sole purpose of changing the beneficiaries of an irrevocable trust."

The court found the following facts, which are not challenged by David Eder. David Eder was born to the settlor and Pearl-Ellen Bench (mother) in 1963, when the settlor was eighteen years old. The settlor and mother divorced soon thereafter. Throughout his childhood, David Eder lived in Connecticut with his mother and her second husband, H. William Shure. Shure had a parent-like relationship with David Eder, and they remain close today. The settlor had little involvement with David Eder and moved to Provincetown, Massachusetts, in 1970.

The settlor met Jill Richter in 1972 and began to live with her and her sons, the Richter brothers, in 1975.

[2] The Probate Court stayed the distribution of the trust corpus for thirty days and, if appeals were taken, until the final order of a court.

At the time, Sacha Richter was six years old and Mischa Richter was four years old. For the next ten years, the settlor, Jill Richter, and the Richter brothers lived together in Provincetown. The settlor and Jill Richter separated in approximately 1985, but the settlor has continued his relationship, including financial and emotional support, with the Richter brothers to the present day.

In 1991, for tax planning purposes, Arthur Eder, the settlor's father, directed his attorney to draft a trust instrument for the settlor.[3] Pursuant to the settlor's trust, the settlor was to receive $114,000 per year for twenty years at which time the trust ended; the corpus of the trust was to be distributed in equal shares to "each child of the [settlor] then living." The settlor executed the trust on October 21, 1991.

David Eder and the settlor had an amicable relationship until approximately 2009. For reasons that are not directly relevant to this appeal, the settlor had a falling-out with David Eder and sought to disinherit him. He consulted Michael D'Addio, an attorney trustee, to undo the monetary gifts that he had made to David Eder. Michael D'Addio informed the settlor that, for tax purposes, the trust was irrevocable and that the settlor did not have the authority to revoke the trust or change the beneficiary.

[3] The settlor testified, in part: "I had no help from a lawyer with this document, I looked through the document. My father and I had discussions before this document was given to me to be signed. I made sure that whatever the discussions were that I had with my father were included in the document. There were two major points that I was concerned with, with the document. He told me that I was going to get $114,000 a year, which was included in the document. I never personally received it in my hand per year. But, I don't know, that's one thing. And the other thing I would talk to my father about at that time, when *he had suggested doing this for tax reasons*, was that since I was in my forties, I believe, that I wanted to make sure any future children, either by blood or adoption, was included within this trust document, because I didn't know what was going to happen, you know, further on." (Emphasis added.)

The court found that, in 2010, the settlor wished to legalize his parental relationships with the Richter brothers and talked to them individually about his plan. The Richter brothers, who were adults, agreed to be adopted by the settlor, and the Probate and Family Court for the County of Barnstable, Massachusetts, approved the adoptions on June 30, 2010. The settlor admitted that the reason he adopted the Richter brothers at the time was "to include them in the [trust] before the date expired." The trust terminated on October 21, 2011.

David Eder claims that by adopting the Richter brothers, the settlor improperly added two remainder beneficiaries to the trust to reduce the size of his share of the trust's corpus. On November 3, 2011, the trustees, Michael D'Addio and Gail D'Addio, filed an application in the Probate Court seeking a determination of the trust's beneficiaries. After the Probate Court decreed that David Eder as well as the Richter brothers were the remainder beneficiaries of the trust, David Eder appealed to the Superior Court.

The standard of review applicable to probate appeals is well known. "In a probate appeal . . . the Superior Court's jurisdiction is statutory and limited to the order appealed from. The issues presented for review are those defined in the reasons of appeal. The Superior Court cannot consider or adjudicate issues beyond the scope of those proper for determination by the order or decree attacked. This is so even with the consent of the parties to the appeal because the court has subject matter jurisdiction limited only to the order or decree appealed from." *Silverstein's Appeal from Probate*, 13 Conn. App. 45, 58, 534 A.2d 1223 (1987). "[The Superior Court] tries the questions presented to it de novo, but in so doing it is . . . exercising a special and limited jurisdiction conferred on it by the statute authorizing

appeals from probate." (Internal quotation marks omitted.) Id., 53–54.

The probate appeal was tried on July 27 and 28, 2015. On March 2, 2016, the court issued a lengthy and comprehensive memorandum of decision dismissing the appeal, holding that the Richter brothers, as adoptees, are children of the settlor within the meaning of the trust and that the adoptions were not a sham as the adoptees were the natural objects of the settlor's bounty. David Eder appealed.

In this court, David Eder claims that, as a matter of law, the Superior Court erred in holding (1) that the settlor's intent in adopting two adults was not relevant to a determination of whether the adoptions were a sham and (2) that the purpose of the trust was not contravened by the settlor's adopting the Richter brothers because they were the natural objects of his bounty. We disagree.

I

THE TRUST

In adjudicating the probate appeal, the court first construed the trust. "Where the language of the [trust instrument] is clear and unambiguous, the [instrument] is to be given effect according to its terms. A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity. . . . [T]he issue of intent as it relates to the interpretation of a trust instrument . . . is to be determined by examination of the language of the trust instrument itself and not by extrinsic evidence of actual intent. . . . The construction of a trust instrument presents a question of law to be determined in the light of facts that are found by the trial court or are undisputed or indisputable." (Citation omitted; internal quotation marks omitted.) *Heath* v. *Heath*, 150 Conn. App. 199, 203–204, 90

A.3d 362, cert. denied, 312 Conn. 921, 94 A.3d 1200 (2014); see also *Heffernan* v. *Freedman*, 177 Conn. 476, 481, 418 A.2d 895 (1979). An appellate court's review of conclusions of law is plenary. *State* v. *Velasco*, 248 Conn. 183, 189, 728 A.2d 493 (1999).

The court found that, at the urging of his father, the settlor established an annuity trust in 1991, which was to terminate in twenty years. The trust was to provide the settlor with $114,000 per year and after twenty years, the trust was to terminate and the trust assets were to be distributed "into separate, equal shares, so as to provide one share for *each child of the Grantor then living* . . . ." (Emphasis added.) The court identified the relevant provisions of the trust.

Subsection one of Article XIII of the trust is entitled "Definitions" and provides: "Lineal Descendants: The term 'lineal descendants' used anywhere in this Trust Indenture shall mean child, grandchild, great-grandchild, etc., whether so *related by blood or legal adoption*, including any of the aforesaid born or *adopted after the signing* of this Trust Indenture. The grantor's only living child is David Eric Eder." (Emphasis added.) Subsection six of Article I contemplates that the grantor may have other children at the time the trust terminated in twenty years.[4] Specifically, subsection six provides in relevant part: "[u]pon the Termination Date, the Trustees shall divide the Trust Property, as it shall then exist, into separate, equal shares, so as to provide one share *for each child of the Grantor then living* . . . ." (Emphasis added.)

Article XII of the trust instrument provides "[t]his trust is irrevocable and the Grantor shall have no right

[4] David Eder emphasizes that the trust identifies him as the settlor's only living child at the time the settlor signed the trust, but he does not dispute that the trust contemplates that the settlor may have more children at the time the trust terminates.

whatsoever to alter, amend, revoke, or terminate the trust created hereunder, in whole or in part." Article X, "Governing Law," states that "Trust Indenture has been accepted by the Trustees and its validity, construction, and all rights thereunder shall be governed by the laws of the State of Connecticut."

The court consulted our General Statutes as they pertain to adoption. Our statutory law permits the adoption of adults and provides that the adopted person shall be the legal child of the adoptive parent. See General Statutes § 45a-734.[5] General Statutes § 45a-707 provides in relevant part: "(1) 'Adoption' means the establishment by court order of the legal relationship of parent and child . . . (5) 'Parent' means a biological or adoptive parent . . . ."

The court concluded that pursuant to the trust and the statutory laws of this state, the Richter brothers are the settlor's children pursuant to the Massachusetts adoption decree.[6] David Eder does not challenge the

[5] Section 45a-734 provides in relevant part: "(a) Any person eighteen years of age or older may, by written agreement with another person at least eighteen years of age but younger than himself or herself unless the other person is his or her spouse, brother, sister, uncle or aunt of the whole or half blood, adopt the other person as his or her child . . . .

"(b) . . . Upon the [probate] court's approval of the adoption agreement, the adopted person shall become the legal child of the adoptive parent, and the adoptive parent shall become the legal parent of the adopted person, and the provisions of section 45a-731 shall apply. . . ."

[6] The Superior Court held in part that not only were the Massachusetts adoptions entitled to full faith and credit in Connecticut; see *Maltas* v. *Maltas*, 298 Conn. 354, 362, 364, 2 A.3d 902 (2010); but also found that General Statutes § 45a-731 provides that "[a] final decree of adoption, whether issued by a court of this state or a court of any other jurisdiction, shall have the following effect in this state . . . (4) The adopted person shall . . . be treated as if such adopted person were the biological child of the adoptive parent for purposes of the applicability of all documents and instruments, whether executed before or after the adoption decree is issued, which do not expressly exclude an adopted person in their operation or effect. *The words 'child*', 'children', 'issue', 'descendant', 'descendants', 'heir', 'heirs', 'lawful heirs', 'grandchild' and 'grandchildren', when used in any will or *trust instrument shall include legally adopted persons unless such document clearly indicates a contrary intention. . . .*" (Emphasis added.)

validity of the adoptions or that the Richter brothers are the settlor's children. Rather, his claim is that the settlor's adoption of the Richter brothers was a sham that altered the terms and purpose of the trust.[7] We disagree.

II

THE ADOPTIONS

The court recognized that under § 45a-731 (4), an adopted child, unless expressly excluded by the trust, shall be treated as a biological child of the adopting parent, that § 45a-734 allows for the adoption of adults, and that full faith and credit must be afforded to the Massachusetts adoption. The court found that the trust did not expressly exclude adopted children. It also found that the trust identified David Eder as the settlor's only living child at the time the trust was established, and that the trust contemplated that the settlor could have other children living when the trust terminated

[7] David Eder devoted a number of pages in his appellate brief to the United States tax code and argued that the trust was intended to achieve tax benefits that could not be achieved if the trust were amended. His contention is that by finding that the Richter brothers are remainder beneficiaries of the trust, the trust was altered and the tax benefit lost. The settlor argues that David Eder did not raise that claim in the Superior Court and, therefore, it is not properly before us on appeal. See Practice Book § 60-5; *Brehm* v. *Brehm*, 65 Conn. App. 698, 702–704, 783 A.2d 1068 (2001). In his reply brief, David Eder states that he did raise the tax issue in the Superior Court during argument. The transcript reveals that David Eder's counsel briefly mentioned that a trust established for tax and estate purposes is not revocable.

Whether the claim was raised in the Superior Court, it is nonetheless entirely without merit. Although the court found that the settlor's father had encouraged him to establish the trust for tax planning purposes, it found no provision in the trust regarding taxes. Even if we were permitted to look beyond the language of the trust to determine the settlor's intent, which we may not; see *Heath* v. *Heath*, supra, 150 Conn. App. 203–204; the court did not consider, let alone find, that by adopting the Richter brothers the intended tax benefits of the trust were negated. Moreover, David Eder has identified no evidence to the contrary.

in 2011.[8] David Eder claimed that the settlor had an improper motive in adopting the Richter brothers that required the court to determine whether the settlor's adoption of the Richter brothers was a sham and act of subterfuge that violated the settlor's original intent in establishing the trust. The court found no Connecticut case on point and looked to the common law of other jurisdictions, as suggested by the parties, for guidance.

It has been stated that a sham or subterfuge adoption occurs "when an adult is adopted for the sole purpose of making him or her an heir and claimant to the estate of an ancestor under the terms of a testamentary instrument known and in existence at the time of the adoption . . . thwarts the intent of the ancestor whose property is being distributed and cheats the rightful heirs." *Minary* v. *Citizens Fidelity Bank & Trust Co.*, 419 S.W.2d 340, 343 (Ky. 1967).

The first sentence of Article XII of the trust provides "[t]his Trust Indenture is irrevocable and the grantor shall have no right whatsoever to alter, amend, revoke, or terminate the trust created hereunder, in whole or in part." The court determined that the settlor could not "change the operation of the trust by a sham adoption done solely for the purpose of creating beneficiaries [that] has the effect of reducing the benefits that would have otherwise accrued to a beneficiary absent the adoption."

Generally, courts that disfavor adult adoptees from taking under a testamentary instrument consider the adoption an act of subterfuge. "It is of paramount importance that man be permitted to pass on his property at his death to those who represent the natural objects of his bounty. This is an ancient and precious right running

[8] David Eder does not claim that the court erred in finding that the trust contemplated the settlor's having other children between 1991 and 2011.

from the dawn of civilization in an unbroken line down to the present day. Our adoption statutes are humanitarian in nature and of great importance to the welfare of the public. However, these statutes should not be given a construction that does violence to the above rule and to the extent that they violate the rule and prevent one from passing on his property in accord with his wishes, they must give way. Adoption of an adult for the purpose of bringing that person under the provisions of a preexisting testamentary instrument when he clearly was not intended to be so covered should not be permitted . . . ." *Minary* v. *Citizens Fidelity Bank & Trust Co.*, supra, 419 S.W.2d 343–44. In a number of cases, an adoption has been considered an act of subterfuge that defies the will of the grantor when a beneficiary of a trust or will adopted an adult, such as a spouse; see *Matter of Trust Created by Belgard*, 829 P.2d 457, 460 (Colo. App. 1991); a same sex partner; see *Cross* v. *Cross*, 177 Ill. App. 3d 588, 590–91, 126 Ill. Dec. 801, 532 N.E.2d 486 (1988), appeal denied, 126 Ill. 2d 558, 541 N.E.2d 1105 (1989); or the adult children of a much younger first spouse whom the beneficiary married late in life; see *Dixon* v. *Weitekamp-Diller*, 365 Ill. Dec. 732, 737–38, 979 N.Ed.2d 98 (Ill. App. 2012), appeal denied, 367 Ill. Dec. 618, 982 N.E.2d 768 (2013); that had the effect of enlarging the beneficiary class of lineal descendants.

The court cited and analyzed numerous cases from other jurisdictions involving trust or will contests involving the adoption of adults. "Adult adoptions in estates and trusts cases have been rife with controversy. This controversy has led to three lines of cases among the jurisdictions in deciding the effect of an adult adoption on the construction of a testamentary instrument. The oldest line presumes all adult adoptees to be included in class gifts to children. A second line presumes all adult adoptees to be excluded from class gifts

to children. A third line takes the middle ground by allowing exceptions to presumptive inclusion or exclusion depending on particular circumstances." (Footnotes omitted.) *Davis* v. *Neilson*, 871 S.W.2d 35, 38 (Mo. App. W.D. 1993).

In resolving the appeal, the court adopted what it called the commonsense test articulated in *Davis*. "[C]ommon sense tells us that a donor would normally expect anyone partaking of his bounty to be a true family member and not just some willing adult adopted for the purpose of reducing or defeating a gift-over to others. . . . Common sense tells us that [the testator], by inserting adopted children in the class described as [the settlor's] issue, intended to include only individuals with some familial bond to her family—individuals to whom [the settlor] felt a familial bond of love and duty, such as adult stepchildren." (Citation omitted; footnote omitted; internal quotation marks omitted.) Id.

Courts generally recognize the public policy and humanitarian nature of adoption but also recognize that those humane purposes can be thwarted by an adoption of an adult for the mere purposes of bringing the adoptee within the class of beneficiaries. It has been stated that Kentucky's "adoption statutes are humanitarian in nature and of great importance to the welfare of the public. However, these statutes should not be given a construction that does violence to [the rule that prevents one from passing his or her property in accord with her or his wishes]." *Minary* v. *Citzens Fidelity Bank & Trust Co.*, supra, 419 S.W.2d 344.

In the present case, the court reasoned that the purpose of adoption laws would not be thwarted by barring a wife who had been adopted by her husband from taking under a trust thus depriving a clearly indicated alternate beneficiary from receiving trust proceeds. A settlor's intent, however, would not be thwarted if an

adoptee who was a natural object of the adopter's affections in a parental relationship over the years was a trust beneficiary despite the fact that the adoption took place after the parental relationship commenced and when the adoptee was an adult. See, e.g., *In re Trusts Created by Agreement with Harrington*, 311 Minn. 403, 250 N.W.2d 163, 164 (1977) (foster children adopted as adults).

On appeal to the Superior Court, David Eder contended that the settlor's adoption of the Richter brothers was a sham to amend the trust thereby reducing his share of the corpus when the trust terminated. The court concluded that, pursuant to the trust, David Eder's share could be reduced permissibly only if the settlor had another biological child or had adopted a child under circumstances in which the adoption could be viewed as (1) a natural expression of a desire to recognize a preexisting familial bond between the settlor and the Richter brothers, who at the time of the adoptions were adults and could be considered natural objects of the settlor's bounty and (2) a recognition of the settlor's and the Richter brothers' desire to continue the bond. The court then turned to the facts of the case before it and made the following findings regarding the settlor's relationships with David Eder and with the Richter brothers.

After David Eder was born, the settlor had little involvement with him. David Eder never lived with the settlor in Massachusetts, only visited him for short periods of time, and periodically saw him at the home of the settlor's parents in Connecticut. David Eder lived with his mother and William Shure with whom he has a father-son relationship that continues to the present time. David Eder has a close relationship with his half brother Andrew Shure.

The settlor clearly has a family-like relationship with the Richter brothers. When he lived with Jill Richter,

he was a father figure to them and made substantial contributions to their financial support. He did homework with them, taught them how to ride a bicycle, and engaged in other age appropriate parent-child activities. The settlor took the Richter brothers to and from school and attended parent-teacher conferences. They "would draw together" and create objects out of different material, which were activities not foreign to their future careers; Sacha Richter is an artist and Mischa Richter is a photographer. On several occasions, the settlor took the Richter brothers to Connecticut to visit his parents.

Jill Richter returned to England in 1985. The settlor visited Mischa Richter there six or eight times, traveled with him in Morocco for several weeks, and participated in his wedding in England. Mischa Richter's children call the settlor "grandpa." Sacha Richter lives in Provincetown, and sees the settlor frequently or speaks to him by phone. The settlor also participated in Sacha Richter's wedding.

Other indicia of the settlor's relationship with the Richter brothers that were put into evidence include cards and letters the Richter brothers had sent to him when they were young men before the legal dispute with David Eder began. The court reasoned that there was no reason for the settlor to save the cards and letters if there were no close relationship between him and the Richter brothers. After the Richter brothers left the settlor's home in 1985, he provided financial support for books, rent, and parking tickets when they were in college. The settlor put into evidence a record of the checks he wrote to the Richter brothers. Between 1991 and 2001, Mischa Richter received two checks; one in the amount of $20,000 was to help with the purchase of property in London. Between 1995 and 2005, the settlor wrote sixteen checks to Sacha Richter totaling $40,134 for a variety of purposes; one check was for $20,000 to help purchase a home in Provincetown. In

addition to writing checks for the Richter brothers, the settlor gave them cash. The court found that the settlor made the monetary gifts before 2009 when the settlor had a falling out with David Eder and are indicia of a familial bond between the settlor and the Richter brothers. The court concluded that the Richter brothers were the natural objects of the settlor's natural bounty.

The court found that the settlor's financial gifts to the Richter brothers continued after he adopted them. The court concluded that such gifts were further evidence of the continuing close relationship between the settlor and the Richter brothers.[9] The court concluded that the settlor gave the funds to the Richter brothers because they were in need of them, which underscored the court's finding that they were the natural objects of his bounty and confirmed the familial relationship that had existed for years and was independent of a desire to harm David Eder.[10] The court found that the settlor's problems with David Eder may have been a catalyst for him to consider adopting them given his long relationship with the Richter brothers and David Eder's wealth.[11] The court reasoned that common sense,

[9] After May 1, 2010, the settlor wrote checks to Mischa Richter totaling $53,600 of which $50,000 was to purchase a home. After that date, the settlor wrote checks to Sacha Richter totaling $12,880. All of the checks were in the nature of "help me out," typical of a familial setting or where a familial relationship exists. The transfer of funds was made after the settlor adopted the Richter brothers but before funds from the trust could be distributed.

[10] The court also found that the settlor's animosity toward David Eder resulted in his leaving him nothing by way of his will. The settlor wrote a will in 2013, in which he left a small portion of his estate to the Richter brothers and the rest to charity. The court again found that the Richter brothers were the natural objects of the settlor's bounty. The bequest from his estate would not accrue to the Richter brothers until he died. The trust gave them funds that they needed in the present.

[11] The settlor testified: "I mean the trouble I had with David Eder was a catalyst for me to start paying more attention to things that I haven't been paying attention to. And when I realize that I had the opportunity to adopt Sacha and Mischa, who were more or less my kids the way they grew up, I thought why not include them in this if I could. Why not share my estate with them? Why not make our relationship legal?"

as described in *Davis* v. *Neilson*, supra, 871 S.W.2d 38, seemed to dictate the adoptions were not a sham or subterfuge just to hurt David Eder, but were consistent with the settlor's affectionate and long-term relationship with the Richter brothers.[12]

III

CLAIMS ON APPEAL

David Eder claims that the court erred, as a matter of law, by holding that the intent of the settlor in adopting two adults was not relevant to determining whether the adoptions were a sham. We disagree.

David Eder's claims on appeal are grounded in the principle of the law stated by the Illinois Court of Appeals. "The adoption of an adult solely for the purpose of making him an heir of an ancestor under the terms of a testamentary instrument known and in existence at the time of the adoption is an act of subterfuge. . . . This practice does great violence to the intent and purpose of our adoption laws, and should not be permitted. . . . We cannot condone such a use of the adoption process." (Citations omitted.) *Cross* v. *Cross*, supra, 532 N.E.2d 488–89. In support of his argument, David Eder cites numerous cases from other jurisdictions that are factually distinguishable. In those cases, it was a different generational beneficiary of a trust settled by an ancestor who adopted an adult in order to enlarge the class of beneficiaries. The various courts

[12] See also *Estate of Pittman*, 104 Cal. App. 3d 288, 292–94, 163 Cal. Rptr. 527 (1980), citing E. Halbach, *The Rights of Adopted Children Under Class Gifts*, 50 Iowa L. Rev. 971, 990–91 (1965) (urging replacement of "stranger to the adoption" rule found in some jurisdictions for "loco parentis" rule); and J. ten Broek, *California's Adoption Law and Programs*, 6 Hastings L. J. 261, 275–82 (1955) (family experience and contact theory is when significant percentage of adult adoptions, those in which stepparents have parented children from early age, either learn belatedly of possibility of legally adopting stepchild or were prevented from doing so earlier by nonconsenting biological parent).

of appeal declined to permit an adult adoptee to be a part of the beneficiary class.[13] These cases are distinct from the facts in the present case in that it is the settlor who adopted two adults that brought them into the class of remainder beneficiaries of the trust. The trust itself defined the beneficiaries as the settlor's then living children, be they biological or adopted.

The laws of the state of Connecticut permit adopted children to take under a will or trust unless the testamentary instrument explicitly excludes them. See General Statutes § 45a-731 (4). The trust does not exclude adopted children. To the contrary, it unambiguously includes them. The adoptions did not alter the intent of the trust, and they did no "violence" to our public policies concerning adoption.

David Eder also claims that the court erred, as a matter of law, by concluding that the purpose of the trust was not contravened because the Richter brothers were the natural objects of the settlor's bounty. In essence, what David Eder claims is that the settlor did not intend the Richter brothers to be beneficiaries of the trust when it was established. This argument fails because the trust provides that a remainder beneficiary is, at the time the trust terminates, a child of the settlor then living. Intent is to be determined by the language of the trust, not external factors. *Heath* v. *Heath*, supra, 150 Conn. App. 203–204. The trust defined child as a biological or adopted child; our statutes permit adult adoptions and adoptees are permitted to take under a testamentary instrument, unless they are expressly excluded. General Statutes §§ 45a-731 (4), 45a-734. Moreover, the trust contemplated that the settlor may have had more children in 2011 than he had in 1991, a

[13] See, e.g., *Otto* v. *Gore*, 45 A.3d 120, 128–29 (Del. 2012) (beneficiary adopted former spouse); *Matter of Estate of Nicol*, 152 N.J. Super. 308, 377 A.2d 1201, 1203 (1977) (long unmarried beneficiary son married much older spouse and adopted her children close to his age).

fact David Eder does not challenge. We conclude that the court properly found that the settlor's adoptions of the Richter brothers were not a sham and that the adoptions did not alter that intent of the trust.

For the foregoing reasons, we conclude that the Superior Court properly affirmed the Probate Court's decree that the corpus of the trust is to be distributed to the settlor's then living children, his biological son and his adopted children. The decree is consistent with the intent of the trust and the laws of this state.

The judgment is affirmed.

In this opinion the other judges concurred.