JAMES W. ROCKWELL, JR. *v.* DONATE S. ROCKWELL ET AL.
(AC 38512)

Lavine, Elgo and Bear, Js.

Syllabus

The plaintiff sought to recover damages from the defendant attorney, C, for vexatious litigation in connection with a breach of contract action against the plaintiff that had been commenced by C on behalf of the plaintiff's former wife, D. That action concerned an agreement between the plaintiff and D pursuant to which D had agreed to invest in certain unspecified securities, which were held in an investment account managed exclusively by the plaintiff. In return, the plaintiff guaranteed repayment of D's total investment amount upon the liquidation of the account, taking into consideration all prior transactions involving the account. On multiple occasions prior to the liquidation of the investment account, D received distributions to pay capital gains taxes on the account. When the account was liquidated, D received some proceeds from the account, and she contacted the plaintiff requesting further payment in accordance with the agreement. The plaintiff thereafter tendered to D a payment of $4000. C then filed an application for a prejudgment remedy on D's behalf. The trial court denied the application, but noted on the record that the breach of contract issue was appropriate for litigation. Thereafter, C commenced a breach of contract action on D's behalf. The trial court denied the plaintiff's motion for summary judgment, in which he claimed that D had received an amount in excess of that guaranteed under the agreement through her withdrawals from the investment account related to the payment of capital gains taxes. After a trial, the jury returned a verdict in favor of the plaintiff, and the court rendered judgment in accordance with the verdict. The plaintiff then brought this vexatious litigation action claiming, inter alia, that C had commenced the breach of contract action without probable cause and with malicious intent. The plaintiff elected a jury trial, and, on the first day of the trial, C moved to bifurcate the issue of probable cause for trial to the court, which denied the motion. Thereafter, the trial was delayed a number of times for various reasons caused by the plaintiff, and C requested that the court reconsider his motion to bifurcate. When the trial resumed, the court discharged the jury because three of the eight jurors indicated that it would be a severe hardship for them to serve on the jury the following week, and C did not assent to continuing the trial with only five jurors. The trial court then, on reconsideration, granted C's motion to bifurcate. Following a hearing, the trial court found that C had probable cause to commence the breach of contact action and rendered

judgment in favor of C, from which the plaintiff appealed to this court. *Held*:

1. The trial court did not abuse its discretion in bifurcating trial of the issue of probable cause from the issues of malice and damages; the record revealed that the court's decision to bifurcate came after a period of significant delay caused solely by the plaintiff, which resulted in the discharge of the jury originally empaneled to hear the matter, and that the court's exercise of discretion in initially denying, and then later granting, C's motion to bifurcate the proceeding was prompted by interests of judicial economy, convenience, and negation of prejudice to the parties, and the resolution of the probable cause issue in C's favor obviated the need to litigate the issues of malice and damages.

2. The plaintiff could not prevail on his claim that the trial court, in deciding the issue of probable cause, violated his state constitutional right to a jury trial: the plaintiff failed to provide this court with a complete analysis of the factors set forth in *State* v. *Geisler* (222 Conn. 672), both this court and our Supreme Court have, in such cases, declined to review claims predicated on our state constitution, and the plaintiff's claim to an absolute right to have the issue of probable cause decided exclusively by a jury could not be reconciled with the ample body of Connecticut precedent, to which this court was bound to follow, holding that the existence of probable cause is a question of law to be decided by a court; moreover, although, in the vexatious litigation context, when the facts are disputed the court may submit the issue of probable cause to a jury as a mixed question of fact and law, whether the facts are sufficient to establish the lack of probable cause is a question ultimately to be determined by the court, and when the facts relevant to the inquiry into the objective reasonableness of a litigant's belief in the validity of the claim asserted are not in dispute, the trial court properly may decide the question of probable cause without the aid of the jury.

3. The trial court properly concluded that the plaintiff failed to meet his burden of proving that C lacked probable cause to prosecute the breach of contract action; the record contained undisputed facts known by C when the action was instituted on which a reasonable attorney familiar with Connecticut law would have believed that lawful grounds for prosecuting the breach of contract action existed, as those facts indicated that a legitimate factual dispute warranting adjudication existed between the plaintiff and D as to whether the distributions to D from the investment account that were used to pay capital gains taxes constituted prior transactions that were to be included in the calculus of the guarantee provisions of the agreement, and, thus, as to whether D had received from the account an amount in excess of that which the plaintiff had guaranteed under the agreement.

Argued September 12—officially released December 5, 2017

Procedural History

Action to recover damages for vexatious litigation, and for other relief, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *Stevens*, *J.*, granted the named defendant's motion to dismiss the action as against her; thereafter, the court granted the defendant Ian A. Cole's motion to bifurcate; subsequently, the matter was tried to the court; judgment for the defendant Ian A. Cole, from which the plaintiff appealed to this court. *Affirmed.*

James W. Rockwell, Jr., self-represented, the appellant (plaintiff).

Raymond J. Plouffe, Jr., for the appellee (defendant Ian A. Cole).

Opinion

ELGO, J. In this vexatious litigation action, the self-represented plaintiff, James W. Rockwell, Jr., appeals from the judgment of the trial court rendered in favor of the defendant Attorney Ian A. Cole.[1] On appeal, the plaintiff claims that the court (1) improperly bifurcated trial of the issue of probable cause from the issues of malice and damages, (2) violated his right to a jury trial and (3) improperly determined that the defendant had probable cause to prosecute the underlying action. We disagree and, accordingly, affirm the judgment of the trial court.

The genesis of the present dispute is a breach of contract action commenced in 2009 (2009 action) by the plaintiff's former spouse, Donate S. Rockwell (Donate).

[1] Subsequent to the commencement of this action, the named defendant, Donate S. Rockwell, filed a motion to dismiss the action against her for lack of personal jurisdiction due to improper service of process, which the court granted. The plaintiff does not challenge the propriety of that judgment in this appeal. For purposes of clarity, we refer to Cole as the defendant in this opinion.

The 2009 action concerned a written agreement between the plaintiff and Donate (agreement), which states that they "have entered into a joint venture for the purchase of certain securities." Pursuant thereto, Donate agreed to invest $22,104.50 in unspecified securities, which were held in an investment account managed exclusively by the plaintiff.[2] The plaintiff, in turn, agreed to "guarantee the total investment amount to [Donate]."[3] That notarized agreement was drafted by the plaintiff's representative and was signed by the plaintiff and Donate.

At all relevant times, the defendant appeared as legal counsel for Donate in the 2009 action. Following an initial consultation with her, the defendant sent a demand letter to the plaintiff dated December 3, 2008, in which he requested payment of approximately $18,000 that allegedly was due and owing to Donate pursuant to the agreement. The defendant never received a response from the plaintiff.

Seven weeks later, the defendant filed an application for a prejudgment remedy on Donate's behalf. The court, *Tyma*, *J.*, held a hearing on that application,

[2] Also admitted into evidence in the present case was a "Trading Authorization" with Prudential Securities Incorporated that Donate signed on April 9, 2000. That authorization named the plaintiff as her "true and lawful agent" and authorized him to manage the investment account in all respects.

[3] The agreement states in relevant part: "That upon the complete sale or liquidation of the Investment, if the total value of the entire Investment, taking into account all prior transactions involving the Investment, exceeds $22,104.00, then [Donate] shall receive the entire value of the Investment.

"That upon the complete sale or liquidation of the Investment, if the total value of the entire Investment, taking into account all prior transactions involving the Investment, is less than $22,104.00, then [the plaintiff] shall pay to [Donate] the entire value of the Investment, plus an additional amount sufficient to provide her [with] the total amount of $22,104.00.

"That it is the express intention of the parties that [the plaintiff] guarantee to [Donate] a full 100% return on her initial $22,104.00 contribution to the Investment and further that she shall be entitled to receive any increase in the Investment value."

which focused in large part on distributions from the investment account made prior to its liquidation in 2007. At that time, the plaintiff[4] introduced into evidence certain financial records from Donate's investment account, which he had subpoenaed. In her testimony, Donate acknowledged that, on multiple occasions prior to liquidation, she received distributions to make capital gains tax payments associated with the investment account, including a payment of "$18,000 at one point." Because the relevant provisions of the agreement required the parties to take "into account all prior transactions involving the Investment"; see footnote 3 of this opinion; the plaintiff testified that, in his view, the term "prior transaction" included any distribution from the investment account. He thus argued that the financial records before the court indicated that Donate had received "more than her initial money back." The defendant disagreed, arguing that the distributions in question were not proceeds applicable to the guarantee provisions of the agreement but, rather, were distributions for capital gains taxes on the investment account. The court ultimately denied the application for a prejudgment remedy. In so doing, the court remarked that although the granting of prejudgment relief was not warranted, the breach of contract issue was "appropriate for litigation."

The defendant thereafter commenced the 2009 action against the plaintiff on behalf of Donate. Her one count complaint alleged in relevant part: "On or about March 8, 1994, the [plaintiff], in order to induce [Donate] to invest $22,104.50 in a joint investment with him, guaranteed repayment to [Donate] of her entire investment of $22,104.50. . . . In reliance upon said guarantee, [Donate] invested with the [plaintiff] the sum of $22,104.50. . . . The guarantee provided, in pertinent part, that upon complete sale or liquidation of the

[4] The plaintiff was represented by counsel throughout the 2009 action.

investment, if the value realized was less than $22,104.50 then the [plaintiff] would pay to [Donate] 'the entire value of the investment, plus an additional amount sufficient to provide her with the total amount of $22,104.00' . . . . The investment was liquidated on or about July 17, 2007 . . . ." Upon liquidation, the complaint alleged that Donate received $1190.60 in proceeds. The complaint further alleged that, one day later, the plaintiff made a "partial payment" of $4000 to Donate in response to her request that he "honor the [agreement]," but thereafter refused to pay the $16,913.90 "balance due [to Donate] under the terms of the [agreement]." Appended to the complaint was a copy of the agreement.

Following a period of discovery, the plaintiff filed a motion for summary judgment, claiming that "[t]he total amount withdrawn by [Donate] from the Investment was $45,495.90, an amount in excess of the amount [the plaintiff] guaranteed she would receive from the Investment." The court, *Hiller*, *J.*, denied that motion.

A jury trial was held in 2010, at which both the plaintiff and Donate testified. In addition, the jury was presented with documentary evidence from both parties. When the trial concluded, the jury returned a verdict in favor of the plaintiff.[5] The court then rendered judgment in favor of the plaintiff in accordance with that verdict.

In 2013, the plaintiff, now self-represented, commenced the present vexatious litigation action. His complaint alleged in relevant part that the defendant, in his capacity as legal counsel to Donate, "commenced and prosecuted" the 2009 action "without probable cause and with malicious intent to unjustly vex and trouble the

[5] The interrogatories completed by the jury indicate that it found that, prior to the liquidation of "the Investment," Donate received moneys from " 'prior transactions involving the Investment' equal to or greater than $20,913.90 . . . ."

[plaintiff]." His prayer for relief sought compensatory damages and treble damages pursuant to General Statutes § 52-568. In his answer, the defendant denied the substance of those allegations. The defendant also filed a special defense, in which he averred in relevant part that "[t]here was probable cause to commence the underlying suit to determine the meaning and effect of disputed contractual guarantee language . . . ." On December 2, 2014, the plaintiff filed a certificate of closed pleadings with the trial court, in which he claimed a jury trial.

A jury was selected and a trial was scheduled for May, 2015. On the first day of trial, the plaintiff filed a request for a one week continuance, which the court denied. At that time, the court, *Stevens*, *J.*, explained to the plaintiff that "[t]his trial date has been outstanding for a significant period of time. You have proceeded to pick a jury which is now ready to proceed, and if this case is going to be continued . . . it probably will have to be continued for a month or two in order to accommodate the scheduling."

The court then turned its attention to the defendant's "motion to bifurcate the issue of probable cause for trial to the court," in which the defendant argued that the issue of whether probable cause exists is always a question of law for the court to decide. In denying that request, the court noted that "the most prudent and effective use of judicial resources and economy is for the case to be tried to the jury and then for the court to address the issue as it may be presented by the parties at the end of the evidence."

The court then asked the plaintiff which witness he would be calling first. When the plaintiff stated that his first witness would not be present that day, the court responded: "Well, if they're not going to be here today then we can't hear them today, so what witness are

you going to call next? They'll have to appear tomorrow. And if they are not going to be here this week then they will not be heard because this case is not going to be continued to accommodate an absent witness in this case in light of the scheduling issues that I've already articulated." When the plaintiff indicated that "[t]he other witnesses that I subpoenaed are not here," the court stated: "Well again, Mr. Rockwell, I appreciate that you are representing yourself, but in order for this case to proceed you're going to put on some evidence. Now either you're going to have to testify, you're going to have somebody else to testify, we're going to have to hear some evidence. . . . This case has been scheduled for some time to start today. You were aware of the fact that this case was scheduled to start today some time ago, and as a result you are required to do what you need to do in order to have witnesses here." When the court then asked who the first witness would be, the plaintiff asked for "a recess until 2 p.m." because he had "left [his] papers at home . . . ." The court then inquired as to whether the plaintiff could at least make an opening statement, to which the plaintiff indicated that he had "left it at home."

At that time, the court advised the plaintiff as follows: "Listen to me very carefully. This case has been scheduled for trial today for some time now. As the plaintiff, you are required to be prepared to present whatever you want to present to the jurors today and tomorrow. That requires you to be prepared to make whatever presentations or arguments that you want to make to the juror[s] as part of opening statements. You have to be prepared today and tomorrow to offer whatever documents you want the jurors to consider. You have to be prepared to offer whatever witnesses you want to call. You have to do that today and tomorrow. I appreciate that you are representing yourself . . . but it does not provide an excuse for not complying with

the law and the rules and procedures of this court. They apply to you whether you are represented by an attorney or not. We can try to accommodate you as the law permits and as procedure allows, but you're still going to have to put on your case. . . . And you have today and tomorrow to do it." The court then recessed the case until 2 p.m.

When court resumed that afternoon, the plaintiff made an opening statement. He then called Donate as a witness, repeatedly asking her whether she had made certain withdrawals from the investment account created pursuant to the agreement. In her testimony, Donate insisted that she "didn't withdraw anything out of that account." With respect to approximately $45,000 in distributions that she received from the investment account prior to its liquidation, Donate testified that she "didn't withdraw anything. It was paid for taxes." When the plaintiff then asked who paid those taxes, Donate responded, "You did, and you also called my tax person every time, every year, and day you handled something." Donate further testified that, on November 5, 2008, she told the defendant that the only proceeds that she ever received from the investment account was $1165.90. Later in her testimony, the plaintiff asked the court for a recess, which the court granted. Following that recess, the plaintiff requested additional time to "take care of a medical problem." The court promptly adjourned the proceeding for the day, advising the jurors that the case would resume at 9:30 a.m. the next day.

When the proceeding resumed the following day, the plaintiff was not present. The court noted for the record that the clerk's office had received a telephone call from the plaintiff's wife, who indicated that the plaintiff woke up not feeling well and, therefore, was taken to a hospital. As a result, the court excused the jury for the day. At that time, the court expressed its concern

as to the availability of jurors moving forward, stating: "[T]he jurors when they were impaneled last week were advised that the case—that the schedule of the case in terms of their commitment was going to involve their time through Friday of this week. Well, it's apparent that this case is not going to be finished this week, so one of the things we do need to do is address with the jurors their schedule and confirm that they are available next week. Looking at the witness list and the rate at which we went yesterday, I am seriously concerned about whether or not we can be done next week either, but that would be the goal." Given those circumstances, the defendant asked the court to "please reconsider my earlier motion to bifurcate," opining that "to convert this to an evidentiary hearing on probable cause . . . would fairly balance the interests of the defendant . . . who is the sole defendant in this case." In response, the court advised the defendant that it would not address that request without the plaintiff present. Rather, the court noted that the plaintiff "will be here tomorrow, and with his presence we can revisit these issues which you would like the court to address . . . ."

The following day was Thursday, May 14, 2015. The plaintiff, who was present in court that morning, furnished a doctor's note asking the court to excuse him from any proceedings over the next three days. In response, the defendant renewed his request that the court reconsider its ruling on the motion to bifurcate. After taking that request under advisement, the court noted certain "procedural issues" stemming from the continuance proposed by the plaintiff's doctor. The court remarked, and the plaintiff confirmed, that when the jury was empaneled, it was "told that [its] time commitment would be this week." The court then brought in the jurors and inquired as to their availability the following week and whether "having to be in court

for those days . . . would create a severe conflict, problem, or hardship for any of [them] for any reason . . . .'' Three of the eight jurors so indicated. Although the plaintiff subsequently assented to continuing with only five jurors, the defendant declined to do so. As a result, the court proceeded to discharge the jury.[6]

The court then returned its attention to the defendant's motion to bifurcate, explaining that ''[o]ne of the reasons I [originally] was disinclined to entertain the motion to bifurcate was judicial economy. The jury had been picked. Put the evidence on . . . before me and the jury once and be done. That was one of the reasons I denied it although it may not have been expressly articulated that way. I just used the phrase judicial economy and efficiency. But again, the situation now is quite different because of the delays we've had this week and the continued delay we're going to have as the result of the plaintiff's present request [for a three

[6] In his reply brief, the plaintiff asserts that the court improperly ''failed to declare a mistrial.'' ''It is well settled that this court does not address claims raised for the first time in a reply brief.'' *BTS, USA, Inc.* v. *Executive Perspectives, LLC*, 166 Conn. App. 474, 498 n.7, 142 A.3d 342, cert. denied, 323 Conn. 919, 150 A.3d 1149 (2016). Furthermore, the plaintiff has neither identified an applicable standard of review nor provided an analysis of relevant legal authority. ''We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly.'' (Internal quotation marks omitted.) *State* v. *Mendez*, 154 Conn. App. 271, 275 n.2, 105 A.3d 917 (2014); see also *Northeast Ct. Economic Alliance, Inc.* v. *ATC Partnership*, 272 Conn. 14, 51 n.23, 861 A.2d 473 (2004) (''[i]nasmuch as the plaintiffs' briefing of the . . . issue constitutes an abstract assertion completely devoid of citation to legal authority or the appropriate standard of review, we exercise our discretion to decline to review this claim as inadequately briefed''). We therefore decline to review the merits of the abstract assertion contained in the plaintiff's reply brief. We do note, however, that such a claim implicates ''the sound policy that courts are afforded wide latitude to redress potentially harmful improprieties in order to avoid the drastic remedy of a mistrial.'' (Internal quotation marks omitted.) *State* v. *Rivera*, 152 Conn. App. 248, 259, 96 A.3d 1285, cert. denied, 314 Conn. 934, 102 A.3d 85 (2014); accord *Hurley* v. *Heart Physicians, P.C.*, 298 Conn. 371, 393, 3 A.3d 892 (2010) (''[i]f curative action can obviate the prejudice, the drastic remedy of a mistrial should be avoided'' [internal quotation marks omitted]).

day continuance]." The court continued: "[W]hen the motion for bifurcation was first presented to me, it was after the jury had been empaneled. The parties were already engaged in jury selection and the jurors were here ready to hear evidence. At that time it seemed to be most prudent and efficient for the evidence to proceed for the jurors. . . . As we sit here today the procedural situation is qualitatively different. You folks do not have a jury now because of the circumstances which have been presented, and in order to acquire one you're going to have to go through jury selection again. That being the case, I'm of the view that I have now heard some of the evidence, it does make sense at this point for me to now hear whatever other evidence that the parties may need to present on the probable cause issue. And if the case can be resolved on the basis of that, then it will be resolved on the basis of that. And for whatever reason either factual or legal the matter cannot be resolved on the basis of that, then the parties will then be in the position that they will need to take the time and expense to go through jury selection again. But since it is now possible that the jury selection process may be obviated by the court hearing this preliminary issue of probable cause, the court is going to now reverse its decision denying the motion to bifurcate through the granting of the oral request for reconsideration, and the court is going to order that there be bifurcation."[7]

[7] The plaintiff subsequently filed two motions to reargue the defendant's motion to bifurcate, which the court denied. In this appeal, the plaintiff alleges that the court improperly denied his second motion to reargue "without reading it" on May 19, 2012. The record plainly indicates otherwise. At the outset of the probable cause hearing on May 19, 2012, the plaintiff raised the issue of his second motion to reargue, and the court denied that motion. The following day, the plaintiff asked for permission to read his second motion to reargue into the record "[b]ecause I don't think you ruled on it . . . ." The court at that time explained to the plaintiff that "I did look at it. . . . What I did is that in order to confirm that I ruled on what I thought I saw, I asked the clerk to pull both of the motions that you filed, and I looked at both of them."

The court held a hearing on the issue of probable cause over the course of three days, at which the parties submitted testimonial and documentary evidence. The parties thereafter submitted posthearing briefs to the court. In a memorandum of decision dated October 14, 2015, the court found that probable cause existed to commence the 2009 action and, therefore, rendered judgment in favor of the defendant. From that judgment, the plaintiff now appeals.

I

We first consider the propriety of the court's decision to bifurcate this civil proceeding. It is well established that the trial court is vested with discretion to bifurcate a civil trial. "Pursuant to General Statutes § 52-205[8] and Practice Book § 15-1,[9] the trial court may order that one or more issues that are joined be tried before the others. The interests served by bifurcated trials are convenience, negation of prejudice and judicial efficiency. . . . Bifurcation may be appropriate in cases in which litigation of one issue may obviate the need to litigate another issue. . . . The bifurcation of trial proceedings lies solely within the discretion of the trial court." (Citation omitted; footnotes in original; internal quotation marks omitted.) *Barry* v. *Quality Steel Products, Inc.*, 263 Conn. 424, 448–49, 820 A.2d 258 (2003). When a trial court exercises its discretion to bifurcate a civil trial, "appellate review is limited to a determination of whether this discretion has been abused. . . .

[8] General Statutes § 52-205 provides: "In all cases, whether entered upon the docket as jury cases or court cases, the court may order that one or more of the issues joined be tried before the others."

[9] Practice Book § 15-1 provides: "In all cases, whether entered upon the docket as jury cases or court cases, the judicial authority may order that one or more of the issues joined be tried before the others. Where the pleadings in an action present issues both of law and of fact, the issues of law must be tried first, unless the judicial authority otherwise directs. If some, but not all, of the issues in a cause are put to the jury, the remaining issue or issues shall be tried first, unless the judicial authority otherwise directs."

In reviewing claims that the trial court abused its discretion [in bifurcating certain issues at trial] 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; the ultimate issue is whether the court could reasonably conclude as it did . . . ." (Citation omitted; internal quotation marks omitted.) *Saczynski* v. *Saczynski*, 109 Conn. App. 426, 428, 951 A.2d 670 (2008).

The record before us reveals no abuse of the court's discretion. Its decision to bifurcate came after a period of significant delay caused solely by the plaintiff, which resulted in the discharge of the jury originally empaneled to hear the matter. As the transcripts plainly reflect, the court's exercise of discretion in initially denying, and then later granting, the defendant's motion to bifurcate the proceeding was animated by interests of judicial economy, convenience, and negation of prejudice to the parties. See *Reichhold Chemicals*, *Inc.* v. *Hartford Accident & Indemnity Co.*, 243 Conn. 401, 423, 426, 703 A.2d 1132 (1997). Furthermore, resolution of the probable cause issue in the defendant's favor in a vexatious litigation action obviates the need to litigate the issues of malice and damages. See id. ("[b]ifurcation may be appropriate in cases in which litigation of one issue may obviate the need to litigate another issue"); see also *Verspyck* v. *Franco*, 274 Conn. 105, 113 n.8, 874 A.2d 249 (2005) (existence of probable cause is absolute protection from liability for vexatious litigation); *Schaeppi* v. *Unifund CCR Partners*, 161 Conn. App. 33, 36 n.1, 127 A.3d 304 ("[b]ecause we conclude that want of probable cause, an essential element of both statutory and common-law causes of action, is lacking, thereby defeating any claim of vexatious litigation, we need not determine whether the trial court properly found that the element of malice was not proved"), cert. denied, 320 Conn. 909, 128 A.3d 953

(2015). Under the circumstances of this case, we conclude that the court did not abuse its discretion in bifurcating the vexatious litigation proceeding.

II

The plaintiff also claims that the court, in deciding the issue of probable cause, violated his state constitutional right to a jury trial.[10] He contends that "a party in a vexatious litigation case . . . has an absolute right to a jury trial" on the probable cause issue pursuant to article first, § 19, of the Connecticut constitution.[11] For two distinct reasons, we disagree.

First, the plaintiff has not provided this court with an analysis of the factors set forth in *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992).[12] Rather, he addresses only its fifth factor.[13] In such instances,

[10] In his principal appellate brief, the plaintiff states that he "makes no claims under the United States constitution . . . ."

[11] Article first, § 19, of the Connecticut constitution, as amended by article four of the amendments, provides: "The right of trial by jury shall remain inviolate, the number of such jurors, which shall not be less than six, to be established by law; but no person shall, for a capital offense, be tried by a jury of less than twelve jurors without his consent. In all civil and criminal actions tried by a jury, the parties shall have the right to challenge jurors peremptorily, the number of such challenges to be established by law. The right to question each juror individually by counsel shall be inviolate."

[12] The *Geisler* factors are: "(1) the 'textual' approach—consideration of the specific words in the constitution; (2) holdings and dicta of [the Connecticut Supreme Court] and the Appellate Court; (3) federal precedent; (4) the 'sibling' approach—examination of other states' decisions; (5) the 'historical' approach—including consideration of the historical constitutional setting and the debates of the framers; and (6) economic and sociological, or public policy, considerations." *State* v. *Linares*, 232 Conn. 345, 379, 655 A.2d 737 (1995).

[13] The plaintiff asserts that "because the tort of vexatious litigation, that existed, and was triable under the common law in 1818, at the time of the adoption of the Connecticut constitution, and was triable by a jury in the [c]ommon [l]aw of the colony of Connecticut and the [c]ommon [l]aw of England prior to 1818 . . . that [the plaintiff] is entitled, as a constitutional right, under article first, § 19, [of the] Connecticut constitution . . . to have a jury try the probable [cause] issue."

both our Supreme Court and this court have declined to review claims predicated on our state constitution. See, e.g., *State* v. *Nash*, 278 Conn. 620, 624 n.4, 899 A.2d 1 (2006) (declining review where "[t]he defendant has not recognized, nor has he applied the six *Geisler* factors"); *Aselton* v. *East Hartford*, 277 Conn. 120, 152–55, 890 A.2d 1250 (2006) (declining review because appellant briefed only Connecticut and federal case law without addressing other *Geisler* factors); *State* v. *Colon*, 272 Conn. 106, 154 n.26, 864 A.2d 666 (2004) (declining review because appellant failed to analyze *Geisler* factors "separately and distinctly"), cert. denied, 546 U.S. 848, 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005); *State* v. *Fisher*, 121 Conn. App. 335, 349 n.10, 995 A.2d 105 (2010) ("the analysis required by [*Geisler*] . . . is a prerequisite to asserting an independent claim under the state constitution").

Second, on a more fundamental level, the plaintiff's claim to an absolute right to have the issue of probable cause decided exclusively by a jury cannot be reconciled with the ample body of Connecticut precedent holding that the existence of probable cause is a question of law to be decided by the court. See, e.g., *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, 281 Conn. 84, 94, 912 A.2d 1019 (2007) ("the existence of probable cause is an absolute protection . . . and what facts, and whether particular facts, constitute probable cause is always a question of law" [internal quotation marks omitted]); *Brodrib* v. *Doberstein*, 107 Conn. 294, 296, 140 A. 483 (1928) (existence of probable cause "is always a question of law"); *Giannamore* v. *Shevchuk*, 108 Conn. App. 303, 312, 947 A.2d 1012 (2008) ("[t]he issue of probable cause . . . ultimately presents a question of law that must be determined by the court"). For that reason, the appellate courts of this state have upheld judgments rendered in favor of defendants in vexatious litigation actions in which the court

rendered summary judgment as a matter of law; see *Lichaj* v. *Sconyers*, 163 Conn. App. 419, 428–29, 137 A.3d 26 (2016); *Hebrew Home & Hospital, Inc.* v. *Brewer*, 92 Conn. App. 762, 773, 886 A.2d 1248 (2005); as well as cases in which the court bifurcated the issue of probable cause, conducted an evidentiary hearing, and then concluded that probable cause existed. See *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 90–92.

The constitutional guarantee enshrined in article first, § 19, of the Connecticut constitution secures a litigant's right to have issues of fact decided by a jury. See, e.g., *Ackerman* v. *Sobol Family Partnership, LLP*, 298 Conn. 495, 498, 4 A.3d 288 (2010) ("[t]he plaintiffs also claim that they were denied their right to a jury trial on issues of fact under article first, § 19, of the Connecticut constitution"); *Donner* v. *Kearse*, 234 Conn. 660, 675, 662 A.2d 1269 (1995) (observing that "[a] statute that prohibited a jury from making factual determinations . . . would run afoul of [the] constitutional guarantee" contained in article first, § 19); *Bower* v. *D'Onfro*, 38 Conn. App. 685, 695–96, 663 A.2d 1061 (discussing "right to have questions of fact resolved by a jury" under state constitution and concluding that "there is no violation of the defendants' article one, § 19 rights because there was no interference with the jury's fact-finding function"), cert. denied, 235 Conn. 911, 665 A.2d 606 (1995); *Rozbicki* v. *Huybrechts*, 22 Conn. App. 131, 133–34, 576 A.2d 178 (1990) ("[i]n Connecticut, the right to have issues of fact decided by a jury is rooted in article first, § 19"), aff'd, 218 Conn. 386, 589 A.2d 363 (1991). To be sure, our Supreme Court has observed, in the vexatious litigation context, that "when the facts themselves are disputed, the court *may* submit the issue of probable cause in the first instance to a jury as a mixed question of fact and law." (Emphasis added.) *DeLaurentis* v. *New Haven*, 220 Conn. 225,

252–53, 597 A.2d 807 (1991). The court nevertheless prefaced that observation by noting that "[w]hether the facts are sufficient to establish the lack of probable cause is a question ultimately to be determined by the court . . . ." Id., 252. Bound by that precedent, which this intermediate appellate court cannot reconsider, reevaluate, or overrule; see *Hartford Steam Boiler Inspection & Ins. Co.* v. *Underwriters at Lloyd's & Cos. Collective*, 121 Conn. App. 31, 48–49, 994 A.2d 262, cert. denied, 297 Conn. 918, 996 A.2d 277 (2010); we must reject the plaintiff's claim. When the facts relevant to the inquiry into the objective reasonableness of a litigant's belief in the validity of the claim asserted are not in dispute, the trial court properly may decide the question of probable cause without aid of the jury. See *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 281 Conn. 112; *DeLaurentis* v. *New Haven*, supra, 252–53; *Cosgrove Development Co.* v. *Cafferty*, 179 Conn. 670, 671, 427 A.2d 841 (1980).

III

The remaining question, then, is whether undisputed facts exist in the record on which the court could conclude that the defendant possessed probable cause to prosecute the 2009 action for breach of contract. At the outset, we note that, in an action for vexatious litigation, the burden rests with the plaintiff to prove that the defendant lacked probable cause to prosecute a prior action. *Harris* v. *Bradley Memorial Hospital & Health Center, Inc.*, 296 Conn. 315, 330, 994 A.2d 153 (2010); see also *Zenik* v. *O'Brien*, 137 Conn. 592, 597, 79 A.2d 769 (1951) ("[a]lthough want of probable cause is negative in character, the burden is upon the plaintiff to prove affirmatively . . . that the defendant had no reasonable ground" for commencing action).

"[T]he probable cause standard applied to a vexatious litigation action against a litigant is a purely objective

one." *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 281 Conn. 95. That standard is defined as "a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a man of ordinary caution, prudence and judgment, under the circumstances, in entertaining it. . . . Probable cause is the knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that he has lawful grounds for prosecuting the defendant in the manner complained of. . . . Thus, in the context of a vexatious suit action, the defendant lacks probable cause if he lacks a reasonable, good faith belief in the facts alleged and the validity of the claim asserted." (Internal quotation marks omitted.) Id., 94–95. Our Supreme Court has described that standard as a "lower threshold of probable cause" that permits "attorneys and litigants to present issues that are arguably correct, even if it is extremely unlikely that they will win . . . ." (Internal quotation marks omitted.) Id., 103–104. As the court emphasized, "[p]robable cause may be present even where a suit lacks merit." (Internal quotation marks omitted.) Id., 103.

The probable cause inquiry in the present case entails consideration of whether, on the basis of the facts known by the defendant at the time the action was filed, a reasonable attorney familiar with Connecticut law would have believed that probable cause existed to prosecute the 2009 action for breach of contract. See id., 104–105. It is well established that "[a]n action in contract is for the breach of a duty arising out of a contract . . . ." *Gazo* v. *Stamford*, 255 Conn. 245, 263, 765 A.2d 505 (2001). "The elements of a breach of contract claim are the formation of an agreement, performance by one party, breach of the agreement by the other party, and damages." *Meyers* v. *Livingston, Adler, Pulda, Meiklejohn & Kelly, P.C.*, 311 Conn. 282, 291, 87 A.3d 534 (2014).

The first two elements of that cause of action require little discussion. It is undisputed that the plaintiff and Donate entered into the agreement in 1994. That written agreement was signed by the parties and appended to the complaint in the 2009 action. It also is undisputed that Donate performed her obligation under the contract by tendering payment of $22,104.50—the "total investment amount" specified in that agreement. Her March 9, 1994 check in that amount was admitted into evidence. Furthermore, in his testimony at the prejudgment remedy hearing held on March 16, 2009, and at the probable cause hearing in the present case, the plaintiff acknowledged both the "authenticity" of the agreement and Donate's payment of $22,104.50 into the investment account.

The critical question, then, is whether the record contains undisputed facts on which the defendant reasonably could advance a claim that the plaintiff had breached the agreement to Donate's detriment. We agree with the trial court that the record contains such facts.

Donate testified at both the trial before the jury on May 12, 2015, and the probable cause hearing on May 19, 2015. She explained that, at the time that she retained his services, she provided the defendant with a copy of the agreement and informed him that she received $1190.60 in proceeds when the investment account was liquidated. Donate testified that, following that liquidation, she contacted the plaintiff requesting further payment pursuant to the agreement. It is undisputed that the plaintiff thereafter tendered a payment of $4000 to Donate. The record contains both an audio recording and a transcript of a message left on Donate's voice mail, which features a brief conversation between the

plaintiff and his wife, Veronica Rockwell.[14] In that message, Veronica states that "[t]his should not be happening" and then asks the plaintiff why he had "transferred $4000 to [Donate's] account?" The plaintiff replied, "She never lied to me before. You know maybe I did guarantee it for her." Donate testified that she provided a copy of that recording to the defendant.

Also admitted into evidence was a letter dated July 27, 2007, that Donate sent to the plaintiff. That letter states in relevant part: "Thank you for depositing $4000 to my . . . account. I really appreciate your effort to come true to your word. . . . I remain [hopeful] that you will overcome all obstacles and fulfill your obligation and promise to me." Donate sent the plaintiff a second letter dated August 23, 2007, which also was admitted into evidence. In that letter, Donate sought compensation for "the money you owe me" pursuant to the agreement. She further indicated that, should the plaintiff require any "more proof," he should contact their representative at Prudential Securities Incorporated (Prudential). At the probable cause hearing, Donate confirmed that she provided copies of those letters to the defendant.

In addition, Donate provided uncontroverted testimony that she provided the defendant with proof of significant capital gains tax payments made prior to the liquidation of the investment account. Copies of two checks that she gave to the defendant were admitted into evidence. The first was payable to the United States Treasury in the amount of $26,085; the second was payable to the Commissioner of Revenue Services for the state of Connecticut in the amount of $6762. In her testimony, Donate also confirmed that the complaint that the defendant subsequently drafted in the 2009

[14] Both the audio recording and the transcript of the voice mail message were admitted into evidence.

action accurately reflected the information that she had provided to him. Donate provided a sworn affidavit to that effect, which was admitted into evidence.

Upon commencement of the 2009 action, a hearing on Donate's application for a prejudgment remedy was held. At that hearing, Donate testified that, on multiple occasions prior to liquidation, she received distributions to pay capital gains taxes on the investment account, including a payment of $18,000. The plaintiff at that time presented certain financial records that he had subpoenaed from Prudential regarding the investment account, which indicated a total of $45,495 in distributions therefrom. Due to the parties' dispute as to whether such distributions should constitute payments toward the guarantee provisions of the agreement, the court denied the application for a prejudgment remedy. At that time, the court noted on the record that the breach of contract issue nevertheless was "appropriate for litigation." The plaintiff was served with process in the 2009 action approximately one week later.

In his January 26, 2010 affidavit filed with the court, the plaintiff swore that "[t]he total amount withdrawn by [Donate] from the Investment was $45,495.90 . . . ." The plaintiff also filed a motion for summary judgment at that time, claiming that "[t]he total amount withdrawn by [Donate] from the Investment was $45,495.90, an amount in excess of the amount [the plaintiff] guaranteed she would receive from the Investment." The court denied that motion. In so doing, the court determined that a genuine issue of material fact existed as to whether Donate had received an amount in excess of that guaranteed under the agreement. Cf. *Lichaj* v. *Sconyers*, supra, 163 Conn. App. 423—24 and 426 n.5 (acknowledging that denial of motion for summary judgment is factor to consider in analysis of probable cause but expressing "no opinion as to whether a denial of a motion for summary judgment, without more, is

sufficient to negate the lack of probable cause for the purpose of a subsequent action in vexatious litigation"); *Porous Media Corp.* v. *Pall Corp.*, 186 F.3d 1077, 1080 (8th Cir. 1999) (when trial court denies defendant's motion for summary judgment "it follows that there was probable cause for bringing the [cause of action]").

Furthermore, the record indicates that, prior to trial, the plaintiff filed a notice of compliance with the court's trial management order (notice). In that notice, the plaintiff provided an overview of the case, stating that "[t]here were many transactions during the thirteen years the investment account existed. [Donate] contends there is an amount due her. The [plaintiff] claims that [Donate] received $22,104 prior to the investment being liquidated . . . ." In addition, the plaintiff averred that the following issues were "not in dispute: From 1998 to 2005, [Donate] withdrew $45,495 from the account and paid capital gains taxes in the amount of $42,528." In addition, the plaintiff submitted proposed jury interrogatories to the court, which limited the alleged withdrawals made by Donate to a total of $44,330. The plaintiff also disclosed Anthony Annunziata, a certified public accountant, as an expert witness prior to trial. In his disclosure, the plaintiff stated that Annunziata was "expected to testify as to the income tax consequences of [Donate's] capital gains and losses." A trial on the 2009 action followed, though the defendant ultimately did not call Annunziata as a witness.

At the conclusion of trial, the court, *Radcliffe*, *J.*, held a charging conference with the parties. At that time, the court indicated, that with respect to the breach of contract cause of action, it would charge the jury that "[Donate] claims that the phrase, 'taking into account all prior transactions involving the investment' refers to withdrawal of monies included in her initial capital investment of $22,104.50. She claims that no portion

of the capital investment was withdrawn prior to the complete liquidation in July of 2007 when she received $1190.60. . . . The [plaintiff] on the other hand, claims that the phrase, 'taking into account all prior transactions involving the investment' includes . . . any withdrawals made by [Donate] over the years [including withdrawals] for the purpose of paying capital gains taxes, and withdrawals made for the personal use of [Donate]. The [plaintiff] claims that [Donate's] withdrawals exceeded $22,104.50, and that no monies are due under the contract . . . ." Both parties expressed their agreement with that instruction. After being so instructed by the court, the jury ultimately found in favor of the plaintiff.

The defendant testified at the probable cause hearing in the present case. He stated that he first learned of approximately $45,000 in distributions from the investment account at the March 16, 2009 prejudgment remedy hearing. As he testified, "that's when I discovered the subpoenaed records from [Prudential and] from [the plaintiff's] testimony that there was a claim that there were $45,000 [in] withdrawals which exceeded the $22,000." At the probable cause hearing, the plaintiff also questioned the defendant on the basis of his determination that there was probable cause to commence the 2009 action. In response, the defendant testified as follows: "[W]e had the subpoenaed account records [provided at the prejudgment remedy hearing], and we had that information which you claimed were withdrawals. We had the fact that you paid $4000 on account when she asked you to honor the agreement. . . . We also had testimony that there were huge capital gains taxes paid, so at that point the issue became what counts as a prior withdrawal or prior transaction because that's what it refers to. It's not defined in the agreement. My argument then and my argument at trial [in the 2009 action] was that all the withdrawals equal

the capital gains taxes paid or became close then she didn't get her initial investment back, and that issue went to the jury, and that's what the [notice] said and that's what [the plaintiff's January 26, 2010] affidavit said. The withdrawals were $45,000. You agreed—you agreed that she had paid $43,000 in capital gains, so there was a very good argument she . . . didn't get her capital investment back. Withdrawals were used to pay taxes . . . ."

Later in the probable cause hearing, the plaintiff asked the defendant "what does the word 'prior transactions' mean in your mind?" The defendant replied, "It depends on what the parties consider—'prior transactions' is a very ambiguous term. It certainly doesn't mean just withdrawals, and I think you'd have to take into account deposits. There's also a question of whether or not that included withdrawals that were to pay capital gains taxes which were caused by [the plaintiff's] trading in the account. And that's what we went to trial on. That's what went to the jury whether or not the capital gains taxes should be counted in this process. That was the [principal] issue that went to the jury." When the defendant was questioned about the notice that the plaintiff had filed with the court prior to trial, the defendant similarly testified that the notice indicated "these were the withdrawals, [$45,000]. These were the capital gains taxes paid. Those were undisputed facts in [the notice]. . . . So, the issue before the jury was whether or not payment of the capital gains should be considered . . . a credit or debit" under the agreement.

The defendant's uncontroverted testimony at the probable cause hearing is further evidence that a bona fide dispute existed as to whether the disbursements to Donate for payment of capital gains taxes should be considered "prior transactions" under the agreement. More importantly, the plaintiff produced no evidence

indicating that the defendant lacked an objectively reasonable, good faith belief in the facts alleged and the validity of the claim asserted in the 2009 action. See *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 281 Conn. 95. We reiterate that, in the context of vexatious litigation actions, the critical inquiry is not whether a plaintiff possessed a meritorious claim but, rather, a viable one. See id., 103–104 (noting that "[p]robable cause may be present even where a suit lacks merit" and explaining that "[t]he lower threshold of probable cause allows attorneys and litigants to present issues that are arguably correct, even if it is extremely unlikely that they will win" [citation omitted; internal quotation marks omitted]).

In his testimony at the probable cause hearing, the plaintiff acknowledged that he had represented to the court, at the March 16, 2009 prejudgment remedy hearing, in his January 26, 2010 affidavit, and in his January 26, 2010 motion for summary judgment, that the total amount of distributions that Donate received from the investment account was $45,495.90. When questioned about his attorney's representations to the court in moving for summary judgment, the plaintiff testified, "That's [what] he knew at the time . . . ." The plaintiff then was asked whether he had any evidence that the defendant "knew anything different than your attorney?" Significantly, the plaintiff conceded that "I have no evidence on that."[15]

[15] Despite that admission, we note that the plaintiff at the probable cause hearing submitted certain documents that suggested that Donate received more than $45,495 in distributions from the investment account. In an affidavit dated April 15, 2014, the plaintiff averred in relevant part that "[t]he total amount withdrawn by [Donate] from the [i]nvestment account was $87,395.90, an amount in excess of the amount I guaranteed she would receive from the [i]nvestment." Also in evidence were numerous monthly statements from the account that were subpoenaed by the plaintiff in 2015, and an undated document titled "Money Earned by Donate Rockwell From Her Investment" that lists a series of withdrawals that Donate allegedly made from the investment account, which also totals $87,395.90. Although such evidence may establish that Donate's breach of contract claim lacked merit, those documents shed no light on the relevant probable cause inquiry

In light of the foregoing, we concur with the trial court that a legitimate factual dispute warranting adjudication

with respect to *the defendant's* conduct in commencing the 2009 action. We reiterate that the proper inquiry in a vexatious litigation action focuses on whether a reasonable attorney familiar with Connecticut law would believe, on the basis of the facts known by the defendant at the time that the action was commenced, that probable cause existed to prosecute the underlying action. See *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 281 Conn. 104–105.

The plaintiff produced no evidence at the probable cause hearing that the defendant, prior to the trial in the 2009 action, was aware of any distributions beyond the $45,495 established at the prejudgment remedy hearing. The financial records produced at that hearing indicated that Donate had received $45,495 in distributions from the investment account prior to liquidation. Moreover, at the March 16, 2009 prejudgment remedy hearing, in his January 26, 2010 affidavit, and in his January 26, 2010 motion for summary judgment, the plaintiff and his counsel consistently represented that the total amount of distributions that Donate received from the investment account was $45,495.90. The court and the defendant were entitled to rely on those affirmations. See *State* v. *Smith*, 289 Conn. 598, 609, 960 A.2d 993 (2008) ("[i]t long has been the practice that a trial court may rely upon certain representations made to it by attorneys, who are officers of the court and bound to make truthful statements of fact or law to the court"); *Lettieri* v. *American Savings Bank*, 182 Conn. 1, 11, 437 A.2d 822 (1980) (party "was entitled to rely on the representation" of opposing counsel); *Lesser* v. *Altnacraig Convalescent Home, Inc.*, 144 Conn. 488, 491–92, 133 A.2d 908 (1957) ("[i]t is imperative that the court and opposing counsel be able to rely on the statement of issues as set forth in the pleadings").

In addition, the record contains evidence that the defendant reached out to the plaintiff's counsel prior to trial in the 2009 action to verify that the defendant had copies of all relevant financial records from the investment account. In his March 24, 2010 e-mail to the plaintiff's counsel, which was admitted into evidence in the present case, the defendant questioned whether the plaintiff had furnished copies of certain documents at the prejudgment remedy hearing, stating: "I am concerned that I do not have all the documents that you subpoenaed from Prudential. Are there any that you subpoenaed that you did not put into evidence at the [prejudgment remedy] hearing? Please advise." Days later, the plaintiff filed the notice with the court, in which he represented in relevant part that there was no dispute between the parties that Donate "withdrew $45,495 from the account and paid capital gains taxes in the amount of $42,528." The court understandably could rely on that factual representation, particularly because it was made in response to a trial management order. See *In re Natalie S.*, 325 Conn. 849, 857, 163 A.3d 1189 (2017) (because "none of the parties disputed these jurisdictional facts or otherwise attempted to challenge the representations made by counsel . . . the trial court was entitled to rely on these factual representations"); *Harp* v. *King*, 266 Conn. 747, 765 n.24, 835 A.2d 953 (2003) ("the record indicates that the facts . . . are undisputed and, further, that the

existed when the 2009 action was instituted—specifically, whether distributions from the investment account that were used to pay capital gains taxes constituted "prior transactions" that were to be included in the calculus of the guarantee provisions of the agreement. As was the case in *Lichaj* v. *Sconyers*, supra, 163 Conn. App. 427, "[r]egardless of how the issue ultimately would be resolved, the matter clearly and objectively required resolution, one way or another." We therefore conclude that, on the basis of the undisputed facts known by the defendant, a reasonable attorney familiar with Connecticut law would believe that lawful grounds for prosecuting the breach of contract action existed. See *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 281 Conn. 101–105. Accordingly, the court properly concluded that the plaintiff had not met his burden of proving that the defendant lacked probable cause to prosecute the 2009 action.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JOSE E. RAMOS
(AC 40390)

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

Syllabus

Convicted, following a jury trial, of the crime of murder arising out of the shooting death of the victim, the defendant appealed. He claimed, inter alia, that the evidence against him was insufficient to support his conviction because a reasonable jury could not have found the witnesses who testified against him to be credible. *Held*:

1. The evidence was sufficient to support the defendant's conviction of murder; it was not for this court to retry the case or to evaluate the

parties expected the trial court to rely on the representations of counsel in regard to those relevant facts"). Likewise, a reasonable attorney familiar with Connecticut law would have relied on the plaintiff's representations to the court in prosecuting the 2009 action.

credibility of the witnesses on appeal, and the state's evidence against the defendant was strong, as the defendant confessed that he shot the victim to his sister, his brother-in-law, his friend, and in a videotaped statement to police in which he provided details such as the nature of the dispute with the victim and the gun that he used, as well as in handwritten letters of apology to his family and members of the victim's family.

2. The defendant's unpreserved claim that the trial court improperly failed to suppress evidence of his post-*Miranda* silence in violation of his constitutional right against self-incrimination failed under the third prong of *State* v. *Golding* (213 Conn. 233), the defendant having failed to demonstrate that a constitutional violation existed that deprived him of a fair trial; the state's use of the defendant's failure to answer a question posed by a detective about whether he killed the victim did not violate the defendant's privilege against self-incrimination, as the defendant remained selectively silent when asked if he had committed the crime, but answered questions before and after that question about his life and relationship with M, a witness who had provided information to the police about the defendant's presence at the murder scene, and he did not assert his *Miranda* right to remain silent or attempt to stop the interview.

3. The defendant could not prevail on his claim that the trial court committed plain error by permitting the state to present uncharged misconduct and past conviction evidence; the defendant's claim did not involve an error so obvious that it affected the fairness of or public confidence in the judicial proceeding, especially in light of the strength of the state's evidence against the defendant.

4. This court found unavailing the defendant's claim that the prosecutor's use of excessive leading questions during the cross-examination of the defendant constituted numerous instances of prosecutorial impropriety that deprived the defendant of his right to due process; our Code of Evidence (§ 6-8 [b]) restates the general rule that although leading questions are not proper on direct examination of a witness, they are proper on cross-examination, and the record here disclosed that the challenged line of questioning was standard cross-examination during which the prosecutor asked the defendant to confine his responses to "yes" or "no" answers, which was not improper.

Argued September 15—officially released December 5, 2017

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of New London, where the court, *A. Hadden, J.*, denied the defendant's motion to suppress certain statements; thereafter, the case was tried to the

jury; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

Jeremiah Donovan, for the appellant (defendant).

Lawrence J. Tytla, supervisory assistant state's attorney, with whom, on the brief, was *Michael L. Regan*, state's attorney, for the appellee (state).

Opinion

PELLEGRINO, J. The defendant, Jose E. Ramos, appeals from the judgment of conviction, rendered following a jury trial, of murder in violation of General Statutes § 53a-54a. On appeal, the defendant claims that (1) there was insufficient evidence to support his conviction, (2) the court erred in failing to suppress evidence of his post-*Miranda*[1] silence, (3) the court committed plain error by admitting prior misconduct evidence, and (4) he was deprived of his due process rights as a result of prosecutorial impropriety. We are not persuaded by the defendant's claims on appeal and, accordingly, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On the evening of October 10, 2008, the victim, Tynel Hardwick, and his fiancée, Lenore Robinson, were at Rumors Bar on Boswell Avenue in Norwich (Rumors). At that time, the defendant was also at Rumors with his friends Lattoya Small and Dishon Morgan. Small observed the defendant and the victim engaged in a verbal dispute. Thereafter, the defendant asked Small to drive him to the apartment of his sister, Shavanha Kincade (Shavanha), and her husband, James Kincade (James), a few miles away, and Morgan joined them. The defendant had left a rifle at the apartment in late summer, 2008, while he was staying with them. When the defendant arrived at the apartment, Shavanha

[1] *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

and James were away for the evening and James' mother was caring for their young child. The defendant went into the apartment and retrieved the rifle. The defendant, Small, and Morgan returned to Boswell Avenue across from Rumors. The defendant got out of the car at a distance away from Rumors and positioned himself in a grassy area in sight of the bar. When the victim came out of the bar, the defendant shot and killed him with a single gunshot wound to the head. The defendant then returned to Small's car and Small, accompanied by Morgan, drove the defendant to Hartford.

During their investigation in October, 2008, the police discovered .22 caliber rounds, a burnt cigar, earplugs, and footprints in the grass across the street from Rumors, but they were unable to identify any suspects. The defendant was implicated as the shooter in 2012 as part of a cold case investigation led by Detective Corey Poore of the Norwich Police Department. On September 25, 2012, while the defendant was living in New York City, Norwich detectives located him in Brooklyn. The Brooklyn detectives arrested him as a fugitive from justice, and the Norwich detectives subsequently extradited him to Connecticut. He then was charged with murder in violation of § 53a-54a. Following the presentation of evidence, the jury returned a verdict of guilty. Thereafter, the court sentenced the defendant to a total effective sentence of sixty years imprisonment. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant claims that the evidence is insufficient to support his murder conviction. He argues that the numerous inconsistencies in testimony, combined with the psychological problems and motivations of the witnesses, were so significant that no reasonable juror

could have accepted their testimony as credible and returned a guilty verdict. We address the defendant's sufficiency of the evidence claim before we address any other claims because if a defendant prevails on such a claim, the proper remedy is to direct a judgment of acquittal. See *State* v. *Raynor*, 175 Conn. App. 409, 419 n.8, A.3d (2017); *State* v. *Holley*, 160 Conn. App. 578, 589 n.3, 127 A.3d 221, cert. granted on other grounds, 320 Conn. 906, 127 A.3d 1000 (2015).

The two part test this court applies in reviewing the sufficiency of the evidence supporting a criminal conviction is well established. "First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the jury reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Lewis*, 303 Conn. 760, 767, 36 A.3d 670 (2012).

"In evaluating evidence, the trier of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence." *State* v. *Delgado*, 247 Conn. 616, 620, 725 A.2d 306 (1999). "[I]n viewing evidence which could yield contrary inferences, the jury is not barred from drawing those inferences consistent with guilt and is not required to draw only those inferences consistent with innocence. The rule is that the jury's function is to draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Internal quotation marks omitted.) *State* v. *Grant*, 219 Conn. 596, 604, 594 A.2d 459 (1991). As we have observed, "proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable

hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Internal quotation marks omitted.) *State* v. *Aloi*, 280 Conn. 824, 842, 911 A.2d 1086 (2007).

The defendant claims that a reasonable jury could not find the witnesses credible; however, "[i]t is well established that a reviewing court is not in the position to make credibility determinations. . . . This court does not retry the case or evaluate the credibility of the witnesses. . . . Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude." (Internal quotation marks omitted.) *Lewis* v. *Commissioner of Correction*, 117 Conn. App. 120, 125–26, 977 A.2d 772, cert. denied, 294 Conn. 904, 982 A.2d 647 (2009). Therefore, we decline to assess the credibility of the witnesses on appeal.

Furthermore, the state's evidence against the defendant, including his multiple confessions, was strong. The defendant confessed that he shot the victim to his sister Shavanha, his brother-in-law James, and his friend Small. He also confessed to shooting the victim to members of the Norwich Police Department, providing details such as the nature of the dispute in the bar and the .22 caliber rifle he used. The jury also heard testimony from the defendant's good friend Morgan, who testified that he was like a "blood brother" to the defendant. Morgan testified that he was present at the time of the murder and saw the defendant shoot the victim. The defendant also gave a videotaped confession to the Norwich Police and confessed in handwritten letters of apology to his family and members of the victim's family. Construing the evidence in the light most favorable to sustaining a verdict, a jury reasonably could have found the defendant guilty of murder beyond a reasonable doubt on the basis of this evidence.

Accordingly, we conclude that the jury's verdict finding the defendant guilty of murder is supported by sufficient evidence.

II

The defendant next claims that the court erred in failing to suppress evidence of his post-*Miranda* warning silence. He contends that his fifth and fourteenth amendment rights against self-incrimination were violated when the jury heard evidence that the defendant did not deny the murder when Poore accused him of killing the victim. As a corollary to the privilege against self-incrimination, the United States Supreme Court held in *Doyle* v. *Ohio*, 426 U.S. 610, 617–18, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), that a state may not use a defendant's post-*Miranda* silence to imply that he is guilty of the crime charged. The defendant argues that the state violated *Doyle* by using his post-*Miranda* silence to imply that he had killed the victim. We do not agree.

The following additional facts and procedural history are relevant to this claim. On September 25, 2012, Poore interviewed the defendant after his arrest in New York City. The defendant was then presented before a New York judge on the extradition warrant and released into the custody of the Norwich detectives on the same day. As the Norwich detectives drove him to Connecticut, the defendant confessed to shooting the victim. The next day, the defendant confessed to the shooting in a videotaped interview at the Norwich Police Department.

Prior to trial, the defendant filed a motion to suppress all of his postarrest statements to members of the Norwich Police Department, including written, spoken, and video statements. The court denied his motion to suppress, but deferred ruling on the issue of the defendant's

post-*Miranda* silence.[2] The defendant then filed a written motion to preclude evidence of his post-*Miranda* silence at trial.

At trial, the state presented evidence of the defendant's post-*Miranda* silence through Poore's testimony as evidence of his guilt.[3] The defendant did not object to Poore's testimony. Poore testified that he interviewed the defendant after he was arrested in New York City on September 25, 2012. Poore verbally advised the defendant of his *Miranda* rights, the defendant then read each sentence out loud, and subsequently initialed by each sentence to indicate that he understood those rights. After the defendant signed the waiver form, Poore told him that they were there to discuss the shooting of the victim outside Rumors in October, 2008. When Poore accused the defendant of the murder, the defendant did not respond to the accusation. Poore then changed the subject and the two conversed about other topics, such as the defendant's family, the Norwich area in which they lived, and the defendant's life in New York City.

The defendant claims that the state improperly used his post-*Miranda* silence to imply his guilt in violation

[2] The court ordered: "I would advise counsel that should an offer be made in regard to this issue, the court should be notified so that the issue can be taken up outside the presence of the jury."

[3] On appeal, the defendant challenges the following examination:

"[The Prosecutor]: [H]ow did you go about speaking to [the defendant], once he had been warned and then waived his rights?

"[Poore]: Well, we basically explained why we were there. We explained the charge . . . that he was being charged with and . . . specifically accused him of the murder of [the victim]. And he didn't deny it.

"[The Prosecutor]: Let me . . . ask you to rephrase that. When . . . you accused him of murder, did he say yes or no?

"[Poore]: He . . . didn't deny it.

"[The Prosecutor]: Did he . . . just not respond?

"[Poore]: Right.

"[The Prosecutor]: Okay. So he didn't say yes, he didn't say no. He just didn't respond.

"[Poore]: Correct."

of his constitutional rights and that this constitutional violation was harmful. The state contends, however, that the defendant did not invoke his right to remain silent, and thus that no *Doyle* violation occurred. Moreover, the state argues, even if such an impropriety occurred, it was harmless beyond a reasonable doubt.

"[T]here is a distinction between a defendant who remains silent after he is arrested and advised of his rights, and a defendant who, after being given *Miranda* warnings, chooses to forgo such rights." *State* v. *Holmes*, 176 Conn. App. 156, 190–91, 167 A.3d 987 (2017). In the absence of an objection at trial, the defendant argues that he is entitled to review of his *Doyle* claim on appeal pursuant to *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). "[A] defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the 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." (Emphasis in original.) *State* v. *Golding*, supra, 239–40. Although the defendant's claim is reviewable, we conclude that the claim fails on the third prong because the defendant has not demonstrated that a constitutional violation existed that deprived him of a fair trial.

It is undisputed that the state's use of the defendant's post-*Miranda* silence raises a constitutional question. "In *Doyle* . . . the United States Supreme Court held that the impeachment of a defendant through evidence of his silence following his arrest and receipt of *Miranda* warnings violates due process. The court

based its holding [on] two considerations: First, it noted that silence in the wake of *Miranda* warnings is insolubly ambiguous and consequently of little probative value. Second and more important[ly], it observed that while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." (Internal quotation marks omitted.) *State* v. *Holmes*, supra, 176 Conn. App. 188–90.[4]

A *Doyle* violation does not occur, however, where the defendant has not invoked his right to remain silent or has remained selectively silent. See *State* v. *Silva*, 166 Conn. App. 255, 283–85, 141 A.3d 916, cert. denied, 323 Conn. 913, 149 A.3d 495 (2016). "Once an arrestee has waived his right to remain silent, the *Doyle* rationale is not operative because the arrestee has not remained silent and an explanatory statement assuredly is no longer insolubly ambiguous. By speaking, the defendant has chosen unambiguously not to assert his right to remain silent. He knows that anything he says can and will be used against him and it is manifestly illogical to theorize that he might be choosing not to assert the right to remain silent as to part of his exculpatory story, while invoking that right as to other parts of his story. While a defendant may invoke his right to remain silent at any time, even after he has initially waived his right to remain silent, it does not necessarily follow that he may remain selectively silent." (Internal quotation marks omitted.) *State* v. *Talton*, 197 Conn. 280, 295, 497 A.2d 35 (1985).

[4] After briefs were filed in this case, this court released its opinion in *State* v. *Holmes*, supra, 176 Conn. App. 190–91. This court ordered the parties to address at oral argument the impact of the *Holmes* decision on the defendant's claim of a *Doyle* violation.

The facts of present case are similar to those in *State* v. *Silva*, supra, 166 Conn. App. 276. In *Silva*, after receiving the *Miranda* warnings, the defendant remained silent when asked if he had killed the victim, yet answered questions about his relationship with the victim and his whereabouts on the morning of the victim's murder. Id., 285. The defendant in *Silva* alleged that the state's use of his post-*Miranda* silence violated his fifth and fourteenth amendment privilege against self-incrimination because he did not respond to the ultimate inculpatory question. Id., 286. This court rejected the defendant's claim, holding that there is no *Doyle* violation where "there was no indication that the defendant was invoking his right to remain silent upon being asked that [inculpatory] question. He continued to answer questions thereafter and did not stop the interview . . . ." Id.

In the present case, we conclude that Poore's testimony that the defendant failed to respond to his accusation that the defendant killed the victim was not a *Doyle* violation. The defendant did not refuse to answer other questions, and in fact, was forthcoming about his relationship with Morgan after the police told the defendant that Morgan had given them information that he was present at the murder scene with the defendant. The defendant's statements were made after Poore had told the defendant that the purpose of the interview was to discuss the victim's murder. The only detail that the defendant did not discuss was whether he was the one who shot the victim. Here, as in *Silva*, the defendant did not assert his *Miranda* right to remain silent, nor did he attempt to stop the interview. He also answered numerous questions about his family, the Norwich area, and his relationship with Morgan. By speaking and answering other questions, the defendant unambiguously chose to waive his right to remain silent while being questioned by police, and was selectively silent

when accused of the murder. We thus conclude that the state's use of the defendant's post-*Miranda* silence during direct examination of Poore was not a constitutional violation of the defendant's fifth and fourteenth amendment privilege against self-incrimination that deprived him of a fair trial.

III

The defendant also claims that the court committed plain error in permitting the state to present a "tsunami of uncharged misconduct and past conviction evidence." The defendant contends that the prosecutor's use of the term "convicted felon" and mention of the defendant's eight prior arrests during cross-examination were extremely prejudicial to him.[5] The defendant, however, concedes that he did not object while he was being cross-examined, and that his evidentiary claim is not preserved. As he has raised an unpreserved claim that is not of constitutional nature, the defendant argues that reversal is nonetheless appropriate under the plain error doctrine. We do not agree. The following additional facts are relevant to this claim.

Prior to trial, the defendant filed three motions in limine to preclude the admission of his past misconduct, requesting that the prosecutor provide notice if the state intended to offer any misconduct evidence. At the start of trial, the prosecutor stated: "As things stand, I don't think there is any stand-alone other misconduct evidence that we . . . intend to introduce." The defendant elected to testify on his own behalf. During the prosecutor's cross-examination of him, the prosecutor asked about his past misconduct. The defendant did not object to the state's cross-examination.

[5] The defendant also claims that his counsel's use of uncharged misconduct and past conviction evidence was improperly admitted and prejudicial to him. We do not reach this issue on appeal.

The plain error doctrine in Connecticut, which is "codified at Practice Book § 60-5, is an extraordinary remedy used by appellate courts only to rectify errors committed at trial that, although unpreserved, are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. . . . [T]he plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly." (Internal quotation marks omitted.) *State* v. *Patterson*, 170 Conn. App. 768, 784 n.17, 156 A.3d 66, cert. denied, 325 Conn. 910, 158 A.3d 320 (2017).

Our review of the transcript of the prosecutor's cross-examination of the defendant discloses that the defendant did not object to that questioning. We conclude that the defendant's claim does not involve an error so obvious that it affects the fairness of or public confidence in the judicial proceeding. In part I of this opinion, we discussed the strength of the state's evidence against the defendant at trial, including eyewitness testimony of the shooting and multiple confessions that the defendant made to family and friends. Accordingly, we conclude that he cannot prevail under the demanding plain error standard.

IV

The defendant's final claim is that he is entitled to a new trial because numerous instances of prosecutorial impropriety during the prosecutor's cross-examination of him deprived him of his due process rights. We disagree.

We first set forth the relevant law on prosecutorial impropriety. "In analyzing claims of prosecutorial impropriety, we engage in a two step process. . . .

First, we must determine whether any impropriety in fact occurred; second, we must examine whether that impropriety, or the cumulative effect of multiple improprieties, deprived the defendant of his due process right to a fair trial. . . . To determine whether the defendant was deprived of his due process right to a fair trial, we must determine whether the sum total of [the prosecutor's] improprieties rendered the defendant's trial fundamentally unfair, in violation of his right to due process. . . . The question of whether the defendant has been prejudiced by prosecutorial [impropriety], therefore, depends on whether there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the improprieties." (Internal quotation marks omitted.) *State* v. *Salamon*, 287 Conn. 509, 551–52, 949 A.2d 1092 (2008). The burden is on the defendant to satisfy both of these analytical steps. *State* v. *Payne*, 303 Conn. 538, 562–63, 34 A.3d 370 (2012). With these standards in mind, we turn to the merits of the defendant's claim.

The defendant contends that the prosecutor engaged in the excessive use of leading questions during his cross-examination. We reject this claim of impropriety. Section 6-8 (b) of the Connecticut Code of Evidence restates the general rule that leading questions are not proper on direct or redirect examination of a witness but are proper on cross-examination or recross-examination. See C. Tait & E. Prescott, Connecticut Evidence (5th Ed. 2014) § 6.20.2, p. 368. The commentary accompanying § 6-8 (b) of the Connecticut Code of Evidence explains that "[a] leading question is a question that suggests the answer desired by the examiner in accord with the examiner's view of the facts." Conn. Code Evid. § 6–8 (b), commentary. "Although questions asking for 'yes' or 'no' answers are frequently leading, and those phrased in a neutral alternative ('whether or not') are

generally not leading, form is not controlling." C. Tait & E. Prescott, supra, § 6.20.2, p. 368.

With respect to the prosecutor's cross-examination of the defendant, we are not persuaded that the conduct was improper. The record disclosed that the challenged line of questioning was standard cross-examination during which the prosecutor asked the witness to confine his responses to "yes" or "no" answers.[6] Having concluded that the defendant has not shown that the prosecutor's use of leading questions on cross-examination was improper, we need not examine whether the defendant was deprived of his due process rights. Accordingly, we reject the defendant's claim that his due process rights were violated by the prosecutor's conduct.

The judgment is affirmed.

In this opinion the other judges concurred.

[6] The following colloquy between the defendant by the prosecutor on cross-examination is illustrative of the kind of questioning the defendant complains violated his due process rights:

"[The Prosecutor]: Let me just ask you a question though. You indicated, I believe, that you had been to Rumors Bar one time back in 2002. Isn't that right?

"[The Defendant]: It was around then.

"[The Prosecutor]: Okay.

"[The Defendant]: 2001, 2002, maybe.

"[The Prosecutor]: Just that one time prior to that.

"[The Defendant]: I mean, I've walked by it before, but I've never been in it until then.

"[The Prosecutor]: Yes or no, sir. Had you been to Rumors Bar, to your recollection more than one time?

"[The Defendant]: Inside?

"[The Prosecutor]: Yes or no?

"[The Defendant]: Inside?

"[The Prosecutor]: To the bar.

"[The Defendant]: Oh.

"[The Prosecutor]: Yes or no?

"[The Defendant]: No.

"[The Prosecutor]: Okay. But you are familiar with the Boswell Avenue area. Isn't that right?

"[The Defendant]: Yep. Yes, I am."

LAW OFFICES OF FRANK N. PELUSO, P.C. *v.* JERRY P. COTRONE (AC 39304)

Lavine, Sheldon and Prescott, Js.

Syllabus

The plaintiff brought this action against the defendant, a former client, for unpaid legal fees. After the defendant filed a counterclaim, the plaintiff filed a request to revise the defendant's special defenses and counterclaim, and no further action was taken in the case by either party until the plaintiff filed a withdrawal of its action approximately three years later. Two days after the plaintiff withdrew its action, the plaintiff filed a withdrawal of the withdrawal of its action. Subsequently, the defendant filed an objection to the plaintiff's withdrawal of the withdrawal of its action, claiming that a withdrawal of a withdrawal was not a proper pleading to restore the plaintiff's action to the docket. Following a hearing, the trial court overruled the defendant's objection, and the matter was thereafter tried to the court, which found in favor of the plaintiff on the complaint and the counterclaim, and awarded the plaintiff damages. On the defendant's appeal to this court, *held* that the trial court abused its discretion in restoring the plaintiff's action to the docket after the plaintiff filed a withdrawal of its action, in the absence of a timely filed motion to restore: pursuant to statute (§ 52-212a), the plaintiff had four months from the date of the filing of the withdrawal of its action to file a motion to restore the case, which the plaintiff failed to do, and there was no basis in the record for the trial court to treat an electronic notation on the docket list as an erasure of the plaintiff's withdrawal of action and the restoration of its action to the docket, nor did the record show that the court ever took any action on the plaintiff's withdrawal of the withdrawal of its action or that it informed either party that the matter had been restored; moreover, the plaintiff's claim that the trial court exercised direct authority over the case when it considered the plaintiff's motions for nonsuit and to dismiss was unavailing, as the plaintiff failed to file any pleading in furtherance of its action following its purported restoration of the case until two years later, and even then, the plaintiff did not file any motion that required any action by the court that could have been construed as implicitly restoring the case to the docket.

Argued October 5—officially released December 5, 2017

Procedural History

Action to recover damages for, inter alia, breach of contract, brought to the Superior Court in the judicial

district of Stamford-Norwalk, where the defendant filed a counterclaim; thereafter, the plaintiff withdrew its action; subsequently, the plaintiff filed a withdrawal of its withdrawal of action; thereafter, the court, *Hon. Edward R. Karazin, Jr.*, judge trial referee, denied the plaintiff's motion to dismiss the defendant's counterclaim; subsequently, the court, *Hon. Edward R. Karazin, Jr.*, judge trial referee, overruled the defendant's objection to the plaintiff's withdrawal of its withdrawal of action; thereafter, the matter was tried to the court, *Heller, J.*; judgment for the plaintiff on the complaint and on the counterclaim, from which the defendant appealed to this court; subsequently, the court, *Heller, J.*, denied the plaintiff's motion for termination of stay of execution. *Reversed*; *judgment directed.*

Haldan E. Connor, Jr., for the appellant (defendant).

Paul Ciarcia, with whom, on the brief, was *Frank N. Peluso*, for the appellee (plaintiff).

Opinion

SHELDON, J. The defendant, Jerry P. Cotrone, appeals from the judgment rendered after a bench trial in favor of the plaintiff, Law Offices of Frank N. Peluso, P.C., awarding damages in the amount of $32,119.06 on the plaintiff's claim for unpaid legal fees. The defendant claims on appeal that the court erred in restoring the plaintiff's case to the docket, in the absence of a timely filed motion to restore, after the plaintiff filed a withdrawal of its action. We agree with the defendant and, thus, reverse the judgment of the trial court.

The following procedural history is relevant to the defendant's claim. The plaintiff brought this action against the defendant for legal fees by way of writ, summons and complaint on May 19, 2009. The defendant appeared through counsel on April 6, 2010, and filed an answer and special defenses to the plaintiff's

revised complaint and a counterclaim on September 22, 2010. The plaintiff sought, and was granted, an extension of time within which to file a responsive pleading, and on October 14, 2010, filed a request to revise the defendant's special defenses and counterclaim.

No further action in this case was taken by either party until the plaintiff filed a withdrawal of its action on September 17, 2013. Two days later, on September 19, 2013, the plaintiff filed a second withdrawal form that purported to withdraw its withdrawal of the action. On October 15, 2013, the defendant filed an amended counterclaim.

On February 26, 2015, the court issued a notice to the parties scheduling "[a] hearing to address the dormancy status of this case" for March 27, 2015. On the latter date, the court, *Mintz, J.*, ordered that the plaintiff file an answer to the defendant's counterclaim on or before April 17, 2015, and that the defendant reply, if necessary, by May 1, 2015. The court further scheduled a pretrial for May 6, 2015. In accordance with the court's order, the plaintiff filed an answer and special defenses to the counterclaim on March 27, 2015, to which the defendant filed a reply on May 1, 2015. On March 30, 2015, the plaintiff filed a motion to dismiss the defendant's counterclaim for lack of subject matter jurisdiction. On April 2, 2015, the plaintiff filed a reply to the special defenses filed by the defendant on September 22, 2010. On May 5, 2015, the plaintiff filed a certificate of closed pleadings and claimed the case to the trial list.

On May 6, 2015, the court, *Hon. Edward R. Karazin, Jr.*, judge trial referee, issued a notice scheduling a hearing on the plaintiff's motion to dismiss the defendant's counterclaim for May 15, 2015.[1] That notice also provided: "The court will also take up [an] objection

[1] The court's May 6, 2015 notice presumably was prompted by the pretrial held on that date.

to the withdrawal [of the withdrawal of the action] (to be filed on or before [May 13, 2015]) and any objection to the objection to the withdrawal [of the withdrawal of the action] (to be filed no later than 9:30 a.m. on [May 15, 2015])."

On May 12, 2015, the defendant filed an objection to the plaintiff's motion to dismiss its counterclaim. On May 13, 2015, the defendant filed an objection to the plaintiff's withdrawal of its withdrawal of its action, in which it argued that the plaintiff's withdrawal of its withdrawal of its action was not a proper pleading to restore its action to the docket. The defendant reasoned that, because a withdrawal is equivalent to a final judgment, a withdrawn case can be restored to the docket upon the filing of a motion to open judgment or a motion to restore to the docket within four months of the withdrawal as required by General Statutes § 52-212a.

On May 14, 2015, the plaintiff filed its reply to the defendant's objection to the withdrawal of the withdrawal of its action. The plaintiff asked the court therein to "accept [its] rescinding of its withdrawal of action and [allow its] complaint to proceed as it were." In support of that request, the plaintiff argued that "post-withdrawal pleadings are permissible in the state of Connecticut," pointing, by way of example, to motions for attorney's fees that are permitted by Practice Book § 11-21. The plaintiff argued that a court's consideration of a motion filed after a case is withdrawn implicitly constitutes the granting of a motion to restore the case to the docket.

At the May 15, 2015 hearing, the court issued its order on the withdrawal issue from the bench.[2] The court held: "Since neither side pursued the case [for approximately three years, from the date that the plaintiff filed a

[2] The court also denied the plaintiff's motion to dismiss the defendant's counterclaim. That ruling has not been challenged on appeal.

request to revise the defendant's counterclaim and special defenses, to the date on which the plaintiff withdrew its action], a fair interpretation was that neither side was interested in the case. The plaintiff, after a phone call to the defense counsel, left a [voice] message that the plaintiff was withdrawing the case with the expectation that the defendant would do so also. It did not, however, happen.

"It's clear to this court that the plaintiff did not intend to withdraw the case without an entire withdrawal of the case. This withdrawal apparently was thereafter addressed by defense counsel and a clear reading of the pleadings in the case show that pleading 121 was the withdrawal of the action and the court thereafter withdrew the action and thereafter in pleading 122 was the withdrawal of the withdrawal.

"Pleading 121.02, however, for this court, is important because what it says is and I read from the computer printout because there is no elaboration in the record otherwise available. It says: 'Replace record to pleading status (keypoint 2) and erase all [higher] keypoint dates.' That's 121.02. That means that that was subsequent to 121 which was the withdrawal of action. And if that means erase all [higher] keypoint dates, that effectively means that the withdrawal of action was erased by the court and that the question of the withdrawal of the withdrawal is less significant because it does appear that, in fact, the case was restored to the docket.

"The philosophy of the court concerning pleadings has become substantially liberal. In the old days of the practice, you served within [twelve] days of the return day the writ, summons and complaint and returned it to the court within six days. Failure to comply and you lost. The case was dismissed.

"Now, we allow amendment of these dates and they . . . no longer fail. Trials are our way of deciding issues. This case is best tried with all the issues before the trier of fact, the complaint and the counterclaim and all other issues.

"The court has reviewed *Rosado* v. *Bridgeport* [*Roman Catholic Diocesan Corp.*, 276 Conn. 168, 884 A.2d 981 (2005)], and the case there seems to substantiate the position that case activity restored the case implicitly to the docket.

"There were documents in a withdrawn and settled case . . . that were referred to by the court thereafter and certainly, in this case, there has been activity in the case by both sides and as the court pointed out, there was reference to the underlying case in subsequent pleadings and the pleadings were addressed accordingly but not to say why are you raising that because the case has already been withdrawn.

"Accordingly the court finds the pleadings—finds that the pleading in this action—the complaint pleading in this action is pending. The court finds substance over form as to the withdrawal. The court finds the defendant is not prejudiced by the complaint still pending and the court finds the plaintiff would be prejudiced by not allowing the complaint to be pending." The court thus overruled the defendant's objection to the plaintiff's withdrawal of the withdrawal of its action.

This action, including the plaintiff's claims and the defendant's special defenses thereto and the defendant's counterclaim, was tried to the court, *Heller*, *J.*, on December 8, 2015. By way of a written memorandum of decision filed May 25, 2016, the court found in favor of the plaintiff on its claims and the defendant's counterclaim and awarded damages in the amount of $32,119.06. This appeal followed.

On appeal, the defendant claims that the court erred in restoring the plaintiff's action to the docket, in the absence of a timely filed motion to restore, after the plaintiff filed a withdrawal of its action. We agree.[3]

"The question of whether a case should be restored to the docket is one of judicial discretion." (Internal quotation marks omitted.) *Travelers Property Casualty Co. of America* v. *Twine*, 120 Conn. App. 823, 826, 993 A.2d 470 (2010). "To the extent that the trial court has made findings of fact [underlying that discretionary ruling], our review is limited to deciding whether such findings were clearly erroneous. When, however, the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Ravetto* v. *Triton Thalassic Technologies, Inc.*, 285 Conn. 716, 735, 941 A.2d 309 (2008).

"Withdrawals are analogous to final judgments. . . . Under [the] law, the effect of a withdrawal, so far as the pendency of the action is concerned, is strictly analogous to that presented after the rendition of a final judgment or the erasure of the case from the docket." (Internal quotation marks omitted.) *Sicaras* v. *Hartford*, 44 Conn. App. 771, 775–76, 692 A.2d 1290, cert. denied, 241 Conn. 916, 696 A.2d 340 (1997). "[T]he motion to restore a case to the docket is the vehicle to open a withdrawal, while the motion to open is the vehicle to open judgments." (Internal quotation marks omitted.) *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, supra, 276 Conn. 196. Section 52-212a, which provides that civil judgments may only be opened or

[3] It is well settled that a trial court has "jurisdiction . . . to restore to the active docket a case which has been voluntarily withdrawn, just as it can open a judgment or restore to the docket a case which has been erased." *Lusas* v. *St. Patrick's Roman Catholic Church Corp.*, 123 Conn. 166, 170, 193 A. 204 (1937).

set aside within four months of the date they were rendered, "is applicable not only to the opening of a case that has proceeded to judgment but also to the restoration of a withdrawn case." Id. Accordingly, "a motion to restore a withdrawn case is seasonable only if it is filed within four months of the withdrawal." *Palumbo* v. *Barbadimos*, 163 Conn. App. 100, 116 n.15, 134 A.3d 696 (2016).

Here, the defendant claims that the court improperly restored the plaintiff's action to the docket despite the plaintiff's failure to file a motion to restore within four months of the date that the plaintiff withdrew its action. It is undisputed that the plaintiff did not file such a motion. The plaintiff nevertheless claims that its case was properly restored to the docket because "[t]he court in effect granted [its] withdrawal of the withdrawal, construing it as a motion to restore, on September 19, 2013." In support of this argument, the plaintiff relies upon the trial court's interpretation of a notation on the "computer printout" of the case that provided, "erase all higher keypoint dates." On the basis of that notation, the trial court determined that the plaintiff's withdrawal of its action had been erased and that the plaintiff's action had been restored to the docket when the plaintiff filed the withdrawal of its withdrawal of its action. The court's determination that the notation on the computer printout constituted an erasure of the plaintiff's withdrawal of its action and the restoration of its action to the docket finds no support in the record. The record also does not reveal that the court took any action whatsoever on the plaintiff's withdrawal of the withdrawal of its action, or that the court ever informed either party that the matter had been restored.[4]

[4] The hearing on this issue was not evidentiary and consisted only of argument by counsel. Although not evidence, we note the explanation of the notation on the computer printout that was offered by counsel for the defendant. Counsel argued that when the plaintiff filed the withdrawal of its action, the court closed the entire case, including the defendant's counterclaim. Counsel indicated that he went to the clerk's office to explain that the

The defendant also claims that the court erred in finding that there had been "activity in the case by both sides" following the filing of the plaintiff's withdrawal of the withdrawal of its action, and that, based upon our Supreme Court's ruling in *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, supra, 276 Conn. 168, that activity had implicitly restored the plaintiff's case to the docket. In *Rosado*, our Supreme Court upheld the granting of a third party's motion to intervene, filed by The New York Times, in cases that had been settled and withdrawn approximately one year prior to the filing of the motion to intervene. Id., 172–73. Our Supreme Court reasoned that, "if the trial court had been required to grant a motion to restore the case to the docket before [acting on the motion], we can only regard [the court's] actions as the functional equivalent of the granting of such a motion. . . . [T]he [trial] court exercised direct authority over the [withdrawn] cases, which had the same effect as restoring those cases to the docket." (Citation omitted; internal quotation marks omitted.) Id., 198. "In other words, the [trial] court considered the . . . motion [to intervene] on its merits, just as it would have done had the [third party] filed, and the court granted, a motion to restore the [withdrawn] cases to the docket." (Internal quotation marks omitted.) Id., 199. Our Supreme Court concluded that "the actions of the trial court reasonably cannot be treated as anything other than the restoration of the withdrawn cases to the docket." Id., 200–201.

The court's reliance on *Rosado* in this case is misplaced. The plaintiff argues that, after it filed the withdrawal of the withdrawal of its action, the court

withdrawal pertained only to the plaintiff's action and not to the defendant's counterclaim, and that the entire case should therefore not have been closed. According to counsel, the clerk agreed and entered the notation on the printout, reinstating the counterclaim to the docket. We stress that we do not credit arguments made by counsel as evidence, but merely mention this argument as an example of an alternative explanation that could be ascribed to that electronic notation and the lack of any evidentiary support as to its actual meaning in the record.

"exercised direct authority over the [case]"; *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, supra, 276 Conn. 198; when it considered its motion for nonsuit and motion to dismiss. Those pleadings, however, were not filed in furtherance of the plaintiff's action but, rather, were filed in defense of the defendant's counterclaim. The plaintiff failed to file any pleading in furtherance of *its* action from the time it filed the withdrawal of the withdrawal of its action on September 19, 2013, until two years later, in March, 2015, when the case appeared on the dormancy calendar. Even then, the plaintiff did not file any motion that required the court's action, and the court thus did not take any action, that reasonably could have been construed as implicitly restoring the plaintiff's action to the docket. In the absence of any such action, or a timely filed motion to restore, we conclude that the court abused its discretion in restoring the plaintiff's case to the docket.

The judgment on the plaintiff's complaint is reversed and the case is remanded with direction to sustain the defendant's objection to the plaintiff's withdrawal of the withdrawal of its action.

In this opinion the other judges concurred.

RICHARD KENT *v.* FLORENCE DIPAOLA
(AC 38347)

DiPentima, C. J., and Kahn and Sullivan, Js.*

Syllabus

The plaintiff appealed to this court from the judgment of the trial court dissolving his marriage to the defendant and issuing certain financial orders regarding the defendant's pensions, the marital home and the percentage of the marital estate that was awarded to him. *Held*:

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

1. The plaintiff could not prevail on his claim that the trial court improperly failed to include the defendant's pensions in its division of the parties' marital property and to credit the testimony of his pension actuary as to the present value of the defendant's pensions: that court did in fact value and distribute the defendant's pensions, as it accounted for the pensions in its financial orders when it awarded all of the income from the pensions to the defendant and, in exchange, offset the monthly income from the pensions by ordering that the plaintiff would not be required to pay child support, which constituted a downward deviation from the presumptive amount in the child support guidelines, and by considering that the pensions had accrued substantially prior to the marriage and that it had ordered little financial contribution from the plaintiff to the defendant, and there was no merit to the plaintiff's claim that the court should have made that distribution more clear or placed specific values on its determinations, the plaintiff having failed to move for an articulation; moreover, the plaintiff's claim that the court improperly failed to credit the testimony of his pension actuary as to the present value of the defendant's pensions was unavailing, as the method of valuation for pension benefits is left to the discretion of the trial court, which considered the testimony of the actuary and elected to use a modified present division method in its valuation of the pensions, and, therefore, it was not necessary for the court to rely on the testimony from the actuary.
2. The plaintiff could not prevail on his claim that the trial court abused its discretion in awarding him 33 percent, and not 50 percent, of the marital home; the court, which thoughtfully and carefully considered the testimony, exhibits and relevant statutory factors in dividing the marital property, found that the defendant had purchased the home prior to the marriage, that she had made a 20 percent down payment on the home, and that, although the plaintiff made minor financial contributions to home improvements, the defendant was solely responsible for major home improvements and made greater economic and noneconomic contributions during the marriage.
3. The trial court did not abuse its discretion in its division of the marital estate; the plaintiff's claim that the trial court improperly awarded him only 33 percent of the marital estate by failing to account adequately for his age, health, station, occupation, amount and sources of income, earning capacity, vocational skills and employability was essentially a recitation of his testimony during the trial, the plaintiff failed to cite any authority for his claim that the court should have ordered a more equitable distribution of property and assets, and the trial court considered the evidence and applied the relevant factors set forth in the statute (§ 46b-81) governing the distribution of assets in a dissolution action.

Argued September 20—officially released December 5, 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, *Colin*, *J.*; judgment dissolving the marriage and granting certain other relief, from which the plaintiff appealed to this court. *Affirmed.*

David V. DeRosa, for the appellant (plaintiff).

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

Opinion

DiPENTIMA, C. J. The plaintiff, Richard Kent, appeals from the judgment of the trial court setting forth financial orders incident to the dissolution of his marriage to the defendant, Florence DiPaola. On appeal, the plaintiff claims that the court erred with respect to its orders regarding the defendant's pensions, the marital home and the percentage of the marital estate that was awarded to him. We disagree and, accordingly, affirm the judgment.

The following facts, as set forth in the court's memorandum of decision, and procedural history are relevant to our discussion. The parties met in March, 1989, and soon thereafter, the plaintiff moved into the defendant's home.[1] The parties were married in March, 1998, and have a minor child.[2] During the course of their relationship, the parties kept their finances separate. They also

[1] The court stated: "The [defendant's] Stamford home where the parties lived together throughout the marriage was purchased by the defendant in 1988, long before the parties' marriage, for $595,000 with 20 [percent] down. The plaintiff declined the defendant's offer earlier in the marriage to purchase an equity interest in the home; as a result, the home has always been in the defendant's sole name."

[2] The parties used a surrogate, and the child was born when the plaintiff was fifty-one years old and the defendant was sixty years old.

maintained records of "virtually everything" that they purchased, and the "receipts were then tallied by the plaintiff and monitored by him through a monthly spreadsheet so that each party could pay their share. This included keeping track of such small details as how much was spent on phone calls, hot dogs, stamps, dog food and cookies."

In the late 1990s, the plaintiff worked in the financial sector, earning $168,000 in 1998. In 2004, he switched careers and became a realtor. In 2013, he earned approximately $76,000, but in 2014, only $7437. As a result of this decreased income, the plaintiff, who was sixty-three years old at the time of trial and had no health conditions that significantly impacted his ability to work,[3] had been using his retirement accounts to pay his living expenses. The defendant, who was nearly seventy-two years old at the time of trial,[4] was retired following "an impressive and accomplished work history that spanned forty-four years. She worked her way up the corporate ladder from a junior entry level position to a managing director."

The defendant had several pensions in pay status that provided her with approximately $50,000 in gross annual income. The plaintiff presented a pension actuary as an expert witness. The pension actuary testified that the present value of the defendant's pensions totaled $662,606. The defendant also received social security benefits for the child of approximately $1350 per month.

[3] The court noted that the plaintiff took medication daily for a number of issues and, at some point, had prostate cancer.

[4] With respect to the defendant's health, the court stated that she "was diagnosed with breast cancer in 2008. She had surgery at that time. In late 2014, she learned that the cancer had recurred and she [was] considering another operation. She also needs eye surgery and surgery on each hand."

With respect to its financial orders,[5] the court expressly considered all of the relevant factors set forth in General Statutes § 46b-81. The court stated: "In addition, the orders reflect the following specific considerations: (1) as previously noted, the defendant's contributions to the acquisition, preservation and appreciation of the assets is far greater than the plaintiff's contributions; (2) the defendant is being ordered by this decision to be more responsible than the plaintiff for the financial support of the parties' minor child; (3) the plaintiff's age, health and current employment status lead this court to conclude that he has a greater opportunity than the defendant to acquire assets and income postdissolution; (4) the plaintiff is more responsible than the defendant for the causes of the breakdown of the marriage;[6] (5) the defendant's noneconomic contributions to the marriage are far greater than those made by the plaintiff; (6) each party had a career and wealth at the time of the marriage, and the defendant had substantially greater premarital assets; (7) each party is fully capable of supporting themselves; (8) the length of the marriage; (9) the plaintiff has provided little to no financial support to the defendant for the benefit of the child since 2012; and (10) the unusual financial structure of this marriage where each party essentially kept their finances separate from each other, except for a sharing of some expenses for a substantial period of time." (Footnote added.)

The court concluded that it was not necessary to calculate the value of the parties' assets at the time of the marriage with "mathematical precision . . . ." The court stated: "Based upon the evidence, the court does

[5] The court accepted and incorporated into the dissolution judgment the parenting plan of the parties, which provided for joint legal custody, with the defendant having primary physical custody of the minor child.

[6] The court noted that this factor was not significant in the overall disposition of the present case.

find, however, that the defendant came to this marriage with far greater assets than the plaintiff, including, most significantly, the Stamford home where the parties resided together, and that the defendant's economic and noneconomic contributions to the acquisition, preservation and appreciation in the value of the parties' estates were substantially greater than those made by the plaintiff."

The court divided the combined current assets of the parties, totaling $4,619,655,[7] awarding 33 percent to the plaintiff and 67 percent to the defendant. To effectuate this division, the court ordered a distribution from the defendant to the plaintiff in the amount of $300,000 pursuant to § 46b-81.

The court did not include the defendant's pensions in this division. Instead, the court accounted for the defendant's pensions in a separate calculation. The court stated: "The present value of the defendant's pensions that are all currently in pay status are not included in this total since those pensions were substantially accrued prior to the marriage and are being treated as an income stream that will be used to support the defendant and the minor child with little financial contribution being ordered today to be paid by the plaintiff."

The court stated that, as a result of the division of assets and the defendant's receipt of social security income for the minor child, it was ordering that the defendant be responsible for the child's educational expenses and would not order the plaintiff to pay child support. In further explaining this order, the court noted the presumptive child support award under the applicable guidelines[8] would require the plaintiff to pay $257

[7] The court determined that the defendant's assets totaled $3,393,418 and that the plaintiff's assets totaled $1,226,247.

[8] "The child support guidelines are the rules, principles, schedule and worksheet established under sections 46b-215a-1, 46b-215a-2b, 46b-215a-3, 46b-215a-4a and 46b-215a-5b of the Regulations of Connecticut State Agen-

per week to the defendant. The court stated: "Based upon the division of assets set forth in this decision, including the recognition that the defendant has a steady pension income stream and the plaintiff does not, a strict application of the guidelines in this case would be unfair and inappropriate, and a deviation on that basis from the presumptive support award is warranted." The court deviated from the child support guidelines on an equitable basis: the defendant, fully retired with a debt-free home, did not need financial support from the plaintiff, who was not similarly situated. Finally, the court ordered the defendant to be liable for the child's unreimbursed medical and dental expenses, and awarded the plaintiff $40,000 for attorney's fees.[9] This appeal followed.

Before addressing the specific claims raised by the plaintiff, we set forth certain relevant legal principles and our standard of review. "The purpose of a dissolution action is to sever the marital relationship, to fix the rights of the parties with respect to alimony and child support . . . [and] to divide the marital estate . . . ." (Internal quotation marks omitted.) *Rozsa* v. *Rozsa*, 117 Conn. App. 1, 11, 977 A.2d 722 (2009).

Section 46b-81 governs the distribution of the assets in a dissolution case. *Gyerko* v. *Gyerko*, 113 Conn. App. 298, 303, 966 A.2d 306 (2009). That statute authorizes the court to assign to either spouse all, or any part of, the estate of the other spouse. Id., 312. "In fixing the nature and value of the property, if any, to be assigned, the court, after considering all the evidence presented

cies for the determination of an appropriate child support award, to be used when initially establishing or modifying both temporary and permanent orders. Regs., Conn. State Agencies § 46b-215a-1 (5); see also General Statutes § 46b-215b." (Internal quotation marks omitted.) *Budrawich* v. *Budrawich*, 156 Conn. App. 628, 630 n.1, 115 A.3d 39, cert. denied, 317 Conn. 921, 118 A.3d 63 (2015).

[9] The court did not award alimony to either party.

by each party, shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates." General Statutes § 46b-81 (c); see also *Coleman* v. *Coleman*, 151 Conn. App. 613, 616–17, 95 A.3d 569 (2014).

Our standard of review is well established. "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. . . . This standard of review reflects the sound policy that the trial court has the opportunity to view the parties first hand and is therefore in the best position to assess all of the circumstances surrounding a dissolution action, in which such personal factors such as the demeanor and the attitude of the parties are so significant. . . .

"Importantly, [a] fundamental principle in dissolution actions is that a trial court may exercise broad discretion in . . . dividing property as long as it considers all relevant statutory criteria. . . . While the trial court must consider the delineated statutory criteria [when allocating property], no single criterion is preferred over others, and the court is accorded wide latitude in varying the weight placed upon each item under the peculiar circumstances of each case. . . . In dividing

up property, the court must take many factors into account. . . . A trial court, however, need not give each factor equal weight . . . or recite the statutory criteria that it considered in making its decision or make express findings as to each statutory factor." (Citation omitted; internal quotation marks omitted.) *Wood* v. *Wood*, 160 Conn. App. 708, 720–21, 125 A.3d 1040 (2015); see also *O'Brien* v. *O'Brien*, 326 Conn. 81, 121–22, 161 A.3d 1236 (2017); *Emerick* v. *Emerick*, 170 Conn. App. 368, 378, 154 A.3d 1069, cert. denied, 327 Conn. 922, A.3d (2017). With these principles in mind, we now turn to the specific claims of the plaintiff.

I

The plaintiff first claims that the court erred with respect to its orders regarding the defendant's pensions. Specifically, he contends that the court improperly failed (1) to include the pensions in the division of the marital property and (2) to credit the testimony of his pension actuary as to the present value of the pensions. We conclude that, contrary to the plaintiff's claim, the court accounted for the pensions in its financial orders and, considering the totality of its orders, did not abuse its discretion in its valuation or distribution of the pensions. Further, we are not persuaded that the court improperly disregarded the testimony of the plaintiff's pension actuary.[10]

The following additional facts are necessary for our discussion. During her career, the defendant worked for a number of companies, including GE Capital, Xerox, Citibank, Bank of America and MetLife.[11] As a result,

[10] As a result of these conclusions, we need not address the plaintiff's claim that the court's deviation from the child support guidelines would remain valid and severable from any error with respect to the division of the parties' assets.

[11] The court noted that "the plaintiff did nothing to assist in his wife's career advancement; in fact, at times he jeopardized his wife's career by making unauthorized stock trades that subjected the defendant to possible disciplinary action."

she received several pensions that were in pay status at the time of trial and provided her with $961 per week, or approximately $50,000 per year, of gross income. The plaintiff presented a pension actuary as an expert witness. The court stated: "The pension [actuary] testified as to the current present value of the defendant's pension benefits and also applied a coverture fraction to determine what [the pension actuary] described as the marital portions of those pensions with the numerator being the number of years that the benefit was earned during the marriage and the denominator being the number of total years that the benefit was earned with that employer."

The pension actuary determined that the defendant's Citigroup pension had a present value of $68,415, but that the marital value was $0 because it had been earned prior to the marriage. The pension actuary further concluded that a pension from Aegon and the GE pensions had present values of $181,060 and $413,131, respectively. The pension actuary concluded that the present value of the pensions was $662,606.

The court, without specifically discrediting or rejecting the testimony of the pension actuary, noted some concerns with her conclusions. First, the court observed that "as to the GE pension, the [pension] actuary incorrectly assumed that the defendant's career at GE was all during the marriage, a significant error since the vast majority of the defendant's career at GE took place prior to the marriage." It also stated that the pension actuary, in calculating the present value of the pensions, used "widely accepted mortality tables that do not account for the health of the employee whose benefit is being analyzed. In this case, with a nearly seventy-two year old woman who has a history of past and current cancer, those assumptions may not be entirely accurate."

As we noted previously, the court did not include the defendant's pensions in the property division. Instead, the court determined that the pensions had been accrued substantially prior to the marriage and treated them as income to support the defendant and the minor child to offset the "little financial contribution being ordered today to be paid by the plaintiff." The court explained that its order regarding the pensions played a role in its decision to depart from the child support guidelines and to not order the plaintiff to pay $257 per week in child support to the defendant.

Before addressing the plaintiff's specific arguments, we first set forth the legal principles relevant to this issue. "As a general framework, [t]here are three stages of analysis regarding the equitable distribution of each resource: first, whether the resource is property within . . . § 46b-81 to be equitably distributed (classification); second, what is the appropriate method for determining the value of the property (valuation); and third, what is the most equitable distribution of the property between the parties (distribution)." (Internal quotation marks omitted.) *Cunningham* v. *Cunningham*, 140 Conn. App. 676, 681, 59 A.3d 874 (2013); see also *Anderson* v. *Anderson*, 160 Conn. App. 341, 352, 125 A.3d 606 (2015).

Pension benefits constitute property under § 46b-81. *Cifaldi* v. *Cifaldi*, 118 Conn. App. 325, 331, 983 A.2d 293 (2009).[12] "Pension benefits constitute a form of deferred compensation for services rendered. . . . Pension benefits are widely recognized as among the most valuable

[12] Our Supreme Court, however, has stated explicitly that "[t]raditional property principles, although relevant . . . are not determinative of whether an interest constitutes property under § 46b-81." (Citation omitted.) *Bender* v. *Bender*, 258 Conn. 733, 748, 785 A.2d 197 (2001); see also *Ranfone* v. *Ranfone*, 103 Conn. App. 243, 251, 928 A.2d 575 (when dividing marital property pursuant to § 46b-81, court, in effort to observe equitable purpose of statutory distribution scheme, looks to substance and not mere form), cert. denied, 284 Conn. 940, 937 A.2d 698 (2007).

assets that parties have when a marriage ends. . . . Nevertheless, there is no set formula that a court must follow when dividing the parties' assets, including pension benefits." (Citations omitted; internal quotation marks omitted.) *Martin* v. *Martin*, 101 Conn. App. 106, 111, 920 A.2d 340 (2007); *Casey* v. *Casey*, 82 Conn. App. 378, 386–87, 844 A.2d 250 (2004); see also *Stamp* v. *Visconti*, 51 Conn. App. 84, 86, 719 A.2d 1223 (1998) (pension benefits are form of deferred compensation, not mere gratuities because employee receives lesser present compensation in exchange for future benefits).

In *Krafick* v. *Krafick*, 234 Conn. 783, 663 A.2d 365 (1995), our Supreme Court discussed the various methods of valuing and distributing pension benefits. Under the present value method, the court is required to "determine the present value of the pension benefits, decide the portion to which the nonemployee spouse is entitled, and award other property to the nonemployee spouse as an offset to the pension benefits to which he or she is otherwise entitled." (Internal quotation marks omitted.) Id., 800. This calculation for the present value method requires generally accepted actuarial principles.[13] Id., 801.

A second method, known as the present division, requires the court to determine, at the time of trial, the percentage share of the pension to which the nonemployee spouse is entitled. Id., 803. "In other words, the court will declare that, upon maturity, a fixed percentage of the pension be distributed to each spouse." Id.; see also *Bender* v. *Bender*, 258 Conn. 733, 758, 785 A.2d 197 (2001). This method credits both parties for the

[13] "Calculating [the present value of a pension] may require taking actuarial testimony, which generally involves: (1) determining future benefits, taking into consideration the date of the employee spouse's retirement, postmarital salary, future taxes and the duration of benefits; and (2) discounting for present value, the probability of mortality and the probability of forfeiture." *Bender* v. *Bender*, supra, 258 Conn. 756–57.

proportionate labors toward the pension. *Bender* v. *Bender*, supra, 759. This method does not require expert testimony from an actuary. Id., 762–63.

Our Supreme Court determined that the method of valuation is to be left to the discretion of the trial court. "We conclude that it is within the trial court's discretion . . . to choose, on a case-by-case basis, among the present value method, the present division method of deferred distribution, *and any other valuation method that it deems appropriate in accordance with Connecticut law that might better address the needs and interests of the parties*. . . . The touchstone of valuation, as well as the ultimate distribution of pension benefits, is the court's power to act equitably." (Citation omitted; emphasis added; internal quotation marks omitted.) Id., 760. It further noted that there was no general consensus among other jurisdictions as to the preferred valuation and division method, thereby leaving it to the discretion of the trial court. Id., 775 n.11. With these principles in mind, we turn to the plaintiff's specific arguments.

A

The plaintiff first argues that the court improperly failed to include the pensions as property of the marriage. Specifically, he contends that in dividing the marital property 33 percent to him and 67 percent to the defendant, the court erred in not including the pensions. We are not persuaded.

This argument requires us to interpret the judgment of the trial court. "The construction of a judgment is a question of law for the court. . . . We review such questions of law de novo. . . . As a general rule, judgments are construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the

judgment. . . . The judgment should admit of a consistent construction as a whole. . . . To determine the meaning of a judgment, we must ascertain the intent of the court from the language used and, if necessary, the surrounding circumstances." (Citation omitted; internal quotation marks omitted.) *Lewis* v. *Lewis*, 154 Conn. App. 233, 243, 105 A.3d 344 (2014); see also *Avery* v. *Medina*, 174 Conn. App. 507, 517, 163 A.3d 1271, cert. denied, 327 Conn. 927, A.3d (2017).

The plaintiff correctly states that the court excluded the defendant's pensions from the marital assets when it awarded one third of the assets to the plaintiff and two thirds to the defendant. His claim falters, however, with his contention that the court failed to account for the pensions in its financial orders.[14] To the contrary, the court offset the monthly income from the pensions by ordering a downward departure from the child support guidelines, and in consideration of its finding that the pensions had been accrued substantially prior to the marriage and that it had ordered "little financial contribution" from the plaintiff to the defendant.

In discussing the defendant's pensions, the court summarized the testimony of the pension actuary and noted that certain aspects were problematic. It then stated that the plaintiff had done "nothing to assist" the defendant's career and in fact had jeopardized it by making unauthorized stock trades that subjected her to possible discipline. The court also noted that the plaintiff had provided little to no noneconomic contributions, and that the defendant was primarily responsible for the upbringing of the child and the running of the household.

The court awarded all of the income from the defendant's pensions, $961 per week or approximately

[14] See, e.g., *Purnell* v. *Purnell*, 95 Conn. App. 677, 683, 897 A.2d 717 (because fact on which party based claim did not find support in record, claim must fail on appeal), cert. denied, 280 Conn. 903, 907 A.2d 91 (2006).

$50,000 in gross annual income, to the defendant. In exchange, the court ordered that the plaintiff would not be required to pay child support, a downward deviation from the presumptive amount of $257 per week. In making its orders, the court also relied on its finding that the defendant's pensions had been accrued substantially prior to the marriage. This modified version of the present division method is well within the court's discretion in applying the factors of § 46b-81 (c). See *Bender* v. *Bender*, supra, 258 Conn. 760–61.

Contrary to the plaintiff's argument, the court did in fact value and distribute the defendant's pensions.[15] Rather than include them in those marital assets subject to the percentage division between the parties, the court offset the pensions with the order of no child support and the consideration that the pensions had been accrued substantially prior to the marriage. See *Ranfone* v. *Ranfone*, 103 Conn. App. 243, 253, 928 A.2d 575 (touchstone of valuation and ultimate distribution of pension benefits is court's power to act equitably), cert. denied, 284 Conn. 940, 937 A.2d 698 (2007); *Kunajukr* v. *Kunajukr*, 83 Conn. App. 478, 481–82, 850 A.2d 227 (issues involving financial order entirely interwoven and carefully crafted mosaic, each element of which may be dependent on the other), cert. denied, 271 Conn. 903, 859 A.2d 562 (2004).[16]

[15] In *Krafick* v. *Krafick*, supra, 234 Conn. 805–806, the trial court failed to consider the plaintiff's pension interest as an asset because it did not have a liquid value and the court did not employ a substitute value. Our Supreme Court concluded that it was an abuse of discretion "to reject present value or any value for vested pension benefits merely because the asset is nonliquid, thereby effectively removing that property interest from the scales in determining an equitable division of all of the property before the court." Id., 806. Unlike the trial court in *Krafick*, the court in the present case did not remove the defendant's pensions from the scales, but instead balanced them against the order of no child support, and in consideration of the fact that the majority of the pensions had been earned prior to the marriage.

[16] The plaintiff argues that "[t]here is no precedent to support the Superior Court's legal authority to treat the pensions in repayment as an 'income

To the extent that the plaintiff argues that the court should have made this distribution more clear, or placed specific values on its determinations, we simply note that he could have moved for an articulation, but failed to do so. See Practice Book § 66-5. "[T]he appellant bears the burden of providing an appellate court with an adequate record for review. . . . It is, therefore, the responsibility of the appellant to move for an articulation or rectification of the record where the trial court has failed to state the basis of [a] decision . . . [or] to clarify the legal basis of a ruling. . . . [I]t is incumbent upon the appellant to take the necessary steps to sustain [her] burden of providing an adequate record for appellate review. . . . [A]n appellate tribunal cannot render a decision without first fully understanding the disposition being appealed. . . . Our role is not to guess at possibilities, but to review claims based on a complete factual record developed by a trial court." (Citations omitted; internal quotation marks omitted.) *Tonghini*

stream' instead of classifying [them] as marital property and assessing the value of that property for purposes of equitable distribution." We iterate that the court did value and distribute the defendant's pensions in accordance with the factors set forth in § 46b-81 (c). See, e.g., *Thompson* v. *Thompson*, 183 Conn. 96, 100, 438 A.2d 839 (1981) ("General Statutes §§ 46b-81 [c] and 46b-82 *both* require the trial court to consider, inter alia, the occupation and the amount and *sources of income of each of the parties when ordering property assignments* and alimony. Just as current and future wages are properly taken into account under these statutes, so may unaccrued pension benefits, a source of future income, be considered." [Emphasis added; footnote omitted.]).

Additionally, in *Brady-Kinsella* v. *Kinsella*, 154 Conn. App. 413, 421–24, 106 A.3d 956 (2014), cert. denied, 315 Conn. 929, 110 A.3d 432 (2015), which is cited in the defendant's brief, we concluded that it was not an abuse of discretion for the court to award the defendant her gross weekly pension payment of $1197, offset by the following payments to the plaintiff: "$125,841 . . . to equalize the distribution of the real property, deferred compensation accounts, and automobiles. In addition, the court ordered the defendant to pay a weekly sum of $172 in child support, maintain life insurance and pay 61 percent of the minor child's unreimbursed medical expenses, as well as the extracurricular expenses." Id., 424. We conclude, therefore, that the use of a pension in repayment as an offset to other financial orders does have support in our law.

v. *Tonghini*, 152 Conn. App. 231, 237–38, 98 A.3d 93 (2014). Accordingly, we conclude that this argument has no merit.

B

The plaintiff next argues that the court improperly failed to credit the testimony of the pension actuary as to the present value of the pensions.[17] Specifically, he contends that the court "abused its discretion in not valuing the retirement assets when the court had the present value of the assets, and all the evidence necessary to make the present value calculation with the coverture fraction for the [GE] pension." He further claims that the court's stated reasons for not crediting the pension actuary's use of the present value of the pensions, that is, that the majority of the GE pension was earned prior to the marriage and that the pension actuary used a widely accepted mortality table that did not account for the specific health conditions and history of the defendant, were not sufficient reasons to reject her testimony. We conclude that this argument is without merit because the court, in its discretion, used the present division method to value the defendant's pensions.

As previously stated, a court may value and distribute pension benefits according to either the present value or present division methods. *Krafick* v. *Krafick*, supra, 234 Conn. 800–803. The method of valuation for pension benefits is left to the discretion of the trial court. *Bender* v. *Bender*, supra, 258 Conn. 760. Here, the court heard and considered the testimony of the pension actuary and elected to use a modified present division method in

[17] We note that "[i]t is the quintessential function of the finder of fact to reject or accept evidence and to believe or disbelieve any expert testimony. . . . The trier may accept or reject, in whole or in part, the testimony of an expert." (Internal quotation marks omitted.) *Sander* v. *Sander*, 96 Conn. App. 102, 107, 899 A.2d 670 (2006).

its valuation of the defendant's pensions. Accordingly, it was unnecessary for the court to rely on the testimony from the pension actuary. See id., 762; see also *Ranfone* v. *Ranfone*, supra, 103 Conn. App. 253. We conclude, therefore, that the plaintiff's claims regarding the testimony of the pension actuary fail.

II

The plaintiff next claims that the court abused its discretion in awarding him 33 percent, and not 50 percent, of the marital home. Specifically, he argues that "he is entitled to 50 [percent] and not 33 [percent] of the marital home because he paid a substantial portion of the mortgage until it was paid off and thereby contributed to the preservation and appreciation of the marital home because [he] helped [extinguish] the mortgage over a twenty-four year period." We are not persuaded.

The court noted that the marital home had been purchased by the defendant in 1988, prior to the marriage, for $595,000, with a 20 percent down payment. It also found that "[t]he plaintiff declined the defendant's offer earlier in the marriage to purchase an equity interest in the home; as a result, the home has always been in the defendant's sole name. The mortgage was paid off in 2009. The plaintiff's rental payments to the defendant throughout the parties' relationship were of some assistance to the defendant and helped to make sure the mortgage was paid early. However, the defendant was able to pay off her mortgage nine years early primarily due to her additional principal payments over the years as a result of her substantial income. It is likely that, even without the plaintiff's assistance, she would have paid off the mortgage well before the end of the thirty year term." The court determined the value of the marital home to be $787,500 at the time of trial.

We have iterated that "[t]here is no set formula the court is obligated to apply when dividing the parties'

assets and . . . the court is vested with broad discretion in fashioning financial orders." (Internal quotation marks omitted.) *Bonito* v. *Bonito*, 140 Conn. App. 697, 707, 59 A.3d 882 (2013); see also *Sapper* v. *Sapper*, 109 Conn. App. 99, 107–108, 951 A.2d 5 (2008) (courts not bound to specific formula and not required to ritualistically recite statutory criteria considered in dividing marital assets).

In the present case, the court found that the defendant had purchased the home prior to the marriage and made a 20 percent down payment.[18] It also determined that although the plaintiff had made "some relatively minor financial contributions to home improvements," the defendant was solely responsible for major home improvements such as a new roof. It also found that the defendant had made greater economic and noneconomic contributions during the marriage.

Under these facts and circumstances, the plaintiff has failed to demonstrate an abuse of discretion with respect to the division of the marital home. We are mindful that "[o]n the basis of the plain language of § 46b-81, there is no presumption in Connecticut that marital property should be divided equally prior to applying the statutory criteria." (Internal quotation marks omitted.) *Desai* v. *Desai*, 119 Conn. App. 224, 238, 987 A.2d 362 (2010). The court thoughtfully and carefully considered the testimony, exhibits and relevant statutory factors in dividing the marital property. The court's memorandum of decision sets forth the reasoning underlying its exercise of discretionary powers. See, e.g., *Bento* v. *Bento*, 125 Conn. App. 229, 233, 8 A.3d 531 (2010). Accordingly, we disagree with the plaintiff that the court abused its discretion with respect to the division of the marital home.

[18] We also note that the court "found the defendant to be a credible, thoughtful and careful witness. The plaintiff was not as credible as the defendant."

III

The plaintiff finally claims that the court improperly awarded him only 33 percent of the marital estate. Specifically, he argues that the court failed to account adequately for his age, health, station, occupation, amount and sources of income, earning capacity, vocational skills and employability. We disagree.

This section of the plaintiff's brief essentially recites his testimony during the trial and fails to cite any authority for his claim that the court should have ordered a more equitable distribution of property and assets. As we stated in parts I and II of this opinion, the court considered the evidence and applied the relevant factors set forth in § 46b-81, and its financial orders did not constitute an abuse of discretion. The plaintiff's brief appears to ask this court to afford him a "second bite at the apple." Significantly, he did not direct our attention to any authority that would support this request. Accordingly, we conclude that the court did not abuse its discretion as to its division of the marital estate.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* DARYL PETITT
(AC 38993)

Lavine, Elgo and Flynn, Js.

Syllabus

Convicted, following a jury trial, of three counts of the crime of sale of narcotics, the defendant appealed to this court. The defendant's conviction arose from three drug transactions between the defendant and an undercover police officer, T, who, after each transaction, handed the drugs off to a supervising police officer, C. The drugs were later delivered to the state laboratory, where a forensic science examiner, V, analyzed the drugs and confirmed that they were cocaine. At trial, C identified,

solely on the basis of markings on the packaging and the number of bags, exhibit 1 as the cocaine that the defendant had sold to T during the first sale, exhibit 2 as the cocaine sold during the second sale, and exhibit 3 as the cocaine sold during the third sale. Exhibit 1 was admitted into evidence without objection by the defendant, but the trial court sustained the defendant's objections to exhibits 2 and 3, concluding that there was an inadequate foundation for the evidence because C did not have firsthand knowledge that would tie the cocaine to the defendant. T later testified and identified all three exhibits as the cocaine he had purchased from the defendant and subsequently handed off to C. The court overruled the defendant's renewed objections to exhibits 2 and 3 and admitted the exhibits into evidence, stating that the evidence had been authenticated and that the weight given to such evidence was a matter for the jury. *Held*:

1. The trial court did not abuse its discretion in admitting into evidence exhibits 2 and 3, the cocaine from the second and third sales, as that court could have determined with reasonable probability that the contents of those exhibits were in substantially the same condition as when the offense was committed: the chain of custody of each batch of cocaine was reasonably traced to permit the jury to find that what was turned over by T to C, was subsequently tested in the state laboratory, and appeared in court, was the cocaine purchased from the defendant, as the testimony of T and C identifying the cocaine completed the chain of custody from the defendant to the securing of the drugs, and the testimony of V, coupled with an exhibit showing when the cocaine was delivered to the laboratory, completed the chain of custody and provided confirmation that the cocaine seized from the defendant was what V received and tested; furthermore, this court declined to hold that evidence is inadmissible unless it is either unique or distinguishable on its own or unless the first officer to encounter the evidence puts a distinguishing mark on it, as it was not practical to require all cooperating civilian buyers of narcotics to mark, change or alter the appearance of evidence or its packaging before delivering it to the supervising police officers or to require more of undercover police officers than from other cooperating witnesses, and this court was bound by precedent established by our Supreme Court upholding the validity of the chain of custody as a proper means of authentication.
2. The defendant could not prevail on his claim that the trial court committed plain error by admitting into evidence exhibit 1, the cocaine from the first sale between the defendant and T, which was based on his claim that T, who was the only police officer who saw the drug transactions, could not authenticate the drugs; exhibit 1 would have been properly admitted into evidence even if the defendant had objected, as the testimony of V established that exhibit 1 was cocaine, and the testimony of T, C, and V, along with an exhibit showing when the cocaine was delivered to the laboratory, established the same chain of custody for

exhibit 1 as was established for exhibits 2 and 3, there was no obvious error affecting the fairness and integrity of the trial where the sole difference in the admissions of exhibit 1 and exhibits 2 and 3 was the defendant's failure to object, and the defendant did not show that any manifest injustice would result from the failure to grant the relief he sought.

Argued September 19—officially released December 5, 2017

Procedural History

Substitute information charging the defendant with three counts of the crime of sale of narcotics, brought to the Superior Court in the judicial district of Stamford-Norwalk, geographical area number one, and tried to the jury before *Blawie*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Daniel J. Foster, assigned counsel, for the appellant (defendant).

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo*, *Jr.*, state's attorney, and *Susan M. Campbell*, assistant state's attorney, for the appellee (state).

Opinion

FLYNN, J. Real evidence that plays an actual and direct part in the incidents giving rise to a criminal trial may be properly authenticated because it was found or seized at the crime scene. Where that real evidence is a narcotic substance, the state's proof of that narcotic character is properly authenticated by presenting testimony tracing the evidence from the time it was found or, in this case, purchased to the time it is offered in the courtroom with sufficient completeness to render it reasonably probable that what is offered is the original and has neither been changed nor altered.

The defendant, Daryl Petitt, appeals from the judgment of conviction, rendered after a jury trial, of three

counts of illegal sale of narcotics in violation of General Statutes § 21a-277 (a). On appeal, the defendant claims the trial court abused its discretion in admitting into evidence crack cocaine from the second and third sales the defendant made to an undercover police officer, who could not authenticate the drugs because he made no distinguishing mark on the contraband. The defendant also claims that the trial court committed plain error by not striking from evidence the crack cocaine from the first sale the defendant made to the officer because the evidence was not first properly authenticated. He seeks reversal of all three counts and a new trial on each of them. We conclude that because the chain of custody was properly established for all three pieces of evidence, the trial court neither abused its discretion nor committed plain error in admitting them into evidence for the jury's consideration. We accordingly affirm the judgment.

The following facts, which the jury reasonably could have found, and procedural history are pertinent to this appeal.[1] In the fall of 2013, a confidential informant informed Stamford Police Officer Michael Connelly that a man who went by the name "DP" was selling crack cocaine. The informant provided Connelly with DP's cell phone number, which one could call to make arrangements with DP to buy drugs. Connelly identified DP as the defendant and, as officer in charge, proceeded to conduct an investigation using an undercover officer.

The investigation consisted of three drug buys using money provided by Connelly, which were conducted by Waterbury Police Detective Maximo Torres acting as undercover officer. Torres wore a Kel monitoring device, which recorded and transmitted audio and

[1] It is worth noting at the outset that the state and the defendant agree on the entire chronology of events, with the defendant only disputing the genuineness of the three exhibits of cocaine presented.

global positioning system (GPS) information to other officers stationed nearby. After each sale, Torres met Connelly at a prearranged safe location and gave Connelly the drugs he purchased from the defendant.

The first sale took place on October 29, 2013. On that date, Torres called the defendant and asked for $100 worth of cocaine. The defendant agreed to sell Torres the cocaine and had Torres meet him at a bodega. There, the defendant and a man the defendant introduced as his cousin got into Torres' car. During the ride, the Kel device recorded the defendant stating that he had three bags left to sell and that he sold "base." Torres drove the two to another location, where the cousin briefly left. The cousin returned with drugs that he then handed to the defendant. Torres drove the two back to the bodega, where the defendant gave Torres six pieces of cocaine in bags in exchange for $100. The defendant and the cousin left. Torres met police at the safe area, where he gave Connelly the six bags of cocaine that he obtained from the defendant. Connelly weighed, field-tested and secured the drugs in an evidence locker pending further testing at the state laboratory.

The second sale occurred on November 5, 2013. Torres called the defendant, and they arranged to meet in downtown Stamford. Torres was met by the defendant and a woman he introduced as his girlfriend. Torres drove them to another location. While the three were in the car outside of the Stamford Police Department, the defendant exchanged six bags of cocaine with Torres for $100. Torres eventually drove the two to a restaurant and dropped them off. Torres met police at the safe area, where he gave Connelly the six bags of cocaine that he obtained from the defendant. Connelly weighed, field-tested and secured the drugs in a police property locker pending future testing at the state laboratory.

The third sale also occurred on November 5, 2013. Torres called the defendant asking for $50 worth of cocaine. Torres picked up the defendant and his girlfriend at the restaurant and drove them to an apartment complex. Upon arrival, the defendant exchanged three bags of cocaine with Torres for $50. After dropping them off, Torres met police at the safe area, where he gave Connelly the three bags of cocaine the defendant had given to him. Connelly weighed, field-tested and secured the drugs in a police property locker pending future testing at the state laboratory.

The drugs Torres purchased from the defendant, which had been weighed, field-tested, and secured by Connelly, later were delivered to the state laboratory by Stamford Police Officer Terry Lauf on June 17, 2014. Vivian Texidor, a forensic science examiner at the state laboratory, was assigned to analyze the drugs to confirm that they indeed were narcotics. She opened the packaging on June 23, 2014, but did not test the drugs until June 30, 2014. After taking photos of the drugs and weighing them, Texidor performed tests and determined that the drugs were cocaine in freebase form.[2] After testing, Texidor sealed the drugs in bags, labeled them and initialed them. At trial, Texidor identified the drugs by the label and her initials.

The defendant was charged with three counts of illegal sale of narcotics. Following a jury trial, he was convicted on all counts, and was sentenced to a total effective sentence of twelve years of imprisonment, followed by five years of special parole. This appeal followed. Additional facts will be set forth as necessary.

[2] Texidor identified the weight of each exhibit as 1.009 grams for exhibit 1, 0.952 grams for exhibit 2 and 0.512 grams for exhibit 3. Connelly had earlier identified the weights of the cocaine from the first sale weighing 1 gram, the second sale 0.9 grams and the third sale 0.6 grams.

I

The defendant first claims that the trial court abused its discretion when it admitted into evidence the cocaine from the second and third sales. The defendant argues that because Torres did not make any identifying mark on the drugs before he handed them off to Connelly, no witness could authenticate the evidence as being exactly what the defendant had sold to Torres. The state contends that the drugs were positively identified by Torres and that, even absent this positive identification, the drugs were properly authenticated through the chain of custody.

The following additional facts are pertinent to our analysis. At trial, the state introduced its exhibit 1, which Connelly identified as the six bags[3] of crack cocaine the defendant had sold to Torres during the first sale on October 29, 2013. Connelly also identified his name on the bag containing the bags of cocaine and the heat seal the Stamford Police Department put on the outer bag to prevent tampering. The state offered exhibit 1 into evidence, and it was admitted without objection.

Later, the state introduced its exhibit 2. Connelly identified his name written on the outer packaging containing the drugs and the heat seal applied by the property personnel at the Stamford Police Department. Connelly, however, had trouble identifying the evidence through the outer packaging, so he asked for permission to open the outer packaging, which the court allowed. Connelly then was able to identify the exhibit as the six bags of crack cocaine the defendant had sold Torres during the first November 5, 2013 sale. When the state subsequently offered exhibit 2 into evidence, the defendant objected. Defense counsel questioned Connelly as

[3] Although we refer to these items as bags, they are tiny knotted bits of glassine about the size of a raisin covering the cocaine.

to how he could identify the evidence. Connelly replied that, between the markings on the packaging and the number of bags of cocaine inside, he knew the evidence was what he had received from Torres. The trial court sustained the objection, concluding that there was an inadequate foundation for the evidence because, although Connelly testified that he had received the cocaine from Torres, Connelly did not have firsthand knowledge that would tie the cocaine to the defendant.[4]

Similarly, when the state introduced its exhibit 3, Connelly again had trouble seeing through the outer packaging. After opening it, Connelly identified his name on the evidence. He then identified the three bags of cocaine the defendant had sold to Torres during the second sale on November 5, 2013. The state then offered the exhibit into evidence, and the defendant again objected. The trial court sustained the objection for the same reasons as before.

Torres later testified and identified all three exhibits as the crack cocaine he had purchased from the defendant and subsequently handed off to Connelly at the prearranged locations.[5] Based on Torres' testimony, the state again offered exhibits 2 and 3 into evidence. The defendant objected to each. During voir dire, defense counsel questioned Torres as to whether there was anything on the evidence that positively identified it to him, which Torres said there was not. The trial court then asked Torres whether he put any identifying mark

[4] Although the Kel device provided audio and GPS information to the officers surveilling the sales, there was no video of the exchanges, and Torres was the only officer who saw the sales.

[5] Torres testified that, after the first sale, he "was brought to another prearranged location. At that location . . . I handed over . . . what I purchased from [the defendant] to the case officer." When later asked what, if anything, he had handed to Connelly after the second sale, Torres replied: "What was purchased from [the defendant]." When asked what he had handed off to Connelly after the third sale, Torres replied: "[T]he contraband that was purchased from [the defendant]."

on the bags himself. Torres stated he did not and that it was not common practice for him to mark evidence before handing it off. Defense counsel also asked Torres whether the Waterbury Police Department used a different label for its evidence than the Stamford Police Department, and Torres confirmed that it did use a different label. The defendant claimed that because cocaine is fungible, Torres could not positively identify the drugs because he did not mark the drugs himself and the labels on the exhibits presented at trial were different from what he would have seen as a Waterbury police officer. The trial court overruled the objections, stating that the evidence had been authenticated and that the weight given to such evidence was a matter for the jury. Accordingly, the court admitted exhibits 2 and 3 into evidence.[6]

A

Section 9-1 (a) of the Connecticut Code of Evidence provides: "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." The proponent need only advance prima facie proof that the proffered evidence is what it is claimed to be before the evidence may be admitted, with the ultimate determination of authenticity resting with the fact finder. See, e.g., *State* v. *Bruno*, 236 Conn. 514, 551, 673 A.2d 1117 (1996); *Neil* v. *Miller*, 2 Root (Conn.) 117, 118 (1794). The opposing party is free to offer evidence to discredit this prima facie showing. *Shulman* v. *Shulman*, 150 Conn. 651, 659–60, 193 A.2d 525 (1963).

[6] Although Texidor had not yet testified at the time the court admitted exhibits 2 and 3 into evidence, she later testified and identified the exhibits as being what she had tested. She further opined on their status as cocaine. This testimony, coupled with exhibit 15, which was admitted into evidence during Texidor's testimony, provided the remaining links in the chain of custody from the crime scene to the courtroom.

"For purposes of authentication . . . an adequate foundation to authenticate the exhibit would be testimony that the [real evidence] offered is the [evidence] that was found [at the scene of the crime]. The offered item may possess characteristics that are fairly unique and readily identifiable. If so, the testimony of a percipient witness . . . will be sufficient to support a finding that the [real evidence] is what it is claimed to be. On the other hand, if the offered evidence is of such a nature as not to be readily identifiable, the foundation for authentication will be substantially more elaborate. Typically, it will entail testimony that traces the chain of custody of the item from the moment it was found to its appearance in the courtroom, with sufficient completeness to render it reasonably probable that the original item has neither been exchanged nor altered." (Footnotes omitted.) 2 C. McCormick, Evidence (7th Ed. 2013) § 213, pp. 13–14.

"[I]n a criminal prosecution, the state has the burden of proving the case set forth in the information in all its material parts beyond a reasonable doubt, so that the court must find, in order to convict, that all the elements of the crime charged have been established beyond a reasonable doubt. . . . The trier must consider, however, the whole evidence, taken together, and is not bound to dissect it into unconnected fragments for a separate microscopic examination of each, regardless of its relation to the rest. . . .

"As a general rule, it may be said that the prosecution is not required or compelled to prove each and every circumstance in the chain of custody beyond a reasonable doubt; the reasonable doubt must be to the whole evidence and not to a particular fact in the case. . . . An object connected with the commission of a crime, however, must be shown to be in substantially the same condition as when the crime was committed before it can be properly admitted in evidence. . . .

"There is no hard and fast rule that the prosecution must exclude or disprove all possibility that the article or substance has been tampered with; in each case the trial court must satisfy itself in reasonable probability that the substance had not been changed in important respects. . . . The trial court must also decide under the same test of reasonable probability whether the identification and nature of contents is sufficient to warrant its reception in evidence. . . . The court must consider the nature of the article, the circumstances surrounding its preservation and custody and the likelihood of intermeddlers tampering with it in making its determination; and there is no rule which requires the state to produce as witnesses all persons who were in a position to come into contact with the substance sought to be introduced in evidence." (Citations omitted.) *State* v. *Johnson*, 162 Conn. 215, 231–33, 292 A.2d 903 (1972).

In the present case, the jury found that the defendant had sold cocaine to Torres. The defendant, though, claims, without citation to any authority, that Torres needed to positively identify the exhibits in order to authenticate them. He contends that such identification was impossible because cocaine is a fungible good that has no unique or distinguishing characteristics on its own, and Torres did not mark this specific cocaine himself. The defendant's contention, as fleshed out during counsel's oral argument before this court, is that it is incumbent on the person who first obtains the contraband from a defendant to mark it in a particular way at the time of purchase or seizure so that it has a distinguishing characteristic in order for it to be properly authenticated and admitted into evidence for the jury's consideration. The state, however, rightly points out that the items did not have to be conclusively identified through their unique or distinguishing characteristics because a chain of custody was established. The

state relies on *State* v. *Hall*, 165 Conn. 599, 345 A.2d 17 (1973), in support of its position.

In *Hall*, an undercover police officer procured drugs from the defendant, which two other officers observed. Id., 601–602. After the sale, the undercover officer handed off the drugs to one of the observing officers, who secured it, conducted a Marquis reagent test, which proved positive for narcotics, and later delivered the drugs to the toxicological laboratory for further testing. Id., 602. At trial, the drugs were admitted into evidence when one of the observing officers was able to authenticate the evidence because he saw the defendant sell the drugs to the undercover officer, who was unavailable to testify because he died prior to trial. Id., 602–605.

The defendant in the present case argues that *Hall* is inapplicable because the other police officers here did not see the transfer of drugs from the defendant to Torres. We disagree, however, and conclude that the operative piece of *Hall* that is relevant here is that *someone* who saw the sale testified to the drugs' authenticity. In *Hall*, it was one of the observing officers. Id., 604. Here, it was Torres.[7]

More on point is *State* v. *Johnson*, 166 Conn. 439, 352 A.2d 294 (1974). In *Johnson*, an undercover officer arranged to purchase heroin from a drug dealer, who

[7] We previously have declined to apply *Hall* in circumstances where either no witness saw the alleged transaction or the witness could not see what precisely changed hands. In *State* v. *Mierez*, 24 Conn. App. 543, 551–54, 590 A.2d 469, cert. denied, 219 Conn. 910, 911, 593 A.2d 136 (1991), officers could not describe what was passed from the defendant to the alleged buyer other than as "small objects," and they saw no money change hands. In *State* v. *Arbelo*, 37 Conn. App. 156, 160, 655 A.2d 263 (1995), no witness saw the alleged drug transaction. Similarly, in *State* v. *Davis*, 38 Conn. App. 621, 625, 662 A.2d 812, cert. denied, 235 Conn. 919, 665 A.2d 907 (1995), no witness saw drugs pass from the defendant to the alleged buyer. Here, because Torres was the buyer and the observing officer, and he paid the dealer the money, and took possession of the drugs those issues are not present.

needed to obtain the drugs from the defendant, his supplier. Id., 440–41. In a parking lot, the defendant threw a plastic bag into the dealer's car and left. Id., 441. When the dealer went to sell the drugs to the undercover officer, other officers converged on the scene and arrested the dealer. Id. The defendant was apprehended nearby. Id. The plastic bag was taken from the dealer by police and then delivered to the state laboratory for its contents to be tested, which confirmed that the bag contained heroin. Id. The defendant claimed the trial court erred in admitting the plastic bag and its contents because there was insufficient proof of identification. Id., 442. The trial court admitted the evidence after the dealer and police officers identified the bag. Id., 442–43. The dealer testified that the defendant threw a bag into the dealer's car and that the exhibit looked like the same bag the defendant tossed to him, with the only difference being the location of the elastic on the bag. Id., 442. The officer who arrested the dealer testified that the exhibit was the bag he seized from the dealer and then turned over to another officer, who testified that the exhibit was the bag he received and then delivered to the state laboratory. Id., 442–43. At no point does the opinion suggest that anyone marked the bag. Our Supreme Court found no error because "[t]he trial court must decide under the test of reasonable probability whether the identification and nature of contents are sufficient to warrant the reception in evidence of an offered exhibit, and this ruling of the trial judge may not be overturned except for a clear abuse of discretion" which our Supreme Court did not find. Id., 443.

In the present case, the defendant's argument is no different from the argument that our Supreme Court rejected forty-three years ago. In *Johnson*, the dealer, the arresting officer and the officer who secured the

drugs all testified. Id., 442–43. Here, Torres and Connelly provided the same complete chain from the defendant to the drugs' securing. In both cases, there was evidence that, once secured, the drugs were then delivered to the state laboratory, which confirmed the presence of the narcotics in the items seized. Id., 441. Our Supreme Court in *Johnson* found no abuse of discretion in permitting such identification of contraband by an admitted drug dealer who purchased from a supplier; id., 443; we see no abuse of discretion in the admission of such identification by an undercover officer making a supervised controlled purchase, where a chain of custody was traced.

The trial court admitted exhibits 1, 2 and 3 as case law permitted it to do. See *State* v. *Anonymous (83-FG)*, 190 Conn. 715, 724–25, 463 A.2d 533 (1983). Texidor's later testimony coupled with exhibit 15, which documented when Lauf delivered the bags of cocaine to the state laboratory, completed the chain and provided confirmation that the cocaine seized from the defendant was what Texidor received and tested. This chain was traced before the jury commenced deliberation and the seized cocaine evidentiary exhibits were given to them. "It is not unusual to admit an exhibit into evidence before its relationship to the issues of a case has been established. . . . This procedure may expedite the trial, and it is ordinarily not prejudicial because the exhibit may be stricken if the necessary evidentiary foundation is not eventually laid." (Citations omitted.) Id.

Thus, the trial court here, in reasonable probability, could have determined that the contents of exhibits 2 and 3 were in substantially the same condition as when the offense was committed, so as to render the exhibits admissible in evidence, especially in light of all of the other evidence tending to support the reasonable inference that what the defendant sold to Torres was indeed

cocaine. The chain of custody of each batch of contraband cocaine was reasonably traced to permit the jury to find that what was turned over by Torres to Connelly and appeared in court was the cocaine purchased from the defendant. Thus, the trial court did not abuse its discretion in admitting exhibits 2 and 3 into evidence.

B

The only alternative to the defendant's claim that we can glean from his arguments is that he is asking this court to hold that evidence is inadmissible unless it is either unique or distinguishable on its own or the first officer to encounter the evidence puts a distinguishing mark on it. Not all persons who participate in controlled narcotic purchases are police officers; some are cooperating civilians. It is not practical to require all such cooperating buyers to mark, change or alter the appearance of evidence or its packaging before delivering it to the supervising police officers or to require more of undercover police officers than from other cooperating witnesses. Such intervention would raise questions about its admissibility in an altered state. Furthermore, such a holding would eliminate the chain of custody as a valid option for authentication. Given the extent of Supreme Court precedent upholding chain of custody authentications, we decline to do so.[8] "[I]t is well established that this court, as an intermediate appellate tribunal, is not at liberty to discard, modify, reconsider, reevaluate or overrule the precedent of our Supreme Court." (Internal quotation marks omitted.) *St. Joseph's High School, Inc.* v. *Planning & Zoning Commission*, 176 Conn. App. 570, 595, 170 A.3d 73 (2017). We, thus, are bound by precedent established by our Supreme

[8] The defendant's claim would require proof beyond a reasonable doubt for this one link in the chain, when it is clear from our case law that not every step in a chain of custody needs to be proved beyond a reasonable doubt; *State* v. *Johnson*, supra, 162 Conn. 231–33; a point that the defendant concedes on appeal.

Court, our highest court and court of last resort in upholding the validity of the chain of custody as a proper means of authentication.[9]

II

The defendant also claims that his conviction should be reversed because the trial court committed plain error in its admission, without objection by the defendant, of exhibit 1, the cocaine from the first sale between the defendant and Torres. We disagree.

"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 [discernible] on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . This determination clearly requires a review of the plain error claim presented in light of the record. . . . [T]he plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice." (Citations omitted; internal quotation marks omitted.) *State* v. *McClain*, 324 Conn. 802, 812, 155 A.3d 209 (2017); see also Practice Book § 60-5 ("The court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. The court may in the interests of justice notice plain error not brought to the attention of the trial

[9] We note that the trial court charged the jury, in part, on the chain of custody, stating: "Where . . . the state relies in whole or in part on circumstantial evidence to prove an element of a crime, although each link in the chain of evidence to support it need not be proven beyond a reasonable doubt, the cumulative impact of that evidence must, in order to support that inference, convince you beyond a reasonable doubt that the element has been proven." This instruction was not objected to, and neither party has addressed it in the arguments.

court."). In this case, we conclude that there was no error.

The testimonies of Torres, Connelly and Texidor, coupled with exhibit 15, established the same chain of custody for exhibit 1 as was established for exhibits 2 and 3. Texidor also established that exhibit 1 was cocaine. Accordingly, the exhibit would have been properly admitted into evidence even if the defendant had objected. We fail to see an obvious error affecting the fairness and integrity of the trial where the sole difference in the admissions of exhibit 1 and exhibits 2 and 3 was the defendant's failure to object. In addition, the defendant has not shown that any manifest injustice would result from the failure to grant the relief he seeks. Under these circumstances, there can be no plain error.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* SIDNEY WADE (AC 38719)

Alvord, Keller and Pellegrino, Js.

Syllabus

The defendant, who previously had been convicted of the crimes of sale of narcotics by a person who is not drug-dependent, possession of narcotics with intent to sell by a person who is not drug-dependent and manslaughter in the first degree, appealed to this court from the judgment of the trial court denying his motion to correct an illegal sentence. In a prior direct appeal from his conviction, this court reversed the defendant's conviction of manslaughter in the first degree and remanded the case with direction to reflect a conviction of manslaughter in the second degree, and to resentence the defendant in accordance with that conviction. On remand, the trial court vacated the sentences imposed on all counts, modified the judgment to reflect a conviction of manslaughter in the second degree, and resentenced the defendant on all counts. In his motion to correct an illegal sentence, the defendant claimed that the trial court, in resentencing him on all counts, violated the prohibition against double jeopardy by altering the sentences on the narcotics

related offenses, which had not been reversed. *Held* that the trial court properly denied the defendant's motion to correct an illegal sentence and rejected his double jeopardy claim, as this court previously has rejected a similar double jeopardy claim in *State* v. *LaFleur* (156 Conn. App. 289), and that case was controlling precedent with respect to the defendant's double jeopardy claim: even if the defendant had raised claims in his direct appeal that challenged only some of the counts under which he had been convicted, the fact that he exercised his right to an appeal undermined his argument that he had an expectation of finality in the sentence originally imposed for the narcotics offenses that were not reversed on appeal, as the legal consequence of his successful challenge to his manslaughter conviction resulted in a resentencing proceeding in which the trial court properly resentenced him pursuant to the remand order, and it is well established that resentencing a defendant does not trigger double jeopardy concerns when the original sentence was illegal or erroneous; moreover, when a defendant successfully challenges one portion of a sentencing package, a trial court may resentence a defendant on his conviction of the other crimes under the aggregate package theory without offending the double jeopardy clause, and the resentencing court is free to restructure the defendant's entire sentencing package, even for those components assigned to convictions that have been fully served, as long as the overall term has not expired, without offending double jeopardy.

Argued October 10—officially released December 5, 2017

Procedural History

Substitute information charging the defendant with two counts each of the crimes of sale of narcotics by a person who is not drug-dependent and possession of narcotics with intent to sell by a person who is not drug-dependent, and with the crimes of manslaughter in the first degree and manslaughter in the second degree, brought to the Superior Court in the judicial district of New Britain and tried to the jury before *D'Addabbo*, *J.*; verdict of guilty of two counts each of sale of narcotics by a person who is not drug-dependent and possession of narcotics with intent to sell by a person who is not drug-dependent, and manslaughter in the first degree; thereafter, the state entered a nolle prosequi as to the charge of manslaughter in the second degree, and the court rendered judgment in accordance with the verdict, from which the defendant appealed to this court,

which reversed the conviction as to manslaughter in the first degree and remanded the case with direction to modify the judgment to reflect a conviction of manslaughter in the second degree and for resentencing in accordance with that conviction; subsequently, following a hearing, the court, *D'Addabbo*, *J.*, vacated the sentences and resentenced the defendant as to all counts, from which the defendant appealed to this court; thereafter, the matter was transferred to our Supreme Court, which affirmed the judgment of the trial court; subsequently, the court, *Alander*, *J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed.*

John C. Drapp III, assigned counsel, for the appellant (defendant).

Jennifer F. Miller, deputy assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, and *Paul N. Rotiroti*, supervisory assistant state's attorney, for the appellee (state).

Opinion

KELLER, J. The defendant, Sidney Wade, appeals from the judgment of the trial court denying his motion to correct an illegal sentence. The defendant claims that the court improperly concluded that his resentencing did not give rise to a double jeopardy violation. We affirm the judgment of the trial court.

The following procedural history is relevant to the present claim. Following a jury trial, the defendant was convicted of two counts of sale of narcotics by a person who is not drug-dependent in violation of General Statutes § 21a-278 (b), two counts of possession of narcotics with intent to sell by a person who is not drug-dependent in violation of General Statutes § 21a-278 (b), and one count of manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (3). For each of

the sale of narcotics counts, the court, *D'Addabbo*, *J.*, imposed a sentence of seven years of imprisonment. For each of the possession of narcotics counts, the court imposed a sentence of seven years of imprisonment. For these four counts, the court ordered the sentences to be served concurrently. For the manslaughter in the first degree count, the court imposed a sentence of eighteen years of imprisonment. The court ordered the sentence for the manslaughter count to be served consecutive to the sentences imposed with respect to the other counts. This resulted in a total effective sentence of twenty-five years of imprisonment.

In a direct appeal to this court, the defendant claimed that the evidence did not support the conviction for manslaughter in the first degree and that the trial court improperly had instructed the jury with respect to the state's burden of proof and the presumption of innocence. See *State* v. *Wade*, 106 Conn. App. 467, 469, 490–91, 942 A.2d 1085, cert. granted, 287 Conn. 908, 950 A.2d 1286 (2008) (appeal withdrawn June 12, 2008). The latter claim pertained to all of the offenses of which he was convicted. A detailed recitation of the facts underlying the judgment is set forth in that opinion.[1] Id., 469–75. This court rejected the claim of instructional error, but agreed with the claim of evidentiary insufficiency. Id., 492–93. Accordingly, this court affirmed in part and reversed in part the judgment of the trial court. Id. Specifically, this court concluded that the conviction of manslaughter in the first degree in violation of § 53a-55 (a) (3) should be reversed and that the case should be remanded to the trial court with direction to reflect a conviction of manslaughter in the second degree in

[1] At trial, the state presented evidence demonstrating that the defendant illegally provided the victim with prescription drugs, specifically, Methadose pills (a drug commonly used to treat heroin addiction) and lollipops containing fentanyl (a narcotic drug commonly used by cancer patients to relieve pain). *State* v. *Wade*, supra, 106 Conn. App. 470 nn.2 and 3. The victim's ingestion of these drugs caused her death. Id., 474.

violation of General Statutes § 53a-56 (a) (1) and to resentence the defendant in accordance with that conviction. Id.

In compliance with this court's remand, the trial court, *D'Addabbo*, *J.*, held a resentencing hearing. The trial court vacated the sentences it had imposed on all counts in the judgment and modified the judgment to reflect a conviction of the four narcotics related counts that were affirmed by this court as well as manslaughter in the second degree. The trial court resentenced the defendant by imposing a total effective sentence of twenty-three years. It restructured the original sentence by increasing the concurrent terms of imprisonment on the four narcotics related counts from seven years each to thirteen years each. The court ordered that these four sentences be served consecutively to a ten year term of imprisonment for the manslaughter in the second degree conviction.

Following his resentencing, the defendant appealed to this court. Our Supreme Court transferred the appeal to itself pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. Before our Supreme Court, the defendant claimed that "(1) the trial court improperly resentenced him on all of his convictions because [this court's] order directed resentencing only on the reversed count; (2) the aggregate package theory, adopted by [our Supreme Court] in *State* v. *Miranda*, 260 Conn. 93, 794 A.2d 506, cert. denied, 537 U.S. 902, 123 S. Ct. 224, 154 L. Ed. 2d 175 (2002), does not apply when the reversal of a conviction is based on insufficient evidence;[2] (3) under *North Carolina* v. *Pearce*,

[2] Under the aggregate package theory of sentencing, when a multicount conviction is remanded for resentencing after one or more convictions has been vacated on appeal, the trial court may, in its discretion, increase the sentences imposed on the remaining counts provided that the original total effective sentence is not exceeded. See *State* v. *Raucci*, 21 Conn. App. 557, 563, 575 A.2d 234, cert. denied, 215 Conn. 817, 576 A.2d 546 (1990). In *Raucci*, this court reasoned that, when a defendant appeals from a multicount conviction, he "has voluntarily called into play the validity of the entire sentencing

395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), the trial court's decision to increase the sentences on the affirmed counts violated the defendant's due process rights under the fourteenth amendment to the United States constitution and, alternatively, article first, § 8, of the Connecticut constitution; and (4) [our Supreme Court] should vacate his sentences under [the court's] supervisory powers over the administration of justice." (Footnotes added and omitted.) *State* v. *Wade*, 297 Conn. 262, 265–66, 998 A.2d 1114 (2010). Our Supreme Court rejected these claims and affirmed the judgment of the trial court. Id., 266.

In February, 2015, the defendant filed a motion to correct an illegal sentence. Although he raised additional arguments that he later abandoned before the trial court, he argued that the newly imposed sentence was illegal because (1) the court violated his right to due process as guaranteed by the federal and state constitutions by altering the sentences on the narcotics related counts without the statutory authority to do so; (2) the court violated the prohibition against double jeopardy enshrined in the federal and state constitutions by altering the sentences on the narcotics related offenses without the statutory authority to do so; and (3) the court altered the sentences on the narcotics related offenses in the absence of factual findings as required by *Apprendi* v. *New Jersey*, 530 U.S. 466, 120

package, and, thus, the proper remedy is to vacate it in its entirety. More significantly, the original sentencing court is viewed as having imposed individual sentences merely as component parts or building blocks of a larger total punishment for the aggregate convictions, and, thus, to invalidate any part of that package without allowing the court thereafter to review and revise the remaining valid convictions would frustrate the court's sentencing intent." Id., 562. This court went on to observe that a trial court's power to restructure the aggregate package "is limited by its original sentencing intent as expressed by the original total effective sentence . . . ." Id., 563. In *State* v. *Miranda*, supra, 260 Conn. 128–30, our Supreme Court endorsed *Raucci* and adopted the aggregate package theory.

S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Alleyne* v. *United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013). The court, *Alander*, *J.*, rejected these three claims on their merits and denied the motion to correct. This appeal followed.

In the present appeal, the defendant challenges only that part of the court's decision in which it rejected his double jeopardy claim. In its memorandum of decision, the court addressed the double jeopardy claim as follows: "The defendant's second claim is that the reopening of his drug convictions for purposes of resentencing violated the double jeopardy clauses of the United States constitution and the Connecticut constitution. This claim lacks merit for the simple reason that the Appellate Court in *State* v. *LaFleur*, 156 Conn. App. 289, 308–11, [113 A.3d 472, cert. denied, 317 Conn. 906, 114 A.3d 1221 (2015),] previously rejected such a claim. In *LaFleur*, the defendant appealed his convictions in two cases consolidated for trial. The convictions in one of the cases were reversed by our Supreme Court which vacated the entire sentence in both cases and remanded the cases for resentencing. Just as the defendant does here, the defendant in *LaFleur* claimed that his subsequent sentence violated the double jeopardy prohibition against multiple punishments for the same offense because he had an expectation of finality in the original sentence [with respect to the convictions that were not reversed on appeal]. The Appellate Court disagreed. 'Even if the defendant had raised claims that challenged only some of the counts under which he had been convicted, the fact that he exercised his right to an appeal undermines his argument to an expectation of finality in the sentence originally imposed. The defendant was successful in undermining a portion of a sentencing package, and the legal consequence of doing so resulted in a resentencing proceeding in which the trial court properly resentenced him pursuant to the remand

order.' Id., 309–10. 'It is well established that resentencing a defendant does not trigger double jeopardy concerns when the original sentence was illegal or erroneous.' Id., 310. 'In the specific context of a remand for resentencing when a defendant successfully challenges one portion of a sentencing "package," the United States Supreme Court has held that a trial court may resentence a defendant on his conviction of the other crimes without offending the double jeopardy clause of the United States constitution. *Pennsylvania* v. *Goldhammer*, 474 U.S. 28, 29–30, 106 S. Ct. 353, 88 L. Ed. 2d 183 (1985). Indeed, the resentencing court is free to restructure the defendant's entire sentencing package, even for those components assigned to convictions that have been fully served, as long as the overall term has not expired, without offending double jeopardy.' *State* v. *Tabone*, 292 Conn. 417, 441, [973 A.2d 74 (2009)]. As in *LaFleur* and *Tabone*, the trial court's resentencing of the defendant upon remand after his successful appeal does not conflict with principles of double jeopardy."

Before the trial court, the defendant argued that the resentencing court violated his double jeopardy rights because he had an expectation of finality in the sentences imposed by the first sentencing court with respect to the narcotics related charges. A defendant properly may raise a double jeopardy claim in the context of a motion to correct an illegal sentence. See, e.g., *State* v. *Starks*, 121 Conn. App. 581, 591–92, 997 A.2d 546 (2010); *State* v. *Olson*, 115 Conn. App. 806, 810–11, 973 A.2d 1284 (2009). "Ordinarily, a claim that the trial court improperly denied a defendant's motion to correct an illegal sentence is reviewed pursuant to the abuse of discretion standard. . . . A double jeopardy claim, however, presents a question of law, over which our review is plenary." (Citation omitted; internal quotation marks omitted.) *State* v. *Baker*, 168 Conn. App. 19, 24,

145 A.3d 955, cert. denied, 323 Conn. 932, 150 A.3d 232 (2016).

In his brief before this court, the defendant reiterates his belief that it was improper for the court to have reopened and resentenced him with respect to the narcotics related charges. He argues that he had an "expectation of finality in the sentences imposed on the narcotics convictions when those convictions were affirmed and the state had no authority to seek further review of those convictions or sentences." The defendant does not attempt to distinguish *LaFleur* or *Tabone* in any meaningful way,[3] and acknowledges that "the courts of this state have otherwise been fairly consistent in finding that no double jeopardy problem exists with respect to the aggregate package theory of sentencing." Rather than attempting to demonstrate that the court either misinterpreted or misapplied the law, the defendant devotes much of his analysis to reviewing what

[3] In his brief, the defendant observes that, in *Tabone*, our Supreme Court stated in relevant part: "The defendant has challenged only the legality of his sentences, not the validity of his conviction. Consequently, the trial court was free to refashion the entire sentence for each of the crimes within the confines of the original package without violating double jeopardy, as long as the entire sentence had not been fully served." *State* v. *Tabone*, supra, 292 Conn. 442. According to the defendant, this language "suggests that a successful challenge to the validity of a *conviction*, as opposed to a *sentence*, prevents the trial court from refashion[ing] the entire sentence for each of the crimes within the confines of the original package on double jeopardy grounds." (Emphasis in original; internal quotation marks omitted.) The defendant in the present case, having challenged the legality of his convictions, reasons: "*Tabone* leaves doubt as to whether the prohibition against double jeopardy is implicated when the aggregate package theory of sentencing is applied upon remand following a successful challenge to a conviction rather than a sentence . . . ."

We disagree with the defendant's narrow interpretation of *Tabone*. As the defendant acknowledges, immediately following the language on which he relies, the court in *Tabone* quoted *State* v. *Miranda*, supra, 260 Conn. 129, for the following proposition: "[T]he defendant, in appealing his conviction and punishment, has voluntarily called into play the validity of the entire sentencing package, and, thus, the proper remedy is to vacate it in its entirety." (Internal quotation marks omitted.) This language dispels the alleged ambiguity in the defendant's interpretation of *Tabone*.

he believes are relevant decisions of the United States Supreme Court, yet he acknowledges that there is support in that body of law "for the proposition that an aggregate package theory of sentencing does not violate double jeopardy."[4]

In exercising our plenary review, we, like the trial court, view *LaFleur* to be controlling precedent with respect to the defendant's double jeopardy claim. Our Supreme Court has already rejected the defendant's claim that the resentencing court improperly sentenced him under the aggregate package theory. See *State* v. *Wade*, supra, 297 Conn. 268–78. We will neither reevaluate nor reconsider that settled issue. As the trial court recognized correctly, this court's analysis in *LaFleur* is dispositive of the double jeopardy claim raised in the present case. See *State* v. *LaFleur*, supra, 156 Conn. App. 308–11. Accordingly, we conclude that the court properly denied the motion to correct.

The judgment is affirmed.

In this opinion the other judges concurred.

[4] As part of his arguments before this court, the defendant relies to a great extent on *United States* v. *DiFrancesco*, 449 U.S. 117, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980), apparently as support for the proposition that, because the state could not obtain appellate review of the sentences imposed with respect to the narcotics related counts in the present case, he had an expectation of finality with respect to those sentences. Thus, the defendant argues, the court violated his double jeopardy rights by resentencing him in the manner that it did.

The defendant's argument is not persuasive. Where, as here, a defendant has challenged the validity of his multicount conviction on direct appeal, he is unable thereafter to claim an expectation of finality in the sentences imposed. Consistent with overwhelming federal authority, our courts have recognized that, in such circumstances, "the defendant, in appealing his conviction and punishment, has voluntarily called into play the validity of the entire sentencing package . . . ." *State* v. *Raucci*, 21 Conn. App. 557, 562, 575 A.2d 234, cert. denied, 215 Conn. 817, 576 A.2d 546 (1990); see also *State* v. *Wade*, supra, 297 Conn. 269–70 (same); *State* v. *Tabone*, supra, 292 Conn. 427–28 (same); *State* v. *Miranda*, supra, 260 Conn. 129 (same).

WILLIAM O'BRIEN *v.* CITY OF NEW HAVEN
(AC 39102)
(AC 39107)

Sheldon, Prescott and Elgo, Js.

Syllabus

The plaintiff, who was formerly the tax assessor for the defendant, the city of New Haven, brought this action against the defendant seeking indemnification for attorney's fees and costs he sustained while defending a civil action that had been brought against him in 2010 by T Co., in which T Co. alleged misdeeds by the plaintiff arising out of his role as tax assessor. The defendant had refused to defend the plaintiff in that action, and he retained his own counsel and incurred attorney's fees and costs. The plaintiff thereafter prevailed in the underlying action in 2015 and, within four months of the judgment, filed a notice with the defendant of his intent to seek indemnification pursuant to the statute (§ 7-101a [b]) that governs indemnification claims by municipal employees against municipalities, which requires the municipality to save harmless any such municipal employee from financial loss and expense, including legal fees and costs, arising out of any claim or demand instituted against such employee by reason of alleged malicious, wanton or wilful act or ultra vires act on the part of such employee while acting in the discharge of his duties, unless judgment is rendered against the employee in the underlying action. The plaintiff commenced the present action seeking to recover those attorney's fees and costs incurred in the underlying action less than six months after judgment was rendered in that action. The defendant filed a motion to dismiss claiming that the plaintiff's notice and action were untimely pursuant to § 7-101a (d), which requires the employee to commence an action for indemnification against a municipality within two years of when the "cause of action therefor arose," and to give notice to the municipality of an intent to commence such action within six months after such "cause of action has accrued." Specifically, the defendant claimed that the term "cause of action" in § 7-101a (d) should be interpreted as the third party's cause of action against the municipal employee and, thus, referred to the tort action brought in 2010 by T Co. alleging misdeeds by the plaintiff, rendering the notice and present action, both filed in 2015, untimely. The trial court, having determined that the plaintiff's notice and action were timely filed within six months of the date that the underlying action was resolved, denied the motion to dismiss. Thereafter, the court rendered judgment in favor of the plaintiff on his complaint and awarded him attorney's fees and costs for defending the underlying action, but denied his request for attorney's fees and costs for prosecuting the

present action. Both the defendant and the plaintiff appealed from that judgment, and this court consolidated the appeals. *Held*:

1. The defendant could not prevail on its claim that the trial court improperly determined that the notice and present action were timely filed: a plain reading of the text of § 7-101a (d) and its relationship to other similar statutes revealed that the plaintiff's claim for indemnification accrued, and the six month notice period and the two year limitation period began to run, when he first could have successfully held the defendant liable for the expenses that he incurred in that underlying action, which could not have occurred until that action was resolved in the plaintiff's favor, and the plaintiff's notice and action were therefore timely filed within six months of the judgment rendered in that action; moreover, the legislature could not have intended to create the bizarre and irrational result that would follow from the defendant's interpretation of § 7-101a (d), under which the six month notice period to file notice of an intention to sue could expire before the municipal employee was served with the action arising out of his allegedly tortious conduct, and although the defendant argued that notice must be given to the municipality prior to judgment in the underlying action because, otherwise, the municipality would be deprived of the opportunity to investigate, defend against, or settle the claims it may ultimately be required to indemnify, this court declined to extend the requirement of notice beyond what the text of § 7-101a (d) required, as § 7-101a did not impose a duty to defend and there was no requirement that the municipality have prior knowledge of the underlying action for it to be liable to indemnify the employee under § 7-101a (b).
2. The trial court properly denied the plaintiff's request to recover all attorney's fees and costs incurred to prosecute the present action; although the plaintiff claimed that § 7-101a authorized the reimbursement of his expenses incurred in prosecuting the present indemnification action against the defendant, that statute authorizes an award of legal fees arising out of any claim, demand, or suit instituted "against" the officer or employee, and does not authorize an award of costs expended to enforce the right to indemnification under § 7-101a against a municipality, and because the present action for indemnification was initiated by the plaintiff, not against him, the plaintiff was not entitled under § 7-101a to the reimbursement of attorney's fees incurred in this action.

Argued September 14—officially released December 5, 2017

Procedural History

Action for indemnification for attorney's fees and costs sustained by the plaintiff in defending against a separate civil action brought against him, and for other relief, brought to the Superior Court in the judicial district of New Haven, and tried to the court, *Frechette*,

J.; judgment for the plaintiff, from which the defendant and the plaintiff filed separate appeals to this court; thereafter, this court consolidated the appeals. *Affirmed.*

Proloy K. Das, with whom was *Joseph B. Schwartz*, for the appellant in AC 39102 and the appellee AC 39107 (defendant).

Vincent F. Sabatini, for the appellee in AC 39102 and the appellant AC 39107 (plaintiff).

Opinion

ELGO, J. These consolidated appeals concern the indemnification provisions of General Statutes § 7-101a. The defendant, the city of New Haven, appeals from the judgment of the trial court in favor of the plaintiff, William O'Brien, its former tax assessor, awarding him the attorney's fees and costs that he incurred in defending himself in a prior action brought by a third party.[1] In its appeal, the defendant claims that the plaintiff's action for indemnification was barred because he failed to comply with the notice requirement and time limitations of § 7-101a (d). In his appeal, the plaintiff challenges the trial court's denial of his request for the attorney's fees and costs that he incurred in bringing the present action, claiming that § 7-101a authorizes such an award.[2] We affirm the judgment of the trial court.

The following facts and procedural history, as set forth in the trial court's memorandum of decision, are relevant to this appeal. "On November 20, 2010, the plaintiff was sued by Tax Data Solutions, LLC (Tax

[1] *Tax Data Solutions, LLC* v. *O'Brien*, Superior Court, judicial district of New Haven, Docket No. CV-10-6016263-S.

[2] We note that the court awarded attorney's fees and costs that the plaintiff expended to defend himself in the prior action, but denied his request for attorney's fees and costs he expended to prosecute the present § 7-101a (b) indemnification action against the defendant.

Data), in the action of *Tax Data Solutions, LLC* v. *O'Brien*, Superior Court, judicial district of New Haven, Docket No. CV-10-6016263-S [prior action]. In that action, Tax Data alleged that [while] the plaintiff was the tax assessor for the defendant . . . Tax Data was subjected to various misdeeds by the plaintiff. Upon receiving notice of the lawsuit, the plaintiff contacted the defendant by way of the mayor and the defendant's counsel, Victor Bolden, and requested that the defendant provide the plaintiff with legal representation in the [action] since it involved his duties as tax assessor. The defendant refused . . . the plaintiff's request, even after judgment entered in his favor in the [prior action].

"The plaintiff further alleges that he then hired private counsel, the law firm of Sabatini and Associates, LLC, in order to convince the defendant to provide [him] with legal representation. The defendant continued to refuse to provide legal representation, and on December 22, 2010, Bolden wrote a letter to the plaintiff's counsel wherein he stated that the defendant would not provide a defense, but pursuant to [§] 7-101a (b), if no judgment was rendered against the plaintiff, then the defendant would indemnify him for financial loss and expenses, which included attorney's fees, provided he was also acting in the discharge of his duties. The plaintiff subsequently retained Sabatini and Associates, LLC, to defend him in the [prior action], and he expended money for the legal services and fees associated with his defense.

"In the [prior] action, the court [rendered] judgment in the plaintiff's favor on January 15, 2015. The plaintiff further alleges that as a result of this favorable judgment, Sabatini and Associates, LLC, presented the defendant with the plaintiff's bill for attorney's fees, but the defendant again refused to pay said fees, despite having an obligation to defend or indemnify the plaintiff pursuant to § 7-101a."

Pursuant to § 7-101a (d), on April 24, 2015, the plaintiff filed a notice with the defendant's city clerk of his intention to bring an action for indemnification. On May 26, 2015, the plaintiff commenced the present action by service of process on the defendant's city clerk.

The trial court continued: "On July 14, 2015, the defendant filed a motion to dismiss the plaintiff's complaint on the ground that the plaintiff failed to provide timely and proper notice required by § 7-101a. The court . . . issued a memorandum of decision on November 10, 2015, denying the defendant's motion to dismiss on the ground that the notice provided to the defendant on April 24, 2015, was timely, as it was filed with the defendant's [city] clerk within six months of receiving a final judgment in the [prior] action.

"The plaintiff then filed an amended complaint on December 15, 2015, alleging the same facts as his original complaint, but revising his prayer for relief. The defendant filed an answer and special defense to the plaintiff's amended complaint on December 22, 2015, denying or leaving the plaintiff to his proof as to the allegations in the amended complaint. As for the defendant's special defense, it allege[d] that the plaintiff's claim is barred because the notice provided by the plaintiff to the defendant was untimely and improper. On December 23, 2015, the plaintiff filed a response to the defendant's special defense, alleging that the issue of notice was previously adjudicated by the court [when it] denied the defendant's motion to dismiss."

The matter was tried to the court. In its memorandum of decision dated March 29, 2016, the court concluded that (1) the notice provided by the plaintiff to the defendant pursuant to § 7-101a (d) was proper and timely; (2) the plaintiff was entitled to recoup attorney's fees and costs he expended to defend himself in the prior action; but (3) the plaintiff was not entitled to recoup

costs and attorney's fees he incurred to prosecute the present action against the defendant.[3] These appeals followed.

I

The principal question raised by the defendant's appeal is when did the plaintiff's cause of action for indemnification pursuant to § 7-101a (b) accrue for the purposes of the notice requirement and time limitations set forth in § 7-101a (d). The defendant maintains that the time limitations in § 7-101a (d) began to run when Tax Data's cause of action against the plaintiff arose in 2010, and that therefore, the present action was not timely filed.

At the outset, we note that "[i]ssues of statutory construction raise questions of law, over which we exercise plenary review." (Internal quotation marks omitted.) *State* v. *Jackson*, 153 Conn. App. 639, 643, 103 A.3d 166 (2014) cert. denied, 315 Conn. 912, 106 A.3d 305 (2015); see also *Dark-Eyes* v. *Commissioner of Revenue Services*, 276 Conn. 559, 570, 887 A.2d 848 (2006) (statutory interpretation gives rise to issue of law over which this court's review is plenary).

We first set forth the relevant statutory language of § 7-101a. Section 7-101a (a) provides in relevant part: "Each municipality shall protect and save harmless any municipal officer, whether elected or appointed, of any board, committee, council, agency or commission . . . or any municipal employee, of such municipality from financial loss and expense, including legal fees and

[3] Although not at issue in this appeal, the court additionally held that (1) in the prior action against the plaintiff, he was clearly acting within the discharge of his duties; (2) the defendant did not breach a contractual obligation with the plaintiff by failing to pay the plaintiff's attorneys fees and costs; (3) the defendant did not breach the covenant of good faith and fair dealing with the plaintiff; and (4) the defendant's actions do not constitute negligent misrepresentation.

costs, if any, arising out of any claim, demand, suit or judgment by reason of alleged negligence, or for alleged infringement of any person's civil rights, on the part of such officer or such employee while acting in the discharge of his duties."

Section 7-101a (b) provides: "In addition to the protection provided under subsection (a) of this section, each municipality shall protect and save harmless any such municipal officer or municipal employee from financial loss and expense, including legal fees and costs, if any, arising out of any claim, demand or suit instituted against such officer or employee by reason of alleged malicious, wanton or wilful act or ultra vires act, on the part of such officer or employee while acting in the discharge of his duties. In the event such officer or employee has a judgment entered against him for a malicious, wanton or wilful act in a court of law, such municipality shall be reimbursed by such officer or employee for expenses it incurred in providing such defense and shall not be held liable to such officer and employee for any financial loss or expense resulting from such act."

Subsections (a) and (b) of § 7-101a plainly provide three causes of action: (1) a municipal employee's indemnification action pursuant to § 7-101a (a); (2) a municipal employee's indemnification action pursuant to § 7-101a (b); and (3) a municipality's reimbursement action pursuant to § 7-101a (b). In order to bring an action under either subsection (a) or (b) of § 7-101a, the municipal employee must comply with the time limitations and notice requirement set forth in § 7-101a (d).

Section 7-101a (d) provides in relevant part: "No action shall be maintained under this section against such municipality . . . unless such action is commenced within two years after the cause of action therefor arose nor unless written notice of the intention to

commence such action and of the time when and the place where the damages were incurred or sustained has been filed with the clerk of such municipality within six months after such cause of action has accrued."

The following principles governing statutory construction are well established and guide our analysis. "When construing a statute, our 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." (Internal quotation marks omitted.) *State* v. *Drupals*, 306 Conn. 149, 159, 49 A.3d 962 (2012). We note that, under General Statutes § 1-2z, "[t]he meaning of a statute shall, in the first instance, be ascertained from 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." "The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *State* v. *Drupals*, supra, 159, citing *Weems* v. *Citigroup, Inc.*, 289 Conn. 769, 779, 961 A.2d 349 (2008).

"[S]tatutes must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant . . . ." (Internal quotation marks omitted.) *Housatonic Railroad Co.* v. *Commissioner of Revenue Services*, 301 Conn. 268, 303, 21 A.3d 759 (2011). "When a statute is not plain and unambiguous, we also look for interpretative guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to

its relationship to existing legislation and [common-law] principles governing the same general subject matter . . . ." (Internal quotation marks omitted.) *State* v. *Drupals*, supra, 306 Conn. 159, citing *Francis* v. *Fonfara*, 303 Conn. 292, 297, 33 A.3d 185 (2012).

"When the meaning of a statute initially may be determined from the text of the statute and its relationship to other statutes . . . extratextual evidence of the meaning of the statute shall not be considered. . . . When the meaning of a provision cannot be gleaned from examining the text of the statute and other related statutes without yielding an absurd or unworkable result, extratextual evidence may be consulted. . . . [E]very case of statutory interpretation . . . requires a threshold determination as to whether the provision under consideration is plain and unambiguous. This threshold determination then governs whether extratextual sources can be used as an interpretive tool. . . . [O]ur case law is clear that ambiguity exists only if the statutory language at issue is susceptible to more than one plausible interpretation." (Citation omitted; internal quotation marks omitted.) *State* v. *Jackson*, supra, 153 Conn. App. 643–44.

"A primary rule of statutory construction is that if the language of the statute is clear, it is presumed that the words express the intent of the legislature. . . . The court must interpret the statute as written . . . and it is to be considered as a whole, with a view toward reconciling its separate parts in order to render a reasonable overall interpretation. . . . By its terms . . . § 7-101a (a) is a provision in this indemnification statute which protects municipal officers and full-time municipal employees from financial loss and expenses arising out of damage suits . . . . Subsection (d) of . . . § 7-101a specifically limits its application to actions maintained under . . . § 7-101a." (Citations

omitted; internal quotation marks omitted.) *Orticelli* v. *Powers*, 197 Conn. 9, 13–14, 495 A.2d 1023 (1985).

As the plain language of § 7-101a reveals, the key difference between indemnification actions under subsections (a) and (b) involves the type of allegations against the municipal officer or employee in the prior action and the result of that prior action. If the prior action involves allegations of negligence or infringement of any person's civil rights on the part of the municipal officer or employee, then the municipal officer or employee can maintain an action against the municipality under § 7-101a (a). If the prior action involves allegations of malicious, wanton or wilful acts or ultra vires acts on the part of the municipal officer or employee, the indemnification action by the employee is maintained under § 7-101a (b). According to § 7-101a (b), however, the municipality will not be liable to the municipal officer or employee if the officer or employee has a judgment entered against him or her for a malicious, wanton or wilful act in a court of law.[4] If the municipal officer or employee has a judgment entered against him or her for a malicious, wanton or wilful act in a court of law, and the municipality has expended resources in providing a defense for him or her in that action, the municipal officer or employee will be liable to the municipality for all expenses that the municipality incurred in providing that defense.[5]

[4] Section 7-101a (b) provides in relevant part: "In the event such officer or employee has a judgment entered against him for a malicious, wanton or wilful act in a court of law, such municipality . . . *shall not be held liable to such officer and employee for any financial loss or expense resulting from such act*." (Emphasis added.) Accordingly, in an indemnification action under § 7-101a (b), the prior action cannot result in a judgment against the plaintiff for any conduct involving malicious wanton or wilful acts or ultra vires acts.

[5] Section 7-101a (b) provides in relevant part: "In the event such officer or employee has a judgment entered against him for a malicious, wanton or wilful act in a court of law, such municipality *shall be reimbursed by such officer or employee for expenses it incurred in providing such defense* . . . ." (Emphasis added.)

In the present case, it is uncontested that Tax Data's complaint in the prior action included allegations of malicious, wanton or wilful acts or ultra vires acts on the part of the plaintiff. As a result, the plaintiff's indemnification action here is maintained under § 7-101a (b).

As previously discussed, to maintain an indemnification action pursuant to § 7-101a (b), the municipal employee must comply with the notice requirement and time limitations of § 7-101a (d). The phrase "under this section" in § 7-101a (d) restricts its time limitations and notice provision to apply only to actions maintained under § 7-101a (a) and (b).[6] As our Supreme Court has recognized, "[a] plain reading of the whole statute indicates that the limitation and notice provisions of § 7-101a (d) are applicable only to actions for indemnification maintained under § 7-101a (a) and to an action for reimbursement of defense expenses pursuant to § 7-101a (b)." *Orticelli* v. *Powers*, supra, 197 Conn. 14. "Subsection (d) of . . . § 7-101a specifically limits its application to actions maintained under . . . § 7-101a." Id. It logically follows that the party required to file such notice with the clerk of the municipality in an indemnification action pursuant to § 7-101a (b) is the municipal employee seeking indemnification pursuant to § 7-101a (b). See *Cannada* v. *Grady*, Superior Court, judicial district of Hartford, Docket No. CV-98-0584296 (September 7, 2001) (30 Conn. L. Rptr. 404, 406).

The text of § 7-101a (d) provides that the two year time limitation begins when the "cause of action therefor arose" and the six month time frame for notice

[6] Section 7-101a (d) provides: "No action shall be maintained *under this section* against such municipality *or employee* unless such action is commenced within two years after the cause of action therefor arose nor unless written notice of the intention to commence such action and of the time when and the place where the damages were incurred or sustained has been filed with the clerk of such municipality within six months after such cause of action has accrued." (Emphasis added.)

begins when the "cause of action has accrued." As our Supreme Court has explained, "[a]pplied to a cause of action, the term to accrue means to arrive; to commence; to come into existence; to become a present enforceable demand. . . . While the statute of limitations normally begins to run immediately upon the accrual of the cause of action, some difficulty may arise in determining when the cause or right of action is considered as having accrued. The true test is to establish the time when the plaintiff first could have successfully maintained an action." (Citation omitted; internal quotation marks omitted.) *Coelho* v. *ITT Hartford*, 251 Conn. 106, 111, 752 A.2d 1063 (1999). Accordingly, under established precedent, to determine when a cause of action has accrued for purposes of an indemnification action under § 7-101a (b), we look to when the plaintiff first could successfully bring such an action.

We now turn to the question of when the time limitations and notice requirement set forth in § 7-101a (d) begin to run for purposes of a § 7-101a indemnification action, an issue on which the decisions of our Superior Courts are divided.[7] Several trial court decisions have held that the notice requirement and time limitations

[7] Although the notice requirement and time limitations of § 7-101a appear to be similar to General Statutes § 7-465, the statutes provide for different types of actions and, thus, involve different causes of action to trigger the time limitations. It is important to note that "[u]nlike [§] 7-465, which permits a plaintiff to bring a claim against a municipality to indemnify [its] employees, [§] 7-101a provides indemnification to the employee from the municipality, and does not contain a direct action by a non-employee plaintiff against the municipality." *Edwards* v. *Cornell*, United States District Court, Docket No. 3:13-CV-878 (WIG), 2017 U.S. Dist. LEXIS 147878, *11 (D. Conn. Sept. 13, 2017). Section 7-465 (a) provides in relevant part: "No action for personal physical injuries or damages to real or personal property shall be maintained against such municipality and employee jointly unless such action is commenced within two years after the cause of action therefor arose and written notice of the intention to commence such action and of the time when and the place where the damages were incurred or sustained has been filed with the clerk of such municipality within six months after such cause of action has accrued. . . ."

in § 7-101a (d) begin to run when the prior action is resolved. See *Spatola* v. *New Milford*, Superior Court, judicial district of Litchfield, Docket No. CV-07-4005617-S (September 26, 2007) (44 Conn. L. Rptr. 242, 243); *Cannada* v. *Grady*, supra, 30 Conn. L. Rptr. 406; *Knapp* v. *Derby*, Superior Court, judicial district of Ansonia-Milford, Docket No. 95-0049918-S (January 15, 1998) (21 Conn. L. Rptr. 149, 150). Other trial court decisions have held that the notice requirement and time limitations in § 7-101a (d) begin to run when the third party tortious cause of action against the employee arises. See *Deleon* v. *Winiarski*, Superior Court, judicial district of Hartford, Docket No. CV-00-0800607-S (March 8, 2001); *Cooney* v. *Montes*, Superior Court, judicial district of Hartford, Docket No. CV-90-0372152-S (May 18, 1992) (6 Conn. L. Rptr. 442).

The court in the present case determined that the notice requirement and time limitations in § 7-101a (d) began to run when the prior action was resolved. The defendant raises several arguments challenging the propriety of that determination.

It is well established that the law favors rational and sensible statutory construction. See, e.g., *Maciejewski* v. *West Hartford*, 194 Conn. 139, 151–52, 480 A.2d 519 (1984) ("The unreasonableness of the result obtained by the acceptance of one possible alternative interpretation of an act is a reason for rejecting that interpretation in favor of another which would provide a result that is reasonable. . . . When two constructions are possible, courts will adopt the one which makes the [statute] effective and workable, and not one which leads to difficult and possibly bizarre results." [Citations omitted; internal quotation marks omitted.]) To hold that the term "cause of action" as used in § 7-101a (d) refers to the alleged tortious conduct underlying the prior action would create an irrational result. For example,

the six month time limitation to file notice of an intention to sue required by § 7-101a (d) could expire before the officer or employee has been sued for the allegedly tortious conduct. In such circumstances, the employee or officer would lose the protections of § 7-101a due to the inability to give timely notice to the municipality. The legislature could not have intended such a bizarre result.

We next address the defendant's arguments in support of its claim that "cause of action," as used in § 7-101a (d), refers to the cause of action in the prior action. The defendant cites to our Supreme Court's decisions in *Orticelli* v. *Powers*, supra, 197 Conn. 9, and *Norwich* v. *Silverberg*, 200 Conn. 367, 511 A.2d 336 (1986), to support its interpretation of § 7-101a (d). Those cases, however, did not involve the application of § 7-101a (d) to a cause of action properly brought pursuant to § 7-101a (a) or (b).

In *Orticelli* v. *Powers*, supra, 197 Conn. 9, the plaintiff brought an action alleging a violation of his civil rights pursuant to 42 U.S.C. § 1983 against the defendants, the Town of Bethel's Board of Education and its members, for wrongful termination of his teaching contract. The defendants claimed that the plaintiff's cause of action was barred due to his noncompliance with the time limitations of § 7-101a (d). Our Supreme Court held that § 7-101a (d) had no application to the plaintiff's § 1983 action.[8] Id., 14. In *Norwich* v. *Silverberg*, supra, 200

[8] The defendant mischaracterizes dicta in *Orticelli* in support of its position. Specifically, the defendant represents in its brief that the Supreme Court "did not recognize a right for a municipal employee to sue a municipality under [§] 7-101a (b)," the plaintiff's cause of action in this case. As previously discussed, the plain language makes clear there are three distinct causes of action in § 7-101a (a) and (b). Further, the Supreme Court, used the language cited by the defendant to clarify what the phrase "or employee" in § 7-101a (d) refers to and not for purposes of excluding the right for a municipal employee to sue a municipality under § 7-101a (b). The Supreme Court stated that "or employee" as used in § 7-101a (d) "places a time limitation on the action a municipality can take against an employee for reimbursement of defense expenses pursuant to . . . § 7-101a (b) in cases

Conn. 367, the plaintiff city brought a legal malpractice action against its municipal employee. The municipal employee, in turn, attempted to bring an indemnification action against the city under § 7-101a. Id. Our Supreme Court held that § 7-101a did not apply to actions involving a municipality suing its own employee, thus, the court did not apply the notice requirement and time limitations of § 7-101a (d) to the case. Id., 375. Unlike in *Orticelli* and *Norwich*, the plaintiff in the present case has properly pursued a § 7-101a (b) indemnification action against the defendant to recover expenses that he incurred in a prior action initiated by a third party. Hence, the cases cited provide no support for the defendant's argument.

To further support its contention that the term "cause of action" in § 7-101a (d) refers to the third party's cause of action against the plaintiff in the prior action, the defendant argues that notice must be given to the municipality prior to judgment in the prior action because, otherwise, the municipality would be deprived of the opportunity to investigate, defend against, or settle the claims it may ultimately be required to indemnify, and the municipality would likely be without insurance coverage for the loss. The defendant contends that its interpretation of "cause of action" is supported by the legislature's inclusion of § 7-101a (c), which authorizes municipalities to purchase liability insurance.

Section 7-101a (c) provides: "Each such municipality may insure against the liability imposed by this section in any insurance company organized in this state or in

involving malicious, wanton and wilful or ultra vires acts of municipal officers and employees." *Orticelli* v. *Powers*, supra, 197 Conn. 14. The Supreme Court's failure to comment on the employee's cause of action under § 7-101a (b) does not, as the defendant implies, constitute a determination that employees are limited to a cause of action under § 7-101a (a). The statute plainly provides for a municipal employee's indemnification action pursuant to § 7-101a (b).

any insurance company of another state authorized to write such insurance in this state or may elect to act as self-insurer of such liability." The defendant argues that if a municipality was not informed of the third-party claim before judgment was rendered in the underlying action, it would not be able to inform its insurance carrier of a potential claim and the insurer would be unable to investigate and defend that claim. The defendant claims that, ultimately, the municipality would be without insurance coverage for such claims. As the Supreme Court stated in *Norwich* v. *Silverberg*, supra, 200 Conn. 372, "subsection [(c) of § 7-101a] authorizes municipalities to purchase insurance to cover 'the liability imposed by [§ 7-101a].' " There is no evidence in the record before this court, however, that insurance coverage for such claims would not be available. Further, a municipality's ability or inability to obtain insurance coverage authorized by subsection (c) is a separate matter. We decline to consider such extratextual evidence in our analysis.

The defendant also argues that the reimbursement language in § 7-101a (b) presupposes that the municipality will be aware of the third party's action against the municipal employee. We acknowledge that a reimbursement of defense expenses would only occur if the municipality provided a defense in the prior action, and that a defense can be mounted only if the municipality has knowledge of the prior action. Knowledge of the prior action, however, is not required for a municipality to be liable to indemnify its employee under § 7-101a (b).[9] The requirement of notice for a municipal officer

[9] In addition, the defendant suggests that the trial court's interpretation of the statute would render the statute unconstitutional under the due process clause of the federal and state constitutions. The defendant has not provided this court with any legal authority on point to substantiate that general assertion. We therefore decline to further consider that contention. *Turner* v. *American Car Rental, Inc.*, 92 Conn. App. 123, 130, 884 A.2d 7 (2005) ("We are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather

or employee to bring a § 7-101a action against the municipality is contained within § 7-101a (d), and we decline to extend the requirement of notice beyond what the text of the statute requires.

At oral argument before this court, the defendant claimed that § 7-101a imposed on the municipality a duty to defend, citing to the word "protect" in § 7-101a (a) and (b). The defendant's interpretation of "cause of action" might have some merit if the provisions of § 7-101a incorporated a duty to defend, as that might provide some relationship between the notice required for a § 7-101a action and the cause of action in the prior action. Our Supreme Court, however, in *Vibert* v. *Board of Education*, 260 Conn. 167, 174–76, 793 A.2d 1076 (2002), has stated that the language "protect and save harmless" establishes a duty to indemnify, not a duty to defend. The court in *Vibert* noted that General Statutes § 10-235[10] contained the same "protect and save harmless" language as set forth in § 7-101a. Id., 173–74 ("we

than mere abstract assertion, is required in order to avoid abandoning an issue by failing to brief the issue properly." [Internal quotation marks omitted.]).

[10] General Statutes § 10-235 provides in relevant part: "(a) Each board of education shall protect and save harmless . . . any teacher . . . from financial loss and expense, including legal fees and costs, if any, arising out of any claim, demand, suit or judgment by reason of alleged negligence . . . or any other acts . . . resulting in any injury, which acts are not wanton, reckless or malicious, provided such teacher . . . was acting in the discharge of his or her duties or within the scope of employment or under the direction of such board of education . . . .

"(b) . . . [E]ach local and regional board of education and each charter school shall protect and save harmless . . . any teacher . . . from financial loss and expense, including legal fees and costs, if any, arising out of any claim, demand or suit instituted against such . . . teacher . . . by reason of alleged malicious, wanton or wilful act or ultra vires act . . . while acting in the discharge of his duties. In the event such member, teacher or other employee has a judgment entered against him for a malicious, wanton or wilful act in a court of law, such board of education or charter school shall be reimbursed by such . . . teacher . . . for expenses it incurred in providing such defense and shall not be held liable to such . . . teacher . . . for any financial loss or expense resulting from such act. . . ."

previously have interpreted . . . § 7-101a, a statute that uses the same 'protect and save harmless' language [as § 10-235] in the context of affording certain protections to a municipal officer or employee against whom a legal claim has been asserted, as an indemnification statute" [footnote omitted]). In recognizing that the "protect and save harmless" language of § 10-235 (b) "clearly mandates that a board of education indemnify a teacher for conduct falling within the purview of that subsection"; id., 173; our Supreme Court concluded that the reimbursement language in § 10-235 (b) did not impose a duty to defend. Id., 173–75. "Rather, the legislature intended merely to provide that, in cases in which the board of education *chooses to incur expenses in providing a defense and a judgment for wilful, wanton or malicious conduct subsequently is rendered against the teacher*, the teacher then would be required to reimburse the board of education for the expenses that it had incurred in providing a defense." (Emphasis added.) Id., 175–76.

Our Supreme Court's analysis in *Vibert* compels a similar conclusion here. Indeed, at oral argument before this court, the defendant stated that "the city has to have the opportunity to determine whether to defend," effectively conceding that § 7-101a imposes no duty to defend on the municipality because the opportunity to choose to defend is, by its very nature, not a duty to defend. Although the language of § 7-101a suggests that a municipality may choose to defend its employees, nothing in its provisions imposes upon it a duty to defend.[11]

[11] As the facts of this case demonstrate, the defendant, through its counsel, recognized it did not have a duty to defend at the outset and exercised its choice not to do so. In fact, the defendant informed the plaintiff that it would not provide a defense, but that pursuant to § 7-101a (b), if no judgment was rendered against him, then the defendant would indemnify him.

Further, the defendant argues that § 7-101a (d) contains no provision regarding the municipality "reimbursing" the employee after a judgment has been rendered. As previously discussed, pursuant to § 7-101a (b), the municipality will not be liable to the municipal officer or employee if the officer or employee has a judgment rendered against him or her in a court of law for malicious, wanton or wilful acts. Therefore, the municipal officer or employee will not be able to successfully maintain an action against the municipality until there is a determination of the prior action in the employee's favor. Although the defendant is correct that § 7-101a (b) does not include the same reimbursement language for the municipal employee, it does include an obligation for the municipality to "protect and save harmless any such municipal officer or municipal employee from financial loss and expense, including legal fees and costs, if any, arising out of any claim, demand or suit instituted against such officer or employee by reason of alleged malicious, wanton or wilful act or ultra vires act. . . ."[12] General Statutes § 7-101a (b).

Despite the numerous arguments presented by the defendant to support its contention that the term "cause of action" in § 7-101a (d) should be interpreted as the third party's cause of action against the municipal officer or employee in the prior action, we ultimately are not persuaded. According to the text of § 7-101a itself, and its relationship to other similar statutes, the cause of action for the plaintiff's claim for indemnification accrued, and the six month notice period and the two

[12] To further support the defendant's interpretation of when the cause of action accrues, the defendant reasons that the use of the different terms—"action" and "cause of action"—in § 7-101a (d) means that the two terms are to have separate meanings. The defendant cites to *State* v. *Walton*, 41 Conn. App. 831, 842–43, 678 A.2d. 986 (1996), to support its interpretation. A plain reading of the statute reveals the word "action" refers to a § 7-101a action and the "cause of action" for a § 7-101a action accrues when the plaintiff could have held the defendant liable for the § 7-101a action.

year limitation period of § 7-101a (d) began to run, when the plaintiff first could have successfully held the defendant liable. The plaintiff could not have successfully done so under § 7-101a (b) until the prior action concluded, which occurred on January 15, 2015. Because notice was provided to the defendant on April 24, 2015, it therefore was timely filed with the defendant's city clerk within the six month period. Further, the plaintiff commenced the indemnification action on May 26, 2015, thereby satisfying the two year time limitation of § 7-101a (d) as well.

II

We next consider the plaintiff's appeal. In its memorandum of decision, the trial court denied the plaintiff's request to recover all attorney's fees and costs he incurred to prosecute the present indemnification action. The plaintiff claims that the phrase "financial loss" in § 7-101a authorizes the reimbursement of his expenses incurred in prosecuting this action against the defendant.[13] The defendant argues that the plaintiff is not entitled to recover the attorney's fees and costs he expended in the present action because § 7-101a (b) does not authorize the recovery of such attorney's fees and costs. We agree with the defendant.

"It is well entrenched in our jurisprudence that Connecticut adheres to the American rule. . . . Under the American rule, a party cannot recover attorneys' fees in the absence of statutory authority or a contractual provision." (Citation omitted.) *Doe* v. *State*, 216 Conn. 85, 106, 579 A.2d 37 (1990); see *Gino's Pizza of East Hartford Inc.* v. *Kaplan*, 193 Conn. 135, 140, 475 A.2d

[13] Section 7-101a (b) provides in relevant part that "each municipality shall protect and save harmless any such municipal officer or municipal employee from *financial loss* and expense, including legal fees and costs, if any, arising out of any claim, demand or suit instituted against such officer or employee . . . ." (Emphasis added.)

305 (1984) ("[t]he rule in Connecticut is that absent contractual or statutory authorization, each party must pay its own attorneys' fees").

Whether § 7-101a (b) authorizes an award of attorney's fees to the plaintiff presents a question of statutory construction, over which our review is plenary. See *Fennelly* v. *Norton*, 294 Conn. 484, 492, 985 A.2d 1026 (2010).

The plaintiff argues that such statutory authorization is contained in § 7-101a, which authorizes an award of legal fees "arising out of any claim, demand, or suit *instituted against such officer or employee*. . . ." (Emphasis added.) Unlike the prior action, the present action was not instituted against an officer or employee. Rather, the attorney's fees and costs that the plaintiff seeks to recover involve an action that the municipal employee or officer initiated against a municipality. Section 7-101a does not authorize an award of costs expended to enforce the right to indemnification under § 7-101a against a municipality. See *Link* v. *Shelton*, 186 Conn. 623, 632, 443 A.2d 902 (1982) (concluding that legislature, in authorizing indemnification for attorney's fees sustained "as a result of such prosecution," did not authorize recovery of attorney's fees sustained as result of separate action to enforce right to indemnification [emphasis omitted]). Because § 7-101a does not authorize reimbursement of attorney's fees that the plaintiff incurred in the present § 7-101a action to enforce the defendant's statutory indemnity obligation, the plaintiff is not entitled to the reimbursement of attorney's fees that he incurred in this action.

The judgment is affirmed.

In this opinion the other judges concurred.