BRENNA M. SPENCER *v.* ROBERT B. SPENCER
(AC 38050)

DiPentima, C. J., and Mullins and Harper, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed from the judgment of the trial court, which denied the plaintiff's motions for contempt and granted the defendant's motion for modification and termination of alimony. The dissolution judgment provided that the defendant would pay the plaintiff periodic alimony until, inter alia, her cohabitation. After a change in the way the defendant was compensated allegedly caused a decrease in his income, he fell behind on his alimony payments, and the parties entered into a stipulated agreement. Thereafter, the plaintiff filed two motions for contempt in response to the defendant's failure to make alimony payments pursuant to the dissolution judgment and the stipulation. The defendant based his modification request on an allegedly substantial change in circumstances due to a decrease in his income and his termination request on the plaintiff's cohabitation with her boyfriend. In granting the defendant's request to terminate alimony, the court determined, inter alia, that the plaintiff began living with her boyfriend, who had been contributing to the household expenses, and that had altered the plaintiff's financial needs. In granting the defendant's request to modify alimony payable

in the month immediately prior to the month in which the termination of alimony became effective, the court found a substantial change in the defendant's financial circumstances as a result of substantially reduced income. The plaintiff appealed to this court, claiming, inter alia, that the trial court improperly denied her motions for contempt and granted the defendant's motion to modify and terminate alimony. *Held*:

1. The trial court did not abuse its discretion in granting the defendant's motion as to the termination of alimony: the court properly interpreted the term "cohabitation" in the dissolution judgment as consistent with the requirements of the statute (§ 46b-86 [b]) providing that a court may terminate alimony upon a showing that the party receiving alimony is living with another person under circumstances that alters the financial needs of that party, and, contrary to the plaintiff's claim, the defendant was not required to present evidence that the plaintiff was engaged in a romantic or sexual relationship with the person with whom she was living; moreover, the trial court's finding that the plaintiff cohabitated within the meaning of § 46b-86 (b) was not clearly erroneous, as the plaintiff testified that she had been living with her boyfriend and that, as a result, her monthly rent payment was reduced; furthermore, the plaintiff could not prevail on her claim that the defendant had unclean hands on the basis of his allegedly wilful nonpayment of alimony, as the trial court properly determined that the defendant's nonpayment of alimony was excusable because his substantial decrease in income prevented him from making full and timely alimony payments.

2. The trial court did not abuse its discretion in modifying alimony: the court's finding that the defendant experienced a substantial change in his financial circumstances due to a reduction in his income was not clearly erroneous, as the evidence demonstrated that his income was substantially lower during the time for which he sought modification than at the time of the dissolution judgment, and, notwithstanding the plaintiff's claim to the contrary, the trial court properly determined that the defendant met his burden of proving that the compensation change to which he agreed with his business partner, which reduced his income, was not the result of neglect or culpable conduct; furthermore, even if this court assumed that the trial court improperly excluded relevant testimony as to whether the defendant's reduction in his income was due to his neglect or culpable conduct because he did not seek advice from an attorney or an accountant, as the plaintiff claimed, the plaintiff failed to demonstrate that this ruling was harmful and required reversal, as such testimony would have been cumulative of other evidence; moreover, the amount by which the trial court modified the defendant's alimony obligation was proportionate to the decrease in his income and was based on that court's determination that the defendant was having trouble meeting his financial obligations during the period for which he sought a modification.

3. The trial court did not abuse its discretion in denying the plaintiff's motions for contempt; the court's determination that the defendant's nonpayment of alimony was not wilful was based on findings that were not clearly erroneous.

Argued March 13—officially released October 31, 2017

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Winslow*, *J.*, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Turner*, *J.*, issued certain orders in accordance with the parties' stipulation; subsequently, the court, *Sommer*, *J.*, granted the defendant's motion for modification and denied the plaintiff's motions for contempt and for counsel fees, and the plaintiff appealed to this court. *Affirmed.*

Norman A. Roberts II, with whom, on the brief, was *Tara C. Dugo*, for the appellant (plaintiff).

James H. Lee, for the appellee (defendant).

Opinion

MULLINS, J. The plaintiff, Brenna M. Spencer, appeals from the judgment of the trial court denying her motions for contempt and granting the motion for modification and termination of alimony filed by the defendant, Robert B. Spencer. On appeal, the plaintiff claims that the trial court erred in (1) terminating alimony on the basis of her cohabitation, (2) modifying alimony on the basis of a substantial change in the defendant's financial circumstances, and (3) denying her motion for contempt.[1] We affirm the judgment of the trial court.

[1] The trial court inadvertently released a decision that was in draft form and that contained mathematical errors and some factual findings that obviously were not part of this case. Following that decision, the plaintiff appealed and filed an appellate brief responding to the trial court's errant memorandum of decision. Before filing his appellate brief, the defendant filed a motion for permission to file a late motion for rectification and articulation, which

The following facts and procedural history are relevant to this appeal. The court rendered a judgment of marital dissolution in accordance with the parties' agreement on April 7, 2011 (dissolution judgment). Article 3.1 of the dissolution judgment provides: "Commencing and effective May 1, 2011 through and including the payment due on April 1, 2017, the [defendant], during his lifetime, shall pay alimony to the [plaintiff], until her death, remarriage, civil union, cohabitation or April 1, 2017, whichever shall first occur, the sum of Five Thousand Dollars ($5,000.00) per month, which shall be paid one-half each on the first and fifteenth of each month."

Within a few months after the dissolution judgment, the defendant fell behind on his semimonthly alimony payments, prompting both parties to file motions concerning the defendant's alimony obligation. On her part, the plaintiff filed: (1) an August 11, 2011 pro se motion for contempt alleging that the defendant owed one semimonthly alimony payment of $2500, and (2) an October 26, 2011 motion for contempt alleging that the defendant had failed to make an unspecified number of alimony payments. The plaintiff's August 11, 2011 motion

this court granted. The trial court then issued a corrected memorandum of decision. After the trial court issued a corrected memorandum of decision, the plaintiff filed a motion for review with this court, claiming that the trial court improperly had made substantive changes to its original decision. This court granted the motion for review but denied the relief requested therein. The plaintiff then filed a motion for reconsideration en banc of our denial of the relief requested in her motion for review. This court denied en banc the plaintiff's motion for reconsideration. Following our denial of her motion for reconsideration en banc, the plaintiff did not request permission to file a new or supplemental brief directed at the corrected memorandum of decision. Given the foregoing procedural history and the fact that the plaintiff did not attempt to file a supplemental brief claiming that the court's correction of its decision was improper, the issue of whether the trial court properly corrected its decision is not before us in this appeal. Additionally, because the plaintiff did not file a new or supplemental brief responding to the trial court's corrected decision, we have done our best to consider her claims, as briefed, in light of the corrected decision.

never was heard, and her October 26, 2011 motion was not heard until January 24, 2013. It appears that the court's inability to hear the former, as well as its delay in ruling on the latter, was caused by the parties' preoccupation with various discovery disputes. At around the same time that the plaintiff filed her two motions for contempt, the defendant filed a motion to modify alimony. The defendant subsequently withdrew that motion at some point before January 24, 2013.

When the plaintiff's October 26, 2011 motion for contempt was heard by the court on January 24, 2013, the parties entered into a stipulated agreement (January, 2013 stipulation) specifying that the defendant had an alimony arrearage of $22,000. Pursuant to the January, 2013 stipulation, the defendant agreed, inter alia, to (1) make an immediate payment of $2250 to the plaintiff, (2) pay the plaintiff $750 per month toward the arrearage, and (3) continue to make monthly alimony payments of $5000 pursuant to the dissolution judgment. The court accepted the stipulated agreement and rendered judgment accordingly.

Soon after the January, 2013 stipulation, the defendant again fell behind on alimony payments and the stipulated arrearage. On May 14, 2013, the plaintiff filed a motion for contempt, alleging the defendant had failed to make several alimony payments and that his alimony arrearage totaled $27,250. Although the motion was continued by agreement, the record does not disclose whether the court ever heard the plaintiff's May 14, 2013 motion. On April 29, 2014, the plaintiff filed another motion for contempt, alleging that the defendant had failed to make several more alimony payments and that his alimony arrearage totaled $70,000. It is unclear from the record if the April 29, 2014 motion was continued, or if it ever was heard by the court. On September 12, 2014, the plaintiff filed another motion for contempt, alleging that the defendant had failed to make several

more alimony payments and that his alimony arrearage totaled $91,700. It is unclear from the record if this motion was continued, or if it ever was heard by the court. On November 13, 2014, the plaintiff filed motions for contempt alleging that the defendant's alimony arrearage exceeded $94,000. The plaintiff's November 13, 2014 motions eventually were heard on January 21, 2015.

Like the plaintiff, the defendant, subsequent to the January, 2013 stipulation, filed additional motions concerning his alimony obligation. On July 30, 2013, the defendant filed a motion to modify alimony on the ground that "a substantial change in the circumstances in [his] business and how [he] is compensated . . . [caused] a decrease in [his] income." In a later filing called, "Defendant's Proposed Orders and Claims for Relief," the defendant clarified that he was requesting that alimony be reduced "to $0 per week" for the period between August 22, 2013 and September 30, 2013. The defendant subsequently amended[2] his July 30, 2013 motion to modify so that it also sought termination of alimony effective October 1, 2013. Specifically, he sought termination on the ground that the plaintiff began cohabitating with her boyfriend on October 1, 2013.

[2] The record reveals that the defendant attempted to amend his July 30, 2013 motion to modify on or around January 5, 2015. That amended motion, which set forth the defendant's claim for termination of alimony on the ground of cohabitation, was not docketed at the time. Indeed, the record reveals that the amended motion was not docketed until February, 2015, which was *after* the January 21, 2015 hearing on the parties' motions. Although the amended motion was not docketed until after that hearing, the defendant had filed on January 13, 2015 a document called, "Proposed Orders and Claims For Relief," which sought termination of alimony on the basis of cohabitation. Additionally, on the day of the January 21, 2015 hearing, the defendant filed a memorandum of law wherein he argued that alimony should be terminated on the basis of cohabitation. Because the plaintiff did not raise the issue of the amended motion's belated docketing in either the trial court or on appeal, we need not address it further.

On January 21, 2015, the court held a consolidated hearing on the plaintiff's November 13, 2014 motions for contempt and the defendant's July 30, 2013 amended motion for modification and termination of alimony. Following that proceeding, the court granted the defendant's amended motion for modification and termination of alimony and denied the plaintiff's motions for contempt. With respect to its granting of the defendant's motion, the court terminated and modified the defendant's alimony obligation as follows. First, it terminated alimony effective October 1, 2013, concluding that the plaintiff began cohabitating with her boyfriend on that date. Second, having terminated alimony, the court then determined that it could modify alimony only for the period between August 22, 2013 and September 30, 2013, the period for which the defendant expressly sought a modification. Third, it modified alimony only for the month of September, 2013, reducing that month's obligation from $5000 to $4000. Fourth, it found that the defendant's total arrearage was $31,550 and ordered the defendant to pay that arrearage in monthly installments of $1500. This appeal followed. Additional facts will be set forth as necessary.

I

TERMINATION OF ALIMONY

The plaintiff's first claim is that the trial court improperly terminated alimony on the ground that she began cohabitating with her boyfriend on October 1, 2013. This claim consists of two challenges to the court's termination of alimony, and we address each separately.

A

In her first challenge to the court's termination of alimony, the plaintiff argues that, under the parties' dissolution judgment, the plaintiff's cohabitation would terminate alimony only if it had "a romantic or sexual

component . . . .'' Because the defendant did not present any evidence that her cohabitation had ''a romantic or sexual component,'' the plaintiff contends, the court erred in terminating alimony on the ground of cohabitation. We disagree.

The following additional facts and procedural history are relevant to our resolution of the plaintiff's first challenge to the court's termination of alimony. As explained previously, the dissolution judgment obligated the defendant to pay the plaintiff alimony ''until her death, remarriage, civil union, *cohabitation* or April 1, 2017, whichever shall first occur . . . .'' (Emphasis added.) At the hearing, the defendant called the plaintiff, who testified that she lived alone on the second floor of a two-family house from October 1, 2012 to September 30, 2013. The plaintiff paid $950 per month to rent the second floor of that house. On October 1, 2013, the plaintiff began residing with her ''boyfriend'' in a rented single-family house. Regarding her living arrangement with her boyfriend, the plaintiff testified that they share equally the cost of rent and utilities. Pursuant to that cost sharing arrangement, the plaintiff pays only $375 per month in rent.

The court heard argument from the parties regarding whether it should terminate alimony on the basis of cohabitation. A fair reading of the transcript reveals that, in the course of argument, the plaintiff's counsel suggested that the court should apply General Statutes § 46b-86 (b).[3] Specifically, the plaintiff's counsel stated:

[3] ''Section 46b-86 (b), known as the cohabitation statute, provides in pertinent part that a court may modify such judgment and suspend, reduce or terminate the payment of periodic alimony upon a showing that the party receiving the periodic alimony is living with another person under circumstances which the court finds should result in the modification . . . of alimony because the living arrangements cause such a change of circumstances as to alter the financial needs of that party.'' (Internal quotation marks omitted.) *D'Ascanio* v. *D'Ascanio*, 237 Conn. 481, 485–86, 678 A.2d 469 (1996).

"[M]y recollection of the [dissolution judgment] is that it referenced [§ 46b-86 (b)], and whenever cohabitation references the statute, our case law [provides] that the court has the authorities of the statute. . . . [Even if the dissolution judgment] doesn't specifically reference the statute . . . *I don't think it changes my argument because I think that absent the definition* [*of cohabitation in the dissolution judgment*] . . . *the case law says that the court is to use the definition as contained in the statute* . . . ." (Emphasis added.) The plaintiff's counsel also argued that a finding of cohabitation under § 46b-86 (b) does not *require* the court to *terminate* alimony. Rather, "the statute says that the court has the authority not just to terminate [alimony] but to exercise its discretion to modify, suspend, or terminate as the court deems appropriate."

Following oral argument on the motions, in its corrected memorandum of decision, the court terminated alimony on the ground of cohabitation. Specifically, the court based its termination on two findings: (1) "[t]he plaintiff has admitted that she began cohabitating with her boyfriend on or about October 1, 2013," and (2) "as a result of that cohabitation and the contribution[s] of [her boyfried] to the plaintiff's household expenses, the plaintiff's financial needs have been altered."

Additionally, in responding to the plaintiff's argument that § 46b-86 (b) permitted the court to modify or suspend alimony instead of terminating it, the court stated the following: "Once the fact of termination has been established, the final part of the inquiry is *the effective date* of that termination. Our case law clearly establishes that where, as here, the language of the decree provides for *remedies* separate from those contained in . . . § 46b-86 (b), the language of the decree controls. *Mihalyak* v. *Mihalyak*, 30 Conn. App. 516, 520–22, 620 A.2d 1327 (1993) . . . ." With respect to the *effective*

date of termination, the court determined that the "alimony termination provision was automatic and self-executing upon cohabitation . . . . See also *Krichko* v. *Krichko*, 108 Conn. App. 644, 648–52, 948 A.2d 1092, cert. granted, 289 Conn. 913, 957 A.2d 877 (2008) (appeal withdrawn May 19, 2009)." Thus, it determined that alimony terminated on "September 30, 2013, the date [immediately preceding] the plaintiff's cohabitation."

With these additional facts in mind, we turn to our analysis of the plaintiff's first challenge to the court's termination of alimony. As previously explained, the crux of this challenge is that the court improperly construed the term "cohabitation" in the dissolution judgment as not requiring evidence of a romantic or sexual relationship and, furthermore, that the defendant presented insufficient evidence that the plaintiff's "cohabitation" with her boyfriend included a romantic or sexual relationship. We are not persuaded.

We begin with our standard of review. "The standard of review in family matters is well settled. An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. 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. . . . 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. . . . Therefore, to conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did." (Internal quotation marks omitted.) *Emerick* v. *Emerick*, 170 Conn. App. 368, 378, 154 A.3d 1069 (2017).

With the appropriate standard of review in mind, we now outline the relevant legal principles governing the termination of alimony on the basis of an alimony obligee's cohabitation. "General Statutes § 46b-86 (b) is the so-called cohabitation statute, which was enacted [in 1978 five] years after § 46b-86 (a) to correct the injustice of making a party pay alimony when his or her ex-spouse is living with a [significant other], without marrying, to prevent the loss of support." (Footnote omitted; internal quotation marks omitted.) *Connolly* v. *Connolly*, 191 Conn. 468, 473–74, 464 A.2d 837 (1983).

Section 46b-86 (b) provides in relevant part that a court may "modify [a dissolution judgment] and suspend, reduce or terminate the payment of periodic alimony upon a showing that the party receiving the periodic alimony is living with another person under circumstances which the court finds should result in the modification, suspension, reduction or termination of alimony because the living arrangements cause such a change of circumstances as to alter the financial needs of that party. . . ."

Our Supreme Court has characterized § 46b-86 (b) as containing both a "definitional portion" and a "remedial aspect." *Nation-Bailey* v. *Bailey*, 316 Conn. 182, 197, 112 A.3d 144 (2015). The "definitional portion" of the statute refers to how the legislature defines "cohabitation." (Internal quotation marks omitted.) See id., 198 n.11; *Fazio* v. *Fazio*, 162 Conn. App. 236, 240 n.1, cert. denied, 320 Conn. 922, 132 A.3d 1095 (2016). The "remedial aspect" refers to the equitable powers the statute

permits the trial court to exercise upon making a finding of cohabitation. *Nation-Bailey* v. *Bailey*, supra, 195–97.

With respect to the definitional portion, "[s]ection 46b-86 (b) does not use the word cohabitation. The legislature instead chose the broader language of living with another person rather than cohabitation . . . . Because, however, living with another person without financial benefit did not establish sufficient reason to refashion an award of alimony under General Statutes § 46b-8[2], the legislature imposed the additional requirement that the party making alimony payments prove that the living arrangement has resulted in a change in circumstances that alters the financial needs of the alimony recipient. Therefore, this additional requirement, in effect, serves as a limitation. Pursuant to § 46b-86 (b), the nonmarital union must be one with attendant financial consequences before the trial court may alter an award of alimony." (Citation omitted; internal quotation marks omitted.) *DeMaria* v. *DeMaria*, 247 Conn. 715, 720, 724 A.2d 1088 (1999).

Thus, under § 46b-86 (b), "a finding of cohabitation requires that (1) the alimony recipient was living with another person and (2) the living arrangement caused a change of circumstances so as to alter the financial needs of the alimony recipient." *Fazio* v. *Fazio*, supra, 162 Conn. App. 240 n.1.

Regarding the remedial aspect of § 46b-86 (b), we previously outlined that the court has the authority to "modify . . . suspend, reduce *or* terminate the payment of periodic alimony" upon making a finding of cohabitation. (Emphasis added.) General Statutes § 46b-86 (b). Section 46b-86 (b) is not the exclusive basis on which an obligor can seek termination of alimony due to the obligee's cohabitation, as an obligor can also seek such termination on the basis of the terms

of a dissolution judgment. See, e.g., *Remillard* v. *Remillard*, 297 Conn. 345, 352–53, 999 A.2d 713 (2010). The issue of *determining which basis the defendant invokes for termination of alimony*, however, is conceptually distinct from the issue of *construing the termination provision of a dissolution judgment.* For instance, if a dissolution judgment incorporates expressly the definitional portion of § 46b-86 (b), the court will apply the statutory definition, even though the obligor has moved for termination pursuant to the agreement rather than § 46b-86 (b). See, e.g., *D'Ascanio* v. *D'Ascanio*, 237 Conn. 481, 484–86, 678 A.2d 469 (1996) (court applied definition of cohabitation in § 46b-86 (b) where obligor moved for modification pursuant to dissolution judgment providing that alimony would be reduced "in the event that . . . [obligee] . . . cohabitates, as defined by statute" [emphasis omitted]). Our Supreme Court has extended this principle even further, holding that a court properly applies the statutory definition of cohabitation *even where the dissolution judgment fails to incorporate that definition*. *DeMaria* v. *DeMaria*, supra, 247 Conn. 719–22.

A review of the factual circumstances of *DeMaria* aids in our resolution of the plaintiff's claim. In *DeMaria*, the dissolution judgment neither defined " 'cohabitation' " nor referenced § 46-86 (b) or any other statute. Id., 717. Rather, it provided merely that "alimony shall terminate upon . . . the cohabitation by the [obligee] with an unrelated male . . . ." (Internal quotation marks omitted.) Id. When the obligor sought termination of alimony, he moved pursuant to the dissolution judgment, not § 46b-86 (b). Id., 717–18 n.3. The trial court denied the obligor's motion for termination of alimony on the ground that, although he proved that the obligee was living with another person, there was no evidence that that obligee's financial needs were altered by her living with another person. Id., 717–18.

On appeal to this court, the obligor in *DeMaria* argued that the trial court had improperly construed the term cohabitation as it was used in the dissolution judgment. Id., 718–19. In particular, he contended that he had moved for termination specifically pursuant to the dissolution judgment, which, unlike § 46b-86 (b), did not require him to prove that the obligee's cohabitation altered her financial circumstances. Id., 719. This court agreed with the obligor, and the obligee appealed to our Supreme Court.

In reversing this court's judgment, our Supreme Court in *DeMaria* first observed that "cohabit[ation]" was not defined in the dissolution judgment, and, therefore, "in deciding the . . . motion to terminate alimony, the trial court was left to construe the word." Id., 720. In construing "cohabitation," our Supreme Court stated that it was appropriate for the trial court to rely on § 46b-86 (b): "Although the definition of cohabitation as set forth in the dissolution judgment *is not controlled by § 46-86 (b)*, statutes are a useful source of policy for common-law adjudication, particularly when there is a close relationship between the statutory and common-law subject matters. . . . We consider this case to be a similarly appropriate instance to look to our statutes as a useful source of common-law policy and, therefore, consider the trial court's reliance upon § 46b-86 (b) as a definitional source to have been a proper exercise of its authority." (Citations omitted; emphasis added.) Id., 721–22. Accordingly, the court concluded that "as a matter of common-law adjudication, the trial court was guided properly by the statute. . . . Nothing in . . . any . . . case that we have examined, precludes an interpretation of cohabitation that is consistent with the considerations expressed by the legislature in § 46b-86 (b). Indeed, we have found no principled reason to reject such an interpretation of cohabitation." (Citations omitted.) Id., 722.

With the relevant legal principles in mind, we turn to the present case. In the present case, our reading of the court's corrected memorandum of decision leads us to conclude that it interpreted "cohabitation" in the dissolution judgment as consistent with the two requirements of § 46b-86 (b). Three reasons support this conclusion.

First, like the trial court in *DeMaria*, the trial court in the present case determined that only two factors controlled its cohabitation analysis. Those two factors are the two requirements imposed by § 46b-86 (b). In the present case, the court based its decision to terminate alimony on only two findings: (1) the plaintiff admitted that she began "cohabitating with her boyfriend"; and (2) the plaintiff's cohabitation altered her financial needs. The first finding, although formulated in terms of "cohabitating," refers to the first requirement imposed by § 46b-86 (b) that the obligee live with another person. See, e.g., *Gervais* v. *Gervais*, 91 Conn. App. 840, 854, 882 A.2d 731 (referring to first requirement of § 46b-86 [b] as "cohabitation"), cert. denied, 276 Conn. 919, 888 A.2d 88 (2005). The second finding unequivocally refers to the second requirement of § 46b-86 (b) that the obligee's financial needs have been altered. Thus, the trial court effectively determined that the two requirements of § 46b-86 (b) were the exclusive considerations in its analysis of cohabitation.

Second, as previously set forth in considerable detail, a fair reading of the transcript of the trial court hearing reveals that the plaintiff's counsel suggested that the court should apply § 46b-86 (b). In particular, counsel argued that the definition of cohabitation found in § 46b-86 (b) applies even to dissolution judgments that do not incorporate that definition. In light of this suggestion, and the court's corrected memorandum of decision, we are convinced that the trial court in fact applied the statutory definition of cohabitation.

Third, we do not believe that the court's statement that "the language of the decree controls" is inconsistent with its application of the definition of cohabitation in § 46b-86 (b). Rather, in making that statement, the court was addressing whether the dissolution judgment incorporated that statute's *remedial aspect*, not whether that statute's definitional portion is applicable. See *Nation-Bailey* v. *Bailey*, supra, 316 Conn. 197. To be sure, as the court correctly pointed out, "where . . . the language of the decree provides for *remedies* separate from those contained in . . . § 46b-86 (b), the language of the decree controls." (Emphasis added.) In other words, the court had to determine if the dissolution judgment required it to terminate alimony upon a finding of cohabitation, or if it had the discretion to modify or suspend alimony pursuant to the statute. The court ultimately concluded that it was obligated to terminate alimony because the dissolution judgment unambiguously provided that the "alimony termination provision was automatic and self-executing upon cohabitation . . . ." Thus, it appears that the court concluded that the dissolution judgment was consistent with § 46b-86 (b) with respect to that statute's definitional portion, but it was inconsistent with that statute with respect to the statute's remedial aspect.[4]

Having concluded that the trial court interpreted the term "cohabitation" in the dissolution judgment as consistent with § 46b-86 (b), we must determine whether that was a proper interpretation. As previously explained, our Supreme Court has held that it is appropriate for a trial court to apply the statutory definition

[4] The court's statement that the "language of the decree controls" also relates to the issue of "the effective date of th[e] termination." Indeed, the authority cited by the court involved the issue of when termination was effective, not the issue of whether cohabitation occurred. See *Krichko* v. *Krichko*, supra, 108 Conn. App. 648 ("the parties are not disputing *whether* the alimony should have been terminated but, rather, *when* it should have been terminated" [emphasis in original]); *Mihalyak* v. *Mihalyak*, supra, 30 Conn. App. 519 (obligor claimed that trial court should have terminated

of cohabitation to a dissolution judgment that neither defines "cohabitation" nor references the statute. Thus, we are aware of no principled basis for deviating from that rule in the present case, in which the dissolution judgment neither defines "cohabitation" nor references § 46b-86 (b) or any other statute. Accordingly, because the definition of cohabitation in § 46b-86 (b) has only two elements, neither of which is evidence of a romantic or sexual relationship, the defendant was not required, pursuant to the dissolution judgment, to present evidence of a romantic or sexual relationship.[5]

Our conclusion that the trial court properly construed the term cohabitation does not end our analysis. Rather,

alimony as of date of cohabitation, not as of date on which obligor filed motion to terminate).

[5] We are not convinced that *Remillard* v. *Remillard*, supra, 297 Conn. 345, compels the conclusion that the dissolution judgment in the present case required evidence of a romantic or sexual relationship to terminate alimony on the basis of cohabitation. As an initial matter, *Remillard* does not purport to explicitly or implicitly overrule *DeMaria*. Indeed, one of the claims on appeal brought by the obligor in *Remillard* was that *DeMaria* was controlling, and, thus, § 46b-86 (b) applied even to a dissolution judgment that did not incorporate the statutory definition of cohabitation. *Remillard* v. *Remillard*, supra, 350–51. Rather than address the merits of that claim, our Supreme Court held that it was unpreserved and unreviewable. Id., 353. Furthermore, there are three crucial distinctions between *Remillard* and the present case. First, unlike in *Remillard*, the parties in the present case did not litigate at all the issue of a romantic or sexual relationship requirement. See id., 348–49. Indeed, neither party raised or argued this issue in any submission to the trial court or at any hearing or oral argument before the trial court. Second, because the issue of a romantic or sexual relationship requirement was never raised in the trial court here, that court never addressed the issue and the parties did not present any evidence of the same. This is in stark contrast to *Remillard*, where the trial court ruled on the romantic or sexual relationship requirement and both parties testified as to their understandings of whether the term "cohabitation" in their separation agreement included such a requirement. Id., 349–50. Third, neither party in *Remillard* urged the trial court to apply the statutory definition of cohabitation; id., 352–53; whereas the plaintiff in the present case appears to have suggested that the court should rely on the definition in § 46b-86 (b). For those reasons, we conclude that *Remillard* does not control the present case.

we still must determine whether it was clearly erroneous for the court to find that the plaintiff cohabited within the meaning of § 46b-86 (b). On the basis of the record before us, we have no difficulty concluding that this finding is not clearly erroneous because there is ample evidence to support it, and we are without the definite and firm conviction that a mistake has been committed. Specifically, the plaintiff's own testimony established that she began living with her boyfriend and that, as a result of that living arrangement, her monthly rent obligations were reduced from $950 to $375. Thus, there was clear evidence of the two requirements imposed by the definition of cohabitation in § 46b-86 (b). Accordingly, we conclude that the trial court's termination of alimony was not an abuse of discretion.

B

The plaintiff's second challenge to the court's termination of alimony is that termination was improper because the defendant had unclean hands. Specifically, the plaintiff argues that the defendant's "wilful" and "culpable" nonpayment of alimony caused the plaintiff to cohabit with her boyfriend. We disagree.

The following additional facts and procedural history are relevant to our resolution of the plaintiff's claim. The plaintiff testified that, before moving in with her boyfriend in October, 2013, she had lived by herself on the second floor of a Holyoke, Massachusetts, home from October 1, 2012 to September 30, 2013. At the time she rented the Holyoke home, she was employed and earning approximately $15 per hour. On October 1, 2013, she moved from the Holyoke home to a home her boyfriend was renting because she could no longer afford the rent for the Holyoke home. According to the plaintiff, the reason she could not afford the rent for the

Holyoke home was that the defendant was not making timely and full alimony payments.

Regarding the defendant's failure to make timely alimony payments, the plaintiff presented evidence that the defendant's total alimony obligation from the time of the dissolution judgment, April, 2011, to the time of her cohabitation, October 1, 2013, was $144,000. When her cohabitation began, according to the plaintiff's evidence, the defendant had paid approximately $114,950 of that $144,000 obligation, $31,950 of which was paid between the January, 2013 stipulation and October 1, 2013. Further evidence relating to the defendant's partial and sporadic payment of alimony during that period was provided in the defendant's testimony. Specifically, the defendant testified that a substantial decrease in income prevented him from making full and consistent alimony payments in 2013, that his reduced income also frustrated his ability to meet other financial obligations, including his mortgage, living expenses, taxes, legal fees, and childcare costs, and that he ultimately borrowed from his 401 (K) retirement account and the overdraft feature on his checking account to pay alimony and to meet his other financial obligations.

As we explain in parts II and III of this opinion, the court, in its corrected memorandum of decision, credited the defendant's testimony. Crucially, it credited the part of his testimony that a substantial decrease in his income prevented him from making full and timely alimony payments and from satisfying his other financial liabilities. In so crediting the defendant's testimony, the court refused to find the defendant in contempt for his nonpayment of alimony: "With respect to the plaintiff's motions for contempt, the court also concludes that the defendant attempted to pay the alimony and the prior arrearage, despite falling behind due to his decreased income, by drawing from his retirement

account and other assets. The plaintiff has failed to sustain her burden for a finding of contempt . . . ."

With these additional facts in mind, we turn to our analysis of the plaintiff's second challenge to the court's termination of alimony. The plaintiff has not identified any specific legal doctrine, other than unclean hands, that purportedly precludes the termination of alimony on the basis of cohabitation when the cohabitation allegedly was caused by the obligor's "wilful" or "culpable" conduct. Even if we assume, without concluding, that unclean hands or some other unspecified doctrine affords such relief, the record does not support the plaintiff's claim that the defendant's nonpayment of alimony was "wilful" or "culpable."

Having invoked specifically the doctrine of unclean hands, the plaintiff's claim requires us to set forth a critical requirement imposed by that doctrine. That is, like a claim of contempt, a claim of unclean hands will not lie unless the alleged misconduct is *wilful*. See, e.g., *Bauer* v. *Bauer*, 173 Conn. App. 595, 600, 164 A.3d 796 (2017) ("To constitute contempt, a party's conduct must be *wilful*. . . . *Noncompliance alone* will not support a judgment of contempt." [Emphasis added; internal quotation marks omitted.]); *Bank of America, N.A.* v. *Aubut*, 167 Conn. App. 347, 380, 143 A.3d 638 (2016) ("[t]he 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" [emphasis added; internal quotation marks omitted]).

Our review of the record leads us to conclude that the plaintiff failed to meet her burden of proving that the defendant's nonpayment of alimony was wilful. Indeed, as we explain in greater detail in part III of this opinion, in refusing to find the defendant in contempt, the trial court properly determined that the defendant's

nonpayment was excusable. In making this determination, the court credited the defendant's testimony that the substantial decrease in his income and the attendant financial hardship prevented him from making full and timely alimony payments, and that he made efforts to make some partial alimony payments despite the substantial decrease in income and financial hardship.[6] Accordingly, having failed to prove that the defendant's nonpayment of alimony was wilful, the plaintiff's second challenge to the termination of alimony must fail.

II

MODIFICATION OF ALIMONY

The plaintiff's second claim is that the court improperly modified alimony on the basis of a substantial change in the defendant's financial circumstances. Having concluded in part I of this opinion that the court properly terminated alimony effective October 1, 2013, our analysis of the plaintiff's second claim is confined to the month of September, 2013, which is the only period for which the court modified alimony. The plaintiff's second claim consists of four challenges, which we address separately.

A

The plaintiff's first challenge to the court's modification of alimony is that it was clearly erroneous for the court to find that the defendant experienced a substantial change in his financial circumstances. We disagree.

The following additional facts and procedural history are necessary to our resolution of the plaintiff's second claim. At the hearing, the defendant presented testimonial and documentary evidence in support of his claim

[6] From the trial court's determination that the defendant's nonpayment of alimony was *excusable*, it is reasonable to conclude that his nonpayment was neither wilful *nor* "*culpable*." See Black's Law Dictionary (10th Ed. 2014) (defining "culpable" as "blameworthy").

that he experienced a substantial decrease in income when he filed his July 30, 2013 motion to modify. The defendant testified that the decrease was due to a change in the way in which he was compensated by the company in which he held a partnership interest. Specifically, prior to 2013, he and the company's only other partner split the partnership's yearly profits equally, regardless of how much revenue each of them generated for the partnership. Beginning in 2013, however, the partnership switched to a commission based compensation model, pursuant to which the defendant's compensation was based on how much sales revenue he personally generated.

As a result of the change in the partnership's compensation scheme, the defendant's adjusted gross income in 2013, the year in which he sought a modification of alimony, was less than his adjusted gross income in 2011, the year in which the parties' marriage was dissolved. The defendant's federal income tax returns, which were admitted at the hearing as exhibits, indicated that his 2011 adjusted gross income was $121,743 and that his 2013 adjusted gross income was $82,507. The defendant provided testimony, corroborated by his bank statements, that his company's new compensation scheme caused there to be months in 2013 in which he did not receive any payments from the company.

In addition to frustrating his ability to make timely alimony payments, the decrease in the defendant's income had other financial consequences. Specifically, the defendant testified that he was unable to pay his federal income tax liability for the years of 2010, 2012, and 2013, that a lien had been placed on his home, that he was five months behind on mortgage payments, and that he had borrowed funds from his 401 (K) retirement account to cover bills and expenses.

In its corrected memorandum of decision, the trial court found that "prior to August, 2013, the defendant's

income had been substantially reduced . . . . [T]he defendant's substantial income reduction occurred shortly before the plaintiff's . . . cohabitation terminated his ongoing alimony obligation." Thus, the court ordered that "alimony . . . [be] reduced to $4000 for September, 2013, the period between when [the defendant] had zero draws and the termination of alimony as a result of plaintiff's cohabitation." In finding a substantial change in the defendant's financial circumstances, the court reasoned as follows: "There is no dispute that the defendant's income as of 2013 is significantly lower than it was previously, in particular, as reflected on his 2011 and 2012 income tax returns."

With these additional facts in mind, we begin our analysis of the plaintiff's first challenge to the court's modification of alimony by outlining the pertinent legal principles. "Our review of a trial court's granting or denial of a motion for modification of alimony is governed by the abuse of discretion standard. . . . To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Trial courts have broad discretion in deciding motions for modification." (Citation omitted; internal quotation marks omitted.) *Light* v. *Grimes*, 156 Conn. App. 53, 64, 111 A.3d 551 (2015).

"Modification of alimony is governed by [§ 46b-86 (a)] which provides in relevant part: Unless and to the extent that the decree precludes modification . . . an order for alimony . . . may at any time thereafter be . . . altered or modified . . . upon a showing of a substantial change in the circumstances of either party . . . . As the party seeking modification, the defendant

ha[s] the burden of proving a substantial change in circumstances. . . .

"We previously have explained the specific method by which a trial court should proceed with a motion brought pursuant to § 46b-86 (a). When presented with a motion for modification, a court must first determine whether there has been a substantial change in the financial circumstances of one or both of the parties. . . . Second, if the court finds a substantial change in circumstances, it may properly consider the motion and, on the basis of the . . . § 46b-82 criteria, make an order for modification. . . . The court has the authority to issue a modification only if it conforms the order to the distinct and definite changes in the circumstances of the parties. . . . Simply put, before the court may modify an alimony award pursuant to § 46b-86, it must make a threshold finding of a substantial change in circumstances with respect to one of the parties." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Schade* v. *Schade*, 110 Conn. App. 57, 62–63, 954 A.2d 846, cert. denied, 289 Conn. 945, 959 A.2d 1009 (2008). A finding of a substantial change in circumstances is subject to the clearly erroneous standard of review. See, e.g., *O'Donnell* v. *Bozzuti*, 148 Conn. App. 80, 89, 84 A.3d 479 (2014). "A finding is clearly erroneous 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.) *Perricone* v. *Perricone*, 292 Conn. 187, 209, 972 A.2d 666 (2009).

Generally, "[i]n considering a motion to modify or terminate an alimony or support order pursuant to § 46b-86, the court is limited to a *comparison between the current conditions and the last court order*." (Emphasis added; internal quotation marks omitted.) *Robinson* v. *Robinson*, 172 Conn. App. 393, 401, 160

A.3d 376, cert. denied, 326 Conn. 921, A.3d (2017). If a postjudgment order merely reaffirms the dissolution judgment's original alimony order, however, the court must compare the current conditions to the conditions *existing at the time of the dissolution judgment*. See *Demartino* v. *Demartino*, 79 Conn. App. 488, 495–96, 830 A.2d 394 (2003) ("Because the 1991 order did not modify alimony, but instead merely denied the motion for modification and maintained the alimony award, the appropriate order was the original order of periodic alimony contained within the judgment of dissolution in 1982. To determine properly whether there had been a substantial change in circumstances, the court would have been required to compare the parties' financial circumstances as they existed in 1982 to the parties' financial circumstances as they existed [when the motion for modification was filed] in 2002.").

Having outlined the relevant law, we proceed to an analysis of the plaintiff's claim. The trial court found that the defendant experienced a substantial change in his financial circumstances in 2013 due to a reduction in his income. Our review of the record leads us to conclude that this finding is not clearly erroneous.

Testimonial and documentary evidence was presented that the defendant's income in 2013 was substantially lower than his income at the time of the 2011 dissolution judgment.[7] Specifically, the defendant provided testimony, which was corroborated by his federal tax returns, that his monthly net income was $10,145.25 in 2011 and $6875.58 in 2013. Moreover, the defendant testified that, as a result of this reduction in income,

[7] We note that, although the parties' January, 2013 stipulation was a postjudgment order, it merely reaffirmed the defendant's periodic alimony obligation as set forth in the 2011 dissolution judgment. Thus, the trial court properly compared the defendant's income at the time of the dissolution judgment to his current income. See *Demartino* v. *Demartino*, supra, 79 Conn. App. 495–96.

he had difficulty paying alimony and meeting his other financial obligations. The court was free to credit this evidence and assign to it whatever weight it deemed appropriate. See, e.g., *Zilkha* v. *Zilkha*, 167 Conn. App. 480, 487–88, 144 A.3d 447 (2016) ("[i]t is within the province of the trial court, when sitting as the fact finder, to weigh the evidence presented and determine the credibility and effect to be given the evidence" [internal quotation marks omitted]). This court previously has held that an income reduction of similar magnitude can constitute a substantial change in circumstances. See, e.g., *Arena* v. *Arena*, 92 Conn. App. 463, 467–68, 885 A.2d 765 (2005) (trial court properly found substantial change in circumstances where obligor's annual income decreased from $200,000 to $145,000).

Accordingly, we conclude that the trial court's finding that there was a substantial change in circumstances is not clearly erroneous because there is evidence to support it, and we are without the definite and firm conviction that a mistake has been committed.

B

The plaintiff's second challenge to the court's modification of alimony is that the court improperly determined that the substantial change in circumstances was not caused by the defendant's own neglect or culpable conduct. We disagree.[8]

[8] Related to the plaintiff's claim that the defendant's neglect caused the substantial change in circumstances is her claim that the court improperly denied her motion for a judgment of dismissal. See Practice Book § 15-8 ("[i]f, on the trial of any issue of fact in a civil matter tried to the court, the plaintiff has produced evidence and rested, a defendant may move for judgment of dismissal, and the judicial authority may grant such motion if the plaintiff has failed to make out a prima facie case"). After the defendant rested, the plaintiff moved for a judgment of dismissal, arguing that the defendant had failed to make out a prima facie case that his own neglect did not cause the substantial change in circumstances. In so arguing, the plaintiff reserved the right to present her own evidence. The court apparently never ruled on the plaintiff's motion, and she never presented her own

The following additional facts and procedural history are relevant to our resolution of the plaintiff's second challenge to the court's modification of alimony. As previously explained, the defendant testified that the reduction in his income resulted from a change in the way that he is compensated by the company in which he holds a partnership interest. The defendant's company is in the business of reselling video broadcasting equipment. The defendant and his business partner, Clifford Allen, are the company's only partners and employees. The defendant's role in the company differs slightly from Allen's role. Allen is responsible primarily for sales, while the defendant does consulting, design, deployment, and installation. From 2005 to 2013, Allen and the defendant shared the company's profits equally, regardless of how much sales revenue each of them generated. While this compensation scheme was in effect, Allen and the defendant generated varying amounts of sales revenue, but the defendant was the principal revenue generator.

In 2013, the defendant's company switched to a commission based compensation scheme whereby each partner receives remuneration only for sales that he generates. According to the defendant, the change in the compensation structure was initiated unilaterally by Allen; the defendant was not involved in the decision at all. When the defendant's sales revenue began to

evidence. We need not address separately the court's functional denial of the plaintiff's motion for a judgment of dismissal. The plaintiff never presented any of her own evidence, and we would affirm the denial of her Practice Book § 15-8 motion if the defendant had produced evidence "sufficient to raise an issue to go to the trier of fact." (Internal quotation marks omitted.) *Carter* v. *State*, 159 Conn. App. 209, 223, 122 A.3d 720, cert. denied, 319 Conn. 930, 125 A.3d 204 (2015). Thus, because we conclude that the court properly found, *on the basis of defendant's evidence alone*, that the substantial change in circumstances was not caused by the defendant's neglect, then, a fortiori, the defendant produced evidence sufficient to defeat a Practice Book § 15-8 motion.

decline in 2013, Allen told the defendant that he would force him out of the company if he did not agree to the new compensation scheme. According to the defendant, the following factors had contributed to the decline in his sales revenue: (1) "changes in technology"; (2) "a much more competitive marketplace"; and (3) "influences outside the company," including his devotion of more time to childrearing. The defendant testified regarding the efforts he made, under the new compensation scheme, to increase his sales revenue by expanding his client base. Specifically, the defendant has "ma[de] more outgoing calls to clients to increase their interest in the [company's] technologies . . . participat[ed] in marketing programs with . . . the manufacturers that [produce his company's products]," and attempted to secure "referral business through . . . existing customers."

The defendant testified that he believed that he had no other alternative but to accept the compensation change so he could remain with the company. He "remained with the company in the hope that things might change in the future because [he] needed to have a job and insurance to take care of [his children]." The defendant reasoned that starting *another* company would be the only alternative to remaining with his current company that would have "the same kind of income potential." Starting another company, however, was not a viable option because the defendant lacked "[s]eed money . . . to start a company [and] credit." The defendant's financial affidavit, which was admitted at the hearing as an exhibit, also revealed that, as of December 31, 2013, there was a $93,436 deficit in the defendant's capital account in the company.

The defendant was cross-examined thoroughly about the change to his company's compensation scheme. The defendant denied that the change was the result of a "negotiation" between Allen and him. Rather, the

change, as characterized by the defendant, was the result of being "given [the] choice of either . . . accepting [the compensation change] or leav[ing] the company." When asked by the plaintiff's counsel if he had sought advice from either a lawyer or an independent accountant regarding whether Allen could force him out of the company in this manner, the defendant answered in the negative. The defendant further testified that he did not have any money to pay for the cost of seeking such advice.

In its corrected memorandum of decision, the court credited the defendant's testimony that the change in his company's compensation scheme was not voluntary. Thus, it found that "the evidence does not support any conclusion that the decrease in income was due to voluntary or culpable conduct by the defendant." In so finding, the court reasoned that "[i]t was not unreasonable for [Allen] to insist that they each draw income from [the defendant's company] based on the amount of business they [each] generate[d]."

With these additional relevant facts in mind, we turn to our analysis of the plaintiff's second challenge to the court's modification of alimony. We begin by setting forth the relevant law. "[T]o qualify as a substantial change in circumstances, a change or alleged inability to pay must be excusable and not brought about by the defendant's own fault. . . . Thus, a mere [i]nability to pay does not automatically entitle a party to a decrease of [a support] order. . . . The moving party must show that the alleged change in circumstances is excusable and not brought about by the defendant's own fault, such as through the moving party's own extravagance, neglect, misconduct or other unacceptable reason . . . ." (Citations omitted; internal quotation marks omitted.) *Zilkha* v. *Zilkha*, supra, 167 Conn. App. 488–89; see id., 485–90 (trial court did not abuse its

discretion by denying obligor's motion to modify alimony because alleged decrease in obligor's earning capacity was caused by his culpable conduct, which consisted of violations of federal security laws and perpetration of domestic violence). In determining whether the evidence establishes a substantial change in circumstances, "the [trial] court [is] free to credit or reject all or part of the testimony given . . . . On review, we do not reexamine the court's credibility assessments." Id., 490.

Here, as explained previously, the trial court credited the defendant's testimony that he could not resist the change to his company's compensation scheme. Specifically, it credited the defendant's assertion that Allen gave him an ultimatum that put him squarely in a dilemma. That is, the defendant could either accede to the change to the compensation scheme or leave the company. On the basis of the record before us, we conclude that the trial court properly determined that the defendant's accession to the compensation change was not the result of neglect or other culpable conduct. Specifically, the record reveals that the defendant had begun to experience a decline in sales revenue in 2013 due to a multitude of factors beyond his control. Rather than leave the company for which he worked and in which he was a partner since 2005, the defendant chose to stay with the company and attempt to rehabilitate his declining sales revenue. In so choosing, the defendant reasonably determined that staying with the company was preferable to the uncertainty of leaving it for another opportunity. The reasonableness of this choice is underscored by the fact that the defendant did not have the requisite capital or credit to start a new business and that he preferred to maintain some income so he could meet his financial obligations, including his mortgage and childcare expenses. Accordingly, we conclude that the court properly determined that the

change in the defendant's financial circumstances was not caused by his own neglect or culpable conduct.

The plaintiff argues that what the defendant characterizes as the dilemma of either agreeing to the compensation change or leaving the company actually was a false dilemma. According to the plaintiff, the defendant had a third option, namely, challenging his business partner's authority to make him agree to the compensation change or leave the company. The plaintiff contends that, by admittedly not seeking expert legal or accounting advice regarding whether he could avail himself of this third option, the defendant failed to exercise due diligence. We are not persuaded by this argument because it focuses too narrowly on general notions of legal and accounting principles at the cost of disregarding the specific practical circumstances surrounding the defendant's situation.

As an initial matter, we reiterate that implicit in the defendant's decision to remain with the company was the reasonable determination that this decision was preferable to the uncertainty of seeking other employment. Likewise, it also would be reasonable to determine that remaining with the company was preferable to the uncertainty of resolving, and possibly litigating, a partnership dispute. Moreover, the record amply demonstrated that the defendant did not need expert legal or accounting advice to surmise that his business partner had leverage over him. In other words, regardless of what the principles of partnership law and accounting dictate, the defendant was not necessarily in a position *practically* to oppose the compensation change. This is especially true in light of the facts that the defendant's income began to decline relative to his business partner's, his capital account in the company contained a substantial negative balance, he needed to maintain some level of income to meet his financial obligations,

and he lacked the capital and credit to start another company.

In light of the foregoing, we conclude that the court properly determined that the defendant met his burden of proving that the change in his financial circumstances was not caused by his own neglect or culpable conduct.

C

The plaintiff's third challenge to the court's modification of alimony purports to be a claim that the court applied the wrong legal standard.[9] In actuality, this challenge merely states a garden variety evidentiary claim, namely, that the court improperly excluded relevant testimony as to whether the reduction in his income was due to his neglect or culpable conduct. We are not persuaded by this evidentiary claim.

The following additional facts and procedural history are necessary to our resolution of the plaintiff's third challenge to the court's modification of alimony. As previously set forth in part II B of this opinion, part of the plaintiff's strategy was to establish that the defendant did not prove that the change in his financial circumstances was not due to his own neglect or culpable conduct. Pursuant to this strategy, the plaintiff sought to inquire whether the defendant exercised due diligence in deciding to accede to his business partner's demand that they change the company's compensation scheme. Specifically, she asked the defendant, without objection, whether he sought advice from a legal or accounting expert regarding his business partner's

[9] The plaintiff contends that the court applied the wrong standard by improperly failing to consider whether the defendant's neglect or culpable conduct caused the change in his financial circumstances. As discussed previously in part II B of this opinion, that claim simply is without merit. Indeed, that contention is belied by the court's explicit determination in its corrected memorandum of decision that "the evidence does not support any conclusion that the [defendant's] decrease in income was due to *voluntary or culpable conduct* . . . ." (Emphasis added.)

demand. The defendant answered that he had not sought such advice. The plaintiff then attempted to ask the defendant the following question: "Did you do a Google search to find out whether or not the ultimatum that was put to you about being forced out or accepting less was viable?" In response to the question, the defendant raised an objection, which was sustained by the court. In sustaining the objection, the court stated, inter alia, that it "has permitted cross-examination on this topic. The plaintiff's counsel has asked a number of times questions related to whether [the defendant] sought other advice whether it was legal, whether it was accounting . . . ."

With those additional relevant facts in mind, we now analyze the defendant's third challenge to the court's modification of alimony. We begin by setting forth the relevant law. "[Our Supreme Court has] held generally that [t]he trial court has broad discretion in ruling on the admissibility [and relevancy] of evidence. . . . The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . Additionally, before a party is entitled to a new trial because of an erroneous evidentiary ruling, *he or she has the burden of demonstrating that the error was harmful.*" (Citation omitted; emphasis added; internal quotation marks omitted.) *Urich* v. *Fish*, 261 Conn. 575, 580, 804 A.2d 795 (2002); see also *Connecticut Light & Power Co.* v. *Gilmore*, 289 Conn. 88, 128, 956 A.2d 1145 (2008) ("Even when a trial court's evidentiary ruling is deemed to be improper, we must determine whether that ruling was so harmful as to require a new trial. . . . In other words, an evidentiary ruling will result in a new trial only if the ruling was both wrong and harmful." [Internal quotation marks omitted.]).

"A determination of harm requires [this court] to evaluate the effect of the evidentiary impropriety in the

context of the totality of the evidence adduced at trial. . . . Thus, our analysis [would include] a review of: (1) the relationship of the improper evidence to the central issues in the case, particularly as highlighted by the parties' summations; (2) whether the trial court took any measures, such as corrective instructions, that might mitigate the effect of the evidentiary impropriety; and (3) whether the improperly admitted evidence *is merely cumulative of other validly admitted testimony*. . . . The overriding question [we must answer] is whether the trial court's improper ruling affected the [fact finder's] perception of the remaining evidence." (Citations omitted; emphasis added; internal quotation marks omitted.) *Hayes* v. *Camel*, 283 Conn. 475, 489–90, 927 A.2d 880 (2007). "It is well recognized that any error in the admission of evidence does not require reversal of the resulting judgment if the improperly admitted evidence is merely cumulative of other validly admitted testimony." (Internal quotation marks omitted.) *State* v. *Dehaney*, 261 Conn. 336, 364, 803 A.2d 267 (2002), cert. denied, 537 U.S. 1217, 123 S. Ct. 1318, 154 L. Ed. 2d 1070 (2003).

Having outlined the relevant legal principles, we turn to the present case. Even if we assume, without deciding, that the challenged evidentiary ruling was improper, the plaintiff has failed to demonstrate that it was harmful. Our review of the record reveals that evidence that the defendant failed to perform a "Google search" was cumulative of other evidence indicating he failed to explore the implications of his business partner's demand to change the company's compensation scheme. Indeed, as the trial court itself explicitly noted, the plaintiff was allowed to ask the defendant several times whether he sought any legal or accounting advice regarding that demand. Accordingly, we conclude that the plaintiff has failed to demonstrate that the allegedly improper evidentiary ruling was harmful.[10]

[10] In precluding testimony on whether the defendant performed a "Google search" regarding his business partner's demand that the company change

D

The plaintiff's final challenge to the court's modification of alimony is that the court abused its discretion in reducing the defendant's alimony obligation for the month of September, 2013. We disagree.

The following additional relevant facts guide our resolution of the plaintiff's final challenge to the court's modification of alimony. As previously set forth, the court properly terminated the plaintiff's periodic alimony effective October 1, 2013. See part I of this opinion. In addition to seeking termination of alimony on that date, the defendant also requested that the court reduce his alimony obligation for the month of September, 2013, from $5000 to $0. Although the court modified the defendant's obligation for that month, it reduced that monthly obligation only by $1000.

As set forth previously, "[o]ur review of a trial court's granting or denial of a motion for modification of alimony is governed by the abuse of discretion standard. . . . To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Trial courts have *broad discretion* in deciding motions for modification." (Citation omitted; emphasis added; internal quotation marks omitted.) *Light* v. *Grimes*, supra, 156 Conn. App. 64. "Trial courts are

its compensation scheme, the court also remarked: "I'm not sure whether Google research is reliable or whether this court would consider that." That statement further convinces us that the allegedly improper preclusion of such testimony would not have likely affected the court's ruling. See, e.g., *Sullivan* v. *Metro-North Commuter Railroad Co.*, 292 Conn. 150, 161, 971 A.2d 676 (2009) ("[t]he harmless [impropriety] standard in a civil case is whether the improper ruling would likely affect the result" [internal quotation marks omitted]).

vested with *broad and liberal discretion* in fashioning orders concerning the type, duration and amount of alimony and support . . . .'' (Emphasis added; internal quotation marks omitted.) *Schwarz* v. *Schwarz*, 124 Conn. App. 472, 485, 5 A.3d 548, cert. denied, 299 Con. 909, 10 A.3d 525 (2010).

Mindful of the broad and liberal discretion that a trial court enjoys in fashioning alimony orders, we have no difficulty in concluding that the court's modification of alimony in the present case was not an abuse of discretion. Indeed, the court's modest reduction of alimony by only 20 percent for only one month, the month immediately preceding the termination of alimony, was a proportionate modification under the circumstances of this case. The proportionality of the court's modification is clear in light of that court's finding that the defendant's income during the period for which alimony was modified was approximately 32 percent lower than it was at the time of the dissolution judgment. Furthermore, the court credited the defendant's assertions that he was having difficulty meeting his financial obligations during the period for which alimony was modified. Accordingly, we conclude that the court's modification of alimony for the month of September, 2013, was not an abuse of discretion.

III

MOTIONS FOR CONTEMPT

The plaintiff's final claim is that the trial court improperly denied her motions for contempt. We disagree.

The following additional facts and procedural history are necessary to our resolution of the plaintiff's final claim. The plaintiff filed numerous postjudgment motions for contempt, alleging that the defendant wilfully and intentionally failed to make alimony payments. The motions that are the subject of this appeal are the

plaintiff's November 13, 2014 motions for contempt. In one motion, the plaintiff alleged that the defendant wilfully and intentionally failed to pay alimony pursuant to the dissolution judgment. With respect to the dissolution judgment, which required the defendant to pay $5000 per month in alimony, the plaintiff alleged that the defendant had failed to make $85,200 in monthly alimony payments. In the second motion, the plaintiff claimed that the defendant was in contempt of the January, 2013 stipulation, which required him to make monthly payments of $750 toward his stipulated arrearage of $22,000. The plaintiff alleged that the defendant had failed to make $9000 in such payments.

At the hearing, the plaintiff presented evidence that the defendant had paid some, but not all, of his alimony obligations under the dissolution judgment and the January, 2013 stipulation. Specifically, the plaintiff's evidence showed that the defendant had paid, as of November, 2014, $114,950 of his total $144,000 alimony obligation for the period between the dissolution judgment and the termination of alimony on September 30, 2013. According to the plaintiff's calculations,[11] of the $114,950 that the defendant paid, $31,950 was paid between the January, 2013 stipulation and the January 21, 2015 hearing.

Furthermore, as previously explained, on July 30, 2013, the defendant filed a motion for modification of alimony on the ground that his 2013 income was substantially less than his income at the time of the dissolution judgment. Notwithstanding the defendant's claim that the substantial decrease in income prevented him from making full alimony payments, he continued to make partial alimony payments. Indeed, the parties' evidence undisputedly indicated that, with the exception of a few months, the defendant paid *some* alimony

[11] The defendant's own calculations suggest that he paid $2500 *less* than what the plaintiff's calculations suggest he paid. The court ultimately resolved this discrepancy in the plaintiff's favor by adopting the defendant's calculations.

in the months preceding and following July, 2013. Specifically, the defendant paid $5700 in February, 2013; $3250 in March, 2013; $750 in April, 2013; $750 in May, 2013; $3750 in June, 2013; $750 in July, 2013; $1000 in August, 2013; $1000 in November, 2013; $1500 in December, 2013; $2000 in January, 2014; $3000 in February, 2014; $300 in April, 2014; $100 in May, 2014; $1400 in June, 2014; $1000 in September, 2014; $750 in October, 2014; and $150 in November, 2014. The defendant testified that in the months in which he had no income, he relied on loans from his 401 (K) and the overdraft protection feature of his checking account to fund partial alimony payments.

As previously set forth in considerable detail, the court credited the defendant's testimony that he experienced a substantial decrease in his income in 2013. It also credited his assertion that, as a consequence of that decrease, he had difficulty paying alimony and meeting his other financial obligations. Thus, in light of the fact that the defendant attempted to pay some alimony despite the decrease in his income, the court refused to find the defendant in contempt and stated: "With respect to the plaintiff's motions for contempt, the court also concludes that the defendant attempted to pay the alimony and the prior arrearage despite falling behind due to his decreased income by drawing from his retirement account and other assets. The plaintiff has failed to sustain her burden for a finding of contempt . . . ." (Citation omitted.)

With these additional relevant facts in mind, we turn to our analysis of the plaintiff's claim that the court erred in failing to find the defendant in contempt. "Contempt is a disobedience to the rules and orders of a court which has power to punish for such an offense." (Internal quotation marks omitted.) *In re Jeffrey C.*, 261 Conn. 189, 196, 802 A.2d 772 (2002). "A finding of contempt is a question of fact, and our standard of

review is to determine whether the court abused its discretion in failing to find that the actions or inactions of the [defendant] were in contempt of a court order. . . . To constitute contempt, a party's conduct must be wilful. . . . Noncompliance alone will not support a judgment of contempt. . . . A finding that a person is or is not in contempt of a court order depends on the facts and circumstances surrounding the conduct. The fact that an order has not been complied with fully does not dictate that a finding of contempt must enter. . . . [It] is within the sound discretion of the court to deny a claim for contempt when there is an adequate factual basis to explain the failure to honor the court's order. . . .

"It is therefore necessary, in reviewing the propriety of the court's decision to deny the motion for contempt, that we review the factual findings of the court that led to its determination. The clearly erroneous standard is the well settled standard for reviewing a trial court's factual findings. 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." (Citations omitted; internal quotation marks omitted.) *Auerbach* v. *Auerbach*, 113 Conn. App. 318, 326–27, 966 A.2d 292, cert. denied, 292 Conn. 901, 971 A.2d 40 (2009).

Having outlined the relevant law, we turn to the present case. The court's refusal to find the defendant in contempt is predicated on two findings: (1) the defendant experienced a substantial decrease in income in 2013 that prevented him from fully meeting his alimony obligations, and (2) despite that substantial decrease in income, the defendant made partial alimony payments. Thus, the court concluded, on the basis of those two factual findings, that the defendant's nonpayment of alimony was not wilful because there was an adequate factual basis explaining his nonpayment. We already

have determined that the first relevant finding supporting this conclusion, the substantial decrease in the defendant's income, is not clearly erroneous. See part II A of this opinion. With respect to the second relevant finding, the defendant's partial payment of alimony, our review of the record leads us to conclude that it, too, is not clearly erroneous. Indeed, the plaintiff's own evidence established that the defendant made, during the period in which his income had substantially decreased, numerous partial alimony payments that totaled nearly $30,000. Moreover, to the extent that the defendant had *no* income at some points during that period, he testified that he relied on other financial resources to fund partial alimony payments. Accordingly, because its determination that the defendant's nonpayment of alimony was not wilful is predicated on findings that are not clearly erroneous, the court did not abuse its discretion in denying the plaintiff's motion for contempt.

The plaintiff argues that, even though the defendant made partial alimony payments, the record reflects that he had the means to make larger payments but wilfully chose not to. Specifically, the plaintiff asserts that there was evidence that the defendant spent money on other expenses while paying only "a fraction" of his alimony obligation. The plaintiff's claim is similar to a claim that we rejected in *Auerbach* v. *Auerbach*, supra, 113 Conn. App. 327–28.

In *Auerbach*, an alimony obligee appealed the trial court's denial of her motion for contempt, claiming that the evidence demonstrated that the obligor's nonpayment of alimony was wilful. Id., 326. Specifically, the obligee argued that the obligor's "conduct . . . was consistent with a higher income than he claimed" and that he had the "ability to comply with the court's orders." Id., 327. The obligee also argued that the wilfulness of the obligor's nonpayment was typified by evidence that he made payments to other creditors and that he "continued his lavish lifestyle and pursued his recreational activities." Id. In affirming the trial court's

denial of the obligee's motion, this court reasoned that the trial court could have credited the obligor's testimony that his income declined substantially, that he had to borrow large sums of money to pay for his children's daily expenses and to meet other financial obligations, and that he was unable to meet his alimony obligations. Id., 327–28. The obligor's testimony, therefore, provided an adequate factual basis explaining his failure to pay alimony: "From the [obligor's] testimony . . . the court reasonably could have concluded that [his] financial situation had so deteriorated that he was unable to comply with [his] . . . alimony . . . obligations . . . ." Id., 328.

The defendant's testimony in the present case, similar to the obligor's testimony in *Auerbach*, indicated that his income decreased substantially, that he had difficulty paying living expenses, such as his mortgage and childcare costs, that he was unable to comply fully with his alimony obligations, and that he ultimately resorted to loans to cover his living expenses and partial alimony payments. The trial court here chose to credit that testimony, which it was entitled to do. Notwithstanding the plaintiff's assertions to the contrary, that testimony, if believed, provided an adequate factual basis establishing that the defendant's nonpayment of alimony was not wilful. See id.

On the basis of the foregoing, we conclude that the court did not abuse its discretion in denying the plaintiff's motions for contempt.

The judgment is affirmed.

In this opinion the other judges concurred.

DEEPALI RAY *v.* SURAJIT D. RAY
(AC 38865)

Keller, Mullins and Norcott, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court

granting the defendant's postjudgment motion for an order establishing his child support obligation in accordance with the child support and arrearage guidelines, as set forth in the applicable state regulations (§ 46b-215a-1 et seq.), and from the court's denial of the relief that she had requested in her motion to reargue that ruling. The defendant sought the order when, pursuant to the dissolution judgment, his unallocated alimony and child support obligation had terminated. At the hearing on the motion for order, the parties presented evidence and testimony regarding their respective incomes. The defendant testified that he received deferred compensation in addition to his base salary, but that the amount of such compensation was indeterminate. A child support guidelines worksheet prepared by a family relations officer also was submitted to the trial court. Following the hearing, the trial court granted the defendant's motion and ordered him to pay $288 in child support, which was the presumptive minimum amount pursuant to the schedule in the child support guidelines for parties whose combined net weekly income exceeded $4000. The court also declined to enter a supplemental child support order based on a percentage of the defendant's deferred compensation income as the plaintiff had requested. Thereafter, the trial court granted the plaintiff's motion to reargue but denied the relief requested therein, and this appeal followed. *Held*:

1. Contrary to the defendant's assertion that the plaintiff had failed to provide a record that was adequate for review by failing to comply with the applicable rules of practice (§§ 64-1 and 67-4), the plaintiff's claims were reviewable on appeal; the record included the transcripts of the relevant hearings, and this court was able to readily identify those portions of the transcripts that encompassed the trial court's factual and legal findings with respect to its rulings and to discern the evidentiary basis, or lack thereof, for the arguments advanced by the parties.
2. The plaintiff could not prevail on her claim that the trial court erred by entering an order establishing the defendant's child support obligation without making a finding as to his net income; the record indicated that, in determining the defendant's child support obligation, the trial court had before it the parties' financial affidavits and other evidence as to their net incomes, that the court specifically stated that it had taken all of the evidence presented into account in fashioning its child support order, and that it stated, referencing the child support guidelines worksheet, the amounts of the parties' gross and net incomes that justified its order.
3. This court declined to review the plaintiff's claim that the trial court, in making its findings, improperly relied on an unsworn child support guidelines worksheet that contained information that was contrary to the gross and net incomes set forth in the parties' financial affidavits or testified to by the parties, the plaintiff having failed to properly preserve her claim for appeal: the plaintiff did not object to the submission of the guidelines worksheet during the hearings on the parties'

respective motions or to the trial court's consideration of it on the grounds asserted on appeal, and the plaintiff's motion to reargue did not refer to the guidelines worksheet; moreover, the plaintiff's counsel admitted during the hearing on the motion to reargue that the guidelines worksheet was based on the defendant's financial affidavit, which directly contradicted the plaintiff's claim on appeal.

4. The plaintiff could not prevail on her claim that the trial court improperly failed to take into account the defendant's income in excess of his base salary in determining his child support obligation, and, therefore, that its child support order did not comply with the child support guidelines: there was no indication in the record that the trial court did not consider the evidence regarding the defendant's deferred compensation income, as it specifically stated during the hearings on the parties' respective motions that it had considered all of the relevant evidence and testimony in making its order, and even if it had been provided with sufficient evidence to assign a predictable amount to the defendant's bonus income, it nevertheless had the discretion to order only the presumptive minimum child support amount and to decline to enter any supplemental order given that the parties' combined net weekly base salaries were in excess of $4000 per week; moreover, the court properly exercised its discretion by ordering the presumptive minimum amount of child support under the child support guidelines and declining to enter a supplemental order given the high incomes of the parties, the lack of any evidence as to any specialized or particular financial needs of the parties' minor child, that other unmodified portions of the dissolution decree addressed payment for many additional expenses related to the child, and that the plaintiff presented little evidence to justify a higher amount or to show that the presumptive minimum amount would be inappropriate or inequitable, thereby requiring the application of the deviation criteria in the guidelines.

5. The trial court did not abuse its discretion in denying the relief requested by the plaintiff in her motion to reargue; the plaintiff's counsel essentially argued at the hearing on the motion to reargue that the facts surrounding the defendant's income had not clearly been presented to the court, which was an improper use of a motion to reargue, as the plaintiff did not present any evidence that the court had misapprehended or that could not have been discovered earlier and presented during the hearing on the defendant's motion for order, and she did not request that the court consider any overlooked legal authority or claim.

Argued May 22—officially released October 31, 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 and tried to the court, *Shay*,

J.; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Jacobs*, *J.*, granted the defendant's motion for order and issued an order regarding child support; subsequently, the court, *Jacobs*, *J.*, granted the plaintiff's motion to reargue but denied the relief requested therein, and the plaintiff appealed to this court. *Affirmed.*

Joseph T. O'Connor, for the appellant (plaintiff).

Sarah E. Murray, with whom, on the brief, was *Caitlin R. Trow*, for the appellee (defendant).

Opinion

KELLER, J. The plaintiff, Deepali Ray, appeals from the judgment of the trial court granting the postjudgment motion brought by the defendant, Surajit D. Ray, for an order establishing his child support obligation to the plaintiff in accordance with the state's child support and arrearage guidelines (guidelines), Regs. Conn. State Agencies § 46b-215a-1 et seq. The plaintiff also appeals from the judgment of the trial court, rendered after argument, denying the relief requested in her postjudgment motion for reargument and reconsideration. The defendant sought an order establishing his child support obligation when, pursuant to the judgment of dissolution rendered on August 11, 2008, his unallocated alimony and child support obligation had terminated. On appeal, the plaintiff claims that the court erred by (1) establishing the defendant's child support obligation without making a finding as to his net income, (2) making findings as to the parties' gross and net incomes based upon an unsworn child support guidelines worksheet (guidelines worksheet) prepared by a family relations officer where the information on the guidelines worksheet was contrary to the evidence, and (3) failing to take into account the defendant's income in excess of his base salary when it determined his child support obligation. We affirm the judgment of the trial court.

The following facts, as found by the trial court or apparent from the record, and procedural history are pertinent to our consideration of this appeal. The parties were married on June 26, 1994, and they have one minor child who was born on September 1, 2005. At the time of the dissolution, the plaintiff was thirty-nine years old and in good health. She has a masters degree in business administration and was employed as a financial manager at Starwood Hotels and Resorts, earning a base salary of $92,000 per year. She also was eligible for bonuses. The defendant was thirty-six years old and also in good health. He was employed as an executive director at Morgan Stanley, earning a base salary of $150,000 per year. He too was eligible for bonuses. Following a trial, the court, *Shay*, *J.* dissolved the parties' marriage and made a finding "[t]hat taking into consideration the factors set forth in General Statutes § 46b-82, including the age, education, earnings and work experience of the [plaintiff], in light of the facts and circumstances of this case, a time limited award of alimony is appropriate." The dissolution court also made a finding "[t]hat the combined net weekly income of the parties is $3145; that basic child support is $418 per week; and that the [defendant's] share is $255 per week . . . ."

The court further ordered that in the event that the alimony should terminate for whatever reason and the child was still a minor, commencing with the first day of the first month following such termination, and monthly thereafter, the defendant would pay to the plaintiff a sum consistent with the then existing guidelines, or as the court may otherwise direct, as child support until such time as the child reached the age of eighteen years. In the event, however, that the child turns eighteen years old and is still in high school, pursuant to General Statutes § 46b-84 (b), the child support order shall continue until the first day of the next month following the

child's graduation from high school or his nineteenth birthday, whichever occurs first.

The court also ordered that the child's extracurricular expenses, including summer camp and day care expenses, would be shared by the parties equally. The plaintiff was ordered to maintain and pay for health insurance for the child, so long as it is available to her through her employment at a reasonable cost. In the event that such insurance is unavailable to the plaintiff, the defendant was ordered to "obtain and maintain health insurance for the . . . child at his expense, so long as he shall be obligated to pay child support [or subject to] an educational support order pursuant to General Statutes § 46b-56c, or an order based upon a written agreement of the parties for postmajority educational support." The dissolution judgment incorporated the agreement of the parties that all unreimbursed medical, dental, orthodontic, optical, pharmaceutical, psychiatric, and psychological expenses for the child would be shared by the parties equally. The dissolution court also reserved jurisdiction to enter an educational support order pursuant to § 46b-56c.

Shortly after it rendered its judgment dissolving the marriage, the dissolution court issued an amendment and corrections to its memorandum of decision that amended its original order of unallocated alimony and child support. The dissolution court deviated from the guidelines and entered financial orders providing that the defendant was to pay to the plaintiff $3125 per month as unallocated alimony and child support until the death of either party, the remarriage of the plaintiff, or August 31, 2015, whichever occurred first. In addition, commencing September 1, 2008, for so long as the defendant had an outstanding alimony obligation to the plaintiff, within two weeks after receipt by the defendant of any gross additional cash compensation from his employment, including, but not limited to, any salary,

bonus or incentive pay in excess of his base salary of $150,000, the defendant was to pay to the plaintiff 25 percent of such gross additional cash compensation up to and including the first $200,000 per year of such additional compensation, as additional periodic unallocated alimony and child support, until the death of either party, the remarriage of the plaintiff, or August 31, 2015, whichever occurred first.

On September 4, 2015, the defendant filed a postjudgment motion for order requesting that the court enter an order establishing his child support obligation in accordance with the guidelines, as the plaintiff's alimony had terminated on August 31, 2015.

On October 19, 2015, the court held a hearing on the defendant's motion. At the hearing, both parties presented evidence and testimony regarding their respective incomes, and during the hearing, the guidelines worksheet prepared by a family relations officer was submitted to the court after it noted that it had not been provided with one. The guidelines worksheet reflected a combined net weekly income of $6000 using the parties' base salaries and allowing for permitted deductions.

The defendant requested that the court enter an order of $288 weekly, which was the amount suggested on the guidelines worksheet. The plaintiff submitted into evidence her own child support calculations. The plaintiff requested, on the basis of her calculations, that the trial court order the defendant to pay her child support in the amount of $895 per week, or $3878 per month, and that the court "consider the . . . [defendant's] deferred compensation . . . [a]nd include [it] in providing an order."

The court, after stating that it had considered all of the evidence, including the testimony of the parties, the exhibits, the parties' financial affidavits, and guidelines,

ordered the defendant to pay the requisite presumptive minimum child support in the amount of $288, in accordance with the guidelines.[1] The court did not issue any supplemental child support order based on the deferred compensation the defendant receives in addition to his base salary.

On November 3, 2015, the plaintiff filed a motion for reargument or reconsideration postjudgment (motion to reargue). The court granted the plaintiff's motion and held a hearing on January 20, 2016. Following argument by counsel for both parties, the court denied the plaintiff the relief she requested and determined that its decision of October 19, 2015, would stand, reiterating that it had "considered the . . . guidelines, the statutory factors of criteria . . . [and] all the evidence that was presented, including the financial affidavits and their attachments." This appeal followed.[2] Additional facts and procedural history will be set forth as necessary.

We begin with the well established standard of review relative to domestic relations cases. "An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion

[1] This figure was derived as follows, as reflected on the guidelines worksheet: The basic child support obligation from the schedule of basic child support obligations for families with combined net weekly incomes of $4000 or higher is $473. The plaintiff's share of this amount, based on the percentage of the parties' combined net weekly incomes that her net weekly income comprises, 39.07 percent, was $185. The defendant's share of the $473 basic child support obligation was 60.93 percent, or $288. If the court had decided to award the maximum presumptive amount of child support, the court would have multiplied the recommended percentage on the schedule of basic child support obligations, 12.04 percent, by the parties' combined net weekly incomes and ordered the defendant to pay 60.93 percent of that amount, or $440.

[2] On March 16, 2016, the plaintiff filed a motion for articulation, which the court denied on July 8, 2016. On August 25, 2016, the plaintiff filed a motion for review. On October 7, 2016, this court granted the motion for review but denied the relief requested therein.

or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . 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. . . . [T]o conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. 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." (Citations omitted; internal quotation marks omitted.) *Valentine* v. *Valentine*, 164 Conn. App. 354, 361,141 A.3d 884, cert. denied, 321 Conn. 917, 136 A.3d 1275 (2016).

In *Fox* v. *Fox*, 152 Conn. App. 611, 619 n.3, 99 A.3d 1206, cert. denied, 314 Conn. 945, 103 A.3d 977 (2014), we applied the abuse of discretion standard to our review of a modification of a child support order, reasoning that the claims at issue "challenge the manner in which the court applied the guidelines, not the applicability of the guidelines or the extent thereof" and that "[t]he parties do not dispute that the guidelines governed the court's decision on the plaintiff's motion to modify child support." In the present case, the challenge on appeal is the manner in which the trial court applied the guidelines.[3]

I

Before we address the plaintiff's claims, we must consider the defendant's assertion that the plaintiff has

[3] Review would be plenary if this appeal raised a question of whether, and to what extent, the guidelines apply. See *Unkelbach* v. *McNary*, 244 Conn. 350, 357, 710 A.2d 717 (1998) (interpretation of statutory scheme that

failed to provide an adequate record for review by failing to comply with Practice Book § 64-1 and by failing to support the arguments in her appellate brief with appropriate citations to the record.

First, the defendant argues that the plaintiff failed to comply with Practice Book § 64-1 (a), thereby rendering the record inadequate for review. "If an oral decision is rendered, a signed transcript of the oral decision should be created and filed for use in any appeal. If the court fails to file an oral or written decision, the appellant, who has the duty to provide an adequate record for appellate review; see Practice Book § 61-10; must file a notice to that effect with the appellate clerk in accordance with Practice Book § 64-1 (b)." *Gordon* v. *Gordon*, 148 Conn. App. 59, 66–67, 84 A.3d 923 (2014). In the present case, the court did not file a written memorandum of decision explaining its ruling, nor did it prepare and sign a transcript of its oral ruling as required by Practice Book § 64-1 (a). The plaintiff did not file a motion pursuant to Practice Book § 64-1 (b) providing notice that the court had not filed a written decision or a signed transcript of its oral decision, nor did the plaintiff take any additional steps to obtain a decision in compliance with Practice Book § 64-1 (a).

"When the record does not contain either a memorandum of decision or transcribed copy of an oral decision signed by the trial court stating the reasons for its decision, this court frequently has declined to review the claims on appeal because the appellant has failed to provide the court with an adequate record for review. . . . Moreover, [t]he requirements of Practice Book § 64-1 are not met simply by filing with the appellate clerk a transcript of the entire trial court proceedings.

governs child support determinations in Connecticut constitutes question of law).

. . . Despite an appellant's failure to satisfy the requirements of Practice Book § 64-1, this court has, on occasion, reviewed claims of error in light of an unsigned transcript as long as the transcript contains a sufficiently detailed and concise statement of the trial court's findings." (Citations omitted; internal quotation marks omitted.) *Stechel* v. *Foster*, 125 Conn. App. 441, 445, 8 A.3d 545 (2010), cert. denied, 300 Conn. 904, 12 A.3d 572 (2011); see also *State* v. *Brunette*, 92 Conn. App. 440, 446, 886 A.2d 427 (2005), cert. denied, 277 Conn. 902, 891 A.2d 2 (2006).

Although we do not countenance this violation of our rules of practice, we are not persuaded that the plaintiff's failure to perfect the record as required by Practice Book § 64-1 in the present case is fatal to her appeal because the record before us includes the transcripts of the court hearings and we can readily identify those portions of the transcripts that encompass the court's factual and legal findings with respect to the defendant's motion for order and the plaintiff's motion to reargue.

The defendant also argues that the plaintiff "runs afoul" of Practice Book § 67-4 (c), which provides, in relevant part, that the statement of the nature of the proceedings and of the facts of the case in the appellant's brief "shall be supported by appropriate references to the page or pages of the transcript or to the document upon which the party relies . . . ." The defendant also asserts that the argument section of the plaintiff's brief does not to comply with Practice Book § 67-4 (d) because, as required by this rule, it fails to include "appropriate references to the statement of facts or to the page or pages of the transcript or to the relevant document upon which the [plaintiff] relies . . . ." In his brief, the defendant describes, in detail, a multitude of factual assertions by the plaintiff that he claims are either unaccompanied by any citation to the

record, or are accompanied by citations to the record that do not support her contentions. The defendant claims that insofar as the plaintiff's factual assertions and arguments remain unsupported by appropriate citations to the record, they should be disregarded by this court, citing *Connecticut Coalition Against Millstone* v. *Connecticut Siting Council*, 286 Conn. 57, 87, 942 A.2d 345 (2008) (mere conclusory assertions regarding claim, with no mention of relevant authority and minimal or no citations from the record, will not suffice)

We have reviewed the plaintiff's principal and reply briefs with the defendant's assertions in mind. The plaintiff has not completely disregarded the applicable rules of appellate procedure. In some instances, we find that the plaintiff has provided a citation to the record or to an exhibit. Although at times the portion of the record to which she cites does not seem to support her argument, we cannot fault her attempt to make the arguments that, in her view, are supported by the record. In her reply brief, the plaintiff adequately counters most of the defendant's complaints by clarifying parts of the record where her assertions are supported with adequate citations.

Despite the existence of some deficiencies in the presentation of the appeal, we will review the plaintiff's claims on appeal because we are able, from the trial court record, which consisted of short testimony and only a few exhibits, to discern the evidentiary basis, or lack thereof, for the arguments advanced by both parties.

II

The plaintiff's first claim is that the trial court erred by entering an order establishing the defendant's child support obligation without making a finding as to his net income. We agree with the defendant that the record in this case directly contradicts the plaintiff's claim that

the court did not make a finding as to the defendant's net income.

In ruling on the defendant's motion for order, the court stated: "The court notes that the [guidelines] worksheet indicates a gross income [for the plaintiff] of . . . $3470, and for [the defendant of] $5769. Net incomes [for the plaintiff] of $2344, and for [the defendant] of $3652. The court notes that the [guidelines indicate] a presumptive current support amount of $185 for [the plaintiff] and $288 for [the defendant]. Having considered the exhibits, the testimony of the parties, having reviewed the motion and supporting documentation, the court grants the defendant's motion for order concerning child support postjudgment and orders child support in the amount of $288 per week."

Unlike in *Tuckman* v. *Tuckman*, 308 Conn. 194, 208, 61 A.3d 449 (2013), upon which the plaintiff relies,[4] the basis for the child support order in this case is readily ascertainable and can be verified by noting that the combined net weekly incomes, as indicated on the guidelines worksheet, to which the court referred, exceeded $4000 per week, and that $185 and $288 were the presumptive proportional minimal amounts required of each party by the guidelines. Given that the parties' combined net weekly base salaries were in excess of $4000, the court had the discretion to order, as a minimum, the presumptive child support amount

[4] In *Tuckman*, our Supreme Court concluded that the trial court had abused its discretion in awarding an amount of child support without determining the net income of the parties, mentioning or applying the guidelines, or making a specific finding on the record as to why it was deviating from the guidelines as required by the child support statutes, regulations and guidelines. *Tuckman* v. *Tuckman*, supra, 308 Conn. 208. The combined effect of these omissions on the part of the trial court left open to speculation whether it acknowledged the guidelines but deviated from them without making findings on the record as to how application of the guidelines would be inequitable or inappropriate, or, in the alternative, disregarded the guidelines entirely. Id., 203.

for a combined net weekly income of $4000, which is the highest weekly amount listed on the guidelines schedule.[5] See Regs., Conn. State Agencies § 46b-215a-2c (a) (2).

Even if the phraseology used by the court in "noting" the parties' gross and net incomes cannot semantically be treated as factual findings, as the plaintiff argues, a court's decision on a support order can stand even if it lacks specific findings as to gross and net incomes. A trial court is "not required to make explicit findings as to net income." *Valentine* v. *Valentine*, supra, 164 Conn. App. 369; see also *Hughes* v. *Hughes*, 95 Conn. App. 200, 207–208, 895 A.2d 274, cert. denied, 280 Conn. 902, 907 A.2d 90 (2006).

"[A] court must base its child support and alimony orders on the available net income of the parties . . . . Whether . . . an order falls within this prescription must be analyzed on a case-by-case basis. Thus, while our decisional law in this regard consistently affirms the basic tenet that support and alimony orders must be based on net income, the proper application of this principle is context specific. . . . [T]he trial court is not required to make specific reference to the criteria that it considered in making its decision." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Szynkowicz* v. *Szynkowicz*, 140 Conn. App. 525, 530–31, 59 A.3d 1194 (2013).

In the present case, facially, the court had before it the parties' financial affidavits and other evidence as to their net incomes, and it specifically indicated that it had taken all of the evidence presented into account in fashioning its modified order of child support, which

[5] Whether the court abused its discretion in not ordering that the defendant pay a higher amount in child support based on his deferred stock compensation, which he received in addition to his base salary, is the subject of part IV of this opinion.

it stated was the presumptive amount required by the guidelines. It is sufficient that the court, referencing the guidelines worksheet, actually stated the amounts of gross and net incomes that justified its determination of a modified child support order. Affording the court every reasonable presumption in favor of the correctness of its decision, and absent any indication to the contrary, we assume that the court considered the appropriate evidentiary underpinnings in fashioning its order. See *Hughes* v. *Hughes*, supra, 95 Conn. App. 208; see also *Young* v. *Commissioner of Correction*, 104 Conn. App. 188, 190 n.1, 932 A.2d 467 (2007) (when decision lacks specificity, this court presumes trial court made necessary findings if we are able to infer facts on which court's decision appears to have been predicated), cert. denied, 285 Conn. 907, 942 A.2d 416 (2008).

III

The plaintiff's next claim is that the trial court erred by making findings as to the parties' gross and net incomes based on an unsworn guidelines worksheet prepared by a family relations officer where the information on the guidelines worksheet was contrary to the gross and net incomes set forth in the parties' financial affidavits or testified to by the parties. As part of this claim, the plaintiff also argues that the court should not have considered the guidelines worksheet without its first being submitted into evidence. The defendant argues that this claim was not properly preserved, but if this court decides to review it, the court properly referred to the net incomes reflected on the guidelines worksheet because the information it contained was supported by the evidence presented during the hearing on the defendant's motion for order.[6] We agree with

[6] Practice Book § 25-30, entitled "Statements to Be Filed," provides in relevant part: "(e) Where there is a minor child who requires support, the parties *shall* file a completed [guidelines worksheet] at the time of any court hearing concerning child support . . . ." (Emphasis added.); see *Lusa* v.

the defendant that the plaintiff did not properly preserve either part of this claim.

"It is well settled that a trial court can be expected to rule only on those matters that are put before it. . . . [A] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . . For this court to . . . consider [a] claim on the basis of a specific legal ground not raised during trial would amount to trial by ambuscade, unfair both to the [court] and to the opposing party." (Citations omitted; internal quotation marks omitted.) *Ucci* v. *Ucci*, 114 Conn. App. 256, 261–62, 969 A.2d 217 (2009).[7] In addition, Practice Book § 60-5 provides in relevant part that this court "shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial . . . ."

The plaintiff first argues that because the guidelines worksheet was not entered into evidence, the court was not permitted to rely on it when determining its order as to child support. During the hearings on the defendant's motion for order and on her motion to reargue, however, the plaintiff never objected to the submission of the guidelines worksheet to the trial court or to the court's consideration of it because it had not been marked as an exhibit. The plaintiff's motion to reargue also makes no reference to the guidelines worksheet; rather, her allegations assert that the defendant's financial affidavit was "incomplete and failed to properly declare his income as that term is defined in the [guidelines]."

As to the plaintiff's claim that the guidelines worksheet contained information that was unsupported by

Grunberg, 101 Conn. App. 739, 758–59, 923 A.2d 795 (2007) (trial court can rely on guidelines worksheet not submitted into evidence if figures going into calculations on worksheet substantiated by evidence produced at trial).

[7] The plaintiff does not argue that this court should afford any type of extraordinary review to the present claim.

the evidence, during the hearing on the plaintiff's motion to reargue, her counsel argued that he had "no reason to doubt that [f]amily [r]elations put together a [guidelines worksheet] because they based it on [the defendant's] financial affidavit," an admission that the information contained in the guidelines worksheet to which the plaintiff is now objecting was indeed in evidence. This admission is diametrically opposed to the plaintiff's claim on appeal that the information on the guidelines worksheet was contrary to the gross and net incomes set forth in the parties' financial affidavits or testified to by the parties.

As the plaintiff is objecting to the court's consideration of the guidelines worksheet for the first time on appeal, we decline to review this claim.

IV

The plaintiff's final claim is that the trial court erred by failing to take into account the defendant's income in excess of his base salary when it determined his child support obligation. The defendant counters that the court entered its order of child support after considering both parties' incomes, including income in excess of their respective base salaries, and that ultimately, the court did not abuse its discretion in determining that a supplemental child support order based on the parties' income of indeterminate amounts was not appropriate in this particular case. We agree with the defendant. We address this claim in two parts as it relates to both the court's initial ruling on the defendant's motion for order and its ruling on the plaintiff's motion to reargue, from which the plaintiff also appeals.

A

We first address the plaintiff's challenge to the court's decision on the defendant's motion for order. During the hearing on the defendant's motion, the parties' financial

affidavits were entered as exhibits. The plaintiff's financial affidavit reflected a gross base salary from her employment at GE Capital of $13,878 per month, or $166,536 per year. During the cross-examination of the plaintiff, however, it was revealed that her gross weekly base salary was $3470, for a total gross annual base salary of $180,440. In addition to her base salary, she earned a gross bonus of $2114 per month, or $25,368 per year. She testified that she is paid a bonus once per year.

The defendant's financial affidavit showed his gross base salary from his employment at Morgan Stanley as being $25,000 per month, or $300,000 per year. The defendant testified that he also received deferred compensation in the form of stock in addition to his base salary. Attached as schedules to his financial affidavit were summaries from Morgan Stanley listing in detail his interest in unvested Morgan Stanley stock units and the "Morgan Stanley Investment Management Plan," as well as the vesting and distribution schedules for both. The defendant testified that the deferred compensation he receives from these interests is not guaranteed and that, if his department or he did something wrong, the money could be taken back. Additionally, he testified that even after some of the awards vest, they are not immediately distributed to the defendant in full but, rather, distributed at a much later date, sometimes years after vesting. The defendant pointed out that, with respect to his 2014 W-2 form, the amount reflected as deferred compensation income had vested but had not been distributed and that he had included all of his cash compensation on his financial affidavit.

There is no indication in the record that the court did not consider the evidence of the plaintiff's bonus income from GE Capital and of the defendant's deferred compensation from Morgan Stanley. The former was presented as evidence during the plaintiff's testimony

and through defendant's exhibit B, although she omitted any mention of her bonus income in her financial affidavit. The defendant testified as to the nature of his deferred compensation plan and his receipt of awards of stock from his employer, and also attached documentation describing his past receipt of such compensation to his financial affidavit as a separate schedule. The gist of the plaintiff's claim is that the court should have based its child support order on more than the defendant's net base income from his base salary. On appeal, the plaintiff argues that the court's order is not in compliance with the guidelines. She asserts that the court was *required* either to issue a supplemental child support order based on a percentage of the defendant's deferred compensation income, which is what the plaintiff requested during the hearing on the defendant's motion for order,[8] or that the court should have included the amount of the defendant's deferred compensation income in determining his net weekly income for purposes of establishing his weekly child support obligation.

During the hearing on the defendant's motion for order, the plaintiff submitted into evidence her own child support calculations. In making these calculations, she did not use the defendant's income as stated on his financial affidavit but, rather, included all the income reported on his 2014 W-2 form, and ascribed to the defendant a weekly income of $7434.[9] She also

[8] We note that the plaintiff was self-represented during the hearing on the defendant's motion for order, and represented by counsel during the hearing on her motion to reargue.

[9] It is on the basis of this 2014 W-2 form that the plaintiff apparently justifies her claim that the defendant also may have been receiving other bonus income besides his deferred compensation at the time of the hearing on the defendant's motion for order. The defendant, however, never testified that he received any bonus income other than the deferred compensation listed on the schedule attached to his financial affidavit. Again, the defendant testified that he did not report all of the income noted on his W-2 form as income on his financial affidavit because, although deferred compensation

calculated her own income based on her admittedly understated weekly base income as reflected on her financial affidavit. The plaintiff, however, clearly indicated to the court that the income from the defendant's deferred compensation was not a part of her calculation that resulted in her request for her purported maximum presumptive amount of $895 per week in child support. Rather, she requested that the court consider entering a supplemental order based on a percentage of his deferred compensation income, which she admitted consisted of future unknown amounts. In seeking the $895 per week order, the plaintiff requested that the court order the maximum presumptive amount of child support based on the parties' proportional shares of 12.04 percent of what she claimed was their combined net weekly income of $9674.[10] In light of the circumstances of the present case, in which the parties' combined net weekly income was in excess of $4000, the court's child support order of the presumptive minimum child support amount pursuant to the guidelines was legally proper.

It has long been established that the guidelines, as promulgated by a commission empowered pursuant to legislation enacted in 1989; see Public Acts 1989, No. 89-203; were intended to "substantially [circumscribe] the traditionally broad judicial discretion of the court in matters of child support." *Favrow* v. *Vargas*, 222 Conn 699, 715, 610 A.2d 1267 (1992). "[T]he . . . guidelines shall be considered in *all* determinations of child support amounts within the state and . . . the guidelines consist of the Schedule of Basic Child Support Obligations as well as *the principles and procedures*

benefits had vested and the vesting amounts been reported as income on the W-2 form, they had not been distributed to him as cash compensation.

[10] The court noted that the plaintiff was seeking more in child support than she had been awarded as unallocated alimony and child support by the dissolution court in 2008.

set forth [therein]." (Emphasis in original; internal quotation marks omitted.) *Maturo* v. *Maturo*, 296 Conn. 80, 118, 995 A.2d 1 (2010).

The guidelines that became effective on July 1, 2015, were in effect at the time the court conducted its hearing on the defendant's motion for order. The 2015 guidelines codified developments in recent cases decided by the Supreme Court and this court regarding the consideration of child support order amounts whenever the parties' combined net weekly income exceeds $4000. Child Support and Arrearage Guidelines (2015), preamble, § (e) (5), p. ix.

In *Maturo*, our Supreme Court noted that "[t]he effect of unrestrained child support awards in high income cases is a potential windfall that transfers *wealth* from one spouse to another or from one spouse to the children under the guise of child support." (Emphasis in original.) *Maturo* v. *Maturo*, supra, 296 Conn. 105. The court emphasized that "all child support awards must be made in accordance with the principles established [in the guidelines and any applicable statutes] to ensure that such awards promote equity, uniformity and consistency for children at all income levels. . . . [All child support awards] should follow the principle expressly acknowledged in the preamble [of the guidelines] and reflected in the schedule that the child support obligation as a percentage of combined net weekly income should decline as the income level rises." (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id., 94–95. In *Maturo*, the court faulted the dissolution court's open-ended allocation of 20 percent of the defendant's net bonus income for child support because it was inconsistent with the schedule contained in the guidelines and it violated the principle that a decreased percentage of the parties' combined net weekly income should be awarded as the parties' income level rises. Id., 97.

Consistent with *Maturo* and the guidelines schedule, absent a proper deviation, the trial court could not order the parties, who had a combined net weekly income of more than $4000 and one minor child, to pay less than the presumptive amount set forth in the child support guidelines, i.e., $482,[11] or more than 12.04 percent of their combined net weekly income. See Regs., Conn. State Agencies § 46b-215a-2b (f). In addition, in *Maturo*, the court determined it was error for the dissolution court to fail to provide "any explicit justification for the award of bonus income that was related to the financial or nonfinancial needs or characteristics of the children under . . . § 46b-84 (d).[12] . . . In fact, there is no evidence that the court considered *anything* other than the defendant's income and earning capacity in making the child support award. Thus, absent a finding as to how the additional funds would be used for the benefit of the children and how the award was related to the factors identified in § 46b-84 (d), we conclude that the court exceeded its legitimate discretion." (Emphasis in original; footnotes added.) *Maturo* v. *Maturo*, supra, 296 Conn. 103.

Subsequent to *Maturo*, in *Dowling* v. *Szymczak*, 309 Conn. 390, 400–402, 72 A.3d 1 (2013), the Supreme Court provided further guidance for determining child support obligations in high asset, high income familial situations. Our Supreme Court explained: "[T]he schedule

[11] Although the plaintiff noted during the hearing on the motion to reargue that the court incorrectly found the presumptive amount to be $473, not $482, she has not requested reversal on this ground.

[12] General Statutes § 46b-84 (d) provides: "In determining whether a child is in need of maintenance and, if in need, the respective abilities of the parents to provide such maintenance and the amount thereof, the court shall consider the age, health, station, occupation, earning capacity, amount and sources of income, estate, vocational skills and employability of each of the parents, and the age, health, station, occupation, educational status and expectation, amount and sources of income, vocational skills, employability, estate and needs of the child."

[in the guidelines] sets forth a presumptive percentage and resultant amount corresponding to specific levels of combined net weekly income; the schedule begins at $50 and continues in progressively higher $10 increments, terminating at $4000. . . . This court has recognized that the guidelines nonetheless apply to combined net weekly income in excess of that maximum amount. . . . Indeed, the regulations direct that, [w]hen the parents' combined net weekly income exceeds $4,000, child support awards shall be determined on a case-by-case basis, and the current support prescribed at the $4,000 net weekly income shall be the minimum presumptive amount. . . .

"Either the presumptive ceiling of income percentage or presumptive floor of dollar amount on any given child support obligation, however, may be rebutted by application of the deviation criteria enumerated in the guidelines and by the statutory factors set forth in § 46b-84 (d). . . . In order to justify deviation from this range, the court must first make a finding on the record as to why the guidelines were inequitable or inappropriate . . . . Thus, this court unambiguously has stated that, when a family's combined net weekly income exceeds $4000, the court should treat the percentage set forth in the schedule at the highest income level as the presumptive ceiling on the child support obligation, subject to rebuttal by application of the deviation criteria enumerated in the guidelines, as well as the statutory factors described in § 46b-84 (d). . . . In other words, as long as the child support award is derived from a total support obligation within this range—between the presumptive minimum dollar amount and the presumptive maximum percentage of net income—a finding in support of a deviation is not necessary." (Citations omitted; emphasis omitted; internal quotation marks omitted.)

In *Misthopoulos* v. *Misthopoulos*, 297 Conn. 358, 363, 999 A.2d 721 (2010), the defendant appealed from a trial court's judgment that required him to pay 20 percent of his annual net cash bonus as additional child support on top of a $477 weekly order based on the parties' combined net weekly income. The Supreme Court reversed the judgment after concluding that the trial court did not base this supplemental child support order on the needs of the children and, in addition, improperly deviated from the guidelines, as "any deviation from the schedule or the principles on which the guidelines are based must be accompanied by the court's explanation as to why the guidelines are inequitable or inappropriate and why the deviation is necessary to meet the needs of the child." (Internal quotation marks omitted.) Id., 368.

In the present case, the court found that the parties' combined net weekly income from their respective base salaries was $6000, well in excess of $4000 per week, the highest combined income level promulgated in the schedule. Pursuant to the applicable guidelines codified subsequent to *Maturo* and its progeny, the court could "exercise [its] discretion consistent with the income scope as set forth in [§] 46b-215c (a) (2) [of the Regulations of Connecticut State Agencies] on a case by case basis where the combined income exceeds the range of the schedule. When the combined net weekly income exceeds $4,000, the presumptive support amount shall range from the dollar amount at the $4,000 level to the percentage amount at that level applied to the combined net weekly income consistent with statutory criteria, including . . . § 46b-84 (d) . . . . In exercising discretion in any given case, the . . . trial judge should consider evidence submitted by the parties regarding actual past and projected child support expenditures to determine the appropriate order." Child Support and Arrearage Guidelines (2015), preamble, § (e) (5), p. ix.

It was therefore an appropriate exercise of the trial court's discretion to adhere to the guidelines schedule and to order the presumptive minimum child support amount of $288 per week in the present case. The plaintiff presented limited evidence to the court that would have justified a higher amount. It was her burden to prove that the presumptive minimum child support amount would be inappropriate or inequitable and that an application of the deviation criteria in the guidelines and the statutory criteria contained in § 46b-84 (d) was necessary. In fact, during the hearing on the defendant's motion for order, the plaintiff never argued that any deviation from the guidelines was justified, nor did she refer to the criteria in § 46b-84 (d). She simply demanded, without any real justification, that the court order both the maximum presumptive amount under the guidelines, as well as a supplemental order based on the defendant's deferred compensation income. Other than the expenses listed on her financial affidavit, the veracity of which had been called into question, she presented no other evidence or any testimony regarding the "age, health, station, occupation, educational status and expectation, amount and sources of income, vocational skills, employability, estate and needs" of the parties' minor child; General Statutes § 46b-84 (d); upon which the trial court could base an order deviating from the guidelines or a supplemental child support order based on income derived from the defendant's deferred compensation plan. The plaintiff did not argue that the child's needs dictated a child support order higher than the presumptive minimum amount. Rather, her arguments focused exclusively on what she asserted was the defendant's cash income from the prior year and his receipt of indeterminate deferred compensation. Her request for a child support order of $895 per week, or $3878 per month, was in excess of the base unallocated alimony and child support amount she had been receiving pursuant to the dissolution judgment, suggesting

that she was essentially seeking a continuation of alimony disguised as child support. "[S]upport award[s] may not be used to disguise alimony award[s] to the custodial parent." (Internal quotation marks omitted.) *Maturo* v. *Maturo*, supra, 296 Conn. 105–106.; see also *Brown* v. *Brown*, 190 Conn. 345, 349, 460 A.2d 1287 (1983).

We therefore are not persuaded that the court abused its discretion in ordering $288 per week as child support given the high incomes of both parties, the lack of any evidence as to any specialized or particular financial needs of the child, and the fact that other unmodified portions of the dissolution decree address payment for the many typical additional expenses for a child that are likely to arise—daycare, the child's health needs, the cost of his extracurricular activities, including summer camp, and his potential need for future assistance with college expenditures.

For the same reasons, we conclude that the court acted within its discretion in determining that a supplemental child support order regarding the parties' income of indeterminate amounts was not appropriate or necessary in this particular case. The guidelines provide that child support shall be determined as follows:

"(1) Order requirements

"(A) Specific dollar amount

"The current support order shall include a specific dollar amount of support as a primary element, to be paid on a recurring basis.

"(B) Indeterminate amounts

"The primary requirement of a specific dollar amount of current support shall not preclude the entry of a supplemental order, in appropriate cases, to pay a percentage of a future lump sum payment, such as a bonus.

Such supplemental orders shall be entered when a specific dollar amount of the future lump sum payment has not been ordered and such payment is of an indeterminate amount, subject to clauses (i) and (ii) in this subparagraph:

"(i) for combined net weekly incomes not more than $4,000, the percentage shall be generally consistent with the schedule in subsection (e) of this section;

"(ii) for combined net weekly incomes over $4,000, the order shall be determined on a case by case basis consistent with applicable statutes." Regs. Conn. State Agencies § 46b-215a-2c (c) (1); see also Child Support and Arrearage Guidelines (2015), preamble, § (g) (7).

The court's child support order tracks the language in § 46b-215a-2c (c) (1) of the Regulations of Connecticut State Agencies. The specific dollar amount ordered to be paid by the defendant as child support was $288 per week, which was calculated using the parties' combined net weekly determinate income, i.e., their base salaries. Because the parties' combined net weekly income exceeded $4000 using their base salary income alone, it was within the court's discretion not to make any supplemental order with respect to income of indeterminate amount, as such orders in cases in which the net weekly income exceeds $4000 are to be determined on a case-by-case basis. See Regs. Conn. State Agencies § 46b-215a-2c (c) (1) (B) (ii).

The preamble to the guidelines, referring to "supplemental orders," provides in relevant part as follows: "[S]ometimes when a support order is being set the parties have knowledge of anticipated future payments of an unknown amount, such as a bonus or other incentive based compensation such as stock options, restricted stock, or other stock rights if, and, or when vested or exercisable. While the expected amounts may be substantial, the indeterminate nature of such amounts precludes their inclusion in the gross income of the parent expected to receive them at the time the

order enters.[13] In such cases . . . the most practical way of considering such amounts for purposes of establishing an appropriate amount of support is to treat the amounts separately from the basic current support order, which is to be paid periodically. . . . [W]hen the order is entered, the parties agree or the court orders [that] a percentage of the future amounts shall be obligated as support upon either the receipt of the payment (such as in the event of a bonus), or upon vesting (such as restricted stock or stock options). This approach maintains the integrity of the current support calculation method, since it does not attempt to include indeterminate or speculative amounts in a parent's gross income. It also saves the parties from returning to court to modify the support order to account for receipt of the payment. . . . [F]or combined net weekly incomes over $4,000, [supplemental] order[s] shall be determined on a case by case basis consistent with the determination of the child support order . . . ." (Footnote added.) Child Support and Arrearage Guidelines (2015), preamble, § (g) (7), p. xv.

It appears from the record that, during the hearing on the defendant's motion for order, the self-represented plaintiff understood that the defendant's deferred compensation would be awarded in future indeterminate amounts, but because she claimed she could determine the amount of such awards on the defendant's 2014 W-2 form, she lumped what he testified was additional

[13] In *Maturo* v. *Maturo*, supra, 296 Conn. 106, our Supreme Court distinguished between two types of bonus income, stating: "[W]hen there is a proven, routine consistency in annual bonus income, as when a bonus is based on an established percentage of a party's steady income, an additional award of child support that represents a percentage of the net cash bonus also may be appropriate if justified by the needs of the child. When there is a history of wildly fluctuating bonuses, however, or a reasonable expectation that future bonuses will vary substantially . . . an award based on a fixed percentage of the net cash bonus is impermissible *unless* it can be linked to the child's characteristics and demonstrated needs." (Emphasis in original.)

vested but undistributed deferred compensation into her calculation of his gross and net weekly income, and asked for the maximum presumptive amount pursuant to the guidelines based on that purported income. At a later point in the hearing, however, she asked the court to consider a supplemental order based on a percentage of the defendant's future bonus or deferred compensation payments of unknown amount.

The plaintiff argues that the court did not consider the parties' income of indeterminate amounts in making its orders, which is not the case. The court had before it evidence of the plaintiff's bonus income, as well as evidence that future deferred compensation paid to the defendant in indeterminate amounts could be subject to "claw back," and that it was, at times, distributed years after being awarded. There is no indication in the record that the trial court did not consider the defendant's receipt of deferred compensation, as it specifically noted during the hearings on the defendant's motion for order and the motion to reargue that it had considered all of the evidence and testimony, including the parties' financial affidavits.

The plaintiff also argues that the parties' indeterminate income should have been included in the court's determination of the parties' gross and combined net weekly income when it calculated the weekly support order. This argument is contrary to *Maturo* and its progeny, and the guidelines' regulations conforming to the legal principles established therein.[14] As described previously, in the preamble to the guidelines, "the indeterminate nature of such amounts [of bonus or other

[14] The plaintiff also claims that the defendant's deferred compensation, which already had been distributed in 2015, should have been considered by the court. Any deferred compensation income distributed to the defendant prior to August 31, 2015, however, already was subject to being paid to the plaintiff as unallocated alimony and child support pursuant to the judgment of dissolution. The court was within its discretion not to order child support based on the receipt of those past amounts prior to the date of the court's order, as ordering child support based on those amounts would inequitably

incentive based compensation] precludes their inclusion in the gross income of the parent expected to receive them at the time the order enters." Child Support and Arrearage Guidelines (2015), preamble, § (g) (7), p. xv. The ability of a trial court to make supplemental orders is meant to address specifically the variability and speculative nature of income of indeterminate amounts and "saves the parties from returning to court to modify the support order to account for receipt of the payment." Id.

Even if the court had been provided with sufficient evidence to assign a periodically determined, predictable amount to the defendant's bonus income, it would not be required to be included in the calculation of his gross and net weekly income, but, rather, it would be awarded as a fixed percentage of the routine, consistent annual bonus income in the nature of a supplemental order. Moreover, because the parties' combined net weekly base salaries were already in excess of $4000 per week, the court still had the discretion to order only the presumptive minimum child support amount and to decline to enter any supplemental order, which the plaintiff conceded during the hearing on her motion to reargue.

As we have discussed previously in this part of the opinion, there was little evidence presented by the plaintiff to justify the necessity for an award higher than the presumptive minimum amount required under the guidelines.[15] Accordingly, we conclude that the trial

have permitted the plaintiff to double dip by requiring the defendant to pay support twice based on the same income.

[15] In determining whether to supplement the basic child support obligation with bonus income, the court also must consider the property division and custody schedule, as well as any additional support obligations imposed on the noncustodial parent for education, health care, recreation, insurance, daycare, and other matters. In the present case, the dissolution court entered separate orders requiring the defendant to pay one half of the child's medical, health related and daycare expenses, as well as one half of his extracurricular activities, which "presumably would cover many of the luxuries to which

court did not abuse its discretion in determining its child support order, which was in compliance with the guidelines.

B

Finally, we address the plaintiff's claim that the trial court erred in denying her the relief that she sought in connection with her motion to reargue. After the court granted the plaintiff's motion to reargue, it held a hearing and declined to afford the plaintiff the relief she was requesting. When a trial court grants a motion to reargue and merely reaffirms the underlying judgment, as is the present case, its original decision stands. See *Nelson* v. *Dettmer*, 305 Conn. 654, 676, 46 A.3d 916 (2012). In refusing to grant the plaintiff any relief, the court reiterated that it had considered all of the evidence presented during the hearing on the defendant's motion for order, as well as the child support guidelines and the statutory factors set forth in General Statutes §§ 46b-82, 46b-86 and 46b-215, and that it could see no reason to disturb its earlier ruling. We are not persuaded that the court's ruling reflects an abuse of discretion.

"The granting of a motion for reconsideration and reargument is within the sound discretion of the court. The standard of review regarding challenges to a court's ruling on a motion for reconsideration is abuse of discretion. 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." (Internal quotation marks omitted.) *Shore* v. *Haverson Architecture & Design, P.C.*, 92 Conn. App. 469, 479, 886 A.2d 837 (2012).

children of affluent families are accustomed and would expect to be maintained following a divorce. When not covered by separate orders, however, such expenses are not infinite, and thus are not likely to represent a uniform percentage of a defendant's variable bonus income, regardless of the income level in any given year." *Maturo* v. *Maturo*, supra, 296 Conn. 107.

"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 may also be used to address . . . claims of law that the [movant] claimed were not addressed by the court." (Internal quotation marks omitted.) *Pressley* v. *Johnson*, 173 Conn. App. 402, 407, 162 A.3d 751 (2017).

"A motion to reargue is not a device to obtain a second bite of the apple or to present additional cases or briefs which could have been presented at the time of the original argument." (Internal quotation marks omitted.) *C. R. Klewin Northeast, LLC* v. *Bridgeport*, 282 Conn. 54, 101 n.39, 919 A.2d 1002 (2007). A motion to reargue may also be appropriate where there is newly discovered evidence, that is, evidence that could not have been discovered earlier by the exercise of due diligence. *Durkin Village Plainville, LLC* v. *Cunningham*, 97 Conn. App. 640, 656, 905 A.2d 1256 (2006).

During the hearing on the motion to reargue, the plaintiff attempted to interject, by way of argument only, additional information and explanation concerning the nature of the defendant's deferred compensation and also claimed, without any proof, that the defendant may have been receiving some other form of additional cash bonus. The plaintiff's primary concern was that the court had misapprehended the facts relative to the total amount of the defendant's income. Counsel for the plaintiff stated: "My review of the orders of the court are that they are not in accordance with the . . . guidelines. . . . [The plaintiff] did, in fact, seek to point [that] out to the court . . . but perhaps in a different way than I would do at the present time."[16] Essentially,

[16] The plaintiff's argument here appears to suggest that because she represented herself during the hearing on the defendant's motion for order and, in connection with the motion to reargue, was represented by counsel, the court should afford her an opportunity to permit counsel to revisit matters decided during the hearing. There is no basis in law for this use of the

counsel was arguing that the facts surrounding the defendant's income were not clearly presented to the court during the hearing on the defendant's motion for order. This was an improper use of a motion to reargue, and the court did not abuse its discretion in declining to grant the plaintiff any relief, as the information the plaintiff was relaying to the court did not consist of any prior evidence that the court had misapprehended or that could not have been earlier discovered and presented during the previous hearing on the defendant's motion. The plaintiff also did not request that the court consider any overlooked legal authority or claim. The plaintiff essentially argued, without any additional proof, that the defendant had misrepresented the extent of his income.[17] We conclude that the court applied the well-known standard on motions to reargue in making its decision and did not abuse its discretion in denying the relief sought in the motion to reargue. See, e.g., *Light* v. *Grimes*, 156 Conn. App. 53, 69–70, 111 A.3d 551 (2015) (holding that abuse of discretion was not demonstrated by trial court's refusal to provide relief in connection with motion for reargument).

We further conclude that even if the arguments made by counsel for the plaintiff to the court during reargument had been proper, they would have made little ifference in an appropriate analysis of the defendant's child support obligation. The arguments did not estabdlish any predictable certainty as to the future amounts

motion to reargue, which, for obvious reasons, would have prejudiced the defendant. "This court has always been solicitous of the rights of pro se litigants and, like the trial court, will endeavor to see that such a litigant shall have the opportunity to have his case fully and fairly heard *so far as such latitude is consistent with the just rights of any adverse party*. . . . Although we will not entirely disregard our rules of practice, we do give great latitude to pro se litigants in order that justice may both be done and be seen to be done. . . . For justice to be done, however, *any latitude given to pro se litigants cannot interfere with the rights of other parties, nor can we disregard completely our rules of practice*." (Citation omitted; emphasis added; internal quotation marks omitted.) *Wasilewski* v. *Machuga*, 92 Conn. App. 341, 342, 885 A.2d 216 (2005).

[17] In fact, counsel for the plaintiff properly stated that a more appropriate motion, in the case of fraud being perpetrated on the court by the defendant,

of the defendant's deferred compensation. Counsel for the plaintiff admitted that the value of the defendant's restricted shares of stock "depends on the value of the stock on the day . . . that the restrictions lapse." Essentially, the plaintiff, in reargument, told the court that the defendant made too much money to be ordered to pay only the presumptive minimum child support amount of $288, but other than focusing on the amount of the defendant's income, the plaintiff, following an approach disapproved by the Supreme Court in *Maturo*, failed to establish any misapprehended deviation or § 46b-84 (d) criteria that would justify a ruling that the needs of the parties' minor child required the entry of either a higher weekly amount within the range between the minimum and the maximum presumptive amounts, a deviation from the guidelines to a higher weekly amount, or a supplemental order based on the defendant's bonus income.

We therefore conclude that the court properly exercised its discretion in ordering the defendant to pay child support based on the presumptive minimum amount for a family whose combined net weekly income exceeds $4000. The presumptive amount of $288 was not rebutted adequately by the plaintiff with proof that a higher amount in compliance with the guidelines was necessary, or that an application of the deviation criteria enumerated in the guidelines, as well as the statutory factors described in § 46b-84 (d), appropriately and equitably justified a higher amount of child support.

The judgment is affirmed.

In this opinion the other judges concurred.

would have been a motion to open the judgment, so that the plaintiff could "present to the court . . . a[n] appropriate and full and comprehensive analysis and display of [the defendant's] income . . . ."

DENISE A. GARVEY *v.* STANLEY M. VALENCIS
(AC 38407)

Lavine, Sheldon and Pellegrino, Js.

Syllabus

The plaintiff mother appealed to this court from the judgment of the trial court sustaining the emergency ex parte custody order denying the plaintiff visitation with the parties' minor child. The defendant father was awarded, and has maintained, sole legal and primary physical custody of the child since 2005. In May, 2015, a physical confrontation had occurred between the child and the plaintiff during a regularly scheduled visit at the plaintiff's home. Shortly after that incident, the defendant filed an emergency ex parte order of custody pursuant to the applicable statute (§ 46b-56f), which the court granted, finding that an immediate and present risk of physical or psychological harm to the child existed. The court suspended the plaintiff's visitation rights, denied her any contact with the child and scheduled a hearing on the matter to be held nine days later. The court subsequently conducted an evidentiary hearing on the ex parte application on the scheduled day in May, 2015, and also conducted two hearings in June, 2015, as well as a final hearing in September, 2015. Thereafter, the court issued a memorandum of decision on the ex parte order of custody, finding, by clear and convincing evidence, that its May, 2015 orders were appropriately entered, and that a current, immediate, and present risk of psychological harm to the child existed. *Held*:

1. The plaintiff could not prevail on her claim that the court improperly entered the emergency ex parte custody order in violation of § 46b-56f (c), which requires an effort to hear from the other party, because she was available, desired to participate, and was present in the courthouse when the court entered the ex parte order: the text of § 46b-56f does not require that the court provide a respondent with the opportunity to be heard prior to ordering emergency ex parte relief, as § 46b-56f provides that the court may, prior to or after a hearing, issue an emergency order for the protection of the child if it finds that an immediate and present risk of physical danger or psychological harm to the child exists, and that the applicant submit an affidavit detailing the conditions requiring an emergency ex parte order, stating that the emergency ex parte order is in the best interests of the child, and stating the actions taken to notify the respondent, or if no actions were taken to inform the respondent, explaining why the court should consider such an application on an ex parte basis absent such notification efforts.
2. The plaintiff's claim that § 46b-56f (c) mandates that a hearing be completed within fourteen days after the ex parte emergency order is issued was unavailing; the statute provides that a hearing must be scheduled

no later than fourteen days after the ex parte emergency order is issued, but does not provide that the hearing must be both scheduled and completed within that time period, and, when read together as a consistent whole, it was obvious that the statute contemplates that the hearing may not be completed within fourteen days of the emergency ex parte order, as the statute specifically provides for a postponement and continuance under certain conditions, and to require the hearing to be completed within fourteen days may lead to an absurd result if all parties are unable to present evidence within that time period.

3. The plaintiff could not prevail on her claim that the trial court's ex parte order expired automatically after thirty days, pursuant to the applicable rule of practice (§ 4-5), and that the court, thus, lost jurisdiction over the ex parte application; the court scheduled and commenced the May, 2015 hearing on the ex parte emergency order within fourteen days from the date that the order was issued, and where, as here, the trial court determined on each day of the hearings, on the basis of the evidence presented, that there was good cause for the ex parte order to remain in effect, the order did not automatically expire and remained in effect until the court properly rendered its judgment.

4. The plaintiff could not prevail on her claim that the trial court violated her constitutional right to procedural due process by entering the ex parte custody order and then extending the order for an unreasonably lengthy period of time: it was not necessary for this court to determine at what point a delay in the postdeprivation hearing would become a violation of the plaintiff's right to due process because no constitutional violation occurred, as the plaintiff was provided with ample opportunity to be heard on the matter, and, although the postdeprivation hearing spanned 112 days following the entry of the ex parte emergency order, the plaintiff contributed to the delay by presenting multiple witnesses out of order, filing motions that had to be addressed and expanding the scope of evidence; moreover, the plaintiff waived her right to object to the length of the hearing, given her consent to the four scheduled postponements and continuances, as well as her course of conduct over the 112 days that the hearing took to complete.

5. The trial court's finding that an immediate and present risk of psychological harm to the child existed as a result of the May, 2015 confrontation between the child and the plaintiff was not clearly erroneous and was supported by sufficient evidence in the record; the evidence presented showed that the child was visibly upset immediately following the May, 2015 incident and expressed his desire to never see the plaintiff again, and evidence of a decline in the child's psychological well-being following the incident, as reflected by his academic and behavioral regression, demonstrated that the child was deeply affected by the incident.

Argued April 25—officially released October 31, 2017

Procedural History

Action for custody and visitation rights as to the parties' minor child, brought to the Superior Court in the judicial district of Hartford, where the court, *Simón, J.*, granted the defendant's ex parte application to suspend the plaintiff's visitation rights; thereafter, following evidentiary hearings, the court, *Simón, J.*, rendered judgment sustaining the emergency ex parte custody order, from which the plaintiff appealed to this court; subsequently, the court *Simón, J.*, issued certain orders regarding therapy for the minor child, and the plaintiff filed an amended appeal with this court; thereafter, the court, *Simón, J.*, issued an articulation of its decision. *Affirmed.*

Charles D. Ray, with whom was *Brittany A. Killian*, for the appellant (plaintiff).

John C. Lewis III, with whom, on the brief, was *Juri E. Taalman*, for the appellee (defendant).

Robert J. Kor, for the guardian ad litem of the minor child.

Opinion

PELLEGRINO, J. The plaintiff, Denise A. Garvey, appeals from the judgment of the trial court sustaining the emergency ex parte custody order entered pursuant to General Statutes § 46b-56f[1] denying the plaintiff visitation with the parties' child. The order was entered pursuant to the application of the defendant, Stanley M. Valencis. On appeal, the plaintiff claims that: (1) the court improperly entered and extended the emergency

[1] General Statutes 46b-56f (a) provides: "Any person seeking custody of a minor child pursuant to section 46b-56 or pursuant to an action brought under section 46b-40 may make an application to the Superior Court for an emergency ex parte order of custody when such person believes an immediate and present risk of physical danger or psychological harm to the child exists."

ex parte custody order in violation of § 46b-56f, Practice Book § 4-5, and the plaintiff's constitutional right to due process, and (2) there was insufficient evidence to conclude, as the court did, that the incident giving rise to the emergency ex parte order constituted an immediate and present risk of psychological harm to the child.[2] We affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. The parties, who never married one another, lived together for a short period of time during the plaintiff's pregnancy but separated after the birth of their child in 2002. The parties have litigated custodial, support, and visitation rights throughout the child's life. Notably, the defendant was awarded, and has maintained, sole legal and primary physical custody of the child since 2005 pursuant to a Massachusetts judgment. The file in the present matter was opened on June 8, 2007, by action of the plaintiff, who sought to register and enforce the foreign child custody determination in this state. Emily Moskowitz, an attorney, was appointed

[2] Our review of the record revealed that on January 5, 2017, the court reopened the proceedings and ordered the child to call the plaintiff once a week and permitted the child to call her more often, if the child so desired. By order dated June 21, 2017, this court, sua sponte, ordered the parties to file briefs as to why this matter is not moot. The plaintiff filed a brief arguing that the matter is not moot because there is practical relief that can be granted to her. See, e.g., *In re Jeremy M.*, 100 Conn. App. 436, 445, 918 A.2d 944, cert. denied, 282 Conn. 927, 926 A.2d 666 (2007) (appeal was not moot where "[u]pon reversal of the court's judgment, the respondent would not be a delinquent, and, therefore, the erasure of his records would be automatic and mandatory"); *Williams* v. *Ragaglia*, 64 Conn. App. 171, 175, 779 A.2d 803 (2001), aff'd, 261 Conn. 219, 802 A.2d 778 (2002) (reversing trial court's dismissal of administrative appeal from revocation of foster care license where "practical relief would be the benefit of having a clean record with the department"). Specifically, the plaintiff argued that the May 12, 2015 orders are still in effect to prevent her from having physical contact with the child. She is only permitted to contact him by a weekly phone call. There is practical relief that could be granted if she prevails on appeal. We agree with the plaintiff, and accordingly, we address the merits of her claims on appeal.

guardian ad litem for the child on May 20, 2010. On January 14, 2013, the parties stipulated to a gradual increase in the plaintiff's visitation with the child.

On May 10, 2015, a physical confrontation occurred between the child and the plaintiff during a regularly scheduled visit at the plaintiff's home. Believing that his mother was recording a conversation with him regarding a prior missed visit, the child texted the defendant stating that he was not okay and wanted to return home. Shortly thereafter, the defendant received a phone call from the child, but the child did not respond when the defendant answered the phone. Instead, the defendant heard a "significant disturbance." Specifically, the defendant heard the child say: "Let me go. You're hurting me. Stop." The defendant's wife and the guardian ad litem also listened to the disturbance. After conferring with the guardian ad litem, the defendant drove to the plaintiff's home to pick up the child. The police were notified of the situation and arrived at the plaintiff's home shortly after the defendant. The police, after interviewing the plaintiff and the then twelve and one-half year old child, and consulting with the guardian ad litem, concluded it was in the child's best interest for him to return home with the defendant.

On May 12, 2015, the defendant filed an application for an emergency ex parte order of custody pursuant to § 46b-56f. That same day, the court found that an immediate and present risk of physical or psychological harm to the child existed and granted the defendant's ex parte application. The court suspended the plaintiff's visitation rights and denied her any contact with the child. The court scheduled a hearing on the matter to be held nine days later, on May 21, 2015.

The court conducted an evidentiary hearing on the ex-parte application over several days: May 21, June 16, June 24, and September 1, 2015. Both parties were

represented by counsel. Numerous witnesses testified, including the parties and the guardian ad litem. On September 2, 2015, the court issued a memorandum of decision on the ex parte order of custody, finding "by clear and convincing evidence that the orders of May 12, 2015, were appropriately entered and that a current, immediate and present risk of psychological harm to the child exists."

Following oral argument before us, we ordered the court to articulate the factual basis for its conclusion that a current, immediate, and present risk of psychological harm to the child existed. The court articulated, among other things, that several days after the incident, the child was still visibly upset and stated to the guardian ad litem that the plaintiff had "hit him, pushed him, and threw him to the ground," and that "he never wanted to see [her] again." The child's therapist recommended that the child not see the plaintiff at that time. According to the child's tutor, the child was upset, aggravated, and agitated. His ability to stay focused and complete his work had decreased drastically. Academically, the child had regressed by two to three years. Additional facts will be set forth as necessary.

I

The plaintiff claims that the court improperly entered, and extended, the emergency ex parte custody order in violation of § 46b-56f (c), Practice Book § 4-5, and the plaintiff's constitutional right to due process under the fourteenth amendment of the United States constitution and article first, §§ 8 and 10, of the constitution of Connecticut.

As a preliminary matter, we identify our standard of review and the general legal principles relevant to our analysis. "The interpretation and application of a statute, and thus a Practice Book provision, involves a

question of law over which our review is plenary." *Wiseman* v. *Armstrong*, 295 Conn. 94, 99, 989 A.3d 1027 (2010). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Wilton Meadows Ltd. Partnership* v. *Coratolo*, 299 Conn. 819, 825, 14 A.3d 982 (2011).

A

The plaintiff first claims that the court improperly entered the emergency ex parte custody order in violation of § 46b-56f (c). Specifically, the plaintiff argues that such relief was improper because § 46b-56f (c) "requires an effort to hear from the other party," and that she was available, desired to participate, and was present in the courthouse when the court entered the ex parte order. The defendant argues that § 46b-56f (b) does not require the court to hear from the respondent. We agree with the defendant.

In accordance with § 1-2z, we begin with the relevant text of § 46b-56f. Section 46b-56f (b) provides that: "The application [to the Superior Court for an emergency ex parte order of custody] shall be accompanied by an affidavit made under oath which includes a statement (1) of the conditions requiring an emergency ex parte order, (2) that an emergency ex parte order is in the

best interests of the child, and (3) of the actions taken by the applicant or any other person to inform the respondent of the request or, if no such actions to inform the respondent were taken, the reasons why the court should consider such an application on an ex parte basis absent such actions." Section 46b-56f (c) provides in relevant part that: "The court shall order a hearing on any application made pursuant to this section. If, prior to or after such hearing, the court finds that an immediate and present risk of physical danger or psychological harm to the child exists, the court may, in its discretion, issue an emergency order for the protection of the child . . . ."

The text of § 46b-56f (b) does not require that the court provide a respondent with the opportunity to be heard prior to ordering emergency ex parte relief. See *Kinsey* v. *Pacific Employers Ins. Co.*, 277 Conn. 398, 408, 891 A.2d 959 (2006) ("when the language is read as so applied, it appears to be *the* meaning and appears to preclude any other likely meaning" [emphasis in original; internal quotation marks omitted]). Section 46b-56f (b) merely provides that the applicant submit an affidavit detailing the conditions requiring an emergency ex parte order, stating that the emergency ex parte order is in the best interests of the child, and stating the actions taken to notify the respondent, or if no actions were taken to inform the respondent, explaining why the court should consider such an application on an ex parte basis absent such notification efforts.[3] Accordingly, we conclude that § 46b-56f does not require the court to hear from the respondent before

[3] In the present case, the defendant submitted a three page affidavit with his application in which he attested to the facts of the May 10, 2015 incident, the child's emotional state following the incident, and the child's unwillingness to visit with the plaintiff in the future. He further attested that his counsel had spoken with the plaintiff to inform her of the defendant's intention to file the application.

granting the application for emergency ex parte order of custody and issuing appropriate ex parte orders.

B

The plaintiff next claims that § 46b-56f (c) mandates that a hearing be *completed* within fourteen days after the ex parte emergency order is issued. We disagree. Section 46b-56f (c) provides in relevant part: "The court shall order a hearing on any application made pursuant to this section. If, prior to or after such hearing, the court finds that an immediate and present risk of physical danger or psychological harm to the child exists, the court may, in its discretion, issue an emergency order for the protection of the child . . . . If relief on the application is ordered ex parte, the court shall *schedule* a hearing not later than fourteen days after the date of such ex parte order. If a postponement of a hearing on the application is requested by either party and granted, no ex parte order shall be granted or continued except upon agreement of the parties or by order of the court for good cause shown." (Emphasis added.)

To resolve the plaintiff's claim, we turn to the tenets of statutory construction. The court's fundamental objective in construing a statute "is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, [the court] seek[s] to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning . . . § 1-2 directs [the court] first to consider the text of the statute itself and its relationship to other statutes." (Internal quotation marks omitted.) *Allen* v. *Commissioner of Revenue Services*, 324 Conn. 292, 307–308, 152 A.3d 488 (2016), cert. denied, U.S. , 137 S. Ct. 2217, 198 L. Ed. 2d 659 (2017). "It is the duty of the court to interpret

statutes as they are written . . . and not by construction read into statutes provisions which are not clearly stated. . . . Moreover, principles of statutory construction require the court to construe a statute in a manner that will not frustrate its intended purpose or lead to an absurd result." (Citation omitted; internal quotation marks omitted.) *Mack* v. *LaValley*, 55 Conn. App. 150, 165–66, 738 A.2d 718, cert. denied, 251 Conn. 928, 742 A.2d 363 (1999).

A statute is plain and unambiguous when "the meaning . . . is so strongly indicated or suggested by the [statutory] language as applied to the facts of the case . . . that, when the language is read as so applied, it appears to be the meaning and appears to preclude any other likely meaning." (Emphasis omitted; internal quotation marks omitted.) *Kinsey* v. *Pacific Employers Ins. Co.*, supra, 277 Conn. 407–408. "[S]tatutes should be interpreted so as to form a rational, consistent whole, rather than an irrational and inconsistent statutory scheme. . . . Another principle is that statutes should be interpreted so as to avoid bizarre or unworkable results . . . and courts should interpret statutes on the premise that the legislature intended to accomplish reasonable result. . . . The final principle is that statutes should be interpreted so as to conform to common sense, rather than so as to violate it." (Citations omitted; internal quotation marks omitted.) *Commission on Human Rights & Opportunities* v. *Housing Authority*, 117 Conn. App. 30, 45–46, 978 A.2d 136 (2009), appeal dismissed, 302 Conn. 158, 24 A.3d 596 (2011).

The question presented is the meaning of the language "schedule a hearing." The plaintiff contends that "schedule a hearing" requires the court to hold a hearing and complete it within fourteen days of the ex parte emergency order. We do not agree. The statute provides that a hearing must be scheduled no later than fourteen days after the ex parte emergency order is issued. It

does not provide that the hearing must be scheduled and completed within that time period. We reject the plaintiff's invitation to read words into a statute that are not there. If the legislature wanted the hearing completed within fourteen days, it knows how to enact legislation consistent with its intent. See *Fedus* v. *Planning & Zoning Commission*, 278 Conn. 751, 771 n.17, 900 A.2d 1 (2006).

When § 46b-56f (c) is read together as a consistent whole, it is obvious that the statute contemplates that the hearing may not be completed within fourteen days of the emergency ex parte order. The statute specifically provides for a postponement and continuance under certain conditions. To require the hearing to be completed within fourteen days may lead to an absurd result if all parties are unable to present evidence within that time period. The statute promotes the best interest of the child by establishing an expeditious procedure by which the court can promptly protect the child from physical and psychological harm and protect the due process right of the child's parent. The notion that a hearing concerning the custody of a minor child can invariably be completed within fourteen days of the date the emergency ex parte order is issued is unrealistic in light of the schedules of the court and counsel. Common sense would dictate that the hearing continue until all parties have been given an opportunity to present their respective cases. For the foregoing reasons, the plaintiff's claim fails.[4]

[4] The plaintiff cited several cases as support for her claim that "schedule a hearing" means complete the hearing. The cases cited do not stand for that proposition. *Pendleton* v. *Minichino*, Superior Court, judicial district of Hartford-New Britain, Docket No. 506673 (April 3, 1992) (6 Conn. L. Rptr. 241), upheld the constitutionality of General Statutes § 46b-15, which permits a court to issue an ex parte order temporarily suspending visitation rights until the date of the hearing that must be held no later than fourteen days following the issuance of the order. Id., 247. The language of § 46b-15 is virtually identical to § 46b-56f (c) and the case is not inconsistent with the present matter. *Morera* v. *Thurber*, 162 Conn. App. 261, 131 A.3d 1155 (2016), concerns the construction of the word "shall" with respect to when a hearing

C

The plaintiff next claims that the court's ex parte order expired "automatically" after thirty days pursuant to Practice Book § 4-5. The plaintiff argues that because the order expired, the court lost jurisdiction over the ex parte application, and the order entered pursuant to the court's memorandum of decision was "a nullity." We do not agree.

Practice Book § 4-5 (b) provides in relevant part that: "When an application for a temporary injunction is granted without . . . a hearing, the court shall schedule an expeditious hearing as to whether the temporary injunction should remain in effect. Any temporary injunction which was granted without a hearing shall automatically expire thirty days following its issuance, *unless the court, following a hearing, determines that said injunction should remain in effect.*" (Emphasis added.)

Section 46b-56f (c) provides in relevant part: "If relief on the application is ordered ex parte, the court shall schedule a hearing not later than fourteen days after the date of such ex parte order. If a postponement of a hearing on the application is requested by either party and granted, no ex parte order shall be granted or continued except upon agreement of the parties or by order of the court *for good cause shown*." (Emphasis added.)

In the present case, the court scheduled and commenced a hearing on the ex parte emergency order within fourteen days from the date that the order was issued. On the first day of the hearing, the plaintiff was permitted to present testimony from some of her witnesses during the time allotted to the defendant to

must be held; it does not address when the hearing must be completed. In *State* v. *Reddy*, 135 Conn. App. 65, 42 A.3d 406 (2012), this court was asked to determine whether a fourteen day hearing requirement contained in General Statutes § 29-38c (d) was mandatory or subject to waiver.

accommodate the schedules of some of the plaintiff's witnesses. At the conclusion of the first day of the hearing, the court stated: "So what I'll do at this time . . . the current orders remain in place as to the ex parte order. I will order the parties to go down and see [the scheduling coordinator] in regards to a new schedule. . . . I know [that the guardian ad litem], based on other cases I had with her, is on vacation next week. . . . So, I'll try and, you know, schedule you in." Counsel for the plaintiff, Martha Dean, stated, "okay." In other words, the plaintiff did not object to the court's continuing the emergency ex parte order.

The hearing continued on June 16, 2015. The following colloquy transpired between the court and Dean:

"[Attorney] Dean: I'm going to move again in the short term to have the normal parenting plan restored immediately. This child has a therapist. [The child] has sole custody with [the defendant]. He lives with [the defendant]. We're talking only about visitation.

"We've heard no testimony of any substantial, significant injury. In fact, we heard testimony to the contrary from the police and from the [guardian ad litem], and we move, again, on the spot, right now, asking the court to put the current orders in place until we can get to the end of this hearing.

"The Court: Attorney Dean, you're out of line. The evidence that I've heard really is not as you say it, and again, I'm giving you, still, the opportunity to put on your witnesses. But [I do not], based on what I've heard here so far, have the same mindset that you have. My orders remain in place." The plaintiff did not further object to the continuance of the emergency ex parte order.

The hearing reconvened on the afternoon of June 24, 2015, at which time the court stated, in part: "So, all

right, folks, look, we're reaching our third day of hearings on the emergency ex parte order. . . . So, I'd like to move this along as quickly as we can." Immediately thereafter, Dean asked that one of the plaintiff's witnesses be taken out of order. The court granted the request.

At the conclusion of the hearing on the afternoon of June 24, 2015, the court indicated to counsel that there would be a two month continuance due to the schedules of two other judges. The court stated: "I will have to do what I need to do based on the evidence that's presented when the hearing finally concludes. But by then, three and one-half months will have passed since the original incident date. It will be, I believe, appropriate if the parties determine it to be in the child's best interest that [the parties] perhaps have a conversation with the guardian ad litem between now and September 1, [2015], two months from now, in regards to current orders and/or what may be the future of this particular case."

"[Attorney] Dean: Your Honor, the important thing to know—we can't get into discussions, but on something as incredible as this, that this mother's ability to see her child has been conditioned on (indiscernible) the removal action of the guardian ad litem. That is so unethical and unscrupulous [that] I have to bring it to your attention.

"The Court: Attorney Dean, I have had the opportunity to listen to all the testimony so far. I don't see your concern.

"[Attorney] Dean: I don't get how (indiscernible) schedules. . . .

"The Court: [A]s I've stated, there is going to be a two month continuance because of the scheduling of

the two judges. So, I believe if it's something the attorneys wish to do, they should discuss the matter with the guardian ad litem, and see if there is any middle road here that would be appropriate. If not, we just continue, and we'll see you back here September 1, [2015].

"[Attorney] Dean: Your Honor, could I ask one last request, and that is because we are so close to the close of the moving party's evidence, that if even for an hour or so, this could be concluded, we could at least move for the failure to make out a prima facie case on the evidence and allow . . . .

"The Court: Counsel, there is no way that I'm going to listen to that type of motion based on what I've heard. It's just not going to happen." The plaintiff did not object.

Here, the trial court determined following each day of hearing, on the basis of the evidence presented, that there was good cause for the ex parte order to remain in effect. Therefore, the order did not automatically expire and remained in effect until September 2, 2015, when the final orders were entered. Accordingly, the court retained jurisdiction over the orders and properly rendered judgment in its September 2, 2015 memorandum of decision.

D

The plaintiff's fourth claim is that the court violated her constitutional right to procedural due process under the fourteenth amendment to the United States constitution and article first, §§ 8 and 10 of the constitution of Connecticut by entering and extending the ex parte custody order. Specifically, the plaintiff argues that a postdeprivation hearing spanning 112 days following the entry of an ex parte emergency order is unreasonable, and that § 46b-56f (c) should be invalidated as

applied to the facts of her case. In response, the defendant argues that the plaintiff had her opportunity to be heard and "caused much of the delay . . . by her own requests and motions."

As a preliminary matter, we identify our standard of review and the general legal principles relevant to our analysis. The due process clause demands that an individual be afforded adequate notice and a reasonable opportunity to be heard when the government deprives her of a protected liberty interest.[5] See *Mathews* v. *Eldridge*, 424 U.S. 319, 333–34, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." (Internal quotation marks omitted.) *State* v. *Joyner*, 225 Conn. 450, 470–71, 625 A.2d 791 (1993). The United States Supreme Court has construed the due process clause to further require that a postdeprivation hearing "proceed and be concluded without appreciable delay." *Barry* v. *Barchi*, 443 U.S. 55, 66, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1979).

The following additional facts are relevant to this claim. The evidentiary hearing began on May 21, 2015, with the plaintiff's counsel being permitted to call three of her witnesses out of order.[6] On June 16, 2015, before continuing with testimony, the court addressed the plaintiff's pending motion in limine to preclude certain evidence and the testimony from the guardian ad litem.

[5] The parties do not dispute that a protected liberty interest has been implicated. Indeed, a parent has a fundamental liberty interest in the "companionship, care, custody, and management of his or her children . . . ." (Internal quotation marks omitted.) *Fish* v. *Fish*, 285 Conn. 24, 117, 939 A.2d 1040 (2008). Therefore, a parent may not be deprived of his or her fundamental liberty interest without being afforded procedural due process. See generally *Mathews* v. *Eldridge*, 424 U.S. 319, 333–34, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

[6] The record also indicates that the court had a date available in between the May 21, 2015 and June 16, 2015 hearing dates, however, the plaintiff or her attorney indicated she was unavailable.

The motion was summarily denied. On June 24, 2015, the hearing began with the plaintiff's counsel calling another witness out of order. Additionally, the plaintiff expanded the scope of evidence by introducing testimony concerning a missed visitation on May 6, 2015, an event which did not give rise to the ex parte proceeding. The May 6, 2015 visitation topic was at issue during each of the four days of the hearing on the ex parte emergency order. On the last day of hearing, the court admonished the plaintiff's counsel for her "protracted litigious presentation."[7]

The record, when taken as a whole, indicates that the plaintiff was given ample opportunity to be heard on the matter. The plaintiff called seven witnesses, many of whom were called out of order, delaying the defendant's case-in-chief. Additionally, the plaintiff filed a number of motions that needed to be addressed during the hearing. Furthermore, the court granted the plaintiff wide latitude in litigating the validity of the order, including expanding the scope of testimony. On the basis of the foregoing facts, we conclude that the plaintiff contributed to the delayed resolution of this matter.

"At some point, a delay in the post-termination hearing would become a constitutional violation." *Board of Education* v. *Loudermill*, 470 U.S. 532, 547, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985); see also id. (finding that nine month adjudication is not "unconstitutionally lengthy per se"). Here, however, we need not determine at what point a delay in the postdeprivation hearing would become a violation of the plaintiff's constitutional rights because we conclude that no constitutional violation occurred, as the plaintiff was provided with

[7] Specifically, the court stated: "[Y]ou have mounted an extremely, I want to say, protracted litigious presentation that is self-serving, that can only be characterized as evading the factual basis of this case. I have allowed you voluminous latitude and yet you continue, continue to take advantage of the court's opportunity to address the matters in an appropriate fashion."

a reasonable opportunity to be heard and she contributed to the delay of the proceedings.

E

Alternatively, we conclude that the plaintiff waived her right to object to the length of the hearing, given her consent to the four scheduled postponements and continuances, and her course of conduct over the 112 days that the hearing took to complete.

We begin by examining our law regarding the general concept of waiver. "[M]andatory time limitations must be complied with absent an equitable reason for excusing compliance, including waiver or consent by the parties." (Internal quotation marks omitted.) *Lostritto* v. *Community Action Agency of New Haven, Inc.*, 269 Conn. 10, 35–36, 848 A.2d 418 (2004). "[W]aiver is an intentional relinquishment or abandonment of a known right or privilege. . . . It involves the idea of assent, and assent is an act of understanding. . . . The rule is applicable that no one shall be permitted to deny that [she] intended the natural consequences of [her] acts and conduct. . . . In order to waive a claim of law it is not necessary . . . that a party be certain of the correctness of the claim of its legal efficacy. It is enough if [she] knows of the existence of the claim and of its reasonably possible efficacy." (Internal quotation marks omitted.) *State* v. *Kitchens*, 299 Conn. 447, 469, 10 A.3d 942 (2011). "Waiver does not have to be express, but may consist of acts or conduct from which waiver may be implied. . . . In other words, waiver may be inferred from the circumstances if it is reasonable to do so." (Internal quotation marks omitted.) *Stewart* v. *Tunxis Service Center*, 237 Conn. 71, 80–81, 676 A.2d 819 (1996).

As set forth in part I C of this opinion, at the end of the May 21, 2015 hearing, the court directed the parties to the case flow office to schedule additional dates for the hearing, emphasizing that the current ex parte order would remain in place as the hearing continued. The

plaintiff did not object. The record indicates that the parties then reported to case flow and agreed to continue the hearing to June 16, June 24, and September 1, 2015. The record reveals that the court had a date available prior to June 16, 2015, but the plaintiff or her counsel were unavailable. On June 16, 2015, the plaintiff raised concerns about the length of the hearing, as it became apparent that the hearing would likely conclude on September 1, 2015. On June 24, 2015, the plaintiff asked that the hearing be concluded sooner than September 1, 2015. After this request was denied by the court, she then asked for an extra hour so that the defendant could conclude his case-in-chief, and the plaintiff could move to dismiss on the ground that the defendant had failed to make out a prima facie case. The court denied the plaintiff's request, stating that it would not consider such a motion on the basis of the facts established. On September 1, 2015, the plaintiff, without prior notice to the court or the defendant, moved to terminate the hearing pursuant to Practice Book § 4-5, claiming for the first time that her constitutional right to due process had been violated by continuing the hearing. Following oral argument, the court denied the plaintiff's motion. The plaintiff then objected to proceeding with the hearing, but was forced to proceed by order of the court.

"Our Supreme Court has long held that [a party] may not pursue one course of action at trial for tactical reasons and later on appeal argue that the path he rejected should now be open to him." (Internal quotation marks omitted.) *State* v. *Barber*, 64 Conn. App. 659, 669–70, 781 A.2d 464, cert. denied, 258 Conn. 925, 783 A.2d 1030 (2001). Here, the plaintiff agreed to the dates upon which the hearing was scheduled. Therefore, on the basis of the plaintiff's acts, conduct, and surrounding circumstances, we determine that she impliedly waived her right to object to the length of the hearing.

II

The plaintiff also claims that the court lacked sufficient evidence to support its finding that an immediate and present risk of psychological harm to the child existed, pursuant to § 46b-56f. Specifically, the plaintiff argues that "psychological harm" under § 46b-56f requires a greater showing than was provided, and that the defendant failed to provide testimony from a mental health expert or disinterested fact witness to establish a risk of psychological harm.[8] We disagree.

"The proper standard of proof in a trial on an order of temporary custody is the normal civil standard of a fair preponderance of the evidence. . . . We note that [a]ppellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. 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. . . . With those principles in mind, we will review the evidence presented at the hearing . . . to determine whether the court's determination is supported by the evidence in the record." (Internal quotation marks omitted.) *In re Paul O.*, 125 Conn. App. 212, 218, 6 A.3d 1209 (2010).

The court was presented with the following relevant evidence. The police interviewed the child at the plaintiff's home following the May 10, 2015 incident. They

[8] We are unpersuaded by the plaintiff's claim that there was no testimony from a disinterested fact witness. The record indicates that the plaintiff continually challenged the guardian ad litem's ability to remain independent, impartial, objective, and fair. The court, however, made no such finding.

noted that he was "extremely upset; his face was flushed, his eyes were red, and was crying with tears running down his face." The child repeatedly stated that he wanted to go home. The police provided the child with his *Miranda* rights,[9] and stated that this might have contributed to the child's emotional state. The court, however, found the reading of the child's *Miranda* rights "to be less significant in comparison to the overall events of the day in question." After speaking with the plaintiff, the defendant, the child, and the guardian ad litem, the police concluded that "it would be appropriate and in the child's best interest [for him] to go home with [the defendant] because they did not believe that there would be a civil visitation past that point."

The guardian ad litem testified as a fact witness and in her legal capacity at the June 16 and September 1, 2015 hearings. Specifically, she testified that she overheard a portion of the May 10, 2015 altercation via telephone and that she heard the child say "don't hit me . . . don't touch me . . . don't push me." The guardian ad litem also met with the child a couple of days after the incident. At that meeting, the child was still visibly upset and told the guardian ad litem that the plaintiff had "hit him, pushed him and threw him to the ground" and that "he never wanted to see [her] again." The guardian ad litem spoke with the child's therapist, who recommended that the child not see the plaintiff "at this time." She also spoke with the child's tutor, who indicated that the child was now very upset, very aggravated, and agitated. The tutor also indicated that the child's ability to stay focused and complete his work had decreased drastically, and he had regressed back to where he was two or three years ago. The defendant and his wife similarly testified that the child's

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

academics had regressed. In addition, the child wet his bed directly following the incident. On the basis of the evidence presented, the court concluded, by both a fair preponderance of the evidence and by clear and convincing evidence, as was set forth in detail in its articulation, filed on May 22, 2017, that there existed an immediate and present risk of psychological harm to the child. Therefore, the court concluded it was in the child's best interest to grant the defendant's application and order that the child's visitation with the plaintiff cease.

We conclude that there was sufficient evidence to support the court's conclusion of an immediate and present risk of psychological harm to the child as a result of the incident on May 10, 2015, at the plaintiff's home. Although § 46b-56f does not contain explicit criteria for the court to consider when analyzing an "immediate and present risk of psychological harm," we cannot conclude that the court's finding was clearly erroneous in light of the evidence presented, which revealed that the child was deeply affected by the May 10, 2015 incident. He was visibly upset immediately following the incident and expressed his desire to never see the plaintiff again. There was evidence of a decline in the child's psychological well-being following the incident, including evidence of his academic and behavioral regression. The evidence is sufficient to support the court's conclusion.

The judgment is affirmed.

In this opinion the other judges concurred.

STEPHEN J. BRUNO *v.* LISA BRUNO
(AC 37473)

Alvord, Mullins and Beach, J.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from certain postjudgment orders of the

trial court. On appeal, the defendant claimed, inter alia, that the trial court, in vacating prior awards of postjudgment interest, exceeded the specific direction of a remand order from this court, which had directed the trial court to vacate a judgment granting the plaintiff's motion to modify his alimony obligation and valuing a certain bank account as of the date on which the defendant withdrew her prior appeals, rather than the date of the dissolution. *Held*:

1. The trial court properly vacated awards of postjudgment interest that previously had been awarded in connection with an alimony arrearage and the bank account in dispute between the parties, and did not exceed the specific direction of this court's mandate on remand: in vacating the judgment granting the plaintiff's motion to modify his alimony obligation in accordance with this court's remand order, the court also vacated an associated award of postjudgment interest, which had been calculated by reference to the plaintiff's modified alimony obligation and, thus, was inextricably intertwined with the court's earlier decision to grant the plaintiff's motion for modification; moreover, the trial court, which vacated the judgment valuing the bank account, properly determined that it also had to vacate an award of postjudgment interest that had been based on that bank account, which was inextricably intertwined with the court's earlier, erroneous decision to value the account on the basis of an incorrect date, and by vacating the awards of postjudgment interest, the court properly put the parties in the same condition as they were in before the court rendered judgment granting the motion to modify and valuing the bank account.

2. The trial court did not abuse its discretion in awarding the defendant interest with regard to an alimony arrearage and the bank account in dispute between the parties: in awarding the defendant postjudgment interest on the bank account, the court explicitly considered the surrounding circumstances of the case, including the plaintiff's history of nonpayment and the court's repeated efforts to determine the value of the bank account, and it properly determined that the detention of the defendant's money was wrongful, pursuant to statute (§ 37-3a), only after September 30, 2014, the date on which the court had determined the value of the bank account; moreover, in awarding postjudgment interest on the alimony arrearage, the court relied on its prior calculation of the total arrearage that had accrued between February, 2009 and April, 2014, awarding interest on the basis of all of the alimony that the plaintiff had withheld since the judgment of dissolution was rendered, rather than individually on each of the missed weekly payments, and nothing in § 37-3a required the compounding of interest; furthermore, the court did not abuse its discretion in awarding interest at a rate of 4 percent, as the court explicitly considered the facts and circumstances of the underlying case, acknowledging that the plaintiff repeatedly had failed to comply with court orders and had engaged in continuous and

persistent contumacious conduct, and that it was awarding the defendant postjudgment interest to compensate her for the loss of the use of money she otherwise would have had available to her from 2009, and the court acted within its discretion to award interest at a rate lower than 10 percent.

3. The trial court properly held the defendant in contempt for violating a court order: the underlying order was sufficiently clear and unambiguous as to support a judgment of contempt, as the court issued a clear oral order instructing the defendant to hold certain proceeds from the sale of certain real property in escrow, and the defendant failed to place any proceeds in escrow following the sale of the property, and there was no merit to the defendant's claim that her actions were not wilful because she had no reason to believe that the court's instructions were not codified in its written order, as the defendant was present when the trial court explicitly stated that it was not granting the defendant's proposed order as it was written, which did not include instructions to hold sale proceeds in escrow, and that there were additional oral orders it made restricting the procedure upon a sale.

Argued April 12—officially released October 31, 2017

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Danbury and tried to the court, *Hon. Sidney Axelrod*, judge trial referee; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Winslow*, *J.*, granted the plaintiff's motion to modify alimony, and the plaintiff appealed and the defendant cross appealed to this court, which dismissed the plaintiff's appeal, reversed the judgment in part, and remanded the case with direction to deny the motion to modify alimony; subsequently, the court, *Winslow*, *J.*, entered orders as to the valuation of a certain asset, and the defendant appealed to this court, which reversed the judgment as to the valuation of that asset and remanded the case for further proceedings; thereafter, the court, *Winslow*, *J.*, granted the defendant's motion for contempt; subsequently, the court, *Winslow*, *J.*, granted the defendant's motion for order regarding real estate and issued other certain orders; thereafter, the court, *Shaban*, *J.*, denied the plaintiff's motion to

modify alimony and issued certain orders regarding alimony and a certain asset; subsequently, the court, *Winslow*, *J.*, granted the plaintiff's motion for clarification regarding the real estate order and issued certain orders; thereafter, the court, *Shaban*, *J.*, denied the defendant's motion to reargue the alimony orders, and the plaintiff appealed and the defendant cross appealed to this court, which dismissed the plaintiff's appeal; subsequently, the court, *Shaban*, *J.*, granted the plaintiff's motion for contempt, and the defendant filed an amended cross appeal; thereafter, the court, *Shaban*, *J.*, granted the defendant's motions for an award of interest; subsequently, the court, *Shaban*, *J.*, granted the defendant's motions to reargue but denied the relief requested therein, and the defendant filed an amended cross appeal. *Affirmed.*

Lisa Bruno, self-represented, the appellant (defendant).

Opinion

BEACH, J. This appeal arises out of several postjudgment orders following the judgment of the trial court dissolving the parties' marriage. On appeal, the defendant, Lisa Bruno, claims that the court erred in (1) vacating prior awards of postjudgment interest on remand from this court, (2) employing an incorrect time frame and improper rate in calculating subsequent awards of postjudgment interest, and (3) finding her in contempt for failure to follow a court order. We affirm the judgment of the trial court.

The following facts are relevant to this appeal. On March 17, 2008, the court rendered a judgment dissolving the defendant's twenty-one year marriage to the plaintiff, Stephen Bruno. The court ordered, among other things, that the plaintiff pay the defendant $4000 per week in alimony, distribute to the defendant certain assets in a Charles Schwab bank account (Schwab

account), and cooperate in the sale of marital property located at 111 Spring Valley Road in Ridgefield. The defendant appealed from the judgment of dissolution, but ultimately withdrew her appeal on August 31, 2009.

Approximately four months after the judgment of dissolution was rendered, the plaintiff moved to modify his alimony obligation, alleging that his earning capacity had been reduced. On February 26, 2009, the court granted the motion and reduced the plaintiff's alimony obligation. The plaintiff appealed from the judgment, and the defendant cross appealed.[1] This court dismissed the plaintiff's appeal on the basis of his "continuous contemptuous conduct." *Bruno* v. *Bruno*, 132 Conn. App. 341 n.1, 31 A.3d 860 (2011). In considering the defendant's cross appeal, this court concluded that there had been "no distinct and definite change in the plaintiff's circumstances that would warrant modification of his alimony obligations," and ordered that "the judgment is reversed only as to the granting of the plaintiff's motion to modify alimony and the case is remanded with direction to deny the motion . . . ." Id., 346, 357.

Prior to this court's decision on the alimony modification appeal, the defendant also filed a motion for contempt for the plaintiff's failure to distribute to her any portion of the Charles Schwab account. The trial court granted the defendant's motion on June 7, 2010. Approximately one month later, in connection with the granting of the defendant's motion for contempt, the court, *Winslow*, *J.*, conducted a hearing to determine the specific amount owed to the defendant pursuant to the division of the Schwab account. In calculating the amount owed, the court determined the value of the

[1] The defendant's cross appeal from the judgment granting the plaintiff's motion to modify eventually was consolidated with her subsequent appeal from the court's March 30, 2010 judgment valuing the Schwab account.

account as of August 31, 2009, the date on which the defendant withdrew her appeal from the judgment of dissolution, rather than March 17, 2008, the date on which the judgment of dissolution was rendered. The court also awarded the defendant postjudgment interest on the Schwab account based on the account's value as of August 31, 2009.

The defendant appealed from the court's order, arguing that the account should have been valued as of the date that the judgment of dissolution was rendered. This court reversed the judgment of the trial court. We noted that the trial court "improperly ordered that assets in the Schwab account be divided based on the value of the account on the date the stay associated with defendant's appeal from the dissolution judgment was terminated, rather than the value of the account on the date of dissolution," and remanded the case "for further proceedings in accordance with this opinion." *Bruno* v. *Bruno*, supra, 132 Conn. App. 351, 357.

On January 31, 2014, the court, *Shaban*, *J.*, issued an order notifying the parties that a hearing would be conducted in order to determine "any alimony arrearage" and to address "[t]he division of the Schwab account." The court conducted the hearing on February 24 and April 7, 2014. In a September 30, 2014 memorandum of decision, the trial court, in accordance with this court's instructions, denied the plaintiff's motion for modification of his alimony obligation. The court determined that "the amount found to be in arrears must be vacated in light of the Appellate Court's ruling reversing the modification of alimony. Such an amount must be redetermined by this court." The court also noted that the defendant previously had been awarded interest on the outstanding alimony arrearage, and held that "[t]hat order is also vacated in light of the Appellate Court finding error as to the modification of alimony. This court takes no action on the issue of the award of

interest on any alimony order and directs the defendant to reclaim the motion if she wishes to address anew the issue of interest." Similarly, with respect to the Schwab account, the court held that "based on the Appellate Court's finding of error in the valuation of the Schwab account, the prior award of interest is also erroneous and cannot be granted."

On October 16, 2014, the defendant filed a motion to reargue, which the court denied on January 22, 2015. The plaintiff appealed from the court's decision on remand, but his appeal was dismissed. The defendant then filed the present cross appeal from the judgment vacating the awards of interest.

While her cross appeal was pending, the defendant filed motions for interest on the money owed to her pursuant to the alimony arrearage and to the division of the Schwab account. On October 9, 2015, after multiple hearings, the court awarded the defendant postjudgment interest at a rate of 4 percent on both the alimony arrearage and the Schwab account. The court determined that interest was to begin to accrue on the Schwab account as of September 30, 2014, the date of the trial court's decision following the remand, and on the alimony arrearage as of April 7, 2014, the date of the hearing in which the alimony arrearage had been calculated. The defendant filed motions to reargue. The court granted the motions, but denied the relief requested therein. The defendant subsequently amended the pending cross appeal to include her claim that the court had improperly awarded postjudgment interest.

While the defendant was involved in court proceedings regarding the alimony arrearage and the Schwab account, she filed a motion for order with respect to the marital property at 111 Spring Valley Road, arguing that the plaintiff had failed to comply with the court's

order that he cooperate in the sale of the property. The court, *Winslow*, *J.*, held a hearing on the motion on August 6, 2010. After noting orally that any "proceeds above $300,000 are to be held in escrow pending further hearing and—and decision by the court," the court issued a written order in which it "assign[ed] to the defendant, Lisa Bruno, all right, title, and interest of Stephen Bruno in the property located at 111 Spring Valley Road, Ridgefield, [Connecticut]." Additionally, the court noted orally that it was "not really granting the order as written [by the defendant]," and that the written order was "not an order in this case, but a document for the land records" prior to issuing the written order.

The defendant subsequently sold the property for $3,700,000, resulting in net proceeds of $1,902,890.41. She did not place any of the proceeds of the sale in escrow. The plaintiff subsequently filed a motion for contempt. The court granted the plaintiff's motion, and the defendant amended the present cross appeal to include an appeal from the court's finding of contempt. We will address each of the defendant's claims in turn, setting forth additional facts and procedural history as necessary.

I

The defendant first claims that the trial court improperly exceeded the specific direction of this court's mandate when, on remand, it vacated awards of postjudgment interest that previously had been awarded in connection with the alimony arrearage and the Schwab account. We disagree.

We begin by setting forth the relevant standard of review. "Determining the scope of a remand is a matter of law because it requires the trial court to undertake a legal interpretation of the higher court's mandate in light of that court's analysis. . . . Because a mandate

defines the trial court's authority to proceed with the case on remand, determining the scope of a remand is akin to determining subject matter jurisdiction. . . . At the outset, we note that, [i]f a judgment is set aside on appeal, its effect is destroyed and the parties *are in the same condition as before it was rendered*. . . . As a result, [w]ell established principles govern further proceedings after a remand by this court. In carrying out a mandate of this court, the trial court is limited to the specific direction of the mandate as interpreted in light of the opinion." (Citations omitted; emphasis altered; internal quotation marks omitted.) *Hurley* v. *Heart Physicians, P.C.*, 298 Conn. 371, 383–84, 3 A.3d 892 (2010).

As set forth previously, with respect to the alimony arrearage, the trial court properly followed this court's mandate on remand and vacated the judgment granting the plaintiff's motion to modify his alimony obligation. In vacating that judgment, the court noted that it was also vacating the associated award of postjudgment interest. The interest award had been calculated by reference to the plaintiff's modified alimony obligation, and was therefore inextricably intertwined with the court's earlier decision to grant the plaintiff's motion for modification. The court's decision to vacate the award of postjudgment interest on remand was consistent with the notion that, when a judgment is set aside, the "effect is destroyed and the parties are in the same condition as before [the judgment] was rendered." (Internal quotation marks omitted.) Id., 383. By vacating the award, the court properly put the parties in the same condition as before the 2009 judgment granting the plaintiff's motion to modify his alimony obligation was rendered. As such, the trial court properly interpreted this court's mandate with respect to the issue of alimony, and did not exceed the specific direction of this court's mandate on remand.

Similarly, with respect to the Schwab account, the trial court properly followed this court's mandate on remand and vacated the judgment which valued the Schwab account as of the date on which the defendant withdrew her appeals, rather than the date of dissolution. The trial court determined that it must also vacate an award of postjudgment interest that had been based on the value of the Schwab account on the date the defendant withdrew her appeals, and was therefore inextricably intertwined with the court's earlier, erroneous decision to value the account as of that date. By vacating the award of postjudgment interest, the court properly put the parties in the same condition as before the judgment improperly valuing the Schwab account was rendered. As such, the trial court properly interpreted this court's mandate on remand, and did not exceed the specific direction of the mandate.

II

The defendant next argues that the court, in ruling on her reclaimed motions for interest, abused its discretion in awarding interest on the Schwab account and on the alimony arrearage accruing from September 30, 2014, and April 7, 2014, respectively, and at a rate of 4 percent, rather than a rate of 10 percent. We disagree and affirm the judgment of the trial court.

We begin by setting forth the relevant standard of review. "An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . [T]o conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or

could not reasonably conclude as it did." (Citations omitted; internal quotation marks omitted.) *Demartino* v. *Demartino*, 79 Conn. App. 488, 492–93, 830 A.2d 394 (2003).

A

The defendant argues that the court erred in determining that the awards of postjudgment interest on the Schwab account and on the alimony arrearage were to accrue from September 30, 2014, and April 7, 2014, respectively. We disagree.

The court awarded the defendant interest on both the Schwab account and the alimony arrearage pursuant to Connecticut General Statutes § 37-3a.[2] "[Section] 37–3a permits interest to accrue on money awarded in a civil action [only] after it has become payable by virtue of the court's judgment." (Emphasis omitted; internal quotation marks omitted.) *Picton* v. *Picton*, 111 Conn. App. 143, 156, 958 A.2d 763 (2008), cert. denied, 290 Conn. 905, 962 A.2d 794 (2009). "Because § 37–3a provides that interest 'may be recovered' . . . it is clear that the statute does not require an award of interest in every case in which money has been detained after it has become payable." (Emphasis omitted.) *Sosin* v. *Sosin*, 300 Conn. 205, 228, 14 A.3d 307 (2011). "Whether interest may be awarded depends on whether the money involved is payable . . . and whether the detention of the money is or is not wrongful under the circumstances." (Internal quotation marks omitted.) Id., 229. "[I]n the context of § 37-3a, a wrongful detention of money, that is, a detention of money without the legal

[2] General Statutes § 37-3a states, in relevant part, that "interest at the rate of ten per cent a year, and no more, may be recovered and allowed in civil actions or arbitration proceedings under chapter 909, including actions to recover money loaned at a greater rate, as damages for the detention of money after it becomes payable."

right to do so, is established merely by a favorable judgment on the underlying legal claim . . . upon a finding that such an award is fair and equitable. . . . [T]he fact that a defendant has a legal right to withhold payment under the judgment during the pendency of an appeal is irrelevant to the question of whether the plaintiff is entitled to interest under § 37-3a." *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, 310 Conn. 38, 48–49, 74 A.3d 1212 (2013).

i

With respect to the interest awarded on the Schwab account, the court, *Shaban, J.*, held that it would be "fair and equitable to award postjudgment interest from September 30, 2014 . . . until the amounts due out of the Schwab account as set forth in [the court's September 30, 2014] decision are paid." The court noted that "the plaintiff has had access to the funds since the date of the dissolution and has made no payments whatsoever," and that "the defendant has been deprived of the use of part or all of the funds due her for over seven years." The court finally noted that the award of interest was intended "to compensate the defendant for the loss of the use of money that she otherwise would have had . . . ."

In determining whether the court "either incorrectly applied the law or could not reasonably conclude as it did"; (internal quotation marks omitted) *Demartino* v. *Demartino*, supra, 79 Conn. App. 493; we note that the trial court has very broad discretion in awarding postjudgment interest. To determine whether the court abused its broad discretion, we must determine whether, in holding that interest on the Schwab account should begin to accrue on September 30, 2014, the court applied the correct standards for exercising its discretion pursuant to § 37-3a.

As mentioned, when the court decided that interest should begin to run from September 30, 2014, the defendant filed a motion to reargue. In response to that motion, the court explained its reasoning as follows: "[T]he value of the Schwab account was not established by court order until September 30, 2014; that order having come about due to an appeal by the parties on the issue of the court's valuation of the account. The Appellate Court found error in the court's original calculation and remanded the matter back to the trial court to establish the value of the account, which it did on September 30, 2014. In *Sosin* v. *Sosin*, [supra, 300 Conn. 245–46 n. 26], our Supreme Court upheld an award of interest from the date of a trial court's order on a party's postjudgment motion. That court specifically noted in footnote 26 that the trial court's award of interest running from the date of its order on the plaintiff's motion to reargue was supported by the record and was proper under General Statutes § 37-3a. Id. It also noted that in considering statutes awarding interest, unlike General Statutes § 37-3b, Section 37-3a contains no similar language requiring that interest be computed from the date of judgment or twenty-one days thereafter." (Footnote omitted; internal quotation marks omitted.)

In *Sosin* v. *Sosin*, supra, 300 Conn. 210, the trial court, on March 22, 2005, dissolved a marriage and issued a memorandum of decision. After the decision was issued, the plaintiff discovered that the court had "misstated the value of eight pieces of furniture, resulting in an overstatement of their value to the plaintiff of $459,700 . . . awarded a painting to both parties and failed to award another painting to either party . . . [and] stated that the value of one of the seventeen bank or brokerage accounts was $57,650,000 when the parties had agreed that the account had a balance of $54,000,000, resulting in an overstatement of the value to the plaintiff of $3,650,000." Id., 211. The plaintiff filed

a motion to reargue, which the trial court granted on September 8, 2005, reducing the award from $24,000,000 to $23,834,900. Id., 212.

The plaintiff subsequently failed to pay the defendant any of that award. Id. On November 10, 2005, after the defendant filed a motion for contempt, the plaintiff paid the defendant $20,006,819, which was $3,828,081 less than the award ordered by the court. Id. In response to the defendant's request for interest on the amount improperly withheld, the court ordered the plaintiff to pay "[i]nterest at the legal rate . . . on said sum from September 8, 2005, the date on which the court had modified its original order in response to the plaintiff's initial motion to argue." (Internal quotation marks omitted.) Id., 213.

In affirming the trial court's award of interest, our Supreme Court held that "[i]n the present case, the trial court determined that the plaintiff's retention of $3,828,081 after the trial court had issued its September 8, 2005 order was wrongful under the circumstances and, therefore, that interest on the amount . . . began to accrue as of September 8, 2005. We must assume that the trial court determined that, until that time, the plaintiff's retention of the money was not entirely unjustified." Id., 247 n.26. In rendering this decision, the court noted that "the trial court has broad discretion under § 37-3a to determine . . . the amount of interest based on the trial court's determination of whether the detention of money, or any portion thereof, was wrongful under all of the circumstances." Id., 246–47 n.26.

In awarding the defendant postjudgment interest in the present case, the court explicitly considered the surrounding circumstances, including the plaintiff's history of nonpayment, and the court's repeated efforts to determine the value of the Schwab account. The

court then determined that the detention of the defendant's money was wrongful, for the purposes of § 37-3a, only after September 30, 2014, the date on which the court determined the value of the Schwab account. Although an earlier date may have been within the court's discretion, we cannot say that the court abused its discretion by the use of that date.[3] Because the court appropriately considered all of the circumstances of both the plaintiff's detention of the funds and the nature of the case in rendering its decision, we conclude that the court did not abuse its broad discretion in awarding

[3] As this court set forth in great detail in *Bruno* v. *Bruno*, supra, 132 Conn. App. 352–54, the determination of precisely how much the plaintiff owed the defendant pursuant to the division of the Schwab account was in flux for several years. We explained: "Pursuant to the terms of the judgment of dissolution, the defendant was awarded $300,000 out of the Schwab account, which the court identified as containing $2,451,343.62 as of August 31, 2007. In addition, the court ordered that a debt in the amount of $22,826 was to be paid out of the Schwab account. The remainder of the Schwab account was to be divided equally between the parties. As previously noted, the defendant filed several appeals that stayed the property distribution provided for in the judgment of dissolution. See Practice Book § 61–11. On September 2, 2008, the defendant filed a motion to terminate the stay, which the court, *Hon. Sidney Axelrod*, judge trial referee, denied on October 14, 2008. On August 31, 2009, the defendant withdrew her appeals. The plaintiff, however, did not transfer the assets in the Schwab account, prompting the defendant to file a motion for contempt on September 18, 2009. The court, *Winslow*, *J.*, heard argument on the motion for contempt on December 22, 2009. The court did not hold the plaintiff in contempt, but ordered that the plaintiff comply with the dissolution orders forthwith. In addition, the court held that, for purposes of dividing the account, the parties were to determine the value of the account as of the date of dissolution. On January 4, 2010, the plaintiff appealed from Judge Winslow's order on the motion for contempt. The defendant filed a motion to terminate the stay associated with that appeal on January 14, 2010.

"On March 8, 2010, the court heard argument on the defendant's motion to terminate the stay. At the hearing, the plaintiff testified that a certain asset in the Schwab account had decreased in value since the date of dissolution due to market conditions. The plaintiff also testified that he had withdrawn funds from the Schwab account to meet his living expenses. At the conclusion of the hearing, the court issued an order on the defendant's motion to terminate the stay, concluding that no stay was in place, but, to the extent that there was a stay, it was terminated. In addition, the court ordered that the 'division of assets will be as of the date the defendant withdrew her appeal.' The defendant filed a motion to reargue on March 15, 2010, which the court denied by memorandum of decision filed March

the defendant postjudgment interest to begin on September 30, 2014.

ii

With respect to the alimony arrearage, the court awarded the defendant postjudgment interest as follows: "[4] percent on $976,627.70 from April 7, 2014 to December 8, 2014; [4] percent on $1,116,627.70 from December 9, 2014 to August 9, 2015 and [4] percent on [$1,256,627.70] from August 10, 2015 until paid in full." The $976,627.70 sum on which the court ran interest from April 7, 2014, to December 8, 2014, represents the

30, 2010. In its memorandum of decision, the court held that the account was to be divided as of August 30, 2009, the date the defendant withdrew her appeals. The court concluded that any funds withdrawn by the plaintiff needed to 'be added back in to determine the amounts due to each party as of August 30, 2009.' The court also held that '[a]ny interest or dividends added to the account from the [date of dissolution] to August 30, 2009, and any diminution [in value] of the account due to the market conditions should not be attributed as a benefit to or assessed as a burden against one party or the other.'

"On July 2, 2010, the court conducted a hearing to determine the amounts owed to each party out of the Schwab account. After calculating the value of the account as of August 31, 2009, the court awarded the defendant $1,404,337.26 and $88,941.36 in interest." (Footnote omitted.) *Bruno* v. *Bruno*, supra, 132 Conn. App. 352–54. As noted previously, the defendant subsequently appealed from the court's valuation of the account. On December 6, 2011, this court held that the trial court had erred in valuing the account as of August 30, 2009, and remanded the case for a determination of the value of the account as of March 17, 2008. Id., 354–55, 357.

On September 30, 2014, the court issued a memorandum of decision in which it noted that "[f]ollowing [the] prehearing conference in February, 2014, the parties agreed and stipulated that the value of the Schwab account as of March 17, 2008 was $1,942,000." The court adopted the stipulation of the parties "as its finding as to the value of the account on that date," and noted that the court could "now recommence its determination of the amounts to be distributed from the account and rule on the defendant's motion for contempt." In a footnote, the court noted that "[a] hearing on [the defendant's] motion [for contempt] was originally commenced by the court, *Hon. Sidney Axelrod*, judge trial referee, but was not completed. Because of the significant length of time that would elapse before Judge Axelrod would have again been available to proceed to complete the matter, the court declared a mistrial as to that motion." The court then determined how much was owed to the defendant pursuant to the division of the Schwab account.

total arrearage that had accrued between February 28, 2009, and April 7, 2014, a sum that had been calculated by the court on April 7, 2014, and established by court order on September 30, 2014. The $1,116,627.70 sum represents the total arrearage that had accrued between February 28, 2009 and December 9, 2014, a sum that had been calculated by the court in response to a motion for order made by the defendant. Finally, the $1,256,627.70 sum represents the total arrearage that had accrued between February 28, 2009 and August 10, 2015, also calculated in response to a motion for order made by the defendant.

The defendant argues that the court abused its discretion in determining that interest should begin to run on April 7, 2014, rather than on February 28, 2009, the date on which the alimony arrearage began. The defendant further argues that the interest awarded by the trial court does not properly compensate her for the loss of the use of her money, because it does not account for compounded interest. We disagree.

As mentioned, the plaintiff had been in alimony arrears since February 28, 2009. In awarding postjudgment interest, the court relied on its prior calculation of the total arrearage that had accrued between February 28, 2009 and April 7, 2014, and awarded four percent interest on that sum. In other words, the court awarded interest on the basis of all of the alimony that the plaintiff had withheld since the judgment of dissolution was rendered, but awarded that interest on the basis of the total arrearage, rather than awarding interest individually on each of the missed weekly payments. The defendant argues that the amount of interest due was not calculated properly, because it does not provide for compound interest. As the court noted in its memorandum of decision in response to her motion to reargue, however, "[t]here is nothing in § 37-3a that calls for compounding of interest." In light of the court's broad

discretion in determining the amount of postjudgment interest to be awarded, the court's decision to calculate interest on the basis of the total arrearage, rather than on the basis of each weekly payment over the course of several years, was not an abuse of discretion.

B

The defendant also argues that the court erred in awarding interest at a rate of 4 percent, rather than 10 percent, on her portion of the Schwab account and the alimony arrearage. We conclude that the court acted within its discretion in awarding interest at a rate of 4 percent.

"It is well established that we will not overrule a trial court's determination regarding an award of interest absent a clear abuse of discretion." (Internal quotation marks omitted.) *Picton* v. *Picton*, supra, 111 Conn. App. 155. "[U]nder § 37–3a, the court may award a maximum rate of interest of 10 percent per year, *but it has discretion to apply a lesser rate*." (Emphasis added.) *Marulli* v. *Wood Frame Construction Co., LLC*, 154 Conn. App. 196, 210, 107 A.3d 442 (2014), cert. denied, 315 Conn. 928, 109 A.3d 923 (2015); see also *Sosin* v. *Sosin*, supra, 300 Conn. 246 n.26 ("this court repeatedly has recognized that the trial court has broad discretion under § 37-3a to determine . . . the rate of interest"). The defendant argues that "the court should have awarded the presumptive rate of 10 [percent] given that the plaintiff waived his right to contest why 10 [percent] should not apply[4] and the facts and circumstances of this case

[4] The defendant argues that because the plaintiff failed to show why interest at the "presumptive rate" of 10 percent should not apply, "[t]he court was not at liberty to act as [the] plaintiff's advocate and substitute its 'broad discretion' for [the] plaintiff's failure to present material evidence on the issue." In making this argument, the defendant relies on language used by this court in *Suffield Development Associates Ltd. Partnership* v. *National Loan Investors, L.P.*, 97 Conn. App. 541, 570, 905 A.2d 1214, cert. denied, 280 Conn. 942, 912 A.2d 479 (2006), in which we stated: "[W]hen a statute provides for a presumptive rate of allowable interest, it is the *defendants'* burden to establish that some lesser rate ought to apply." (Emphasis

overwhelmingly support the award of 10 [percent]." She specifically argues that an award at the rate of 4 percent "is simply not equitable" because "the judgment is more than eight years old and still has not been effectuated because the plaintiff has simply refused to comply and has stolen the defendant's property."

In awarding interest on the alimony arrearage, the court explicitly considered the facts and circumstances of the underlying case. The court acknowledged that the plaintiff repeatedly had failed to comply with court orders, and that he had engaged in "continuous and persistent contumacious conduct"; (internal quotation marks omitted); following the judgment of dissolution. The court specifically noted that it was awarding the defendant postjudgment interest "to compensate the defendant for the loss of the use of money she otherwise would have had available to her from February 28, 2009 until such time as the arrearage is paid in full." Importantly, the court also cited several cases in which interest had been awarded at a rate lower than 10 percent to reflect the significant fall in interest rates in recent years. In awarding interest on the Schwab account, the court made nearly identical observations. Because the court has the discretion to apply a rate lower than 10 percent, and because the record reflects that the court did consider the relevant facts and circumstances of the underlying case in reaching its decision, we cannot conclude that the court abused its discretion in awarding interest at a rate of 4 percent.

III

The defendant next claims that the court improperly held her in contempt for violating a court order. We disagree.

in original.) Id. It would appear that the later Supreme Court cases of *DiLieto* and *Sosin* have implicitly overruled the precedential value of this isolated sentence from the Appellate Court case of *Suffield Development*.

The following facts are relevant to this claim. As set forth previously, pursuant to the judgment of dissolution, the parties were required to cooperate in the sale of their home and to divide any net proceeds over $300,000 from the sale equally between them. The defendant's attempts to sell the property were frustrated by the plaintiff's failure to cooperate. The defendant filed a motion for order with respect to the property, and the court, *Winslow*, *J.*, held a hearing on the motion on August 6, 2010. At that hearing, the court stated: "All right. Here's what I'm going to do, at this time, I'm going to transfer, via [General Statutes § 46b-81], the title to the property at 111 Spring Valley Road in Ridgefield solely to the defendant, Lisa Bruno, for the purpose of effectuating the orders of the court . . . to bring about a sale of the property. . . . From any proceeds realized upon the sale of the property, the first $300,000 of any equity, should there be that much, will be apportioned to [the defendant] as an immediate relief for the monies owed to her, generally, through this lawsuit. Any additional proceeds above $300,000 are to be held in escrow pending further hearing and . . . decision by the court, escrowed by the . . . real . . . property attorney, who handles it. My belief and understanding is that the majority of those proceeds would be [the defendant's], but I don't want to make that decision at this point in time . . . ."

The court further noted: "Now, it will be necessary, I believe, once again, for an order to be presented to the court—not an order in this case, but a document for the land records . . . ." The defendant responded: "I typed up an order it's that—without giving any of the other details that Your Honor alluded to, it just talks about the right, title, and interest . . . to be transferred to me . . . and I have a schedule A for the property." The court replied: "Okay. Coming prepared, as usual. Except I'm not really granting the order as written.

. . . All right. I have modified this written document, somewhat, by referencing a particular statute, § 46b-81, and limiting this particular order that's going on the land records to the sentence put forward by [the defendant]. As we all know, however, there are additional orders that I've made today, somewhat restricting the procedure upon a sale."

The court then issued a written order in which it stated: "[The] [d]efendant's motion for order, postjudgment, having been reviewed by the court, is hereby granted, as follows: Pursuant to Connecticut General Statutes § 46b-81, the court hereby assigns to the defendant, Lisa Bruno, all right, title, and interest of Stephen Bruno in the property located at 111 Spring Valley Road Ridgefield [Connecticut]."

The defendant sold the property in April, 2011, and failed to place any proceeds in escrow. On November 1, 2013, the plaintiff filed a motion for contempt. While his motion for contempt was pending, the plaintiff filed a motion for clarification of the court's August 6, 2010 order, arguing that "[t]he order as written does not include the entirety of the court's orders as described in the [August 6, 2010] transcript . . . ." On December 10, 2014, the court, *Winslow*, *J.*, granted the plaintiff's motion for clarification and issued a clarification of the August 6, 2010 order. The clarified order reflected the oral orders issued at the August 6, 2010 hearing; specifically, the clarified order stated, in relevant part, that "proceeds over $300,000 are to be held in escrow by the real property attorney handling the sale, pending further hearing and decision by the court." On April 6, 2015, the court, *Shaban*, *J.*, granted the plaintiff's motion for contempt and found the defendant in contempt for failing to place the proceeds of the sale in escrow. This appeal followed.

We begin by setting forth the relevant standard of review. "[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 determination of whether the violation was wilful or excused by a good faith dispute or misunderstanding." (Citations omitted.) *In re Leah S.*, 284 Conn. 685, 693–94, 935 A.2d 1021 (2007).

The defendant argues that the order that served as the basis for the court's finding of contempt was not clear and unambiguous. Specifically, she argues that because Judge Winslow granted the plaintiff's motion for clarification and issued "a completely new written order that comported only with what was stated orally during the [August 6, 2010] hearing," the original written order must have been unclear. We disagree.

"[A] person must not be found in contempt of a court order when ambiguity either renders compliance with the order impossible, because it is not clear enough to put a reasonable person on notice of what is required for compliance, or makes the order susceptible to a court's arbitrary interpretation of whether a party is in compliance with the order." *In re Leah S.*, supra, 284 Conn. 695. The defendant argues that the court's August 6, 2010 written order made "no mention of escrowing any proceeds," and that "[i]t is not incumbent upon a party to attempt to reconcile what appears to be a complete written embodiment of the court's intentions by examination of transcripts to search for possible

inconsistencies." She argues that the court "clearly stated its decision in writing and the defendant had a legal right, pursuant to [Practice Book] § 64-1, to rely on the court's written order as issued . . . ."

The defendant's argument is contradicted by the transcript of the August 6, 2010 hearing on the defendant's motion for order. At that hearing, Judge Winslow issued a clear and unambiguous oral order that "[a]ny additional proceeds [from the sale of the property] above $300,000 are to be held in escrow pending further hearing . . . ." The defendant was present and did not object when Judge Winslow said that it would be necessary "for an order to be presented to the court—*not an order in this case*, but a document for the land records," and when the court emphasized that the written order did not represent the entirety of its oral orders. Judge Winslow specifically noted that "I'm not really granting the order as written," and that "there [were] additional orders that [she] made . . . ." The defendant acknowledged that the written order did not include "any of the other details [the court] alluded to," and she did not request that the court issue a written copy of the order in its entirety. Because the court issued a clear oral order instructing the defendant to hold any proceeds of the sale in escrow, we conclude that the underlying order was sufficiently clear and unambiguous as to support a judgment of contempt.

We must next determine whether the trial court abused its discretion in issuing a judgment of contempt. The defendant argues that her actions were not wilful, and therefore could not serve as a basis for a finding of contempt, because she "had no reason to believe that the court's full intentions were not codified in the written order . . . ." As set forth previously, however, the defendant was present in court when Judge Winslow explicitly stated that she was "not really granting the order as written" and noted, in issuing the written order,

that "as we all know, however, there are additional orders that I've made today, somewhat restricting the procedure upon a sale." As such, the defendant's argument that she had "no reason to believe that the court's full intentions were not codified in the written order" does not have merit.[5]

The judgment is affirmed.

In this opinion the other judges concurred.

U.S. BANK NATIONAL ASSOCIATION, TRUSTEE *v.* ROBIN BLOWERS ET AL.
(AC 39219)

Alvord, Prescott and Pellegrino, Js.

Syllabus

The plaintiff bank, as trustee, sought to foreclose a mortgage on certain real property owned by the defendants P and B. Following the defendants

[5] The defendant also argues that "in light of the plaintiff's unclean hands, the court should not have allowed the plaintiff to invoke the contempt powers of the court in the first instance." The court, in rendering its decision on the plaintiff's motion for contempt, did find that "the plaintiff approaches the court with unclean hands," and noted that, as a result, it would not "enter any orders beyond finding the defendant in contempt for her failure to ensure the escrow of certain funds . . . ." In reviewing the defendant's claim on appeal, we note that "[a]pplication of the doctrine of unclean hands rests within the sound discretion of the trial court. . . . The exercise of [such] equitable authority . . . is subject only to limited review on appeal. . . . The only issue on appeal is whether the trial court has acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of [the trial court's] action." (Internal quotation marks omitted.) *Nuzzi* v. *Nuzzi*, 164 Conn. App. 751, 763, 138 A.3d 979, cert. granted, 323 Conn. 902, 150 A.3d 684 (2016). We further note that our Supreme Court has held specifically that the doctrine of unclean hands "should be applied in the trial court's discretion to promote public policy and the integrity of the courts, and *is not one of absolutes*." (Emphasis added.) *DeCecco* v. *Beach*, 174 Conn. 29, 35, 381 A.2d 543 (1977). In this case, the trial court agreed with the defendant that the plaintiff had approached the court with unclean hands, and adjusted its judgment accordingly, such that no sanctions were imposed following the finding of contempt. The court did not abuse its discretion.

default on their mortgage payments, the plaintiff, through its loan servicing agent, initiated loan modification negotiations with the defendants, but the parties were unable to agree on a binding modification. Thereafter, the plaintiff commenced a foreclosure action, and the parties subsequently participated in a foreclosure mediation program but were unable to reach an agreement. The defendants then filed an answer, special defenses and counterclaims, claiming, inter alia, that during the foreclosure mediation and loan modification negotiations, the plaintiff hindered their ability to obtain a binding loan modification, thereby unnecessarily increasing the amount that the plaintiff sought to recover from the defendants, and that the plaintiff and its loan servicer failed to conduct themselves in a manner that was fair, equitable and honest. In response, the plaintiff filed a motion to strike the defendants' special defenses and counterclaims, which the trial court granted. Thereafter, the trial court rendered a judgment of strict foreclosure, and P appealed to this court. *Held*:

1. P could not prevail on his claim that the trial court improperly granted the plaintiff's motion to strike the defendants' special defenses and counterclaims:

   a. The trial court properly determined that the special defenses did not relate to the making, validity or enforcement of the subject note and mortgage; all of the alleged improper conduct giving rise to the special defenses took place during foreclosure mediation or the loan modification negotiations and no binding modification was agreed on by the parties, and contrary to P's assertion that the transaction test set forth in the applicable rule of practice (§ 10-10) applied to the special defenses, that rule, which, in a foreclosure action, requires consideration of whether a counterclaim has some reasonable nexus to the making, validity or enforcement of the note or mortgage, does not mention special defenses and applying it to them would be unnecessary and duplicitous because the purpose of the rule is to permit the joinder of closely related claims and special defenses, which, by their nature, must be tried with the corresponding complaint.

   b. The allegations in the defendants' counterclaims were insufficient to establish that the counterclaims had a reasonable nexus to the making, validity or enforcement of the note or mortgage pursuant to the transaction test; the allegations of the counterclaims related solely to the plaintiff's conduct during the foreclosure mediation and the loan modification negotiations, which did not demonstrate a sufficient nexus to the making, validity or enforcement of the note or mortgage.

2. This court declined P's request to diverge from well established legal precedent and to adopt a transaction test in foreclosure actions that does not include the requirement that special defenses and counterclaims have a reasonable nexus to, or relate to, the making, validity or enforcement of the note or mortgage; contrary to P's contention that

the requirement is opposed to fundamental principles of equity jurisprudence, the requirement permits equitable considerations when justice requires while simultaneously serving to promote judicial economy through the swift and uncomplicated resolution of foreclosure proceedings, and adopting the transaction test requested by P would lead to an increase of special defenses and counterclaims in foreclosure actions that would unnecessarily convolute and delay the foreclosure process and would deter mortgagees from participating in mediation and loan modification negotiations.

3. P could not prevail on his claim that, even if the making, validity or enforcement requirement applied to counterclaims and special defenses, the trial court erred by improperly limiting the scope of the term enforcement; that court did not err in its interpretation of the term enforcement, as the alleged conduct of the plaintiff did not relate to the enforcement of the note or mortgage because it occurred during the foreclosure mediation and loan modification negotiations, and no binding loan modification was reached between the parties that rendered the original note and mortgage unenforceable.

4. P's claim that the trial court made factual errors when assessing the plaintiff's motion to strike was unavailing; even if this court accepted all of the allegations as true and viewed them in the light most favorable to sustaining their legal sufficiency, the defendants failed to allege that the parties agreed to a binding modification that affected the making, validity or enforcement of the original note or mortgage, and, therefore, the trial court did not err in finding that no binding loan modification existed between the parties.

(*One judge dissenting*)

Argued May 16—officially released October 31, 2017

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., brought to the Superior Court in the judicial district of Hartford, where the defendant Farmington Valley Landscape, LLC, et al. were defaulted for failure to appear; thereafter, the defendant C&I Solutions, LLC, was defaulted for failure to plead; subsequently, the named defendant et al. filed counterclaims; thereafter, the named defendant et al. withdrew the counterclaims in part; subsequently, the court, *Dubay*, *J.*, granted the plaintiff's motion to strike the special defenses and counterclaims; thereafter, the court, *Wahla*, *J.*, granted the plaintiff's motion for judgment on the counterclaims;

subsequently, the court, *Peck*, *J.*, granted the plaintiff's motion for summary judgment as to liability; thereafter, the court, *Wahla*, *J.*, granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon, from which the defendant Mitchell Piper appealed to this court. *Affirmed.*

P. Solange Hilfinger-Pardo, certified legal intern, with whom were *Jeffrey Gentes* and, on the brief, *Anderson Tuggle*, *Noah Kolbi-Molinas* and *Emily Wanger*, certified legal interns, for the appellant (defendant Mitchell Piper).

Pierre-Yves Kolakowski, with whom, on the brief, was *Zachary Bennett Grendi*, for the appellee (plaintiff).

Opinion

PELLEGRINO, J. In this mortgage foreclosure action, the defendant Mitchell Piper,[1] appeals from the judgment of strict foreclosure rendered by the trial court in favor of the plaintiff, U.S. Bank National Association, as Trustee for the Holders of the First Franklin Mortgage Loan Trust Mortgage Pass-Through Certificates, Series 2005-FF10. On appeal, Piper claims that the court improperly granted the plaintiff's motion to strike the defendants' special defenses and counterclaims. Specifically, he contends that the court improperly required the special defenses to directly relate to and the counterclaims to have a sufficient nexus to the making, validity, or enforcement of the note and mortgage. Instead, Piper argues, the court should have applied a "straightforward version of the transaction test with allowances for equitable considerations" to both the special

[1] Robin Blowers, Farmington Valley Landscape, LLC, Land Rover Capital Group, C&I Solutions, LLC, and Viking Fuel Oil Company, Inc., also were named as defendants but are not parties to this appeal. For convenience, we refer in this opinion to Piper and Blowers as the defendants and individually by name where appropriate.

defenses and counterclaims. Additionally, Piper claims that even if the court did not err in applying the making, validity, or enforcement requirement, the counterclaims and special defenses should have survived a motion to strike under a broad reading of the term "enforcement." Finally, Piper claims that the court erred in its determinations that no binding modification to the defendants' loan existed, that, if such modification existed, the defendants defaulted on the loan, and that all of the plaintiff's alleged misconduct took place during foreclosure mediation. We disagree with Piper contentions and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. The defendants executed a promissory note, dated August 2, 2005, in which they promised to pay First Franklin division of National City Bank of Indiana the principal sum of $488,000. To secure the note, the defendants mortgaged their interest in their property located at 129 Stagecoach Road in Avon. The mortgage was assigned to the plaintiff on September 1, 2005.

In February, 2014, the plaintiff commenced this action to foreclose the mortgage on the subject property. In its complaint, the plaintiff alleged that the defendants defaulted under the terms of their note and mortgage, that the plaintiff exercised its option to declare the entirety of the balance due, and that, despite due demand, the defendants failed to pay the balances due and owing. The parties subsequently participated in a foreclosure mediation program but were unable to reach an agreement. On April 17, 2015, the defendants filed an answer, three special defenses and three counterclaims. The counterclaims sounded in negligence; violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.; and unjust enrichment. The special defenses sounded in equitable estoppel, unjust enrichment, and unclean hands. On

July 17, 2015, the plaintiff filed a motion to strike the defendants' special defenses and counterclaims, which was granted by the court on December 28, 2015. Thereafter, the court rendered a judgment of strict foreclosure. This appeal followed. Additional facts will be set forth as necessary.

"Our standard of review is undisputed. Because a motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court, our review of the court's ruling on [a motion to strike] is plenary. . . . A party wanting to contest the legal sufficiency of a special defense [or counterclaim] may do so by filing a motion to strike. The purpose of a special defense is to plead facts that are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action. . . . In ruling on a motion to strike, the court must accept as true the facts alleged in the special defenses and construe them in the manner most favorable to sustaining their legal sufficiency." (Citations omitted; internal quotation marks omitted.) *Brasso* v. *Rear Still Hill Road, LLC*, 64 Conn. App. 9, 12–13, 779 A.2d 198 (2001).

I

We first address Piper's claim that the court improperly struck the defendants' special defenses, namely, equitable estoppel and unclean hands.[2] Piper contends that the court failed to apply properly the transaction test when reviewing the special defenses. Instead, he argues, the court improperly narrowed the transaction test by requiring the defendants' special defenses to relate to the making, validity, or enforcement of the note or mortgage.

[2] The defendants withdrew their unjust enrichment special defense and counterclaim on September 16, 2015.

The following additional facts are relevant to this claim. Shortly after the defendants defaulted on their mortgage payments in January, 2010, a servicing agent for the plaintiff reached out to the defendants offering a "rate reduction." After the defendants successfully completed a three month trial modification period, however, the plaintiff withdrew its offer to modify the loan. The plaintiff continued to offer loan modifications, but no offers resulted in a final, binding modification to the defendants' mortgage. Following the defendants' failure to cure the debt, the plaintiff commenced this foreclosure action.

In their answer, special defenses, and counterclaims filed on April 17, 2015, the defendants claimed, in relevant part, that throughout the foreclosure mediation and loan modification negotiation period, the plaintiff hindered their ability to obtain a proper loan modification. As a result, the defendants claimed, the amount that the plaintiff sought to recover from them in connection with the foreclosure action unnecessarily increased. Additionally, the defendants claimed that the plaintiff and its servicing agent failed to conduct themselves in a manner that was fair, equitable, and honest during the mediation and loan modification negotiation period.

We begin by setting forth the relevant legal principles. "In addition to challenging the legal sufficiency of a complaint or counterclaim, our rules of practice provide that a party may challenge by way of a motion to strike the legal sufficiency of an answer, including any special defenses contained therein . . . ." (Internal quotation marks omitted.) *GMAC Mortgage, LLC* v. *Ford*, 144 Conn. App. 165, 179–80, 73 A.3d 742 (2013). "The purpose of a special defense is to plead facts that are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action." (Internal quotation marks omitted.)

TD Bank, N.A. v. *M.J. Holdings, LLC*, 143 Conn. App. 322, 326, 71 A.3d 541 (2013). "A motion to strike does not admit legal conclusions. . . . Conclusions of law, absent sufficient alleged facts to support them, are subject to a motion to strike. The trial court may not seek beyond the complaint for facts not alleged, or necessarily implied . . . ." (Citations omitted.) *Fortini* v. *New England Log Homes, Inc.*, 4 Conn. App. 132, 134–35, 492 A.2d 545, cert. dismissed, 197 Conn. 801, 495 A.2d 280 (1985).

"Historically, defenses to a foreclosure action have been limited to payment, discharge, release or satisfaction . . . or, if there had never been a valid lien. . . . A valid special defense at law to a foreclosure proceeding must be legally sufficient and address the making, validity or enforcement of the mortgage, the note, or both. . . . Where the plaintiff's conduct is inequitable, a court may withhold foreclosure on equitable considerations and principles. . . . [O]ur courts have permitted several equitable defenses to a foreclosure action. [I]f the mortgagor is prevented by accident, mistake or fraud, from fulfilling a condition of the mortgage, foreclosure cannot be had . . . . Other equitable defenses that our Supreme Court has recognized in foreclosure actions include unconscionability . . . abandonment of security . . . and usury." (Citation omitted; internal quotation marks omitted.) *LaSalle National Bank* v. *Freshfield Meadows, LLC*, 69 Conn. App. 824, 833–34, 798 A.2d 445 (2002).

In the present case, neither of the defendants' special defenses at issue directly attacks the making, validity, or enforcement of the note or mortgage. See *CitiMortgage, Inc.* v. *Rey*, 150 Conn. App. 595, 603, 92 A.3d 278, cert. denied, 314 Conn. 905, 99 A.3d 635 (2014). All events giving rise to the special defenses took place during the loan modification negotiation period or during foreclosure mediation. This court previously has held that

alleged improper conduct occurring during mediation and modification negotiations lacked "any reasonable nexus to the making, validity or enforcement of the mortgage or note . . . ." *U.S. Bank National Assn.* v. *Sorrentino*, 158 Conn. App. 84, 97, 118 A.3d 607, cert. denied, 319 Conn. 951, 125 A.3d 530 (2015). By contrast, if the modification negotiations ultimately result in a final, binding, loan modification, and the mortgagee subsequently breaches the terms of that new modification, then any special defenses asserted by the mortgagor in regard to that breach would relate to the enforcement of the mortgage. In the present case, however, no binding modification was ever agreed upon by the parties. Accordingly, the special defenses raised by the defendants do not relate to the making, validity, or enforcement of the note or mortgage.

Piper attempts to circumvent the fact that the defendants' special defenses do not relate to the making, validity, or enforcement of the note or mortgage by arguing that the broader transaction test set forth in Practice Book § 10-10 applies to their special defenses. Section 10-10 provides, in relevant part, that "[i]n any action for legal or equitable relief, any defendant may file counterclaims against any plaintiff . . . provided that each such counterclaim . . . arises out of the transaction or one of the transactions which is the subject of the plaintiff's complaint . . . ." This section is "a common-sense rule designed to permit the joinder of closely related claims where such joinder is in the best interests of judicial economy." (Internal quotation marks omitted.) *JP Morgan Chase Bank, Trustee* v. *Rodrigues*, 109 Conn. App. 125, 131, 952 A.2d 56 (2008). Section 10-10 makes no mention of special defenses and explicitly states that it applies to counterclaims. Further, because the purpose of the rule is to permit the joinder of closely related claims that meet the transaction test, this purpose could not possibly be furthered

when the rule is applied to special defenses. "The purpose of a special defense is to plead facts that are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action." (Internal quotation marks omitted.) *Fidelity Bank* v. *Krenisky*, 72 Conn. App. 700, 705, 807 A.2d 968, cert. denied, 262 Conn. 915, 811 A.2d 1291 (2002). Special defenses, by their very nature, must be tried with the corresponding complaint, so the transaction test set forth in § 10-10 would be unnecessary and duplicitous as applied to special defenses. Accordingly, the transaction test does not apply, and the court properly granted the motion to strike the defendants' special defenses.

II

We next address Piper's claim that the trial court improperly struck the defendants' counterclaims by requiring the counterclaims to have a sufficient nexus to the making, validity, or enforcement of the note or mortgage.

"A plaintiff can [move to strike] a . . . counterclaim." *Nowak* v. *Nowak*, 175 Conn. 112, 116, 394 A.2d 716 (1978). "A counterclaim has been defined as a cause of action existing in favor of a defendant against a plaintiff [that] a defendant pleads to diminish, defeat or otherwise affect a plaintiff's claim and also allows a recovery by the defendant. . . . In other words, a counterclaim is a cause of action . . . on which the defendant might have secured affirmative relief had he sued the plaintiff in a separate action." (Citation omitted; internal quotation marks omitted.) *Historic District Commission* v. *Sciame*, 152 Conn. App. 161, 176, 99 A.3d 207, cert. denied, 314 Conn. 933, 102 A.3d 84 (2014).

"[T]his court [has] clarified that a proper application of Practice Book § 10-10 in a foreclosure context

requires consideration of whether a counterclaim has some reasonable nexus to, rather than directly attacks, the making, validity or enforcement of the mortgage or note." *U.S. Bank National Assn.* v. *Sorrentino*, supra, 158 Conn. App. 96. "[R]elevant considerations in determining whether the transaction test has been met include whether the same issues of fact and law are presented by the complaint and the [counter]claim and whether separate trials on each of the respective claims would involve a substantial duplication of effort by the parties and the courts." (Internal quotation marks omitted.) *CitiMortgage, Inc.* v. *Rey*, supra, 150 Conn. App. 606.

In the present case, the defendants failed to assert factual allegations underlying their counterclaims that had a reasonable nexus to the making, validity, or enforcement of the note or mortgage. The defendants' counterclaims, like their special defenses discussed previously in part I of this opinion, were based upon similar factual allegations derived solely from the plaintiff's conduct during postdefault mediation and loan modification negotiations.[3] Because the defendants failed to show how this conduct had a sufficient nexus to the making, validity, or enforcement of the note or mortgage, the court properly struck the counterclaims pursuant to Practice Book § 10-10.

[3] The counterclaims asserted by the defendants include negligence and a violation of CUTPA. In support of their negligence claim, the defendants alleged that the plaintiff: (1) erroneously informed the defendants' insurance company of false information resulting in a cancellation of their insurance policy, (2) arrived late to mediation sessions, (3) provided conflicting information to the defendants during mediation, and (4) took years to evaluate the defendants' request for a loan modification due to the plaintiff's duplicative and changing requests for information.

In support of their CUTPA claim, the defendants alleged that the plaintiff: (1) repeatedly requested duplicative and unnecessary documentation updates during modification negotiations, (2) communicated false information to the defendants' insurance carrier, and (3) made material misrepresentations to the defendants throughout the loan modification negotiation process.

III

Piper nonetheless hopes to prevail on his claims on appeal by asking this court to diverge from decades of legal precedent and to abolish the requirement that counterclaims and special defenses have a sufficient nexus to, or relate to, the making, validity, or enforcement of the note or mortgage, in favor of a "straightforward version of the transaction test." He argues that the current legal standard for counterclaims and special defenses in foreclosure proceedings "stands opposed to . . . fundamental principles of equity jurisprudence." We do not agree with Piper's contention and decline to abandon the current standard.[4]

Piper attempts to characterize the court's application of the making, validity, or enforcement requirement as a rigid barrier to the assertion of viable special defenses and counterclaims. His claim, however, overlooks the fact that equitable considerations may be taken into account in foreclosure proceedings.

On the contrary, our courts have allowed exceptions to the making, validity, or enforcement requirement where traditional notions of equity would not be served by its strict application. For example, in *Thompson* v. *Orcutt*, 257 Conn. 301, 777 A.2d 670 (2001), our Supreme Court reversed this court's determination that a special defense of unclean hands did not apply where the plaintiff's fraudulent conduct occurred in a separate bankruptcy proceeding that was not strictly related to the

[4] Further, we do not have the power to change existing precedent set by our Supreme Court and by other panels of this court. "As an intermediate court of appeal, we are unable to overrule, reevaluate, or reexamine controlling precedent of our Supreme Court." (Internal quotation marks omitted.) *State* v. *Fuller*, 158 Conn. App. 378, 387 n.6, 119 A.3d 589 (2015). Moreover, "it is axiomatic that one panel of this court cannot overrule the precedent established by a previous panel's holding." *Samuel* v. *Hartford*, 154 Conn. App. 138, 144, 105 A.3d 333 (2014).

making, validity, or enforcement of the note or mortgage. In reversing this court's decision, the Supreme Court observed that the plaintiff would not have had the legal authority to bring the foreclosure action against the defendants but for its fraudulent conduct during the bankruptcy proceeding. Id., 313–14. The court noted, "[b]ecause the doctrine of unclean hands exists to safeguard the integrity of the court . . . [w]here a plaintiff's claim grows out of or depends upon or is inseparably connected with his own prior fraud, a court of equity will, in general, deny him any relief, and will leave him to whatever remedies and defenses at law he may have." (Citations omitted; internal quotation marks omitted.) Id., 310.

Piper's contention in the present case that the making, validity, or enforcement requirement "stands opposed to . . . fundamental principles of equity jurisprudence," therefore, is misguided. The requirement serves to promote judicial economy through the swift and uncomplicated resolution of foreclosure proceedings while simultaneously allowing for equitable considerations when justice so requires. If we were to dispose of the requirement and adopt the defendants' "straightforward" transaction test, it would lead to a flood of counterclaims and special defenses in foreclosure cases that would unnecessarily convolute and delay the foreclosure process. Further, automatically allowing counterclaims and special defenses in foreclosure actions that are based on conduct of the mortgagee arising during mediation and loan modification negotiations would serve to deter mortgagees from participating in these crucial mitigating processes. Accordingly, we decline Piper's invitation to depart from the subject making, validity, or enforcement requirement for counterclaims and special defenses in the foreclosure context.[5]

[5] We note that mortgagors are not without a remedy for the alleged reprehensible postdefault conduct of mortgagees. Aside from the ability of a trial

IV

Piper next claims that, even if this court were to determine that the making, validity, or enforcement requirement applies to the defendants' counterclaims and special defenses, the trial court erred by improperly limiting the scope of the term "enforcement." Specifically, he contends that under a proper reading of the term "enforcement," conduct that occurred during the loan modification negotiation process and foreclosure mediation can meet the making, validity, or enforcement requirement even where no binding modification was reached. We do not agree with his interpretation of the term "enforcement."

As discussed in parts I and II of this opinion, our courts have determined that conduct occurring during loan modification negotiations and foreclosure mediation does not give rise to a valid counterclaim or special defense in a foreclosure action unless such conduct affects the making, validity, or enforcement of the original note or mortgage. See *U.S. Bank National Assn.* v. *Sorrentino*, supra, 158 Conn. App. 97.[6] In the present case, the plaintiff's alleged conduct does not relate to the enforcement of the note or mortgage because no binding modification was reached between the parties that rendered the original note and mortgage unenforceable. Accordingly, the trial court did not err in its interpretation of the term "enforcement," and the

court in a foreclosure action to deny a mortgagee the relief sought on equitable grounds; see *Thompson* v. *Orcutt*, supra, 257 Conn. 310; a mortgagor is not precluded from bringing a separate action for damages caused by such conduct.

[6] For example, in *EMC Mortgage Corp.* v. *Shamber*, Superior Court, judicial district of Tolland, Docket No. CV-07-5001252-S (November 12, 2009), the court struck the defense of breach of the implied covenant of good faith and fair dealing where the alleged breach occurred as a result of a postdefault "repayment agreement." The court reasoned that the defense was legally insufficient because the defendants failed to allege that the repayment agreement modified the provisions of the note or mortgage or that it rendered them invalid or unenforceable. .

defendants' counterclaims and special defenses were properly stricken.

V

Finally, Piper claims that the trial court made factual errors when assessing the plaintiff's motion to strike, and that these errors amounted to an abuse of discretion.[7] Specifically, he asserts that the court erred in finding that (1) no binding loan modification existed between the parties, (2) if a modification did exist, the defendants defaulted on it, and (3) all of the plaintiff's alleged misconduct took place during the foreclosure mediation. Further, Piper argues that because the court relied on these factual findings in granting the plaintiff's motion to strike the defendants' special defenses and counterclaims, the alleged factual errors constitute an abuse of discretion. We are not persuaded.

A motion to strike requires no factual findings by the trial court. *Larobina* v. *McDonald*, 274 Conn. 394, 400, 876 A.2d 522 (2005). "We take the facts to be those alleged in the complaint that has been stricken and we construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . . If facts provable in the complaint would support a cause of action, the motion to strike must be denied." *Kumah* v. *Brown*, 127 Conn. App. 254, 259, 14 A.3d 1012, aff'd, 307 Conn. 620, 58 A.3d 247 (2011).

In the present case, the court was not required to make factual determinations, and, therefore, our review of this claim is plenary. See *Brasso* v. *Rear Still Hill Road, LLC*, supra, 64 Conn. App. 12. Accordingly, we look to the allegations of the defendants' pleadings,

[7] We note that discretion plays no part in the granting or denial of a motion to strike. A motion to strike presents the court solely with a question of law over which our review is plenary. See *Melanson* v. *West Hartford*, 61 Conn. App. 683, 687, 767 A.2d 764, cert. denied, 256 Conn. 904, 772 A.2d 595 (2001).

construed in the manner most favorable to sustaining their legal sufficiency, to determine if the allegations are legally sufficient counterclaims or special defenses. Id., 13.

The defendants' answer, special defenses, and counterclaims filed on April 17, 2015, alleged that "[i]n April, 2012, [the] defendants contacted the state banking commission, which intervened on [the] defendants' behalf, resulting in an immediate modification being received." Piper argues that the court improperly construed this allegation as failing to establish that a binding loan modification occurred between the parties. As a result, he argues, the court improperly determined that the defendants' allegations failed to meet the making, validity, or enforcement requirement. The defendants, however, never alleged that a binding modification existed between the parties. Instead, they merely alleged that the banking commission "intervened" on their behalf, resulting in an "immediate modification *being received.*" (Emphasis added.) Nowhere do the defendants allege that the parties agreed to this modification and therefore that it was final and binding on them. Even if this court were to accept all of the allegations as true and viewing them in the light most favorable to sustaining their legal sufficiency, the defendants failed to properly allege that there was a binding modification to their loan that affected the making, validity, or enforcement of the original note or mortgage.

In regard to Piper's remaining contentions, namely, (1) the court's reference to the defendants' default on any modification if such modification existed, and (2) the court's statement that all of the defendants' allegations against the plaintiff were based on facts occurring during foreclosure mediation, we do not agree that there was any error. The court made these references in dicta, and, accordingly, the references did not affect the court's ultimate determination to grant the plaintiff's

motion to strike. On the basis of our plenary review of the pleadings, we conclude that the trial court properly granted the plaintiff's motion to strike.

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

In this opinion ALVORD, J., concurred.

PRESCOTT, J., dissenting. In my view, in striking the counterclaims and special defenses filed by the defendants Robin Blowers and Mitchell Piper,[1] the trial court failed to construe the pleadings in a light most favorable to upholding their legal sufficiency and too narrowly construed and applied the making, validity, or enforcement of the note test. Moreover, I believe that the present case is distinguishable from, and thus not controlled by, this court's decision in *U.S. Bank National Assn.* v. *Sorrentino*, 158 Conn. App. 84, 118 A.3d 607, cert. denied, 319 Conn. 951, 125 A.3d 530 (2015). Unlike the majority, I would conclude that the court improperly granted the motion to strike filed by the plaintiff, U.S. Bank National Association, as Trustee for the Holders of the First Franklin Mortgage Loan Trust Mortgage Pass Through Certificates, Series 2005-FF10, and would vacate the judgment of foreclosure and remand the case for further proceedings.[2] Accordingly, I respectfully dissent.[3]

[1] A number of subsequent encumbrancers with respect to the subject property in this foreclosure action also were named as defendants. For convenience, I refer in this opinion to Blowers and Piper as the defendants and to Piper, the sole appellant, individually by name where appropriate.

[2] My conclusion should not be construed as a comment on the relative factual strength of the counterclaims or special defenses, or whether they could withstand a motion for summary judgment.

[3] Because I conclude that the trial court misapplied the making, validity, or enforcement test to the counterclaims and special defenses, and would reverse the judgment on that basis, I do not reach the Piper's additional claim, which asks us to abandon our existing jurisprudence in favor of what he describes as a more "straightforward version of the transaction test."

I begin by setting forth the relevant facts, accepting as admitted those facts alleged in the special defenses and counterclaims, and procedural history. The defendants executed the promissory note and mortgage at issue in 2005. Later that year, the mortgage was assigned to the plaintiff. The defendants first began to fall behind on their mortgage payments in January, 2010. At that time, a loan servicing agent for the plaintiff reached out to the defendants and offered them a plan to reduce their monthly payments. The defendants made payments in accordance with that plan for several months, but the plaintiff rescinded the plan because it determined that the new payments were no longer sufficient. Over the next few years, the plaintiff offered several other payment plans or trial modifications, each of which the plaintiff later rescinded despite the defendants' compliance as to the requested payments. In one instance, the plaintiff rescinded a payment plan after the defendants were one day late in filing requested paperwork. In late 2013, the plaintiff's servicer erroneously informed the defendants' homeowners insurer that they were no longer living at the property, which resulted in the defendants' insurance premiums rising from $900 to over $4000 a year, exacerbating the defendants' already challenging financial circumstances. Ultimately, none of the plaintiff's offered payment plans or trial modifications resulted in a permanent and binding modification of the defendants' mortgage or their obligations under the note. Rather than continue to work with the defendants, the plaintiff instead notified the defendants that they were in default under the terms of the note, accelerated the debt, and declared the note due in full.

The plaintiff commenced the present foreclosure action in February, 2014. The parties participated in the court-sponsored foreclosure mediation program, but

were unable to reach any resolution. After the mediation period terminated, the defendants filed their answer to the foreclosure complaint on April 17, 2015, which included three special defenses and three counterclaims.

The counterclaims alleged causes of action against the plaintiff sounding in negligence; a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.; and unjust enrichment. The special defenses alleged equitable estoppel, unjust enrichment, and unclean hands.[4] According to the defendants, during negotiations with the plaintiff, including those that had occurred prior to the commencement of the foreclosure action, the plaintiff and its servicing agent failed to act in a fair, equitable, and honest manner, and their actions hindered the defendants' ability to obtain a binding loan modification.[5] Consequently, the defendants argued, the total amount of the debt owed in connection with the mortgage default unnecessarily increased.

[4] Prior to the court's ruling on the motion to strike, the defendants withdrew their special defense and counterclaim sounding in unjust enrichment. Accordingly, I limit my discussion to the remaining defenses and counterclaims.

[5] The defendants acknowledged in their opposition to the motion to strike that the same basic facts and alleged misconduct underlie each of their special defenses and counterclaims. They summarized those facts as follows: "Prior to commencing the instant foreclosure, and over a period of several years, the conduct the plaintiff engaged in included the following: entering into a trial modification which it later refused to convert to a permanent modification despite full compliance by the defendants with the terms of the trial modification; offering and then refusing to accept a modification for a pretextual reason . . . offering, accepting, and then unilaterally altering modifications in material respects without prior discussion or agreement of the defendants; refusing to accept a lump sum payment of an escrow shortfall which resulted from the plaintiff's servicer miscalculation; and erroneously informing the defendants' insurance carrier that they were not living in the house, resulting in a cancellation thereof and force-placed coverage." The defendants also made a number of allegations with respect to the plaintiff's conduct during court-sponsored mediation.

The plaintiff moved to strike the defendants' counterclaims and special defenses, and the defendants opposed the motion. Following a hearing, on December 28, 2015, the court, *Dubay*, *J.*, issued a memorandum of decision granting the motion to strike.

With respect to the counterclaims at issue on appeal, the court summarized the defendants' factual allegations as follows: "The defendants allege that the plaintiff was negligent in some of the following ways: (1) the plaintiff's servicer erroneously informed the defendants' insurance company that they were not living in the house which led to the cancellation of their insurance policy, (2) during mediation, the plaintiff's representative often showed up late, (3) in mediation sessions, the defendants were routinely provided with conflicting information by the plaintiff's representative, and (4) through a combination of duplicative, exhaustive, and ever-changing requests, the plaintiff took years to evaluate the defendants for a loan modification. The defendants allege that the plaintiff violated CUTPA in some of the following ways: (1) by repeatedly requesting duplicative, unnecessary documentation updates to documentation during the modification process, (2) by communicating false information to the defendants' insurance carrier, and (3) making material misrepresentations, including, but not limited to, misrepresenting to the defendants the availability of principal forgiveness." According to the court, however, the defendants failed to assert any factual allegations in their counterclaims that had any reasonable nexus to the making, validity, or enforcement of the note or mortgage. The court reasoned that the counterclaims must be stricken because "[a]ll of the conduct alleged in the defendants' counterclaims relate to activities that took place during the foreclosure mediation program and, therefore, subsequent to the execution of the note or mortgage." The court further suggested that the

defendants' claims would be viable only if the defendants had reached an agreement to replace or modify the terms of the note or mortgage and the plaintiff sought foreclosure in contravention of that modified agreement.

With respect to the defendants' special defenses, the court reasoned that they also were legally insufficient. The court first acknowledged that the defendants' allegations were sufficient to support their equitable estoppel counterclaim because, if viewed in a light most favorable to the defendants, they established that the plaintiff's servicer had engaged in conduct "calculated to induce the defendants to believe that they were going to get a loan modification . . . ." The court nevertheless stated that the facts alleged did not directly address the making, validity, or enforcement of the note or mortgage at issue because there was no allegation that the plaintiff's actions in any way invalidated or rendered unenforceable the original loan documents or affected the plaintiff's authority to foreclose under the existing note and mortgage. The court stated: "In the present case, it seems that at one point the parties entered into a modification, however, the allegations lead the court to believe that it was not a permanent modification and the defendants defaulted under the modified agreement, and, therefore, the plaintiff was able to seek the equitable relief of foreclosure." Similarly, the court found that the defendants had alleged sufficient facts to support a special defense of unclean hands, which included the preforeclosure actions of the plaintiff's servicer in negotiating a loan modification agreement. The court concluded, however, that the allegations did not relate to the plaintiff's ability to enforce the existing note and mortgage or to affect their validity.

On February 5, 2016, the court, *Peck*, *J.*, granted a motion filed by the plaintiff seeking summary judgment as to liability only on the foreclosure complaint. On

April 11, 2016, the court, *Wahla*, *J.*, rendered a judgment of strict foreclosure in favor of the plaintiff. At that time, the court also rendered judgment in favor of the plaintiff on the stricken counterclaims. Piper thereafter filed the present appeal.[6]

I next set forth the applicable legal principles governing our review of the court's decision to grant the motion to strike. A motion to strike is the proper vehicle for challenging the legal sufficiency of all or part of a complaint, counterclaim, or answer, including any special defenses asserted. See *GMAC Mortgage, LLC* v. *Ford*, 144 Conn. App. 165, 180, 73 A.3d 742 (2013). "Because a motion to strike challenges the legal sufficiency of a pleading . . . and, consequently, requires no factual findings by the trial court, our review of the court's ruling [on a motion to strike] is plenary." (Internal quotation marks omitted.) *Kumah* v. *Brown*, 307 Conn. 620, 626, 58 A.3d 247 (2013). I am mindful that, in reviewing the court's decision to strike portions of a defendant's counterclaim or special defenses, we must take the facts alleged in the challenged pleading as admitted and view them in a light most favorable to upholding the sufficiency of the pleadings, including those facts necessarily implied from the allegations expressly asserted. See *Connecticut National Bank* v. *Douglas*, 221 Conn. 530, 536, 606 A.2d 684 (1992); *JP Morgan Chase Bank, Trustee* v. *Rodrigues*, 109 Conn. App. 125, 128–29, 952 A.2d 56 (2008). "In an appeal from the granting of a motion to strike, we must read the allegations of the [challenged pleading] generously to

[6] Piper indicated on his appeal form that he intended to challenge the court's rulings on the motion to strike and the motion for summary judgment, as well as the judgment of strict foreclosure. The claims actually raised on appeal, however, as reflected in Piper's statement of issues, are limited to the court's decision to grant the motion to strike the defendants' special defenses and counterclaims.

sustain its viability, if possible . . . .'' (Internal quotation marks omitted.) *Sherwood* v. *Danbury Hospital*, 252 Conn. 193, 212, 746 A.2d 730 (2000).

''The purpose of a special defense is to plead facts that are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action.'' (Internal quotation marks omitted.) *TD Bank, N.A.* v. *M.J. Holdings, LLC*, 143 Conn. App. 322, 326, 71 A.3d 541 (2013). Our courts have recognized a distinction between equitable defenses and defenses at law. ''Historically, defenses [at law] to a foreclosure action have been limited to payment, discharge, release or satisfaction . . . or, if there had never been a valid lien. . . . A valid special defense *at law* to a foreclosure proceeding must be legally sufficient *and address the making, validity or enforcement of the mortgage, the note, or both.* . . . Where the plaintiff's conduct is inequitable, a court may withhold foreclosure on equitable considerations and principles. . . . [O]ur courts have permitted several equitable defenses to a foreclosure action. [I]f the mortgagor is prevented by accident, mistake or fraud, from fulfilling a condition of the mortgage, foreclosure cannot be had . . . . Other equitable defenses that our Supreme Court has recognized in foreclosure actions include unconscionability . . . abandonment of security . . . and usury.'' (Citation omitted; emphasis added; internal quotation marks omitted.) *LaSalle National Bank* v. *Freshfield Meadows, LLC*, 69 Conn. App. 824, 833, 798 A.2d 445 (2002).

With regard to counterclaims, a court may grant a party's motion to strike a counterclaim on the ground that it is improperly joined with the plaintiff's primary action in contravention of Practice Book §10-10. See *U.S. Bank National Assn.* v. *Sorrentino*, supra, 158 Conn. App. 95; *JP Morgan Chase Bank, Trustee* v. *Rodrigues*, supra, 109 Conn. App. 132–33 (affirming motion to strike defendants' counterclaim because it

did not arise from same transaction). Practice Book § 10-10 provides in relevant part that "[i]n any action for legal or equitable relief, any defendant may file counterclaims against any plaintiff . . . provided that each such counterclaim . . . arises out of the transaction or one of the transactions which is the subject of the plaintiff's complaint . . . ." Practice Book § 10-10 "is a common-sense rule designed to permit the joinder of closely related claims where such joinder is in the best interests of judicial economy. . . . The transaction test is one of practicality, and the trial court's determination as to whether that test has been met ought not be disturbed except for an abuse of discretion." (Citation omitted; internal quotation marks omitted.) *JP Morgan Chase Bank, Trustee* v. *Rodrigues*, supra, 131–32.

It is generally well accepted in our foreclosure jurisprudence that a court may utilize the making, validity, or enforcement test in assessing not only the viability of special defenses, but also in applying the transaction test in Practice Book § 10-10 to determine whether counterclaims asserted by a foreclosure defendant are sufficiently related to consider them properly joined. *CitiMortgage, Inc.* v. *Rey*, 150 Conn. App. 595, 603, 92 A.3d 278, cert. denied, 314 Conn. 905, 99 A.3d 635 (2014). Although courts require that a viable legal special defense *directly* attack the "making, validity or enforcement" of the mortgage, in assessing counterclaims, our courts generally have applied a more relaxed standard, requiring only that the subject of the counterclaims have a "sufficient connection" or "nexus" to the making, validity, or enforcement of the note and mortgage to pass the transaction test. Id. Accordingly, although in a foreclosure action a proper application of the transaction test set forth in Practice Book § 10-10 "may require an assessment of whether the counterclaim in question relates to the making, validity or enforcement of the subject note and mortgage, there can be such a nexus

even though the counterclaim may not directly attack the making, validity or enforcement of the mortgage and note which form the basis of the foreclosure complaint." Id., 606. With these principles in mind, I turn to whether, in the present case, the defendants' special defenses and counterclaims were properly stricken by the court.

I

I first consider whether either of the defendants' special defenses directly related to the making, validity, or enforcement of the note or mortgage. The trial court and the majority answer this question in the negative, concluding that the allegations giving rise to the special defenses took place during loan modification negotiations or foreclosure mediation, both of which came after the execution of the note and mortgage and the latter of which came after the foreclosure action was commenced. I conclude, however, that the special defenses are legally sufficient and, thus, were improperly stricken.

The trial court, in granting the motion to strike, reasoned that because no formal modification ever was agreed to by the parties, none of the special defenses raised by the defendants directly relates to the making, validity, or enforcement of the note or mortgage. Having carefully reviewed the relevant pleadings, however, I am not persuaded that the trial court construed the allegations in the special defenses in a light most favorable to upholding their legal sufficiency, particularly with respect to the whether the allegations related to the enforcement of the note and mortgage.

For example, at one point in its analysis, the court states that "it seems that at one point the parties entered into a [loan] modification." The court is referring to the following factual allegation, which was incorporated into both the special defenses and the counterclaims:

"In April, 2012, [the] defendants contacted the state banking commission, which intervened on [the] defendants' behalf, *resulting in an immediate modification being received*." (Emphasis added.) Rather than accepting the defendants' allegation as true for purposes of evaluating the legal sufficiency of the defendants' pleading, the court did the opposite, construing the allegation in such a way as to "leave the court to believe that it was not a permanent modification and the defendants defaulted under the modified agreement, and, therefore, the plaintiff was able to seek the equitable relief of foreclosure." Thus, the court apparently attempts to resolve a factual dispute as to whether a modification had occurred, and did so in favor of the plaintiff.

Furthermore, the court, like the majority, relied in large part on *U.S. Bank National Assn.* v. *Sorrentino*, supra, 158 Conn. App. 97, for the proposition that allegations of improper conduct occurring during mediation and modification negotiations lacks any reasonable nexus to the making, validity, or enforcement of the note or mortgage. This interpretation of our holding in *U.S. Bank National Assn.* is, in my view, overly broad.

Unlike in the present case, the court in *U.S. Bank National Assn.* was faced only with allegations of wrongdoing or misconduct by the foreclosing bank that occurred during the court-sponsored foreclosure mediation process, which occurred well after the action to foreclose the mortgage already had commenced. By contrast, the defendants in the present case have alleged that the plaintiff engaged in dishonest and deceptive practices prior to its having initiated the foreclosure action, including the possibility that the plaintiff failed to honor the terms of a loan modification agreement. Accordingly, unlike in *U.S. Bank National Assn.*, the allegations of preforeclosure conduct by the plaintiff in the present case had a far more obvious

and direct connection to the enforcement of the note or mortgage.[7]

Moreover, the majority's suggestion that the defendants' special defenses could be viable only if the defendants actually had reached a modification agreement would unnecessarily shield mortgagees or their agents from judicial scrutiny of potentially unscrupulous behavior that may have directly resulted in the foreclosure action. Courts have not always strictly applied the making, validity, or enforcement requirement in evaluating the sufficiency of equitable special defenses such as those raised here, particularly if a strict application would offend traditional notions of equity. For example, in *Thompson* v. *Orcutt*, 257 Conn. 301, 313, 777 A.2d 670 (2001), our Supreme Court clarified that an equitable defense of unclean hands need not strictly relate to the making, validity, or enforcement of the note or mortgage provided the allegations set forth were " 'directly and inseparably connected' " to the foreclosure action. In reversing this court's decision, which narrowly focused upon the making, validity, or enforcement test, the Supreme Court observed "[b]ecause the doctrine of unclean hands exists to safeguard the integrity of the court . . . [w]here a plaintiff's claim grows out of or depends upon or is inseparably connected with his own prior fraud, a court of equity will, in general, deny him any relief, and will leave him to whatever remedies and defenses at law he may have." (Citations omitted; internal quotation marks omitted.) Id., 310.

[7] I recognize that our jurisprudence is somewhat opaque with regard to the meaning of enforcement in this context and that there can be reasonable and differing views about how to interpret that term in the foreclosure context. For example, enforcement could be construed narrowly to refer only to the ability of a mortgagee to enforce the note or mortgage or, more broadly, to include a mortgagee's actions related to such enforcement. In the absence of needed clarification by our Supreme Court, and given the equitable nature of foreclosure proceedings, I believe that a broader interpretation is appropriate.

Finally, I do not share the concern expressed by the majority that allowing special defenses or counterclaims related to the preforeclosure actions of mortgagees would significantly impact judicial economy or unnecessarily open the floodgates to convoluted claims that will unduly delay foreclosure actions. I am confident that our courts will be able to discern efficiently between claims that are well pleaded and supported by specific factual allegations and those that are merely frivolous and intended only to create unneeded delay. Further, courts readily can differentiate between allegations involving inequitable practices that may have occurred prior to the commencement of the foreclosure action and that implicate enforcement, such as in the present case, and more attenuated allegations related solely to mediation occurring after the commencement of litigation. See *U.S. Bank National Assn.* v. *Sorrentino*, supra, 158 Conn. App. 95–97.

Here, the court found that the allegations in the pleadings were wholly sufficient to support the special defenses of estoppel and unclean hands, but only failed because they did not directly relate to the making, validity, or enforcement of the note or mortgage. I would conclude, however, that the allegations of deceitful and unfair practices leading to the filing of the foreclosure action were sufficiently related to the enforcement of the note and mortgage, and they were directly and inseparably connected to the foreclosure action. Accordingly, I would reverse the court's decision to strike both special defenses.

II

Finally, I address Piper's claim that the trial court improperly granted the motion to strike as to the defendants' counterclaims. The court concluded that the defendants failed to assert in their counterclaims factual allegations that demonstrated some reasonable

nexus between those allegations and the making, validity, or enforcement of the mortgage or note. I disagree, and, therefore, would also reverse the court's judgment on the counterclaims.

"[T]his court has clarified that a proper application of Practice Book § 10-10 in a foreclosure context requires consideration of whether a counterclaim has some reasonable nexus to, rather than directly attacks, the making, validity or enforcement of the mortgage or note." Id., 96. "[R]elevant considerations in determining whether the transaction test has been met include whether the same issues of fact and law are presented by the complaint and the [counter]claim and whether separate trials on each of the respective claims would involve a substantial duplication of effort by the parties and the courts." (Internal quotation marks omitted.) *CitiMortgage, Inc.* v. *Rey*, supra, 150 Conn. App. 606. I believe that proper application of the transaction test demonstrates that both of the defendants' counterclaims were properly joined.

The counterclaims asserted by the defendants sounded in negligence and a violation of CUTPA based upon the conduct of plaintiff's servicing agent during mediation and modification negotiations that culminated in the present foreclosure action. In support of their negligence claim, the defendants alleged, inter alia, that the plaintiff erroneously informed the defendants' homeowners insurance company of false information that resulted in the cancellation of their policy and an increase in premiums, and the plaintiff unnecessarily delayed the defendants' request for a loan modification by making duplicative and changing requests for information. In support of their CUTPA claim, the defendants alleged, inter alia, that throughout modification negotiations, the plaintiff repeatedly requested duplicative and unnecessary documentation updates and made material

misrepresentations, including communicating false information to the defendants' insurance carrier.

The court did not strike the counterclaims because they failed to state cognizable causes of action, but, rather, because they did not have a proper nexus either to the making, validity, or enforcement of the note and mortgage. For the same reasons that I articulated with respect to the special defenses, however, I believe that the factual underpinnings set forth in the defendants' counterclaims directly relate to the plaintiff's prefore-closure efforts to enforce its rights under the existing note and mortgage. Accordingly, the counterclaims were properly joined and should have survived the plaintiff's motion to strike.

In sum, I would reverse the judgment of the trial court granting the motion to strike and, accordingly, would reverse the judgment of strict foreclosure and remand the case for further proceedings.

STATE OF CONNECTICUT *v.* JUAN C. LOPEZ (AC 37912)

Lavine, Prescott and Harper, Js.

Syllabus

Convicted of the crimes of operating a motor vehicle while under the influence of alcohol in violation of statute (§ 14-227a [a] [1]) and operating a motor vehicle while his license was suspended, the defendant, who also was found guilty of being a third time offender, appealed to this court. The defendant had failed three field sobriety tests that were administered to him by a state police trooper, who had stopped the defendant's vehicle after observing it swerve on an interstate highway and estimating that the defendant was driving above the speed limit. The defendant was charged under subdivision (1) of § 14-227a (a), the behavioral subdivision, pursuant to which blood alcohol levels are generally excluded from evidence without a defendant's consent. On direct examination, the state's expert witness, a forensic toxicologist, testified in response to a set of hypothetical facts that an individual who performed in a certain way on the three sobriety tests must have had a

blood alcohol concentration higher than the legal limit under § 14-227a and, thus, must have been intoxicated. On cross-examination, the defendant sought make the point that the expert's opinion was based on a hypothetical, and that the expert had not and could not express an opinion on the ultimate issue of whether the defendant was intoxicated and to what extent, but the court sustained the state's objections to those questions. On appeal, the defendant claimed, inter alia, that the trial court improperly restricted his cross-examination of the state's expert. *Held*:

1. The trial court abused its discretion in sustaining the state's objections to the defendant's attempts on cross-examination to question the state's expert witness regarding his lack of knowledge as to the defendant's blood alcohol content level: that court's ruling, which permitted the expert to testify on direct examination that an individual who performed in a certain way similar to that of the defendant on each of the field sobriety tests must have been under the influence of a central nervous system depressant such as alcohol and must have had a blood alcohol concentration higher than the legal limit, but precluded the defendant from questioning the expert to clarify that his opinion did not apply to this specific defendant, improperly allowed the state to open the door unfairly to the jury's consideration of blood alcohol levels when the defendant was charged solely under the behavioral subdivision of § 14-227a, without allowing the defendant an opportunity to defend against that critical evidence by explaining to the jury that the witness had not and could not express an opinion regarding the defendant's level of intoxication or whether he was intoxicated at all, and it was clear from the context of the expert's full testimony that the defendant did not ask him to opine on the ultimate issue of whether the defendant was intoxicated during the traffic stop; moreover, the defendant met his burden of demonstrating that the court's undue restriction on his cross-examination of the state's expert was harmful, as the jury may have misused the expert's opinion testimony on the topic of blood alcohol level to find the defendant guilty of operating a motor vehicle while under the influence of alcohol when he was charged only under the behavioral subdivision of § 14-227a (a), which precluded evidence of the defendant's blood alcohol content without his consent, of which there was no evidence in the record, and there was a substantial question regarding the scientific reliability of the expert's opinion evidence.

2. The defendant could not prevail on his claim that the trial court abused its discretion by admitting into evidence a DVD that contained video of the traffic stop, taken from the trooper's patrol car, which the defendant asserted was not sufficiently authenticated and was incomplete and altered: the defendant failed to preserve any claim that the admission of the DVD was improper on the ground that it was incomplete or potentially altered, and his unpreserved claim, which was evidentiary and not constitutional in nature, was not reviewable pursuant to *State* v. *Golding* (213 Conn. 233), as no due process violation resulted from the admission of the DVD because that claim was abandoned when the

defendant expressly disavowed, in his reply brief to this court, any claim for failure to preserve evidence, and the defendant's right to confrontation was not violated because he cross-examined the expert as to the segment of the video that was admitted, as well as about that portion of the traffic stop that was not captured on the DVD; moreover, the trooper's testimony that the video was a fair and accurate representation of the events was sufficient to authenticate the DVD, and the admission of the DVD did not constitute plain error, as the defendant presented no evidence that the video was anything other than an exact copy of the original footage and the issue of whether the DVD depicted the entire event concerned the weight of the evidence, not its admissibility.

(*One judge dissenting in part and concurring in part*)

Argued May 31—officially released October 31, 2017

Procedural History

Two part substitute information charging the defendant, in the first part, with the crimes of operating a motor vehicle while under the influence of intoxicating liquor and operating a motor vehicle with a suspended license, and, in the second part, with having previously been convicted of operating a motor vehicle while under the influence of intoxicating liquor, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, where the first part of the information was tried to the jury before *Dennis*, *J.*; verdict of guilty; thereafter, the defendant was presented to the court on a plea of guilty to the second part of the information; judgment of guilty in accordance with the verdict and plea, from which the defendant appealed to this court. *Reversed; new trial.*

James B. Streeto, senior assistant public defender, with whom, on the brief, was *Ani A. Desilets*, certified legal intern, for the appellant (defendant).

Ronald G. Weller, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Mark R. Durso*, senior assistant state's attorney, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, Juan C. Lopez, appeals from the judgment of conviction, rendered after a jury

trial, of operating a motor vehicle while under the influence of alcohol in violation of General Statutes § 14-227a (a) (1) and operating a motor vehicle while his license was suspended in violation of General Statutes § 14-215. On appeal, the defendant claims, among other things, that the trial court improperly (1) restricted his cross-examination of the state's expert witness and (2) admitted an "incomplete and altered" dashboard camera video taken from the arresting officer's patrol car. With respect to the first claim, we agree with the defendant that the court improperly restricted his cross-examination of the expert witness and that that impropriety was harmful.[1] We thus reverse the judgment and remand the case for a new trial.

The following facts, which the jury reasonably could have found, and procedural history are relevant to this appeal. In the early morning of March 3, 2013, state police Trooper Colin Richter was driving northbound on Interstate 95 in Fairfield at a rate of speed of seventy-five miles per hour, patrolling a portion of the highway for motor vehicle violations. At approximately 1:50 a.m., he observed the defendant's vehicle in his rearview mirror "coming up on [him] very quick." The defendant's vehicle passed Richter and "began to swerve from the left lane to the center lane." At that point, having estimated that the defendant was driving above the speed limit, Richter activated his vehicle's red lights and conducted a motor vehicle stop. The defendant pulled over onto the right shoulder of the highway.

[1] The defendant also claims that the trial court improperly allowed an expert witness to opine about the defendant's blood alcohol content without a proper foundation for that opinion, in the absence of any chemical testing, and without first conducting a hearing pursuant to *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997) (en banc), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998). Because we reverse the court's judgment on the ground that it improperly restricted the defendant's cross-examination of the expert witness, we need not reach the merits of this claim, except as it is discussed in the context of our analysis of the first claim.

Richter approached the defendant's vehicle and, upon speaking with him, noticed that the defendant was slurring his speech and had glassy, bloodshot eyes. Richter also detected the odor of alcohol on the defendant's breath. When asked for his license and registration, the defendant could not produce a license. At that point, Richter asked the defendant where he had come from and whether he had been drinking beforehand. The defendant replied that he was coming from Stamford and had not been drinking.

After his initial contact with the defendant, Richter went back to his cruiser and looked up the defendant by his name and date of birth. Upon running the defendant's information in the Department of Motor Vehicles (department) database, Richter learned that the defendant's license had been suspended. Richter then called into dispatch, stating that he would be performing tests on the defendant to determine whether the defendant was intoxicated. He then administered the following three field sobriety tests:[2] (1) the horizontal gaze nystagmus test,[3] (2) the walk and turn test,[4] and (3) the one leg stand test.[5]

[2] Richter was properly trained to administer the tests used to determine whether the defendant was intoxicated.

[3] "The horizontal gaze nystagmus test measures the extent to which a person's eyes jerk as they follow an object moving from one side of the person's field of vision to the other. The test is premised on the understanding that, whereas everyone's eyes exhibit some jerking while turning to the side, when the subject is intoxicated the onset of the jerking occurs after fewer degrees of turning, and the jerking at more extreme angles becomes more distinct." (Internal quotation marks omitted.) *State* v. *Popeleski*, 291 Conn. 769, 770 n.3, 970 A.2d 108 (2009).

[4] "The walk and turn test requires the subject to walk heel to toe along a straight line for nine paces, pivot, and then walk back heel to toe along the line for another nine paces. The subject is required to count each pace aloud from one to nine." (Internal quotation marks omitted.) *State* v. *Popeleski*, 291 Conn. 769, 771 n.4, 970 A.2d 108 (2009).

[5] "The one leg stand test requires the subject to stand on one leg with the other leg extended in the air for [thirty] seconds, while counting aloud from [one] to [thirty]." (Internal quotation marks omitted.) *State* v. *Popeleski*, 291 Conn. 769, 771 n.5, 970 A.2d 108 (2009).

The defendant failed all three tests. On the basis of these results, Richter determined that the defendant could not safely operate a motor vehicle and placed him under arrest. Richter then transported the defendant to the police barracks, where he read the defendant his constitutional rights and asked if the defendant was injured or suffered from any medical conditions, to which the defendant replied in the negative.[6] Richter also asked the defendant, for a second time, whether he had had anything to drink the night of March 2, 2013, into the early morning of March 3, 2013. The defendant responded that he had had two mojitos between 7:30 and 9:30 p.m. at a restaurant in New York City, and then had stopped at his grandmother's residence in Stamford on his way home to Bridgeport. After this admission, Richter asked the defendant to submit to a Breathalyzer test to measure his blood alcohol content, but he refused.

On November 17, 2014, a jury trial commenced against the defendant. The state called three witnesses to testify on its behalf: Richter; Dr. Robert H. Powers, a forensic toxicologist; and department analyst Brian Clarke. After the state rested, the defendant did not present any additional evidence. Subsequently, the defendant was found guilty of operating a motor vehicle while under the influence of alcohol in violation of § 14-227a (a) (1) and operating a motor vehicle while his license was suspended in violation of § 14-215. Thereafter, he pleaded guilty to a part B information charging him as a third time offender pursuant to § 14-227a (g) (3).[7]

[6] Richter previously had asked the defendant this same question before he administered each of the three field sobriety tests.

[7] General Statutes § 14-227a (g) provides in relevant part: "Any person who violates any provision of subsection (a) of this section shall . . . (3) for conviction of a third and subsequent violation within ten years after a prior conviction for the same offense, (A) be fined not less than two thousand dollars or more than eight thousand dollars, (B) be imprisoned not more than three years, one year of which may not be suspended or reduced in

The court sentenced the defendant to three years of incarceration, execution suspended after two years, followed by three years of probation. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant claims on appeal that the trial court unduly restricted his cross-examination of Dr. Powers on the subject of his opinion testimony regarding the blood alcohol level of a person exhibiting the same behaviors as the state alleged the defendant exhibited in this case. More specifically, the defendant argues that once Dr. Powers testified on direct examination that an individual who performed in a certain way on each of the field sobriety tests had an extrapolated blood alcohol content of 0.12 or higher, the court should not have foreclosed the defendant from later cross-examining him about this central, relevant issue. We agree with the defendant that the court's ruling was an abuse of discretion and conclude that the impropriety was not harmless.

The following facts are relevant to the defendant's claim. At trial, the state's witness, Dr. Powers, was permitted to testify as an expert in the field of forensic toxicology without objection. He testified that nystagmus exhibited during a horizontal gaze nystagmus test is caused by the presence of a central nervous system depressant, such as alcohol, in the operator's system. The state then asked Dr. Powers several hypothetical

any manner, and sentenced to a period of probation requiring as a condition of such probation that such person . . . [p]erform one hundred hours of community service, as defined in section 14-227e . . . and (C) have such person's motor vehicle operator's license or nonresident operating privilege permanently revoked upon such third offense . . . ."

We note that although § 14-227a has been amended since the events at issue here, those amendments are not relevant to this appeal. For convenience, we refer in this opinion to the current revision of § 14-227a.

questions comprised of facts mirroring those present in the case.

In its first hypothetical, the state described a man who exhibited an odor of alcohol on his breath, bloodshot/glassy eyes, and who failed the horizontal gaze nystagmus test by exhibiting the same signs the defendant had—a lack of smooth pursuit in each eye, a distinct and sustained nystagmus at maximum deviation, and the onset of nystagmus prior to forty-five degrees. The second hypothetical went on to posit that the man described in the first hypothetical had also failed the walk and turn test in the same way the defendant had. The third hypothetical described the same man failing the one leg stand test in the way the defendant had.

After each hypothetical, the state asked Dr. Powers whether he could opine to a reasonable degree of scientific certainty as to whether the man described was under the influence of a central nervous system depressant such as alcohol. In each instance, Dr. Powers responded that he could and answered in the affirmative that he would expect the individual in question to have been affected by a central nervous system active agent.

The state then asked Dr. Powers what he would expect the hypothetical man's blood alcohol level to be on the basis of the behavior he exhibited and his performance on each of the three field sobriety tests. The defendant objected to the question on the ground that there was not an appropriate foundation laid as to "how much alcohol" was ingested. The court overruled his objection. Dr. Powers then responded that he would be looking for "blood alcohol concentration of a 0.12 or higher. How much higher, that's very hard to say. But I'd be looking for at least a 0.12. Below a 0.12, we tend not to see complete failures on the standardized field sobriety tests. . . . [O]ur research actually [that] we've done recently shows that when basically all the

clues in the . . . standardized field sobriety tests are being generated, that individuals tend to have a concentration above 0.12 or 0.15 or even higher. . . . [T]he ability to operate motor vehicles diminishes with increased blood alcohol concentration, or with an increase in the concentration of any central nervous system depressant."

Subsequently, during cross-examination, the following colloquy took place between Dr. Powers, defense counsel, the prosecutor, and the court:

"[Defense Counsel]: So, if you recall the question that [the prosecutor] had asked you regarding a—let me withdraw that question. If a person has driven from Stamford, Connecticut, to Fairfield, Connecticut, was not involved in any accidents, was pulled over by a trooper, the trooper only saw the car swerve once, the operator then pulled over three lanes from the left lane to the middle lane to the right lane to the shoulder, parked the car properly, did not hit any other objects, did not hit a guardrail; and would those set of facts change your opinion as to the level of intoxication somebody may have?

"[Dr. Powers]: Probably not; but I recognize that that level of control and behavior seems inconsistent with the level of alcohol that I opined on earlier, assuming this is all referring to the same individual.

"[Defense Counsel]: Okay. So, it is—so, assume that it's the same individual and—but you just testified that it doesn't —it doesn't indicate the person that you just opined to. So, would that—so, would that level of intoxication be lower, then, if they had that much control over a vehicle?

"[Dr. Powers]: I'm just saying that—that the—that the behavior you described seems inconsistent to me with the behavior described in the performance of the

standardized field sobriety tests. And I heard it as weaving. But nevertheless, I was responding to your question.

"[Defense Counsel]: Okay. And would that change your answer as to the level of intoxication if the person was able to do that much?

"[Dr. Powers]: No, I don't think so. It does make me think about it, but I don't—I think I would stick with what I've said so far based on the descriptions of the performance on the field testing as described.

"[Defense Counsel]: But it could possibly change your opinion?

"[Dr. Powers]: I think I just said it would not.

"[Defense Counsel]: Right. But you don't want—

"[Dr. Powers]: It certainly is—

"[Defense Counsel]: —you don't want to change your opinion.

"[Dr. Powers]: I'm sorry?

"[Defense Counsel]: You don't want to change your opinion.

"[The Prosecutor]: Objection; that's argumentative.

"The Court: The objection is sustained. You may disregard the question.

"[Defense Counsel]: Okay. . . . And were you on [Interstate] 95 on March 3, 2013, at 1:52 a.m.?

"[Dr. Powers]: I can say no.

"[Defense Counsel]: And so you were not present when any field sobriety tests were administered to [the defendant]?

"[Dr. Powers]: Correct. I was not.

"[Defense Counsel]: And with any level—with any degree of certainty with you not being there, do you—

"[Dr. Powers]: I'm sorry?

"[Defense Counsel]: Without—with any degree of medical certainty with you not being present at this scene on [Interstate] 95 on March 3, 2013, at 1:52 a.m., you—you do not know what [*the defendant's*] level of intoxication was.

"[The Prosecutor]: I'm going to object. That calls for a legal conclusion or a conclusion at this point. That's the jury's responsibility.

"The Court: *The objection is sustained.*

"[Defense Counsel]: Okay. . . . As you sit here today, do you know if [*the defendant*] was intoxicated that day?

"[The Prosecutor]: Objection.

"The Court: *The objection is sustained.*

"[Defense Counsel]: I have no further questions." (Emphasis added.)

Turning now to the governing legal principles and the standard of review, we note that "[t]he sixth amendment to the [United States] constitution guarantees the right of an accused in a criminal prosecution to confront the witnesses against him. . . . The primary interest secured by confrontation is the right to cross-examination . . . . Compliance with the constitutionally guaranteed right to cross-examination requires that the defendant be allowed to present the jury with facts from which it could appropriately draw inferences relating to the witness' reliability. . . . However, [t]he [c]onfrontation [c]lause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent,

the defense might wish. . . . Thus, [t]he confrontation clause does not . . . suspend the rules of evidence to give the defendant the right to engage in unrestricted cross-examination. . . .

"Although [t]he general rule is that restrictions on the scope of cross-examination are within the sound discretion of the trial [court] . . . this discretion comes into play only after the defendant has been permitted cross-examination sufficient to satisfy the sixth amendment." (Internal quotation marks omitted.) *State* v. *Leconte*, 320 Conn. 500, 510–11, 131 A.3d 1132 (2016). If that constitutional standard has been satisfied, then "[t]he trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . [That is to say] [t]he court's decision is not to be disturbed unless [its] discretion has been abused, or the error is clear and involves a misconception of the law." (Internal quotation marks omitted.) *State* v. *Favoccia*, 306 Conn. 770, 785–86, 51 A.3d 1002 (2012).

With these principles in mind, we turn to the present case. First, we note that "[i]t is well established that this court has a basic judicial duty to avoid deciding a constitutional issue if a nonconstitutional ground exists that will dispose of the case." (Internal quotation marks omitted.) *State* v. *Brown*, 309 Conn. 469, 478–79 n.11, 72 A.3d 48 (2013). Because the present appeal properly may be resolved on evidentiary grounds, we need not address the defendant's argument that the restrictions that the court placed on defense counsel's cross-examination of Dr. Powers did not comply with the minimum constitutional standards required by the sixth amendment.

We thus consider whether the court abused its discretion in sustaining the state's objection to defense counsel's question to Dr. Powers regarding his lack of

knowledge as to the defendant's blood alcohol level on the ground that it sought to elicit his opinion on a legal conclusion belonging to the jury. The defendant contends that it was an abuse of discretion, arguing that once the state improperly asked Dr. Powers on direct examination to draw a legal conclusion for the jury, i.e., that the defendant was "per se" intoxicated with an elevated blood alcohol content on the basis of his performance on the field sobriety tests,[8] the defendant should not have been foreclosed from then questioning Dr. Powers to make clear that his opinion regarding the individual's extrapolated blood alcohol content did not, in fact, apply to this specific defendant. We agree.

Our Supreme Court has held that "[g]enerally, a party who delves into a particular subject during the examination of a witness cannot object if the opposing party later questions the witness on the same subject. . . . The party who initiates discussion on the issue is said to have opened the door to rebuttal by the opposing party. Even though the rebuttal evidence would ordinarily be inadmissible on other grounds, the court may, in its discretion, allow it where the party initiating inquiry has made unfair use of the evidence. . . . The doctrine of opening the door cannot, of course, be subverted into a rule for injection of prejudice. . . . The trial court must carefully consider whether the circumstances of the case warrant further inquiry into the subject matter, and should permit it only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence." (Internal quotation marks omitted.) *State* v. *Brown*,

[8] "We previously have described General Statutes § 14-227a (a) (1) as the 'behavioral' subdivision and § [14-227a] (a) (2) as the 'per se' subdivision" of the offense of operating under the influence. *State* v. *Longo*, 106 Conn. App. 701, 705 n.5, 943 A.2d 488 (2008). This statute will be discussed more fully in this part of the opinion.

supra, 309 Conn. 479. In addition, § 7-3 (a) of the Connecticut Code of Evidence provides in relevant part that "[t]estimony in the form of an opinion is inadmissible if it embraces an ultimate issue to be decided by the trier of fact . . . ."

In reviewing the transcript of Dr. Powers' cross-examination in the present case, we note that the defendant did not ask the witness to opine on an ultimate issue in the case when he asked, "you do not know what [the defendant's] level of intoxication was . . . ." Although the state argues on appeal that the defendant was asking Dr. Powers "to opine on whether the defendant himself specifically was intoxicated that evening" in violation of § 7-3 (a) of the Connecticut Code of Evidence, if viewed in the context of Dr. Powers' full testimony, it is clear that that was not the intent of the question posed.

Although defense counsel subsequently attempted to rephrase this question by asking, "do you know if [the defendant] was intoxicated that day?," this time omitting any reference to "the level" of his intoxication, we are still unconvinced that this omission indicates that the defendant was asking him to opine on the ultimate issue of the defendant's intoxication generally, as opposed to making the point that Dr. Powers did not know his specific blood alcohol level. In reviewing this specific colloquy in the transcript, defense counsel used the phrase "level of intoxication" in four questions immediately prior to the one at issue and asked Dr. Powers whether the level of intoxication of a person exhibiting certain behaviors would be *lower* than the level on which he previously opined on direct examination—0.12 or higher—all of which indicate that he was referring to blood alcohol level specifically during this entire line of questioning and not intoxication generally.

Rather, the defendant, through his questions, was pointing out to the jury that the expert witness had

not offered any opinion on this *particular* defendant's blood alcohol content when he testified on direct examination that a person who performed field sobriety tests in a certain manner must have a "blood alcohol concentration of a 0.12 or higher" and, thus, must be intoxicated. In other words, the defendant was attempting to make the significant point that the expert's opinion was based on a hypothetical set of facts and not on any chemical analysis of the defendant's blood alcohol content or even upon his own personal observation of the defendant. Indeed, viewed in this light, the defendant was attempting to make clear to the jury that the witness had not and could not express an opinion on the ultimate issue in this case: whether the defendant was intoxicated and to what extent.[9]

Accordingly, we are left with a situation in which the court improperly allowed the state to open the door unfairly to the jury's consideration of blood alcohol levels in a case in which the defendant was charged solely under the "behavioral" subdivision of § 14-227a, as we will discuss more fully in our harmlessness analysis, without also allowing the defendant an opportunity to defend against that critical evidence by explaining to the jury that the witness had not and could not express an opinion regarding the defendant's level of intoxication or whether he was intoxicated at all. By sustaining the state's objections to this question, the court's ruling allowed the state to "have it both ways": its expert was permitted to testify that a person who

[9] The dissent argues that the defendant's questions must be construed as an attempt to get the state's expert to opine on an ultimate issue in the case, namely, whether the defendant was intoxicated. We are not persuaded by this reading of the transcript because it seems most unlikely that counsel for the defendant would invite the state's witness, who already had suggested on direct examination that the defendant was intoxicated, to opine directly on the ultimate issue in the case. In our view, defense counsel was attempting to do precisely the opposite, i.e., make clear to the jury that the expert witness had not and could not opine on the ultimate issue in the case.

performed on the field sobriety test in the same manner that the state claimed the defendant did must have had a blood alcohol level of at least 0.12, but the defendant could not make clear that the expert had not opined about the blood alcohol level of this specific defendant. For these reasons, the court's evidentiary ruling was an abuse of discretion.

Having determined that the court's ruling was an abuse of discretion, we must next consider whether that impropriety was nonetheless harmless. "When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [A] nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict. . . . [O]ur determination [of whether] the defendant was harmed by the trial court's . . . [evidentiary ruling] is guided by the various factors that we have articulated as relevant [to] the inquiry of evidentiary harmlessness . . . such as the importance of the . . . testimony in the [state's] case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony . . . on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the [state's] case. . . . *Most importantly, we must examine the impact of the evidence on the trier of fact and the result of the trial.*" (Emphasis added; internal quotation marks omitted.) *State* v. *Rodriguez*, 311 Conn. 80, 89, 83 A.3d 595 (2014). After reviewing these factors in the present case, we are convinced that the defendant has met his burden of demonstrating that the court's undue restriction on his cross-examination of Dr. Powers was harmful.[10]

[10] In attempting to rebut our conclusion, the dissent implies that the *quantity* of defense counsel's overall cross-examination of the state's expert suggests harmlessness. In our view, however, the court's restriction on cross-examination impacted the *quality* of the cross-examination, and it is that impact that is significant here.

Significantly, in considering the impact on the trier of fact of Dr. Powers' direct examination testimony combined with the court's limitation on his cross-examination testimony, we have serious concerns that the jury may have misused the witness' opinion testimony on the topic of blood alcohol level to improperly find the defendant guilty of operating while under the influence. More specifically, because the legislature has evinced a clear intent that a defendant's blood alcohol content should not be admitted without the defendant's consent in a prosecution brought pursuant to § 14-227a (a) (1), and because there is a substantial question regarding the scientific reliability of this opinion evidence, we cannot conclude that the court's ruling was harmless.

First, we note that § 14-227a (a) provides in relevant part: "No person shall operate a motor vehicle while under the influence of intoxicating liquor or any drug or both. A person commits the offense of operating a motor vehicle while under the influence of intoxicating liquor or any drug or both if such person operates a motor vehicle (1) while under the influence of intoxicating liquor or any drug or both, or (2) while such person has an elevated blood alcohol content. For the purposes of this section, 'elevated blood alcohol content' means a ratio of alcohol in the blood of such person that is eight-hundredths of one per cent or more of alcohol, by weight . . . ." Moreover, subsection (c) of § 14-227a provides that "[i]n any prosecution for a violation of subdivision (1) of subsection (a) of this section, reliable evidence respecting the amount of alcohol in the defendant's blood or urine at the time of the alleged offense, as shown by a chemical analysis of the defendant's blood, breath or urine, otherwise admissible under subsection (b)[11] of this section, shall be admissible *only at*

[11] General Statutes § 14-227a (b) provides: "Except as provided in subsection (c) of this section, in any criminal prosecution for violation of subsection (a) of this section, evidence respecting the amount of alcohol or drug in the defendant's blood or urine at the time of the alleged offense, as shown by a chemical analysis of the defendant's breath, blood or urine shall be

the request of the defendant." (Emphasis added; footnote added.)

As previously mentioned herein, this court has "described General Statutes § 14-227a (a) (1) as the 'behavioral' subdivision and § [14-227a] (a) (2) as the 'per se' subdivision" of the offense of operating under the influence. *State* v. *Longo*, supra, 106 Conn. App. 705 n.5. "The legislative history reflects that the two subdivisions of § 14-227a (a) describe alternative means for committing the same offense of illegally operating a motor vehicle while under the influence of intoxicating

admissible and competent provided: (1) The defendant was afforded a reasonable opportunity to telephone an attorney prior to the performance of the test and consented to the taking of the test upon which such analysis is made; (2) a true copy of the report of the test result was mailed to or personally delivered to the defendant within twenty-four hours or by the end of the next regular business day, after such result was known, whichever is later; (3) the test was performed by or at the direction of a police officer according to methods and with equipment approved by the Department of Emergency Services and Public Protection and was performed in accordance with the regulations adopted under subsection (d) of this section; (4) the device used for such test was checked for accuracy in accordance with the regulations adopted under subsection (d) of this section; (5) an additional chemical test of the same type was performed at least ten minutes after the initial test was performed or, if requested by the police officer for reasonable cause, an additional chemical test of a different type was performed to detect the presence of a drug or drugs other than or in addition to alcohol, provided the results of the initial test shall not be inadmissible under this subsection if reasonable efforts were made to have such additional test performed in accordance with the conditions set forth in this subsection and such additional test was not performed or was not performed within a reasonable time, or the results of such additional test are not admissible for failure to meet a condition set forth in this subsection; and (6) evidence is presented that the test was commenced within two hours of operation. In any prosecution under this section it shall be a rebuttable presumption that the results of such chemical analysis establish the ratio of alcohol in the blood of the defendant at the time of the alleged offense, except that if the results of the additional test indicate that the ratio of alcohol in the blood of such defendant is ten-hundredths of one per cent or less of alcohol, by weight, and is higher than the results of the first test, evidence shall be presented that demonstrates that the test results and the analysis thereof accurately indicate the blood alcohol content at the time of the alleged offense."

liquor or drugs. In other words, the two subdivisions provide for different methods of proof of the same offense and, significantly, the legislature clearly indicated that an individual could not be punished under both subdivisions of the statute without violating double jeopardy." *State* v. *Re*, 111 Conn. App. 466, 472–73, 959 A.2d 1044 (2008).

In the present case, the defendant was charged only under the behavioral subdivision of § 14-227a (a). In a prosecution under that subdivision, the legislature has evinced a clear intent that a defendant's blood alcohol content should *not* be admitted absent the defendant's consent, of which there is no evidence in the record of the present case. See General Statutes § 14-227a (c). Despite this, the state elicited testimony from Dr. Powers concerning the blood alcohol level—0.12 or higher—of an individual who exhibited the same behaviors during the horizontal gaze nystagmus, walk and turn, and one leg stand tests as the state alleged the defendant exhibited on March 3, 2013, without allowing the defendant to make clear to the jury that Dr. Powers was not opining on the blood alcohol level of this *specific* defendant.[12]

Although we recognize that the language of the statute refers to blood alcohol content "as shown by a chemical analysis of the defendant's blood, breath or urine"; General Statutes § 14-227a (c); and that the blood alcohol content evidence in this case was not derived from such a chemical analysis, we do not

[12] Moreover, because the specific blood alcohol level that constitutes per se intoxication in this state for purposes of operating a motor vehicle under the influence is likely within the common knowledge of most jurors, Dr. Powers' opinion that an individual who behaved in a manner similar to the defendant had a blood alcohol content over that per se number might provide the jury with an attractive shortcut in determining the defendant's guilt, despite the fact that he solely was charged under the behavioral subdivision of § 14-227a (a), and, thus, the state must prove the offense in that specific manner.

believe that, at the time the legislature passed the statute, it contemplated that there would be any other way to demonstrate the concentration of alcohol in someone's blood except by chemical analysis. Thus, as a matter of statutory interpretation, it would lead to absurd and unworkable results to interpret the statute to permit evidence of the defendant's blood alcohol content derived from a less reliable, extrapolated analysis, such as the one made here, while prohibiting blood alcohol content evidence derived from a more reliable procedure, i.e., chemical testing of the defendant's blood, breath, or urine. Indeed, from the plain language of § 14-227a, it is reasonably apparent that the legislature intended blood alcohol content evidence to be based solely on chemical testing and its admissibility to be contingent on the satisfaction of strict statutory criteria, e.g., the performance of multiple chemical tests administered by qualified law enforcement personnel within two hours of the defendant's operation of the vehicle. See General Statutes § 14-227a (b). Permitting evidence in this behavioral prosecution case of a blood alcohol content derived from a subjective interpretation of the defendant's performance on standard field sobriety tests, without using any of the approved methods and procedures, does great violence to the intent of the statute.[13]

This leads to the second reason that the court's evidentiary ruling was harmful in its potential impact on the jury: there is a substantial question regarding the

[13] The dissent claims that our analysis rests in part on an implicit assumption that the jury disobeyed or ignored the court's legal instructions, and asserts that the court expressly directed the jury that it could rely on "only" behavioral evidence in determining whether the defendant was intoxicated. Nowhere in the court's instructions, however, did the court place any limitation on what duly admitted trial evidence the jury could consider in reaching that ultimate conclusion. Because the blood alcohol content testimony was admitted, it was evidence before the jury, and the jury was never given any type of limiting instruction regarding that evidence.

scientific reliability of this opinion evidence, and it has been excluded by the large majority of courts that have considered it. See, e.g., *State* v. *Shadden*, 290 Kan. 803, 820–25, 235 P.3d 436 (2010); *Wilson* v. *State*, 124 Md. App. 543, 553–59, 723 A.2d 494 (1999); *State* v. *Fisken*, 138 Or. App. 396, 398–99, 909 P.2d 206 (1996). Although we need not determine, for purposes of deciding this claim, whether the opinion testimony should have been excluded pursuant to *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997) (en banc), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998), the significant questions regarding its reliability exacerbate the conflict between our statutory provision generally excluding blood alcohol levels in behavioral cases and the court's admission of it in this case without an opportunity for the defendant, at the very least, to limit the scope of the opinion on cross-examination by emphasizing that the expert witness had not and could not express an opinion regarding the defendant's level of intoxication or if he was intoxicated at all.

As the Arizona Supreme Court noted in construing that state's similar statutory scheme: "[O]ur state legislature has specified that blood, breath, and urine tests are the only methods for measuring, or quantifying, [blood alcohol content]. A.R.S. § 28-692 (G), (H) . . . *People* v. *Dakuras*, 172 Ill. App. 3d 865, [868–70, 527 N.E.2d 163] (because the [horizontal gaze nystagmus] test does not determine [blood alcohol content] by analysis of specified bodily substances, the results are not admissible to prove [blood alcohol content] in any prosecution under [the driving while under the influence] statute) [leave to appeal denied, 123 Ill. 2d 561, 535 N.E.2d 405 (1988)]; *State* v. *Barker*, [179 W. Va. 194, 198, 366 S.E.2d 642 (1988)] (assuming [horizontal gaze nystagmus] test was found reliable, evidence would be admissible only as evidence of driving under the influence, but not to estimate[blood alcohol content],

as state legislature has not recognized [horizontal gaze nystagmus] test as an appropriate method for measuring [blood alcohol content]). Therefore, [blood alcohol content], under § [28]-692 is to be determined deductively from analysis of bodily fluids, not inductively from observation of involuntary bodily movements. . . . Within the limits of due process, it is the legislature's role to determine which tests may be used to measure [blood alcohol content]. Where the legislature has prescribed only specific tests for such measurements, it is not our province to add others.

"Moreover, the [horizontal gaze nystagmus] test does not conform to the requirements for determining [blood alcohol content] stated in the Arizona implied consent law, which does not include implied consent to take a [horizontal gaze nystagmus] test for[blood alcohol content]. A refusal to take one of the prescribed tests leads to automatic suspension of the license or permit for a period of twelve months . . . and can be brought out in any civil or criminal action arising from the incident . . . . In recognition of the constitutional limitations of implied consent laws, tests pursuant to the law are strictly governed by statutes for both testing requirements and Department of Health Services . . . qualifications. An important part of the testing requirements is the defendant's right to independently check the test results. . . . The [horizontal gaze nystagmus] test, although it carries a scientific patina, is clearly unchallengeable by independent means, other than by cross-examining the officer who administered the test. We do not believe cross-examination of the officer is a sufficient check when compared to the standards set forth for tests specifically accepted under [driving under the influence] statute provisions for implied consent and for establishing [blood alcohol content]." (Citations omitted; internal quotation marks omitted.) *State*

ex rel. Hamilton v. *City Court of Mesa*, 165 Ariz., 514, 517, 799 P.2d 855 (1990).

Accordingly, we find it significant, for purposes of determining harmfulness, that the horizontal gaze nystagmus test and other field sobriety tests from which Dr. Powers derived his blood alcohol content opinion testimony are not outlined in subsection (b) of § 14-227a alongside the other strict chemical analysis requirements for per se prosecutions in which blood alcohol content evidence *is* admissible, had that been the case here. Given the potential unreliability of blood alcohol content evidence that is based on this method, and given that "[w]e cannot ignore the heightened credence juries tend to give scientific evidence"; (internal quotation marks omitted) *Wilson* v. *State*, supra, 124 Md. App. 559; the risk that this type of evidence might have had an improper impact on the jury and on the result of the trial, without the defendant's being permitted to engage in the scope of unfettered cross-examination to which he was entitled, is too great.

Ultimately, our consideration of both of these factors leads us to conclude that the defendant met his burden of proving that the court's restriction of his cross-examination of Dr. Powers on the issue of the defendant's blood alcohol content was harmful. Accordingly, we reverse the judgment on this ground and remand the case for a new trial.

II

Although we have concluded in part I of this opinion that the judgment must be reversed and the case remanded for a new trial, we address the defendant's claim that the court abused its discretion by admitting into evidence a DVD containing an "incomplete and altered" dashboard camera video taken from Richter's patrol car because that issue is likely to arise again on remand. See *State* v. *Chyung*, 325 Conn. 236, 260 n.21,

157 A.3d 628 (2017) (addressing issue likely to arise on remand). The plaintiff claims that the court abused its discretion by admitting the DVD because the state failed to authenticate it properly.[14] Specifically, the defendant contends that, as an altered exhibit, the DVD was subject to the "heightened standard" for authentication articulated in *State* v. *Swinton*, 268 Conn. 781, 847 A.2d 921 (2004), and *State* v. *Melendez*, 291 Conn. 693, 970 A.2d 64 (2009).[15] He also claims that the state failed to demonstrate a chain of custody for the DVD. We are not persuaded by the defendant's claims.

The following additional facts are relevant to this claim. A DVD of the dashboard camera footage from Richter's patrol car was admitted into evidence at trial, depicting a portion of the traffic stop and the transportation of the defendant following his arrest. The video footage on the DVD begins during administration of the walk and turn test. Richter's interactions with the defendant from the time that he activated his emergency

[14] In his appellate brief, the defendant appears to conflate what are two separate arguments: that the video was not properly authenticated, and that the admission of the video violated his due process rights because it only showed selected parts of Richter's full encounter with the defendant and a video of the entire traffic stop had not been disclosed to him. As we will discuss more fully, these are, in fact, two separate claims, one of which was preserved at trial, and one of which was not.

[15] Our Supreme Court in *Swinton* set forth six factors for a court to consider when the authentication of computer generated evidence is in question. See *State* v. *Swinton*, supra, 268 Conn. 811–14; id., 811–12; (proponent must adduce testimony to establish that "(1) the computer equipment is accepted in the field as standard and competent and was in good working order, (2) qualified computer operators were employed, (3) proper procedures were followed in connection with the input and output of information, (4) a reliable software program was utilized, (5) the equipment was programmed and operated correctly, and (6) the exhibit is properly identified as the output in question" [internal quotation marks omitted]). Following *Swinton*, our Supreme Court held that the *Swinton* factors applied to video evidence that had been modified but not to video evidence that copied exactly footage from an original eight millimeter format to DVD by downloading the eight millimeter footage onto a computer hard drive and then copying that footage to DVD. *State* v. *Melendez*, supra, 291 Conn. 709–11.

lights, including the administration of the horizontal gaze nystagmus test, are not depicted in the video.

Before that DVD was admitted and published to the jury, however, Richter testified on direct examination that the entire stop of the defendant, including the horizontal gaze nystagmus test, should have been recorded by his dashboard camera system because the system begins recording whenever he activates his emergency lights.[16] He also testified that on the morning of his testimony, he had viewed the DVD with the prosecutor. The state then sought to admit the DVD into evidence. Thereafter, defense counsel conducted voir dire of Richter. During this voir dire, Richter testified that his dashboard camera system records onto a VHS videotape, which he then submits to the trooper in charge of evidence at the troop G barracks. Richter was unable to explain how the video was transferred to a DVD, but stated that he and the defendant were depicted in the video.

The defendant objected to the admission of the DVD, stating, "[Richter] didn't make this actual DVD. I mean, he isn't able to identify how it got here or how it gets here." The court asked Richter whether the DVD, as viewed by him earlier that morning, was a fair and accurate representation of the events that occurred on the morning in question, to which Richter responded in the affirmative. The court then overruled the objection and admitted the DVD as a full exhibit.

[16] The prosecutor asked Richter on direct examination what portion of the stop was recorded on video, and he answered, "All of it." The prosecutor then asked whether the horizontal gaze nystagmus test was recorded on the video, and he responded, "Yes." Nonetheless, he explained that he "knew" this because his dashboard camera system engages when he activates his emergency lights. As explained further in this opinion, the video on the DVD entered into evidence began in the middle of the walk and turn test; Richter could not explain, when asked, why the DVD did not include additional footage.

After the court admitted the DVD as a full exhibit and its contents were published to the jury, it became apparent that the video on the DVD did not begin to depict the defendant's traffic stop until the defendant was taking the *second* field sobriety test he was given, the walk and turn test. Richter again testified that the dashboard camera in his cruiser is activated when he engages his emergency lights, and, when asked, could not explain why the DVD did not include the entire encounter.

It is significant that the defendant did not renew his objection to the admission of the DVD when these facts were revealed, nor did he specifically argue that the state had violated his rights by failing to produce a video of the entire traffic stop. Consequently, although the defendant attempts to reframe, on appeal, his original objection to the admission of the DVD as taking issue with both the fact that only portions of Richter's full traffic stop, the entirety of which was never shown to the defendant, were contained in the video presented to the jury *and* the lack of proper authentication of the video, this is not an accurate retelling of the events at trial. Rather, a review of the trial transcripts makes it clear that the defendant failed to preserve any claim that the court abused its discretion in admitting the DVD on the ground that it was incomplete or potentially altered and, thus, the original evidence had not been disclosed to him. See *State* v. *Rivera*, 169 Conn. App. 343, 366, 150 A.3d 244 (2016) ("In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling." [Internal quotation marks omitted.]), cert. denied, 324 Conn. 905, 152 A.3d 544 (2017).

The defendant does argue on appeal, however, that in the event his claim that the DVD was inadmissible because the state failed to produce a video of the entire traffic stop was not properly preserved at trial, the claim is nevertheless reviewable under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). "Under *Golding*, a defendant may prevail on an unpreserved claim only if the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Baccala*, 326 Conn. 232, 269–70 n.11, 163 A.3d 1 (2017), *petition for cert. docketed* (U.S. September 28, 2017).

With regard to the second prong of *Golding*, the defendant appears to argue in his brief that both his due process rights under the fifth and fourteenth amendments to the United States constitution, and his confrontation clause rights under the sixth amendment were violated by the admission of the DVD. First, we summarily reject his argument that his due process rights were violated by the court's admission of the purportedly incomplete video because that claim was abandoned when the defendant expressly disavowed, in his reply brief to this court, any claim for failure to preserve evidence pursuant to *State* v. *Morales*, 232 Conn. 707, 657 A.2d 585 (1995). Second, we conclude that the defendant's confrontation clause rights under the sixth amendment were not violated by the court's admission of the DVD because the defendant was able

to cross-examine Richter, confronting him with the segment of the video that was admitted. Importantly, the record shows that the defendant did, in fact, question Richter regarding the portion of the traffic stop that was *not* captured on the video on the DVD. Consequently, he was able to confront Richter using the video that was admitted into evidence. Thus, his claim is merely of an evidentiary nature and does not rise to the level of constitutional magnitude required by the second prong of *Golding*. See *State* v. *Smith*, 110 Conn. App. 70, 86, 954 A.2d 202 ("[r]obing garden variety claims [of an evidentiary nature] in the majestic garb of constitutional claims does not make such claims constitutional in nature" [internal quotation marks omitted]), cert. denied, 289 Conn. 954, 961 A.2d 422 (2008). Therefore, the claim is not reviewable pursuant to *Golding*.

The defendant also invokes the plain error rule in an attempt to prevail on his claim that the DVD was inadmissible because the state failed to produce a video of the entire traffic stop. See Practice Book § 60-5. "An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily discernable on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . Although a complete record and an obvious error are prerequisites for plain error review, they are not, of themselves, sufficient for its application. . . . [I]n addition to examining the patent nature of the error, the reviewing court must examine that error for the grievousness of its consequences in order to determine whether reversal under the plain error doctrine is appropriate. A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice." (Internal quotation marks omitted.) *State* v. *Sanchez*, 308 Conn. 64, 77, 60 A.3d 271 (2013).

We are not persuaded that there was any error in the admission of the DVD, much less plain error. See *State* v. *Pierce*, 269 Conn. 442, 453, 849 A.2d 375 (2004) ("the plain error doctrine should not be applied in order to review a ruling that is not arguably incorrect in the first place"). Whether the DVD depicted the entire event or not goes to the weight of the evidence, not its admissibility. See, e.g., *Williams Ground Services, Inc.* v. *Jordan*, 174 Conn. App. 247, 259, 166 A.3d 791 (2017) (stating completeness of business records goes to weight not admissibility). Additionally, the defendant has not presented evidence that the video contained on the DVD was anything other than an exact copy of the original footage.

As previously discussed in our analysis of whether the defendant's claim is entitled to *Golding* review, the defendant appears to argue that the court's ruling was plain error because he was clearly entitled to production of the video of the entire traffic stop; without it, he argues, one is left to speculate as to whether the entire video of the traffic stop was saved or, alternatively, was simply not provided to him in discovery as is required by *State* v. *Morales*, supra, 232 Conn. 707. We reject this argument on the ground that the defendant has expressly disavowed any such claim on appeal. More specifically, the defendant clarified in his reply brief to this court that he is not arguing that the state improperly lost or destroyed evidence and that he thus was deprived of due process pursuant to *Morales*. The defendant accordingly has failed to persuade us that a manifest injustice has occurred. Consequently, he cannot prevail under the plain error doctrine.

We then turn to the only preserved claim that the defendant advances on appeal, which is that the DVD was not sufficiently authenticated and, thus, should not have been admitted. "We review the trial court's decision to admit evidence, if premised on a correct

view of the law . . . for an abuse of discretion." *State* v. *Saucier*, 283 Conn. 207, 218, 926 A.2d 633 (2007); see also *Nieves* v. *Commissioner of Correction*, 169 Conn. App. 587, 597 n.12, 152 A.3d 570 (2016) (because "[t]he trial court has broad discretion in ruling on the admissibility . . . of evidence . . . [t]he trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion" [internal quotation marks omitted]), cert. denied, 324 Conn. 915, 153 A.3d 1288 (2017). The abuse of discretion standard requires that "every reasonable presumption . . . be given in favor of the trial court's rulings on evidentiary matters." (Internal quotation marks omitted.) *State* v. *Gauthier*, 140 Conn. App. 69, 79–80, 57 A.3d 849, cert. denied, 308 Conn. 907, 61 A.3d 1097 (2013).

"The requirement of authentication as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the offered evidence is what its proponent claims it to be." Conn. Code Evid. § 9-1 (a); see also *State* v. *Garcia*, 299 Conn. 39, 57, 7 A.3d 355 (2010). A DVD of dashboard camera video is "subject to the same foundational requirements for admission as any other demonstrative evidence. Such evidence should be admitted only if it is a fair and accurate representation of that which it attempts to portray." (Internal quotation marks omitted.) *State* v. *Melendez*, supra, 291 Conn. 710.

In the present case, the DVD was purported to be a video of the traffic stop of the defendant on March 3, 2013. Richter testified that he and the defendant were in the video and that it was a fair and accurate representation of the events of that morning. This evidence is sufficient to establish that the DVD is what the state claimed it to be. Richter's testimony was sufficient to authenticate the DVD, and the defendant cannot prevail on his claim that the video was improperly admitted.

The judgment is reversed and the case is remanded for a new trial.

In this opinion LAVINE, J., concurred.

HARPER, J., dissenting in part and concurring in part. I write separately to express my opinion that the trial court did not improperly restrict the cross-examination by the defendant, Juan C. Lopez, of the state's expert witness, Robert H. Powers, a forensic toxicology expert, and my conclusion that the defendant's conviction should be affirmed. The conclusion reached by the majority requires us to make assumptions that are not supported by the record and to ignore established precedent concerning the analysis of whether a jury has complied with the trial court's instructions. I do, however, concur in the conclusion of the majority that the trial court did not abuse its discretion in admitting an "incomplete and altered" dashboard camera video taken from the arresting police officer's patrol car. I would affirm the judgment of the trial court on all claims.

The following facts, which the jury reasonably could have found, and procedural history are relevant to this appeal. On March 3, 2013, at approximately 1:50 a.m., the defendant was stopped on Interstate 95 in Fairfield by state police Trooper Colin Richter after Richter observed the defendant driving erratically and speeding. Richter performed a series of standard field sobriety tests on the defendant, which the defendant failed. Thereafter, Richter arrested the defendant, and charged him with operating a motor vehicle while under the influence of alcohol in violation of General Statutes § 14-227a (a) (1) and driving with a suspended license in violation of General Statutes § 14-215. No tests were performed to determine the defendant's blood alcohol

content level via a chemical analysis of his blood, urine, or breath.

At trial, the state pursued a drunken driving prosecution under § 14-227a (a) (1) on the basis of behavioral evidence of intoxication, known as a behavioral prosecution or behavioral theory. Because the state pursued a behavioral prosecution, it was prohibited by § 14-227a (c) from presenting evidence of the defendant's blood alcohol level that derived from a chemical analysis of his blood, urine, or breath. The state presented two witnesses: Richter, who testified regarding the circumstances of his encounter with the defendant and the factors that led him to arrest the defendant; and Powers, who testified regarding the scientific basis of the field sobriety tests and the intoxication status of a person who fails such tests. The trial court qualified Richter as an expert in the administration of field sobriety tests on the basis of his training and experience, and Powers as an expert in toxicology, including the scientific basis of field sobriety tests.

Richter testified regarding his interactions with the defendant from his first observation of the defendant driving erratically through his arrest and booking at the state police barracks. The following testimony from Richter is relevant. He testified that his interaction with the defendant began when he noticed a vehicle approaching him quickly from behind on Interstate 95 in Fairfield and then speeding past him. Richter then followed the vehicle and observed the vehicle being driven erratically, swerving between the left and center lanes. Richter thereafter activated the overhead lights in his police cruiser and stopped the vehicle. The vehicle safely maneuvered from the left lane across the center and right lanes before coming to a stop on the right shoulder of the highway. Richter approached the vehicle and found that the defendant was the driver of the vehicle. Richter then proceeded to ask the defendant

standard questions about where he was going, where he was coming from, and whether he could provide a driver's license for Richter to inspect.[1] During this interaction, Richter noted that the defendant had slurred speech, his eyes were glassy and bloodshot, and he had the odor of alcohol on his breath. On the basis of these details, Richter suspected that the defendant was intoxicated and determined that it would be appropriate for him to perform a series of field sobriety tests on the defendant.

Richter instructed the defendant to exit his vehicle in order to undergo the field sobriety tests. These tests included the horizontal gaze nystagmus test, the walk and turn test, and the one leg stand test. Before performing each test, Richter gave the defendant detailed instructions and demonstrations, asked if the defendant understood the instructions, and asked if the defendant had any medical conditions or physical impairments that would impact the results. Each time, the defendant stated that he understood the instructions and did not have any medical or physical conditions that would affect his performance on the tests.

The first test Richter performed on the defendant was the horizontal gaze nystagmus test. Richter testified that the test looks for nystagmus, which is an involuntary jerking of the eyes that is indicative of intoxication. The test required the defendant to track Richter's pen[2] with his eyes only while Richter held his pen a few inches in front of the defendant's eyes and moved his

[1] The defendant was unable to produce a driver's license, which Richter later determined had been suspended, and a computer check of the defendant's motor vehicle registration performed from the computer in Richter's police cruiser revealed that the defendant's registration for the vehicle he was operating had expired.

[2] Richter testified that he administers the test using either his finger or his pen. In this case, Richter recalled using his finger to determine equal tracking of the defendant's eyes prior to administering the test. Richter then used a pen to administer the horizontal gaze nystagmus test.

pen from side to side. When officers perform this test, they look for lack of smooth pursuit of the eyes, onset of nystagmus prior to 45 degree turn of the eyes, and nystagmus at the maximum deviation of the eye turned from center. Richter testified that the presence of these symptoms indicates intoxication. The defendant failed the test because Richter observed all three factors indicative of intoxication in the defendant's performance on the test.

The second test Richter performed on the defendant was the walk and turn test. Richter testified that this test consists of having the defendant walk heel to toe in a straight line for exactly nine steps, with his arms at his side, turn in a particular direction, and then walk back to the starting point. The defendant failed this test because he started the test before instructed to do so, could not stay on the line he was instructed to walk, raised his arms in order to gain better balance, turned incorrectly, failed to walk heel to toe, took an incorrect number of steps, and swayed.

The third and final test that Richter performed on the defendant was the one leg stand test. Richter testified that this test consists of the defendant counting out loud as he stands on one foot while raising the other foot approximately six inches off the ground and counting, keeping his arms at his sides. The defendant failed this test because he put his foot down three times, he swayed, and he was unable to properly count.

Richter testified that he determined that the defendant was intoxicated and could not safely operate a motor vehicle because the defendant failed the field sobriety tests, and because Richter had observed other indicators of intoxication, including glassy and bloodshot eyes, the odor of alcohol on his breath, and erratic driving. Additionally, Richter testified that the defendant admitted drinking mojitos earlier that evening,

although the location of where the defendant stated he drank this alcohol was not consistent with where the defendant initially told Richter he was coming from when Richter stopped him on the highway.

Subsequently, Richter placed the defendant under arrest and transported him to the state police barracks to be processed. Richter testified that, at the barracks, the defendant still smelled of alcohol and had bloodshot and glassy eyes, and acted intoxicated throughout the booking process by exhibiting belligerent behavior. Also during the booking process, the defendant refused to submit to a breath test to determine his blood alcohol level.

Following Richter's testimony, the state called Powers to testify. As previously noted, Powers was qualified by the court as an expert in forensic toxicology. Powers testified that the field sobriety tests performed by Richter on the defendant are reliable indicators of whether a person is likely intoxicated or impaired because they seek to identify involuntary symptoms that are commonly caused by intoxication.

The state then asked Powers to opine on a series of hypotheticals that involved a hypothetical person exhibiting the same behaviors and performance on the field sobriety tests as Richter testified the defendant had exhibited. Powers testified that, on the basis of the behaviors described, he would expect that person to be under the influence of a central nervous system depressant, such as alcohol. He further explained that he would expect such a person to have a blood alcohol level of 0.12 or higher because below that level people do not generally completely fail the field sobriety tests. Further, he would expect such a person to have a diminished ability to operate a motor vehicle.

The defendant objected to the state's questions regarding the blood alcohol level of the hypothetical

person. First, the defendant objected on the ground that there was inadequate foundation regarding "how much alcohol" for the state to ask: "And if these same symptoms, based upon the [hypothetical] . . . and based on the assumptions that we've talked about here in court, were caused by alcohol, could you opine as to how much alcohol it would take to achieve those symptoms?" The court overruled the objection because the question asked only whether Powers could form an opinion on the information provided to him on the basis of his education, training, and experience. Powers answered that he could form an opinion, and the state then asked Powers to give his opinion. The defendant objected again on the ground that there was inadequate foundation regarding "how much alcohol." The court overruled the objection because there was proper foundation for Powers to offer his opinion as a forensic toxicologist because he had been qualified as an expert witness in the field of forensic toxicology.

On cross-examination of Powers, the defendant asked numerous questions regarding the state's hypotheticals, and Powers' underlying scientific knowledge regarding field sobriety tests and how such tests relate to a person's ability to operate a motor vehicle under certain blood alcohol levels. The defendant also twice attempted to ask Powers to opine on the ultimate issue of the case—specifically, whether the defendant was intoxicated. On his first attempt, the defendant made a rambling statement that could be viewed as either asking about the defendant's blood alcohol level or about whether the defendant was so intoxicated as to be legally impaired: "Without—with any degree of medical certainty with you not being present at this scene on [Interstate] 95 on March 3, 2013, at 1:52 a.m., you—you do not know what [the defendant's] level of intoxication was." The court sustained the state's objection to this question, and the defendant attempted

to ask the question again by rephrasing it: "As you sit here today, do you know if [the defendant] was intoxicated that day?" The court again sustained the state's objection to this question.

Following the testimony of Richter and Powers, the state rested, and the defendant called no witnesses. The jury found the defendant guilty of operating a motor vehicle while under the influence of alcohol in violation of § 14-227a (a) (1) and of driving with a suspended license in violation of § 14-215. The defendant also pleaded guilty to a part B information as a third time offender. The court sentenced the defendant to three years of incarceration, execution suspended after two years, followed by three years of probation. This appeal followed.

I disagree with the majority's conclusion that the defendant's right to cross-examine Powers was improperly restricted and that the restriction was harmful to a degree requiring reversal of the defendant's conviction. The defendant argues, and the majority agrees, that once Powers opined on direct examination that a hypothetical individual who performed in a certain way on each of the field sobriety tests would be expected to have a blood alcohol level of 0.12 or higher, the court should not have foreclosed the defendant from later cross-examining him about this central, relevant issue. A thorough review of the trial transcripts shows that the court did not prevent, improperly or otherwise, the defendant from cross-examining Powers regarding his testimony as to the blood alcohol level of a person described in the hypotheticals posed by the prosecutor. Rather, the questions that he was prohibited from asking sought Powers' opinion on the ultimate issue of the case—whether the defendant was intoxicated—and it is only on appeal that the defendant casts these questions as an attempt to undermine Powers' testimony regarding blood alcohol content.

"[R]estrictions on the scope of cross-examination are within the sound discretion of the trial judge . . . but this discretion comes into play only after the defendant has been permitted cross-examination sufficient to satisfy the sixth amendment [to the United States constitution]." (Internal quotation marks omitted.) *State* v. *Daniel B.*, 164 Conn. App. 318, 341, 137 A.3d 837, cert. granted on other grounds, 323 Conn. 910, 149 A.3d 495 (2016). This sixth amendment right is satisfied "when defense counsel is permitted to expose to the jury the facts from which [the] jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." (Internal quotation marks omitted.) Id. "The defendant's sixth amendment right . . . does not require the trial court to forgo completely restraints on the admissibility of evidence. . . . Generally, [a defendant] must comply with established rules of procedure and evidence . . . ." (Internal quotation marks omitted.) *State* v. *Wright*, 273 Conn. 418, 424, 870 A.2d 1039 (2005). It is well established that "[a]n expert witness ordinarily may not express an opinion on an ultimate issue of fact, which must be decided by the trier of fact." (Internal quotation marks omitted.) *State* v. *Taylor G.*, 315 Conn. 734, 761, 110 A.3d 338 (2015).

The defendant's claim that his cross-examination of Powers was improperly restricted concerns two questions only, and each time the defendant asked these questions, the court properly sustained the state's objections because the questions improperly sought Powers' opinion on the ultimate issue of intoxication. On his first attempt, the defendant asked: "Without—with any degree of medical certainty with you not being present at this scene on [Interstate] 95 on March 3rd, 2013, at 1:52 a.m., you—you do not know what [the defendant's] level of intoxication was" (first question).

Immediately after the court properly sustained an objection to this question, the defendant rephrased the question as: "As you sit here today, do you know if [the defendant] was intoxicated that day?" (second question). Taken together, these questions make clear that the defendant was attempting to ask about an ultimate issue and that the court properly prohibited him from doing so. Under the case law cited herein, this is a proper restraint on cross-examination and does not provide a basis for this court to reverse the defendant's conviction. It is only on appeal that the defendant has attempted to cast these questions in a different light by suggesting that the questions were an attempt to undermine Powers' blood alcohol content testimony and clarify that Powers was not testifying as to the defendant's blood alcohol level.

There are three primary reasons why the prohibition on these two questions did not improperly restrict the defendant's right to cross-examine Powers. First, in the context of the cross-examination as a whole, there is no basis to support a claim that the defendant's right to cross-examine was improperly restricted on the basis of the court's sustaining objections to only two questions. When the cross-examination is viewed as a whole, it is clear that the defendant was afforded an opportunity to thoroughly cross-examine Powers regarding his blood alcohol content testimony.

As previously noted, to satisfy the defendant's right to cross-examine the state's witnesses under the sixth amendment, he must be "permitted to expose to the jury the facts from which [the] jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." (Internal quotation marks omitted.) *State* v. *Daniel B.*, supra, 164 Conn. App. 341. The defendant was afforded an ample opportunity to do so. On cross-examination, the following colloquy took place:

"[Defense Counsel]: Now, so you had testified that regarding the horizontal gaze nystagmus, how many types of nystagmus are there?

"[Powers]: Well, I think medical personnel parse it down quite a bit. In terms of forensic work, we really only pay attention to horizontal and vertical.

"[Defense Counsel]: Okay. But as an expert in forensic toxicology and the effects of depressants on the central nervous system, you should know the different types of nystagmus. Is that correct?

"[Powers]: I should?

"[Defense Counsel]: But you don't know all of the types of nystagmus?

"[Powers]: No, I don't know all the medical classifications of nystagmus.

"[Defense Counsel]: Okay. And so are you familiar with optokinetic nystagmus?

"[Powers]: I'm sorry?

"[Defense Counsel]: Are you familiar with optokinetic nystagmus?

"[Powers]: Optokinetic nystagmus. I may have read the term, but I couldn't define it for you.

"[Defense Counsel]: Okay. But you've done research on . . . the effects of depressants on the central nervous system and the horizontal gaze nystagmus, yet you don't know what optokinetic nystagmus is?

"[Powers]: Correct.

"[Defense Counsel]: Okay. And so you don't know that there possibly might be another forty-seven types of nystagmus?

"[Powers]: Again, I would indicate that the medical community parses this down quite a little bit. For my purposes, I focused on horizontal and vertical gaze nystagmus.

"[Defense Counsel]: So—and that is only based upon interpretations from police officers on the road for the . . . horizontal gaze nystagmus?

"[Powers]: The observations that we utilize are generally acquired by that fashion, yes.

"[Defense Counsel]: Okay. And have you ever consulted . . . with any neurologists or doctors that are specialized in neurology that could affect the nystagmus of the eye? Have you ever consulted with anybody like that in any of your studies?

"[Powers]: I had a question that has led me to do so.

"[Defense Counsel]: Okay. But you don't think that it's necessary to know about the different types of nystagmus if you're going to be an expert in nystagmus?

"[Powers]: I guess that would depend on the level of expertise with regard to nystagmus that one is claiming.

"[Defense Counsel]: So, you don't think that you have the certain level of expertise, then, if you've never studied it?

"[Powers]: I'm not offering . . . an understanding of nystagmus that one would expect from a medical person who has trained in that field.

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"[Defense Counsel]: . . . If a person has driven from Stamford, Connecticut, to Fairfield, Connecticut, was not involved in any accidents, was pulled over by a trooper, the trooper only saw the car swerve once, the operator then pulled over three lanes from the left lane to the middle lane to the right lane to the shoulder, parked the car properly, did not hit any other objects, did not hit a guardrail; and would those set of facts change your opinion as to the level of intoxication somebody may have?

"[Powers]: Probably not; but I recognize that that level of control and behavior seems inconsistent with

the level of alcohol that I opined earlier, assuming this is all referring to the same individual.

"[Defense Counsel]: Okay. So, it is—so, assume that it's the same individual and—but you just testified that . . . it doesn't indicate the person that you just opined to. So, would that . . . level of intoxication be lower, then, if they had that much control over a vehicle?

"[Powers]: I'm just saying . . . that the behavior you described seems inconsistent to me with the behavior described in the performance of the standardized field sobriety tests. And I heard it as weaving. But nevertheless I was responding to your question. . . .

"[Defense Counsel]: And were you on [Interstate] 95 on March 3rd, 2013, at 1:52 am?

"[Powers]: I can say no.

"[Defense Counsel]: And so you were not present when any field sobriety tests were administered to [the defendant]?

"[Powers]: Correct. I was not."

The majority attempts to belittle this examination by referring to it in footnote 10 of its opinion as "quantity" over "quality." While *quantity* over *quality* certainly is not determinative, nor do I assert that it is, this line of questioning, with accompanying responses, clearly demonstrates that the defendant was permitted to thoroughly cross-examine Powers and used that cross-examination to undermine Powers' credibility on his interpretation of field sobriety tests and the accuracy of his blood alcohol content testimony regarding the hypothetical person. On this basis alone, this court should affirm the defendant's conviction.

Second, when the defendant's cross-examination of Powers is considered in its entirety, it is clear that the two questions he was prevented from asking are of a

different nature than the other questions he asked, and these two questions should be considered as being outside the proper scope of cross-examination. Indeed, as support for the assertion that the ambiguous phrase, "level of intoxication," in the first question should be understood as a reference to a blood alcohol level, the majority references questions the defendant asked Powers earlier in cross-examination, in which it is clear that the defendant was using this phrase to refer to Powers' testimony regarding blood alcohol content. The previously cited cross-examination shows that the defendant was permitted to ask Powers questions regarding the blood alcohol level of the hypothetical person that the state's questions had posited. This was properly within the scope of cross-examination because the state had asked Powers to opine as to the blood alcohol level of that hypothetical person. Accordingly, the defendant was permitted to thoroughly examine Powers regarding the hypotheticals.

The state did not, however, ask Powers to speculate as to the defendant's blood alcohol level. Rather, the state merely asked Powers to opine as to the blood alcohol level of a person exhibiting the behaviors described in the posed hypotheticals. In fact, no evidence of the defendant's blood alcohol level was offered at trial.[3] Indeed, it would have been impossible to offer such evidence because the defendant refused to submit to a breath test on the night of his arrest.[4]

[3] This fact did not receive adequate attention from the majority. There can be no dispute that no evidence of the defendant's blood alcohol level was offered at any point during the trial. The majority nevertheless, in effect, treats Powers' opinion as to the blood alcohol level of an individual described in the state's hypothetical as being testimony about the defendant's blood alcohol level.

[4] The jury was well aware that there was no evidence of the defendant's blood alcohol level in this matter—further negating any argument that the jury considered such evidence in finding the defendant guilty, as I will discuss in greater detail—because Richter, in response to the prosecutor's questioning, testified as follows:

"[The Prosecutor]: Now, on March 3rd, 2013, did you ask the defendant to submit to a breath test?

By contrast, the two questions highlighted by the defendant were outside the proper scope of cross-examination because they asked Powers to opine on whether the defendant was intoxicated. In the first question, the defendant called on Powers to refute the statement, "you do not know what [the defendant's] level of intoxication was." Similarly, in the second question, the defendant asked Powers, "do you know if [the defendant] was intoxicated that day?" Independent of the trial court's proper conclusion that these questions inappropriately called on Powers to opine on an ultimate issue, I also conclude that these questions could have been properly barred as outside the scope of direct examination.

Third, the light in which the defendant attempts to cast these questions on appeal is contrary to his objections to their exclusion during trial. On appeal, he argues that these questions did not seek an opinion on an ultimate issue, but rather that these questions were an attempt to clarify Powers' earlier testimony opining as to a blood alcohol level in order to help the jury understand that Powers was not testifying as to his opinion of the defendant's blood alcohol level.[5] There is no connection between this asserted purpose of the questions and the questions themselves, both of which asked Powers whether he knew if the defendant was intoxicated. It is a matter of common sense that a question seeking to clarify an issue must make clear on which issue clarification is sought. Neither of the two questions at issue here made reference to Powers' earlier testimony regarding the blood alcohol level of the

"[Richter]: I did.

"[The Prosecutor]: And did he submit to a breath test?

"[Richter]: No.

"[The Prosecutor]: Why is that?

"[Richter]: He refused."

[5] Notably, when the state objected to these questions, the defendant did not defend his right to ask these questions on the ground that he raises on appeal.

hypothetical person. Neither question asked Powers to distinguish between the hypothetical person and the defendant. Rather, the defendant simply asked Powers if he knew whether the defendant was intoxicated. Thus, the prohibition on these two questions was proper, as they clearly were outside the scope of cross-examination.

Although, as noted previously, I do not agree that the defendant's right to cross-examine Powers was improperly restricted, I continue my analysis in order to address the majority's conclusion that this restriction on cross-examination caused the defendant harm requiring reversal. "When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [A] nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict. . . . [O]ur determination [of whether] the defendant was harmed by the trial court's . . . [evidentiary ruling] is guided by the various factors that we have articulated as relevant [to] the inquiry of evidentiary harmlessness . . . such as the importance of the . . . testimony in the [state's] case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony . . . on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the [state's] case. . . . *Most importantly, we must examine the impact of the evidence on the trier of fact and the result of the trial.*" (Emphasis added; internal quotation marks omitted.) *State* v. *Rodriguez*, 311 Conn. 80, 89, 83 A.3d 595 (2014). Even assuming *arguendo* that there was an improper restriction on the cross-examination of Powers, after applying these factors to the present case, I cannot agree with the majority that the record supports the

conclusion that Powers' blood alcohol content testimony, and therefore the restriction on the defendant's questions on cross-examination, had *any* impact on the trier of fact and the result of the trial.

As an initial matter, in the context of the evidence presented as a whole, the result of the trial would have been the same, even if the defendant had been permitted to ask the two questions on cross-examination. The jury heard Richter's testimony as to his observations of the defendant's driving—that the defendant's car was swerving and speeding. The jury heard Richter's observations that the defendant had slurred speech, his eyes were glassy and bloodshot, and he had the odor of alcohol on his breath. The jury heard Richter's testimony that the defendant had admitted to drinking alcohol earlier in the evening. The jury heard Richter's lengthy testimony that the defendant failed all three field sobriety tests. The jury also heard testimony that the defendant refused to submit to a breath test. On the basis of this evidence alone, even without Powers' testimony, the jury reasonably could have found the defendant guilty of operating a motor vehicle while under the influence of alcohol in violation of § 14-227a (a) (1). The defendant has not met his burden of showing how a restriction on just two questions was harmful. See id. Thus, in light of the " 'the overall strength of the [state's] case,' "; id.; even if the restriction on the defendant's two questions was improper, the error was harmless.

Further, the majority's conclusion to the contrary relies on assumptions that are unsupported by the record and requires the court to ignore established precedent regarding analysis of whether a jury has complied with the trial court's instructions. The majority's conclusion that the restriction on cross-examination was harmful relies on the assumption that the jury viewed Powers' testimony regarding the blood alcohol level of

the hypothetical person as conclusive of the defendant's blood alcohol level. But this assumption itself relies on several additional assumptions that are equally unsupported by the record.

First, the majority's conclusion necessarily assumes that Powers' blood alcohol content testimony regarding a hypothetical person influenced the jury's determination of whether the defendant was intoxicated. This assumption rests on the additional assumptions that the jury was either unable to distinguish between the hypothetical person and the defendant, or somehow viewed an opinion regarding a hypothetical person's expected blood alcohol level as conclusively determinative of the defendant's intoxication status.[6] It is unnecessary to address these assumptions further than to note that there is simply nothing in the record to support them.

Second, the majority is clear that it presumes that the jury was aware that Connecticut law specifies a particular blood alcohol level as constituting per se intoxication. In footnote 12 of its opinion, the majority states that it "is likely within the common knowledge of most jurors" that a "specific blood alcohol level . . .

[6] The majority's assumption ignores the court's instruction to the jury as to the testimony of an expert witness. The court instructed the jury: "*An expert witness may state an opinion in response to a hypothetical question, and some experts have done so in this case.* A hypothetical question is one in which the witness is asked to assume that certain facts are true and to give an opinion based on those assumptions. The value of the opinion given by an expert in response to a hypothetical question depends upon the relevance, validity, and completeness of the facts he was asked to assume. The weight that you give to the opinion of an expert will depend on whether you find that the facts assumed were proved and whether the facts relied upon in reaching the opinion were complete or whether material facts were omitted or not considered. Like all other evidence, an expert's answer to a hypothetical question may be accepted or rejected in whole or in part according to your best judgment." (Emphasis added.) These instructions contradict any assumption that the jury would accept the expert's testimony as to a hypothetical as "conclusive" of the defendant's blood alcohol level.

constitutes per se intoxication in this state for purposes of operating a motor vehicle under the influence . . . ." The record contains no evidence, testimony, arguments from counsel, or instructions from the court regarding the fact that Connecticut law identifies some blood alcohol level as per se intoxication or explaining what specific level constitutes per se intoxication. While I certainly agree with the majority that many people are aware that the law designates some blood alcohol level as constituting per se intoxication, I do not agree that the average lay person could recite, without reference to a statute or conducting cursory independent research, which specific blood alcohol level constitutes per se intoxication. The record contains no indication that the jury was provided with the information necessary to conclude that the defendant was per se intoxicated based on a 0.12 or higher blood alcohol level.

When the blood alcohol content testimony is divorced from the information that such a blood alcohol level would constitute per se intoxication, it becomes merely another factor for the jury's consideration—on par with testimony that the defendant's speech was slurred, that his driving was erratic, that there was an odor of alcohol on his breath, that his eyes were bloodshot and glassy, and that he failed all three field sobriety tests. In this context, Powers' blood alcohol content testimony told the jury nothing more than that the hypothetical person would be expected to have alcohol in his blood and at a level that Powers associates with impaired ability to drive a motor vehicle. This is markedly different from the majority's assumption that this testimony informed the jury that the defendant was necessarily intoxicated as a matter of law due to a particular blood alcohol level, which had not even been attributed to the defendant.

Third, implicit in the majority's conclusion is the assumption that the jury ignored or deliberately disobeyed the court's instructions on finding intoxication.

The court's instructions to the jury made no reference to finding the defendant guilty on the basis of any blood alcohol level, but instead made reference to behavioral evidence only.[7] Yet, the majority's conclusion necessarily assumes that the jury considered Powers' blood alcohol content testimony as determinative of the

[7] The court instructed the jury: "Element two, under the influence. The second element is that at the time the defendant operated the motor vehicle, he was under the influence of intoxicating liquor. A person is under the influence of intoxicating liquor when, as a result of drinking such beverage, that person's mental, physical, or nervous processes have become so affected that he lacks to an appreciable degree the ability to function properly in relation to the operation of his motor vehicle.

"The person's physical or mental capabilities must have been impaired to such a degree that he no longer had the ability to drive a vehicle with the caution characteristic of a sober person of ordinary prudence under the same or similar circumstances. If you find that the defendant was operating a vehicle under the influence of an intoxicating liquor, it is no defense that there was some other cause that also tended to impair the defendant's ability to exercise the required caution. Evidence of the manner in which a vehicle was operated is not determinative of whether the defendant was operating the vehicle under the influence of an intoxicating beverage. It is, however, a factor to be considered in light of all the prudent surrounding circumstances in deciding whether the defendant was or was not under the influence.

"In this case, there has been testimony that the defendant was asked and did agree to perform certain acts which are commonly called field—field sobriety tests. It is up to you to decide if those tests give any reliable indication of whether or not the defendant's capacity to operate a motor vehicle safely was impaired to such a degree that he no longer had the ability to drive a motor vehicle with caution characteristic of a sober person of ordinary prudence under the same or similar circumstances, or whether they have any rational connection to operating a motor vehicle safely.

"In judging the defendant's performance of those tests, you may consider the circumstances under which they were given, the defendant's physical condition, the defendant's state of mind, and other factors you may deem relevant. Further, in evaluating his testimony, you should consider whether proper instructions and directions were given by the officer to the defendant prior to the commencement of the test, the observations made during the test, and use your common experience in determining whether the defendant was under the influence of intoxicating liquor as I have defined it for you.

"The horizontal gaze nystagmus test is a scientific test. The standardized field sobriety test known as the walk and turn and the one leg stand are not scientific tests, and you should not consider them as scientific tests. You may, however, consider the police officer's observations of the defen-

defendant's intoxication status. As stated numerous times herein, however, no evidence of the defendant's blood alcohol level was introduced at trial. Therefore, the jury instructions properly made reference to behavioral evidence only,[8] and there is nothing in the record to support a finding that the jury disregarded the court's instructions.

"[I]n the absence of evidence that the jury disregarded any of the court's instructions, we presume that the jury followed the instructions." *State* v. *A. M.*, 324 Conn. 190, 215, 152 A.3d 49 (2016). "Mere conjecture by the defendant is insufficient to rebut this presumption." *State* v. *Purcell*, 174 Conn. App. 401, 413, 166 A.3d 883 (2017). The defendant has the burden of establishing that Powers' testimony was so prejudicial that the jury cannot be presumed reasonably to have followed the court's instructions. See id. The defendant has pointed to no evidence that the jury failed to determine intoxication according to the instructions of the trial court. He also has failed to establish that Powers' testimony was so prejudicial as to lead the jury to disregard the court's

dant while such tests were being performed, and use your common experience in determining the value, if any, of this evidence. Evidence of the defendant's refusal to submit to a breath test has been introduced. If you find the defendant did refuse to submit to such a test, you may make any reasonable inference that follows from that fact. Any inference that you draw must be reasonable and logical and not the result of speculation or conjecture or guessing in accordance with my earlier instruction to you regarding inferences. To be clear, the state does not have to prove refusal as an element of the offense of operating under the influence, but if you find that there was a refusal you are permitted to draw inferences in accordance with my earlier instructions regarding inferences. The law does not require that you draw any inference, but rather permits you to do so. Evidence of a refusal by itself cannot support a guilty verdict."

[8] In an attempt to rebut this point, the majority asserts in footnote 13 of its opinion that the court did not "expressly [direct] the jury that it could rely on 'only' behavioral evidence . . . ." Certainly, no such limiting instruction was given because no evidence of the defendant's blood alcohol level was introduced at trial. Instead, the court properly instructed the jury based on the evidence it could consider in reaching an ultimate conclusion.

instructions—particularly given that his claims of prejudice rely so heavily on the assumptions noted previously, which lack evidentiary support in the record. There is simply no reason to conclude that the defendant's conviction was based on any consideration other than the proper behavioral evidence referenced by the court in its instructions on finding intoxication.

For the foregoing reasons, I would affirm the judgment of the trial court.

ROGER EMERICK *v.* TOWN OF GLASTONBURY (AC 38646)

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

Syllabus

The self-represented plaintiff landowner brought this action for, inter alia, private nuisance against the defendant town, alleging that development upstream from his property had caused damage to wetlands on his property. The trial court rendered judgment dismissing the action as a sanction for the plaintiff's conduct during the five days of the jury trial, in which the plaintiff, inter alia, refused to accept the court's evidentiary rulings, interrupted and spoke over the court, called the court's rulings "bizarre," remarked that the court was "incompetent" and needed "to go back to law school," and accused the trial judge of speaking in "gibberish" and nodding her head as if she were "drugged." During the trial, the court employed a series of progressive steps to address the plaintiff's behavior, which included, inter alia, verbal warnings, and instructions to cease making comments about the court's evidentiary rulings and to cease interrupting the court and making insulting or disparaging remarks about the court and the defendant's counsel. The court also fined the plaintiff and advised him on multiple occasions that dismissal of the case was an option it would consider if he continued with his actions. On the plaintiff's appeal to this court, *held* that the trial court did not abuse its discretion in dismissing the plaintiff's action, as his continuing and deliberate misconduct during the trial, for which he bore sole responsibility, demonstrated such deliberate disregard for the court's orders as to warrant dismissal: the plaintiff did not demonstrate any mitigating factors for his actions during the trial, the court's use of escalating disciplinary steps to compel his observance of its orders proved unsuccessful, which left dismissal of the case as a last resort and the only reasonable remedy, the court's repeated warnings,

suggestions and fines had no impact on the plaintiff, as he ignored the court's admonitions and continued to delay the trial, and there was no merit to the plaintiff's claims that the court did not adhere to standards of stare decisis, that the court dismissed the case on the basis of his claims of judicial bias or that the dismissal followed from a finding of contempt, as the dismissal was based on the court's inherent authority to compel observance of its rules and to deal with continuing misconduct; furthermore, the court did not fail to consider the plaintiff's motions for a mistrial or his requests that the court recuse itself, there were instances where the plaintiff raised his voice or challenged the court's evidentiary rulings in front of the jury, the absence of the jury when certain acts of misconduct occurred did not deprive the court of its authority to sanction the plaintiff for his continuing misconduct during the trial and lack of cooperation with the court, and the plaintiff's claim that the dismissal of his case violated his constitutional right to procedural due process was inadequately briefed and essentially restated his previous arguments, which this court had rejected.

Argued April 13—officially released October 31, 2017

Procedural History

Action to recover damages for, inter alia, private nuisance, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Wiese*, *J.*, denied the plaintiff's motion for summary judgment and granted in part the defendant's motion for summary judgment; thereafter, the matter was tried to the jury before *Peck*, *J.*; subsequently, the court, *Peck*, *J.*, denied the plaintiff's motions for a mistrial and rendered judgment of dismissal; thereafter, the court, *Peck*, *J.*, denied the plaintiff's motion to reargue, and the plaintiff appealed to this court. *Affirmed.*

Roger Emerick, self-represented, the appellant (plaintiff).

Kristan M. Maccini, for the appellee (defendant).

Opinion

DiPENTIMA, C. J. The trial court possesses the inherent power to impose sanctions on litigants in cases before it, including dismissing the case, both to compel observance of its rules and to bring an end to continuing

violations of those rules. *D'Ascanio* v. *Toyota Industries Corp.*, 309 Conn. 663, 670–71, 72 A.3d 1019 (2013). This power "rests within the discretion of the trial court and will not be disturbed on review unless there is an abuse of discretion. . . . Generally, a sanction should not serve as a punishment or penalty. . . . Such drastic action is not, however, an abuse of discretion where a party shows a deliberate, contumacious or unwarranted disregard for the court's authority." (Citations omitted.) *Fox* v. *First Bank*, 198 Conn. 34, 39, 501 A.2d 747 (1985); see also *D'Ascanio* v. *Toyota Industries Corp.*, supra, 672; *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, 257 Conn. 1, 16–17, 776 A.2d 1115 (2001). In the present case, the self-represented plaintiff, Roger Emerick, appeals from the judgment of the trial court dismissing his case against the defendant, the town of Glastonbury, as a sanction for his actions during trial. On appeal, the plaintiff claims that the dismissal constituted reversible error.[1] We are not persuaded that the court abused its discretion in dismissing the plaintiff's case after his deliberate, continuing, and at times contumacious disregard for the court's authority. Accordingly, we affirm the judgment of the trial court.

The following facts and procedural history are relevant to our decision. The plaintiff commenced this action on February 15, 2011. In the operative complaint, he set forth claims against the defendant of private nuisance, reckless and wanton conduct, trespass, violation of General Statutes § 13a-138,[2] intentional infliction

[1] As stated in the table of contents in his appellate brief, the plaintiff set forth the following issues: "(1) Did the Court err in dismissing the case during trial based on [November 4, 2015] statements? (2) Did the Court err in Dismissing the Case based on stare decisis standards? (3) Did the Court err in Dismissing the Case based on Rules and Laws as argued in Reargument and Motions for Mistrial? (4) Did the Court violate plaintiff's . . . rights to due process in dismissing the case?"

[2] General Statutes § 13a-138 provides: "(a) Persons authorized to construct or to repair highways may make or clear any watercourse or place for draining off the water therefrom into or through any person's land so far as necessary to drain off such water and, when it is necessary to make any

of emotional distress, negligent infliction of emotional distress and breach of fiduciary duty.[3] The plaintiff alleged that he owned 580 Hopewell Road in South Glastonbury, a forty acre property with wetlands along Roaring Brook. He claimed that development upstream from his property caused damage to Roaring Brook and his wetlands. The operative complaint was filed on October 29, 2013, and the defendant filed its answer and special defenses on November 13, 2013.

On November 3, 2014, the defendant filed a motion for summary judgment as to all counts. Two weeks later, the plaintiff filed his own motion for summary judgment on all counts. The parties filed various objections and replies to these motions, and the court, *Wiese*, *J.*, heard oral argument on the motions on January 26, 2015. On May 14, 2015, the court issued a memorandum of decision granting the defendant's motion with respect to the plaintiff's claims for damages for reckless and wanton conduct, violation of § 13a-138, negligent infliction of emotional distress, intentional infliction of emotional distress and breach of fiduciary duty but denying it as to his claims for damages for private nuisance and trespass, and his claim for injunctive relief for intentional infliction of emotional distress. The plaintiff's motion for summary judgment was denied in its entirety.

drain upon or through any person's land for the purpose named in this section, it shall be done in such way as to do the least damage to such land.

"(b) Nothing in this section shall be so construed as to allow the drainage of water from such highways into, upon, through or under the yard of any dwelling house, or into or upon yards and enclosures used exclusively for the storage and sale of goods and merchandise." See generally *Glasson* v. *Portland*, 6 Conn. App. 229, 234–35, 504 A.2d 550 (1986).

[3] In its memorandum of decision addressing the parties' motions for summary judgment, the court explained that the plaintiff's claim of breach of fiduciary duty incorporated the allegations set forth in count one and further alleged that the defendant had failed to return property to the plaintiff's grandfather after it was no longer used as a public school. The plaintiff claimed that this failure, which occurred in 1945, constituted a breach of fiduciary duty.

The trial commenced on October 27, 2015, before Judge A. Susan Peck.[4] At the beginning of the trial, the court gave the jury preliminary instructions, including an estimation that the evidentiary phase of the trial would take three to four days. Following opening statements, the plaintiff called himself as a witness. He testified throughout the first and second days and the majority of the third day of the trial. Near the end of the third day, the plaintiff called Daniel A. Pennington, the defendant's town engineer and manager of physical services, as a witness. Pennington's testimony continued into the morning of the fourth day of trial.

On the afternoon of the fourth day, the court excused the jury to consider the defendant's objections to the plaintiff's expert witness, Sigrun N. Gadwa. At the outset of the fifth day of trial, the court permitted Gadwa to testify before the jury. During her testimony, the jury was excused so that the court could consider the objections by the defendant's counsel and the plaintiff's responses thereto. After an extended argument, the court focused on the plaintiff's behavior during the trial, finding that he had been insulting and abusive to the court and the defendant's counsel, resulting in a disruption of the administration of justice. After being interrupted by the plaintiff, the court further found that the plaintiff had exhibited a lack of respect for and refused to follow court rules, procedure and decorum. As a result of his misconduct during the course of the trial, the court dismissed the plaintiff's case. The plaintiff subsequently filed a motion to reargue, which the court denied. This appeal followed. Additional facts will be set forth as necessary.

[4] At oral argument before this court, both parties expressly agreed that the court should listen to the audio recordings of the trial. Therefore, in addition to reviewing the transcripts, we also have listened to portions of these recordings.

As an initial matter, we set forth the legal principles and our standard of review. "It is well established that a court may, either under its inherent power to impose sanctions in order to compel observance of its rules and orders, or under the provisions of [Practice Book] § 13-14, impose sanctions . . . ." (Footnote omitted; internal quotation marks omitted.) *Evans* v. *General Motors Corp.*, 277 Conn. 496, 522–23, 893 A.2d 371 (2006); see also *DuBois* v. *William W. Backus Hospital*, 92 Conn. App. 743, 748, 887 A.2d 407 (2005) (trial court has inherent authority to impose sanctions), cert. denied, 278 Conn. 907, 899 A.2d 35 (2006). The sanction of "dismissal serves not only to penalize those whose conduct warrants such a sanction but also to deter those who might be tempted to [engage in] such conduct in the absence of such deterrent. *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, 96 S. Ct. 2778, 49 L. Ed. 2d 747 (1976)." *Pavlinko* v. *Yale-New Haven Hospital*, 192 Conn. 138, 145, 470 A.2d 246 (1984).

This case involves the inherent authority of the court to impose reasonable sanctions against a party during litigation. "The decision to enter sanctions . . . and, if so, what sanction or sanctions to impose, is a matter within the sound discretion of the trial court. . . . In reviewing a claim that this discretion has been abused the unquestioned rule is that great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness. . . . [T]he ultimate issue is whether the court could reasonably conclude as it did. . . .

"At the same time, however, we also have stated: [D]iscretion imports something more than leeway in decision-making. . . . It means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . In addition, the

court's discretion should be exercised mindful of the policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court. . . . The design of the rules of practice is both to facilitate business and to advance justice; they will be interpreted liberally in any case where it shall be manifest that a strict adherence to them will work surprise or injustice. . . . Rules are a means to justice, and not an end in themselves . . . . Our practice does not favor the termination of proceedings without a determination of the merits of the controversy where that can be brought about with due regard to necessary rules of procedure. . . . Therefore, although dismissal of an action is not an abuse of discretion where a party shows a deliberate, contumacious or unwarranted disregard for the court's authority . . . the court should be reluctant to employ the sanction of dismissal except as a last resort. . . . [T]he sanction of dismissal should be imposed only as a last resort, and where it would be the only reasonable remedy available to vindicate the legitimate interests of the other party and the court." (Citations omitted; internal quotation marks omitted.) *D'Ascanio* v. *Toyota Industries Corp.*, supra, 309 Conn. 671–72; see also *Evans* v. *General Motors Corp.*, supra, 277 Conn. 522–24; *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 15–16; *Pavlinko* v. *Yale-New Haven Hospital*, supra, 192 Conn. 145 (dismissal, when party fails to obey court's order, is appropriate and serves as penalty and deterrent).

To determine whether the court's dismissal of the plaintiff's case constituted an abuse of discretion, we must set forth a detailed account of the events that occurred each day of the trial. This account reveals that the plaintiff's confrontations with the court and his refusal to comply with its orders began on the first day

of the trial and continued to its end on the fifth day of trial.

FIRST DAY OF TRIAL—OCTOBER 27, 2015

At the outset of the first day, the court instructed that there were to be no "speaking objections" and that it would notify the parties regarding any further argument. The plaintiff inquired if a copy of the "Practice Book" could be made available for his use during the trial, and the court replied in the negative.[5] The plaintiff then asked if he would be permitted to testify from the counsel table, rather than the witness stand. The court replied in the negative. It reasoned that the jury would need an unobstructed view of the plaintiff as he testified and that "to maintain a proper decorum, each witness should testify from the witness chair." The plaintiff countered that it would be easier for the jury to see him at the counsel table and that, in unrelated cases, he had been permitted to testify from the counsel table to accommodate his status as a self-represented party. The court iterated its ruling that the plaintiff would testify from the witness stand.

After further discussions regarding the plaintiff's testimony, the court stated that he would not be permitted to read from a "marked up" copy of an exhibit. The plaintiff voiced his displeasure with this procedure.[6]

[5] Specifically, the court stated: "Mr. Emerick, I'm sorry. I just don't think that's possible because these courtrooms are used all day long at various times, by different judges or magistrates who may rely on the Practice Book. The Practice Book has to be present in court within the courtroom, so—certainly, the library, I believe the library is open. You're welcome to go down during recess and check what you may need in the library."

[6] Specifically, the plaintiff stated: "[D]o you have any case law for that, because that's bizarre. I have marked my exhibits, where I want to read from, and you're telling me that I can't use that. I have to go by an unmarked copy and somehow flip through four or five hundred pages and find the spot, without looking to see where it is here, because—or I can run down, see where it is here, then run back and then look at it. We're making this way more complicated, and it's not toward the ends of justice whatsoever. It's making it mind-boggling confusion and unnecessary movement when

The court responded that its role was to manage the case, and that if this method proved unwieldy, then a modification could be made. It also noted that the plaintiff could testify in a narrative, or use a question and answer format. The court instructed that he could use marked up copies of exhibits to present his case, but could read only from full exhibits. The plaintiff then asked if the court had any legal authority that required a witness to testify from the witness stand, but the court declined "to articulate" on that issue. The plaintiff opined that the court had imposed a hardship on him.[7]

After a recess, the court informed the jury that the trial likely would last through the middle of the following week. The plaintiff and the defendant's counsel made opening statements and then the evidentiary phase of the trial commenced.

The plaintiff was the first witness. During his testimony, the defendant's counsel made a hearsay objection. The court sustained the objection and explained to the plaintiff that an out-of-court statement offered in court to prove the truth of the matter, even if made by the plaintiff, constituted hearsay. The following colloquy occurred:

"[The Plaintiff]: This is the first I've heard of that. Exception.

"The Court: I'm sorry, Mr. Emerick.

"[The Plaintiff]: I will take an exception.

it could be done so quickly otherwise. . . . We're making this way too complicated . . . ."

[7] Specifically, the plaintiff stated: "But I will note that typically, the counsel, when a party is represented by a lawyer, they typically have the advantage of being able to sit at their table and organize everything, and I won't be able to do that, presenting my case from the witness stand, especially if I ask myself questions, without being able to look at everything first and then ask a question. I just—I note there is—you're imposing a hardship on a self-represented party representing themselves that a represented party doesn't have."

"The Court: The objection is sustained. Move on.

"[The Plaintiff]: I've never heard of this.

"The Court: Ask another question.

"[The Plaintiff]: I've never heard of this.

"The Court: Mr. Emerick, I'm going to ask you not to comment—

"[The Plaintiff]: Yes, Your Honor.

"The Court: —on the rulings of the court."

After a further comment by the plaintiff, the court reminded him that speaking objections were not permitted. The court then excused the jury and stated: "I just want to remind you that I specifically directed that there be no speaking objections. And it's not proper for you to challenge my rulings in a way; if it's based on the law, it's one thing, but if it's not your understanding, Mr. Emerick, you are not a lawyer; so I'm going to guess that there are other things that may be not your understanding. But just because it's not your understanding, that doesn't mean that it's admissible in evidence." A discussion on whether the plaintiff's out-of-court statements constituted hearsay ensued, with the plaintiff requesting that the court provide a citation to support its ruling. The court declined to do so, and instead suggested to the plaintiff what testimony would be admissible.

The court stated that it would not explain the rules of evidence to the plaintiff at the cost of the time of the jury. The plaintiff remarked that he was surprised by the ruling and that his concept of what testimony would be permitted had been "turned . . . on its head." The plaintiff also questioned why his complaint had not been stricken, and the court explained that the

complaint contained allegations, while the rules of evidence applied to "things that are being offered into evidence in court."

The plaintiff's testimony continued, with the defendant's counsel raising numerous objections, many of which the court sustained.[8] The plaintiff eventually turned his testimony to conversations that he had had with an individual named Peter Stern. The defendant's counsel asked and received permission to raise an objection outside the presence of the jury. The defendant's counsel stated that this topic had been the subject of a motion in limine and that the court previously had informed the plaintiff that he was not permitted to discuss any conversations that he had had with Stern. A dispute between the plaintiff and the defendant's counsel ensued, at which point the plaintiff stated that the defendant's counsel "lies all the time."[9] The court instructed the plaintiff and the defendant's counsel to refrain from talking over each other and that argument

[8] Both during the trial and on appeal to this court, the plaintiff suggested that the court had sustained the majority of the objections raised by the defendant's counsel and that these rulings support his claims of judicial bias in favor of parties represented by counsel, and against self-represented parties, as well as bias against him personally. The number of the objections by the defendant's counsel that were sustained by the court, without more direct and substantive evidence of bias, is not a recognized way to demonstrate judicial bias. See, e.g., *Burns* v. *Quinnipiac University*, 120 Conn. App. 311, 317, 991 A.2d 666, cert. denied, 297 Conn. 906, 995 A.2d 634 (2010). Additionally, the plaintiff's conduct in revisiting matters that had been ruled on previously by the court resulted in many of the objections by the defendant's counsel that the court again sustained. For example, on October 28, 2015, the court iterated that photographs containing hearsay captions and descriptions would not be admitted into evidence. It further stated that the plaintiff had failed to offer "clean" copies of the photographs and, as a result, would "have to accept the consequences." Finally, it noted: "If you persist in offering this exhibit with various arrows and commentaries, and without establishing a proper foundation for the admission of each photograph . . . then the exhibit will be rejected."

[9] Later that day, and outside of the presence of the jury, the plaintiff again accused the defendant's counsel of lying.

would be conducted in an orderly fashion. After considering the matter, the court sustained the objection and the plaintiff's testimony resumed.

The plaintiff subsequently sought to have a document admitted into evidence and the defendant's counsel raised numerous objections, including a lack of authentication. After the court sustained the objection, the plaintiff requested an interruption of his testimony to "briefly" call Pennington, the engineer and manager of physical services for the defendant, to authenticate the document. The court rejected this, stating that it was "not appropriate" and that the plaintiff could not "have a witness testify in the middle of another witness' testimony." The court then excused the jury.

The court informed the plaintiff that he needed to "plan out" his evidence and testimony. The plaintiff responded that the court's interpretation of the authentication requirement was "bizarre." After a recess, the plaintiff again described the proceedings as "bizarre." Eventually, the jury returned and the plaintiff's testimony continued for the remainder of the day.

SECOND DAY OF TRIAL—OCTOBER 28, 2015

At the outset of the second day of trial, the defendant's counsel noted that several of the photographs that the plaintiff would be seeking to have admitted into evidence contained "editorial comments." The defendant's counsel wanted to raise her concerns about these exhibits outside the presence of the jury because she felt "like I'm being put in the position where I look like I'm harassing [the plaintiff] by objecting, because the jury doesn't understand what the [Connecticut] Code of Evidence is. I'm repeatedly objecting. It looks like I'm harassing him. It's prejudicial to the [defendant]." The court ruled that the objections would need to be raised in due course as the plaintiff attempted to introduce each of the photographs into evidence. The discussion then turned to another exhibit, and the court indicated to the plaintiff that this document contained

hearsay. The plaintiff responded: "It is not hearsay. You're making this up." During the court's response, the plaintiff interrupted, prompting the following admonition: "Excuse me. I am talking, Mr. Emerick. I am talking. You may not like it, but my job here is to rule on the evidence that is offered in this case, in accordance with the Code of Evidence, not what you think it should be."

After further discussion, the court warned the plaintiff that several of his exhibits were "problematic" and subject to objections from the defendant's counsel, and therefore he should refrain from discussing the substance of these exhibits. The plaintiff claimed that all of the objections by the defendant's counsel had been sustained, and that "lawyers have a right to lie, and I'm getting tired of it." The court stated that while the plaintiff was entitled to his opinion, he was not to repeat his derogatory comments about lawyers to the jury.

The plaintiff resumed his testimony in front of the jury. At one point, the court, after sustaining an objection, reminded the plaintiff that his out-of-court statements, offered for the truth of the matter asserted, constituted hearsay. Outside the presence of the jury, the court inquired as to how long the plaintiff's testimony would last; he replied, "[m]aybe all month. Excuse me. I tend to be jocular on occasion." The court repeated its inquiry, and a dispute ensued.[10] At this

[10] The following colloquy occurred:

"The Court: I want you to answer the question I just asked you.

"[The Plaintiff]: Could you please repeat it.

"The Court: I asked you how long you plan to testify.

"[The Plaintiff]: Well, I conversed and gotten opinions from probably half a dozen very high lawyers. I cannot give their names, or they will never help me.

"The Court: Mr. Emerick, I'm not interested—

"[The Plaintiff]: And the ability to submit a document—

"The Court: I'm not interested.

"[The Plaintiff]: I'm not done talking. The ability to submit a document that I created to the [defendant] and gave them is well within my right.

"The Court: Mr. Emerick, Mr. Emerick, you will not shout at me. You will not disrespect opposing counsel. You will not keep doing that.

"[The Plaintiff]: You interrupt me all the time.

"The Court: That is my privilege, to interrupt you. When you become the

point, the plaintiff moved for a mistrial, which the court denied.[11] The court again cautioned the plaintiff about his conduct and raised the possibility of sanctions.[12] It

judge, then you can interrupt. But in the meantime, you're not the judge. And either we maintain proper decorum in this courtroom or you're going to have other problems. It is your choice. You could have retained any number of lawyers that you may have conferred with concerning this case. And until or unless you do, I have no interest in hearing anything about what any other person, what any lawyer has to say on your behalf."

[11] As the basis of his motion for a mistrial, the plaintiff alleged that he could not rely on the court's competency or impartiality.

[12] The following colloquy occurred between the court and the plaintiff:

"The Court: You will not talk when I'm talking, Mr. Emerick. You will not talk when I'm talking. You will not accuse me of things. You will not accuse me of things.

"[The Plaintiff]: I've asked—I'm raising a—

"The Court: I am sworn to uphold the laws—

"[The Plaintiff]: I don't believe it.

"The Court: —and constitution of the state of Connecticut and United States constitution. You will not accuse me of disrespecting the law. And in the course of doing that, that is my job. That is not what I'm charged with. I'm charged with making findings concerning the legal issues in this case, including evidentiary rules. If you don't like them, and this case turns out adversely to you, then you can pursue whatever remedies that you may have available to you. But in the meantime, we're going to do things in a proper way.

"[The Plaintiff]: That's your opinion.

"The Court: In this courtroom—

"[The Plaintiff]: Like I said, the attorneys I talked to state it's no problem at all submitting a document that you gave to the [defendant].

"The Court: —Mr. Emerick, that is the only opinion that counts. Don't push me, Mr. Emerick.

"[The Plaintiff]: I would like to recall the statement that I made previously, that when I first heard you were going to be on the case, I asked for a different judge—

"The Court: Mr. Emerick—

"[The Plaintiff]: —because I feel that you're—

"The Court: Mr. Emerick, it's just not possible. It's just not possible. So, either you do things the way you're supposed to do—

"[The Plaintiff]: I am.

"The Court: —get your case done, and you respect this jury and you respect this process or we're going to have a very rough road here.

"[The Plaintiff]: The attorney is getting away with misconduct.

"The Court: That is not true.

"[The Plaintiff]: Oh, it is.

"The Court: Because an attorney is representing or seeking to represent a client, you don't like it, that, you know—this is an adversarial process, Mr. Emerick.

"[The Plaintiff]: I know how to lay a foundation.

"The Court: You don't have to like it.

"[The Plaintiff]: I was going into laying a foundation.

"The Court: It's not—she's not here to please you and do things the way you want her to do them. She's here to represent a client. She has a professional responsibility to her client and she had, as an officer of the court, she has a responsibility to the court. So, until or unless you have something definitive to say, you will not say it again. You will not accuse opposing counsel of lying. If you do it again, then I'm going to have seriously consider sanctioning you."

then instructed the plaintiff to prepare a written outline of the remainder of his testimony during the lunch break. In response, the plaintiff again complained about the court's evidentiary ruling and included ad hominem remarks regarding Judge Peck's competence.[13]

The court restated its order for the plaintiff to compose an outline, and further argument ensued. During this argument, the plaintiff accused the court of giving "preferential treatment to lawyers" and was told, on several occasions, to stop speaking. The plaintiff characterized the court's statements as "ridiculous . . . ." Before the jury returned, the following colloquy occurred:

"[The Plaintiff]: This is not law.

"The Court: That's it.

"[The Plaintiff]: This is not law. *This is an abuse of law at the highest level.*

"The Court: I want—you will not say one more word. You will not say one more word. Get on that witness stand.

"[The Plaintiff]: I move to recuse.

"The Court: Mr. Emerick, take the witness stand. Sit down. And you will not make any further comments or raise your voice in front of this jury.

[13] The following colloquy occurred between the court and the plaintiff:

"[The Plaintiff]: I asked to be allowed to put into evidence things that anybody could put into evidence, except in front of you in this court by a self-represented party. A document given to everybody that they have, and I'm not allowed to put it into evidence? *You need to go back to law school.*

"The Court: Mr. Emerick, being a self-represented party does not give you a license to violate the rules of appropriate—

"[The Plaintiff]: I do not.

"The Court: —decorum in the courtroom. It does not give you a license for the court to ignore the rules of evidence in your favor, and other rules of civil procedure.

"[The Plaintiff]: *You talk in gibberish half the time.*

"The Court: It does not give you a license, sir.

"[The Plaintiff]: *I listen to you talk and it's like gibberish I'm hearing, literally gibberish,* and I've also gotten that opinion from other attorneys as well, but I can't say their names." (Emphasis added.)

"[The Plaintiff]: *I have no respect for you whatsoever*." (Emphasis added.)

The plaintiff resumed his testimony. Despite the court's prior rulings, he continuously made reference to photographs and documents that had been ruled inadmissible.[14] At one point, the court inquired if the plaintiff had planned to ask another question, to which he responded, "Yes, I am, unless you'd rather ask it for me." After a few more questions, the court informed the plaintiff that his testimony was not furthering the issues in this case and then excused the jury for lunch. The court reminded the plaintiff to complete his written outline for the remainder of his testimony during the break.

Before his testimony resumed, the court again warned the plaintiff about his conduct[15] and cautioned him to not raise his voice, even when the jury was not in the courtroom. After an extended discussion regarding the admissibility of various exhibits, the following colloquy occurred:

"[The Plaintiff]: May I be excused and call me back when you and the lawyer here get done talking?

"The Court: No, sir. Exhibit 13.

"[The Plaintiff]: I again request a mistrial. A gross, gross, gross incompetence regarding legal knowledge and understanding what the complaint is about and literally fabricating things that don't make any sense at all. It's bizarre to me, what I'm listening to.

[14] The plaintiff's persistent behavior caused to the court to provide the jury with a general explanation as to why these photographs were not admissible evidence and to instruct the plaintiff to cease this line of testimony.

[15] The court stated: "And I just want to say to you, Mr. Emerick, that the fact that you are self-represented does not give you license to be disrespectful to the court or to opposing counsel."

"The Court: I just want to note for the record, Mr. Emerick, that—well, first, it's appropriate to stand when you address the court. You don't have to respect me.

"[The Plaintiff]: I don't.

"The Court: Which you've already indicated on the record before, but you do have to respect the process.

"[The Plaintiff]: And you don't respect me or my complaint, and you're just using your position of power to formulate or promote the business of law, pursuant to Practice Book § 1-8.

"The Court: Your comments are totally inappropriate, Mr. Emerick.

"[The Plaintiff]: No, it's not.

"The Court: And I'm going to direct you to confine your comments to the legal issues that we have to address. These extraneous comments that you're making are totally inappropriate. Okay. Exhibit 13—

"[The Plaintiff]: And the comments that I'm hearing are totally inappropriate. . . . It's a waste of time."

As the parties and the court continued to discuss the exhibits outside of the presence of the jury, the plaintiff asked if he would be permitted to voir dire the defendant's counsel regarding her "math capability" and stated that the court was "just nodding your head like you're drugged or something. Yeah, let's move on. This makes no sense." After a ruling on a particular exhibit, the plaintiff sarcastically remarked, "[o]f course it's not coming in," and moved for a mistrial because it was "a waste of time presenting a case" to the court, which, in his view, was "incompetent." Shortly thereafter, after the court asked him about a particular exhibit, the plaintiff abruptly left the courtroom, without asking permission to do so.

After a recess, the court made the following statement outside the presence of the jury: "Mr. Emerick, you've been extremely disrespectful of this process, the court, opposing counsel. You've shouted at me. You have talked over me. You've made snide and insulting comments to me, demonstrating what you have stated to be your lack of respect for me. *Your behavior is intolerable*, but I want to put you on notice now that you will not comment. I am going to rule on evidence. You will not comment on my rulings. *You will not be disrespectful to me or opposing counsel or I will dismiss your case*. I want you to understand that.

"I will not declare a mistrial. *I will dismiss your case*. You do not have to like me. I'm not asking you to. But you have to respect this process, or you have no right to be here. You can disagree but you cannot be—you cannot continue to be abusive. Your behavior has been abusive. *You must present your case in a proper and respectful manner, in accordance with the rules of decorum and the rules of practice and the rules of evidence of this court, or it will be dismissed.*

"I want you to understand that. This is the—I should have warned you when we came back from lunch, and I deferred, because I thought maybe we could make some headway. But it's obvious to me after that scene that you just created by rudely turning your back, rushing out of the courtroom, slamming the swinging door against the wall, that you need to know and understand that this is the way it's going to be.

"So, what I'd like to do now, if you will agree with what I just said, that you understand what I've just told you, Mr. Emerick, we can proceed. . . . *But if you have no intention of behaving in a proper and civilized and nonabusive manner, then I think the sanction of dismissal is an appropriate one.* Do you understand?"

(Emphasis added.) The plaintiff responded in the affirmative. Despite the court's statement, the plaintiff again challenged the honesty of the defendant's counsel specifically, and attorneys generally. Later that day, and outside the presence of the jury, the plaintiff raised his voice to the court, and after an objection was sustained, he remarked, "[n]o kidding."

THIRD DAY OF TRIAL—OCTOBER 30, 2015

On the third day of trial, the court commented on the plaintiff's conduct. "I just have a few remarks I want to make before we begin. They're directed against the—primarily concerning the disruptive behavior of [the plaintiff] on [October 29, 2015], which needs to be addressed by the court. And I just want to say to you, Mr. Emerick, I know I may have said some of this previously, but it bears repeating.

"Because you've chosen to represent yourself, it does not mean that you get to rewrite the rules of court to suit yourself. You are not an inexperienced litigant. This is not the first time that you have represented yourself in a civil proceeding. Your behavior thus far has been extremely disruptive and calculated in an effort to present your case in the peculiar way that you believe you should be entitled to present it, despite warnings that your tactics are improper and unacceptable in a court of law.

"This court, the Superior Court, has existed—existed long before you filed your first pleading in this case. It will continue long after this lawsuit is history. Individual litigants do not come here on a blank slate, and you know this, based on your own courtroom experiences. There are rules of courtroom decorum, rules of civil practice, and rules of evidence established by our legislature and judges of the courts of this state that must be followed in fairness and justice to all parties to a litigation, the jury and the public.

"You can't ignore the rules based on your own vision of how you should be able to present your case to a jury. Now, my goal is to conclude this trial on the merits, and I make this statement at this point to remark for the record that your behavior has been an outrageous display, disrespectful of opposing counsel, her client, and the jury, and the court, as I have noted. It has delayed the progress of this trial, caused the jury to be excluded from the courtroom for extended periods of time to go over, while we go over in court, issues relating to your exhibits, all of which could have been avoided, had you heeded the directions and rulings of the court.

"You'll recall that the court first attempted to resolve issues relating to your exhibits on Monday, before the evidence began; despite several efforts, you have chosen to ignore the concerns and proper objections to your proposed exhibits at a time when much of the delay could have been avoided. You've also ignored rulings and directions of the court concerning the rules of evidence and the rules of practice concerning your exhibits and testimony. You've flagrantly violated proper courtroom decorum by making personal attacks against opposing counsel and me.

"You rudely speak while others are speaking; you continuously interrupt. You have shouted at me in an extremely loud voice and in disparaging tones. You stormed out of the courtroom on Wednesday [October 28, 2015] in the midst of being addressed by the court. You slammed the swinging door against the wall upon exiting so loudly that the marshals were alerted. You have repeatedly ignored the rulings of the court, causing them to be repeated over and over, all resulting in unnecessarily delaying these proceedings.

"*This repeated behavior is contumacious.* It cannot go unaddressed, as I've indicated. You've acted in a wilful—in a wilful, repeated, conduct which is directed

against the dignity and authority of this court, which has interfered with the orderly administration of justice. If you repeat this conduct, I will fine you for each such contemptuous act. Do you understand what I've just said to you, Mr. Emerick? [The plaintiff responded in the affirmative.] Okay. All right. Then, let's begin. Hopefully, today's a new day." (Emphasis added.)

The parties and the court resumed discussions regarding exhibits that the plaintiff would be attempting to introduce into evidence. On two occasions, the court warned the plaintiff that the next time he spoke when the court was talking, it would "cost [him] a hundred dollars . . . ." The court extensively explained the redactions needed so that certain exhibits would be admitted into evidence. It also informed the plaintiff that his testimony needed to be concluded by the lunch break.

The plaintiff again requested a mistrial, which the court denied.[16] The court directed the plaintiff to take the witness stand, and the plaintiff continued to complain about the court's rulings. After being directed to the witness stand for a second time, the plaintiff responded: "Incredible." The court imposed a $100 fine for his "gratuitous comment . . . ."[17]

During his testimony, the plaintiff repeatedly was cautioned not to refer to items that had been ruled

[16] Specifically, the following colloquy occurred:

"[The Plaintiff]: I would like to—one more time, [make] a motion for mistrial. I think this is so grossly bias—

"The Court: Denied.

"[The Plaintiff]: —it defies logic in every standard, every standard.

"The Court: I'm sorry. Mr. Emerick, at some point, you have to conclude your testimony."

[17] The court stated: "You just made a gratuitous comment. Take the witness stand. Plus, this is like the third or fourth time I've asked you take the witness stand. For all that behavior, it's costing you a hundred dollars. Stop glaring at me, Mr. Emerick, and take the witness stand. The court notes that the plaintiff is glaring."

inadmissible.[18] After the court excused the jury for the morning recess, it articulated its concern regarding the length of time to complete both the plaintiff's testimony and the trial. During this exchange, the plaintiff questioned the court's impartiality and stated, "I notice you read the statement this morning. Did you get that yesterday with all the judges and your help?" The court responded: "I'm going to warn you again, Mr. Emerick, you make another comment like that and I will fine you another hundred dollars. It's impertinent. It has nothing to do with your case. It's totally improper. You will show proper respect and decorum in this courtroom."

Following the morning recess, the plaintiff's testimony continued. He raised the issue of whether the complaint had contained "a claim for emotional distress . . . ." The defendant's counsel immediately objected, and the court excused the jury. The defendant's counsel argued that the plaintiff was ignoring the court's previous rulings.[19] The court agreed with counsel's argument.

The plaintiff completed his testimony, and the defendant's counsel conducted her cross-examination. During the plaintiff's redirect examination, he made

[18] For example, the court stated: "Mr. Emerick, we've had extensive discussion about exhibit—what exhibits would be admissible and what exhibits would not be admissible outside the presence of the jury. And there were certain things that were excluded because they're not admissible in evidence. You—I directed you not testify about them just a few minutes ago.

"I've repeatedly instructed you, in the course of these proceedings, not to testify about things that are not in evidence. So, I'm going to strike that—the last two or three questions concerning things that—reference to certain photographs that are not in evidence. You can testify—just so the jury understands—you can testify as to what you observed through your senses and you can offer photographs, as you have, concerning conditions on your property."

[19] Specifically, the defendant's counsel stated that "[j]ust before we recessed, you specifically instructed [the [plaintiff] and ruled that only injunctive relief is relevant to his intentional infliction of emotional distress claim. You told him your emotional distress is not in this case. Essentially, that's what you told him. He is once again just ignoring your instructions and not—and abusing the process and prejudicing my client. He is completely

reference to an offer of settlement. The court sustained the immediate objection from the defendant's counsel and struck the plaintiff's statement. Shortly thereafter, he made another reference to an offer to settle the matter, prompting another objection.[20] After a third reference to settlement discussions, the court excused the jury. The defendant's counsel argued that the plaintiff had abandoned his action by wilfully ignoring the court's instructions and requested a dismissal.[21] During the ensuing argument, the plaintiff claimed that the defendant's counsel stated an "outright lie . . . ." The court admonished the plaintiff for that accusation and for speaking over the court.[22]

The plaintiff completed his redirect examination and called Pennington as the next witness. After the jury had been excused for the day, the defendant's counsel informed the court that she planned to move for a directed verdict at the conclusion of the plaintiff's case. The court then adjourned for the day.

FOURTH DAY OF TRIAL—NOVEMBER 3, 2015

On the next day of trial, the court immediately inquired about the time frame for concluding the case. The impetus for this discussion was a note from an alternate juror asking to be excused because of a financial hardship. The court noted that the jurors had been

ignoring what you told him before we recessed, to my client's prejudice. Emotional distress is not a part of this case; you told him that."

[20] The defendant's counsel argued as follows: "You just instructed him that this was improper, and he's not listening to the court and he hasn't listened to the court since day one."

[21] Specifically, the defendant's counsel stated: "At this point, I want to ask that you,—he's abandoned his claims. He's abandoned his claims by willingly ignoring Your Honor's instructions time and time again. I would ask for a dismissal. He has ignored what you have told him time and time again, to my client's prejudice, so I would ask that you dismiss the case."

[22] Specifically, the court stated: "I have directed you in the past not to accuse or state that the defendant's lawyer is lying. . . . I'm telling you again to stop talking. Stop talking. And do not interrupt me and do not speak over me."

informed that the trial would take four days, and yet, at the start of the fourth day of evidence, the conclusion of the trial was not imminent. The plaintiff estimated that he could complete his direct examination of Pennington by the end of the day. The court responded: "Oh, no, no, no. Not today. You have to finish him this morning. There's no question about it. No question. You can't have beyond this morning with this witness."

The court then addressed and orally denied the plaintiff's written motion for a mistrial alleging judicial bias.[23] Pennington's testimony resumed, subject to a variety of successful objections from the defendant's counsel. At one point, the court excused the jury and rejected the plaintiff's attempt to have certain exhibits admitted into evidence as a judicial admission. Later, the following colloquy ensued:

"The Court: . . . This case has been unduly prolonged because the plaintiff, in particular, has repeatedly sought to introduce things and argue evidentiary issues over and over and over again, despite the rulings of this court.

"[The Plaintiff]: And my reply—

"The Court: We need to—we need to move on, Mr. Emerick.

"[The Plaintiff]: I agree.

"The Court: The jury, you know, one of my roles as a judge is to, you know, protect the integrity of the

[23] Specifically, the court stated: "Well, I've reviewed the motion, and I don't think it has stated any sufficient grounds for a mistrial, so the motion is denied for judicial recusal. Because rulings may be adverse, it doesn't necessarily mean, although they may be—when a ruling is adverse, and although based on law, sometimes it is difficult to accept and digest. And I can understand, Mr. Emerick, why you may be frustrated, but I—but be that as it may, there are not sufficient grounds for either a mistrial—it's not appropriate in the middle of a trial to move for recusal, unless there was something—you know, there's just not basis for it."

administration of justice. You know, a jury's time and attention has to be protected. It's not protected, it's not respected, if their time is wasted sitting in a jury room because issues that have been addressed and ruled on by the court and that you have made a redundant record of, you keep on raising it and raising and raising. It's disrespectful of the jury. It's disrespectful of this process, and we need to move this case along."

After the lunch break, the defendant's counsel argued that Gadwa was not qualified to testify as an expert and that, in the alternative, her opinions would not assist the jury in understanding the evidence in this case. The court excused the jury for the remainder of the day. During his voir dire of Gadwa, the plaintiff claimed that the court had interrupted him, and the court iterated that the trial had gone on "way too long" as a result of "unnecessary arguments and improper arguments" by the plaintiff. The plaintiff responded, "[i]ncredible, incredible." The court warned him that if he made a similar comment again, he would be fined.

Later, the plaintiff asked Gadwa whether the defendant had acted negligently or recklessly. The defendant's counsel objected, arguing that the court previously had ruled that topic improper because it went to the ultimate issue for the jury. The court agreed with the defendant's counsel. The plaintiff responded: "Let the record show that I filed an exception on this. This is beyond, again, beyond belief, beyond credibility, beyond the generally accepted common knowledge of the general public, beyond anything I've read in law thus far. This goes well beyond anything. This is—appears to be, and I cite this as an objection—this is so gross; this is like a collusion between the judge . . . and the defendant's counsel." He also noted that he could not understand the court's confusing and bizarre statements.

After more questions to Gadwa, the court sustained an objection, and the following colloquy occurred:

"[The Plaintiff]: Can the court please tell me what I plead[ed] in my complaint, because this is what we're talking about. This is my complaint; so can you tell me, please—

"The Court: Ask another—

"[The plaintiff] —do you have enough decency to let—

"The Court: You know what, we're going to adjourn for the day.

"[The Plaintiff]: —me speak, and please have enough decency to tell me what my complaint is about?

"The Court: Mr. Emerick, you are totally out of line. You are totally out of order.

"[The Plaintiff]: You cut me off every time I start to speak.

"The Court: It is not the role of the court to tell you how to conduct your examination.

"[The Plaintiff]: Do you understand when I file a motion for mistrial—

"The Court: I've tried to—

"[The Plaintiff]: —I went downstairs and vomited [during the second day of trial after he abruptly left the courtroom] because I realized what you were doing. That's how sick you got me. I'm standing in front of someone—

"The Court: Mr. Emerick—

"[The Plaintiff]: —after all this time, that I know is here to destroy my case—

"The Court: Mr. Emerick—

"[The Plaintiff]: —with their logic.

"The Court: —that's going to cost you another hundred dollars. You're up to three hundred dollars. You're totally out of order. You have disrespected this court; you have abused—you have abused—

"[The Plaintiff]: I disagree.

"The Court: —the privilege that you're being given here.

"[The Plaintiff]: Self-serving. I swore I would not get mad today. I swore I would not raise my voice.

"The Court: You are—you have constantly—

"[The Plaintiff]: And you are always able to do it.

"The Court: You are rude, you are abusive. You are abusing this process. You have squandered your time, squandered the time of this jury. You are totally out of line."

The court then adjourned for the day.

FIFTH DAY OF TRIAL—NOVEMBER 4, 2015

On the final day of the trial, the court informed the parties that it would permit Gadwa to testify and that the defendant's counsel would have to raise her objections in front of the jury. After the court sustained an objection raised by the defendant's counsel, the plaintiff remarked, "[i]ncredible." The court instructed the plaintiff to refrain from commenting on its rulings. After an objection was raised following the plaintiff's next question to Gadwa, the plaintiff spoke over the court as it ruled. The court admonished the plaintiff: "Mr. Emerick, you are out of line. You will not speak when anybody else is speaking. You will not be disrespectful

to the court." It then offered the plaintiff some suggestions on how to question his expert.[24] Rather than follow the court's advice, the plaintiff commented on the court's statement and was ordered to refrain from such behavior.

The plaintiff attempted to introduce a document, exhibit 13, into evidence, which the court previously had ruled inadmissible on several occasions. The court excused the jury, and the defendant's counsel stated: "I know that the court is making its best effort to make this a fair and balanced proceeding, but when you rule and tell [the plaintiff] to move on and that this is not admissible, and he keeps going back and he keeps going back, the jury necessarily wants to see that [exhibit 13]. It's highly prejudicial to my client. He's not following this court's instructions." The court noted its agreement with the defendant's counsel, who requested that the plaintiff's case should be considered abandoned and dismissed, or, at a minimum, that the plaintiff follow the court's instructions. The court responded: "I don't disagree with you. Your behavior, Mr. Emerick, is obstructive to the progress of this case." The plaintiff continued, and the court admonished the plaintiff from arguing in that "tone of voice. . . . You will not, Mr. Emerick, or I will remove you—have the marshal remove you from this courtroom. . . . I'm sorry. We are not going to keep doing this, Mr. Emerick. You will adhere to the rules of this court, period. If you do not, I will dismiss this case. We've not made any progress, hardly no progress with this witness, because of your obstreperous behavior, your refusal to accept the rulings of this court. In this courtroom, it is the judge, the

[24] Specifically, the court stated: "You need to ask this witness, focus your questioning on what this witness did in this particular case, within her area of expertise, and what opinions she may have, based on that, based on that, a proper foundation, what opinions she may have that are relevant to the issues in this case. That's what you need to do."

person in this chair, where I am, who makes rulings on the law. You don't have to agree with me. I don't require you to agree with me. I just require you to accept my rulings, and if, at the end of this case, the case goes against you, you can take it up with an appellate court, as is your right to do. But for now, for here, I am the final say on what the law is. Do you understand me? I know you're not looking at me. You're looking down and you're reading something, and I don't know what you're doing. As you've repeatedly done, you refuse to look at the person who's speaking to you. So, do you understand and hear me, what I've said? In this courtroom, I am the final arbiter of what the law is. Do you understand?" The plaintiff responded in the affirmative. Before taking a recess, the court informed the plaintiff that it would not revisit this evidentiary ruling.

After the ruling, the plaintiff resumed his questioning of Gadwa. Shortly thereafter, he made reference to exhibit 13, prompting an objection from the defendant's counsel, which the court sustained.[25] The plaintiff then

[25] At this point, the court elaborated its ruling as follows: "Ladies and gentlemen, I'm going to sustain the objection. I instructed [the plaintiff], both in your presence and outside of your presence, not to make an issue of this affidavit [exhibit 13], and I just want to explain to you a little bit more about the purpose of this affidavit. There are other proceedings that do take place in court, leading up to trial, where an affidavit is appropriate, and it has a limited utility. It doesn't mean that that affi—the reason that that affidavit, one of the reasons that that may not come into evidence at trial, is that—and one of the two primary reasons; one is that it's a hearsay document.

"It's a document that's made out of court, and to some extent—and it's not subject to cross-examination. So, in terms of the evidence that is allowed in the trial, there is a back and forth that is allowed by each side, in an effort to get to—as I will later instruct you—in an effort to assist the jury in reaching the truth.

"We get to hear both sides of any different aspect of evidence. An affidavit is hearsay and that, the fact that it's not subject to cross-examination, make it less reliable than testimony that you hear in court, which is subject to cross-examination.

"So, I don't want you to feel as though you're missing out on anything. The witness is here, and she is available to testify, and there are very specific rules of evidence that provide that in the context of a jury trial, it is not

posed a series of questions to Gadwa, many of which were successfully objected to. The defendant's counsel specifically requested that the court order the plaintiff to cease questioning Gadwa with respect to exhibits 17, 18, and 23. The court instructed the plaintiff to refrain from discussing those exhibits, and he responded by citing to § 7-4 of the Connecticut Code of Evidence. The court declined to entertain this argument and instructed him to proceed. The court again attempted to guide the plaintiff in the questioning of an expert witness.

After some further questioning, the court sustained an objection by the defendant's counsel to a portion of Gadwa's testimony that was based on speculation. The court instructed the jury that Gadwa's response was speculation and therefore could not be considered in its deliberations. The plaintiff then questioned Gadwa regarding a photograph of water that was not on the plaintiff's property, which the court previously had ruled inadmissible. The court sustained the objection by the defendant's counsel, explaining to the jury that opinions regarding other property were not relevant to the plaintiff's case. The plaintiff then asked if Gadwa had an opinion about the "source of some of the water quality" on his property. The defendant's counsel objected, and the court again excused the jury.

The court heard argument from the defendant's counsel and the plaintiff. The court noted that evidence

usual for a—and it's not allowable, as a principle of evidence, for an affidavit of a witness, particularly a witness who is here to testify, to have an affidavit come into evidence.

"It, in effect, would allow the witness to testify twice, once subject to cross-examination and once not subject to cross examination. So, I just want you to understand that the rules—I know you've heard me recite rules at various times for various reasons. And these rules have evolved and have been developed and written and amended over a period of time, and they exist for reasons that are rooted in the law. So, I just want to make sure that you understand that."

was needed to support the allegations contained in the complaint, at which point the plaintiff interrupted the court. The plaintiff accused the court of "redrafting" his complaint and always interrupting him. After allowing further argument from the plaintiff, the court sustained the objection by the defendant's counsel. The plaintiff then stated: "I would like to just first move for a mistrial because you are so bizarre in your statements. It is bizarre beyond anything I've ever come across in my life, what you're saying. It's bizarre. I don't know how to address something which is—it doesn't register on a general public scale of common intelligence that you would expect someone to—to say. What you're saying makes no sense at all, actually, no sense. It's contrary to the complaint. It's contrary to the evidence that's been entered. It's contrary to everything for validation; there's nobody would say that this is not valid. . . . And you just keep talking in circles like this lawyer here about some—nothing is relevant. There is nothing relevant. The whole complaint is about what they've done to allow this quality and quantity degradation coming in."

The plaintiff then criticized the court's ruling as making "no sense at all, none, in law and the rules of the Code of Evidence . . . ." At this conclusion of his commentary, the following colloquy occurred:

"The Court: Mr. Emerick, you have been grossly insulting. You've abused me, you've insulted me. You have abused—you have abused this process in a way that has totally disrupted and interfered with the administration of justice—

"[The Plaintiff]: I consider that a lie.

"The Court: —as I have always understood it to be. And I—you have insulted me openly. You have insulted me repeatedly under your breath. You've accused me

now, for at least the third time, of making bizarre rulings. You have accused me of trying to destroy your case. You have only—you only have listened to what you have to say and what your view of this case is. That is just—if you have—just give me a moment. You obviously have no respect for court rules or procedure. You have no respect for the rule of law other than your own interpretation as what that should be. Your behavior is unmanageable. If I haven't said it's intolerable, you know, I'll say it again. You have insulted your opposing counsel repeatedly, repeatedly. You've made everybody in this courtroom uncomfortable. You have wilfully disregarded any semblance of courtroom decorum. If I didn't indicate it before, you verbally abused staff.[26]

"[The Plaintiff]: I will note that the court is reading from a preprepared statement before any of this occurred.

"The Court: Absolutely, because I have thought—

"[The Plaintiff]: She had prepared it before she even walked into court and brought it with her. So, now she was reading it—

"The Court: I hope that I—

"[The Plaintiff]: —so that she can justify—

"The Court: —any statement that I make, Mr. Emerick, is only because it's thoughtful, that I have given it a great deal of thought.

"[The Plaintiff]: Planning, is what I call it.

"The Court: And I have—I think I've been very restrained. I indicated to you last Wednesday, the second day of trial, because of your behavior on that day, that as a sanction, that your case should be dismissed,

[26] After a careful review of the record, we are unable to identify a specific instance where the plaintiff verbally abused the court's staff.

because you really do not—you don't respect the process. And to the extent that you are not willing to abide by the established rules of practice and procedure and evidence and rules of decorum, you really have abused your right to be here. You—

"[The Plaintiff]: This is all preplanned on your part. You know that as well as I do, and you want to put that down on the record—

"The Court: This is not helping you. This is not helping you one bit.

"[The Plaintiff]: —so the Appellate Court can say, oh, we have to stand by our colleague in the business.

"The Court: This is not helping you one bit, Mr. Emerick.

"[The Plaintiff]: A hundred percent of the objections by opposing counsel, which are bizarre, one hundred percent are sustained, no matter what they are.

"The Court: You know—

"[The Plaintiff]: It gets old.

"The Court: —Mr. Emerick, after this case, you know, this process, civil justice, civil trials, it will continue on, you know, after both you and I are gone. It's bigger than you, it's bigger than me.

"[The Plaintiff]: Right. And people standing before you will be in the business, and so they have to accommodate that. That's right.

"The Court: And—

"[The Plaintiff]: People in the business will accommodate them.

"The Court: —my concern at this point is preserving the integrity of the judicial process.

"[The Plaintiff]: No, it isn't at all. That's why you're smiling so much. Let it be shown that the court is smiling with a preprepared statement that she made before she

even walked into court, and then she knew she would ask questions and make ruling, so that—to make me look bad. It's so obvious; it's not very intelligent.

"The Court: You have repeatedly—

"[The Plaintiff]: It's well planned out. And you can smile because you know the Appellate Court will do nothing but—

"The Court: If you continue, Mr. Emerick—

"[The Plaintiff]: —agree with you on everything. All you have to do is read the statement.

"The Court: —if you don't stop talking, I'm going to ask the marshal to take you outside, and when you're prepared to listen, I'll have him bring you back. But you need to stop talking, because I have a right to speak, too. You've refused to follow or respect the requirements of the law as articulated by this court, and like I indicated to you just earlier today, in this courtroom, it is my job, whether, you know, you like it or not, it is my job to decide what the law is and what the appropriate procedure is for us to follow. We don't all—we don't—the litigants that come to this court do not create their own rules. We can't operate that way; we don't operate that way. It has no place here, you divining your own rules and your own interpretation of the law . . . ."

The court and the plaintiff then discussed the issue of what opinion testimony would be permitted from Gadwa. After debating what had been said on the prior day regarding § 7-3 of the Connecticut Code of Evidence, the court stated: "I don't know where you came to the—jumped to the conclusion that you jumped to, Mr. Emerick, but that's your problem. That's not mine, because that is not what I—I never told you yesterday that you could not elicit opinions from your expert

witness. We're finished here, Mr. Emerick. I'm dismissing your case." In conclusion, the plaintiff stated that he had "spent five years or four years on a case, present a perfect case, and you destroyed it because I'm a self-represented party. Congratulations, [the defendant's counsel], corruption prevails."

As we have detailed extensively, the plaintiff inappropriately challenged the court's rulings from the outset of the trial through the order of dismissal. He also consistently interrupted and spoke over the court, despite numerous warnings about this behavior. The plaintiff refused to accept the court's evidentiary rulings. Over the course of the trial, he insulted the court by calling the rulings "bizarre" and remarking that the trial court was "incompetent" and needed "to go back to law school." The plaintiff also accused the court of speaking in "gibberish" and nodding her head as if "drugged . . . ." He made unsubstantiated allegations of "gross incompetence" and a "collusion" between the court and the defendant's counsel. Our review of the audio recording of the trial proceedings revealed several instances where the plaintiff also made gratuitous remarks, sarcastic grunts and audible sighs in response to the court's rulings.

During the trial, the court explained that its role was to manage the proceedings and expressly remarked that its goal was to conclude the case on the merits. The court noted its willingness to modify the manner in which the plaintiff testified, if necessary, offered suggestions on how to question witnesses and present evidence so that it could be admitted, and provided the plaintiff with detailed explanations of its evidentiary rulings. The court, however, did caution that it could not take the time to educate the plaintiff on our rules of evidence at the expense of the jury's time. At one point, in an apparent effort to move the trial along, it

ordered the plaintiff to create an outline of his testimony.

The court also employed a series of progressive steps in an effort to address the plaintiff's untoward behavior. It started with verbal warnings and reminders to avoid "speaking objections." It continually instructed the plaintiff to cease commenting on evidentiary rulings, interrupting the court and making insulting or disparaging remarks. On the second day of trial, the court advised the plaintiff that he could face sanctions, including dismissal, if this behavior continued. It stated that the plaintiff would be fined if he continued with his refusal to comply with the court's orders. After several warnings, the court fined the plaintiff on the third and fourth days of the trial for his refusal to follow its instructions and his persistence in commenting on its evidentiary rulings. The court advised the plaintiff on multiple occasions that dismissal of the case was an option it would consider if he continued with his actions.

We iterate that the sanction of dismissal does not constitute an abuse of discretion "where a party shows a deliberate, contumacious or unwarranted disregard for the court's authority . . . ." (Internal quotation marks omitted.) *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 16–17; *Fox* v. *First Bank*, supra, 198 Conn. 39. The plaintiff's conduct, considered in its entirety, satisfied this standard. The plaintiff did not demonstrate any mitigating factors for his actions during the trial. Cf. *Usowski* v. *Jacobson*, 267 Conn. 73, 93–95, 836 A.2d 1167 (2003) (in each instance where plaintiff failed to comply with order of court, mitigating factor was present, and thus conduct did not evince contumacious or unwarranted disregard for court's authority and there was not a pattern of abuse so egregious as to warrant dismissal). Additionally, the court's use of a series of escalating disciplinary steps

to compel the observance of its orders proved unsuccessful, leaving dismissal as a last resort, and therefore the only reasonable remedy. The court's repeated warnings, suggestions and fines had no impact on the plaintiff, as he ignored the court's admonitions and continued to delay the trial. See *Pavlinko* v. *Yale-New Haven Hospital*, supra, 192 Conn. 144–45 (dismissal was only viable sanction where plaintiff administrator of estate removed hospital records of his decedent and refused to answer questions about integrity and reliability of those records in medical malpractice action); see also *Fox* v. *First Bank*, supra, 40 (court afforded plaintiff several chances to comply with payment orders before dismissing her case); cf. *D'Ascanio* v. *Toyota Industries Corp.*, supra, 309 Conn. 683–84 (after dishonest conduct of plaintiff's expert, court could have struck his testimony or granted request for continuance or mistrial rather than dismiss the case). Simply put, the plaintiff's continuing and deliberate misconduct, for which he bears sole responsibility, demonstrated such deliberate disregard for the court's orders as to warrant dismissal. See *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 14; cf. *D'Ascanio* v. *Toyota Industries Corp.*, supra, 679–82 (dismissal of case constituted abuse of discretion where plaintiffs were not complicit in dishonest and deceitful conduct of expert witness, objectionable conduct was isolated event and not a series of actions done in disregard of court's authority and plaintiff was not given opportunity to rectify situation). We conclude, therefore, that the court did not abuse its discretion in dismissing the plaintiff's case.

We now briefly address the remainder of the claims raised by the plaintiff in this appeal. First, he claims that the court erred in dismissing the case by not adhering to stare decisis standards. Specifically, the plaintiff quoted language from *D'Ascanio* v. *Toyota Industries Corp.*, supra, 309 Conn. 670–72, arguing that the court did

not follow the controlling authority from our Supreme Court. We are not persuaded by these arguments, many of which we have addressed in this opinion, and conclude that the court's dismissal did not conflict with the *D'Ascanio* case.[27] Accordingly, the plaintiff's claim regarding stare decisis is without merit.

Next, the plaintiff claims that the court erred in dismissing the case on the basis of arguments set forth in his motion to reargue and his motions for a mistrial, which alleged judicial bias.[28] In the motion for reargument, the plaintiff assumed that the dismissal followed from a finding of contempt pursuant to General Statutes §§ 51-33 and 51-33a, and Practice Book § 1-14. This assumption, however, is incorrect. The dismissal was based on the court's inherent authority to compel observance of its rules and to deal with continuing misconduct. The plaintiff's contempt arguments, therefore, are inapplicable to the present case, and therefore are without merit.

The plaintiff also relied on the Code of Judicial Conduct and made allegations regarding the court's unwillingness to recuse itself or grant a mistrial. After a careful

[27] Specifically, the plaintiff quotes language from *D'Ascanio* v. *Toyota Industries Corp.*, supra, 309 Conn. 663, arguing that he had complied with "every rule and order" of the trial court. (Emphasis omitted.) As we have extensively detailed, the record contradicts the plaintiff's assertion. He next contends that the court could have permitted the proceedings to conclude, then considered the defendant's motion for a directed verdict. In his view, this would have been preferable to "a dismissal read with a smile from a statement . . . ." We have concluded, to the contrary, that the court acted well within its discretion by dismissing the case as a sanction for his conduct. Therefore, this contention is without merit. The plaintiff again asserts that there was "no disobedience or contumacious conduct during the trial." We simply refer to our detailed description of the events before the trial court to reject this claim.

[28] We note that the plaintiff claimed in the motion for reargument that the defendant did not request the sanction of dismissal. The record does not support this statement. The defendant's counsel did, in fact, ask the court to dismiss the case on more than one occasion.

review of these arguments, we conclude that they are wholly without merit. First, we disagree with the plaintiff's blanket assertion that the court failed to consider his motions for recusal and for a mistrial. Second, we also are not persuaded that the court improperly failed to grant his repeated requests for a different trial judge. The mere fact that the court ruled adversely to the plaintiff does not equate to a showing or appearance of bias necessitating recusal. "[A]dverse rulings do not themselves constitute evidence of bias. . . . Obviously, if a ruling against a party could be used as an indicia of bias, at least half of the time, every court would be guilty of being biased against one of two parties. Moreover, the fact that a trial court rules adversely to a litigant, even if some of these rulings were determined on appeal to have been erroneous, [still] does not demonstrate personal bias. . . . The fact that the plaintiff strongly disagrees with the substance of the court's rulings does not make those rulings evidence of bias. In the present case, the plaintiff's argument of bias is completely unsubstantiated by the trial record." (Citation omitted; internal quotation marks omitted.) *Burns* v. *Quinnipiac University*, 120 Conn. App. 311, 317, 991 A.2d 666, cert. denied, 297 Conn. 906, 995 A.2d 634 (2010); see also *Tracey* v. *Tracey*, 97 Conn. App. 278, 284–85, 903 A.2d 679 (2006) (in addition to adverse rulings, vague and unverified assertions of opinion, speculation and conjecture cannot support claim of judicial bias).

The plaintiff next argues that the court's dismissal was improper because there was no misconduct that occurred in the presence of the jury. Although much of the continuing misconduct that resulted in the dismissal occurred outside of the presence of the jury, there were instances where the plaintiff raised his voice or challenged the court's evidentiary rulings in front of the jury. Nevertheless, the absence of the jury when certain acts of misconduct occurred did not deprive the court of its authority to sanction the plaintiff for his continuing

misconduct during the trial and lack of cooperation with the court. See generally *State* v. *Jones*, 281 Conn. 613, 625–37, 916 A.2d 17 (defendant, outside presence of jury, argued with court and during his removal from court engaged in physical altercation with marshals and this conduct constituted waiver of right to be present at trial), cert. denied, 552 U.S. 868, 128 S. Ct. 164, 169 L. Ed. 2d 112 (2007); see also *Pavlinko* v. *Yale-New Haven Hospital*, supra, 192 Conn. 145.

Finally, the plaintiff claims that the dismissal violated his right to procedural due process and cites to article first, §§ 10[29] and 19,[30] of our state constitution. This portion of the plaintiff's appellate brief essentially restates his previous arguments, which we previously have rejected, and fails to adequately brief his constitutional claim. See, e.g., *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016).

The judgment is affirmed.

In this opinion the other judges concurred.

ROCCO YASHENKO *v.* COMMISSIONER OF CORRECTION (AC 39356)

Alvord, Kahn and Bear, Js.

Syllabus

The petitioner, who had been convicted on a plea of guilty to the crime of burglary in the first degree, sought a writ of habeas corpus, claiming,

[29] "The Connecticut constitution, article first, § 10, provides: All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay. The current article first, § 10, originally appeared in article first, § 12, of the constitution of 1818." (Internal quotation marks omitted.) *Binette* v. *Sabo*, 244 Conn. 23, 27–28 n.6, 710 A.2d 688 (1998).

[30] Article first, § 19, of the constitution of Connecticut, as amended by article four of the amendments, provides in relevant part: "The right of trial by jury shall remain inviolate . . . ."

inter alia, that his trial counsel had rendered ineffective assistance by failing to convey the petitioner's acceptance of a plea offer from the state on the day that the offer was made and by subsequently failing to prevent the plea offer from lapsing. After an initial plea offer was made, the prosecutor informed the petitioner that that offer was no longer available, and the petitioner accepted a less favorable plea offer. The habeas court rendered judgment denying the petition, concluding, inter alia, that the petitioner's testimony that he had instructed counsel to accept the initial plea offer prior to the prosecutor's withdrawal of that offer was not credible. Thereafter, the habeas court granted the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the judgment of the habeas court denying the petition for a writ of habeas corpus was affirmed; the habeas court having thoroughly addressed the arguments raised in this appeal, this court adopted the habeas court's well reasoned decision as a statement of the facts and the applicable law on the issues.

Argued September 7—officially released October 31, 2017

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Bright, J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Conrad Ost Seifert, assigned counsel, for the appellant (petitioner).

Bruce R. Lockwood, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Eva B. Lenczewski*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

PER CURIAM. The petitioner, Rocco Yashenko, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court improperly concluded that his trial counsel did not provide ineffective assistance by failing to adequately prevent a plea

offer from lapsing. We affirm the judgment of the habeas court.

The record and the habeas court's opinion reveal the following facts and procedural history. On January 26, 2013, the petitioner was arrested for participating in a burglary in Waterbury. On October 17, 2013, the petitioner pleaded guilty to the charge of burglary in the first degree in violation of General Statutes § 53a-101 (a) (3), and he was sentenced to five years of incarceration followed by five years of special parole.

On August 13, 2015, the petitioner filed an amended petition for a writ of habeas corpus. In his amended petition, the petitioner claims that his first trial counsel, Brian Pear, rendered ineffective assistance by not conveying on May 3, 2013, his acceptance of a plea offer made by the state for the first time on that day, while the case was pending in part B of the criminal docket in Waterbury. By the petitioner's next court date on May 30, 2013, the state had decided to transfer the petitioner's pending charges, with the exception of a motor vehicle charge, to part A of the criminal docket. The part B prosecutor informed the petitioner that the May 3, 2013 plea offer was no longer available to him. Eventually, while the charges were pending in part A, the state offered a new, less favorable plea offer that the petitioner accepted. The petitioner further alleges a violation of his due process rights because his guilty plea was involuntary. Following a trial held on February 5, 2016, the habeas court, on May 25, 2016, denied the petition for a writ of habeas corpus. On June 8, 2016, it granted the petition for certification to appeal.

The habeas court did not find credible the petitioner's testimony that he had instructed Pear to accept the May 3, 2013 offer prior to the state's withdrawal of that offer. Rather, the court determined that the petitioner, before he decided whether to accept the state's offer, wanted to see what happened with his codefendant's pending case, and whether he could get a better plea

offer that included no probationary period. Additionally, the court found that although the petitioner was disappointed with the terms of the state's second plea offer, which he accepted on October 17, 2013, his guilty plea was nevertheless knowingly and voluntarily entered.

After examination of the record on appeal and the parties' briefs and arguments, we conclude that the judgment of the habeas court should be affirmed. Because the habeas court thoroughly addressed the arguments raised in this appeal, we adopt its well reasoned decision as a statement of the facts and the applicable law on the issues. See *Yashenko* v. *Commissioner of Correction*, Superior Court, judicial district of Tolland, Docket No. CV-14-4006262-S (May 25, 2016) (reprinted in 177 Conn. App. 743). Any further discussion by this court would serve no useful purpose. See, e.g., *Woodruff* v. *Hemingway*, 297 Conn. 317, 321, 2 A.3d 857 (2010); *Brander* v. *Stoddard*, 173 Conn. App. 730, 732, 164 A.3d 889 (2017).

The judgment is affirmed.

APPENDIX
ROCCO YASHENKO *v.* COMMISSIONER OF CORRECTION*

Superior Court, Judicial District of Tolland
File No. CV-14-4006262-S
Memorandum filed May 25, 2016

Proceedings

Memorandum of decision on petitioner's petition for writ of habeas corpus. *Petition denied.*

William A. Adsit, assigned counsel, and *Robert O'Brien*, assigned counsel, for the petitioner.

* Affirmed. *Yashenko* v. *Commissioner of Correction*, 177 Conn. App. 740, A.3d (2017).

Eva B. Lenczewski, supervisory assistant state's attorney, for the respondent.

Opinion

BRIGHT, J.

I

INTRODUCTION

The petitioner, Rocco Yashenko, brings this petition for a writ of habeas corpus, claiming that his conviction based upon his guilty plea is unconstitutional because his attorney, Brian Pear, failed to communicate to the state and the court the petitioner's acceptance of an earlier, more favorable plea offer. The petitioner claims that this failure by counsel caused him to accept a much less favorable plea offer. In Count One of his amended petition, the petitioner claims that his sixth amendment right to effective assistance of counsel was violated. In Count Two, he claims that his due process rights under the fifth amendment were violated in that he was coerced to enter into the plea he is now challenging because his acceptance of the earlier plea offer was not communicated to the court. The respondent, the Commissioner of Correction, has denied that any of the petitioner's constitutional rights were violated.

The case was tried to the court on February 5, 2016. The petitioner presented his own testimony, as well as the testimony of Attorney John Drapp, who represented the petitioner after his case was transferred to the part A docket, Donald Cretella, a Connecticut attorney who specializes in criminal matters, and Attorney Pear. The respondent cross-examined the petitioner's witnesses, but called no witnesses of his own. The court also received as exhibits the original information, the substitute information to which the petitioner pleaded guilty, and the transcripts related to the petitioner's court appearances, including his guilty plea and sentencing.

II

FINDINGS OF FACT

Based on the evidence presented, the court finds the following facts. On January 26, 2013, the petitioner participated in a burglary of 62 Appleton Street in Waterbury. Accompanying the petitioner in the crime was Anthony Olzewski. A neighbor called the police after observing the petitioner and Olzewski entering the backyard of 62 Appleton Street. The police responded and found the petitioner hiding in the attic of the property. After a brief struggle, the petitioner was arrested. The police also found Olzewski in the residence. A further search of the house disclosed that the petitioner and Olzewski had neatly stacked by the back door the items they intended to steal from the residence, including several small kitchen appliances, three air powered rifles, a Sony PlayStation 3, tools and several other electronic devices.

The petitioner and Olzewski were arrested and charged. The petitioner was charged with burglary in the first degree, conspiracy to commit burglary in the first degree, larceny in the fifth degree, conspiracy to commit larceny in the fifth degree, criminal mischief in the second degree, conspiracy to commit criminal mischief in the second degree, and interfering with an officer. At the time of his arrest, the petitioner was also facing an outstanding charge of operating a motor vehicle on November 8, 2012, while under suspension. His criminal case was assigned docket number CR-13-0414623 S. His motor vehicle case was docket number MV-12-04244273 S.

The petitioner was arraigned in Waterbury on January 28, 2013. The petitioner made application for a public defender, and on March 1, 2013, Attorney Pear appeared in court with the petitioner for the first time as his assigned counsel on both cases. At the time, the cases

were pending in the geographical area number four courthouse.

The petitioner next appeared in court on the charges on March 28, 2013. By that time, the petitioner had discussed with Attorney Pear his desire to enter into a plea agreement with the state. The petitioner knew that the criminal case against him was strong and that he had little chance at prevailing if he took the case to trial. The petitioner also knew that he was exposed to a potentially long sentence because he had prior burglary convictions in Waterbury. In connection with those prior cases, the petitioner had received sentences that included periods of probation. He did not do well on his probations and ended up being prosecuted for violating the probations, and, as a result, being incarcerated. Given his bad experience with probation, the petitioner asked Attorney Pear to negotiate a plea agreement for no more than a flat two years to serve. On March 28, Attorney Pear had discussions with the state's attorney regarding a possible plea. There is no evidence of any offer being made at that time, as the state's attorney informed Attorney Pear that he needed to talk to the victim of the burglary.

The petitioner next appeared in the geographical area number four courthouse on May 3, 2013. The petitioner and Attorney Pear agree that the state made an offer on that date to file a substitute information charging the petitioner with burglary in the third degree, and allowing the petitioner to plead guilty to that charge to resolve his criminal case. In return, the petitioner would agree to a sentence of five years, execution suspended after two years of incarceration, followed by three years of probation (5/2/3 offer). Attorney Pear conveyed the offer to the petitioner. Attorney Pear thought the offer was good for the petitioner in light of the case against him.

The petitioner and Attorney Pear disagree about what happened after Attorney Pear conveyed the offer to the petitioner. According to the petitioner, he immediately told Attorney Pear that he wanted to accept the offer. Attorney Pear testified that he could not remember exactly what the plaintiff said about the offer. However, after reviewing his file to refresh his recollection, Attorney Pear testified that the petitioner did not want to accept the offer that day. The petitioner still wanted to negotiate a sentence that involved no probation. In addition, Attorney Pear testified that the petitioner wanted to wait to see what happened with Olzewski's case before accepting the state's offer. Attorney Pear further testified that the offer could have been accepted that day and that he would have conveyed the petitioner's acceptance of the offer if the petitioner had instructed him to do so. He also testified that he would not have asked for a continuance of the case against his client's wishes.

The court finds Attorney Pear's account to be more credible. While Attorney Pear had no particular reason to delay resolution of the case, the petitioner did. He was still hopeful that he could ultimately negotiate a plea that did not involve probation. He also hoped that the disposition of his codefendant's case might result in a more favorable disposition for the petitioner. Consequently, the court finds that the petitioner never instructed Attorney Pear to accept the state's offer. Instead, the petitioner told Attorney Pear that he wanted to have the case continued to see if a better offer could be negotiated and to see what happened with his codefendant's case.

This finding is further supported by what happened in court on May 3, after the state's offer was conveyed to the petitioner. The petitioner appeared in court with Attorney Pear. Attorney Pear noted that the state had made an offer that involved jail time. He then asked

for a continuance until May 30. Finally, he informed the court that he thought the case would be resolved at that time. At no time did the petitioner express any reservations about the continuance or any desire to accept the state's offer. Furthermore, there was no reason for Attorney Pear to ask that the case be continued for four weeks and then be disposed of, if the petitioner truly wanted to accept the state's offer that day. The brief report by Attorney Pear and the petitioner's silence during it, only confirm that the petitioner did not want to accept the state's offer that day.

The 5/2/3 offer was not placed on the record, and the case was continued until May 30, 2013. While the petitioner did not want to accept the offer on May 3, both he and Attorney Pear expected that the offer would still be available when they returned to court on May 30. That turned out not to be the case.

When the petitioner returned to court on May 30, Attorney Pear was informed that the state had created a new burglary docket due to the rash of burglaries in Waterbury. All cases involving defendants who were previously convicted of burglaries would be placed on this docket and assigned to one particular prosecutor who would handle the cases on the part A docket. Attorney Pear was informed that the petitioner's criminal case was being transferred to part A as part of this docket. As a result, the 5/2/3 offer made to the petitioner on May 3 was withdrawn. Attorney Pear argued that such a transfer was unfair to the petitioner and contrary to the practice in the district of leaving plea offers open until the next court date. This was the first and only time that Attorney Pear had an offer withdrawn by the state with no advance notice. The state's attorney was not persuaded. Attorney Pear concluded that there was little he could do. The trial judge could not require the state to reduce the charge as contemplated by the plea offer. In any event, the offer had not been accepted.

Consequently, when the petitioner appeared in court on May 30, the state informed him and the court that his criminal case was being transferred to part A. The state offered an unconditional discharge if the petitioner pleaded guilty to the motor vehicle charge. The petitioner agreed, and pleaded guilty to the charge of operating under suspension. He was canvassed by the court, which accepted his plea and entered a sentence of an unconditional discharge.

In July or August, 2013, Attorney Drapp was appointed as a special public defender to represent the petitioner, replacing Attorney Pear. Attorney Drapp learned about the previous 5/2/3 offer from the petitioner. The petitioner told Attorney Drapp that he had accepted the offer on May 30 and had pleaded guilty pursuant to the offer. Attorney Drapp knew this was not true. Instead, he concluded that the petitioner must have misunderstood that his guilty plea on May 30 was only to the motor vehicle charge. Attorney Drapp informed the petitioner that while he was unclear on what happened before the case was transferred to part A, he did know that the 5/2/3 offer was no longer available. Instead, on September 4, 2013, Attorney Drapp informed the petitioner that the state's new offer was a sentence of five years in prison followed by five years of special parole in exchange for a guilty plea on the charge of burglary in the first degree. The petitioner was not happy about the new offer or the fact that he could no longer take advantage of the 5/2/3 offer. Nevertheless, he had no intention of taking his case to trial. However, he still wanted some time to consider the state's offer. Consequently, when the petitioner appeared before the court on September 4, the state agreed to give the petitioner until September 30 to accept or reject the offer. Attorney Drapp then recited the offer on the record. The offer was subsequently

extended until October 17, 2013, when the petitioner accepted it.

Prior to accepting the petitioner's guilty plea, the court canvassed the petitioner. The court specifically asked the petitioner if he was pleading guilty voluntarily and of his own free will. The petitioner responded that he was. The petitioner also specifically confirmed that nobody had forced him or threatened him to get him to plead guilty. The court also noted that by pleading guilty, the petitioner was avoiding the possibility of being charged as a persistent offender in light of his prior convictions. The petitioner then confirmed that the state's recitation of the facts, which was consistent with the underlying facts set forth above, was accurate. Finally, the petitioner confirmed that he understood the agreed upon sentence to be five years of incarceration followed by five years of special parole. At no time did the petitioner express any reluctance or reservations about his guilty plea or the agreed upon sentence. At no time did he make any reference to the 5/2/3 offer or claim that he had previously accepted that offer. Nor did the petitioner claim that he felt pressured to plead guilty or that he needed more time to consider his options. The court accepted the petitioner's guilty plea and sentenced him in accordance with the parties' plea agreement. Additional facts will be discussed as necessary.

III

DISCUSSION

A

Count One—Ineffective Assistance of Counsel

In Count One of his amended petition, the petitioner claims that he was deprived of his constitutional right to the effective assistance of counsel. In particular, he

claims that Attorney Pear's performance was constitutionally deficient because Attorney Pear: (1) failed to communicate the petitioner's acceptance of the state's plea offer before it was withdrawn; (2) failed to inform the petitioner of the potential consequences of not accepting the offer; and (3) failed to ensure that the plea offer was preserved and not permitted to lapse.

It is well established that under the sixth and fourteenth amendments to the United States constitution, and article first, § 8, of the Connecticut constitution, a criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of a criminal proceeding. *Strickland* v. *Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The United States Supreme Court has held that pretrial negotiations implicating the decision as to whether to plead guilty are a critical stage in criminal proceedings for purposes of the sixth amendment right to effective assistance of counsel. *Padilla* v. *Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010); *Missouri* v. *Frye*, 566 U.S. 134, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012); *Lafler* v. *Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012).

"In today's criminal justice system . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always a critical point for a defendant." *Missouri* v. *Frye*, supra, 566 U.S. 144. Similarly, "[o]ur Supreme Court has recognized that pretrial negotiations implicating the decision of whether to plead guilty is a critical stage, and, therefore, a defendant is entitled to adequate and effective assistance of counsel at this juncture of the criminal proceedings . . . ." (Emphasis omitted; internal quotation marks omitted.) *Gonzalez* v. *Commissioner of Correction*, 122 Conn. App. 705, 724 n.4, 1 A.3d 170 (2010) (*Schaller*, *J.*, *dissenting*), aff'd, 308 Conn. 463, 68 A.3d 624, cert. denied sub nom. *Dzurenda* v. *Gonzalez*, U.S. , 134 S. Ct. 639, 187

L. Ed. 2d 445 (2013). The decision to plead guilty is "ordinarily the most important single decision in any criminal case." (Internal quotation marks omitted.) *Peterson* v. *Commissioner of Correction*, 142 Conn. App. 267, 273, 67 A.3d 293 (2013). Because the plea bargaining process is a critical stage in a criminal proceeding, "criminal defendants require effective counsel during plea negotiations." *Missouri* v. *Frye*, supra, 144; see *Lafler* v. *Cooper*, supra, 566 U.S. 163. "Anything less . . . might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him." (Internal quotation marks omitted.) *Missouri* v. *Frye*, supra, 144.

"Although this decision [to plead guilty] is ultimately made by the defendant, the defendant's attorney must make an informed evaluation of the options and determine which alternative will offer the defendant the most favorable outcome. A defendant relies heavily upon counsel's independent evaluation of the charges and defenses, applicable law, the evidence and the risks and probable outcome of a trial." (Emphasis omitted; internal quotation marks omitted.) *Peterson* v. *Commissioner of Correction*, supra, 142 Conn. App. 273.

In *Missouri* v. *Frye*, supra, 566 U.S. 134, the United States Supreme Court held that "defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." Id., 145. When defense counsel allows an offer to expire without advising the defendant or allowing him to consider it, defense counsel does not render the effective assistance the constitution requires. Id.

This principle logically applies to counsel's duty to communicate a client's response to such an offer. The duty to convey a plea offer to a defendant would have little meaning if counsel did not have a corresponding

duty to communicate to the state and the court that his client has accepted the offer. Consequently, failure to inform the state or the prosecutor that a client has accepted an offer made to him would constitute deficient performance.

It is important to remember, though, that when assessing counsel's performance during the plea negotiating process, the habeas court is still required to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." *Strickland* v. *Washington*, supra, 466 U.S. 689. The United States Supreme Court explained: "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation . . . the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." (Citation omitted; internal quotation marks omitted.) Id.

"To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state

law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time. Cf. *Glover* v. *United States*, 531 U.S. 198, 203 [121 S. Ct. 696, 148 L. Ed. 2d 604] (2001) ('[A]ny amount of [additional] jail time has [s]ixth [a]mendment significance')." *Missouri* v. *Frye*, supra, 566 U.S. 147; see also *Ebron* v. *Commissioner of Correction*, 307 Conn. 342, 357, 53 A.3d 983 (2012) (to show prejudice in lapsed plea case, petitioner must establish: "[1] it is reasonably probable that, if not for counsel's deficient performance, the petitioner would have accepted the plea offer, and [2] the trial judge would have conditionally accepted the plea agreement if it had been presented to the court"), cert. denied sub nom. *Arnone* v. *Ebron*, U.S. , 133 S. Ct. 1726, 185 L. Ed. 2d 802 (2013). "In order to complete a showing of *Strickland* prejudice, defendants who have shown a reasonable probability they would have accepted the earlier plea offer must also show that, if the prosecution had the discretion to cancel it or if the trial court had the discretion to refuse to accept it, there is a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented." *Missouri* v. *Frye*, supra, 148.

Applying these same principles to a case where counsel failed to communicate his client's acceptance of the state's offer, the petitioner must prove that: (1) the offer was still available when the petitioner instructed his counsel to accept it; (2) the failure to communicate acceptance of the offer resulted in it lapsing or being withdrawn such that it was no longer available to the petitioner; (3) there is a reasonable probability that the trial judge would have accepted the plea agreement; and (4) the outcome of the proceeding was worse for the petitioner than the offer.

The petitioner cannot succeed on his first claim of deficient performance because he has not proven that he instructed Attorney Pear to accept the 5/2/3 offer. It is undisputed that the state made such an offer and that Attorney Pear communicated it to the petitioner. It is also undisputed that Attorney Pear and the petitioner discussed the offer. As noted above, though, the court does not find credible the petitioner's testimony that he instructed Attorney Pear to accept the offer. To the contrary, the court finds, based on Attorney Pear's testimony, that the petitioner wanted to have the case continued to see what happened with his codefendant's case, and to see if the state would agree to a sentence that included no probationary period. Attorney Pear cannot be blamed for not communicating an acceptance that never occurred.

The petitioner alternatively claims that Attorney Pear was deficient for failing to make sure on May 3 that the 5/2/3 offer was preserved until the next court date on May 30. Presumably, the petitioner is claiming that Attorney Pear could have done so either by getting the state's express commitment to keep the offer open and/or by having the offer placed on the record in open court, as Attorney Drapp did with the state's second offer on September 4. The court is not persuaded.

The offer placed on the record on September 4 was set down to be accepted or rejected on the next court date. Those were the choices that the petitioner had at that time. There is no evidence that either the petitioner or the state intended to negotiate further. By contrast, the petitioner did not accept the 5/2/3 offer on May 3 specifically because he hoped for a better offer on his next court date. Had Attorney Pear put the offer on the record and asked for an accept or reject date, he would have communicated to the state and the court that that was the offer under consideration and there would be

no more negotiations. That was not the petitioner's intention.

While Attorney Cretella testified that it is his customary practice to put offers made in the geographical area courthouses on the record, he did not testify that it would be deficient performance not to do so. Such a conclusion would require that every time the state makes an offer to a defendant, that it is stated on the record. There was no evidence that this is the practice in any criminal court in this state. Attorney Pear testified that it was not his typical practice in the geographical area number four courthouse to put offers on the record. The court concludes that it is fairly typical for counsel to place an offer on the record only if it is the state's final offer to be accepted or rejected, or when it is necessary to make a record of an offer that was rejected by a defendant. Neither circumstance applied here. Attorney Pear's failure to recite the 5/2/3 offer on the record was not unreasonable.

Nor was it unreasonable for Attorney Pear not to extract an explicit promise from the state to keep the offer open until the next court date. First, doing so would have sent a signal to the state that the offer was acceptable, and would have undermined the petitioner's attempts to secure a better offer. Second, Attorney Pear testified that he probably did not ask the state to keep the offer open because he had never had an issue with the state doing so. In fact, the offer was withdrawn here only because of the unique circumstance of the state's deciding between May 3 and May 30 to create the specialized burglary docket. There was no evidence that Attorney Pear could have or should have anticipated this development. While in hindsight one might question whether he should have explicitly preserved the offer, the court cannot say that based on what Attorney Pear knew on May 3, that his decision not to do so constitutes deficient performance.

For the same reason, the petitioner's final claim that Attorney Pear failed to advise him of the consequences of not accepting the offer fails. Attorney Pear could not have anticipated the circumstance that caused the offer to be withdrawn. Based on past experience, he reasonably believed that the 5/2/3 offer would still be available on May 30 if he was not able to negotiate a better deal. His failure to caution the petitioner about a contingency that he could not have foreseen does not constitute deficient performance.

Because the petitioner has failed to prove that Attorney Pear's performance was deficient, he cannot succeed on his claim of ineffective assistance of counsel.

B

Count Two—Voluntariness Of October 17, 2013 Guilty Plea

In Count Two of his amended petition, the petitioner claims that his guilty plea on October 17, 2013, to the charge of burglary in the first degree was not voluntary. In particular, he claims that Attorney Pear's negligence in not conveying the petitioner's acceptance of the 5/2/3 offer and/or in making sure that the offer was preserved for the next court date somehow undermines the voluntariness of his subsequent plea.

Because this claim is premised on Attorney Pear's conduct, it is inextricably tied to the petitioner's ineffective assistance of counsel claim. As such, this claim cannot succeed. First, the court finds that the petitioner did not want to accept the 5/2/3 offer on May 3. Thus, there was no acceptance for Attorney Pear to communicate. Second, the court finds that Attorney Pear did not act unreasonably by not placing the 5/2/3 offer on the record on May 3 or by not getting an explicit promise from the state to keep the offer open.

Furthermore, the evidence is clear that the petitioner's plea on October 17, 2013, was knowing and voluntary. First, he explicitly told the court that it was. Second, there is no evidence that he did not completely understand exactly what he was doing when he pleaded guilty. Third, the petitioner was clear to both Attorney Pear and Attorney Drapp that he did not want to go to trial. He wanted to plead guilty. While he may have been disappointed that the state's offer on October 17 was not as good as the offer he received and chose not to accept on May 3, that does not mean that his plea on October 17 was involuntary. The petitioner's disappointment in no way undermines the validity of his guilty plea. He made a knowing and rational decision that rather than going to trial on a case he was almost certain to lose and risk exposure to a much longer sentence, he was better off accepting five years in prison followed by five years of special parole.

For these reasons, the petitioner has failed to prove his claim in Count Two.

IV

CONCLUSION

For the foregoing reasons, the petition is denied and judgment shall enter for the respondent.

IN RE CEANA R. ET AL.*
(AC 40134)

Alvord, Kahn and Bear, Js.

Syllabus

The respondent father appealed to this court from the judgments of the trial court adjudicating his minor children abused and neglected. Three

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

of the father's previously appointed attorneys were permitted to withdraw as counsel. Prior to approving the appointment of a fourth attorney, the trial court warned the father that if that attorney was later permitted to withdraw, he would not be appointed a fifth attorney and he would have to represent himself or hire outside counsel. During a subsequent hearing, the court approved the appointment of the father's fourth attorney, C, and issued the same warning to the father. A couple weeks after being appointed as counsel for the father, C filed a motion to withdraw her appearance, stating that it was impossible to establish an attorney-client relationship given the father's unreasonable demands, and the motion was denied by the trial court. During the hearing on C's motion, as well as during a subsequent hearing, the father was again warned by the court that he should not expect the appointment of a fifth attorney if C withdrew as counsel. On the first day of trial, the father advised the court that he had filed a grievance against C and requested permission for C to withdraw as counsel, which was denied by the court. Upon a request for reconsideration by C, however, the court permitted C to withdraw as counsel, stating that it considered the filing of the father's grievance as an act terminating C's representation. Thereafter, the court concluded that the father had knowingly and voluntarily waived his right to appointed counsel by his conduct, and it declined to continue the trial to another date. After the father subsequently failed to appear on a set trial date, the trial court entered a default against the respondent father and adjudicated the minor children abused and neglected. This appeal followed. *Held*:

1. The trial court did not abuse its discretion in permitting C to withdraw as counsel, as the court properly determined that a de facto termination of the attorney-client relationship occurred based on the respondent father's filing of a grievance against C in the juvenile proceeding: a parent has a statutory, not constitutional, right to appointed counsel in abuse and neglect proceedings, and the record demonstrated that the relationship between the father and C had been the subject of a motion to withdraw filed by C before trial commenced, that the father had inquired of the court whether he would be permitted to release C from representing him if some misconduct had occurred, and that, after learning of the grievance filed by the father, the court asked for a copy of the grievance, inquired at length as to why the father believed that C had violated her professional responsibilities, and asked C whether she could continue to represent the father, to which C replied that she could not; furthermore, given that the father had been warned numerous times that he would not be appointed a fifth attorney if C was permitted to withdraw, the court did not abuse its discretion by failing to issue another warning to that effect or in permitting C to withdrawn from representing the father.
2. The trial court did not abuse its discretion in finding that the respondent father had waived his statutory right to appointed counsel by his conduct;

the father previously had been appointed four attorneys, all of whom were removed from the case due to an attorney-client conflict, the father requested that C be removed despite repeated warnings from the court that it would not provide him with a fifth attorney, he was aware that the withdrawal of C would mean that he would represent himself, as he had been expressly informed of that consequence by two different judges on at least four previous occasions, and he had a general understanding of legal proceedings and indicated that he understood the hazards associated with representing himself.

Argued September 7—officially released October 26, 2017**

Procedural History

Petitions by the Commissioner of Children and Families to adjudicate the respondents' minor children neglected, brought to the Superior Court in the judicial district of New Britain, Juvenile Matters, where the court, *Frazzini, J.*, granted the motion of the respondent father's appointed counsel to withdraw representation; thereafter, the matter was tried to the court; judgments adjudicating the minor children neglected, from which the respondent father appealed to this court. *Affirmed.*

John C. Drapp III, assigned counsel, for the appellant (respondent father).

Daniel M. Salton, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

Opinion

ALVORD, J. In this appeal, we are called upon to determine whether a parent in a neglect and abuse proceeding de facto terminated his court-appointed lawyer and whether that parent waived by his conduct his right to a fifth appointed lawyer. The respondent father, Pablo R., appeals from the judgments of the trial

** October 26, 2017, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

court finding that his two daughters, C.R.[1] and A.R., were neglected and abused.[2] On appeal, the respondent claims that the court abused its discretion in (1) permitting his appointed counsel to withdraw and (2) finding that he had waived his right to appointed counsel by conduct.[3] We affirm the judgments of the trial court.

The record discloses the following procedural history. In March, 2016, the petitioner, the Commissioner of Children and Families (commissioner), filed two motions for temporary custody and two neglect petitions, one for each of the respondent's children, C.R. and A.R. The petitions alleged that C.R. and A.R. were neglected and abused.[4]

Attorney Roger Chiasson was appointed to represent the respondent as his counsel and filed an appearance on March 10, 2016. Six weeks later, Attorney Chiasson filed a motion to withdraw his appearance, representing that the attorney-client relationship had broken down in that the respondent had sought advice from another attorney and had expressed that he was not happy with the advice and counsel being given by Attorney Chiasson. The court, *Frazzini*, *J.*, heard argument on the motion on May 11. Attorney Chiasson represented that

[1] C.R. has since reached the age of majority, and the respondent concedes that the appeal is moot as to C.R.

[2] The children's mother also was a respondent in the neglect proceeding. She is not a party to this appeal, however. Accordingly, we refer to the children's father as the respondent.

[3] On appeal to this court, counsel for the children has adopted the position of the petitioner, the Commissioner of Children and Families.

[4] The petition as to C.R. alleged that she was neglected in that she was denied proper care and attention, physically, educationally, emotionally or morally. The petition as to A.R. alleged that she was neglected in that she was being permitted to live under conditions, circumstances or associations injurious to her well-being. Both petitions alleged that the children were abused in that they were in a condition that is the result of maltreatment, including, but not limited to, malnutrition, sexual molestation or exploitation, deprivation of necessities, emotional maltreatment or cruel punishment.

the respondent had engaged in conversations with other lawyers, and, based on those conversations, had expressed to others that Attorney Chiasson may have been misleading him. The respondent objected to the withdrawal and claimed that this was the first time he was hearing of Attorney Chiasson's dissatisfaction with the relationship. The respondent claimed that he had spoken to other people for advice but denied that he had discussed legal matters. The court granted the motion and ordered that new counsel be appointed.

Attorney Elizabeth Potts Berman was appointed as the respondent's second counsel.[5] Shortly thereafter, Attorney Berman filed a motion to withdraw her appearance, representing that the attorney-client relationship had broken down irretrievably. During argument on July 20, the respondent objected to the withdrawal and again represented to the court that this was the first time he was hearing that "this relationship had any problem." The court, *Abery-Wetstone*, *J.*, granted the motion to withdraw and ordered that new counsel be appointed. However, Attorney Christine Rapillo from the Office of Public Defender informed the court that "because a number of the lawyers from New Britain have covered the case . . . we may have to look outside the New Britain panel to get someone . . . ."[6]

Attorney Joshua Michtom, an employee of the public defender's office, was appointed as the respondent's third counsel and filed his appearance on July 27, 2016. Less than two weeks later, on August 5, Attorney Michtom filed a motion to withdraw his appearance, in which he represented that the respondent had yelled at him

[5] The exact date upon which Attorney Berman began to represent the respondent is unknown; however, she represented the respondent as early as June 1, 2016, on which date she appeared for the respondent in court.

[6] The panel referred to by Attorney Rapillo is a list of attorneys who have entered into assigned counsel contracts with the Division of Public Defender Services.

after he refused to file certain motions that he deemed frivolous, unethical, and counterproductive. Attorney Michtom further represented that the respondent had registered a formal complaint against him with the Office of the Chief Public Defender and had indicated that he would like Attorney Michtom to withdraw on the basis that communication had broken down. Lastly, Attorney Michtom expressed a willingness to continue to represent the respondent, but noted that communication in the future might be impossible based on the respondent's "having indicated unequivocally" that he desired Attorney Michtom to withdraw. During a hearing on the motion on August 18, the respondent asserted a number of reasons in support of the request to withdraw, including that Attorney Michtom had been dishonest to the court and to the respondent, and that Attorney Michtom had represented him "without any understanding of the case." Attorney Rapillo again appeared, stating that there were no panel attorneys left in New Britain, and that the public defender's office could not, under its contracts with individual attorneys, require an attorney to accept an appointment in another jurisdiction. The court, *Abery-Wetstone*, *J.*, requested that the public defender's office appoint another attorney for the respondent.

The court then issued the following warning to the respondent: "You understand . . . this is your last chance. If you have a fight with the next attorney, you're not going to be able to get one." The court further cautioned: "Understand this is it. We don't have anybody else. You'll get one more lawyer. . . . If you have a disagreement with this next lawyer or this next lawyer feels abused or maligned by you, then you're going to have to represent yourself." The court instructed the parties to return on September 1, 2016, and stated that "I would like Mr. [R.] and new counsel here, because if he doesn't get new counsel, he's going to be instructed

that he either has to file a pro se appearance or he has to hire counsel on his own."

Prior to September 1, 2016, Attorney Trudy Condio, a panel attorney from the Hartford Juvenile Court, was contacted by the public defender's office regarding appointment as the respondent's fourth counsel. At the hearing on September 1, which Attorney Condio had previously stated that she could not attend, the respondent indicated that he had not yet made a decision as to whether he wished to be represented by Attorney Condio, that he had been trying to set up a meeting with her, and that she did not have a copy of the file yet. The court, *Abery-Wetstone*, *J.*, approved the appointment of Attorney Condio, stating that unless the court received a motion to withdraw from Attorney Condio, she would represent the respondent. The court warned that Attorney Rapillo "indicated that she was going to have a hard time replacing Attorney Michtom and she has provided counsel for Mr. [R.]. If you are dissatisfied with Ms. Condio . . . you are going to have to either file a pro se appearance indicating you're going to represent yourself or you're going to have to hire private counsel, because Ms. Rapillo represented to the court that she had no one else and this was the last person, if even she could get Ms. Condio."[7]

On September 16, 2016, Attorney Condio filed a motion for continuance and a motion to withdraw her appearance stating that it was impossible to establish an attorney-client relationship based on the respondent's unreasonable demands. Attorney Condio represented

[7] The court reiterated its warning a second and a third time during the hearing: "If you choose not to have Attorney Condio represent you, you are certainly welcome to hire private counsel on your own or you're welcome to file an appearance and represent yourself, but that's it." "So if you choose not to have Ms. Condio represent you, then your choices are to hire private counsel or represent yourself."

that although she had communicated with the respondent on four occasions, the respondent refused to meet with her before 5 p.m. and refused to meet with her without a third party present. Moreover, she claimed that the respondent insisted on meeting at his home.

On September 21, 2016, the court, *Abery-Wetstone*, *J.*, heard argument on Attorney Condio's motions. With respect to the respondent's insistence on a third party being present during attorney-client meetings, the respondent explained that he always had a third party present for his protection during his meetings with previous counsel and that he wanted to waive the attorney-client privilege. He also informed the court that he had a third party monitoring phone conversations "so there wouldn't be any issue of the he said/she said . . . ." Regarding the respondent's unwillingness to meet before 5 p.m., the respondent stated that although he was unemployed, he was busy with other personal, medical responsibilities that prevented him from meeting with Attorney Condio during business hours. The court ordered the respondent to meet with Attorney Condio with no one else present, between the hours of 9 a.m. and 5 p.m. on weekdays, and denied the motions for continuance and to withdraw.[8] After further argument, the court asked the respondent: "Mr. [R.], do you

[8] Also during the September 21, 2016 hearing, the court inquired as to the respondent's educational background:

"The Court: You do have a right to have an attorney. You don't have a right to pick your attorney. You've been through four attorneys. All four attorneys have asked to withdraw from your case. I'm finding that your demands of meeting after 5 p.m. [are] unreasonable, I'm finding that your demand that a third party be present is unreasonable, it violates ethics and it violates privacy laws for juvenile court documents. How far did you go in school, Mr. [R.]?

"[The Respondent]: I completed college. . . .

"The Court: And when did you get your degree?

"[The Respondent]: 2007 was the last one, AAS in criminal justice, and in '98, a BS.

"The Court: In what?

"[The Respondent]: In criminology.

"The Court: Criminology? And have you ever represented yourself in court proceedings before?

wish to keep this attorney or do you wish to represent yourself?" The court further inquired of the respondent whether he understood the potential danger of representing himself while his application for accelerated rehabilitation was pending in criminal court, to which the respondent replied, "Yes, I—that's why I told the court back in September 1, 2016, that I was not qualified to represent myself . . . ." The court then reminded the respondent that he previously had been warned: "If you couldn't get along with [Attorney Condio], you were going to have represent yourself because I'm not going to give you a fifth attorney."

Both parents were before the court for a hearing on October 14, 2016. On that date, the court, *Frazzini*, *J.*, permitted the mother's counsel to withdraw from representation based on the mother's filing of a grievance against that lawyer. The court rescheduled the trial, and addressed the respondent and the mother: "I'm telling you both right now, don't expect or believe that if you obtain a new lawyer by hiring them, or if you—if your lawyer seeks to withdraw, that a new lawyer would be appointed for you. Do not anticipate that; do not expect that. It would not happen." The respondent asked: "So Your Honor, so if we have an issue with misconduct or some issue that the lawyer violates Connecticut statute that we won't be allowed to obtain a new lawyer—a counsel? Is that my understanding?"[9] The court, stating that the respondent had a legal right to file a grievance, asked the respondent to present the

"[The Respondent]: Never. This is the first time that I've had a matter, a juvenile matter dealing with anything so—

"The Court: Well, I'm not just talking about juvenile matters. Have you ever been in civil court?

"[The Respondent]: Anytime? No, never, never had any issue."

[9] The respondent further inquired: "That's why I'm asking you, Your Honor, if you're stating whether we go through this trial, and if there's an instance where there is some kind of issue or there's a problem that constitute[s] with the Connecticut state statutes regarding the code of ethics within the attorney, that we would not be allowed to release that attorney."

grievance to the court first so the court could review the situation and determine whether the facts showed that the attorney had committed an act or failure to act that would necessitate withdrawal.

On the first day of trial, November 28, 2016, the respondent advised the court, *Frazzini*, *J.*, that he had filed a grievance against Attorney Condio because of failed communication and a lack of representation and stated: "I don't think it's appropriate that Ms. Condio now go forward in representing me or my—or my best interests . . . ." After hearing argument from the respondent and Attorney Condio, both advocating for withdrawal, the court stated that it had not found exceptional circumstances to justify discharging counsel at the last minute, which would cause a delay in trial, and ordered that evidence proceed. Attorney Condio noted further objection, and trial commenced. After the testimony of the first witness, Attorney Condio orally moved the court to reconsider, stating that the public defender's office had expressed concern that her continued representation could create further liability. Counsel for the Department of Children and Families (department) and counsel for the children both agreed that Attorney Condio should be permitted to withdraw, but both expressed concern that the trial should not be continued. The court then stated that it would "take the filing of the grievance as a—as an act terminating Attorney Condio's representation and allow you to withdraw."

After permitting Attorney Condio to withdraw, the court turned to the question of whether the respondent had waived his right to an appointed attorney by conduct. The respondent told the court that he was not stating that he was capable of representing himself, and he stated that he was "not an attorney" and was not "familiar with this process." The court continued the matter until the next morning and ordered the parties to file briefs addressing whether the respondent had

waived his right to appointed counsel by virtue of his conduct and, if so, whether the trial should proceed.

The next morning, the court, *Frazzini*, *J.*, heard argument from the department's counsel and the respondent as to whether the respondent had waived his right to appointed counsel.[10] The respondent stated: "[A]t no point did I ever indicate to this court or I'm telling you that now do I have the education or ability, or because I am indigent, to basically represent myself or seek outside counsel." The court concluded that the respondent had knowingly and voluntarily waived his right to appointed counsel by his conduct, and it declined to continue the trial to another date. The department then proceeded to call its witnesses. On the first day of trial, in the presence of the respondent, the court had set a number of court dates, including January 3, 2017. The respondent did not appear on January 3, and the trial continued. The court, *Frazzini*, *J.*, entered a default against the respondent and adjudicated C.R. and A.R. neglected and abused as alleged in the petitions. The court heard evidence as to disposition.

On January 11, 2017, the court issued its written memorandum of decision committing the children to the custody of the commissioner until such time as a subsidy to the foster parent could be approved, at which time guardianship of the children would be transferred. This appeal followed.

I

The respondent first claims that the court abused its discretion in permitting the respondent's fourth attorney to withdraw from representing him. Specifically, the respondent contends that his filing of a grievance against Attorney Condio did not require withdrawal

[10] The respondent stated that he did not file a brief because he did not know "how to do one."

from representation, especially given that the respondent's complaints were "vague and nothing more than disagreements with strategy and tactics." We disagree that the trial court abused its discretion in permitting Attorney Condio to withdraw.

We begin our analysis by setting forth principles surrounding the attorney-client relationship. "An attorney-client relationship is established when the advice and assistance of the attorney is sought and received in matters pertinent to his profession." (Internal quotation marks omitted.) *DiStefano* v. *Milardo*, 276 Conn. 416, 422, 886 A.2d 415 (2005). With respect to termination of the relationship, our Supreme Court has stated: "The formal termination of the relationship occurs when the attorney is discharged by the client, the matter for which the attorney was hired comes to a conclusion, or a court grants the attorney's motion to withdraw from the representation. A *de facto termination* occurs if the client takes a step that unequivocally indicates that he has ceased relying on his attorney's professional judgment in protecting his legal interests, such as hiring a second attorney to consider a possible malpractice claim or filing a grievance against the attorney." (Emphasis added; footnote omitted.) *DeLeo* v. *Nusbaum*, 263 Conn. 588, 597–98, 821 A.2d 744 (2003); see also *Straw Pond Associates, LLC* v. *Fitzpatrick, Mariano & Santos, P.C.*, 167 Conn. App. 691, 719, 145 A.3d 292, cert. denied, 323 Conn. 930, 150 A.3d 231 (2016).

In the present case, the court concluded that the respondent's filing of a grievance constituted a de facto termination of the attorney-client relationship pursuant to *DeLeo*. In *DeLeo*, our Supreme Court adopted the continuous representation doctrine, pursuant to which the statute of limitations applicable to legal malpractice claims may be tolled when the plaintiff can show: "(1) that the defendant continued to represent him with regard to the same underlying matter; and (2) either

that the plaintiff did not know of the alleged malpractice or that the attorney could still mitigate the harm allegedly caused by that malpractice during the continued representation period." (Emphasis omitted; footnote omitted.) *DeLeo* v. *Nusbaum*, supra, 263 Conn. 597. The first prong of the test prompted our Supreme Court to define termination of the attorney-client relationship, which it described as including de facto termination through the filing of a grievance against the attorney. Id., 597–98.

The respondent argues that the *DeLeo* court's definition of termination of the attorney-client relationship is limited to circumstances where the continuous representation doctrine is at issue. In so arguing, he points to the *DeLeo* court's statement that "[o]nce such a step has been taken, representation may not be said to continue for purposes of the continuous representation doctrine." Id., 598. The court continued: "A client who has taken such a concrete step may not invoke this doctrine, because such actions clearly indicate that the client no longer is relying on his attorney's professional judgment but instead intentionally has adopted a clearly adversarial relationship toward the attorney. Thus, once such a step has been taken, representation does not continue for purposes of the continuous representation doctrine." Id. We agree that *DeLeo* elucidated the termination of an attorney-client relationship in the context of continuous representation. However, this court finds that it was within the trial court's discretion to use *DeLeo* as guidance in its determination that a de facto termination occurred based on the respondent's filing of a grievance against his appointed counsel in a juvenile proceeding.

Although our appellate courts have not had occasion to consider whether de facto termination based on the filing of a grievance extends beyond the continuous representation doctrine, recently, this court in *Straw*

Pond Associates, LLC v. *Fitzpatrick, Mariano & Santos, P.C.*, supra, 167 Conn. App. 719, described the *DeLeo* framework as "instructive in that it defines what is meant by legal representation." Moreover, although not binding on our analysis, we note that the Superior Court has cited to *DeLeo*'s formal and de facto methods of termination in the context of determining the date representation terminated for purposes of a conflict of interest analysis under rule 1.7 of the Rules of Professional Conduct. See *Sullivan Construction Co., LLC* v. *Seven Bridges Foundation, Inc.*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-10-6005404-S (February 22, 2011) (51 Conn. L. Rptr. 517, 520–21).

The respondent relies solely upon two cases in support of his contention that the court abused its discretion in permitting Attorney Condio's withdrawal. Both cases addressed whether a conflict of interest posed by the filing of a grievance was sufficient to prove prejudice for purposes of determining whether counsel's assistance was rendered ineffective. See *State* v. *Vega*, 259 Conn. 374, 388–91, 788 A.2d 1221, cert. denied, 537 U.S. 836, 123 S. Ct. 152, 154 L. Ed. 2d 56 (2002); *Morgan* v. *Commissioner of Correction*, 87 Conn. App. 126, 127–28, 866 A.2d 649 (2005). In *Vega*, the court considered in a criminal case whether the defendant had been denied effective assistance of counsel in violation of the sixth amendment to the United States constitution as a result of the trial court's denial of counsel's motion to withdraw after the defendant had filed a grievance against him. *State* v. *Vega*, supra, 377, 380. The court noted that "the filing of a grievance in and of itself is insufficient to establish a violation of a defendant's *sixth amendment rights*." (Emphasis added.) Id., 388. This court, in *Morgan* v. *Commissioner of Correction*, supra, 132–42, after extending sixth amendment protection to the statutory right to counsel in

habeas proceedings, considered whether the petitioner had been denied effective assistance of counsel when the habeas court denied his motion to disqualify his attorney without inquiring into the nature of three grievances the petitioner filed. This court concluded that the trial court's summary denial of the motion to disqualify was improper, in that the court failed to inquire whether the nature of the grievances constituted a conflict of interest. Id., 142.

We conclude that *Vega* and *Morgan* do not compel the conclusion that the trial court abused its discretion in finding a de facto termination of the attorney-client relationship caused by the respondent's filing of a grievance. A parent has a statutory, not constitutional, right to appointed counsel in neglect and abuse proceedings. See *In re Zen T.*, 151 Conn. App. 724, 731, 95 A.3d 1258, cert. denied, 314 Conn. 911, 100 A.3d 403 (2014), cert. denied sub nom. *Heather S.* v. *Commissioner of Children & Families*, U.S. , 135 S. Ct. 2326, 191 L. Ed. 2d 991 (2015); *In re Tayler F.*, 111 Conn. App. 28, 47 n.8, 958 A.2d 170 (2008), aff'd, 296 Conn. 524, 995 A.2d 611 (2010). General Statutes § 46b-135 (b) provides in relevant part that "[a]t the commencement of any proceeding on behalf of a neglected, uncared-for or abused child . . . the . . . parents . . . shall have the right to counsel, and shall be so informed by the judge, and that if they are unable to afford counsel, counsel will be provided for them. . . ." Moreover, the protections of the sixth amendment to the United States constitution and article first, § 8, of the Connecticut constitution have not been extended to a parent in a neglect proceeding. See *In re Tayler F.*, supra, 47 n.8 (distinguishing statutory right to confrontation from sixth amendment right to confrontation); see also *State* v. *Anonymous*, 179 Conn. 155, 159, 425 A.2d 939 (1979). Accordingly, the respondent's reliance on *Vega* and *Morgan* is inapt. See *In re Isaiah J.*, 140 Conn. App.

626, 640, 59 A.3d 892 (noting that respondent provided no legal basis to support argument that statutory right to counsel in termination of parental rights proceeding carries with it the same sixth amendment protections accorded to criminal proceeding), cert. denied, 308 Conn. 926, 64 A.3d 333, cert. denied sub nom. *Megan J.* v. *Katz*, U.S. , 134 S. Ct. 317, 187 L. Ed. 2d 224 (2013).[11]

Moreover, the court's decision to recognize a de facto termination must be viewed in light of the full record of the proceeding. The relationship between the respondent and Attorney Condio, the respondent's fourth appointed attorney in approximately six months' time, had been the subject of a previous motion to withdraw filed by Attorney Condio approximately two months before trial commenced. In the interim, the respondent witnessed the withdrawal of the mother's counsel based on the mother's filing of a grievance, and at that hearing had inquired of the court whether he would be permitted to "release" his attorney if some misconduct had occurred. At trial, after learning from the respondent himself that he had indeed filed a grievance, the court asked whether the respondent had a copy of the grievance, inquired at length of the respondent as to why he believed Attorney Condio had violated her professional responsibilities, and inquired of Attorney Condio whether she believed she could continue to represent the respondent, which she stated she did not.

At oral argument before this court, counsel for the respondent clarified that his claim is that the trial court

[11] In his reply brief, the respondent points to this court's citation in *In re Danyellah S.-C.*, 167 Conn. App. 556, 572, 143 A.3d 698, cert. denied, 323 Conn. 913, 150 A.3d 228 (2016), to *Vega* for the proposition that differences of opinion over trial strategy do not necessarily compel the appointment of new counsel. He contends that this citation, while not definitive, supports the argument that *Vega* applies to civil proceedings. We disagree.

should have once again told the respondent that if Attorney Condio was permitted to withdraw, he would not be appointed a fifth attorney. Given that the respondent had been given this exact warning numerous times on multiple occasions prior to the filing of his grievance against Attorney Condio, we cannot conclude that the trial court abused its discretion in not issuing the warning yet again or in permitting Attorney Condio to withdraw from representation.

II

The respondent's second claim is that the court abused its discretion in finding that he had waived his right to appointed counsel by virtue of his conduct. Specifically, the respondent claims that the record is clear that he wanted representation and that his conduct did not rise to the level that has been found to justify a waiver of counsel in other cases. We hold that the court did not abuse its discretion.

We begin our analysis by setting forth the governing legal principles regarding the right to counsel, self-representation, and waiver in the context of a neglect proceeding. As noted in part I of this opinion, a parent has a statutory right to appointed counsel in a neglect proceeding. See General Statutes § 46b-135. A parent may waive his statutory right to counsel in favor of representing himself. See *In re Zowie N.*, 135 Conn. App. 470, 483, 41 A.3d 1056, cert. denied, 305 Conn. 916, 46 A.3d 170 (2012). "Waiver, of course, is the intentional relinquishment of a known right. . . . [A] proper waiver of counsel must be intelligent and voluntary and . . . its basis, having been clearly determined by the trial court, should appear on the record." (Citation omitted; internal quotation marks omitted.) *In re Daniel A.*, 150 Conn. App. 78, 86, 89 A.3d 1040, cert. denied, 312 Conn. 911, 93 A.3d 593 (2014). "[T]he determination of whether there has been an intelligent waiver of the

right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. . . . This important decision rests within the discretion of the trial judge. . . . Our task, therefore, is to determine whether the court abused its discretion in allowing the defendant to discharge his counsel and to represent himself." (Internal quotation marks omitted.) Id., 88.

Although a parent has a statutory right to counsel in a neglect proceeding, "[t]here is no unlimited opportunity to obtain alternate counsel. . . . It is within the trial court's discretion to determine whether a factual basis exists for appointing new counsel. . . . [A]bsent a factual record revealing an abuse of that discretion, the court's failure to allow new counsel is not reversible error. . . . Such a request must be supported by a substantial reason and, [i]n order to work a delay by a last minute discharge of counsel there must exist exceptional circumstances. . . . A request for the appointment of new counsel . . . may not be used to cause delay." (Citation omitted; internal quotation marks omitted.) *In re Isaiah J.*, supra, 140 Conn. App. 633–34.

The court in this neglect and abuse proceeding made the following finding on the record: "In the circumstances here, I find that there has been a knowing and voluntary waiver of the right to appoint a counsel. I've indicated the basic, the general background facts, but in summary they include the fact that Mr. [R.] has had four appointed attorneys. All were removed at some level because of a client-attorney conflict. He was told the last time an attorney had been appointed that a new lawyer would not be automatically appointed. He was assured that the court would continue to monitor attorney conduct, and that if there was a legitimate claim of attorney misconduct with an action that warranted discharge of counsel, that the court would act in that

way, but after [the mother] had filed a grievance, that has necessitated the discharge of [her attorney]. He was specifically reminded to present any claim to the court first. And the reason for presenting it to the court first was so that the almost automatic de facto termination of a discharge of attorney that occurs by the filing of the grievance could be . . . avoided and the court would have an opportunity to ascertain whether the complaints and the dissatisfaction of a person being represented by a lawyer were sufficient, that they met the standards for discharge of that lawyer. It's the court's duty to ensure that people who have counsel have competent, qualified and effective counsel. And I assured him that I would review any claim of misconduct, and that the assured filing of the grievance would not be that. So I find that the conduct has waived his right to an attorney . . . ."

The respondent concedes that waiver may be implied by conduct, but argues, based on out-of-state cases addressing forfeiture of the constitutional right to counsel, that the respondent's conduct has not risen to the level that has been found by sister courts to constitute a waiver of counsel. The cases relied upon by the respondent all involve criminal or habeas proceedings and violence, or threats thereof, by the defendant against appointed counsel.[12] None of these decisions

[12] See *Gilchrist* v. *O'Keefe*, 260 F.3d 87, 100 (2d Cir. 2001) (holding that state court was not unreasonable in concluding that right to counsel in criminal proceeding could be forfeited based on petitioner's physical assault on defense attorney), cert. denied sub nom. *Gilchrist* v. *Smith*, 535 U.S. 1064, 122 S. Ct. 1933, 152 L. Ed. 2d 839 (2002); *United States* v. *Leggett*, 162 F.3d 237, 250–51 (3d Cir. 1998) (district court did not err in concluding that criminal defendant, by physically attacking counsel, engaged in "extremely serious misconduct" to forfeit right to counsel at sentencing hearing), cert. denied, 528 U.S. 868, 120 S. Ct. 167, 145 L. Ed. 2d 141 (1999); *King* v. *Superior Court*, 107 Cal. App. 4th 929, 949, 132 Cal. Rptr. 2d 585 (2003) (where fundamental constitutional right to counsel is at issue, proceeding to find forfeiture of that right requires procedural due process protections); *State* v. *Montgomery*, 138 N.C. App. 521, 524–25, 530 S.E.2d 66 (2000) (defendant had forfeited constitutional right to counsel through purposeful conduct

supports a conclusion that the court here abused its discretion in concluding that the respondent had waived his statutory right to counsel.

This court's decision in *In re Daniel A.* is instructive. There, the court permitted the respondent's second attorney to withdraw from representation after the court informed the respondent that it would not appoint a third counsel if it granted the motion to withdraw. *In re Daniel A.*, supra, 150 Conn. App. 94. The respondent said he would represent himself, and the respondent's counsel remained present as standby counsel. Id. In considering whether the respondent's election to represent himself was voluntary, this court considered the trial court's familiarity with the respondent, the respondent's general understanding of legal proceedings and tactics, including that the respondent had made suggestions to counsel regarding cross-examination tactics and demonstrated a familiarity with the allegations of the petition to terminate his rights, and the respondent's understanding of the gravity of the proceedings. Id., 94–95.

In the present case, the record is clear that the trial court was familiar with the respondent as a result of presiding over previous proceedings in the neglect and abuse case.[13] On the first day of trial, the respondent requested that his fourth appointed attorney be removed despite repeated warnings from the court that it would not provide him with a fifth attorney. The

and tactics to delay orderly processes of the court, including disruptive and assaultive behavior); *State* v. *Boykin*, 324 S.C. 552, 554, 558, 478 S.E.2d 689 (App. 1996) (defendant's conduct in one instance of verbal abuse and physical threatening not sufficient to constitute forfeiture of sixth amendment right to counsel); *State* v. *Holmes*, 302 S.W.3d 831, 848 (Tenn. 2010) (defendant had not forfeited his fundamental constitutional right to counsel as result of verbal threat and physical assault).

[13] In its oral decision, the court also noted that it had reviewed the court file, reviewed the memoranda of court hearings, and listened to audio recordings of three hearings.

respondent was aware that the withdrawal of Attorney Condio would mean that he would represent himself, having been expressly informed of this consequence by two different judges on at least four previous occasions. Moreover, the record shows a general understanding of legal proceedings, in that the respondent's frustration with Attorney Condio stemmed, in part, from certain motions he wished to file, evidence he wished to obtain, and exhibits he wished to introduce. The record also shows that the respondent indicated that he understood the hazards associated with representing himself. Lastly, the record indicates that the respondent understood the gravity of the proceedings; he stated he was seeking a "fair shot of trying to debunk these allegations about neglect and abuse."

Here, as in *In re Daniel A.*, "[a]lthough the record indicates that the respondent did not state, in so many words, that he no longer desired counsel, he engaged in a course of conduct that demonstrated that he knew what he [was] doing and [that] his choice [was] made with eyes open . . . ." (Internal quotation marks omitted.) Id., 95. The respondent's attempts to distinguish *Daniel A.* are entirely unavailing. As we concluded in part I of this opinion, the trial court did not abuse its discretion in not issuing the same repeated warning one final time. The record reveals that the respondent knew that his last minute request for Attorney Condio's withdrawal would mean that he would be representing himself. Accordingly, we cannot conclude that the court abused its discretion in finding that the respondent waived his statutory right to appointed counsel by conduct.

The judgments are affirmed.

In this opinion the other judges concurred.