STATE OF CONNECTICUT *v.* ANTHONY JOHNSON (AC 37859)

Keller, Prescott and Kahn, Js.*

Syllabus

Convicted, after a jury trial, of the crimes of robbery in the second degree and conspiracy to commit robbery in the second degree in connection with his alleged conduct in robbing a store with D, the defendant appealed to this court. At the defendant's trial, D, who already had pleaded guilty to criminal charges related to the robbery, testified about details of the robbery, including that the defendant had been the other participant. The state also called as a witness M, who previously had provided the police with a signed, written statement indicating that he had seen another person, K, give the car involved in the robbery to D, the defendant and another individual, but who testified at trial that he did not actually see K give the car to D. The state then sought to admit into evidence M's statement to the police as a prior inconsistent statement pursuant to *State* v. *Whelan* (200 Conn. 743). The trial court admitted a redacted version of the statement for substantive purposes under *Whelan*. Following his conviction, the defendant appealed to this court. *Held*:

1. The defendant could not prevail on his claim that there was insufficient evidence to sustain his conviction because it was based on uncorroborated accomplice testimony; our Supreme Court has long held that accomplice testimony does not require corroboration to sustain a conviction, and as an intermediate court of appeal, this court was bound by and unable to overrule that controlling Supreme Court precedent.
2. The defendant could not prevail under the plain error doctrine on his unpreserved claim that the trial court improperly failed to provide an adequate cautionary instruction to the jury regarding the dangers of relying on uncorroborated accomplice testimony; there was no patent and obvious error that required reversal under that doctrine, as the law does not require that an accomplice's testimony be corroborated for the jury to accept it or that the trial court instruct the jury that it is unsafe to rely on uncorroborated accomplice testimony, and the trial court provided the jury with a specific instruction regarding accomplice testimony that cautioned the jury to consider an accomplice's character and interests when weighing his testimony and to look at the testimony with particular care and careful scrutiny, and it also generally instructed the jury to weigh a witness' testimony in light of his interest in the case and all the other evidence.

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

3. The trial court did not abuse its discretion in admitting into evidence M's statement to the police, that statement having satisfied the personal knowledge requirement under *Whelan*; the statement itself demonstrated that M had personal knowledge of the facts that it contained, as it stated that M saw K give the car to D, the defendant and another individual, M signed the statement, thereby attesting to its truth and acknowledging that he understood that he could be subject to criminal penalties for making a false statement, and although the court allowed only a redacted version of the statement to be introduced into evidence, when determining whether it satisfied *Whelan*'s requirements, the court had the full statement before it, which included details that further demonstrated that M had possessed the requisite personal knowledge.

Argued September 8—officially released December 12, 2017

Procedural History

Substitute information charging the defendant with the crimes of robbery in the second degree, conspiracy to commit robbery in the second degree, larceny in the fourth degree and conspiracy to commit larceny in the fourth degree, brought to the Superior Court in the judicial district of Hartford, geographical area number twelve, and tried to the jury before *Noble*, *J.*; verdict of guilty; thereafter, the court vacated the verdict as to the charges of larceny in the fourth degree and conspiracy to commit larceny in the fourth degree; judgment of guilty of robbery in the second degree and conspiracy to commit robbery in the second degree, from which the defendant appealed to this court. *Affirmed.*

Emily Wagner, assistant public defender, for the appellant (defendant).

Jennifer F. Miller, deputy assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Erika L. Brookman*, assistant state's attorney, for the appellee (state).

Opinion

KAHN, J. The defendant, Anthony Johnson, appeals from the judgment of conviction, rendered after a jury trial, of robbery in the second degree in violation of

General Statutes § 53a-135 (a) (1) (B), and conspiracy to commit robbery in the second degree in violation of General Statutes §§ 53a-48 and 53a-135.[1] On appeal, the defendant claims that the jury found him guilty on the basis of uncorroborated accomplice testimony, which, as a matter of law, is insufficient evidence to sustain a conviction. In making this argument, the defendant acknowledges that Supreme Court precedent must be overturned for him to be able to prevail on this claim. The defendant also claims that the trial court improperly failed to caution the jury regarding the dangers of uncorroborated accomplice testimony and improperly admitted a witness' prior inconsistent statement. We affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to this appeal. On May 29, 2013, the defendant and Sedwick Daniels robbed a CVS store in Glastonbury. The store manager, Thang Trang, was in his office counting cash and monitoring the store's surveillance cameras, while another CVS employee, Roberto Orellana, was at the cash register. No other employees were working. The defendant and Daniels arrived between 6 p.m. and 9 p.m. When Trang saw the two men enter the store on the surveillance footage, he left his office to offer them assistance. When the defendant and Daniels declined, Trang returned to his office and continued to count the store's cash and to monitor the cameras. The defendant and Daniels began placing merchandise in laundry bags that they had brought with them. Daniels went behind the counter and began to place cartons of cigarettes into his bag. Meanwhile, the defendant approached Orellana

[1] The jury also found the defendant guilty of the lesser included offenses of larceny in the fourth degree in violation of General Statutes § 53a-125 and conspiracy to commit larceny in the fourth degree in violation of General Statutes §§ 53a-48 and 53a-125. The trial court vacated the verdict as to these charges. See *State* v. *Polcano*, 308 Conn. 242, 248, 61 A.3d 1084 (2013).

and demanded that he open the register. Trang ran from his office to intervene. The defendant put his hand in his pocket as if he had a gun and threatened Trang. After taking money from the register, the defendant and Daniels left the store. As they drove away, Trang went outside and wrote down the car's license plate number. Orellana called 911, and Glastonbury police arrived to take Trang and Orellana's verbal and written statements, and the license plate number.

The responding officer "radioed [the license plate number] into dispatch who put it out over the hotline." The car was traced to an incident from earlier that same day. The car had run out of gas on the highway, and State Trooper Erin Lowney responded. Glastonbury police later showed CVS' surveillance footage of the robbery to Lowney. Lowney could not make a positive identification, but told the Glastonbury police that although "one of the body types didn't look similar to anyone in the car . . . one of the body types" looked similar to Daniels. Daniels and his cousin, Kenneth Millege, were the occupants of the car Lowney had encountered.

On May 30, 2013, the day following the CVS robbery, Farmington police stopped the same car in response to a shoplifting incident at Westfarms Mall. Glastonbury police arrived at the scene and interviewed two of the car's occupants, Millege and Kirk McDowell. McDowell told the police that the previous day he had seen Millege give the car to Daniels, the defendant, and a third individual. Subsequently, Glastonbury police arrested Daniels. Upon arrest, Daniels told the police that the defendant had been the other participant in the CVS robbery.

The police subsequently arrested the defendant and charged him for his involvement in the CVS robbery. At trial, Daniels, who had already pleaded guilty to

charges stemming from this incident, testified about the robbery, again identifying the defendant as the other participant. The jury found the defendant guilty. On February 13, 2015, the defendant was sentenced to a total effective sentence of eight years of incarceration followed by two years of special parole. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that he was convicted on the basis of uncorroborated accomplice testimony which, as a matter of law, is insufficient evidence to sustain the conviction.[2] The state argues that this court is bound by the Supreme Court's decision in *State* v. *Stebbins*, 29 Conn. 463 (1861), and its progeny, which do not require corroboration for accomplice testimony.[3] We agree with the state.

Our Supreme Court has long held that accomplice testimony does not require corroboration to sustain a conviction. See *State* v. *Stebbins*, supra, 29 Conn. 473 (accomplice testimony "if standing alone, is not to be rejected, and whether corroborated or not . . . may be sufficient to satisfy the minds of the jury"); see also *State* v. *LaFountain*, 140 Conn. 613, 620–21, 103 A.2d 138 (1954) ("within power of jury . . . to convict accused upon the uncorroborated testimony of his accomplices"); *State* v. *Williamson*, 42 Conn. 261, 263 (1875) ("testimony of an accomplice, though altogether

[2] The defendant conceded, both in his appellate brief and at oral argument, that this court does not have the authority to overturn Supreme Court precedent, and, thus, he only "raises this claim to preserve it for future review by the Supreme Court."

[3] The state also argues that the defendant's claim lacks a factual premise because McDowell's statement to the police corroborated Daniels' accomplice testimony. Because this court is bound by *State* v. *Stebbins*, supra, 29 Conn. 463, we need not address whether Daniels' testimony was corroborated.

uncorroborated, [is] evidence to go to a jury, and . . . conviction on such testimony [is] legal"); *State* v. *Wolcott*, 21 Conn. 272, 281–82 (1851) (uncorroborated accomplice testimony sufficient for jury to convict accused). "As an intermediate court of appeal, we are unable to overrule, reevaluate, or reexamine controlling precedent of our Supreme Court. . . . As our Supreme Court has stated: [O]nce this court has finally determined an issue, for a lower court to reanalyze and revisit that issue is an improper and fruitless endeavor." (Citation omitted; internal quotation marks omitted.) *State* v. *LaFleur*, 156 Conn. App. 289, 302–303, 113 A.3d 472 (2015). Thus, we decline to overturn *Stebbins* and its progeny.

II

The defendant next claims that the court improperly failed to give a specific cautionary instruction to the jury regarding the dangers of relying on uncorroborated accomplice testimony. The parties agree that this claim of instructional error is unpreserved and may be subject to the implied waiver announced in *State* v. *Kitchens*, 299 Conn. 447, 482–83, 10 A.3d 942 (2011). The defendant nevertheless seeks to prevail on this claim pursuant to the plain error doctrine, as set forth by Practice Book § 60-5. See *State* v. *McClain*, 324 Conn. 802, 808, 155 A.3d 209 (2017) ("*Kitchens* waiver does not preclude appellate relief under the plain error doctrine"). The state argues that the court did not commit plain error.[4] We agree with the state.

[4] When reviewing a preserved claim of error, "[t]he test of a court's charge is not whether it is as accurate upon legal principles as the opinions of a court of last resort but whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper." (Internal quotation marks omitted.) *Stafford* v. *Roadway*, 312 Conn. 184, 189, 93 A.3d 1058 (2014). In essence, the state argues that the defendant has not demonstrated that the court committed error, let alone plain error.

When a party does not preserve a claim, the rules of practice allow this court to review the trial court's decision for plain error. Practice Book § 60-5. "An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily [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. Although a complete record and an obvious error are prerequisites for plain error review, they are not, of themselves, sufficient for its application. . . . [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. . . . [I]n addition to examining the patent nature of the error, the reviewing court must examine that error for the grievousness of its consequences in order to determine whether reversal under the plain error doctrine is appropriate. . . . [Our Supreme Court] described the two-pronged nature of the plain error doctrine: [An appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest injustice." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *McClain*, supra, 324 Conn. 812. The defendant bears the burden of meeting this two-prong test. See *State* v. *Moore*, 293 Conn. 781, 824, 981 A.2d 1030 (2009), cert. denied, 560 U.S. 954, 130 S. Ct. 3386, 177 L. Ed. 2d 306 (2010).

The following additional facts and procedural history are necessary to our resolution of this issue. At trial, Daniels testified that he and the defendant had participated in the May 29, 2013 robbery together. Daniels

explained that he had returned to Hartford from shoplifting in New London and was approached by the defendant about robbing a CVS store that night. Daniels described how he and the defendant stole merchandise from the store, and he identified himself and the defendant in a series of CVS' surveillance photographs. On both direct examination and cross-examination, Daniels answered questions about his prior convictions and about the agreement he had made with the state to receive a reduced sentence in exchange for his testimony. During closing arguments, however, only the state drew attention to the issue of whether Daniels' testimony was corroborated.[5]

The court instructed the jury that it should "decide which testimony to believe and which testimony not to believe" and that it could "believe all, none or any part of any witness' testimony." The court listed a number of factors for the jury to consider, including whether "the witness [had] an interest in the outcome of this case or any bias or prejudice concerning any party or any matter involved in this case," "how reasonable was the witness' testimony when considered in light of all the evidence in the case," and whether "the witness'

[5] The state reminded the jury, in its closing argument, that "in your role as a juror you have to assess the credibility of the witnesses who have come in here. . . . Now there was only one person who identified [the defendant] as the other participant, but I would submit to you that the other evidence here are those photographs. . . . Mr. Daniels identified [the defendant] for you. . . . Now I'm sure defense counsel will tell you, well, you shouldn't believe Mr. Daniels. He's a convicted felon and, you know what, he took a plea agreement here. He helped himself. He has nobody else to corroborate what he says. Only what he's telling you. But, again, those photographs corroborate what Mr. Daniels told you. The clerks who work at CVS corroborate what Mr. Daniels told you." Defense counsel's closing argument focused primarily on "the ways . . . that . . . Daniels lied," pointing to his prior convictions and plea agreement as reasons not to credit his testimony. Although defense counsel noted that the two CVS employees did not identify the defendant as the other participant in the robbery, he did not directly argue that Daniels' testimony lacked corroboration.

testimony [was] contradicted by what that witness has said or done at another time, or by the testimony of other witnesses or by other evidence." The court then provided the jury with a specific accomplice testimony instruction, highlighting that "[i]n weighing the testimony of an accomplice who is a self-confessed criminal, you should consider that fact. It may be that you would not believe a person who has committed a crime as readily as you would believe a person of good character. In weighing the testimony of an accomplice who has not yet been sentenced, you should keep in mind that he may in his own mind be looking for some favorable treatment in the sentence of his own case. Therefore, he may have such an interest in the outcome of this case that his testimony may have been colored by that fact. Therefore, you must look with particular [care] at the testimony of an accomplice and scrutinize it very carefully before you accept it."

The court's instructions continued as follows: "There are many offenses that are of such a character that the only persons capable of giving useful testimony are those who are themselves implicated in the crime. It is for you to decide what credibility you will give to a witness who has admitted his involvement and criminal wrongdoing, whether you will believe or disbelieve the testimony of a person who by his own admission has committed or contributed to the crime charged by the state here. Like all other questions of credibility, this is a question you must decide based on all the evidence presented to you."

The defendant argues that the accomplice instruction the court provided to the jury did not adequately warn the jury of the dangers of relying on uncorroborated accomplice testimony. We disagree.

The law does not require "the judge, whenever an accomplice testifies, to instruct the jury that it is not

safe to convict on his testimony alone. . . . It is the character and interest of the witness, as shown upon the trial, and not the mere fact of his being an accomplice, that must determine the discretion of the judge in commenting on his credibility. The conditions of character and interest most inconsistent with a credible witness, very frequently, but not always, attend an accomplice when he testifies. When those conditions exist, it is the duty of the judge to specially caution the jury . . . .'' *State* v. *Carey*, 76 Conn. 342, 349, 56 A. 632 (1904); see also *State* v. *Williamson*, supra, 42 Conn. 263–64 (''it has become a rule of practice, it cannot correctly be called a rule of law, for the court to caution the jury as to the weight of [uncorroborated accomplice testimony]''); *State* v. *Wolcott*, supra, 21 Conn. 282 (''[c]ourts frequently do and ought to advise caution in reposing confidence in the naked testimony of an accomplice; but this is rather in the exercise of a proper judicial discretion, than because the law demands it''). Because the law does not require that an accomplice's testimony be corroborated for the jury to accept it, the Supreme Court has held that the accused is not entitled to a charge that an accomplice's testimony should be corroborated. *State* v. *Heno*, 119 Conn. 29, 33, 174 A. 181 (1934). ''[T]he decision [rests with the jury] as to whether corroboration [for accomplice testimony] was necessary and the extent to which it was necessary.'' *State* v. *Leopold*, 110 Conn. 55, 64, 147 A. 118 (1929). ''The degree of credit which is due to an accomplice, is a matter exclusively for the jury to say.'' *State* v. *Wolcott*, supra, 282.

In the present case, the court's instruction cautioned the jury to consider an accomplice's character and interests when weighing his testimony and to look at the testimony with particular care and careful scrutiny. The instruction noted that ''[t]here are many offenses that are of such a character that the only persons capable

of giving useful testimony are those who are themselves implicated in the crime" and that the jury should consider this testimony in light of all other evidence. The court also provided the jury with a general witness instruction, which similarly instructed the jury to weigh a witness' testimony in light of his interest in the case and all the other evidence.[6] Although the court did not use the word "corroboration," the court instructed the jury to consider other evidence when weighing all witnesses', as well as an accomplice's, testimony. Because the law does not require that an accomplice's testimony be corroborated for the jury to accept it and because the law does not require the court to instruct the jury that it is unsafe to rely on uncorroborated accomplice testimony, there is no patent and obvious error that requires reversal under the plain error doctrine.

III

Finally, the defendant claims that the court improperly admitted McDowell's statement to the police as a prior inconsistent statement. On appeal, the defendant argues that McDowell's statement to the police did not satisfy the personal knowledge requirement of *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986); see also Conn. Code Evid. § 8-5 (1). The state argues that, at trial, the defendant did not object to the statement's admission on this ground and, in the alternative,

[6] The state notes, in its brief to this court, that both the specific accomplice testimony instruction and general witness instruction given were nearly identical to Connecticut's model jury instructions. See Connecticut Judicial Branch Criminal Jury Instructions § 2.5-2 (Revised to December 1, 2007), available at http://www.jud.ct.gov/ji/criminal/Criminal.pdf (last visited December 5, 2017). As we have stated in the context of claims of instructional error that were preserved or raised under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), "[w]hile not dispositive of the adequacy of the [jury] instruction, an instruction's uniformity with the model instructions is a relevant and persuasive factor in our analysis." (Internal quotation marks omitted.) *State* v. *Leandry*, 161 Conn. App. 379, 396–97, 127 A.3d 1115, cert. denied, 320 Conn. 912, 128 A.3d 955 (2015).

that McDowell possessed the requisite personal knowledge. Assuming that the defendant preserved this claim, we agree with the state that the statement itself demonstrates that McDowell had personal knowledge of the facts in the statement.

The following additional facts and procedural history are relevant to this claim. On May 30, 2013, the police questioned McDowell about the previous day's CVS robbery. He provided a signed written statement to the police whereby he indicated the following: "Yesterday when I was at my house, I saw Kenny [Millege] give [Daniels], [the defendant], and [a third individual] the car I was stopped in today by the police at West Farms Mall. I saw him giving them the car at about 4:30 to 5:00 pm." At trial, the state called McDowell as a witness. When McDowell insisted that he had not seen Millege give them the car but, rather, that Millege had told him who he gave the car to, and that he did not remember everything he had said to the police, the assistant state's attorney sought to offer McDowell's May 30 statement as a prior inconsistent statement under *Whelan*. Defense counsel objected to the admission of the statement because it "totally lack[ed] the indicia of reliability needed to come in under [*Whelan*]" because McDowell had been falling asleep and "high on heroin when [he] gave the statement." The court initially sustained the objection because of the statement's inherent unreliability.

At the next trial day, the state asked the court to reconsider its ruling, arguing that under *State* v. *Hersey*, 78 Conn. App. 141, 151, 826 A.2d 1183 (2003), the statement's reliability "goes to the weight of the evidence and not to its admissibility . . . ." Defense counsel responded by distinguishing *Hersey* from the present case, noting that "[f]irst of all, Mr. McDowell at one point stated in his testimony that he was repeating not what he knew from his own statements, but from what

Mr. Millege had told him . . . .'' Nevertheless, the court reconsidered its decision from the previous day. After reviewing the case law and the statement itself, the court concluded that it could not find that the statement was ''so unreliable . . . that a jury should not be permitted to consider it for substantive purposes.''

The defendant now argues that the court improperly admitted McDowell's statement because it did not satisfy *Whelan*'s personal knowledge requirement.[7] We disagree.

Before addressing the merits of the defendant's claim, we set forth the standard of review and relevant law. ''The admissibility of evidence, including the admissibility of a prior inconsistent statement pursuant to *Whelan*, is a matter within the . . . discretion of the trial court. . . . [T]he trial court's decision will be reversed only where abuse of discretion is manifest or where an injustice appears to have been done. . . . On review by this court, therefore, every reasonable presumption should be given in favor of the trial court's ruling.'' (Citation omitted; internal quotation marks omitted.) *State* v. *Pierre*, 277 Conn. 42, 56, 890 A.2d 474, cert. denied, 547 U.S. 1197, 126 S. Ct. 2873, 165 L. Ed. 2d 904 (2006).

In *Whelan*, the court adopted a hearsay exception ''allowing the substantive use of prior written inconsistent statements, signed by the declarant, who has personal knowledge of the facts stated, when the declarant testifies at trial and is subject to cross-examination.''

[7] The defendant also argued that the statement constituted hearsay within hearsay but, at oral argument before this court, conceded that the statement could only be said to contain hearsay by virtue of McDowell's inconsistent testimony at trial. As the defendant concedes, for the *Whelan* statement to contain hearsay, the court would have to credit McDowell's trial testimony that his statement was based on what Millege had told him and not based on what he had seen as stated in his statement. See *State* v. *Pierre*, 277 Conn. 42, 64–65, 890 A.2d 474, cert. denied, 547 U.S. 1197, 126 S. Ct. 2873, 165 L. Ed. 2d 904 (2006).

State v. *Whelan*, supra, 200 Conn. 753.[8] "In evaluating whether a declarant has personal knowledge of the facts contained within a prior inconsistent statement, we look to the statement itself. If the statement itself indicates that the basis of the information contained in that statement is the declarant's personal knowledge, that is sufficient to satisfy the criteria of personal knowledge established by *Whelan*. . . . Whether a witness repudiates a prior inconsistent statement has no bearing on the reliability of such statement." (Citation omitted; internal quotation marks omitted.) *State* v. *Juan V.*, 109 Conn. App. 431, 443–44, 951 A.2d 651, cert. denied, 289 Conn. 931, 958 A.2d 161 (2008). "The jury can . . . determine whether to believe the present testimony, the prior statement, or neither." (Internal quotation marks omitted.) *State* v. *Pierre*, supra, 277 Conn. 57. "Furthermore, [a]llowing a party to circumvent the exception to the hearsay rule established by *Whelan* merely by repudiating the foundation for his knowledge when that foundation is an element of the statement itself would eviscerate the *Whelan* exception, potentially leaving no statement admissible under the pertinent rule." (Internal quotation marks omitted.) *State* v. *Juan V.*, supra, 444.

In the present case, the statement itself demonstrates that McDowell had personal knowledge when he made the statement. See id., 443. McDowell's statement states that he "*saw* Kenny [Millege] give [Daniels], [the defendant], and [a third individual] the car . . . ." (Emphasis added.) McDowell then signed his statement, thereby attesting to its truth and acknowledging that he understood that he could be subject to criminal penalties

[8] "This rule also has been codified in § 8-5 (1) of the Connecticut Code of Evidence, which incorporates all of the developments and clarifications of the *Whelan* rule that have occurred since *Whelan* was decided." (Internal quotation marks omitted.) *State* v. *Simpson*, 286 Conn. 634, 642, 945 A.2d 449 (2008).

for making a false statement. Nevertheless, McDowell repudiated his statement at trial, indicating that he had not in fact seen Millege transfer the car but, rather, had been told by Millege about the transfer. Although the court only allowed a redacted version of the statement to be introduced into evidence, when determining whether it satisfied *Whelan*'s requirements, the court had the full statement before it, which includes details that further demonstrate that McDowell possessed the requisite personal knowledge. In drawing every reasonable presumption in favor of the court's ruling, we hold that the court did not abuse its discretion in determining that McDowell's statement itself demonstrated that McDowell possessed the requisite personal knowledge. See *State* v. *Pierre*, supra, 277 Conn. 56; see also *State* v. *Juan V.*, supra, 109 Conn. App. 443.

The judgment is affirmed.

In this opinion the other judges concurred.

JOHN K. HORVATH *v.* CITY OF HARTFORD (AC 39132)

Alvord, Prescott and Bishop, Js.

Syllabus

The plaintiff, who had been employed by the defendant city of Hartford as an assistant chief of police, sought to recover damages from the defendant for its alleged violation of the state whistle-blower statute (§ 31-51m) in connection with his reporting of actual or suspected violations of law by the commander of the police department's internal affairs division. The plaintiff alleged that as a result of his whistle-blowing actions, the defendant constructively discharged him from his employment by reducing his responsibilities and taking other actions with the intent to create an intolerable work atmosphere that caused his involuntary resignation. After the city council cut certain funding for the police department, the plaintiff took on additional duties as a result of the retirement of another assistant chief of police, and the interim chief of police informed the plaintiff that his position was going to be eliminated from the budget but that his job was safe. The plaintiff, while

still employed by the defendant, then obtained employment elsewhere and thereafter left his employment with the defendant. The trial court granted the defendant's motion for summary judgment, concluding that there existed no genuine issue of material fact in support of the plaintiff's claim that he was constructively discharged. From the judgment rendered thereon, the plaintiff appealed to this court, claiming that disputed issues of material fact existed regarding whether the defendant's actions amounted to a constructive discharge in violation of § 31-51m, and whether the defendant had penalized him as a consequence of his whistle-blowing activities. *Held*:

1. This court declined to consider the plaintiff's claim that the defendant's actions amounted to a retaliatory penalty and discipline for his having reported alleged abuses of authority, as the plaintiff's complaint did not claim relief on the basis of other forms of retaliation such as discipline or penalty, as described in § 31-51m, his claims were limited to those made in the complaint, and the claim was raised for the first time on appeal.

2. The trial court properly rendered summary judgment in favor of the defendant, the plaintiff having failed to establish the existence of a genuine issue of material fact as to whether he was constructively discharged as a result of his whistle-blowing actions: although it was undisputed that the plaintiff had raised a genuine issue of material fact that he had engaged in a protected activity as defined by § 31-51m (b), the changes in some of his work responsibilities were not so objectively intolerable that a reasonable person would have felt compelled to resign, the plaintiff provided no admissible evidence to demonstrate that he was demoted, reprimanded or threatened with the termination of his employment, his compensation never changed during that period, and the fact that he accepted a new position with higher pay before he resigned significantly undermined his claim of constructive discharge; moreover, the admissible evidence submitted by the parties in conjunction with the motion for summary judgment suggested that any adverse action by the police department was driven by budgetary constraints, and, thus, the actions by the defendant were not sufficient to raise a genuine issue of material fact as to whether it intended to create an intolerable work environment, as the defendant's conduct in conveying to the plaintiff that his job might be at risk of elimination for budgetary reasons could not be equated to allegations of threats of discharge from employment so as to warrant a conclusion of constructive discharge.

Argued September 20—officially released December 12, 2017

Procedural History

Action to recover damages for, inter alia, violation of the state whistle-blower statute, and for other relief, brought to the Superior Court in the judicial district of

Hartford, where the court, *Elgo*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Richard J. Padykula, with whom, on the brief, was *Leon M. Rosenblatt*, for the appellant (plaintiff).

John P. Shea, *Jr.*, for the appellee (defendant).

Opinion

BISHOP, J. The plaintiff, John K. Horvath, appeals from the summary judgment rendered in favor of the defendant, the city of Hartford. On appeal, the plaintiff asserts that the trial court's judgment was in error because disputed issues of material fact exist concerning whether he was retaliated against, and later constructively discharged, by the defendant in violation of General Statutes § 31-51m as a result of his whistleblowing activities while in the defendant's employ. In response, the defendant claims that summary judgment was appropriate because, in opposition to its motion for summary judgment, the plaintiff offered no evidence that the defendant constructively discharged him by intentionally creating an intolerable work environment compelling him to resign. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to the resolution of this appeal. In 2011, the defendant employed the plaintiff as an assistant chief of police for the Hartford Police Department (department). At the time, the department's command structure was comprised of the chief of police, two deputy chiefs and three assistant chiefs. On April 11, 2011, in response to an internal complaint, the plaintiff requested an investigation into the actions of Neville Brooks, commander of the department's internal affairs division. In September, 2011, the city hired Marcum LLP

to conduct an independent review of the operations of the internal affairs division. Following the release of the Marcum LLP report, the plaintiff sent a letter on December 1, 2011, to Daryl Roberts, the chief of police, setting forth his concerns regarding "numerous errors, omissions and intentional misrepresentations" contained in the Marcum LLP report.

On May 17, 2011, the Hartford city council passed a financial resolution reducing its budget by $1,750,000, including a reduction of $300,000 in department's executive command level expenses. This budget included funding for the plaintiff's position. The cuts were accomplished, in part, by the retirement of Lester McKoy, an assistant chief of police. On May 24, 2012, James Rovella, who became the interim chief of police after Roberts retired in December, 2011, informed the plaintiff that his position as assistant chief was going to be eliminated from the budget. In the same conversation, however, Rovella assured him that "his job was safe."[1]

In June, 2012, the plaintiff had a series of interviews with the University of Massachusetts in Amherst, Massachusetts, for the position of chief of police and subsequently accepted the position on September 4, 2012.

[1] Rovella succeeded Roberts as chief of police after Roberts' retirement in 2011. We note that, in conjunction with its motion for summary judgment, the defendant submitted a transcript excerpt from Rovella's September 1, 2015 deposition, in which the following exchange occurred between Rovella and the plaintiff's counsel:

"Q. Why was [the plaintiff] led to believe his position was not open anymore and was unfunded?

"A. There's no reason for [the plaintiff] to believe that was an unfunded position. . . .

"Q. So, do you recall telling [the plaintiff] that his position was in the budget for 2012–2013?

"A. Yes."

In addition, the court had evidence, in the form of the plaintiff's deposition transcript and handwritten notes, submitted in conjunction with the motion for summary judgment, indicating that the plaintiff learned from Tom Bowley, the department's fiscal manager, that even though funding for his posi-

The plaintiff left his employ with the department as assistant chief of police on September 21, 2012.

On May 14, 2013, the plaintiff filed a single count amended complaint alleging that the defendant had penalized him by constructively discharging him from his employment in violation of § 31-51m because "he investigated and reported, verbally and in writing, Brooks' actual or suspected violations of state law, municipal ordinance, and pertinent regulations."[2] Thereafter, the defendant filed a motion for summary judgment in which it claimed, inter alia, that there existed no genuine issue of material fact in support of the plaintiff's claim that he was constructively discharged. On April 13, 2016, the trial court issued a memorandum of decision granting the defendant's motion. This appeal followed. Additional facts will be provided as necessary.

I

We first set forth the applicable standard of review. "The standards governing our review of a trial court's decision to grant a motion for summary judgment are well established. Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material

tion was being eliminated from the budget, funds necessary to pay his salary were being "backfilled" from another department account. See footnote 5 of this opinion.

[2] The complaint further alleges that the defendant penalized the plaintiff by discharging him for investigating, identifying and reporting "Brooks' alleged unethical practices, mismanagement, and abuse of authority."

facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact which will make a difference in the result of the case. . . . Finally, the scope of our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Internal quotation marks omitted.) *McClancy* v. *Bank of America, N.A.*, 176 Conn. App. 408, 412–13, 168 A.3d 658 (2017).

Additionally, "[o]nly evidence that would be admissible at trial may be used to support or oppose a motion for summary judgment. . . . Practice Book § 17-46 provides in relevant part that affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." (Citation omitted; internal quotation marks omitted.) *Midland Funding, LLC* v. *Mitchell-James*, 163 Conn. App. 648, 655, 137 A.3d 1 (2016). "A conclusory assertion . . . does not constitute evidence sufficient to establish the existence of a disputed material fact for purposes of a motion for summary judgment." *Hoskins* v. *Titan Value Equities Group, Inc.*, 252 Conn. 789, 793–94, 749 A.2d 1144 (2000). Last, summary judgment "is appropriate only if a fair and reasonable person could conclude only one way." *Miller* v. *United Technologies Corp.*, 233 Conn. 732, 751, 660 A.2d 810 (1995).

Section 31-51m protects an employee from retaliatory discharge when the employee has complained about a suspected violation of a state or federal law or regulation. *Arnone* v. *Enfield*, 79 Conn. App. 501, 506–507, 831 A.2d 260, cert. denied, 266 Conn. 932, 837 A.2d 804 (2003). Section 31-51m (b) provides in relevant part: "No employer shall discharge, discipline or otherwise

penalize any employee because (1) the employee, or a person acting on behalf of the employee, reports, verbally or in writing, a violation or a suspected violation of any state or federal law or regulation or any municipal ordinance or regulation to a public body . . . . No municipal employer shall discharge, discipline or otherwise penalize any employee because the employee, or a person acting on behalf of the employee, reports, verbally or in writing, to a public body concerning the unethical practices, mismanagement or abuse of authority by such employer. The provisions of this subsection shall not be applicable when the employee knows that such report is false."

"Constructive discharge of an employee occurs when an employer, rather than directly discharging an individual, *intentionally* creates an intolerable work atmosphere that forces an employee to quit involuntarily. . . . Working conditions are intolerable if they are so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Brittell* v. *Dept. of Correction*, 247 Conn. 148, 178, 717 A.2d 1254 (1998). "A claim of constructive discharge must be supported by more than the employee's subjective opinion that the job conditions have become so intolerable that he or she was forced to resign." *Seery* v. *Yale-New Haven Hospital*, 17 Conn. App. 532, 540, 554 A.2d 757 (1989). "Normally, an employee who resigns is not regarded as having been discharged, and thus would have no right of action for abusive discharge. . . . Through the use of constructive discharge, the law recognizes that an employee's voluntary resignation may be, in reality, a dismissal by the employer." (Citation omitted; internal quotation marks omitted.) Id. Moreover, "[i]n order to meet the high standard applicable to a claim of constructive discharge, a plaintiff is required to show both (1) that

there is evidence of the employer's intent to create an intolerable environment that forces the employee to resign, and (2) that the evidence shows that a reasonable person would have found the work conditions so intolerable that he would have felt compelled to resign." (Internal quotation marks omitted.) *Irizarry* v. *Lily Transportation Corp.*, Docket No. 3:15-CV-1386 (DJS), 2017 WL 3037782, *4 (D. Conn. July 18, 2017), citing *Adams* v. *Festival Fun Parks, LLC*, 560 Fed. Appx. 47, 49 (2d Cir. 2014).[3]

II

On appeal, the plaintiff makes two claims: (1) that he was constructively discharged from his employment in violation § 31-51m, and (2) that he was otherwise penalized as a consequence of his whistle-blowing activities at the department in violation of the same statute. In regard to this second claim, the plaintiff asserts that "a reasonable jury could conclude that [the] defendant's actions amounted to a retaliatory penalty and discipline for the plaintiff['s] reporting of abuses of authority . . . ." In response, the defendant argues that the court correctly rendered summary judgment as to the plaintiff's retaliatory discharge claim, and that the plaintiff's second claim is outside the scope of the complaint and has been raised for the first time on appeal. In sum, the defendant claims that the plaintiff relied solely on retaliatory constructive discharge in his pleadings and, therefore, cannot now raise additional theories of recovery that are based on discipline or penalty untethered to his wrongful discharge claim. Because we agree that the plaintiff's second claim has been raised for the first time on appeal and is not framed as a distinct claim in the plaintiff's complaint, it does not warrant detailed

[3] We note that our courts have looked to federal employment discrimination standards, in the absence of authority to the contrary, in retaliatory discharge cases. See, e.g., *LaFond* v. *General Physics Services Corp.*, 50 F.3d 165, 172 (2d Cir. 1995); *Ritz* v. *East Hartford*, 110 F. Supp. 2d 94, 98 (D. Conn. 2000); *Beizer* v. *Dept. of Labor*, 56 Conn. App. 347, 355–56, 742 A.2d 821, cert. denied, 252 Conn. 937, 747 A.2d 1 (2000).

analysis. Accordingly, we discuss it briefly before turning to the wrongful discharge claim.

The complaint alleges that the plaintiff "was constructively discharged on September 21, 2012." In three subsequent paragraphs, the complaint further repeats that the "defendant penalized the plaintiff by discharging him . . . ." Nowhere in the complaint does the plaintiff frame a claim for relief on the basis of other forms of retaliation, such as "disciplined or otherwise penalize[d]," as described in § 31-51m (b). In short, in his complaint, he claims that he was constructively discharged as a consequence of his whistle-blowing actions. A plaintiff's claims are, of course, framed by and limited to those made in the complaint. *Mamudovski* v. *BIC Corp.*, 78 Conn. App. 715, 732, 829 A.2d 47 (2003) ("[a] fundamental tenet in our law is that the plaintiff's complaint defines the dimensions of the issues to be litigated" [internal quotation marks omitted]), appeal dismissed, 271 Conn. 297, 857 A.2d 328 (2004). Additionally, we decline to consider his attempt to raise claims of alternative forms of retaliation for the first time on appeal. See, e.g., *Murphy* v. *EAPWJP, LLC*, 306 Conn. 391, 399, 50 A.3d 316 (2012) ("[i]t is well established that a claim must be distinctly raised at trial to be preserved for appeal"); see also Practice Book § 60-5 ("[t]he court shall not be bound to consider a claim unless it was distinctly raised at the trial").

III

Turning to the constructive discharge claim, the plaintiff asserts that there are genuine issues of material fact regarding whether the defendant's actions amounted to a constructive discharge in violation of § 31-51m. Specifically, the plaintiff claims that as a result of his whistle-blowing actions, the defendant reduced his responsibilities and took other actions with the intention to create an intolerable work atmosphere that caused his involuntary resignation.

In *Arnone* v. *Enfield*, supra, 79 Conn. App. 501, this court examined the framework for analyzing retaliatory discharge claims. "In an action under § 31-51m (b), [the] plaintiff has the initial burden under *McDonnell Douglas Corp.* [v. *Green*, 411 U.S. 792, 802–804, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)] of proving by a preponderance of the evidence a prima facie case of retaliatory discharge. . . . This consists of three elements: (1) that [the plaintiff] engaged in a protected activity as defined by § 31-51m (b); (2) that [the plaintiff] was subsequently discharged from his employment; and (3) that there was a causal connection between his participation in the protected activity and his discharge. . . . Once the plaintiff has made a prima facie showing of a retaliatory discharge, the defendant is obligated to produce evidence that, if taken as true, would permit the conclusion that there was a nonretaliatory reason for the termination of employment." (Citations omitted; internal quotation marks omitted.) *Arnone* v. *Enfield*, supra, 507; see also *Ritz* v. *East Hartford*, 110 F. Supp. 2d 94, 98 (D. Conn. 2000) (same). In order to satisfy the second element of § 31-51m by way of constructive discharge, the plaintiff needs to establish that the employer intentionally created an intolerable work atmosphere that forced the employee to quit involuntarily, and that the intolerable conditions are supported by more than the employee's subjective opinion. *Brittell* v. *Dept. of Correction*, supra, 247 Conn. 178.

It is undisputed that the plaintiff has raised a genuine issue of material fact regarding the first element of his prima facie case. As to the second element, we agree with the court that the plaintiff failed to raise, through admissible evidence in opposition to the defendant's motion for summary judgment, a genuine issue of material fact that he was constructively discharged. In support of this aspect of his claim, the plaintiff has presented evidence of what he alleges to be intolerable

work conditions. He asserts that work responsibilities were taken from him, and that Rovella "began to manipulate [his] professional responsibilities, usurp [his] authority as assistant chief, and diminish [his] substantive duties." Specifically, this included: (1) taking away his duties in managing the police department's fleet vehicles; (2) removing him from the collective bargaining negotiating team; (3) denying his request to attend a Federal Bureau of Investigation training program; (4) approving a staffing, budget and overtime request without discussion with him, even though he chaired the overtime committee; and (5) excluding him from certain meetings and initiatives, such as special events planning, a vendor outreach program, a police visibility project to improve community perception, representation in the public safety complex project, and a multiagency meeting to address violent crime in the city.

The defendant does not refute this evidence, but instead highlights that the plaintiff took on additional duties as a result of McKoy's resignation, such as the responsibilities of the assistant chief of operations in addition to his role as the assistant chief of detectives.[4]

[4] The defendant submitted, among its exhibits in support of its motion for summary judgment, excerpts of the plaintiff's August 31, 2015 deposition. During that deposition, the following exchange occurred between the defendant's counsel and the plaintiff:

"Q. . . . [I]f you could provide me with an encapsulation of what your duties were before McKoy left, primary duties . . . and your primary duties after McKoy left?

"A. Sure. Prior to Assistant Chief McKoy leaving city service, I was the assistant chief in charge of the detective bureau, and after Chief McKoy's departure, I assumed the responsibilities for not only the detective bureau, but also all of the patrol division, uniformed services, and it was titled assistant chief of operations.

"Q. Okay. And so am I correct in understanding that you kept all or the majority of your duties as assistant chief of the detective bureau and they just added the additional duties of operations?

"A. Yes."

The plaintiff's resume reflected that these additional responsibilities began in July, 2011.

The defendant therefore argues that although some duties were taken from him, the addition of other duties simply rebalanced his responsibilities.

We agree, in principle, with the plaintiff's assertion that the accumulation of adverse conditions in the workplace can amount to intolerable conditions for purposes of assessing whether a constructive discharge has taken place. In *Grey* v. *Norwalk Board of Education*, 304 F. Supp. 2d 314, 319 (D. Conn. 2004), the plaintiff contended that she suffered a hostile work environment and was constructively discharged as the Norwalk public schools' director of curriculum and assessment. In *Grey*, the court stated: "[The plaintiff] presents a variety of circumstances that, combined, she argues made her situation 'intolerable,' including: the repeated threat that her position would be eliminated; a rumored letter announcing her termination; [the deputy superintendent's] public usurpation of her authority in front of her subordinates; the administration's manipulation of her curricular responsibilities; petty reprimands; and [the district superintendent's] suggestion that the District [buy back] her contract and his subsequent comment that she should consider herself 'finished.' Together, these circumstances support a reasonable inference of constructive discharge. On [the plaintiff's] version of the facts, the fact-finder could determine that it was reasonable for her to assume that she was 'compelled to leave.' " Id., 324.

Additionally, in *Chertkova* v. *Connecticut General Life Ins. Co.*, 92 F.3d 81 (2d Cir. 1996), the United States Court of Appeals for the Second Circuit concluded that the plaintiff presented sufficient evidence to overcome a motion for summary judgment on her constructive discharge claim. The plaintiff's evidence suggested that "her supervisor engaged in a pattern of baseless criticisms, said she would not 'be around,' and that she would be fired instantly if she did not meet certain

ambiguous behavior objectives." Id., 89. The plaintiff learned that her supervisor was soliciting other employees for negative information about her. Id., 85. A former employee stated in an affidavit that "creating intolerable conditions to force unwanted employees to quit was a recognized practice of [the] defendant's managers." Id., 90. It was also discovered that the employer had prepared a letter of termination, which the plaintiff never received. Id., 86.

We do not agree, however, that the plaintiff's grievances, even if proven, parallel those found in decisional law to be sufficient to constitute an intolerable work environment. In sum, although we recognize that " '[t]he effect of adverse conditions is cumulative' "; *Grey* v. *Norwalk Board of Education*, supra, 304 F. Supp. 2d 324; the circumstances in which the plaintiff in the present matter was confronted with cannot be equated either in kind or in adversity with the work conditions found in *Grey* and *Chertkova* to constitute the basis for a finding of constructive discharge.

Indeed, viewed in the light most favorable to the nonmoving party, the admissible evidence submitted by the parties in conjunction with the motion for summary judgment suggests that any adverse action by the department against the plaintiff was driven not by a desire for retaliation but by looming budgetary constraints affecting the top tier of the department. Accordingly, regardless of whether the plaintiff thought that his position was to be eliminated and even if he was told of this probability in the context of budget discussions, the actions by the defendant are not sufficient to raise a genuine issue of material fact as to the high standard of demonstrating "the employer's *intent* to create an intolerable environment." (Emphasis added.) *Irizarry* v. *Lily Transportation Corp.*, supra, 2017 WL 3037782, *4. Moreover, given the evidence submitted by the defendant that, indeed, arrangements had been

made to preserve the plaintiff's position even amidst budgetary cuts, we agree with the court's conclusion that, as a matter of law, no reasonable person "would have found the work conditions so intolerable that he would have felt compelled to resign." (Internal quotation marks omitted.) Id.[5] In sum, conveying to the plaintiff that his job may be at risk of elimination for budgetary reasons cannot be equated to allegations of threats of discharge from employment or termination letters such as those found in different circumstances so as to warrant a conclusion of constructive discharge.[6]

[5] We again note that in his deposition, the plaintiff recalled that the defendant had "backfilled" his salary with funding from another account:

"Q. Well, [Bowley] said [the plaintiff's job] was cut in theory, but that it was still reflected in the budget book as filled.

"A. Because it was being backfilled by moneys from another account or category, as I have written here . . . .

"Q. I don't see backfilled. Is that what you're suggesting, that it is coming out of the attrition category as backfilling?

"A. Yes. The $127,000 would have been my salary. So, if my salary equated to $127,000 and that exact amount is coming out of the attrition and this is the information that he's providing to me, one would only make that assumption that that's where the money was coming from." See also footnote 1 of this opinion.

Additionally, the defendant submitted a portion of the department's adopted payroll analysis budget for fiscal year 2012–2013, showing that the plaintiff's position was funded.

[6] Because the plaintiff repeatedly relies on specific statements contained in his affidavit and the affidavit of Valda G. Washington, the defendant's director of human resources, to support his claim that the defendant intended to discharge him in retaliation for his whistle-blowing actions, we briefly address them.

In his affidavit, the plaintiff states: "On February 15, 2012, Frank Rudewicz e-mailed me to set up a meeting. Rudewicz was the lead investigator for the Marcum LLP group. Rudewicz and I subsequently met, and Rudewicz told me that he had been called to a meeting with Mayor [Pedro] Segarra and members of his cabinet team, where he was given a copy of the memorandum I submitted to Chief Roberts on December 1, 2011. Rudewicz told me the [m]ayor was very angry and asked him, 'Why are these guys documenting everything? Why should I keep them around if they are going to do this?' . . . Rudewicz then asked me if I was looking for another job. It was clear from the context that he was telling me to look for another job because the mayor and staff were angry at me . . . ."

"Only evidence that would be admissible at trial may be used to support or oppose a motion for summary judgment. . . . Practice Book § 17-46 provides in relevant part that affidavits shall be made on personal knowledge,

Cf. *Chertkova* v. *Connecticut General Life Ins. Co.*, supra, 92 F.3d 85–86; *Grey* v. *Norwalk Board of Education*, supra, 304 F. Supp. 2d 319–20.

We conclude, therefore, that the changes in some of the plaintiff's work responsibilities were not so objectively intolerable that a reasonable person would have felt compelled to resign. The plaintiff has not provided admissible evidence demonstrating that he was demoted, reprimanded or personally threatened with the termination of his employment.[7] The plaintiff gained the additional responsibilities of another assistant chief.[8] The plaintiff's compensation never changed during this period. Furthermore, as the trial court noted,

shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." (Citation omitted; internal quotation marks omitted.) *Midland Funding, LLC* v. *Mitchell-James*, supra, 163 Conn. App. 655. "Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. . . . Unless subject to an exception, hearsay is inadmissible." (Citation omitted; internal quotation marks omitted.) Id.

In the plaintiff's affidavit, he recalls a statement made to him by a third party, Rudewicz, who was also recalling a statement made to him by the mayor. The statement, " 'Why should I keep them around if they are going to do this?' " is an out-of-court statement offered to prove the truth of the matter asserted; that is, to prove that the defendant intended to terminate the plaintiff's employment for his whistle-blowing activities. The statement was not made by the declarant. See Conn. Code Evid. § 8-1. This statement is hearsay by definition in our Code of Evidence and is not admissible, nor does it fall within one of the exceptions to the rule against hearsay. Conn. Code Evid. §§ 8-2 and 8-3. Accordingly, we cannot consider this statement as admissible evidence in opposition to the motion for summary judgment.

The same logic applies to the out-of-court statements contained in Washington's affidavit, dated December 4, 2015. Furthermore, there is no evidence or allegation that the plaintiff was aware of the statements contained in Washington's affidavit until after December 4, 2015.

[7] Again, we note that although the plaintiff's complaint and affidavit state that he was informed by Rovella "that [his] *position* as [a]ssistant [c]hief of [p]olice was being eliminated from the budget"; (emphasis added); there is no admissible evidence supporting the allegation that the plaintiff himself (and not his position in the budget) was being eliminated. See footnote 1 of this opinion.

[8] The court noted that up until the time the plaintiff resigned, he retained such duties as: "leading Compstat meetings; leading the police budget committee; serving on the policy and procedure committee; serving on the firearms discharge board of inquiry; serving on the safety committee; serving

"the fact that the plaintiff accepted a new position with a higher pay *before* he resigned significantly undermines a claim of constructive discharge." (Emphasis in original.)

Viewing the evidence in the light most favorable to the nonmoving party, the plaintiff has failed to establish the existence of a genuine issue of material fact as to whether he was constructively discharged as a result of his whistle-blowing actions. In order to successfully oppose summary judgment, the plaintiff must provide an evidentiary foundation to demonstrate the existence of a fact that will make a difference in the result of the case. There are no genuine issues of material fact that support his claim that the defendant intentionally created such an intolerable work environment that a reasonable person would feel forced to resign. Accordingly, the court properly rendered summary judgment.

The judgment is affirmed.

In this opinion the other judges concurred.

JAMIE R. GOMEZ *v.* COMMISSIONER OF CORRECTION
(AC 39328)

Lavine, Kahn and Bishop, Js.*

Syllabus

The petitioner, who had been convicted of the crimes of murder and conspiracy to commit murder, sought a writ of habeas corpus, claiming, inter alia, that his due process rights were violated by the state's suppression of material exculpatory evidence in violation of *Brady* v. *Maryland* (373 U.S. 83). Specifically, he claimed that the

on the health and wellness committee; serving as a CTIC policy board member; and serving as a police representative to the homeless working group."

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

state failed to disclose certain consideration that allegedly had been offered in exchange for the testimony of two witnesses, V and S, both of whom had been charged with various crimes in connection with the underlying murder. The petitioner claimed that express agreements existed between the state and V and S to bring their cooperation to the attention of the sentencing court, and that the state had failed to disclose such agreements. The habeas court rendered judgment denying the habeas petition, from which the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The habeas court properly concluded that the state had not committed a *Brady* violation with respect to the agreements that existed between the state and V and S; that court's finding that agreements existed between the state and V and S, and that the agreements were limited to bringing their cooperation to the attention of the judicial authority posttrial was not clearly erroneous and was supported by the record, and because the evidence also supported the habeas court's finding that the state had disclosed the agreements, no *Brady* violation occurred.

2. The petitioner could not prevail on his claim that the state improperly failed to disclose impeachment evidence relating to how it had assisted in reducing bonds for V and S, which was based on his claim that transcripts of bond hearings involving V and S revealed the consideration offered to them with respect to a reduction of their bonds; the habeas court properly concluded that the petitioner failed to prove a *Brady* violation with respect to evidence of an informal understanding between the state and V and S, as the petitioner had equal access to the transcripts of the bond hearings and did not present any evidence at the habeas trial indicating an inability to obtain them.

3. The petitioner could not prevail on his claim that the state violated his rights to due process and a fair trial when, during his criminal trial, it knowingly presented, and failed to correct, the false testimony of V and S that they had not received any consideration from the state in exchange for their testimony, even though the state had promised to bring their cooperation to the attention of the sentencing court and had provided assistance in lowering their bonds; where, as here, the habeas court reasonably concluded that the state's express agreements to bring the cooperation of V and S to the attention of the judicial authority posttrial had been disclosed, the statements made during the bond modification hearings, which formed the substantive basis of the petitioner's claims with respect to undisclosed evidence of an informal understanding, took place in open court, and the petitioner had equal access to the transcripts for those proceedings, the petitioner failed to prove the existence of an undisclosed agreement or understanding, and, therefore, the state was not required to correct the allegedly false testimony of V and S.

4. The habeas court properly concluded that the petitioner was not denied the effective assistance of counsel as a result of the alleged failure of his trial counsel to adequately cross-examine V and S regarding their

alleged agreements or understandings with the state; even if trial counsel was deficient in failing to specifically impeach V and S with certain transcripts, the petitioner failed to prove that he was prejudiced thereby, as the jury knew of the substantive terms of the witnesses' agreements with the state, could have reasonably inferred a connection between their cooperation and their reduced bonds, and was fully informed that the witnesses might have potential biases against the petitioner, and, therefore, there was not a reasonable probability that the outcome of the petitioner's criminal trial would have been different had trial counsel impeached the witnesses with the various transcripts.

Argued September 11—officially released December 12, 2017

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, and tried to the court, *Oliver*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Andrew P. O'Shea, assigned counsel, for the appellant (petitioner).

Stephen Carney, senior assistant state's attorney, with whom, on the brief, were *Michael L. Regan*, state's attorney, and *Theresa Anne Ferryman*, senior assistant state's attorney, for the appellee (respondent).

Opinion

LAVINE, J. The petitioner, Jamie Gomez, appeals from the judgment of the habeas court denying his second petition for a writ of habeas corpus. Following that denial, the court granted his petition for certification to appeal. On appeal, the petitioner claims that the habeas court erred when it concluded that (1) his state and federal constitutional due process rights were not violated by the state's suppression of material exculpatory evidence concerning agreements or understandings that it allegedly had with two of its witnesses, (2)

the state did not violate his state and federal constitutional rights to due process by knowingly presenting, and failing to correct, the false testimony from those witnesses, and (3) he was not denied his state and federal constitutional rights to the effective assistance of counsel when his trial counsel failed to properly cross-examine those witnesses regarding their alleged agreements or understandings with the state. Because we conclude that the petitioner failed to prove that the agreements or understandings were not disclosed, we are unpersuaded by the petitioner's first and second claims. We are also unpersuaded by the petitioner's third claim because, even if it is assumed that his trial counsel provided constitutionally deficient representation, the petitioner failed to prove that he was prejudiced. Accordingly, we affirm the judgment of the habeas court.[1]

The following facts and procedural history are relevant. In connection with the murder of Darrell Wattley, the state charged the petitioner and his codefendants, Anthony Booth and Daniel Brown, each with one count of murder in violation of General Statutes § 53a-54a, one count of felony murder in violation of General Statutes § 53a-54c, and one count of conspiracy to commit murder in violation of General Statutes §§ 53a-48 (a) and 53a-54a.[2] The factual backdrop underlying the charges is set forth in our Supreme Court's decision and need not be repeated in full for this appeal. See *State* v. *Booth*, 250 Conn. 611, 614–17, 737 A.2d 404 (1999) (consolidated trial with three codefendants and Supreme Court

[1] Although the petitioner claims that his rights under article first, §§ 8 and 9, of the constitution of Connecticut were violated, he has failed to provide an independent analysis under our state constitution. Accordingly, we deem his state constitutional claims abandoned. See, e.g., *State* v. *Bennett*, 324 Conn. 744, 748 n.1, 155 A.3d 188 (2017).

[2] After the close of evidence, the state filed substitute informations against the petitioner and Booth, which removed their felony murder charges and charged each of them with one count of murder and one count of conspiracy to commit murder.

consolidated appeals), cert. denied sub nom. *Brown* v. *Connecticut*, 529 U.S. 1060, 120 S. Ct. 1568, 146 L. Ed. 2d 471 (2000).

The following facts from that decision, however, provide context for the petitioner's second habeas petition. On July 4, 1995, James "Tiny" Smith and Wattley fought one another at a party. Id., 614. During the fight, Wattley sliced Smith's throat with a box cutter, wounding him. Id. On July 13, 1995, when Smith, Brown, and the petitioner were at Booth's apartment in New London, "Booth told them that he had asked Angeline Valentin, who lived in the same building, to call Wattley over to the building so that Wattley and Smith could fight." Id.

"When Valentin called to say that Wattley was on his way, the four men left the building and went outside. [The petitioner] and Brown went to the north side of the building while Smith and Booth went to the south side and hid behind a bush. While they were waiting, Booth was talking on a cellular telephone to either Brown or [the petitioner]. After approximately fifteen minutes, a car arrived and Wattley got out. Wattley walked toward the north end of the building, where Brown and [the petitioner] were waiting. Smith and Booth then entered the building on the south side and began to ascend the stairs. When Smith and Booth reached the third floor, where Valentin's apartment was located, they heard gunshots below. Smith and Booth then ran to exit the building. As they descended the stairs, they saw Wattley lying face down in the second floor hallway with blood everywhere. Booth then stabbed Wattley a couple of times before Smith and Booth fled the building." Id., 614–15. Shortly after the incident, the petitioner drove his codefendants and Smith across town, where they all agreed to come up with alibis. Id., 615.

Following a consolidated jury trial, the petitioner and his codefendants were found guilty of murder and conspiracy to commit murder. Id., 613. During the consolidated trial, John F. Cocheo, now deceased, represented the petitioner, Jeremiah Donovan represented Brown, and Bruce Sturman represented Booth. On January 7, 1997, the court, *Parker*, *J.*, sentenced the petitioner to a term of imprisonment of fifty years on the murder conviction and a concurrent sentence of fifteen years on the conspiracy to commit murder conviction, for a total effective sentence of fifty years to serve. Our Supreme Court affirmed the petitioner's conviction. See id., 617, 663.

On September 18, 2000, the petitioner filed his first self-represented petition for a writ of habeas corpus (first petition). In a two count revised petition, he alleged ineffective assistance of counsel against Cocheo and actual innocence. The habeas court denied his first petition, and this court affirmed the denial. See *Gomez* v. *Commissioner of Correction*, 80 Conn. App. 906, 836 A.2d 1279 (2003), cert. denied, 267 Conn. 917, 841 A.2d 219 (2004).

On May 16, 2013, the petitioner filed a second self-represented petition for a writ of habeas corpus. In his amended petition (present petition), he first alleged that the state violated his right to due process by failing to disclose material exculpatory evidence. Specifically, he alleged that the state told Smith and Valentin that, in exchange for their testimony, it would assist in (1) reducing their bonds and (2) disposing of their charges in a manner favorable to them, and that it failed to disclose this information.[3] He also alleged that the state

[3] The state charged Smith with murder, felony murder, and conspiracy to commit murder, and also charged Valentin with accessory to assault in the first degree in violation of General Statutes §§ 53a-8 and 53a-59.

On March 16, 2000, Smith pleaded guilty to manslaughter in the second degree in violation of General Statutes § 53a-56 (a) (1) and was sentenced to one year and three months incarceration. On January 13, 1997, Valentin pleaded guilty to accessory to assault in the third degree in violation of

violated his right to due process when the prosecutor failed to correct the false testimony of Smith and Valentin, who both testified at the consolidated trial that the state had not offered them "consideration" in exchange for their testimony. Additionally, he alleged that Cocheo's failure to adequately impeach Valentin and Smith deprived him of his right to the effective assistance of trial counsel.[4] The respondent, the Commissioner of Correction, filed his return on January 12, 2016, denying the material allegations of the present petition.[5]

On May 23, 2016, the habeas court denied the present petition in a written decision. It made several relevant findings of fact, including: "(a) The petitioner has failed to demonstrate that underlying trial counsel (Cocheo) was unaware of the existence of an agreement between Smith and Valentin and the prosecuting authority to bring their cooperation to the attention of the judicial authority posttrial. The evidence demonstrated that at least one other defense attorney in the consolidated trial was made aware of the agreement; (b) The petitioner has failed to demonstrate that the underlying

General Statutes §§ 53a-8 and 53a-61 (a) (1) and received a suspended sentence of one year.

[4] In his present petition, the petitioner also raised claims of judicial bias and ineffective assistance of counsel of his first habeas counsel. He withdrew his judicial bias claim prior to trial and does not press his ineffective assistance of habeas counsel claim in this appeal.

[5] The respondent did not plead procedural default or successive petition with regard to any of the petitioner's claims. See Practice Book §§ 23-29 and 23-30 (b); see also *Zollo* v. *Commissioner of Correction*, 133 Conn. App. 266, 277–80, 35 A.3d 337 (discussing and applying successive petition doctrine), cert. granted, 304 Conn. 910, 39 A.3d 1120 (2012) (appeal dismissed May 1, 2013); *Milner* v. *Commissioner of Correction*, 63 Conn. App. 726, 731–34, 779 A.2d 156 (2001) (discussing procedural default). We, therefore, decide this appeal on the merits of the petitioner's claims. See, e.g., *Quint* v. *Commissioner of Correction*, 99 Conn. App. 395, 403, 913 A.2d 1120 (2007) (petitioner's claim "should be heard on its merits" when respondent fails to raise procedural default).

trial testimony of Smith and Valentin was 'false' as suggested by the petitioner, as opposed to, for example, their uncertainty as to the likely posttrial sentencing scenario. The nature and circumstances of Smith and Valentin's 'agreements' were thoroughly explored and dissected on both direct and cross-examination. There is no reasonable probability that the jury was misled in this regard; (c) Nothing about the nature of the agreements or their disclosure was violative of *Brady*[6] or *Giglio* [v. *United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972)][7]; and (d) The petitioner has failed to demonstrate, as was the case in the first habeas trial, that Attorney Cocheo was deficient in any regard, including cross-examining Smith and Valentin." (Footnotes added.)

The petitioner filed a motion for articulation, which the habeas court denied on September 23, 2016. He did not seek review of that denial. See Practice Book §§ 66-5 and 66-7. This appeal followed. Additional facts will be set forth as necessary.

"In evaluating the merits of the underlying claims on which the petitioner relies in the present appeal, we observe that [when] the legal conclusions of the court are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record. . . . To the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous. . . . [A] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with

[6] See *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

[7] See also *Napue* v. *Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959).

the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Diaz* v. *Commissioner of Correction*, 174 Conn. App. 776, 785–86, 166 A.3d 815, cert. denied, 327 Conn. 957, A.3d (2017). Because the issues presented in this appeal involve mixed questions of law and fact, our review is plenary. See, e.g., *George M.* v. *Commissioner of Correction*, 290 Conn. 653, 659, 966 A.2d 179 (2009).

I

We begin with the petitioner's claim that the state failed to disclose the "consideration" that it had allegedly offered Valentin and Smith in exchange for their testimony. We understand his claim to be supported by two separate arguments. First, he appears to argue that express agreements existed between the state and the witnesses to bring their cooperation to the attention of the sentencing court, and that the state failed to disclose them.[8] Second, he appears to argue that the state failed

[8] The petitioner alleged in his present petition that the prosecuting authority offered to assist Valentin and Smith in "disposing of their charges in a manner more favorable to them," but failed to disclose such offers. In support of this allegation, he only argues that an agreement existed to bring the witnesses' cooperation to the attention of the sentencing court. He made this same, limited argument to the habeas court. He fails to direct our attention to specific points in the record that otherwise support his claim. We follow the petitioner's lead and limit our analysis to his argument that the state had express agreements with Valentin and Smith to bring their cooperation to the attention of the sentencing court, but failed to disclose them. See, e.g., *Bharrat* v. *Commissioner of Correction*, 167 Conn. App. 158, 181–82, 143 A.3d 1106 (declining to review argument on appeal that was never raised in habeas court), cert. denied, 323 Conn. 924, 149 A.3d 982 (2016); see also *Solek* v. *Commissioner of Correction*, 107 Conn. App. 473, 480, 946 A.2d 239 ("[i]t is not the responsibility of the trial judge . . . to search a record, often, in a habeas case, involving hundreds of pages of transcript, in order to find some basis for relief for a petitioner"), cert. denied, 289 Conn. 902, 957 A.2d 873 (2008).

After reviewing the record, however, we note that it does contain statements during Smith's plea hearing, held on March 16, 2000, after our Supreme Court affirmed the petitioner's conviction, from which it can be inferred that the state had an agreement or understanding with Smith. The following colloquy took place between the prosecutor, Paul E. Murray, defense counsel for Smith, Anthony Basilica, and the court in connection with the prosecutor

to disclose impeachment evidence relating to how the state assisted in reducing the witnesses' bonds. The respondent argues that the record demonstrates that the state had disclosed the existence and terms of any agreement between the state and the witnesses. Additionally, the respondent argues that any statements

providing the factual basis for Smith pleading guilty to manslaughter in the second degree:

"[The Prosecutor]: We recognize and have recognized from the beginning the value of [Smith's] cooperation. It has been the state's position that with respect to . . . Booth, there was sufficient evidence and all probability to convict . . . Booth of murder and conspiracy to commit murder without the assistance of [Smith] because . . . Booth had been injudicious in his comments and had made statements in the presence of police officers, among other things, that clearly showed his involvement. With respect, however, to . . . Gomez and . . . Brown, the state would have had a difficult, if not impossible, case without the assistance of [Smith]. It was in fact [Smith's] cooperation that led to their arrest. He testified at their probable cause hearing, and he testified extensively at the trial. . . .

"*Early in the proceedings, after the trial of . . . Booth, Brown, and Gomez, as long ago as when Judge Purtill was . . . still the presiding judge in this judicial district on the criminal side, we had had discussions about the disposition in this case, and the state has always offered a plea to a manslaughter charge. And the state has always offered to agree to a recommendation of the state of a ten year sentence to be served with* [*Smith*] *reserving the right to argue for less. Again, as long ago as when Judge Purtill was presiding and Judge Purtill had heard the testimony of* [*Smith*] *at the probable cause hearing, Judge Purtill had indicated his inclination to impose a substantially lesser sentence than the ten years that the state was recommending. We have been aware of that from the beginning.* And I know that this court has indicated a sentence of, I believe, [fifteen] months. . . .

"So, that is the basis on which this plea is entered, and factual basis on which the charges are brought.

"The Court: Thank you. Attorney Basilica, is that what had been discussed with . . . Smith?

"[Basilica]: Yes, Your Honor." (Emphasis added.)

The prosecutor's statements during the March 16, 2000 proceeding suggest that an agreement or understanding existed, at some point in time, between the state and Smith regarding a favorable disposition to his pending criminal charges. It is unclear on this record, however, as to precisely when that agreement or understanding might have existed. The petitioner did not call the prosecutor or Smith to testify during his habeas trial and, therefore, we are left to speculate as to when such an agreement or understanding might have existed.

made during the bond hearings for Valentin and Smith, which form the basis of the petitioner's claim, "were public proceedings, open to anyone with interest, and transcripts were presumably available upon request." We agree with the respondent.

The following additional facts and procedural history are relevant. On September 13, 1995, Valentin testified during a probable cause hearing for Booth that implicated Booth in Wattley's murder. During Valentin's bond hearing on October 5, 1995, Bernard Steadman, her attorney, represented: "I have discussed this matter with the state and they would—my understanding is that there would be no objection to her moving out of state, should she be released on a bond, and provided that she maintain contact with—to or with their office either through me or directly." Steadman asked the court to consider releasing Valentin on a promise to appear and allowing her to travel to New Jersey given her cooperation with the state and because Wattley's murder appeared to be gang related. Paul E. Murray, the supervisory assistant state's attorney (prosecutor),[9] informed the court: "I did indicate to [Steadman], Your Honor, that I would bring to the court's attention [Valentin's] cooperation, and I think I've done that." The prosecutor also informed the court that he had spoken with Valentin's mother about Valentin going to New Jersey and that "both [Valentin] and her mother have agreed . . . to keep the state apprised as to her location and how she can be reached . . . ." In the event that she did not keep the state apprised of her location, the prosecutor stated that "[the state] will find her and she will have forfeited whatever benefits she has gained from her cooperation to this point." He also stated: "I'm not sure whether a promise to appear is the appropriate

[9] Murray represented the state at the petitioner's consolidated criminal trial. He also represented the state in connection with the criminal proceedings against Valentin and Smith.

thing, but I think certainly a substantial reduction in her bond is appropriate." Thereafter, the prosecutor stated that he would not object to a written promise to appear and informed the court: "I think if I were in your position, I would not be averse to a written promise to appear. I'm trying to be careful as to—as to the record I'm making."

After considering, inter alia, the "cooperative aspects of this matter," the court, *Purtill*, *J.*, reduced Valentin's bond from $100,000 to a written promise to appear and permitted her to reside in New Jersey. Immediately following that decision, the following colloquy took place in open court:

"[The Prosecutor]: . . . For the record, I would indicate I do not disagree at all with the court's decision. I was trying to be careful with the record because of obvious cross-examination effect. In consideration, I want the record to be clear that *the only representations made to* [*Valentin*] *were that any cooperation would be brought to the attention of the sentencing court. There was no quid pro quo for a specific bond recommendation.*

"[Steadman]: That is true, Your Honor." (Emphasis added.)

On March 14, 1996, during a consolidated probable cause hearing for Brown and the petitioner, Smith provided testimony that implicated Brown and the petitioner in Wattley's murder. The petitioner and Cocheo attended this hearing, and so did Donovan, Brown's lawyer. At the beginning of Smith's testimony, the following examination took place in open court:

"[The Prosecutor]: And you are in fact charged with murder, felony murder, and conspiracy to commit murder with respect to the case that we are going to talk about, is that right?

"[Smith]: Yes.

"[The Prosecutor]: And is it fair to say that *other than bringing your cooperation to the attention of the sentencing court*, you haven't been promised anything in return for your testimony?

"[Smith]: No.

"[The Prosecutor]: You say 'no.' That is the truth, isn't it?

"[Smith]: That's the truth." (Emphasis added.)

On May 3, 1996, approximately two months after Smith testified at the consolidated probable cause hearing, the court, *Parker*, *J.*, addressed Smith's motion for modification of his bond. The state did not object to the motion. Counsel for Smith represented that the reasons for requesting a bond modification were that Smith's life had been threatened and he had cooperated with the state. Thereafter, the court reduced Smith's bond from $500,000 to $100,000 and permitted him to travel throughout the continental United States.

On May 10, 1996, the court, *Purtill*, *J.*, amended the terms of Smith's bond, making it a $100,000 nonsurety bond with a nominal real estate bond. During this hearing, the prosecutor stated that the state had been in contact with a parole officer in Alabama, who agreed to arrange weekly reporting with Smith if he were allowed to reside there. The court asked that the state "reduce that condition to writing and give a copy to . . . Smith." Smith was then permitted to be released on bond.

At his habeas trial on the present petition, the petitioner called Donovan, trial defense counsel for Brown, and Sturman, trial defense counsel for Booth, to testify. Many of the questions that the petitioner asked on direct examination related to whether Donovan or Sturman had seen the bond hearing transcripts for Valentin and

Smith, and whether they would have impeached Valentin and Smith with the information contained in those transcripts. Specifically, the petitioner asked Donovan and Sturman whether they would have impeached Valentin and Smith regarding the state's promise to bring their cooperation to the attention of the sentencing judge and whether they would have impeached those witnesses with the "connection" between their cooperation and their reduced bonds. Donovan and Sturman both testified that they would have used the testimony from those transcripts to impeach Valentin and Smith. And neither Donovan nor Sturman recalled seeing the bond modification hearing transcripts prior to testifying at the habeas trial on the present petition.

Donovan also testified that, on four or five occasions, "[the prosecutor] told me . . . that the only promise that had been [made] to [Valentin and Smith] is [that] their cooperation would be brought to the attention of the judge." On the basis of his extensive experience dealing with the New London County Office of the State's Attorney, he also testified that the general procedure was not to offer specific "deals."

Contrary to Donovan's testimony, Sturman testified that, although he knew that Valentin had been released on a reduced bond, he was never informed that the state had offered any promises to either Valentin or Smith in exchange for their cooperation. He echoed Donovan's testimony, however, that the standard procedure in New London "was that no specific deals were made between a cooperating witness and the prosecution."

The respondent did not call any witnesses or present any evidence beyond cross-examination of Donovan and Sturman. During his argument to the habeas court, the petitioner focused on the contents of the bond hearing transcripts in support of his *Brady* claim, noting

that Donovan and Sturman "had never seen these proceedings. They didn't know this information [contained in the witnesses' bond hearing transcripts]."

"The defendant has a right to the disclosure of exculpatory evidence under the due process clauses of both the United States constitution and the Connecticut constitution. . . . In order to prove a *Brady* violation, the defendant must show: (1) that the prosecution suppressed evidence after a request by the defense; (2) that the evidence was favorable to the defense; and (3) that the evidence was material. . . . Any . . . understanding or agreement between any state's witness and the state police or the state's attorney clearly falls within the ambit of *Brady* principles. . . .

"The question of whether there existed an agreement between [a witness] and the state is a question of fact." (Citations omitted; internal quotation marks omitted.) *Elsey* v. *Commissioner of Correction*, 126 Conn. App. 144, 152–53, 10 A.3d 578, cert. denied, 300 Conn. 922, 14 A.3d 1007 (2011). "Furthermore, the burden is on the defendant to prove the existence of undisclosed exculpatory evidence." *State* v. *Floyd*, 253 Conn. 700, 737, 756 A.2d 799 (2000).

As previously noted, the petitioner essentially makes two separate arguments in support of his *Brady* claim. First, he contends that express agreements existed between the state and Valentin and Smith to bring their cooperation to the attention of the sentencing court, and that the state failed to disclose them. Second, the petitioner argues that the state failed to disclose impeachment evidence relating to how the state assisted in reducing the bonds for Valentin and Smith. We reject each argument and address them in turn.

A

The petitioner first argues that express agreements existed between the state and the witnesses to bring

their cooperation to the attention of the sentencing court, and that the state failed to disclose them. We agree that the state had express agreements with Valentin and Smith to bring their cooperation to the attention of the sentencing court, but disagree that the state failed to disclose them.

The habeas court found: "The petitioner has failed to demonstrate that underlying trial counsel (Cocheo) was unaware of the existence of an agreement between Smith and Valentin and the prosecuting authority to bring their cooperation to the attention of the judicial authority posttrial. The evidence demonstrated that at least one other defense attorney in the consolidated trial was made aware of the agreement." This finding is relevant in two material respects. First, it indicates that the habeas court found that agreements did, in fact, exist, and that they were limited to "bring[ing] [Valentin's and Smith's] cooperation to the attention of the judicial authority posttrial." Second, the court's finding indicates that another defense attorney was aware of these agreements that the state had with Valentin and Smith and that the petitioner failed to prove that Cocheo was unware of such agreements.

On the basis of our review of the record, we conclude that the habeas court's finding that agreements existed between the state and the cooperating witnesses, and that the agreements were limited to bringing their cooperation to the attention of the judicial authority posttrial, was not clearly erroneous. The prosecutor's statements during Valentin's bond hearing on October 5, 1995, indicate that an agreement existed with Valentin. The prosecutor's direct examination of Smith during the petitioner's consolidated probable cause hearing on March 14, 1996, which Cocheo and the petitioner attended, also indicates that the state had an agreement with Smith. During Valentin's bond hearing, Valentin's attorney confirmed that the agreement with Valentin

was limited to bringing her cooperation to the attention of the sentencing authority and that it did not include a quid pro quo for a specific bond recommendation. Additionally, Donovan testified that the prosecutor informed him on multiple occasions that agreements existed, but that the only promise was to bring the cooperation of Valentin and Smith to the attention of the court. Because this evidence supports the habeas court's finding that the state had limited agreements to bring the cooperation of Valentin and Smith to the attention of the court posttrial, we conclude that the habeas court's finding was not clearly erroneous.[10]

The habeas court's finding also reflects that the state disclosed the agreements. During the habeas trial, Donovan admitted to knowing about the agreements between the state and the witnesses. Cocheo and the petitioner attended the petitioner's consolidated probable cause hearing when the prosecutor asked Smith, in open court, whether the state had promised him anything other than bringing his cooperation to the attention of the sentencing court. This evidence supports the habeas court's finding that the state disclosed the agreements.

"Evidence known to the defendant or his counsel, or that is disclosed, even if during trial, is not considered suppressed as that term is used in *Brady*." (Internal quotation marks omitted.) *Hines* v. *Commissioner of Correction*, 164 Conn. App. 712, 726, 138 A.3d 430 (2016). Because the habeas court found that the agreements had been disclosed, it properly concluded

[10] The habeas court concluded that no agreements existed between Valentin and Smith, on the one hand, and the state, on the other, insofar as there was no specific agreement as to what sentence the state would recommend. On the basis of our review of the record, that conclusion is amply supported by the record. But that conclusion is incorrect, however, insofar as it ignores the fact that the state *had agreed* to bring the cooperation of Valentin and Smith to the attention of the sentencing court.

that the state had not committed a *Brady* violation with respect to the express agreements that existed.

B

The petitioner next argues that the state failed to disclose impeachment evidence relating to how it assisted in reducing the bonds for Valentin and Smith. We disagree.

The petitioner appears to argue that the state offered to assist in reducing the bonds for Valentin and Smith in exchange for their testimony based on the following: (1) they were required to stay in contact with the state while out on bond; (2) the court considered their cooperation in reducing their bonds; and (3) the state did not object to their motions to modify their respective bonds. "Our Supreme Court has acknowledged that even when certain undisclosed evidence did not support a finding of an implied agreement between the state and a witness, such evidence may nonetheless constitute impeachment evidence under *Brady* if it reasonably could be construed to suggest an 'informal understanding' between the state and a witness." *Elsey* v. C*ommissioner of Correction*, supra, 126 Conn. App. 155; see also *State* v. *Floyd*, supra, 253 Conn. 740–46 (addressing circumstances where state failed to disclose that it had not opposed witness' request to reduce bond to promise to appear).

The petitioner's argument that the state failed to disclose impeachment evidence stems from statements made during the witnesses' respective bond hearings. He argues that the transcripts of these proceedings reveal the "consideration" offered to Valentin and Smith with respect to a reduction of their bonds. It is significant that the *only* evidence offered by the petitioner of an informal understanding between the state and Valentin and Smith regarding a reduction of their bonds were these transcripts. "*Brady* is designed to assure

that the defendant is not denied access to exculpatory evidence known or available to the state but unknown *or unavailable to him*." (Emphasis added.) *State* v. *Skakel*, 276 Conn. 633, 702, 888 A.2d 985, cert. denied, 549 U.S. 1030, 127 S. Ct. 578, 166 L. Ed. 2d 428 (2006).

Under the circumstances of the present case, the habeas court properly concluded that the petitioner failed to prove a *Brady* violation with respect to evidence of an informal understanding between the state and Valentin and Smith.[11] The petitioner had equal access to the transcripts of the bond modification proceedings and did not present any evidence at the habeas trial indicating an inability to obtain them. See, e.g., *State* v. *Simms*, 201 Conn. 395, 404–408, 518 A.2d 35 (1986) (rejecting defendant's argument that state failed to disclose evidence of witness' mental health records because relevant information was matter of public record); *State* v. *Crump*, 43 Conn. App. 252, 263, 683 A.2d 402 (defendant failed to prove *Brady* violation because, inter alia, he "failed to demonstrate that . . . he did not know of [a victim's] testimony or have the opportunity to purchase the transcripts [from his coconspirator's] probable cause hearing and trial"), cert. denied, 239 Conn. 941, 684 A.2d 712 (1996). Accordingly, the petitioner failed to prove that the state committed a *Brady* violation with respect to impeachment evidence

[11] We note that the habeas court did not explicitly find that the state disclosed or otherwise did not suppress the impeachment evidence relating to how the state allegedly assisted Valentin and Smith in reducing their bonds. The habeas court's memorandum of decision simply concludes that "[n]othing about the nature of the agreements or their disclosure was violative of *Brady* or *Giglio*." On the basis of the evidence before it, including the transcripts from the respective bond hearings for both witnesses, it is implicit in the habeas court's conclusion that the petitioner failed to prove that the state did not disclose or otherwise suppressed this impeachment evidence. See, e.g., *Charlotte Hungerford Hospital* v. *Creed*, 144 Conn. App. 100, 116, 72 A.3d 1175 (2013) (appellate courts read ambiguous memorandum of decision to support, rather than undermine decision).

relating to a reduction of the bonds for Valentin and Smith.

II

We next address the petitioner's claim that his rights to due process and a fair trial were violated when the state knowingly presented the false testimony of Valentin and Smith during his consolidated criminal trial. Specifically, he argues that both witnesses falsely testified that they had not received any consideration from the state in exchange for their testimony and that the state failed to correct their false testimony. He argues that the state, in fact, promised to bring their cooperation to the attention of the sentencing court and provided assistance in lowering their bonds.[12] The respondent argues, inter alia, that the petitioner's claim fails because the testimony in question did not involve an undisclosed agreement or understanding. We agree with the respondent.

The following additional facts and procedural history are relevant. Smith and Valentin both testified on behalf of the state during the petitioner's consolidated trial. At trial, Valentin implicated the petitioner and his codefendants in Wattley's murder, but denied receiving any consideration from the state in exchange for her testimony.[13] Smith similarly implicated the petitioner and

[12] As in his *Brady* claim, the petitioner makes the general assertion that the witnesses received consideration from the state with respect to their eventual sentences. As previously noted in footnote 8 of this opinion, we understand the petitioner's argument to be limited to the state's promise to bring Valentin's and Smith's cooperation to the attention of the sentencing court.

[13] During direct examination, the prosecutor questioned Valentin about her pending criminal charges. The following portion of that examination is relevant:

"[The Prosecutor]: Do you have any idea what's going to happen to your case in the end?

"[Valentin]: No, I don't.

"[The Prosecutor]: *Has anybody promised you anything*?

"[Valentin]: *No*.

***

his codefendants, but denied receiving consideration from the state in exchange for his testimony.[14] At oral argument before this court, the respondent agreed that the testimony of these witnesses was "significant" and "extremely important" to convicting the petitioner and his codefendants.

"Regardless of the lack of intent to lie on the part of the witness, *Giglio* and *Napue* [v. *Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959)] require that the prosecutor apprise the court when he knows that his witness is giving testimony that is substantially misleading. . . .

"The prerequisite of any claim under the *Brady*, *Napue* and *Giglio* line of cases is the existence of an *undisclosed* agreement or understanding between the cooperating witness and the state. . . . Normally, this

"[The Prosecutor]: Do you hope that by being here and testifying it will help your case?

"[Valentin]: Yes, I hope so.

"[The Prosecutor]: But you don't know for sure what's going to happen?

"[Valentin]: No." (Emphasis added.)

Valentin subsequently confirmed that the state had not promised her anything during cross-examination and redirect examination.

[14] The prosecutor similarly asked Smith about his pending criminal charges in connection with Wattley's murder. The following exchange took place during direct examination:

"[The Prosecutor]: Do you have any idea what's going to happen in the criminal charges against you?

"[Smith]: No, I don't.

"[The Prosecutor]: *Did anybody promise you anything?*

"[Smith]: *No.*

"[The Prosecutor]: Do you have some hopes as to what might happen to them, at least in part as a result of your testimony?

"[Smith]: Yes.

"[The Prosecutor]: What do you hope?

"[Smith]: That they find out the truth, and that I had nothing to do with this." (Emphasis added.)

Smith subsequently confirmed that the state had not promised him anything in return for his statements to police or testimony at trial, and that there was no connection between his reduced bond and cooperating with the state.

is a fact based claim to be determined by the trial court, subject only to review for clear error." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Ouellette*, 295 Conn. 173, 186–87, 989 A.2d 1048 (2010); see also *State* v. *Jordan*, 314 Conn. 354, 369–71, 102 A.3d 1 (2014) (setting forth governing standards for proving that state failed to correct false or misleading testimony); *Adams* v. *Commissioner of Correction*, 309 Conn. 359, 369–73, 71 A.3d 512 (2013) (same). "[T]he burden is on the defendant to prove the existence of undisclosed exculpatory evidence." *State* v. *Floyd*, supra, 253 Conn. 737.

We conclude that the petitioner's *Napue/Giglio* claim is controlled by our recent decision in *Hines* v. *Commissioner of Correction*, supra, 164 Conn. App. 712. There, this court held that, where a case does not involve an undisclosed agreement or understanding, the state is not required to correct a witness' allegedly false testimony. Id., 728.[15] As previously noted, the habeas court reasonably concluded that the state's express agreements to bring the cooperation of Valentin and Smith to the attention of the judicial authority posttrial had been disclosed. Additionally, the statements made during the bond modification hearings, which form the substantive basis of the petitioner's *Brady*, *Napue*, and *Giglio* claims with respect to undisclosed evidence of an informal understanding, took place in open court. The petitioner had equal access to the transcripts for those proceedings. See, e.g., General Statutes § 51-61 (c) (court reporter "shall, when requested, furnish . . . *to any other person*, within a reasonable time, a transcript of the proceedings" [emphasis added]); *State* v. *Ross*, 208 Conn. 156, 160, 543 A.2d 284 (1988) (noting

[15] In his brief to this court, the petitioner argued that *Hines* should be overruled and requested en banc consideration of his appeal. On July 26, 2017, this court denied the petitioner's motion for en banc consideration.

1988 amendment to § 51-61 permitting "any other person" to obtain transcript of proceedings). Under these circumstances, the habeas court properly concluded that the state did not violate *Napue/Giglio*, because the petitioner failed to prove the existence of an undisclosed agreement or understanding.[16]

III

The petitioner's final claim is that he was deprived of his right to the effective assistance of trial counsel when Cocheo failed to adequately cross-examine Valentin and Smith. Specifically, he argues that, if Cocheo knew and had access to evidence that Valentin and Smith received consideration from the state, objective standards of reasonable performance required that he

[16] Although we conclude that the present case is controlled by *Hines*' rationale that the state is not required to correct a witness' allegedly false testimony when the case does not involve an undisclosed agreement or understanding, we recognize that there is language in *State* v. *Jordan*, 135 Conn. App. 635, 42 A.3d 457 (2012), rev'd in part on other grounds, 314 Conn. 354, 102 A.3d 1 (2014), suggesting that a prosecutor is obligated to correct the record under similar circumstances. In *Jordan*, this court held that, although the state had informed the court and defense counsel of agreements to bring two witnesses' cooperation to the court's attention, the prosecutor still had a duty to correct the witnesses' subsequent misleading testimony when both witnesses denied the existence of any agreements with the state. Id., 666. On appeal to our Supreme Court, the state raised the alternative ground for affirmance in that this court improperly concluded that the prosecutor had violated the standards set forth by *Napue*. *State* v. *Jordan*, supra, 314 Conn. 366 n.6. Notably, our Supreme Court stated: "We agree with the Appellate Court that the alleged improprieties were harmless and thus need not reach the alternative grounds for affirmance. *Nevertheless, nothing in this opinion should be construed to suggest that we concur in the Appellate Court's determination that improprieties occurred.*" (Emphasis added.) Id., 369 n.7.

Nonetheless, this court and our Supreme Court have stated that a prerequisite to a claim under *Brady*, *Napue*, and *Giglio* is the existence of an *undisclosed* agreement or understanding between the cooperating witness and the state. *State* v. *Ouellette*, supra, 295 Conn. 186–87; *Hines* v. *Commissioner of Correction*, supra, 164 Conn. App. 728. Because of that precedent, we affirm the habeas court's decision that the state did not commit a *Napue/Giglio* violation.

impeach the witnesses with that evidence. He argues that there is a reasonable probability that the outcome of the trial would have been different if Cocheo had used this evidence. We disagree.

The following additional facts and procedural history are relevant. During his direct examination of Valentin, the prosecutor questioned her about her pending charge of accessory to assault in the first degree in connection with Wattley's murder. He specifically asked her whether she had testified at a "preliminary hearing" and whether, subsequent to testifying, her bond was reduced to a promise to appear. She agreed that her bond was reduced after she testified at that hearing. She further testified that she hoped that her testimony against the petitioner and his codefendants would help her case. Additionally, Donovan, Sturman, and Cocheo each cross-examined her about the circumstances surrounding her bond reduction.[17]

In response to the prosecutor's questions, Smith admitted that he faced criminal charges in connection with Wattley's murder, namely, murder, conspiracy to commit murder, and felony murder. He testified that he hoped that he would not go to jail and that his testimony would show "that [he] had nothing to do with this." Smith further agreed with the prosecutor that his bond was reduced after testifying at the consolidated probable cause hearing for Brown and the petitioner,

[17] For example, the following examination took place during Donovan's cross-examination of Valentin:

"[Donovan]: After you testified against . . . Booth, you were released from jail, weren't you?

"[Valentin]: Yes, I was.

"[Donovan]: Do you think there might be, there just might be, some connection between you testifying against . . . Booth and your not being in jail anymore?

"[Valentin]: No.

"[Donovan]: You don't see any connection at all?

"[Valentin]: (Witness nods in the negative.)"

that he returned to Alabama, and that the state paid for his flight, hotel, and food while he was in Connecticut for the petitioner's trial. As with Valentin, Donovan and Sturman cross-examined Smith about his bond reduction.[18] Part of their cross-examination focused on the potential connection between his cooperation and a reduction in his bond.[19] Other portions of their cross-examination sought to expose their defense theory that Smith fabricated his testimony because *he* murdered Wattley.[20]

Donovan, Sturman, and Cocheo also commented on the circumstances surrounding the bond reductions for Valentin and Smith during final arguments to the jury, suggesting there was a connection between their bond reductions and testimony. They argued that the jury

[18] Cocheo did not cross-examine Smith about his bond reduction.

[19] For example, the following exchange took place during Donovan's cross-examination of Smith:

"[Donovan]: . . . As you sit here today, you recognize that there's some connection between your being a free man today and your testifying against these defendants?

"[Smith]: Rephrase that again.

"[Donovan]: Do you think that there may be a connection between your being a free man today—

"[Smith]: I'm not totally free.

"[Donovan]: When you leave this courtroom, you'll leave without shackles on, right?

"[Smith]: Yeah.

***

"[Donovan]: But the point is, that there is a connection between your being able to enjoy all those things and the fact that you're sitting up on the stand trying to put the blame on these men, isn't there?

"[Smith]: I'm just telling the truth.

***

"[Donovan]: It just happens that you came in and testified in a probable cause hearing, and then miraculously after that you were no longer in jail?

"[Smith]: I was bonded out."

[20] As noted by our Supreme Court, Wattley had sliced Smith's throat with a box cutter, "wounding him superficially," roughly one week before Wattley's murder. See *State* v. *Booth*, supra, 250 Conn. 614. The defense theory for Booth and Brown was that Smith had the motive to kill Wattley and did so in retaliation for Wattley's previous attack.

should consider this connection in assessing the witnesses' credibility. The court also instructed the jury to pay careful attention to "accomplice testimony" and that such testimony "may be colored" by a witness' hope for some favorable treatment.[21]

"To succeed on a claim of ineffective assistance of counsel, a petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. *Strickland* requires that a petitioner satisfy both a 'performance prong' and a 'prejudice prong.' To satisfy the performance prong, a [petitioner] must show that counsel's conduct fell below an objective standard of reasonableness for competent attorneys [as measured by prevailing professional norms]. . . . To satisfy the prejudice prong, a [petitioner] must show a reasonable probability that the outcome of the proceeding would have been different but for counsel's errors. . . . The claim will succeed only if both [*Strickland*] prongs are satisfied. . . . It is well settled that [a] reviewing court can find against a petitioner on *either* ground, whichever is easier." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Arroyo* v. *Commissioner of Correction*, 172 Conn. App. 442, 458, 160 A.3d 425, cert. denied, 326 Conn. 921, 169 A.3d 235 (2017). In these

[21] The court instructed the jury in relevant part: "Now, in this case, we have what we call 'accomplice testimony.' Certain of the witnesses, by their own testimony, participated in one way or another in the criminal conduct charged by the state in this case. In weighing the testimony of [an] accomplice who is a self-confessed criminal, you must consider that fact. . . .

"Also, in weighing the testimony of [an] accomplice who has not yet been sentenced or whose case has not yet been disposed of, you should keep in mind that he or she may, in his or her own mind, be looking for or hoping for some favorable treatment in the sentence or disposition of his or her case, and that therefore, he or she may have such an interest in the outcome of this case that his or her testimony may be colored by that fact. . . .

"Therefore, the jury must look with particular care at the testimony of accomplices and scrutinize it very carefully before you accept it."

circumstances, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." (Internal quotation marks omitted.) *Hinton* v. *Alabama*, U.S. , 134 S. Ct. 1081, 1089, 188 L. Ed. 2d 1 (2014).

Even if we were to assume, which we do not, that Cocheo's failure to specifically impeach Valentin and Smith with the transcripts from the probable cause hearings and their respective bond hearings constituted deficient performance, we conclude that the petitioner failed to prove prejudice.

The agreements that Valentin and Smith had with the state did not require that the state advance a specific recommendation in exchange for their testimony; rather, the substance of the agreements was that both Valentin and Smith hoped that their cooperative testimony might favorably be taken into account by the sentencing court. During the consolidated trial, Valentin and Smith both testified, in substance, that they hoped that their cooperative testimony would be taken into account with regard to their pending charges. Valentin and Smith also agreed with the prosecutor that their bonds were reduced following their testimony at the probable cause hearings for Booth, Brown, and the petitioner. And Cocheo and codefense counsel thoroughly explored the circumstances surrounding the bond reductions for both witnesses. Questioning Valentin and Smith about the contents of the transcripts, therefore, would have provided the jury with little additional information.

The court also informed the jurors that those witnesses who admitted to participating in the criminal conduct charged by the state may be looking for favorable treatment and "may have such an interest in the outcome of this case that his or her testimony may be colored by that fact." This instruction reminded the jurors of Valentin's and Smith's potential biases, and

jurors are presumed to follow the court's instructions. See, e.g., *State* v. *Fernandez*, 169 Conn. App. 855, 870, 875, 153 A.3d 53 (2016).

Our conclusion is further buttressed by the closing remarks of Cocheo and Sturman. Cocheo argued: "[Valentin] said, I had no idea at all I was going to be released. I had no idea, hadn't thought about it, hadn't talked about it at all. I ask you, is that credible? Is that credible? All she says is that she hopes her testimony will help her case. We know it helped so far; she's not in jail anymore." Sturman argued during his closing, "don't you think that [Smith's] testimony is flavored by his expectation of what's going to happen if he continues to play ball?" Such closing remarks urged the jury to discredit Valentin's and Smith's testimony based on their reduced bonds and their cooperation with the state.

We are not persuaded that there is a reasonable probability that, had Cocheo impeached Valentin or Smith with either the probable cause hearing transcripts or their respective bond hearing transcripts, the outcome of the petitioner's trial would have been different. The jury knew of the substantive terms of the witnesses' agreements with the state, could have reasonably inferred a connection between their cooperation and their reduced bonds, and was fully informed that the witnesses might have potential biases against the petitioner. Under the circumstances of the present case, we are confident that the outcome of the petitioner's trial would not have been different if Cocheo specifically impeached Valentin and Smith with the relevant transcripts. The habeas court, therefore, properly concluded that the petitioner was not denied the effective assistance of counsel at his criminal trial.

The judgment is affirmed.

In this opinion the other judges concurred.

TARA S. *v.* CHARLES J.*
(AC 39284)

Lavine, Prescott and Bear, Js.

Syllabus

The plaintiff sought to recover damages from the defendant for personal injuries she allegedly sustained in connection with his sexual assaults of her when she was four years old. The plaintiff, who was thirty-six years old, filed an application for a prejudgment remedy, seeking to attach certain of the defendant's real property. In response, the defendant filed a motion to dismiss the application and the underlying action. After a hearing, the trial court denied the defendant's motion to dismiss and granted a prejudgment remedy in the amount of $150,000 in favor of the plaintiff, determining that she had shown that there was probable cause that she would obtain a judgment against the defendant in that amount. Thereafter, the defendant appealed to this court, claiming that the trial court improperly denied his motion to dismiss because the applicable statute of limitations (§ 52-577d), which permits a minor victim of sexual abuse to bring an action for damages against the perpetrator of the abuse no later than thirty years from the date that the victim attains the age of majority, was unconstitutional as applied to him for a number of reasons. Specifically, he claimed that the statute was unconstitutional as applied to him because the plaintiff allegedly did not repress memories of the sexual assaults, and the legislative purpose behind extending the limitations period was to allow victims of childhood sexual abuse to recall memories of the abuse that had been repressed. *Held* that the trial court properly denied the defendant's motion to dismiss the application for a prejudgment remedy and the underlying action; the language of the statute was clear and unambiguous in that it allows a victim of childhood sexual abuse to bring a claim for damages against the perpetrator of the abuse no later than thirty years from the date upon which the victim attains the age of majority, and does not mention or require repressed memories, nor does it bar plaintiffs who have not repressed memories of the abuse from relying on it, the application of § 52-577d, as a statute of limitations, did not impact any constitutionally protected conduct or any property right of the defendant, and the defendant's claims that the application of § 52-577d violated his rights to a speedy trial, to confrontation and to protection against

* In accordance with our policy of protecting the privacy interests of the victims of sexual abuse, we decline to use the party's full names or to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

double jeopardy were unavailing, as those constitutional provisions were applicable only in criminal settings.

Argued October 10—officially released December 12, 2017

Procedural History

Action to recover damages for sexual assault, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the court, *Aurigemma, J.*, granted the plaintiff's application for a prejudgment remedy and denied the defendant's motion to dismiss the application and the action, and the defendant appealed to this court. *Affirmed.*

Bryan P. Fiengo, with whom, on the brief, was *Eric W. Callahan*, for the appellant (defendant).

Karen K. Clark, with whom, on the brief, was *Timothy L. O'Keefe*, for the appellee (plaintiff).

Opinion

BEAR, J. The defendant, Charles J., appeals from the trial court's judgment (1) denying his motion to dismiss the application for a prejudgment remedy filed by the plaintiff, Tara S., and the underlying action,[1] and (2) granting a prejudgment attachment of $150,000 in favor of the plaintiff. On appeal, the defendant claims that the court improperly denied his motion to dismiss because, as applied to him, General Statutes § 52-577d is unconstitutional in that the plaintiff did not repress memories of the sexual assault and, therefore, knew of her potential claim against him for more than thirty

[1] A ruling denying a motion to dismiss is an interlocutory ruling that does not usually constitute a final judgment. *Sasso* v. *Aleshin*, 197 Conn. 87, 89–90, 495 A.2d 1066 (1985). Because we determine, however, that the defendant's claim relating to the denial of his motion to dismiss is encompassed in the issues presented by the prejudgment remedy granted to the plaintiff, we have jurisdiction to consider the defendant's claim. See *Canty* v. *Otto*, 304 Conn. 546, 555–56, 41 A.3d 280 (2012). An order granting a prejudgment remedy after a hearing under General Statutes § 52-278d is a final judgment for purposes of appeal. General Statutes § 52-278*l*.

years. The defendant also argues that § 52-577d violates his right to a speedy trial, his protection against double jeopardy, and his right to confrontation provided by both the United States and Connecticut constitutions. Finally, the defendant argues that § 52-577d is unconstitutionally overbroad and improperly deprives him of a property interest. We affirm the judgment of the trial court.

The relevant facts are set forth in the court's memorandum of decision on the motion to dismiss and the application for a prejudgment remedy. "The plaintiff is a victim of sexual abuse at the hand of her father, the defendant . . . who was the subject of a criminal prosecution, the appeal of which resulted in a case of first impression [in our Supreme Court] concerning the use of videotaped testimony of minor victims . . . .

"At the hearing on the prejudgment remedy application, the plaintiff . . . testified that she had reviewed the [Supreme Court] decision and other documents relating to the prosecution shortly before she testified. Her testimony about the events surrounding the sexual assaults [was] nearly identical to the facts as recited by the court . . . . The plaintiff was four years old at the time of the assault and, although she claimed to have memory of the assaults, the court finds that the memory is largely based on a recent reading of the accounts of the events and extensive discussion with family members.

"The plaintiff, now [thirty-six] years of age, testified that she and her mother and brother moved away from Middletown when she was [five] years old. She stated that she thought she had received some counseling, but had not received regular medical checkups as a child. The plaintiff played sports and an instrument in high school, where she was on the honor roll. She was never suspended in school for any misconduct. The plaintiff

received her bachelor's degree from the University of North Carolina at Asheville, where she was on the dean's list, and a master's degree from the University of Oregon. She married in 2010, had a child, and divorced in 2015.

"The plaintiff testified that she had never been diagnosed with depression by any medical professional. However, she stated that she diagnosed herself with depression and obtained antidepression medication from her primary care physician. She last took the antidepression medication in 2013. . . .

"The plaintiff testified that the main effect that the sexual assaults had on her life was that she grew up only knowing her mother's side of the family, she felt guilty about her [the defendant's] prosecution and was embarrassed when people asked her where her father was. When asked why she decided to bring this lawsuit now, after the passage of so many years, the plaintiff testified she struggled everyday and also, learned that the case against [the defendant] had considerable notoriety."

General Statutes § 52-577 provides that "[n]o action founded upon a tort shall be brought but within three years from the date of the act or omission complained of." Section 52-577d, upon which the plaintiff relies to establish the timeliness of this litigation, provides that "[n]otwithstanding the provisions of section 52-577, no action to recover damages for personal injury to a minor, including emotional distress, caused by sexual abuse, sexual exploitation or sexual assault may be brought by such person later than thirty years from the date such person attains the age of majority."[2] The defendant makes several arguments challenging the

[2] The defendant does not dispute that the plaintiff's complaint was served on him within thirty years after she reached the age of majority.

constitutionality of § 52-577d as applied to him. Specifically, the defendant argues that the plaintiff's claim does not satisfy the legislative purpose behind extending the limitations period for victims of childhood sexual abuse because the plaintiff allegedly did not repress any memories of the sexual assaults. The defendant further argues that this civil litigation is of a "quasi-criminal" nature and infringes upon certain constitutional protections typically afforded criminal defendants, namely, the right to a speedy trial, the protection against double jeopardy, and the right to confrontation under the United States and Connecticut constitutions. The defendant also claims that § 52-577d is unconstitutionally overbroad and infringes upon a property interest of the defendant. We disagree.

"In considering an application for a prejudgment remedy [t]he trial court's function is to determine whether there is probable cause to believe that a judgment will be rendered in favor of the plaintiff in a trial on the merits. . . . Appellate review of the granting of a [prejudgment remedy] is extremely narrow and focused. In determining probable cause, the trial court is vested with wide discretion and our role in reviewing the trial court's action is limited to determining whether the court's conclusion was reasonable. . . . Accordingly, the trial court's determination in a [prejudgment remedy] proceeding should not be disturbed unless it is clearly erroneous. . . . Furthermore, we are entitled to presume that the trial court acted properly and considered all the evidence." (Internal quotation marks omitted.) *Giordano* v. *Giordano*, 39 Conn. App. 183, 206, 664 A.2d 1136 (1995). On appeal, the defendant does not, separately from or in addition to his constitutional claims, contest the court's finding of probable cause or its granting of or the amount of the prejudgment remedy.

"Determining the constitutionality of a statute presents a question of law over which our review is plenary. . . . It [also] is well established that a validly enacted statute carries with it a strong presumption of constitutionality, [and that] those who challenge its constitutionality must sustain the heavy burden of proving its unconstitutionality beyond a reasonable doubt. . . . The court will indulge in every presumption in favor of the statute's constitutionality . . . . Therefore, [w]hen a question of constitutionality is raised, courts must approach it with caution, examine it with care, and sustain the legislation unless its invalidity is clear." (Internal quotation marks omitted.) *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 405, 119 A.3d 462 (2015).

We first address the defendant's claim that § 52-577d is unconstitutional as applied to him because the plaintiff allegedly did not repress memories of the sexual assaults perpetrated by the defendant.[3] Relying on certain pieces of legislative history to support his claim, the defendant argues that the purpose behind extending the limitations period was to allow victims of childhood sexual abuse time to recall memories of the abuse that they had repressed. When § 52-577d is read in light of General Statutes § 1-2z,[4] however, we are compelled to

[3] The court rejected the defendant's factual premise for this claim: "The plaintiff was four years old at the time of the assault and, although she claimed to have a memory of the assaults, the court finds that the memory is largely based on a recent reading of the events and extensive discussion with family members." Although this finding is sufficient for us to reject the claim because the defendant did not offer proof of the plaintiff's memory of the events in addition to her statements that the court did not believe to be accurate, we, nevertheless, consider it on its merits.

[4] General Statutes § 1-2z provides: "The 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."

conclude that, whether the plaintiff did or did not repress memories of the sexual abuse is irrelevant, as § 52-577d does not mention or require repressed memories, nor does it bar plaintiffs who have not repressed memories of the abuse from relying on it. As our Supreme Court has recognized, the language of § 52-577d is clear and unambiguous in that it allows a victim of childhood sexual abuse to bring a claim for damages against the perpetrator of the abuse no later than thirty years from the date upon which the victim attains the age of majority. See *Doe* v. *Norwich Roman Catholic Diocesan Corp.*, 279 Conn. 207, 214, 901 A.2d 673 (2006) ("[t]he meaning of § 52-577d . . . is plain and unambiguous because it is susceptible of only one reasonable interpretation, namely, that a minor victim of sexual assault may bring a civil action no later than thirty years from the date that he or she attains the age of majority . . . ."). Because the meaning of § 52-577d is plain and unambiguous, we do not consider the legislative history that the defendant relies on and conclude that its language permitted the plaintiff to bring an action against the defendant regardless of whether she had or had not repressed her memories of the sexual assaults.

We next address the defendant's constitutional challenges regarding the alleged "quasi-criminal" nature of this civil litigation. The defendant argues that application of § 52-577d violates his constitutional right to a speedy trial,[5] his protection against double jeopardy,[6] and his right to confrontation.[7] Each constitutional provision at issue, however, is applicable only in criminal settings. See, e.g., U.S. Const., amend. VI ("[i]n all criminal proceedings . . ."); Conn. Const., art. 1, § 8 (same); U.S. Const., amend. V ("[n]o person shall be . . . subject for the same offence to be twice put in jeopardy

[5] See U.S. Const., amend. VI; see also Conn. Const., art. 1, § 8.

[6] See U.S. Const., amend. V; see also Conn. Const. art. 1, § 8.

[7] See U.S. Const., amend. VI; see also Conn. Const., art. 1, § 8.

of life or limb . . .''); cf. *In re Ceana R.*, 177 Conn. App. 758, 772, A.3d (2017) (noting that constitutional protections of sixth amendment to United States constitution and article first, § 8, of state constitution do not extend to parents in neglect proceeding, which is civil proceeding).[8]

Finally, we address the defendant's arguments that § 52-577d is unconstitutionally overbroad and unconstitutionally infringes upon a property interest. ''A clear and precise enactment may . . . be overbroad if in its reach it prohibits constitutionally protected conduct.'' *State* v. *Cook*, 287 Conn. 237, 244–45, 947 A.2d 307, cert. denied, 555 U.S. 970, 129 S. Ct. 464, 172 L Ed. 2d 328 (2008). Section 52-577d permits victims of childhood sexual abuse to bring claims against perpetrators of the abuse not later than thirty years after reaching the age

[8] The United States Supreme Court has stated that double jeopardy applies only to criminal punishments. See *Hudson* v. *United States*, 522 U.S. 93, 98–99, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997) (''We have long recognized that the Double Jeopardy Clause does not prohibit the imposition of all sanctions that could, in common parlance, be described as punishment. . . . The [double jeopardy] [c]lause protects only against the imposition of multiple *criminal* punishments . . . .'' [Citations omitted; emphasis in original; internal quotation marks omitted.]).

Our Supreme Court has not decided whether the confrontation clause applies in civil cases, but it has noted that the right to confrontation is limited to criminal prosecutions. See *Struckman* v. *Burns*, 205 Conn. 542, 549, 534 A.2d 888 (1987) (''the right of cross-examination does have a constitutional basis in the confrontation clause of our federal and state constitutions. . . . These provisions, however, are *expressly limited to criminal prosecutions*.'' [Citations omitted; emphasis added.]); see also *In re Ceana R.*, supra, 177 Conn. App. 772.

Courts also have stated that the right to a speedy trial is reserved for criminal cases. See, e.g., *Caesar* v. *Sessions*, 698 Fed.Appx. 655 (2d Cir. 2017) (concluding no ''colorable speedy trial claim [existed] because the Sixth Amendment does not apply in immigration proceedings, which are classified as civil rather than criminal''); *Akande* v. *Warden, Corrigan Correctional Institution*, United States District Court, Docket No. 3:08-CV-882 (AWT) 2009 WL 3838836 (D. Conn. November 16, 2009) (''[t]he right to a speedy trial . . . applies to an accused in a criminal case and does not apply to litigants in civil actions'').

of majority. The statute, as a statute of limitations, does not impact any constitutionally protected conduct. See *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, supra, 317 Conn. 412–13 ("[t]he Supreme Court [has] characterized statutes of limitations as restrictions only on that remedy, and emphasized that [the] authorities . . . show that no right is destroyed when the law restores a remedy which has been lost" [internal quotation marks omitted]). Application of the statute also does not impact any property right of the defendant. See *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, supra, 317 Conn. 412 (citing two United States Supreme Court cases that hold "that a defendant does not have a vested property right in a statute of limitations defense such that a legislative change reviving an otherwise time barred cause of action violates the defendant's rights under the due process clause of the fourteenth amendment to the United States constitution"); see also *Roberts* v. *Caton*, 224 Conn. 483, 492, 619 A.2d 844 (1993) ("[t]his court, however, has never recognized a vested right in the lapsing of a statute of limitations").

Our Supreme Court has consistently upheld the constitutionality of § 52-577d, albeit for different reasons than those presented in this case. In *Roberts* v. *Caton*, supra, 224 Conn. 494, the Supreme Court held that it was permissible to apply § 52-577d retroactively. In so holding, the court stated: "Although statutes of limitation generally operate to prevent the unexpected enforcement of stale claims . . . one object of § 52-577d is to afford the plaintiff sufficient time to recall and come to terms with traumatic childhood events before he or she must take action. The defendant's assertion that he is now unexpectedly exposed to liability was an express purpose of the statute." (Citation omitted; footnote omitted.) Id., 493–94.

More recently, in *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, supra, 317 Conn. 405, our Supreme

Court concluded: "[T]he application of § 52-577d retroactively to revive a time barred cause of action does not violate a defendant's substantive right to due process under the Connecticut constitution because it is a rational response by the legislature to the exceptional circumstances and potential for injustice faced by adults who fell victim to sexual abuse as a child."

This court has also had occasion to rule on the issue. In *Giordano* v. *Giordano*, supra, 39 Conn. App. 193, 195, this court determined that § 52-577d did not violate either the equal protection clause or the due process clause of the fourteenth amendment to the United States constitution. We also stated that "[t]he state has a legitimate interest both in deterring the sexual abuse of children and in providing a means for the victims of childhood sexual abuse to recall the traumatic events and *understand the harm done to them before seeking redress*." (Emphasis added.) Id., 193. This court consequently upheld the granting of a prejudgment remedy in the amount of $225,000. Id., 216.

We, accordingly, must reject the defendant's argument that, because the plaintiff allegedly did not repress her memories of the sexual assault, § 52-577d is unconstitutional as applied to him. We also reject the defendant's argument that this civil litigation is "quasi-criminal" in nature, and thus a civil action brought within the permitted time frame of § 52-577d implicates certain constitutional rights afforded criminal defendants. Additionally, the defendant has not, on nonconstitutional grounds in this appeal, challenged or offered proof of clear error in the court's ruling that the plaintiff has shown probable cause of obtaining a judgment against the defendant in the amount of $150,000. We thus affirm the court's judgment denying the defendant's motion to dismiss the application for a prejudgment remedy and the underlying action, and granting

a prejudgment remedy in the amount of $150,000 in favor of the plaintiff.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JAY GARCIA (AC 39851)

Alvord, Sheldon and Keller, Js.

Syllabus

The plaintiff in error, A Co., a bail bonds company, brought this writ of error from the decision of the trial court denying a motion it had filed for discharge from its obligation under a certain bond that it had executed to obtain the release from custody pending trial of a criminal defendant, G, who had absconded to Peru. Following G's failure to appear at a scheduled court hearing, G was ordered rearrested and his bond forfeited. In seeking the discharge of its obligation under the bond, A Co. claimed that the bond was issued by certain of its agents who were not authorized to issue bonds. A Co. also filed a motion to compel the defendant in error, the state of Connecticut, to seek extradition of G because, according to A Co., the state previously had promised to do so, and the trial court denied that motion. The trial court found that A Co. had failed to demonstrate good cause to be relieved of its bond obligations as required by the applicable rule of practice (§ 38-23) and that the state was under no obligation to pursue extradition. *Held*:

1. The trial court, in denying A Co.'s motion for discharge from its obligation under the bail bond, applied the correct legal standard as set forth in *Taylor* v. *Taintor* (83 U.S. [16 Wall.] 366), which provides that a surety will be discharged of its obligation on a bail bond for good cause only when the performance of the condition of the bond is rendered impossible by an act of God, an act of the obligee, which, in this case, is the state, or an act of law: our Supreme Court previously has applied the rule in *Taylor* for determining whether a surety has provided good cause for being relieved of its obligation on a bond, and although the legislature expanded the common-law definition of good cause by statute (§ 54-65c), this court was bound by our Supreme Court's precedent holding that the rule in *Taylor* continued to govern in cases in which the conditions set forth in § 54-65c did not apply, namely, where a criminal defendant voluntarily leaves the country and is not held in governmental custody elsewhere, which was the case here; moreover, G's status under federal immigration law, which made it illegal for him to return to this country, was not an act of law that made G's compliance with the bond

obligation impossible, nor did it constitute good cause to excuse A Co.'s performance under the *Taylor* rule, as an act of law that renders the performance on a bond obligation impossible must involve a law operative in the state where the obligation was assumed, and no laws of this state made G's compliance with the bond impossible.

2. A Co. could not prevail on its claim that the trial court, as part of its good cause analysis, should have considered the relevance of the state's indication that it would extradite upon notification that G was in the custody of Peruvian authorities; there was nothing in the record indicating that, prior to A Co.'s decision to post bond on behalf of G, the state promised to extradite G if he fled to another country, which would have been a factor relevant to good cause because the surety could have relied on the state's representation in assessing the risk of G's nonappearance, A Co. did not challenge the trial court's finding that the state made no promise to extradite when the bond was executed, and it provided no authority for the proposition that a prosecutor's indication after a principal has absconded that the state intended to extradite was a relevant consideration to the court's determination of whether good cause existed to discharge the obligation on the bond.

Argued September 15—officially released December 12, 2017

Procedural History

Writ of error from the decision of the Superior Court in the judicial district of New Britain, geographical area number fifteen, *Alexander*, *J.*, denying a motion by the plaintiff in error for discharge from certain surety bond obligations, brought to the Supreme Court, which transferred the matter to this court. *Writ of error dismissed.*

James R. Hardy II, for the plaintiff in error (Afford-A-Bail, Inc.).

Harry Weller, senior assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, and *Mary Rose Palmese*, supervisory assistant state's attorney, for the defendant in error (state).

Opinion

KELLER, J. In this writ of error,[1] the plaintiff in error, Afford-A-Bail, Inc. (Afford), claims that the trial court

[1] Afford filed the present writ of error in our Supreme Court. Our Supreme Court transferred it to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

improperly denied its motion to discharge its obligation on a surety bail bond.[2] Afford claims that the court, in denying its motion, improperly concluded that: (1) the standard for demonstrating "good cause" for discharge of an obligation upon a surety bail bond pursuant to Practice Book § 38-23[3] is the standard first set forth in *Taylor* v. *Taintor*, 83 U.S. (16 Wall.) 366, 369–70, 21 L. Ed. 287 (1872), rather than a more holistic, equitable assessment; and (2) the failure of the defendant in error, the state of Connecticut, to extradite the criminal defendant, Jay Garcia, after representing that it would do so, was not relevant to the court's good cause determination. The state argues that the requirement of good cause for discharge of the obligation upon the surety bond pursuant to General Statutes § 54-65c and aspects of the common-law rule in *Taylor* as explicated in *State* v. *Sheriff*, 301 Conn. 617, 21 A.3d 808 (2011), were not satisfied. We conclude that the trial court properly denied Afford's motion to discharge its obligation on the surety bond and, therefore, we dismiss the writ of error.

The following allegations of fact by Afford and procedural history are necessary for our resolution of this writ of error.[4] In the underlying criminal case, the criminal defendant, who identified himself to police as Garcia, was arrested and charged with robbery in the first

[2] Afford first filed a "motion to vacate bond forfeiture," which the court, *A. Hadden*, *J.*, denied on July 21, 2015. Subsequently, on October 6, 2015, Afford made an oral request to the court, *Alexander*, *J.*, to have its obligation on the surety bond discharged. It is the denial of this oral motion by Judge Alexander on December 14, 2015, that is the judgment from which the petition for writ of error is brought.

[3] Practice Book § 38-23 states: "Where bail has been posted by a bondsman or other surety, such bondsman or surety shall not be relieved of any obligation upon the bond except with the permission of the judicial authority and for good cause shown."

[4] We refer to Afford's declarations as to the factual basis for seeking a discharge of its obligation on the bond as allegations because the record reflects that no testimony or other documentary evidence was introduced in support of them, and the court, in its memorandum of decision, made

degree in violation of General Statutes § 53a-134, conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 52a-134, larceny in the sixth degree in violation of General Statutes § 53a-125b, and conspiracy to commit larceny in the sixth degree in violation of §§ 53a-48 and 53a-125b. These crimes were alleged to have been committed on or about December 20, 2014. Garcia was arraigned in court on December 22, 2014. Bond was set at $75,000 and the case was continued to February 3, 2015. Garcia subsequently executed a $75,000 bond with surety for his appearance at future court dates. Afford is the surety on the bond. On February 3, 2015, Garcia failed to appear and the court ordered Afford's bond forfeited and imposed a six month statutory stay pursuant to General Statutes § 54-65a.[5]

On April 29, 2015, Afford filed a motion to vacate bond forfeiture. In its motion, it asserted the following: "Upon being arrested by the local authorities, [Garcia] was processed. However, the true identity of [Garcia] was never verified or his passport seized, due to the fact that he is an illegal immigrant. [Garcia's] legal name is Jonatan Lovis Mattos. . . .

"Subsequent to the offense date in which [Garcia] was criminally charged (December 20, 2014), [Afford] became bo[u]nd by a bail bond, as surety, in the amount of $75,000 for the appearance of [Garcia]. . . .

few factual findings. It appears that the state and the court assumed, *arguendo*, that Afford's allegations, as set forth in its motion to vacate bond forfeiture and attachments thereto and two affidavits subsequently filed with the court, were true.

[5] General Statutes § 54-65a provides in relevant part: "Whenever an arrested person is released upon the execution of a bond with surety in an amount of five hundred dollars or more and such bond is ordered forfeited because the principal failed to appear in court as conditioned in such bond, the court shall, at the time of ordering the bond forfeited . . . order a stay of execution upon the forfeiture for six months."

"Following the issuance of the bond, [Garcia] was ordered by this court to appear on February 3, 2015. [Garcia] failed to appear for his scheduled court hearing and a rearrest [order] was issued. . . .

"It was discovered that on February 22, 2015, [Garcia] fled the jurisdiction of the United States from Bradley International Airport in Windsor Locks . . . and absconded to Lima, Peru.[6] . . .

"Officer Nestor Silva Angeles, of the National Police of Peru—Division of Criminal Investigations, has confirmed the location of [Garcia].[7] . . .

"The country of Peru will not detain the defendant unless the state . . . extradites him.[8] . . .

"It is presumed that the Office of the State's Attorney [in] New Britain will decline to seek extradition of [Garcia] given his location in another country. . . .

"The bond was written by an agent of [Afford], who was not authorized to write bonds for subjects who are classified as undocumented, and as a result, [this agent's employment] was terminated from [Afford's] company." (Footnotes added.)

[6] Attached to Afford's motion to vacate bond forfeiture was a letter from Michelle Vetrano-Antuna, a deportation officer in the Department of Homeland Security, Immigration and Customs Enforcement, dated March 17, 2015, which purportedly verifies that Jonatan Lovis Mattos departed the United State for Lima, Peru, on February 3, 2015. Despite the letter's source, Afford makes no claim that Garcia was deported to Peru.

[7] Also attached to Afford's motion to vacate bond forfeiture was a document, written in Spanish, with an accompanying translation, purportedly signed by Nestor Silva Angeles of the Policia Nacional Del Peru on March 26, 2015.

[8] The court ultimately found that Afford failed to "provide proof of [Garcia's] incarceration in or removal to another country. No proof was provided because [Garcia] was not, in fact, incarcerated in Peru, or removed to Peru. . . . It was the wilful act of the accused which caused his departure from this country and his nonappearance for trial . . . ."

On July 21, 2015, the court denied Afford's motion and declined to vacate the forfeiture ordered on the bond. On August 3, 2015, Afford filed a motion for extension of satisfaction of the bond forfeiture, which was denied on August 4, 2015.

On September 4, 2015, Afford filed a motion for reconsideration of its motion for extension of satisfaction of the bond forfeiture and a motion to compel the extradition of Garcia. In the latter motion, Afford alleged that the denial of its motion to vacate the bond forfeiture on July 24, 2015, was exclusively based on the fact that the state had represented that it would extradite Garcia and had initiated the extradition process. On September 4, 2015, the court granted Afford's motion for reconsideration of its motion for extension of satisfaction of the bond forfeiture and extended the stay of the forfeiture of the bond.

On October 6, 2015, the court heard argument on Afford's motion to compel extradition. Afford also again moved, by way of an oral motion, to have its obligation on the bond discharged pursuant to Practice Book § 38-23.[9]

Counsel for Afford provided two arguments in support of its motion to discharge. First, Afford's counsel alleged that the state made a representation in court three months earlier that it would extradite Garcia back to the United States and that it should be compelled to take the necessary steps to extradite Garcia and provide written documentation of such efforts within thirty days. In the alternative, counsel requested that Afford's obligation on the bond be vacated due to the state's

[9] Practice Book § 38-23 provides: "Where bail has been posted by a bondsmen or other surety, such bondsman or surety shall not be relieved of any obligation upon the bond except with the permission of judicial authority and for good cause shown."

lack of action.[10] In response to this argument, the state's attorney indicated: "It has been made clear that we certainly intend to extradite [Garcia]. . . . I don't know what inquiries were made, but this is a fully extraditable offense. That the bondman should not be let off the bond for that reason because it's extraditable and because we intend to extradite once the Peruvian authorities notify us that [Garcia] is in custody." Counsel for Afford responded that the state's attorney had not taken any steps to put an extradition into place. The court indicated that the state had no obligation to seek extradition and denied the motion to compel extradition.

Second, counsel for Afford argued that its "rogue agents," for their own monetary gain, lied about Garcia's alienage to obtain authorization to write the bond. Rather than rule on Afford's oral motion to discharge its obligation on the bond at that time, the court continued the hearing and indicated that it would terminate the stay that had been imposed on the bond forfeiture 2 p.m. on December 14, 2015, if there was no further information from Afford by that time, and provided Afford with an opportunity to provide affidavits substantiating its allegations of fraud on the part of its rogue agents, to produce Garcia on that date or to prove that an extradition had been initiated by that date.

Subsequently, on December 8, 2015, Afford filed two affidavits signed by Shane Burby, the owner of Afford, and William Munck, its operations manager. According to both Munck and Burby, former employees named Daniel Ruiz and Jesus Agosto provided them with "false and omitting" information as to the status of Garcia's employment. The affidavits stated that their agents also

[10] These alleged prior representations as to the state's commitment to extraditing Garcia and initiating the extradition process cannot be verified because Afford has not provided this court with the transcript of the court hearing of July 24, 2015.

falsely advised them that Garcia was a United States citizen and his father was a former police officer. This erroneous information led them to believe that Garcia was not a flight risk, resulting in approval of the bond without requiring collateral.

On December 14, 2015, the court, after a hearing, denied Afford's oral motion to discharge its obligation on the surety bond and again denied its motion to compel extradition.[11] On December 30, 2015, Afford filed this writ of error.

On February 6, 2016, the court issued a written memorandum of decision articulating its reasons for its denial of Afford's oral motion for discharge of its obligation on the bond and motion to compel extradition.[12] The court stated: "[Afford's] arguments and the facts upon which it relies do not entitle [Afford] to any relief from this court because they do not constitute good cause . . . . This court notes that [Afford] was not entitled to an order vacating bond forfeiture pursuant to . . . § 54-65c because it did not provide proof of [Garcia's] incarceration in or removal to another country. No proof was provided because [Garcia] was not, in fact, incarcerated in Peru, or removed to Peru . . . . It was the wilful act of the accused which caused his departure from this country and his nonappearance for trial, not an act of God, an act of the obligee, or an act of law.

"The [representation by the] state's attorney's [office] . . . that it will extradite [Garcia] is not relevant to the question at hand. . . . The [state] was not a party to the agreement between [Garcia] and [Afford], and did not promise, when the bond was executed, to extradite [Garcia] in the event that he flees.

[11] Inexplicably, we have not been provided with a transcript of the court proceedings on December 14, 2015.

[12] See Practice Book § 64-1 (a).

"Likewise, the actions of [Afford's] agents in executing the bond are not relevant to the determination of whether good cause has been established . . . . These actions may have violated [Afford's] procedures, but they are not an act of God, an act of the obligee, or an act of law that prevented [Afford] from fulfilling the requirements of the bond."

I

Afford first claims that the trial court improperly concluded that the standard for demonstrating "good cause" for discharge of an obligation upon a bond pursuant to Practice Book § 38-23 is the standard first set forth in *Taylor* v. *Taintor*, supra, 83 U.S. 369–70, rather than a more holistic, equitable assessment that presumably would consider the alleged fraudulent actions of its agents and the state's failure to follow through on its alleged July 24, 2015 promise to initiate the extradition process for Garcia as good cause to discharge its obligation upon the bond.

We begin with the standard of review. "The interpretation of a rule of practice is a question of law, subject to plenary review . . . and such an interpretation begins with the text of the provision at issue." (Citation omitted.) *State* v. *Sheriff*, 301 Conn. 617, 622, 21 A.3d 808 (2011).

Although Practice Book § 38-23 does not specify the exact legal test to be used by a court in determining good cause, this state has followed the common-law rule set forth in *Taylor* v. *Taintor*, supra, 83 U.S. 366, which affirmed the decision of the our Supreme Court in *Taintor* v. *Taylor*, 36 Conn. 242, 255 (1869), that a surety will be relieved of its obligation on a bail bond only when "the performance of the condition [of the bond] is rendered impossible by the act of God, the act

of the obligee, or the act of the law" (*Taylor* rule).[13] *Taylor* v. *Taintor*, supra, 83 U.S. 369. This common-law rule was reaffirmed in *State* v. *Sheriff*, supra, 301 Conn. 626. The legislature, by enacting § 54-65c in 2011 and amending it in 2014, has since expanded the common-law definition of "good cause."[14]

In *Taylor*, the criminal defendant and principal on the bond, Edward McGuire, was released after posting bond in a Connecticut criminal court. *Taylor* v. *Taintor*, supra, 83 U.S. 368. He later voluntarily left Connecticut for New York and failed to appear in court as ordered. Id. Meanwhile, Maine issued a governor's requisition to New York to take custody of McGuire so he could be prosecuted on a pending burglary charge in Maine, and New York delivered him to proper officers of the state of Maine. Id. Neither of the two sureties on the bond

[13] Death of the principal the day prior to a court appearance is an example of an act of God. See *State* v. *Sheriff*, supra, 301 Conn. 624. Where the court before which the principal is about to appear is "abolished, without qualification," that is an "act of the obligee." Id. If the principal is arrested in the state where the obligation is given and sent out of the state by the governor, upon the requisition of the governor of another state, that is an act of law. Id.

[14] General Statutes § 54-65c provides: "A court shall vacate an order forfeiting a bail bond and release the professional bondsman, as defined in section 29-144, or the surety bail bond agent and the insurer, as both terms are defined in section 38a-660, if (1) the principal on the bail bond (A) is detained or incarcerated (i) in another state, territory or country, or (ii) by a federal agency, of (B) has been removed by United States Immigration and Customs Enforcement, and (2) the professional bondsman, the surety bail bond agent or the insurer provides satisfactory proof of such detention, incarceration or removal to the court and the state's attorney prosecuting the case, and (3) the state's attorney prosecuting the case declines to seek extradition of the principal."

Afford neither alleged nor proved that Garcia was detained or incarcerated in Peru or anywhere else, or that he had been deported by United States Immigration and Customs Enforcement, and, thus, makes no claim that this case satisfied one of the additional conditions for vacating a bond in § 54-65c. For cases not within the statute, the three common-law conditions of the *Taylor* rule, reaffirmed in *Sheriff*, remain binding precedent. See *State* v. *Agron*, 323 Conn. 629, 639, 148 A.3d 1052 (2016).

knew, when they entered into the recognizance, that McGuire had a burglary charge pending in Maine. Id., 369. After McGuire was sent to Maine, he was convicted and sentenced to a term of incarceration of fifteen years. Id., 368. During his confinement, the Connecticut court forfeited the bond. Id.

Henry G. Taintor, the Connecticut state treasurer, brought an action against McGuire and the sureties on his bond to collect the debt on the recognizance. *Taintor* v. *Taylor*, supra, 36 Conn. 242. The sureties sought to be discharged from their obligation claiming that they did not know at the time they posted bond for McGuire that he had charges pending against him in Maine. They had not acted in New York to obtain custody of McGuire after he had left Connecticut. *Taylor* v. *Taintor*, supra, 83 U.S. 368–69. The sureties claimed they were excused by acts of both the law and the obligee.

The United States Supreme Court provided examples of what would satisfy each of the common-law conditions of the *Taylor* rule. An act of God occurs when the bonded defendant "dies before the day" on which he must appear. *Taylor* v. *Taintor*, supra, 83 U.S. 369. An act of the obligee, or the party protected by the bond, which is the state, occurs when the state does something that makes it impossible for the defendant to appear in its courts, such as abolishing the court in question without qualification. Id. The third condition, an act of law, arises when the state protected by the bond takes custody of the defendant and then surrenders his custody to another state, thereby exercising control of the defendant in such a way as to make compliance with the bond impossible. Id., 369–70. Because Connecticut had not abolished the court in which McGuire was required to appear, the court in *Taylor* focused on the third condition and stated that good cause cannot exist as an act of law when McGuire

voluntarily removed himself from Connecticut by crossing the border into New York. Id., 370. "There is a distinction between an act of the law proper and the act of the [criminal defendant], which exposes him to the control and action of the law. While the former exonerates, the latter gives no immunity." (Internal quotation marks omitted.) Id.

The defendant sureties in *Taylor* argued that the case fell into the act of law condition because even though McGuire left Connecticut of his own volition, an act of law rendered his appearance impossible due to the lawful arrest and transfer of McGuire to Maine as a result of the cooperation between authorities in New York and Maine. Id., 368. In rejecting this argument, the court stated that it considered New York and Maine "strangers" to the bond agreement and held that an act of law that makes it impossible for the criminal defendant to appear must derive from the protected state's action, in other words, Connecticut's action, which did not occur in *Taylor*. Id., 373–74.

The sureties in *Taylor* also argued that their obligation should be discharged because they were not made aware of McGuire's pending charge in Maine, but the Supreme Court considered the sureties at fault for McGuire's departure and also stated that it was their duty to be aware of his arrest when it occurred and to interpose their claim for custody. Their resulting loss, the court concluded, was "due to [the sureties'] own supineness and neglect." *Taylor* v. *Taintor*, supra, 83 U.S. 373. "The principal in the case before us, cannot be allowed to avail himself of an impossibility of performance he created; and what will not avail him cannot avail his sureties. His contract is identical with theirs. They undertook for him what he undertook for himself." Id., 374.

In *State* v. *Sheriff*, supra, 301 Conn. 617, the plaintiff in error, Flavio Bail Bonds, LLC (Flavio), executed three

bonds for David Sheriff, the criminal defendant, for each of his cases and Sheriff was released from custody. Id., 619. Subsequently, Sheriff failed to appear and it was revealed that, two days prior to trial, he had fled to Jamaica and remained there. Id., 620. Flavio located a likely address for Sheriff in Jamaica, but the chief state's attorney declined to initiate extradition proceedings. Id.

Bringing a writ of error from the trial court's denial of its request to have its obligation on the bond compromised or discharged, Flavio contended that its efforts to locate Sheriff after his failure to appear and the chief state's attorney's subsequent decision not to seek extradition of Sheriff established good cause for relieving Flavio of its obligation on the bonds. Id., 618, 621. Similar to the nature of the claim Afford asserts here—that the court should have applied a more holistic, equitable assessment rather than the *Taylor* rule—Flavio argued that the *Taylor* rule was antiquated and unduly restrictive and asked our Supreme Court to adopt a standard consistent with "emerging jurisprudence," requiring a "multifaceted examination of the circumstances rather than holding tightly to any absolute rule." (Internal quotation marks omitted.) Id., 622. Flavio asserted that several other jurisdictions employ a "multifaceted" approach permitting courts to examine a number of factors beyond the condition in the *Taylor* rule when determining whether to discharge a surety from a bond obligation. Id., 625. Our Supreme Court declined to expand the *Taylor* rule, and in applying it, suggested that unless the state had promised to extradite a criminal defendant should he become a fugitive, the state's decision not to seek extradition was not an act of law warranting a surety's discharge from its obligation on a bond. Id., 628.

In *State* v. *Agron*, 323 Conn. 629, 148 A.3d 1052 (2016), which our Supreme Court officially released on November 22, 2016, after Afford filed its brief but before the

state filed its brief,[15] the court applied § 54-65c[16] in deciding another writ in error involving the denial of a request to discharge an obligation on a bond as a result of the principal, Angel Agron, failing to appear in court after voluntarily fleeing to and remaining in Puerto Rico. Id., 631. Although bail enforcement agents had located Agron in Puerto Rico and made him aware of his warrants for failure to appear in Connecticut, the state did not seek extradition. Id. The court held that the word "detained" in § 54-65c does not include being detained by bail enforcement agents but rather referred to being detained by and held in the custody of a governmental entity. Id., 639. The court also suggested, referring to its previous holding in *Sheriff*, the facts of which it considered comparable to the facts which led to the forfeiture of the bond in *Agron*, that if a case does not involve facts falling within the statutory conditions set forth in § 54-65c, the *Taylor* rule continues to govern in cases in which the defendant voluntarily leaves the country and is not held in governmental custody elsewhere. See id.

Afford, like the surety in *Sheriff*, is requesting that this court add a new prong to the *Taylor* rule, namely, a prong that considers "extreme, rare, and extraordinary circumstances," such as it alleged occurred in the present case. Because, in *Sheriff*, our Supreme Court, presented with a similar argument, reaffirmed the use of the *Taylor* rule, this argument bears no further discussion. Insofar as Afford is attempting to persuade us to revisit the reaffirmation of the *Taylor* rule in *Sheriff*, we cannot do so. See *Anderson* v. *Commissioner of Correction*, 148 Conn. App. 641, 645, 85 A.3d 1240 ("[i]t is axiomatic that this court, as an intermediate body, is bound by Supreme Court precedent and [is] unable

[15] Afford did not file a reply brief.

[16] Section 54-65c became effective on October 1, 2011, subsequent to the issuance of the decision in *Sheriff*. See Public Acts 2011, No. 11-45, § 24 (1).

to modify it" [internal quotation marks omitted]), cert. denied, 311 Conn. 945, 90 A.3d 976, cert. denied sub nom. *Anderson* v. *Dzurenda*, U.S. , 135 S. Ct. 201, 190 L. Ed. 2d 155 (2014).[17]

As part of its first claim, Afford also argues that even if the trial court properly applied the *Taylor* rule, the present situation falls within the act of law condition of that rule. We apply plenary review to the court's application of the *Taylor* rule to the facts in the present case. *State* v. *Sheriff*, supra, 301 Conn. 628. Afford asserts that because Garcia is an undocumented alien, absent the state extraditing him, the law prevents him from returning to the United States due to his lack of any valid immigration status that would permit his lawful reentry. Therefore, an act of law prevented Garcia from returning to the United States for his scheduled court appearance, which constitutes good cause under the *Taylor* rule excusing Afford's performance.

In *Taylor*, the Supreme Court stated that for the act of law to render the performance on a bond obligation impossible, it "must be a law operative in the [s]tate

[17] Afford's plea that this court take note of the "vast changes that have taken place in the evolution of the bail bond system" which require "expansion of [the] antiquated rule[s] . . . determining when a surety should be released from its obligation" is undermined by the fact that the *Taylor* rule has recently been altered by the legislature's enactment of § 54-65c in 2011; Public Acts 2011, No. 11-45, § 24 (1); and its amendment in 2014; Public Acts 2014, No. 14-184, § 4; to include provisions for discharge of an obligation on a bond in situations where the principal is detained or incarcerated in another state, territory or country or detained by a federal agency, or has been removed by United States Immigration and Customs Enforcement. See General Statutes § 54-65c (A) (i), (A) (ii) and (B). Because we presume that the legislature was aware of the common-law *Taylor* rule and only altered the rule in some respects rather than making sweeping changes to it, and did so after the Supreme Court in *Sheriff* reaffirmed the viability of the rule, we recognize "only those alterations of the common law that are clearly expressed in the language of the statute because the traditional principles of justice [on] which the common law is founded should be perpetuated." *State* v. *Courchesne*, 296 Conn. 622, 669, 998 A.2d 1 (2010).

where the obligation was assumed." *Taylor* v. *Taintor*, supra, 83 U.S. 371. In *Taylor*, the surety claimed that even though the criminal defendant, McGuire, left Connecticut on his own volition, an act of law rendered his appearance impossible when New York arrested him and transferred him to Maine for prosecution and incarceration there. Id., 371. The court stated that it considered New York and Maine "strangers" to the bond agreement, and held that the act of law that makes it impossible for a defendant to appear must derive from action on the part of the protected state.[18] Id., 374. If Connecticut, rather than New York, had taken custody of McGuire and transferred him to Maine pursuant to its demand, the bond would be excused because an act of the state had deliberately prevented him from returning to Connecticut for his court appearance. See *State* v. *Sheriff*, supra, 301 Conn. 627. Here, Garcia voluntarily leaving the United States for Peru, therefore, does not meet the act of law condition under the *Taylor* rule because Connecticut, the protected state, was not responsible for making his compliance with the bond impossible. Accordingly, this claim fails.

II

Afford's second claim is that, as part of the trial court's good cause analysis, the court should have considered the relevance of the state's indication that it would extradite Garcia. We disagree.

Afford relies on dicta in both *Sheriff* and *Agron* regarding the impact of the alleged promise by the

[18] The dissent in *Taylor* accepted the argument that the criminal defendant's appearance was rendered impossible by an act of law because of New York's legal duty to remit him, upon demand, to Maine. *Taylor* v. *Taintor*, supra, 83 U.S. 377 (Field, J., dissenting). The majority rejected this argument because that the cooperation between New York and Maine, which made it impossible for the defendant to appear in court in Connecticut, was a creature of Maine, New York and federal law. *Taylor* v. *Taintor*, supra, 83 U.S. 374–75.

state's attorney on July 24, 2015, to extradite Garcia, in determining whether there was good cause to vacate a bond obligation. In *Sheriff*, our Supreme Court stated: "[E]ven if we assume that the chief state's attorney could have extradited Sheriff from Jamaica, in the absence of any promise by the chief state's attorney that he would seek extradition of Sheriff in the event that he fled, the chief state's attorney had no obligation to Flavio to extradite Sheriff from Jamaica in order to fulfill the obligation that Flavio willingly undertook. As one court has observed, [t]he state is not the surety's surety." (Internal quotation marks omitted.) *State* v. *Sheriff*, supra, 301 Conn. 628. In *State* v. *Agron*, supra, 323 Conn. 629, the court reiterated, citing *Sheriff*, that the state was neither a party to the contract between the surety, 3-D Bail Bonds, Inc., and Agron and, therefore, had no responsibilities arising from that contract, nor did the state ever promise that it would extradite Agron in the event that he fled to another country. Id., 639.

First, we note that this is nonbinding authority because neither case expressly holds that failure to fulfill a promise to extradite constitutes good cause excusing performance under the bond. Second, the language on which Afford relies is not applicable to the present case. Both cases refer to a promise to extradite *in the event* the criminal defendant fled. *State* v. *Agron*, supra, 323 Conn. 639, citing *State* v. *Sheriff*, supra, 301 Conn. 628. In this case, the only indication in the record that the state represented it would extradite Garcia is the prosecutor's assertion at the October 6, 2015 hearing, after Garcia already had absconded to Peru, that "we intend to extradite once the Peruvian authorities notify us that he is in custody." There is nothing in the record that shows that prior to Afford's agreement to

post bond on behalf of Garcia, the state promised to extradite him if he fled to another country.[19]

The statement in *Sheriff* regarding a promise to extradite only arguably provides a basis for relief if, "at the time bail was posted," the state had promised it would seek extradition if Garcia left the country and, thereafter, the state refused to extradite him. See *State* v. *Mungia*, 446 N.J. Super. 318, 330–31, 141 A.3d 395 (App. Div.), cert. denied, 228 N.J. 91, 154 A.3d 709 (2016). Only then could such a promise possibly be a factor relevant to good cause because the surety would have relied on the state's representation regarding extradition when it assessed the risk of Garcia's nonappearance and this promise would have been factored into what the surety charged for the bond.[20]

[19] There was also no compelling reason to extract a promise to extradite from the state at the time. Afford claims it executed the bond because its agents misrepresented that the defendant was a United States citizen, not because the state, prior to the time the bond was executed, asserted that it would extradite Garcia in the event he fled the country. The state should not have to bear the loss from Afford's failure to monitor its agents. The obligation of the bail bondsman is to ensure his principal's appearance in court. *State* v. *Nugent*, 199 Conn. 537, 545, 508 A.2d 728 (1986). Although sureties have the right to utilize agents, the agent and the bail bondsman continue to share the obligation to make sure the principal appears in court. Id., 549. Further, because an agent acts to the benefit of the principal, "the acts of an agent, however, are ascribable or chargeable to the principal." *Connecticut Air Services, Inc.* v. *Danbury Aviation Commission*, 211 Conn. 690, 696, 561 A.2d 120 (1989). The doctrine recognizes that "every man who prefers to manage his affairs through others, remains bound to so manage them that third persons are not injured by any breach of legal duty on the part of such others while they are engaged upon his business and within the scope of their authority." (Emphasis omitted; internal quotation marks omitted.) *Gutierrez* v. *Thorne*, 13 Conn. App. 493, 498, 537 A.2d 527 (1988).

[20] The state suggests in its brief that a surety's reliance on the state's promise to extradite before the bond is issued, which somehow binds the state "by something akin to equitable estoppel," would be problematic for the surety because a state prosecutor has control only of *seeking* extradition. After seeking extradition, the state prosecutor has no control beyond that point because extradition is a national power that pertains to the national government and not to the states. *Valentine* v. *United States ex rel. Neidecker*, 299 U.S. 5, 8, 57 S. Ct. 100, 81 L. Ed. 5 (1936). The federal government might refuse to seek extradition, and even if it pursued the

Here, the court found that the state had made no promise to extradite "when the bond was executed," a factual finding Afford does not challenge on appeal. Afford cites no authority for the proposition that a prosecutor's indication after a principal has absconded that the state intends to extradite is a relevant consideration to the court's determination of whether good cause exists to discharge the obligation upon the bond.

The writ of error is dismissed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* TYRIECE S. FULLER (AC 38166)

Sheldon, Prescott and Pellegrino, Js.

Syllabus

Convicted of the crimes of conspiracy to steal a firearm, conspiracy to commit larceny in the fourth degree, illegal manufacture, distribution, sale, prescription or administration of narcotics by a person who is not drug-dependent, illegal manufacture, distribution, sale, prescription or administration of narcotics by a person who is not drug-dependent within 1500 feet of a public elementary school, conspiracy to commit the illegal manufacture, distribution, sale, prescription or administration

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matter, the foreign sovereign might refuse to extradite. *State* v. *Mungia*, 446 N.J. Super. 318, 331, 141 A.3d 395 (App. Div.), cert. denied, 228 N.J. 91, 154 A.3d 709 (2016). Equitable estoppel is a mechanism used against the state "(1) only with great caution; (2) only when the action in question has been induced by an agent having authority in such matters; and (3) only when special circumstances make it highly inequitable or oppressive not to estop the agency." (Internal quotation marks omitted.) *Shanahan* v. *Dept. of Environmental Protection*, 305 Conn. 681, 708, 47 A.3d 364 (2012). The state argues that the second requirement could not be satisfied because all a prosecutor can do is promise to try to extradite, but can never guarantee that such request for extradition would be honored. As a result, it may be unwise for a surety to rely on such a promise when assessing the risk of flight to another country because it might be difficult to assert reasonable reliance on a promise to seek extradition as a basis for equitably estopping the state from enforcing the bond when a defendant flees the country.

of narcotics by a person who is not drug-dependent and criminal possession of a firearm, the defendant appealed to this court. He claimed that, in denying his requests to personally possess a copy of certain discovery items disclosed by the state pursuant to the applicable rules of practice (§§ 40-10 and 40-13), the trial court violated his constitutional rights to counsel, a fair trial and due process, and that the court abused its discretion and committed structural error. *Held*:

1. The defendant's claim that the trial court violated his constitutional rights in denying his requests to personally possess a copy of the discovery items was not reviewable, the defendant having failed to properly preserve his claim for review; the record indicated that the defendant, through counsel, never framed his discovery requests as assertions that his constitutional rights to due process or the effective assistance of counsel entitled him to personally possess the discovery documents in question, and the unpreserved claim was not of constitutional magnitude so as to warrant review under *State* v. *Golding* (213 Conn. 233), as a criminal defendant has no general constitutional right to discovery and a criminal defendant's procedural right to the disclosure of discovery pursuant to § 40-13 does not give rise in and of itself to a constitutional right.
2. The trial court did not abuse its discretion in denying the defendant's discovery requests to personally possess a copy of the discovery items disclosed by the state; the record demonstrated that the defendant personally reviewed the state's disclosure in the presence of his attorneys or their agents on multiple occasions, and the defendant did not provide a compelling reason for his need to personally possess the discovery materials, other than his repeated claims that the state's evidence was either being fabricated or withheld.

Argued September 22—officially released December 12, 2017

Procedural History

Substitute information charging the defendant with the crimes of conspiracy to steal a firearm, conspiracy to commit larceny in the fourth degree, conspiracy to commit burglary in the third degree, illegal manufacture, distribution, sale, prescription or administration of narcotics by a person who is not drug-dependent, illegal manufacture, distribution, sale, prescription or administration of narcotics by a person who is not drug-dependent within 1500 feet of a public elementary school, conspiracy to commit the illegal manufacture,

distribution, sale, prescription or administration of narcotics by a person who is not drug-dependent and criminal possession of a firearm, brought to the Superior Court in the judicial district of Fairfield; thereafter, the court, *Devlin*, *J.*, denied the defendant's motion for disclosure; subsequently, the court, *Blawie*, *J.*, denied the defendant's motion for disclosure and production; thereafter, the charges of conspiracy to steal a firearm, conspiracy to commit larceny in the fourth degree, conspiracy to commit burglary in the third degree, illegal manufacture, distribution, sale, prescription or administration of narcotics by a person who is not drug-dependent, illegal manufacture, distribution, sale, prescription or administration of narcotics by a person who is not drug-dependent within 1500 feet of a public elementary school and conspiracy to commit the illegal manufacture, distribution, sale, prescription or administration of narcotics by a person who is not drug-dependent were tried to the jury before *Blawie*, *J.*; subsequently, the court, *Blawie*, *J.*, granted the defendant's motion for judgment of acquittal with respect to the charge of conspiracy to commit burglary in the third degree; verdict of guilty on the remaining charges; subsequently, the charge of criminal possession of a firearm was tried to the court, *Blawie*, *J.*, judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

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

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *John Smriga*, state's attorney, *C. Robert Satti*, senior assistant state's attorney, and *Ann Lawlor*, senior assistant state's attorney, for the appellee (state).

Opinion

PELLEGRINO, J. The defendant, Tyriece S. Fuller, appeals from the judgment of conviction rendered after

a jury trial, of conspiracy to steal a firearm in violation of General Statutes §§ 53a-48 and 53a-212; conspiracy to commit larceny in the fourth degree in violation of General Statutes §§ 53a-48 and 53a-125; illegal manufacture, distribution, sale, prescription or administration of narcotics by a person who is not drug-dependent in violation of General Statues §§ 53a-8 and 21a-278 (b); illegal manufacture, distribution, sale, prescription or administration of narcotics by a person who is not drug-dependent within 1500 feet of a public elementary school in violation of General Statutes §§ 21a-278 (b) and 21a-278a (b); and conspiracy to commit the illegal manufacture, distribution, sale, prescription or administration of narcotics by a person who is not drug-dependent in violation of General Statutes §§ 53a-48, 21a-277 (a), 21a-278 (b) and 21a-279 (a).[1]

The defendant claims on appeal that the trial court, in denying his requests to personally possess a copy of the discovery items disclosed by the state pursuant to Practice Book §§ 40-10[2] and 40-13A:[3] (1) violated his

[1] The defendant also was convicted by the court of one count of criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1). In addition, the defendant was charged with conspiracy to commit burglary in the third degree in violation of General Statutes §§ 53a-48 and 53a-103; however, prior to the close of evidence, the court granted the defendant's motion for judgment of acquittal with respect to that charge.

[2] Practice Book § 40-10 (a) provides: "Any materials furnished to counsel pursuant to this chapter, including statements, reports and affidavits disclosed pursuant to Section 40-13A, shall be used only for the purposes of conducting such counsel's side of the case or for the performance of his or her official duties, and shall be subject to such other terms and conditions as the judicial authority may provide. Without the prior approval of the prosecuting authority or the court, defense counsel and his or her agents shall not provide copies of materials disclosed pursuant to Section 40-13A to any person except to persons employed by defense counsel in connection with the investigation or defense of the case."

[3] Practice Book § 40-13A provides: "Upon written request by a defendant and without requiring any order of the judicial authority, the prosecuting authority shall, no later than forty-five days from receiving the request, provide photocopies of all statements, law enforcement reports and affidavits within the possession of the prosecuting authority and his or her agents, including state and local law enforcement officers, which statements, reports

federal and state constitutional rights to counsel,[4] a fair trial and due process; (2) abused its discretion; and (3) committed structural error. For the reasons set forth herein, we affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of the defendant's claims. The defendant was arrested following an extensive investigation by the Statewide Urban Violence Cooperative Crime Control Task Force (task force), which targeted the sale of illegal firearms and narcotics in the city of Bridgeport in 2012. The defendant was implicated in the investigation after he was involved in the sale of stolen guns and oxycodone pills to confidential informants in two separate controlled purchases in June and July, 2012. On May 22, 2013, the state filed an information charging the defendant with multiple offenses. Attorney Frederic Ury was appointed as the defendant's counsel on June 24, 2013, and represented the defendant throughout the majority of his pretrial proceedings. On February 19, 2014, Ury moved to withdraw his appearance, citing a breakdown in the attorney-client relationship. On February 26, 2014, the court granted Ury's motion to withdraw. On March 3, 2014, Attorney Miles Gerety filed an appearance on behalf of the defendant. A six-day jury trial commenced on July 15, 2014. Several members of the task force, and an alleged coconspirator, Serafettin Senel, testified. The defendant did not testify. On July 23, 2014, the defendant was found guilty on the counts tried to the jury and the count tried to the court.

On August 28, 2014, the defendant filed a handwritten motion to dismiss Gerety as his counsel. In his motion,

and affidavits were prepared concerning the offense charged, subject to the provision of Sections 40-10 and 40-40 et seq."

[4] The defendant claims that Practice Book § 40-10 "compromised [his] relationship[s] with his assigned counsel" because they could not provide him with a copy of the state's disclosure, which prevented him from assisting in his own defense.

the defendant alleged that Gerety assaulted him, coerced him into not presenting evidence or testifying at trial, and conspired with various other individuals to convict him.[5] On October 17, 2014, the court granted Gerety's oral motion to withdraw. On October 21, 2014, Attorney Donald Cretella filed an appearance to represent the defendant with respect to sentencing. On January 26, 2015, the court sentenced the defendant to a total effective sentence of eight years of incarceration, followed by five years of special parole. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant's first claim on appeal is that the trial court violated his federal and state constitutional rights in denying his requests to personally possess a copy of the discovery items disclosed by the state pursuant to Practice Book § 40-10. The defendant contends that § 40-10 "creates a presumption" that he is not permitted to possess a copy of the state's disclosure in violation of his constitutional rights. The defendant asserts that his claim was adequately preserved by his attorneys' three "motions to provide redacted reports to [him], which were denied by the trial court . . . ." Alternatively, the defendant seeks review 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). The state argues that the defendant is not entitled to review of this claim because it is unpreserved and not constitutional in nature. We conclude that the defendant's claim was not properly preserved for our review.

The following additional facts are necessary for our resolution of this claim. On July 10, 2013, Ury orally

[5] The defendant's claims were never substantiated.

sought permission from the court to provide the defendant with a redacted copy of a police report. The court, *Devlin*, *J.*, denied the motion. On May 28, 2014, Gerety asked for the court's permission to provide the defendant with a redacted copy of the state's disclosure. The court, *Blawie*, *J.*, deferred ruling on the motion until counsel had an opportunity to meet off the record to try and resolve the disclosure issue. On June 4, 2014, Gerety filed a motion for disclosure and production requesting that the state permit defense counsel to provide a copy of the state's disclosure to the defendant pursuant to Practice Book § 40-10. On June 5, 2014, after conducting a hearing to determine "whether or not the defendant should be entitled to have his own copies of the state's disclosure materials," Judge Blawie denied the defendant's motion.

The record indicates that the defendant, through counsel, never framed his requests as a constitutional issue.[6] None of the requests contained any assertion that the defendant's constitutional rights to due process or the effective assistance of counsel entitled him to personally possess discovery documents. Therefore,

[6] The defendant was represented by appointed counsel for all relevant portions of the underlying criminal matter. We note that on numerous occasions, the defendant, while represented by Ury, Gerety and Cretella, and against their advice, filed numerous handwritten motions and spoke out in court on his own behalf. Some of these motions and in-court statements contained allegations of constitutional violations. Furthermore, on June 10, 2014, the defendant wrote to the court indicating that he intended to act as cocounsel during his trial proceedings. The court correctly held that the defendant could not file his own motions or act as cocounsel. Our state does not recognize a defendant's constitutional right to hybrid representation. See *State* v. *Gethers*, 197 Conn. 369, 384 n.17, 386–94, 497 A.2d 408 (1985); see also *State* v. *Flanagan*, 293 Conn. 406, 418, 978 A.2d 64 (2009) ("The right to counsel and the right to self-representation present mutually exclusive alternatives. A criminal defendant has a constitutionally protected interest in each, but since the two rights cannot be exercised simultaneously, a defendant must choose between them." [Internal quotation marks omitted.]). Therefore, we will not consider the defendant's motions and in-court statements for purposes of deciding whether his claim was properly preserved.

appellate review of his unpreserved claim is subject to *State* v. *Golding*, supra, 213 Conn. 239–40. "Under this standard, [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; internal quotation marks omitted.) *State* v. *Biggs*, 176 Conn. App. 687, 705–706, A.3d (2017).

We conclude that this claim is not "of constitutional magnitude alleging the violation of a fundamental right . . . ." *State* v. *Golding*, supra, 213 Conn. 239. A criminal defendant has no general constitutional right to discovery. See *Weatherford* v. *Bursey*, 429 U.S. 545, 559, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977). This court has previously held that a criminal defendant's procedural right to the disclosure of discovery pursuant to Practice Book § 40-13 "does not give rise in and of itself to a constitutional right." *State* v. *Sewell*, 95 Conn. App. 815, 822, 898 A.2d 828, cert. denied, 280 Conn. 905, 907 A.2d 94 (2006); see also *State* v. *Coriano*, 12 Conn. App. 196, 200, 530 A.2d 197, cert. denied, 205 Conn. 810, 532 A.2d 77 (1987) ("The right under the rules of practice to statements of witnesses . . . is not a right of constitutional magnitude."). Accordingly, this argument fails under the second prong of *Golding*. We therefore decline to review the merits of the defendant's constitutional claims.

II

The defendant's second claim on appeal is that the trial court abused its discretion in denying his requests

to personally possess a copy of the discovery items disclosed by the state pursuant to Practice Book § 40-10. We disagree.

The following additional facts are necessary for our resolution of this claim. In denying Ury's oral motion to give the defendant a redacted copy of the police report, Judge Devlin stated, "in other cases where I've authorized police reports to go into the correctional center, what they're really used for is to find out who the informants are, who the witnesses are, and sometimes those people are given a hard time. So, I don't permit that. [Ury] will go over the report with you, so you're fully informed about what the accusations are against you, what the police evidence is against you, but I'm not going to permit the actual physical copy of the report into the jail. I just don't do that because we have had bad situations come out of that."

This issue was readdressed during a June 5, 2014 hearing on the defendant's motion for disclosure and production. Gerety stated to the court that the motion was "driven by the defendant." Gerety also acknowledged that the decision to permit the defendant to possess discovery under Practice Book § 40-10 was "largely [in] the court's discretion." Gerety represented to the court that he had visited the defendant in prison on "numerous occasions."[7] During these visits, the defendant had the opportunity to read most of the disclosure but claimed that he had not finished reading it. Gerety also brought his laptop and reviewed a series of police videos with the defendant. Gerety stated that they "spent hours going over line by line . . . writing down the words that were said." The state objected to the defendant's motion, citing its interest in preventing disclosed materials from circulating in the jails. The state

[7] Gerety also represented to the court that Ury had his investigator go over everything in his file with the defendant.

also argued that this motion was merely an attempt to circumvent prior rulings made by the court, which denied the defendant's motion to remove counsel and to represent himself. The state further contended that the defendant would suffer no prejudice because he "had full access to . . . the disclosure materials" through his attorney. Further, the defendant admitted that he already possessed many of the documents through a Freedom of Information Act request. Judge Blawie denied the defendant's motion, finding that there had not been a sufficient change in circumstances to overturn Judge Devlin's prior ruling on the same issue. Judge Blawie, however, accepted an alternative proposed by Gerety, and the defendant was given the remainder of the day to review the state's disclosure in the courthouse.

We review the court's granting or denial of a discovery request for an abuse of discretion. See *In re Jason M.*, 140 Conn. App. 708, 737, 59 A.3d 902, cert. denied, 308 Conn. 931, 64 A.3d 330, cert. denied sub nom, *Charline P.* v. *Connecticut Dept. of Children & Families*, U.S. , 134 S. Ct. 701, 187 L. Ed. 2d 564 (2013). "Our role as an appellate court is not to substitute our judgment for that of a trial court that has chosen one of many reasonable alternatives." (Internal quotation marks omitted.) Id., 734. Therefore, "[i]n determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done." *State* v. *Megos*, 176 Conn. App. 133, 148, 170 A.3d 120 (2017).

The record demonstrates that the defendant personally reviewed the state's disclosure in the presence of his attorneys or their agents on multiple occasions. The defendant did not provide a compelling reason for his need to personally possess discovery materials, other

than his repeated claims that the state's evidence was either being fabricated or withheld. We therefore conclude that the court did not abuse its discretion in denying the defendant's requests.[8]

The judgment is affirmed.

In this opinion the other judges concurred.

ALICE K. GECI, EXECUTRIX (ESTATE OF WILLIAM F. KLEE), ET AL.
v. DAVID BOOR

ALICE K. GECI, EXECUTRIX (ESTATE OF WILLIAM F. KLEE), ET AL.
v. DAVID BOOR ET AL.
(AC 39446)

Keller, Prescott and Kahn, Js.*

Syllabus

The defendant appealed to this court from the judgments of the trial court, finding, inter alia, that upon the decedent's death, the named plaintiff, A, the decedent's daughter and executrix of his estate, had become the sole owner of certain joint bank accounts that had been held by the decedent and A, and ordering the reinstatement of A as the executrix of the decedent's estate after she had been removed as executrix by order of the Probate Court. The Probate Court had found, inter alia, that the decedent and A held funds in joint accounts for convenience purposes only and that the decedent had not intended that A become the sole owner of those funds upon his death. The Probate Court also had determined that A had undervalued certain assets in the inventory of the decedent's estate and ordered, inter alia, that a constructive trust for the benefit of the defendant be placed on the funds in the joint accounts and on the undervalued assets. *Held*:

1. The defendant could not prevail on his claim that the trial court erred by finding that, upon the death of the decedent, A became the sole owner of the joint bank accounts that had been held by the decedent

[8] In light of our conclusion that the court did not improperly prevent the defendant from personally possessing discovery materials, we need not reach the defendant's claim that any error was structural in nature.

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

and A, and, thus, that those joint bank accounts were not part of the decedent's estate:

a. The defendant's claim that the court should have found that A was in a confidential relationship with the decedent, which would have shifted the burden of proof regarding ownership of the accounts to A, was unavailing; the record contained evidence demonstrating that A's relationship with the decedent did not reflect the paradigms of a confidential relationship, as there was evidence that the decedent did not wholly trust A to manage his finances, and that he monitored and made the ultimate determination in the management of his financial affairs, and the trial court's finding that the decedent was capable of managing his financial affairs was supported by evidence that he had successfully operated a family farm, and had an understanding of complex legal and financial documents, and of survivorship rights on a joint account.

b. It was not improper for the trial court to rely on certain case law for the proposition that it was the court's responsibility, as the finder of fact, to determine the factual issue of the ownership of the funds in the joint accounts; even though the court cited to a criminal case, that case discussed the statute (§ 36a-290) governing joint accounts at length, and the court was free to look to any case that it believed was instructive in deciding the matter before it.

c. It was not clearly erroneous for the trial court to fail to find that A fraudulently concealed the survivorship rights on the joint accounts from her daughter, the decedent and the decedent's attorney; whether A informed her daughter about the survivorship nature of the accounts was not relevant to the intent of the joint account holders, and the court, which was presented with contradictory testimony, was free to assign credibility to the testimony that A did not conceal the survivorship rights from the decedent or his attorney.

d. The defendant's claim that the trial court failed to give proper weight to evidence concerning the decedent's intent was unavailing, that court having weighed that evidence and decided that it did not clearly and convincingly overcome the presumption in the statute (§ 36a-290 [b]) that governs joint accounts that the decedent intended the joint accounts to become the property of the surviving account holder.

2. The trial court did not abuse its discretion by reinstating A as the executrix of the decedent's estate; even though the defendant's appraisals of certain assets differed from A's valuations of those assets, the court's decision to reinstate A as the executrix was reasonable and supported by the record, as the values utilized by A were equal or close in value to the tax assessments on the assets by the town of Ellington, which were admitted into evidence.

Argued September 8—officially released December 12, 2017

Procedural History

Appeals from the orders and decrees of the Probate Court for the district of Ellington imposing, inter alia,

a constructive trust on certain assets of the decedent's estate and removing the named plaintiff in both appeals as executrix of the decedent's estate, brought to the Superior Court in the judicial district of Tolland, where the appeals were consolidated; thereafter, the named defendant filed a counterclaim; subsequently, the defendant John Henneberger was defaulted for failure to plead; thereafter, the matter was tried to the court, *Fuger*, *J.*; judgments for the plaintiff, from which the named defendant appealed to this court. *Affirmed.*

Malcolm F. Barlow, for the appellant (named defendant).

Vincent John Purnhagen, for the appellee (plaintiff).

Opinion

KELLER, J. In this consolidated probate appeal, the defendant David Boor appeals from the judgments rendered by the trial court in favor of the plaintiff, Alice K. Geci.[1] The defendant claims that (1) the court erred by finding that, upon the death of the decedent, William F. Klee, the plaintiff became the sole owner of joint bank accounts held by the decedent and the plaintiff, and, thus, they were not part of his estate, and (2) the court abused its discretion by reinstating the plaintiff as the executrix of the decedent's estate. We disagree with the defendant and, therefore, affirm the judgments of the trial court.

We begin by setting forth the relevant facts and procedural history. On July 12, 2015, the Probate Court for the district of Ellington issued a decision in which it

[1] Geci brought this appeal from probate both individually and in her representative capacity as executrix of the estate of the decedent, William F. Klee. She refers to herself as the plaintiff, as do we. The defendant, David Boor, is the decedent's grandson and a beneficiary of his will. John Henneberger, the administrator of the decedent's estate, was also named as a defendant but was defaulted for failure to plead and is not involved in this appeal. Our references in this opinion to the defendant are to Boor.

found that the decedent and the plaintiff held funds in joint accounts for convenience purposes only, that the decedent did not intend for the plaintiff to become the sole owner of the funds in the joint accounts upon his death, that the plaintiff undervalued assets in the inventory of the estate, and that money given to the plaintiff by the decedent to purchase a new car must be reported as estate inventory. On the basis of those findings, the Probate Court ordered that a constructive trust for the benefit of the defendant be placed on the undervalued assets and the funds in the joint accounts or, in the alternative, that a constructive trust be imposed on the remainder of the proceeds in the decedent's estate. The Probate Court also ordered that the money the plaintiff used to purchase the car must be reported as an advanced distribution in the final accounting of the decedent's estate. Later, on August 17, 2015, the Probate Court removed the plaintiff as executrix of the decedent's estate.

Pursuant to General Statutes § 45a-186 (a), the plaintiff appealed to the Superior Court from the Probate Court's orders involving the joint bank accounts and its decision to remove her as executrix of the decedent's estate. The Superior Court consolidated the plaintiff's appeals and conducted a de novo hearing focused on two issues—whether the jointly held bank accounts in question were part of the decedent's estate and whether the plaintiff should be reinstated as the executrix. The court, after conducting a three day bench trial, found that the plaintiff became the sole owner of the joint bank accounts upon the decedent's death. The court also reinstated the plaintiff as the executrix of the decedent's estate.

The trial court set forth the following facts in its memorandum of decision: "[The decedent] . . . died on September 19, 2013 [and was] predeceased [by his spouse, Gloria R. Klee. The decedent and Gloria Klee]

had three children . . . the plaintiff, Marjorie K. Heintz and Frederick G. Klee. All three of these children . . . survived the decedent. . . . [The decedent] was, by all reports, known to be a hard-working, self-employed farmer throughout his life, who, in partnership with . . . Gloria Klee . . . was able to maintain a farming business in the town of Ellington, Connecticut, for many years. Both the decedent and [Gloria Klee] did physical work on the farm. However, while it was the decedent who was primarily involved in the actual physical operation of the farming business, it was [Gloria] Klee who did all the household chores and bookkeeping . . . .

"Notwithstanding the fact that the decedent did not routinely write out checks to pay family household or business related bills, the decedent was nonetheless a competent and savvy businessman/farmer. . . . [According to the] plaintiff's expert witness, Attorney Atherton B. Ryan, the decedent was more than capable of managing and conducting his own affairs." (Internal quotation marks omitted.) Ryan's professional relationship with the decedent began in 2006 when the decedent hired Ryan to collect a debt from the decedent's daughter, Marjorie Heintz. During the litigation regarding the contested debt, Ryan advised the decedent to amend his will. The decedent directed Ryan to draft a new will[2] in order to "remove Marjorie from the will and to give Marjorie's one-third share to Marjorie's children, the defendant, David Boor, (a 2/9ths share) and [the defendant's] sister, Melissa Mascalla, (a 1/9th share)." The decedent signed this will on June 13, 2006.

Gloria Klee was diagnosed with cancer in 2005. Shortly thereafter, the plaintiff "assumed not only the role of caregiver for her mother during the period of her mother's final illness but also her mother's duties

[2] Pursuant to the terms of the June 13, 2006 will, Frederick Klee's one-third share was to be devised to the plaintiff in trust for Frederick Klee.

at the farm. This included not only doing the bookkeeping and bill-paying for the family household, but more importantly, assuming the responsibility for [the decedent's] well-being after Gloria [Klee] had died. With this in mind, the decedent and [Gloria Klee] made a conscious decision during the period of [her] last illness to apprise the plaintiff of their financial affairs. . . . [Gloria Klee] showed the plaintiff all of the financial and bookkeeping documents . . . ." (Internal quotation marks omitted.)

The decedent, Gloria Klee, and the plaintiff opened joint checking and savings accounts on April 5, 2006, in person at Bank of America.[3] On April 11, 2006, the decedent and Gloria Klee also made the plaintiff a joint owner with a right of survivorship on three certificate of deposit accounts at Rockville Bank. Gloria Klee died shortly after adding the plaintiff onto those accounts. The decedent closed all of the accounts at Bank of America and Rockville Bank on March 12, 2007.

The decedent once again created a new will on January 11, 2012, to replace the June 13, 2006 will. The new "will provided a few specific bequests with the residuary of the decedent's estate to be divided equally between the plaintiff and the defendant . . . . No provision was made for the decedent's daughter, Marjorie, or the decedent's son, Frederick [Klee][4] . . . . [This will was] admitted to probate after the decedent's death . . . and the plaintiff was appointed executrix of the estate."

Although not explicitly set forth in the court's memorandum of decision, the following additional facts are

[3] It is not disputed that both accounts had a right of survivorship.

[4] Pursuant to the terms of the June 13, 2006 will, Frederick Klee and Mascalla were to receive a one-third share in trust and a one-ninth share, respectively. The January 11, 2012 will removed Frederick Klee and Mascalla as beneficiaries of the decedent's residual estate. This left the plaintiff and defendant as the sole intended beneficiaries in the 2012 will, each receiving a one-half share of the residual estate.

not disputed by the parties and are consistent with the court's other findings. The plaintiff and decedent opened joint accounts with a right of survivorship at Rockville Bank, which is now known as United Bank. At the time of the decedent's death, the decedent and the plaintiff were signatories on a joint checking account, a joint savings account, and four joint certificate of deposit accounts at United Bank. The plaintiff did not probate the funds, totaling approximately $400,000, in the bank accounts. Additional facts will be set forth as needed.

I

The defendant claims that the court erred by finding that the plaintiff became the sole owner of joint bank accounts held by the decedent and the plaintiff upon the decedent's death. We disagree.

We begin by setting forth the relevant law pertaining to the ownership of joint bank accounts after the death of one account holder, as well as the standard that governs our review of the court's findings. Joint survivorship bank accounts are governed by General Statutes § 36a-290.[5] Case law interprets § 36a-290 (b) as

[5] General Statutes § 36a-290 provides in relevant part: "(a) When a deposit account has been established at any bank, or a share account has been established at any Connecticut credit union or federal credit union, in the names of two or more natural persons and under such terms as to be paid to any one of them, or to the survivor or survivors of them, such account is deemed a joint account, and any part or all of the balance of such account, including any and all subsequent deposits or additions made thereto, may be paid to any of such persons during the lifetime of all of them or to the survivor or any of the survivors of such persons after the death of one or more of them. Any such payment constitutes a valid and sufficient release and discharge of such bank, Connecticut credit union or federal credit union, or its successor, as to all payments so made.

"(b) The establishment of a deposit account or share account which is a joint account under subsection (a) of this section is, in the absence of fraud or undue influence, or other clear and convincing evidence to the contrary, prima facie evidence of the intention of all of the named owners thereof to vest title to such account, including all subsequent deposits and additions made thereto, in such survivor or survivors, in any action or proceeding

giving rise to a rebuttable presumption that "the creation of a joint account is evidence of the intent of the person creating the account to have the proceeds go, upon his or her death, to the other joint account holder." *Bunting* v. *Bunting*, 60 Conn. App. 665, 679, 760 A.2d 989 (2000). A person challenging the survivor's right to ownership of the balance in the account must overcome the presumption with clear and convincing evidence. *Garrigus* v. *Viarengo*, 112 Conn. App. 655, 662, 963 A.2d 1065 (2009). The phrase "clear and convincing" denotes a degree of belief that lies between a preponderance of the evidence and proof beyond a reasonable doubt. *Dacey* v. *Connecticut Bar Assn.*, 170 Conn. 520, 536–37, 368 A.2d 125 (1976). "[C]lear and convincing proof is strong, positive, free from doubt, and full, clear and decisive." (Internal quotation marks omitted.) Id., 537. When, however, the challenger presents clear and convincing evidence that the surviving account holder committed fraud, exerted undue influence on the deceased account holder; *Garrigus* v. *Viarengo*, supra, 662; or was in " 'a confidential relationship' " with the deceased account holder, the burden of proof with regard to ownership shifts to the surviving account holder, who then has the burden of proving fair dealing or the absence of undue influence by clear and convincing evidence. *Bunting* v. *Bunting*, supra, 680.

The issue of ownership upon the death of a joint account holder is a factual one. *Driscoll* v. *Norwich Savings Society*, 139 Conn. 346, 349, 93 A.2d 925 (1952). Appellate review of findings of fact is limited to the clearly erroneous standard. *Bunting* v. *Bunting*, supra, 60 Conn. App. 679. A finding of fact is deemed clearly erroneous when there is no evidence in the record to support it or when there is evidence, "the reviewing court on the entire evidence is left with the definite and

between any two or more of the depositors, respecting the ownership of such account or its proceeds. . . ."

firm conviction that a mistake has been committed." (Internal quotation marks omitted.) Id. This court "cannot retry the facts or pass upon the credibility of the witnesses." (Internal quotation marks omitted.) Id.

The court stated that the defendant in this case bore the burden of persuasion, by clear and convincing evidence, to rebut "the statutory presumption vesting ownership in the surviving owner in a joint account upon the demise of the other joint account holder . . . ." The court found that the defendant did not meet that burden. Because the court did not shift the burden to the plaintiff, it can be inferred that the court did not find that the plaintiff committed fraud, exerted undue influence on the decedent, or that she and the decedent were in a confidential relationship.

In challenging the court's finding that the plaintiff became the sole owner of the accounts upon the decedent's death, the defendant makes four arguments. The defendant first argues that the court should have found that the plaintiff and the decedent were in a confidential relationship, shifting the burden of proof with regard to ownership of the accounts to the plaintiff. The defendant's second argument is that the present case is factually similar to *Garrigus* v. *Viarengo*, supra, 112 Conn. App. 655, and that it was improper for the court to rely on *State* v. *Lavigne*, 307 Conn. 592, 57 A.3d 332 (2012). The defendant's last two arguments are that the court erred by not finding that the plaintiff concealed the joint ownership of the accounts and that the court improperly weighed evidence concerning the decedent's intent.

A

The defendant argues that the court should have found that the plaintiff was in a confidential relationship with the decedent, shifting the burden of proof with

regard to ownership of the accounts to the plaintiff.[6] The defendant's argument is predicated on portraying the decedent as a simple farmer, with little understanding of how to manage his personal finances, and inherently susceptible to the plaintiff's influence. The record, however, reveals a basis to conclude that this was not the case. First, the plaintiff's relationship with the decedent did not reflect the paradigms of a confidential relationship. Second, the record demonstrates that the decedent may not have been as susceptible as the defendant contends; the decedent was capable of managing his financial affairs and there is evidence that the decedent understood the survivorship rights on joint accounts.

Determining whether a confidential relationship exists is a factual inquiry. *Albuquerque* v. *Albuquerque*, 42 Conn. App. 284, 287, 679 A.2d 962 (1996). Appellate review is limited to the clearly erroneous standard. Id.

The record contains evidence that the plaintiff's relationship with the decedent did not reflect the paradigms of a confidential relationship. "A fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other." *Dunham* v. *Dunham*, 204 Conn. 303, 322, 528 A.2d 1123 (1987), overruled in part on other grounds by *Santopietro* v. *New Haven*, 239 Conn. 207, 213 n.8, 682 A.2d 106 (1996). The superior position of the fiduciary or dominant party affords him a great opportunity for abuse of the confidence reposed in him. Id. "The relationship between a parent and a child does not per se give rise to the

[6] Although it is not explicitly stated in the defendant's brief, the defendant also seems to be arguing that the burden of establishing ownership should have been on the plaintiff because she fraudulently concealed her right of survivorship or, more generally, that she otherwise exerted undue influence on the decedent.

establishment of a fiduciary relationship." (Internal quotation mark omitted.) *Bunting* v. *Bunting*, supra, 60 Conn. App. 680. Here, there was evidence that the decedent did not wholly trust the plaintiff to manage his finances. The defendant referred to this in his testimony by stating that the decedent "would accuse . . . [the plaintiff] of stealing his money." There was evidence that the decedent monitored the plaintiff's management of his financial affairs. The plaintiff recalled that the decedent was aware of how much money the accounts contained[7] and scrutinized how the money was being spent, frequently questioning payments to parties he did not recognize.[8] Further, there was evidence that the decedent made the ultimate determination in the management of his financial affairs. According to the plaintiff, when she purchased a new car, it was the decedent who made the decision about which account the money would come from.[9]

The record contains a basis to support the court's finding that the decedent was capable of managing his financial affairs. The evidence reflects that the decedent—with help from Gloria Klee, family members, and friends—successfully operated a family farm for many years. In managing the farm, the decedent purportedly made purchases, sold farm products and services, bartered, and negotiated.[10] The plaintiff testified that the

[7] The plaintiff testified: "When the bank statements came in every month, [the decedent] would open up the statements, and he'd look, and his first question was how much money's in there . . . ." The plaintiff would reply, "I don't know, dad. You got to add it up. . . . I'd say, dad, you've got to get a piece of paper, start adding them up."

[8] The plaintiff testified: "Sometimes [the decedent] didn't recognize the names of places that I mailed a check to, and he would [say], what's this check for, what's this check for, and I would tell him."

[9] The plaintiff testified: "I gave him the options of what . . . he had, and he said, I want to take it out of John Hancock. He did not want to touch the [joint accounts]. This was in November. He just renegotiated them in July. He was afraid he would lose his rate or interest [on the composite deposit accounts]."

[10] James Prichard, owner of the hardware store that the decedent frequented, testified: "I would buy egg cartons, shavings [from the decedent].

decedent annually visited Rockville Bank to renegotiate the interest rates on his composite deposit accounts.[11] Additionally, there was evidence that the decedent demonstrated an understanding of complex legal and financial documents. The decedent supposedly instructed his attorney to change his will despite the plaintiff's protests.[12] The defendant recalled times when the decedent would execute contracts for mortgage liens and automobile sales.[13]

The evidence reasonably demonstrated that the decedent understood survivorship rights on a joint account, which supports the notion that the decedent was not as susceptible to the plaintiff's influence as the defendant represents. At trial, a representative from United Bank, Tracy Roy, explained that it is bank policy to inform anyone opening a joint account about the right of survivorship.[14] Additionally, a bank representative would

We would trade eggs back and forth . . . ." Prichard also recalled negotiating with the decedent: "I told him the price [for a wood stove]. He'd say it was too high, and then I'd sell it to him for close to what it cost me."

[11] The plaintiff testified: "Every July, because that's when the . . . [composite deposit accounts] came due, we would go to the bank together, and he would talk to the lady about the interest rates, and he would renegotiate them."

[12] The plaintiff testified: "I didn't agree with it, but I wasn't really sure about it, and once my dad heard that . . . [if Freddy goes into a convalescent home, the government can get your money], he decided to go up and take Freddy out of [the] will. I was quite against it."

[13] The defendant testified that the decedent entered into contracts to purchase automobiles and signed his will. The defendant also secured mortgage financing from the decedent, and the decedent was a signatory on the mortgage release agreement, which was signed before a notary.

[14] Roy, a manager of two branches for United Bank, testified in response to questioning regarding the process of opening an account: "I would identify each customer . . . go over, if it's a joint account, what a joint account means; all of our joint accounts are with right to survivorship and not tenants in common, which means either of the parties, either account holder has full access to the funds. It is 100 percent owner A and 100 percent owner B's money. They do not need each other's permission to conduct any transaction on the account. Upon the death of one joint account holder, the surviving holder becomes the sole owner of the money."

give customers an informative booklet on joint account ownership. The booklet contains the following provision, "Joint Account—With Survivorship (And not as Tenants in Common)—is an account in the name of two or more persons (where the other person is not a fiduciary or beneficiary). Each of you intends that when you die the balance in the account (subject to any previous pledge to which we have agreed) will belong to the survivor(s)." The decedent should have received this information when he opened the accounts with the plaintiff. Additionally, the decedent, prior to opening joint accounts with the plaintiff, held joint accounts with Gloria Klee. The decedent gained firsthand experience dealing with survivorship rights when Gloria Klee died.[15]

B

The defendant's second argument is that the present case is factually similar to *Garrigus* v. *Viarengo*, supra, 112 Conn. App. 655, and that it was improper for the court to rely on *State* v. *Lavigne*, supra, 307 Conn. 592. In *Garrigus*, the executrix of the decedent's estate brought an action against the decedent's niece to recover funds in accounts held by the decedent and her niece. *Garrigus* v. *Viarengo*, supra, 660. The court found that by transferring the decedent's assets into the joint accounts, the niece committed fraud against the decedent's estate. Id., 671. The trial court in *Garrigus* found that shortly after the decedent's husband died, "the niece] transported [the decedent] to the bank, and the [niece's] name was added as a joint owner on savings bonds . . . ." Id., 665–66. A few months later, "the [niece] was added as a joint owner on several of [the decedent's] savings and checking accounts, certificates of deposit and savings bonds. . . . When a few

[15] Ryan testified that "[a]pparently," the decedent was aware of the survivorship nature of joint bank accounts in March, 2007.

relatives became aware that the [niece] was a joint owner on some of [the decedent's] bank accounts, they expressed their concern to [the decedent] that those accounts would belong to the [niece] when [the decedent] died. [The decedent] was adamant that the [niece's] name had been added for convenience only because the [niece] helped [the decedent] with her financial affairs and was the coexecutor of her will. [The decedent] indicated that she had told [her niece] that her estate was to be divided equally among the ten beneficiaries." Id., 666. The court inferred that when faced with the decedent's instructions to split the estate evenly, the niece "remained silent" and that the decedent "undoubtedly assumed [her niece's] assent . . . ." Id., 669. In the present case, there was no finding that (1) the decedent created joint accounts with the plaintiff only for convenience purposes, (2) any of the other family members ever questioned him about his intent, or (3) he indicated that the money in the accounts was to be distributed equally to all his stated beneficiaries. Thus, we do not agree with the defendant that the present case is factually similar to *Garrigus*.

The court also did not err by citing to *State* v. *Lavigne*, supra, 307 Conn. 592. The court cited to *Lavigne* for the proposition that determining ownership of funds in a joint account is a factual issue in order to establish that it was the court's responsibility in the present case to make that determination as the finder of fact. Although *Lavigne* is a criminal case, § 36a-290 is discussed at length in our Supreme Court's decision. First, we observe that a court is free to look to any case that it believes is instructive in deciding the matter before it. Second, there is no basis on which to conclude that the court's reliance on *Lavigne* was misplaced because in *Lavigne*, our Supreme Court reviewed the "longstanding jurisprudence concerning § 36a-290 or its predecessor provision and other cases in which the ownership of joint bank accounts was at issue . . . ." Id.,

601. The defendant's brief even contradicts itself in one instance by stating that the court erroneously relied on *Lavigne* and in another instance by stating that "the *Lavigne* case gives sufficiently relevant law to be the key case in this matter." (Internal quotation marks omitted.)

C

The defendant next argues that the court improperly failed to find that the plaintiff fraudulently concealed the beneficial effect of her survivorship rights in the joint accounts from her daughter, the decedent, and the decedent's attorney. It is not this court's role to examine the record to determine whether the trier of fact could have reached a different conclusion. *Wyszomierski* v. *Siracusa*, 290 Conn. 225, 238, 963 A.2d 943 (2009). Instead, this court reviews the trial record to determine whether the trial court's decisions are legally correct and factually supported. Id. The defendant is requesting that this court replace the trial court's findings of fact with a different narrative where the defendant is entitled to half the funds in the joint accounts. The record does not reveal the requisite compelling reasons to do so.

The defendant contends that the court improperly failed to find that the plaintiff concealed the survivorship nature of the joint bank accounts from the plaintiff's daughter, Attorney Ryan, and the decedent. The defendant does not establish why it was clearly erroneous for the court to fail to find that the plaintiff concealed the accounts. The plaintiff's alleged concealment of the survivorship rights of the accounts from her daughter is not material to the outcome of this case. There is contradictory testimony regarding whether the plaintiff concealed the survivorship rights from the decedent and Ryan; therefore, the trial court did not err by not finding that she did so.

The court did not act improperly by failing to find that the plaintiff concealed the survivorship nature of

the accounts from her daughter. Courts do not need to include immaterial facts in their findings. *Yale University* v. *New Haven*, 169 Conn. 454, 463, 363 A.2d 1108 (1975). The defendant was "required to prove by clear and convincing evidence that the bank accounts . . . were not valid inter vivos gifts . . . or that they were assets acquired by the defendant under circumstances which required equity to divest [the plaintiff of her] beneficial interest and to convert [her] into a trustee in order to prevent [her] unjust enrichment." (Citations omitted.) *Cooper* v. *Cavallaro*, 2 Conn. App. 622, 626, 481 A.2d 101 (1984). The § 36a-290 (b) presumption focuses on the intent of the joint account holders. *State* v. *Lavigne*, supra, 307 Conn. 603. Whether the plaintiff informed her daughter about the survivorship nature of the accounts neither provides insight as to the decedent's intent, nor reveals anything about the relationship between the decedent and the plaintiff. The defendant does not proffer a reason why a finding that the plaintiff concealed her right of survivorship from her daughter would be material to the case. Further, the defendant needed to explain that failing to make such a finding would be impactful in light of the fact that the defendant needed to establish by clear and convincing evidence that equity required divesting the plaintiff of the accounts. Whether or not the court found the daughter's testimony credible, the court did not have to address this factual issue in its analysis.

With respect to Ryan and the decedent, although a finding that the plaintiff purposely concealed the survivorship nature of the accounts from them may have been material to the court's analysis, the defendant must establish on appeal that the court's failure to find that the plaintiff deceived either of them was clearly erroneous. The record contains contradictory testimony regarding whether the plaintiff had an opportu-

nity to conceal the survivorship rights from Ryan and whether the decedent knew about the survivorship rights. "Where there is conflicting testimony, we do not retry the facts or pass upon the credibility of the witnesses. . . . Weighing the evidence and judging the credibility of the witnesses is solely within the province of the trial court and this court will not usurp that role." (Citation omitted.) *Hallmark of Farmington* v. *Roy*, 1 Conn. App. 278, 281, 471 A.2d 651 (1984). Also, the court was not required to credit any particular individual's account of the events. *Wilson* v. *Hryniewicz*, 51 Conn. App. 627, 633, 724 A.2d 531, cert. denied, 248 Conn. 904, 731 A.2d 310 (1999).

The defendant contends that the court erred by not finding that the plaintiff concealed the survivorship nature of the accounts from Ryan. The defendant alleges that the plaintiff concealed the survivorship nature when she brought the decedent to Ryan's office to amend his will in 2012. Ryan testified that the plaintiff sat in on the conference when the decedent discussed how he wanted to amend his will, but that the plaintiff did not actively participate in the conversation. Ryan stated that, aside from exchanging brief pleasantries, the plaintiff said little at the meeting[16] and that although there was a terse discussion of the decedent's assets, the decedent brought the conversation to an abrupt end. The plaintiff testified that she was asked to leave the room after briefly greeting Ryan.[17] The court was left to evaluate contradictory testimony that the plaintiff did not attend the meeting against evidence that she

[16] Ryan testified: "My recollection is that [the plaintiff] had brought [the decedent] to the office. She did sit [in] on the conference [to discuss amending the decedent's will]. I don't remember her contributing to the conference or the discussion at all other than to say hi, the normal greeting kind of discussion. Specifically, I do not believe she contributed or commented upon [the decedent's] expressed desire."

[17] The plaintiff testified: "[The decedent] said he wanted to change the will, and . . . Ryan sat down with him, and [Ryan] asked me to walk out of the room so he could talk to [the decedent], and I sat in the lobby."

was not an active participant. The court was free to assign credibility to either account. Therefore, it was not clearly erroneous for the court to fail to find that the plaintiff concealed the right of survivorship from Ryan.

The defendant relies on his own testimony to argue[18] that the plaintiff concealed the right of survivorship from the decedent. The defendant testified that the decedent was confused as to why the plaintiff's name was on the accounts and that despite arguments between the plaintiff and the decedent regarding finances, the decedent never took the plaintiff's name off the accounts.[19] The plaintiff testified that her name was on the accounts as a joint owner because her parents wanted her to have the money in the accounts.[20] Again, the court was left to evaluate contradictory testimony. The plaintiff's testimony provided evidence that she did not conceal the survivorship rights from the

[18] The defendant also refers to the lack of anyone from Rockville Bank testifying about the decedent opening the accounts with the plaintiff in support of a finding that the plaintiff concealed the right of survivorship. This is a speculative proposition and ignores the possibility that the bank employees cannot accurately recall every patron who opens a new account.

[19] In arguing that the plaintiff concealed the right of survivorship on the accounts from the decedent, the defendant relies on his own testimony, which, rather than supporting his claim that the plaintiff concealed the survivorship rights from the decedent, reveals the opposite, mainly that the decedent was aware that the plaintiff's name was on the accounts. The defendant testified that the decedent was aware the plaintiff was listed on the account and contemplated removing her, but never did so. The defendant testified that "[a]ll [the plaintiff] would say [to the decedent] is, go to the bank and take my name off." "One time after . . . [the plaintiff and the decedent] had an argument about [the accounts], he asked me to take him to the bank to find out why her name was on it, whose money it was, and I flat out refused."

[20] During the plaintiff's direct examination, the following colloquy occurred:

"[The Plaintiff's Counsel]: And whose money was it [in the accounts] . . . upon [the decedent's] passing?

"[The Plaintiff]: Mine.

"[The Plaintiff's Counsel]: And why you do you say that . . . ?

"[The Plaintiff]: Because that's what my mom and dad wanted—was for me to have the money [in the accounts] upon their death."

decedent, and the court was free to credit that testimony. Therefore, it was not clearly erroneous for the court to fail to find that she concealed the survivorship rights on the accounts.

D

The defendant's final argument is that the court failed to give proper weight to evidence concerning the decedent's intent. As previously explained, the existence of a joint account creates a presumption that the decedent intended the joint account to become the property of the surviving account holder(s). This presumption can be overcome only with clear and convincing evidence. *Garrigus* v. *Viarengo*, supra, 112 Conn. App. 662. Nothing in the court's decision suggests that the court failed to consider whether the presumption was overcome or any of the relevant evidence on the issue. The court noted that "[i]t is true that the state of the evidence in this case is a bit contradictory. On the one hand, we have the incontrovertible evidence that the decedent created these joint accounts with himself and [the plaintiff]. Examined in a vacuum, this seems to clearly show that he intended to have ownership of the totality of the $400,000 vest in [the plaintiff] upon his death (after all, that is the general meaning of a joint account). On the other hand, there is the clearly contradictory stated intent in his last will and testament—that the residuary of [the decedent's] estate is to be equally divided between [the plaintiff and the defendant]." Therefore, the court weighed the evidence concerning the decedent's intent and decided that it did not clearly and convincingly overcome the presumption set forth in § 36a-290 (b).

II

The defendant also claims that the court abused its discretion by reinstating the plaintiff as the executrix of the decedent's estate. The defendant argues that, by undervaluing certain assets in the inventory of the

decedent's estate, the plaintiff failed to perform adequately her duties as executrix. We disagree.

The property at issue was a tractor and two vehicles—an automobile and a dump truck. The defendant supports this claim by arguing that his own testimony contradicts the plaintiff's valuations and that the plaintiff, by her own admission, initially confused the value of the two vehicles. The court observed that "[d]espite there being some allegations that the plaintiff did not perform her job properly, this court cannot find that the decisions she made as executrix, the valuations she placed upon the property in the inventories, were unsupported by evidence."

Removal of an executrix is left to the sound discretion of the Probate Court. *Ramsdell* v. *Union Trust Co.*, 202 Conn. 57, 65, 519 A.2d 1185 (1987). "On appeal from probate, the trial court may exercise the same discretion de novo, reviewing the facts relating to the propriety of removal without regard to the Probate Court's decision." Id. That leaves this court to determine whether the decision of the trial court amounts to an abuse of discretion. "Under the abuse of discretion standard of review, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Internal quotation marks omitted.) *Selene Finance, L.P.* v. *Tornatore*, 137 Conn. App. 130, 134, 46 A.3d 1070, cert. denied, 307 Conn. 908, 53 A.3d 223 (2012).

The record reveals that the plaintiff and the defendant presented the court with conflicting values of the assets. The plaintiff valued the tractor at $12,000, the automobile at $4000, and the dump truck at $8000. The defendant, "a person who deals in automotive transactions,"

appraised the automobile at $12,088. The defendant estimated, on the basis of the National Auto Dealers Association blue book, that the dump truck was worth $15,413. Scott Stanton, the tractor dealer who sold and repaired the decedent's tractor, estimated that the tractor was worth $25,000 at the time of the decedent's death.

The defendant is essentially requesting that this court conclude that it was an abuse of discretion for the trial court to reinstate the plaintiff because of the higher estimated values of the assets that he, an interested party, and Stanton presented. Even though there was a difference between the defendant's appraisals and the plaintiff's valuations, the court acted within its discretion by reinstating the plaintiff as executrix. The values utilized by the plaintiff equal, or are close in value to, the town of Ellington's tax assessments on the assets, which were admitted as evidence. Therefore, after reviewing the record, we conclude that the court's decision to reinstate the plaintiff as the executrix was reasonable, supported by the record, and not an abuse of its discretion.

The judgments are affirmed.

In this opinion the other judges concurred.

CHRISTOPHER CUSANO *v.* EDWARD LAJOIE ET AL.
(AC 39279)

Sheldon, Prescott and Bear, Js.

Syllabus

The plaintiff sought to recover damages from the defendants for personal injuries he allegedly sustained when an automobile driven by the named defendant rear-ended his automobile. After the jury returned a verdict awarding $3000 in economic damages and zero noneconomic damages, the trial court declined to accept the verdict and ordered the jury to

review its verdict. After reconsidering the verdict, the jury again returned a verdict awarding no noneconomic damages. The trial court, thereafter, granted the plaintiff's motion for additur and ordered an additur of $2000. From the judgment rendered thereon, the defendants appealed to this court. *Held* that the trial court abused its discretion in ordering the additur and concluding that the jury's award of medical expenses required it to find that the plaintiff had suffered compensable pain throughout the period of his medical treatment; that court did not identify any part of the trial record that supported its reasoning, nor did it provide any explanation for the amount of the additur, and the jury reasonably could have determined that the plaintiff had not proven any noneconomic damages for pain and suffering, or damages for lost wages, given the inconsistent and conflicting evidence, the questions of credibility concerning the extent, if any, of the plaintiff's pain and suffering, and the plaintiff's subjective complaints of pain stemming from alleged soft tissue injuries rather than from injuries such as broken bones.

Argued October 5—officially released December 12, 2017

Procedural History

Action to recover damages for personal injuries sustained by the plaintiff as a result of the defendants' negligence, brought to the Superior Court in the judicial district of New Britain and tried to the jury before *Swienton*, *J.*; verdict for the plaintiff; thereafter, the court granted the plaintiff's motion for additur, and the defendants appealed to this court. *Reversed*; *judgment directed.*

Karen L. Dowd, with whom, on the brief, was *Brendon P. Levesque*, for the appellants (defendants).

Scott A. Leventhal, for the appellee (plaintiff).

Opinion

BEAR, J. The defendants, Edward Lajoie and Kathleen Weaver,[1] appeal from the judgment of the trial court granting the motion of the plaintiff, Christopher Cusano, for additur in the amount of $2000. On appeal,

[1] Lajoie was Weaver's employee, and was acting within the scope of his employment while driving Weaver's vehicle at the time of the automobile accident at issue in this case. Collectively, we refer to Lajoie and Weaver as "the defendants." Individually, we refer to them by name.

the defendants argue that the trial court abused its discretion in granting the motion for additur. We agree and, accordingly, reverse the judgment of the trial court.

The plaintiff filed this action following a minor car accident that occurred on July 4, 2014, in which Weaver's vehicle, while being driven by Lajoie, rear-ended the plaintiff's vehicle. The collision caused the plaintiff's vehicle to sustain damage requiring approximately $678 in repair costs.

Following the collision, the plaintiff did not immediately feel injured, so he drove away and spent several hours at a picnic. When the plaintiff woke up the next day, however, he allegedly felt pain in his neck and upper back, which caused him to leave work approximately ninety minutes after he arrived. Five days later, the plaintiff saw a chiropractor, Awilda Figueroa, to whom he reported that he was experiencing pain that was "like a nine" on a scale of one to ten. Figueroa saw the plaintiff nineteen times over the ensuing three months for the alleged injuries to his neck and upper back. Over the course of his treatment, the level of pain the plaintiff reported to Figueroa decreased. After the plaintiff's final visit in January, 2015, Figueroa stated in her final report that "[t]he patient reports that all injuries and underlining pain have resolved with reference to the accident he suffered."

Following the accident, the plaintiff's employer, a furniture liquidation company, placed him on light duty. When the plaintiff attempted to resume his more labor-intensive duties, he allegedly began to feel discomfort in his neck and upper back. The plaintiff also worked part time for an executive protection firm, performing five or six jobs per year, ranging from what he described as high risk to low risk assignments. After the accident, the plaintiff allegedly did not accept any high risk

assignments; however, he occasionally accepted low risk assignments.

On April 7, 2015, the plaintiff filed a two count complaint alleging negligence against the defendants. The defendants did not contest liability. After a jury trial in April, 2016, the jury initially sought to return a verdict awarding the plaintiff the full amount of his claimed $3320 in medical expenses, but no damages for his claimed lost wages of $750 or his claimed noneconomic damages. After its review of the initial verdict, the court declined to accept it and instructed the jury as follows: "While that is a possible verdict, some might argue that it is inconsistent to say that a person was injured enough to incur medical expenses and lost wages, but experienced no pain and suffering or other noneconomic damages. On the other hand, you may have concluded that while the plaintiff proved his economic damages, he failed to prove any noneconomic damages. To help eliminate any concerns either party might have, I'm going to ask you to go back and review your verdict. In addition to my instructions regarding the plaintiff's burden of proving damages, you should, also, remember my instruction that even momentary pain and suffering is compensable."

After reconsidering its verdict, the jury once again sought to return a verdict awarding the plaintiff no noneconomic damages. On April 13, 2016, after the second verdict was accepted and recorded, the plaintiff filed a motion for additur, or in the alternative, to have the verdict set aside as "inconsistent and unreasonable given the evidence presented in this case." The court determined that "under the particular circumstances of this case, it is inconsistent to conclude that [the plaintiff] was injured to the extent that he incurred substantial medical expenses and at no time during the course of the treatment experienced pain and suffering. The court is compelled to conclude that the jury did not

apply the law to the facts of the case, or were influenced by partiality, prejudice or mistake." The court accordingly ordered an additur for noneconomic damages in the amount of $2000. The plaintiff accepted the additur, but the defendants rejected it. This appeal followed.

The standard of review for determining whether a trial court properly ordered an additur is well settled. "[W]e review a decision of the trial court . . . ordering an additur to determine whether the trial court properly exercised its discretion." *Wichers* v. *Hatch*, 252 Conn. 174, 181, 745 A.2d 789 (2000). "[T]he jury's decision to award economic damages and zero noneconomic damages is best tested in light of the circumstances of the particular case before it. Accordingly, the trial court should examine the evidence to decide whether the jury reasonably could have found that the plaintiff had failed in his proof of the issue. That decision should be made, not on the assumption that the jury made a mistake, but, rather, on the supposition that the jury did exactly what it intended to do." Id., 188–89.

"It is axiomatic that [t]he amount of damages awarded is a matter peculiarly within the province of the jury . . . . Moreover, there is no obligation for the jury to find that every injury causes pain, or the amount of pain alleged. . . . Put another way, [i]t is the jury's right to accept some, none or all of the evidence presented. . . . It is the [jury's] exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses. . . . The [jury] can . . . decide what—all, none, or some—of a witness' testimony to accept or reject." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Smith* v. *Lefebre*, 92 Conn. App. 417, 421–22, 885 A.2d 1232 (2005). "The only practical test to apply to a verdict is whether the award of damages falls somewhere within the necessarily uncertain limits of fair and reasonable compensation in the particular case, or whether the

verdict so shocks the sense of justice as to compel the conclusion that the jury [was] influenced by partiality, mistake or corruption." *DeEsso* v. *Litzie*, 172 Conn. App. 787, 796, 163 A.3d 55, cert. denied, 326 Conn. 913, A.3d (2017).

On appeal, the defendants argue that the court failed to review the evidence in the light most favorable to sustaining the verdict. Specifically, the defendants argue that the court abused its discretion in ordering the additur because there existed conflicting evidence and questions of credibility, and the plaintiff's complaints were of a subjective nature, i.e., stemming from so-called soft tissue injuries rather than from injuries such as broken bones. We agree.

This court previously has explained that "[w]e read *Wichers* as an instruction to a trial court specifically to identify the facts of record that justify the extraordinary relief of additur and as an instruction to an appellate court to inquire whether the facts so identified justify the trial court's exercise of its discretion to set a jury verdict aside because of its perceived inadequacy." *Turner* v. *Pascarelli*, 88 Conn. App. 720, 723–24, 871 A.2d 1044 (2005). "Under *Wichers*, it is not enough to base an additur on a conclusory statement that a jury award was [inadequate] . . . . The question, therefore, is whether the court elsewhere articulated a sufficient factual basis for its decision to order an additur." Id., 724.

Our review of the trial court's memorandum of decision in the present case reveals only a conclusory statement regarding the jury's award and no delineation of a sufficient factual basis for its decision to order an additur of $2000. Although the memorandum of decision details the facts that the parties established at trial, it does not state the specific facts relied upon by the court to justify its decision to award the extraordinary

relief of additur. Moreover, the memorandum of decision does not contain any description or explanation of how or why the court calculated $2000 as the appropriate amount of noneconomic damages. Instead, the court seems to assume that because the plaintiff sought medical treatment for pain in his upper back and neck, and was awarded the full amount of the cost of that treatment, the plaintiff inevitably experienced compensable pain and suffering. Our Supreme Court expressly rejected that reasoning in *Wichers* v. *Hatch*, supra, 252 Conn. 188–89. We, therefore, conclude, as this court did in *Turner* v. *Pascarelli*, supra, 88 Conn. App. 727, "that the court abused its discretion by ordering an additur without identifying the part of the record that supported its determination that an award of [zero] noneconomic damages was unreasonable under the circumstances of this case."

Furthermore, the court abused its discretion in ordering the additur because there existed conflicting evidence and credibility issues concerning the extent, if any, of the plaintiff's pain and suffering. A court must view the evidence in the light most favorable to sustaining the jury's verdict. "Because in setting aside a verdict the court has deprived a litigant in whose favor the verdict has been rendered of his constitutional right to have disputed issues of fact determined by a jury . . . the court's action cannot be reviewed in a vacuum. The evidential underpinnings of the verdict itself must be examined. Upon issues regarding which, on the evidence, there is room for reasonable difference of opinion among fair-minded men, the conclusion of a jury, if one at which honest men acting fairly and intelligently might arrive reasonably, must stand . . . ." (Citation omitted; internal quotation marks omitted.) *Wichers* v. *Hatch*, supra, 252 Conn. 189. Thus, the court should not assume that the jury made a mistake, but should

suppose "that the jury did exactly what it intended to do." Id.

This court's decision in *Smith* v. *Lefebre*, supra, 92 Conn. App. 417, guides our discussion of this issue. In *Smith*, the plaintiff and the defendant were in a minor motor vehicle accident in which the defendant rear-ended the plaintiff. Id., 418, 426. Credibility issues existed in *Smith*, as the defendant established that the plaintiff's attorney referred her to a doctor, but the plaintiff testified that she chose the doctor from a telephone directory in the phonebook. Id., 424–25. Additionally, there were conflicting statements about the nature of the plaintiff's injury—specifically whether the injury was a bulging or herniated disk and whether surgery was required. Id., 426. This court concluded that "[i]n light of the evidence, it was reasonable for the jury to award zero noneconomic damages." Id.

Similarly here, the evidence presented regarding how much time from work the plaintiff missed was inconsistent. In an answer to one of the defendants' interrogatories, the plaintiff stated that he "was home for the first [one to two] days after the accident." Later, in answering another interrogatory, the plaintiff stated that he missed one week of work. The interrogatory answers were introduced at trial. The plaintiff testified at trial that he missed one week of work. Thus, the evidence, at times, was conflicting and inconsistent.

Moreover, on cross-examination, when the defendants' counsel asked the plaintiff about the pain he was claiming, the plaintiff testified to the following: he did not seek medical treatment until five days after the accident; he never went to the emergency room; he did not have an MRI or a CAT Scan; and he did not know the results of his X ray, but it would not surprise him if the results showed everything was normal. Cross-examination also established that, despite the plaintiff's

claim of ongoing pain in mid-2016 at the time of trial, Figueroa last treated the plaintiff in September, 2014, and gave the plaintiff a "final rating"[2] in January, 2015. The plaintiff also testified that he had not sought treatment for the injuries or pain related to the accident after his last visit with Figueroa in January, 2015.

The jury also heard testimony about the plaintiff's current job, as a surveyor for an engineering company, where he was working in the field about 80 percent of the time. The plaintiff explained that the job had a physical aspect because he hiked through marshes and up and down trails. The plaintiff answered in the affirmative when the defendants' counsel asked him whether "there['s] some beating that [his] body takes [while] doing [his current job]." He also testified that he never had to call out of work in his current employment because of injuries or pain related to the accident.

In light of the two identical verdict forms that the jury submitted to the court, it is reasonable to conclude that the jury resolved the conflicting evidence by rejecting the plaintiff's lost wages claim and his noneconomic damages claim for pain and suffering upon determining that the plaintiff had failed to prove those claims by a fair preponderance of the evidence. As set forth in *Wichers*: "[I]f there is a reasonable basis in the evidence for the jury's verdict, unless there is a mistake in law or some other valid basis for upsetting the result other than a difference of opinion regarding the conclusions to be drawn from the evidence, the trial court should let the jury work their will." (Internal quotation marks omitted.) *Wichers* v. *Hatch*, supra, 252 Conn. 189.

After reviewing the evidence adduced at trial, we conclude that the jury's verdict was within the parameters of fair and reasonable compensation. The jury reasonably could have determined, as it apparently twice

[2] The "final rating" was a report that Figueroa created detailing the plaintiff's treatment and progress. The "final rating" noted that the plaintiff had returned to preinjury status as of January, 2015.

did, that the plaintiff had not proven any noneconomic damages for pain and suffering, or damages for lost wages. The court, in its memorandum of decision, did not set forth facts and reasons in explanation of how and why it determined that an additur was appropriate, how and why it calculated $2000 as the appropriate amount of the additur, or why it concluded that "the jury [was] influenced by partiality, mistake or corruption." (Internal quotation marks omitted.) *DeEsso* v. *Litzie*, supra, 172 Conn. App. 796. Accordingly, we conclude that the trial court abused its discretion in ordering an additur for noneconomic damages in the amount of $2000.[3]

The judgment is reversed and the case is remanded with direction to reinstate the jury's verdict and to render judgment thereon.

In this opinion the other judges concurred.

[3] The plaintiff claims that the existence or nonexistence of a preexisting injury is the determining factor in whether an award of virtually all of the plaintiff's economic damages but no noneconomic damages is inconsistent and unreasonable. Although the existence of a preexisting injury may be a circumstance for the jury to consider when deciding whether to award noneconomic damages, it is not the sole deciding factor. See *Turner* v. *Pascarelli*, supra, 88 Conn. App. 726, 730 (jury could have found that plaintiff contributed to his lack of recovery by failing to follow physical therapy, and by engaging in activities that exacerbated his injuries; preexisting injury was *alternative* factor); see also *Fileccia* v. *Nationwide Property & Casualty Ins. Co.*, 92 Conn. App. 481, 488, 886 A.2d 461 (2005) (absence of preexisting injury as *additional* factor for consideration), cert. denied, 277 Conn. 907, 894 A.2d 987 (2006).

"[O]ur Supreme Court has held that an award of virtually all of a plaintiff's claimed economic damages, with no accompanying noneconomic damages, demonstrated an inconsistency in the verdict . . . although it allowed that in a different case, such an award might be proper." (Citation omitted; internal quotation marks omitted.) *Fileccia* v. *Nationwide Property & Casualty Ins. Co.*, supra, 92 Conn. App. 487; see also *Schroeder* v. *Triangulum Associates*, 259 Conn. 325, 334 n.5, 789 A.2d 459 (2002) ("[o]ur conclusion on the facts of this case does not foreclose the possibility, in accordance with *Wichers* . . . that a jury in a case with different facts reasonably could award the full amount of a plaintiff's claimed economic damages but no noneconomic damages").

ROBERT H. LAWRENCE, JR. *v.* DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION
(AC 39496)

Lavine, Elgo and Beach, Js.

Syllabus

The plaintiff appealed to this court from the judgment of the trial court dismissing his administrative appeal from the decision by the Commissioner of Energy and Environmental Protection granting an application by H Co. to construct a residential dock and pier adjacent to certain waterfront property. Thereafter, the trial court granted H Co.'s motion to intervene as a defendant. After a trial to the court, the trial court determined that the plaintiff had not established that he was classically aggrieved by the decision of the commissioner and that the plaintiff lacked statutory (§ 22a-19) aggrievement in all respects, except for his claim of visual degradation. On appeal to this court, the plaintiff claimed, inter alia, that the trial court improperly concluded that he was not classically aggrieved and that he was statutorily aggrieved under § 22a-19 only with respect to his claim of visual degradation. *Held* that the trial court properly dismissed the plaintiff's appeal; because the trial court properly resolved the issues in its memorandum of decision, this court adopted the trial court's well reasoned decision as a proper statement of the relevant facts, issues and applicable law.

Argued October 12—officially released December 12, 2017

Procedural History

Appeal from the decision by the defendant granting an application by 16 Highgate Road, LLC, to construct a residential dock and pier, brought to the Superior Court in the judicial district of Stamford-Norwalk and transferred to the Superior Court in the judicial district of New Britain, where the court, *Schuman*, *J.*, granted the motion to intervene as a defendant filed by 16 Highgate Road, LLC; thereafter, the matter was transferred to the Superior Court in the judicial district of Hartford, Land Use Litigation Docket, and tried to the court, *Berger*, *J.*; judgment dismissing the appeal, from which the plaintiff appealed to this court. *Affirmed.*

James R. Fogarty, for the appellant (plaintiff).

Sharon M. Seligman, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Matthew I. Levine*, assistant attorney general, for the appellee (defendant).

John P. Casey, with whom, on the brief, were *Evan J. Seeman* and *Andrew A. DePeau*, for the appellee (intervenor 16 Highgate Road, LLC).

Opinion

PER CURIAM. The plaintiff, Robert H. Lawrence, Jr., appeals from the judgment of the Superior Court dismissing his administrative appeal from the decision of the Commissioner of Energy and Environmental Protection (commissioner) granting the application of 16 Highgate Road, LLC (Highgate), to construct a residential dock and pier. The plaintiff claims that the court improperly concluded that (1) he was not classically aggrieved by the commissioner's decision, (2) he was statutorily aggrieved under General Statutes § 22a-19 only with respect to his claim of visual degradation, (3) the commissioner's decision was supported by substantial evidence in the record and (4) the commissioner's decision complied with all applicable laws and regulations. We affirm the judgment of the Superior Court.[1]

The facts relevant to this appeal are not in dispute. In 2012, Highgate filed an application with the defendant, the Department of Energy and Environmental Protection (department), through its office of Long Island

[1] In hearing administrative appeals such as the present one, the Superior Court acts as an appellate body. See General Statutes § 4-183 (j); see also *Connecticut Coalition Against Millstone* v. *Connecticut Siting Council*, 286 Conn. 57, 85, 942 A.2d 345 (2008) (noting that Superior Court sits "in an appellate capacity" when reviewing administrative appeal); *Par Developers, Ltd.* v. *Planning & Zoning Commission*, 37 Conn. App. 348, 353, 655 A.2d 1164 (1995) (distinguishing administrative appeals in which Superior Court "reviewed the agency's decision in an appellate capacity").

Sound Programs, for a permit to construct a residential dock and pier adjacent to waterfront property known as 16 Highgate Road in Greenwich. While that application was pending, the plaintiff intervened pursuant to § 22a-19 (a).[2] Following an evidentiary hearing that spanned six days, Kenneth M. Collette, a hearing officer with the department, issued a proposed final decision approving the application, subject to certain modifications. The plaintiff subsequently filed twenty-six exceptions to that proposed decision and requested argument thereon. The commissioner heard arguments from interested parties on January 20, 2015. The commissioner thereafter issued a final decision, in which he determined that the proposed activity complied with all applicable statutes and regulations, and would not unreasonably pollute, impair, or destroy the public trust in the air, water or other natural resources of the state.[3]

Pursuant to General Statutes § 4-183, the plaintiff appealed from that decision to the Superior Court. Following a hearing, the court rendered judgment dismissing the appeal. In so doing, the court determined that

[2] At all relevant times, the plaintiff owned real property in Greenwich known as 3 Seagate Road, which is approximately 400 feet southwest of 16 Highgate Road. In granting the plaintiff's notice of intervention, the hearing officer ruled that "in the interest of the orderly conduct of the proceeding, the [plaintiff] will be limited to presenting evidence on the environmental issues articulated in [his] notice to intervene under § 22a-19 . . . ."

[3] In his final decision, the commissioner found that "the record . . . demonstrates that the impact of the proposed project to tidal wetlands, the intertidal flat, wildlife and other natural resources in the area is minimal." The commissioner further observed that "[w]hile it is true the dock will be built and be located in an area that supports a variety of wildlife, no credible evidence has been presented to demonstrate that the proposed structure will result in an adverse environmental impact to the project area. In fact, the record reflects that the dock is likely to have a positive impact on the vegetation in the tidal wetlands, due in part to the planned removal of stone debris in the area as required by the permit terms, which will create an additional 600 to 700 square feet of wetlands and allow tidal vegetation to repopulate the area. In addition, the dock will provide a way of accessing the water without walking through the tidal wetlands and thus will curb the physical breakage, uprooting and trampling of vegetation in the wetlands that is currently occurring."

the plaintiff had not established that he was classically aggrieved by the decision of the commissioner. The court also emphasized, consistent with well established precedent, that standing to bring an appeal pursuant to § 22a-19 is limited to environmental issues only. See *Pond View, LLC* v. *Planning & Zoning Commission*, 288 Conn. 143, 157, 953 A.2d 1 (2008) ("an intervenor's standing pursuant to § 22a-19 strictly is limited to challenging only environmental issues"). After scrutinizing the allegations of the plaintiff's complaint, the court concluded that the plaintiff lacked such statutory aggrievement in all respects, except for his claim of visual degradation. The court then reviewed the administrative record and concluded that it contained substantial evidence to support the commissioner's decision on that claim. It further concluded that the plaintiff had not demonstrated that the commissioner failed to comply with any applicable law or regulation. From that judgment, the plaintiff appealed to this court.

Our examination of the record and briefs and our consideration of the arguments of the parties persuade us that the judgment should be affirmed. On the facts of this case, the issues properly were resolved in the court's well reasoned memorandum of decision. See *Lawrence* v. *Dept. of Energy & Environmental Protection*, Superior Court, judicial district of Hartford, Land Use Litigation Docket, Docket No. CV-15-6066232-S (July 18, 2016) (reprinted at 178 Conn. App. 619). We therefore adopt it as the proper statement of the relevant facts, issues, and applicable law, as it would serve no useful purpose for us to repeat the discussion contained therein. See *Citizens Against Overhead Power Line Construction* v. *Connecticut Siting Council*, 311 Conn. 259, 262, 86 A.3d 463 (2014); *Pellecchia* v. *Killingly*, 147 Conn. App. 299, 301–302, 80 A.3d 931 (2013).

The judgment is affirmed.

APPENDIX

ROBERT H. LAWRENCE, JR. *v.* DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION*

Superior Court, Land Use Litigation Docket at Hartford
File No. LND CV-15-6066232-S

Memorandum filed July 18, 2016

Proceedings

Memorandum of decision on plaintiff's appeal from final decision by defendant approving application to construct residential dock and pier. *Appeal dismissed.*

James R. Fogarty, for the plaintiff.

Sharon M. Seligman, assistant attorney general, and *George Jepsen*, attorney general, for the defendant.

John P. Casey and *Evan J. Seeman*, for the intervening defendant, 16 Highgate Road, LLC.

Opinion

I

BERGER, J. The plaintiff, Robert H. Lawrence, Jr., the owner of 3 Seagate Road in Greenwich, filed this action on July 23, 2015, against the defendant, the state of Connecticut Department of Energy and Environmental Protection (department), seeking review of a final decision of the commissioner, Robert J. Klee (commissioner). The commissioner approved the December, 2012 application of the intervening defendant, 16 High-

* Affirmed. *Lawrence* v. *Dept. of Energy & Environmental Protection*, 178 Conn. App. 615, A.3d (2017).

gate Road, LLC[1] (Highgate), to construct a seventy-two foot residential dock in Greenwich Cove at 16 Highgate Road in Greenwich.[2] The application was initially approved by Tonia Selmeski of the office of Long Island Sound Programs on September 18, 2013. (Return of Record [ROR], Pleading [Pl.] # 119.00, DEEP-24.)

On October 24, 2013, a petition requesting a hearing was submitted by twenty-five individuals requiring that the department hold a hearing on the application. (ROR, Pl. # 120.00, DEEP-32.) On November 22, 2013, the plaintiff sought and was granted intervention status under General Statutes § 22a-19[3] of the Connecticut Environmental Protection Act (CEPA), General Statutes § 22a-14 et seq. (ROR, Pl. # 123.00.) Hearings were then conducted before Kenneth M. Collette in March and April,

[1] Highgate moved to intervene in this action on August 13, 2015; the court, *Schuman*, *J.*, granted the motion on August 14, 2015. According to Highgate's brief, Timothy Coleman and Allison Coleman are the members of Highgate and occupy a single-family house on the property. The southerly portion of the property is on an inlet that is part of Greenwich Cove along the waters of Long Island Sound and "contains a rock ledge outcrop elevated approximately ten feet above tidal wetlands and an intertidal flat area." (Return of Record [ROR], Pleading [Pl.] # 119.00, DEEP-23.) Lawrence alleges in paragraph eleven of his complaint that Highgate's proposed structures would be built on top of the ledge outcrop, thereby obscuring it.

[2] According to the record, the application for the dock was the third iteration. Highgate had submitted two prior versions, the first 180 feet in length and the second 100 feet in length. (ROR, Pl. # 117.00, DEEP-3.) This version is a four feet by seventy-two feet fixed timber and steel framed pier with a three feet by thirty-eight feet aluminum gangway and an eight feet by twelve and one-half feet floating dock secured by four float anchor piles. (ROR, Pl. # 117.00, DEEP-3.)

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

2014, and a proposed final decision approving the application with modifications was issued on October 30, 2014. (ROR, Pl. # 113.00.)

Lawrence filed twenty-six exceptions to the decision on November 14, 2014, and requested oral argument; (ROR, Pl. # 125.00); which was heard by the commissioner on January 20, 2015. (ROR, Pl. # 114.00.) On June 23, 2015, the commissioner issued his final decision finding that the proposed activity would comply with all applicable statutes and regulations, and would not unreasonably pollute, impair or destroy the public trust in the air, water or other natural resources of the state. (ROR, Pl. # 113.00, Final Decision.)

Lawrence filed this appeal on July 23, 2015. He alleges that the final decision allowing the construction of the pier is clearly erroneous and arbitrary, capricious, and an abuse of discretion because it violates the Tidal Wetlands Act, General Statutes § 22a-28 et seq.; the Coastal Management Act, General Statutes § 22a-90 et seq.; and the Structures, Dredging and Fill Act, General Statutes § 22a-359 et seq. Specifically, he alleges that the commissioner is obligated under General Statutes

"(2) The verified pleading shall contain specific factual allegations setting forth the nature of the alleged unreasonable pollution, impairment or destruction of the public trust in air, water or other natural resources of the state and should be sufficient to allow the reviewing authority to determine from the verified pleading whether the intervention implicates an issue within the reviewing authority's jurisdiction. For purposes of this section, 'reviewing authority' means the board, commission or other decision-making authority in any administrative, licensing or other proceeding or the court in any judicial review.

"(b) In any administrative, licensing or other proceeding, the agency shall consider the alleged unreasonable pollution, impairment or destruction of the public trust in the air, water or other natural resources of the state and no conduct shall be authorized or approved which does, or is reasonably likely to, have such effect as long as, considering all relevant surrounding circumstances and factors, there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare."

§ 22a-98 to "assure consistency with such goals and policies in granting or denying or modifying permits under" the Tidal Wetlands Act, the Coastal Management Act, and the Structures, Dredging and Fill Act. Section 22a-98, in relevant part, continues: "Any person seeking a license, permit or other approval of an activity under the requirements of such regulatory programs shall demonstrate that such activity is consistent with all applicable goals and policies in section 22a-92 and that such activity incorporates all reasonable measures mitigating any adverse impacts of such actions on coastal resources . . . ."

Under this umbrella, Lawrence alleges first that the decision allowing construction of the pier is inconsistent with and contrary to General Statutes § 22a-93 (15) (F). The statute defines " '[a]dverse impacts on coastal resources' " to "include but are not limited to . . . degrading visual quality through significant alteration of the natural features of vistas and view points . . . ." Second, Lawrence asserts that allowing the pier violates General Statutes § 22a-92 (b), which, in relevant part, provides: "[T]he following policies are established for federal, state and municipal agencies in carrying out their responsibilities under this chapter . . . (1) Policies concerning development, facilities and uses within the coastal boundary are . . . (H) to protect coastal resources by requiring, where feasible, that such boating uses and facilities . . . (ii) utilize existing altered, developed or redevelopment areas . . . [and] (iv) utilize ramps and dry storage rather than slips in environmentally sensitive areas . . . ." Third, Lawrence asserts a violation of § 22a-30-10 of the Regulations of Connecticut State Agencies (regulation) concerning tidal wetlands. The regulation, in relevant part, provides: "(a) . . . The commissioner shall grant, or grant with limitations or conditions a permit to conduct a proposed activity on any wetland only if it is determined

that the application is consistent with all applicable criteria set forth herein. (b) . . . In order to make a determination that a proposed activity will preserve the wetlands of the state and not lead to their despoliation and destruction the commissioner shall, as applicable, find that: (1) There is no alternative for accomplishing the applicant's objectives which is technically feasible and would further minimize adverse impacts . . . ." Lawrence asserts that the commissioner should have found that Highgate was able to utilize an existing boat launch. Finally, Lawrence alleges that construction of the pier violates § 22a-359 (a) of the Structures, Dredging and Fill Act. The statute, in relevant part, provides: "The Commissioner of Energy and Environmental Protection shall regulate dredging and the erection of structures and the placement of fill, and work incidental thereto, in the tidal, coastal or navigable waters of the state waterward of the coastal jurisdiction line. Any decisions made by the commissioner pursuant to this section shall be made with . . . proper regard for the rights and interests of all persons concerned." General Statutes § 22a-359 (a). Lawrence asserts that the commissioner failed to give proper regard to restrictive covenants that applied to Highgate's and Lawrence's properties.[4]

Highgate filed an answer, and the department filed an answer and the record on October 30, 2015. On December 15, 2015, Lawrence filed his brief. The department and Highgate filed their briefs on February 5, 2015,

[4] Both Lawrence's and Highgate's properties are subject to restrictive covenants dated April, 1954, as set forth in the Greenwich land records. The covenants state, in relevant part, that "no building or structure shall be erected or maintained upon the premises hereby conveyed other than one single family dwelling house with garage, if any, attached, except with the written consent of the grantor or its successors or assigns." (ROR, Pl. # 121.00, INT-1, p. 2.) Lawrence alleges in paragraphs four through eight of his complaint, that Harbor Point Association, Inc., became the successor and assignee of the grantor of the covenants in 1958.

and the plaintiff filed two briefs in reply on April 1, 2015. The court heard the appeal on April 12, 2015.[5]

II

A

The defendants contest Lawrence's standing to pursue this appeal.[6] "The fundamental aspect of standing . . . [is that] it focuses on the party seeking to get his complaint before [the] court and not on the issues he wishes to have adjudicated." (Internal quotation marks omitted.) *Mystic Marinelife Aquarium, Inc.* v. *Gill*, 175 Conn. 483, 491–92, 400 A.2d 726 (1978). "[S]tanding is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented." (Internal quotation marks omitted.) *Handsome, Inc.* v. *Planning & Zoning Commission*, 317 Conn. 515, 550, 119 A.3d 541 (2015) (*Palmer, J.*, dissenting).

In *Mystic Marinelife Aquarium, Inc.*, the court set forth the standing limitations for intervenors filing under CEPA: "because [the intervening plaintiff] became a party under § 22a-19 (a) in filing a verified pleading, which set the parameters of the issues it could raise on this appeal, there is no question here that [the intervening plaintiff] can appeal. That appeal, however, is limited to raising environmental issues only, as the

[5] Pursuant to General Statutes § 4-183 (c), the matter was returned to the judicial district of New Britain and was transferred to this docket on February 17, 2016.

[6] On April 12, 2016, the parties agreed that in light of the factual evidence in the record, Lawrence need not further testify concerning aggrievement except insofar as he still owned his property.

Superior Court properly held. Therefore, having become a proper party in the administrative proceeding, [the intervening plaintiff] had statutory standing to appeal for the limited purpose of raising environmental issues." *Mystic Marinelife Aquarium, Inc.* v. *Gill*, supra, 175 Conn. 490; see also *Finley* v. *Inland Wetlands Commission*, 289 Conn. 12, 34, 959 A.2d 569 (2008) ("[a]n intervenor pursuant to § 22a-19 has standing to bring an appeal from an agency's decision 'only to protect the natural resources of the state from pollution or destruction' "); *Red Hill Coalition, Inc.* v. *Conservation Commission*, 212 Conn. 710, 715, 563 A.2d 1339 (1989) ("[b]ecause the [plaintiff] filed a notice of intervention at the commission hearing in accordance with § 22a-19 [a], it doubtless had statutory standing to appeal from the commission's decision for that limited purpose"). But for the recent expansion allowing a challenge to the fairness of the hearing process set forth in *FairwindCT, Inc.* v. *Connecticut Siting Council*, 313 Conn. 669, 714, 99 A.3d 1038 (2014) ("[t]he right to a fundamentally fair hearing is implicit in the right to intervene pursuant to CEPA"), this qualified standing rule has remained essentially intact. See D. Sherwood & J. Brooks, 15 Connecticut Practice Series: Connecticut Environmental Protection Act (2006) § 8:15, pp. 205–206.

In the present case, Lawrence's and Highgate's properties front the tidal waters of Long Island Sound with Lawrence's property approximately 400 feet southwest of Highgate's property. (ROR, Pl. # 121.00, INT-8; Pl. # 123.00.) Lawrence filed a notice of intervention with the department; (ROR, Pl. # 123,00); in which he specifically alleged[7] that "the structures proposed in the captioned application will cause adverse impacts on coastal

[7] General Statutes § 22a-19 (a) (2), in relevant part, requires: "The verified pleading shall contain specific factual allegations setting forth the nature of the alleged unreasonable pollution, impairment or destruction of the public trust in air, water or other natural resources of the state . . . ."

resources, within the meaning of General Statutes § 22a-93 (15), by: a. Increasing the hazard of coastal flooding through significant alteration of shoreline configurations of bathymetry; b. Degrading visual quality through significant alteration of natural features of vistas and viewpoints; c. Degrading or destroying essential wildlife, finfish or shellfish habitat through significant alteration of the composition, migration patterns, distribution, breeding or other population characteristics of the natural species or significant alteration of the natural components of the habitat; and/or d. Degrading tidal wetlands, beaches and dunes, rocky shorefronts, and bluffs and escarpments through significant alteration of their natural characteristics or function." (ROR, Pl. # 123.00.)

Lawrence's complaint is, however, quite different. It, in relevant part, alleges:

"26. The Final Decision of DEEP has adversely affected (a) the Plaintiff's use and enjoyment of his home and the waters of Long Island Sound to which it is contiguous; (b) the Plaintiff's rights under the Restrictive Covenants; (c) the Plaintiff's littoral rights;[8] and (d) the value of the Plaintiff's premises. . . .

"27. In pertinent part, General Statutes § 22a-93 (15) defines 'adverse impacts on coastal resources': as including the following:

". . . '(F) [D]egrading visual quality through significant alteration of the natural features of vistas and viewpoints.'

"(The 'Vistas and Viewpoints Provision.')

[8] "Black's Law Dictionary (6th Ed. 1990) defines 'littoral rights' as: 'Rights concerning properties abutting an ocean, sea or lake rather than a river or stream (riparian).' " *Water Street Associates Ltd. Partnership* v. *Innopak Plastics Corp.*, 230 Conn. 764, 766 n.3, 646 A.2d 790 (1994).

"28. The Applicant's expert consultants did not consider the visual impact of the proposed structures because they did not believe that it was relevant to the Application.

"29. In granting tentative approval of the Application, DEEP Staff interpreted the Vistas and Viewpoints Provision as being applicable only to sites designated by federal, state or municipal governments as having special significance.

"30. DEEP's interpretation of the Views and Viewpoints Provision is contrary to the terms of the statute, as determined by the courts of this State.

***

"35. General Statutes § 22a-98, provides in pertinent part:

". . . The commissioner shall assure consistency with such goals and policies [referred to in the Three Acts, among other authorities] in granting, denying or modifying permits under such programs. Any person seeking a license, permit or other approval of an activity under the requirements of such regulatory programs *shall demonstrate that such activity is consistent with all applicable goals and policies in section 22a-92.* . . ." (Emphasis added.)

"36. General Statutes § 22a-92 (b) (1) provides, in pertinent part:

"In addition to the policies stated in subsection (a) of this section, the following policies are established for federal, state and municipal agencies in carrying out their responsibilities under this chapter:

". . . (H) to protect coastal resources by requiring, where feasible, that such boating uses and facilities . . .

"(ii) utilize existing altered, developed or redevelopment areas . . . and . . .

"(iv) utilize ramps and dry storage rather than slips in environmentally sensitive areas.

"(The 'Existing Facilities Provision.')

"37. The Final Decision is inconsistent with, and contrary to the Existing Facilities Provision, by interpreting it as applicable only to commercial or public boating facilities such as marinas or state-owned launch ramps.

***

"40. State Reg. 22a-30-10 . . . provides, in pertinent part:

"(a) . . . The commissioner shall grant, or grant with limitations or conditions a permit to conduct a proposed activity on any wetland *only if* is determined that the application is consistent with all applicable criteria set forth herein.

"(b) Criteria for preservation of wetland and prevention of their despoliation and destruction. *In order to make a determination that the proposed activity will preserve the wetlands of the state and will not lead to their despoliation and destruction the commissioner shall, as applicable, find that*

"(1) *There is no alternative for accomplishing the applicant's objectives which is technically feasible and would further minimize adverse impacts.* . . .

"(The 'No Feasible Alternative Provision.') (Emphasis added.)

"41. The Association's existing launching and storage area at Elias Point is a technically feasible alternative to the structures proposed in the Application.

***

"46. In applying this balancing of interest analysis, DEEP should not have given weight in favor of the

Applicant based upon its littoral rights, due to the applicability of the Restrictive Covenants.

"47. General Statutes § 22a-359 (a) provides, in pertinent part:

"The Commissioner of Energy and Environmental Protection shall regulate . . . the erection of structures . . . and work incidental thereto, in the tidal, coastal or navigable waters of the state waterward of the coastal jurisdiction line. Any decisions made by the commissioner pursuant to this section *shall be made with due regard for . . . the use and development of adjoining uplands . . .* [*and*] *the use and development of adjacent lands and properties . . . with proper regard for the rights and interests of all persons concerned.*

"(The 'Due Regard For Property Rights' Provision.) (Emphasis added.)

"48. DEEP should have considered the Due Regard For Property Rights Provision and taken into account the Restrictive Covenants." (Emphasis in original.)

As this illustrates, the department is correct that the complaint is silent concerning most of the allegations in the intervention petition. Nevertheless, in *Finley* v. *Inland Wetlands Commission*, supra, 289 Conn. 34–35, the court stated that "an intervenor pursuant to § 22a-19 has standing to appeal from the decision of an [agency] . . . only for the purpose of raising claims that are within the zone of interests that are protected under the Inland Wetlands and Watercourses Act, i.e., claims alleging the pollution, impairment or destruction of the state's inland wetlands and watercourses." Id. The *Finley* court went on to note that under *Windels* v. *Environmental Protection Commission*, 284 Conn. 268, 290, 933 A.2d 256 (2007), "[a] complaint does not sufficiently allege standing [however] by merely reciting

the provisions of § [22a-19], but must set forth facts to support an inference that unreasonable pollution, impairment or destruction of a natural resource will probably result from the challenged activities unless remedial measures are taken." (Internal quotation marks omitted.) *Finley* v. *Inland Wetlands Commission*, supra, 35.

In the present case, except for allegations concerning visual impact or degradation, the complaint contains no facts concerning unreasonable pollution, impairment or destruction of any other natural resource. Under CEPA, an intervenor is limited to raising "environmental matters which impact on the particular subject of an act pursuant to which the commissioner is acting." *Connecticut Water Co*. v. *Beausoleil*, 204 Conn. 38, 46, 526 A.2d 1329 (1987). The department argues that the complaint fails to allege any CEPA based environmental harm and "exceeds the zone of interests protected by the Acts in question." Specifically, it asserts that Lawrence's claim that "the proposed structures will degrade the visual quality of natural features of vistas" is not a substantive environmental issue that analyzes harm to air, water, or other natural resources of the state.[9] Lawrence argues that the department minimizes his concern

[9] The department takes this argument a step further by asserting that the "vistas and view points" provision constitutes only an aesthetic consideration. Statutory considerations of aesthetic, scenic and visual quality impacts; see, e.g., General Statutes §§ 22a-28, 22a-36, 22a-91 and 22a-93 (15) (F); are, however, different than the traditional view that regulating aesthetic impacts are not within an agency's police power. See *Silitschanu* v. *Groesbeck*, 208 Conn. 312, 317–18, 543 A.2d 737 (1988) ("The photographs were introduced as evidence of the plaintiffs' conjecture as to the impact of the proposed building on the scenic view. Such evidence, representing nothing more than the plaintiffs' speculation as to the potential harm posed by the proposed building, does not rise to the level of a demonstration of irreparable injury." [Footnote omitted.]); *New Haven* v. *United Illuminating Co*., 168 Conn. 478, 495, 362 A.2d 785 (1975) ("[n]either the stipulated facts as found by the court nor the exhibits incorporated in its finding disclose the existence of any statute . . . which might conceivably serve as the basis for its claimed right to light, air, and view unobstructed by such structures as the towers and lines involved in this case"); *DeMaria* v. *Planning & Zoning*

that the proposed dock will degrade the existing vista in its statement that "the dock will only minimally obscure the view of the rock outcropping surrounding the cove." (ROR, Pl. # 113.00.)

"Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Internal quotation marks omitted.) *Huck* v. *Inland Wetlands & Watercourses Agency*, 203 Conn. 525, 530, 525 A.2d 940 (1987). "It is clear that one of the basic purposes of the [CEPA] is to give persons standing to bring actions to protect the environment and standing is conferred only to protect the natural resources of the state from pollution or destruction." *Mystic Marinelife Aquarium, Inc.* v. *Gill*, supra, 175 Conn. 499. "Mindful that the 'environment' encompasses all the factors that affect the quality of life . . . it can be seen that environmental issues may arise in a number of settings. Our

Commission, 159 Conn. 534, 541, 271 A.2d 105 (1970) ("[c]ertainly, vague and undefined aesthetic considerations alone are insufficient to support the invocation of the police power, which is the source of all zoning authority"); see also R. Fuller, 9 Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 4:48, p. 185 ("[t]he Connecticut decisions presently allow aesthetics to be considered in two situations: [1] in an historical preservation context, and [2] where a statute provides for it"). Additionally, a more modern view is that aesthetics may be a consideration within police powers. See, e.g., *McCormick* v. *Lawrence*, 83 Misc. 2d 64, 67, 372 N.Y.S.2d 156 (1975) ("[h]owever reluctant courts have been in the past to allow aesthetic considerations alone to justify the use of police power . . . the courts now recognize aesthetics as a legitimate concept within the general police powers" [citation omitted]), aff'd, 54 App. Div. 2d 123, 387 N.Y.S.2d 919 (1976), leave to appeal denied, 41 N.Y.2d 801, 362 N.E.2d 626, 393 N.Y.S.2d 1025, and appeal dismissed, 41 N.Y.2d 900, 362 N.E.2d 641, 393 N.Y.S.2d 1029 (1977); see also 2 A. Rathkopf & D. Rathkopf, Law of Zoning and Planning (2005) § 16:5, pp. 16-20 through 16-25. Indeed, the United States Supreme Court noted in *Berman* v. *Parker*, 348 U.S. 26, 33, 75 S. Ct. 98, 99 L. Ed. 27 (1954), "The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean . . . ." (Citation omitted.)

courts have prudentially limited intervention under § 22a-19 (a), consistent with legislative intent, to the raising of environmental issues only." (Citation omitted.) *Zoning Commission* v. *Fairfield Resources Management, Inc.*, 41 Conn. App. 89, 116, 674 A.2d 1335 (1996).

Although not in the context of aggrievement, one Superior Court has examined § 22a-93 (15) (F). In *Fromer* v. *Lombardi*, Superior Court, judicial district of New London, Docket No. CV-91-0518691-S, 1992 WL 231185, *5 (September 14, 1992) (*Koletsky, J.*), aff'd, 33 Conn. App. 910, 633 A.2d 741 (1993), the court stated, "One who intervenes pursuant to General Statutes § 22a-19 in proceedings for coastal site plan approval before a zoning commission is limited to raising those environmental issues which are within the zoning commission's power to determine when acting on a coastal site plan." The court held that the commission made findings in accordance with § 22a-93 (15) (F) as to potential adverse impact of the proposed activity on degradation of coastal resources. Id.

In *Glendenning* v. *Conservation Commission*, 12 Conn. App. 47, 529 A.2d 727, cert. dismissed, 205 Conn. 802, 531 A.2d 936 (1987), the Appellate Court reversed the trial court's decision based upon a failure to consider adequately the plaintiff's claims of aggrievement. "Although in considering an application for a permit to engage in any regulated activity a local inland wetlands and watercourses agency under both the [Inland Wetlands and Watercourses Act] and its regulations must take into account the environmental impact of the proposed project, it is the impact on the regulated area that is pertinent, and not the environmental impact in general. . . . Any aggrievement claimed on appeal from the grant of a permit for regulated activities must, therefore, arise from or relate to their impact upon the environmental factors required to be considered by the

agency under the act and its regulations. Any claimed depreciation or loss of value of real estate must result from such environmental impact. Additional claims of aggrievement may arise from the environmental impact of the permitted activities on the regulated area. . . .

"Environmental matters provide a new breadth to claims of aggrievement, one created by the governmental trusteeship of the environment for the benefit of the public. Monetary loss, such as was the sole consideration of the trial court here, is not the complete measure of aggrievement in environmental appeals and judicial review." (Citations omitted.) Id., 52–53.

The court continued, "In the case before us, the commission in its decision specifically found the following anticipated environmental impact from the permitted regulated activities: 'There may be a significant loss of view of the Harbor by the adjacent property owners. This proposal will also displace the existing lobster fishery. From an aesthetic point of view, this proposal is a particularly intensive development of waterfront property, and the applicant has proposed no compensatory activities to ameliorate the loss of unobstructed visual Harbor contact.' These stated injurious consequences of the permitted activities were alleged as claims of aggrievement by the plaintiffs in their complaint. While a transcript of the trial testimony has not been supplied with the record in this case, that evidence thereon was submitted to the court is confirmed by its memorandum of decision as follows: 'Both during the public hearing and the hearing on aggrievement before this court, the plaintiffs expressed sincere concern that the granting of this application would result in the destruction of a panoramic view of a beautiful and tranquil harbor, the loss of historic and aesthetic values and a diminution of the opportunity of citizens to seek serenity and spiritual renewal from the simple enjoyment of an unencumbered view of a unique vista. The

court cannot and certainly does not wish to minimize the importance of such considerations.' " Id., 55–56.

In remanding for a rehearing on aggrievement, the court held, "Notwithstanding such evidentiary recognition of the plaintiffs' claims of aggrievement, as well as the commission's anticipated environmental impact upon which they are based, the court failed to make any findings or conclusions therefrom concerning the plaintiffs' asserted aggrievement. The court's sole finding to support its conclusion of lack of aggrievement was the following: 'This Court has reservations and finds the claim that the mere construction of a building which might partially interfere with the view of neighboring landowners significantly depreciates the value of their properties to be highly speculative.' In so limiting its finding, the court erred in the standard of aggrievement that it applied in this case. The court should have considered the plaintiffs' claims and evidence of aggrievement in relation to the commission's anticipated environmental impact for the purpose of making findings thereon and drawing its conclusions therefrom as to the plaintiffs' aggrievement." Id., 56.

In the present case, visual impact is an express consideration under § 22a-93 (15) (F).[10] Lawrence had alleged visual impact in his notice of intervention before the department and alleges it in his complaint here. (ROR, Pl. # 123.00.) Additionally, evidence of visual impact was brought before the commission. (ROR, Pl. # 114.00.) Therefore, the court finds that Lawrence is

[10] Moreover, § 22a-359 (a), in relevant part, provides that "[a]ny decisions made by the commissioner pursuant to this section shall be made with due regard for . . . the use and development of adjoining uplands . . . the use and development of adjacent lands and properties and the interests of the state, including . . . recreational use of public water and management of coastal resources, *with proper regard for the rights and interests of all persons concerned*." (Emphasis added.) The concern for visual impact in the Costal Management Act is arguably a right and interest of all.

aggrieved and may pursue his statutory CEPA claim of visual degradation in light of the alleged violations of the three environmental statutes. See *Finley* v. *Inland Wetlands Commission*, supra, 289 Conn. 34 (concluding that plaintiffs as intervenors in proceedings before commission pursuant to § 22a-19 were entitled to appeal to trial court from commission's decision pursuant to General Statutes § 22a-43).

B

Lawrence also alleges essentially three other non-CEPA claims.[11] In paragraph thirty-four, he alleges that the proposed dock "will be usable for paddleboards less than sixty percent of each tidal cycle." In paragraph fifty-three, he asserts that "[t]he condition of the seabed in the area of the proposed structure is so soft that it is, effectively, 'quicksand' and dangerous to any person who, intentionally or unintentionally, steps or falls in the seabed."[12] In paragraph fifty-nine, he alleges that "[a] severe storm would likely dislodge the dock and/or ramp, causing damage and/or injury to nearby properties, including the Plaintiff's premises and/or the Plaintiff." These claims are subject to the test for classical aggrievement. See *Red Hill Coalition, Inc.* v. *Conservation Commission*, supra, 212 Conn. 716–17 ("[f]rom our review of the record we cannot say that the trial court erred when it found that [an abutting plaintiff] had, in addition to standing under § 22a-19, 'the more traditional aggrievement standing of having a specific, personal and legal interest in the subject

[11] Other allegations are subsumed in broader claims. As noted, Lawrence has also claimed that the commissioner failed to consider the restrictive covenants, which will be discussed hereinafter.

[12] Timothy Coleman testified that people have been injured crossing the wetlands and rocks while trying to reach the water, and that he has gotten stuck in mud that was knee deep. (ROR, Pl. # 114.00, Transcript [Tr.], 3/24/14, pp. 13–14.)

matter of the [commission's] decision' "), citing *Glendenning* v. *Conservation Commission*, supra, 12 Conn. App. 54.

"[P]leading and proof of aggrievement are prerequisites to a trial court's jurisdiction over the subject matter of an administrative appeal. . . . It is [therefore] fundamental that, in order to have standing to bring an administrative appeal, a person must be aggrieved." (Citation omitted; internal quotation marks omitted.) *Bongiorno Supermarket, Inc.* v. *Zoning Board of Appeals*, 266 Conn. 531, 537–38, 833 A.2d 883 (2003). "The fundamental test for determining [classical] aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific personal and legal interest in the subject matter of the decision, as distinguished from a general interest, such as is the concern of all the members of the community as a whole. Second, the party claiming aggrievement must successfully establish that the specific personal and legal interest has been specially and injuriously affected by the decision." (Internal quotation marks omitted.) Id., 539. "To be aggrieved . . . requires that property rights be adversely affected by an 'order, authorization or decision' of the commission[er]. . . . We have already stated that the property rights that may be subject to aggrievement need not be confined to real property rights. . . . Aggrievement is an issue of fact . . . ." (Citations omitted; internal quotation marks omitted.) *Mystic Marinelife Aquarium, Inc.*, supra, 175 Conn. 495–96.

In the present case, Lawrence's non-CEPA claims do not meet the classical aggrievement test. Specifically, he cannot and has not demonstrated "a specific personal and legal interest in the subject matter of the decision, as distinguished from a general interest, such as is the concern of all the members of the community

as a whole" or that such an interest has been "specially and injuriously affected by the decision." (Internal quotation marks omitted.) *Bongiorno Supermarket, Inc.* v. *Zoning Board of Appeals*, supra, 266 Conn. 539. Therefore, Lawrence does not have standing to pursue these claims.

III

As to Lawrence's statutory CEPA claim of visual degradation, "[t]he substantial evidence rule governs judicial review of administrative fact-finding under [the Uniform Administrative Procedure Act]. General Statutes § 4-183 (j) (5) and (6). Substantial evidence exists if the administrative record affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . This substantial evidence standard is highly deferential and permits less judicial scrutiny than a clearly erroneous or weight of the evidence standard of review. . . . The reviewing court must take into account [that there is] contradictory evidence in the record . . . but the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence . . . . The burden is on the [plaintiff] to demonstrate that the [department's] factual conclusions were not supported by the weight of substantial evidence on the whole record." (Internal quotation marks omitted.) *Shanahan* v. *Dept. of Environmental Protection*, 305 Conn. 681, 700, 47 A.3d 364 (2012).

"Judicial review of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . This so-called substantial evidence rule is similar to the sufficiency of the evidence standard applied in

judicial review of jury verdicts, and evidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . [I]t imposes an important limitation on the power of the courts to overturn a decision of an administrative agency . . . and [provides] a more restrictive standard of review than standards embodying review of weight of the evidence or clearly erroneous action. . . . The United States Supreme Court, in defining substantial evidence . . . has said that it is something less than the weight of the evidence, and [that] the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. . . . [T]he credibility of witnesses and the determination of factual issues are matters within the province of the administrative agency. . . . As with any administrative appeal, our role is not to reexamine the evidence presented to the council or to substitute our judgment for the agency's expertise, but, rather, to determine whether there was substantial evidence to support its conclusions." (Citations omitted; internal quotation marks omitted.) *FairwindCT, Inc.* v. *Connecticut Siting Council*, supra, 313 Conn. 689–90.

"In reviewing decisions made by an administrative agency, a reviewing court must sustain the agency's determination if an examination of the record discloses evidence that supports any one of the reasons given. . . . The evidence, however, to support any such reason must be substantial . . . ." (Internal quotation marks omitted.) *Adriani* v. *Commission on Human Rights & Opportunities*, 228 Conn. 545, 550–51, 636 A.2d 1360 (1994).

IV

Greenwich Cove is not pristine; it is not without development. The record reveals that it contains homes,

docks and floats, seawalls, a causeway, and approximately 300 moorings just beyond the mouth of the cove. (ROR, Pl. # 113.00; Pl. # 114.00, Transcript [Tr.], 3/27/14, p. 123.) Highgate's application seeks to add another dock to this harbor setting. All of Lawrence's surviving claims concern the subjective visual impact of the pier. Thus, this court's review is not unlike that in cell tower siting cases where aesthetic concerns must be satisfied under local zoning regulations. See, e.g., *Farmington* v. *Viacom Broadcasting, Inc.*, 10 Conn. App. 190, 196, 522 A.2d 318 (holding that it was "within the scope of the zoning regulations for the commission to impose conditions related to aesthetics and property values on the granting of the special exception"), cert. denied, 203 Conn. 808, 525 A.2d 523 (1987). As in those cases, "aesthetic concerns *can* be a valid basis for denial of a permit by a local governing body, *so long as* a judgment based on those concerns is supported by objective facts or evidence."[13] (Emphasis in original; internal quotation marks omitted.) *Wireless Towers, LLC* v. *Jacksonville*, 712 F. Supp. 2d 1294, 1302 (M.D. Fla. 2010).

Aesthetic concerns must be examined, however, in terms of Highgate's ability to exercise its littoral right to wharf subject to certain regulations. "The owner of land adjoining waters in which the tide ebbs and flows has the exclusive right to dig channels and build wharves from his land to reach deep water, so long as

[13] In *Wireless Towers, LLC*, the city's zoning ordinance, in relevant part, provided: "The Commission shall approve, deny, or conditionally approve the application where it finds that the proposed tower (1) complies with the tower siting and design standards and performance standards of this Subpart; and (2) is compatible with the existing contiguous uses or zoning and compatible with the general character and aesthetics of the surrounding neighborhood or area, considering (a) the design and height of the wireless communication tower; and (b) the potential adverse impact upon any environmentally sensitive lands, historic districts or historic landmarks, public parks or transportation view corridors." (Emphasis omitted; internal quotation marks omitted.) *Wireless Towers, LLC* v. *Jacksonville*, supra, 712 F. Supp. 2d 1296.

he does not interfere with free navigation. . . . There is no reason why, because of its peculiar nature as property, this right cannot, like any other property right, be made subject to reasonable police regulation in the interest of the public welfare." (Citations omitted.) *Shorehaven Golf Club, Inc.* v. *Water Resources Commission*, 146 Conn. 619, 624, 153 A.2d 444 (1959); see also *Port Clinton Associates* v. *Board of Selectmen*, 217 Conn. 588, 598, 587 A.2d 126 ("[t]he owner of riparian rights . . . has the right to build a pier or wharf past the low water mark subject to the qualification that he thereby does no injury to the free navigation of the water by the public" [internal quotation marks omitted]), cert. denied, 502 U.S. 814, 112 S. Ct. 64, 116 L. Ed. 2d 39 (1991). The legislature again emphasized this common-law right, subject to the police power, recently in No. 12-101 of the 2012 Public Acts. Public Act 12-101 amended § 22a-92 (a) (1) so that it now, in relevant part, provides: "[t]o ensure that the development, preservation or use of the land and water resources of the coastal area proceeds in a manner *consistent with the rights of private property owners* . . . ." (Emphasis added.)

Lawrence testified that he loves the current view of the cove and does not wish it to change. (ROR, Pl. # 114.00, Tr., 4/3/14, pp. 73–74.) This court does not dispute that the cove, even with the existing houses, seawalls, docks, sailboats, and the large causeway to Elias Point, is pleasant and a natural resource that is subject to protection like all of Connecticut's coastal areas. See General Statutes § 22a-90 et seq. Nevertheless, there are existing structures and development in the cove. See *Coen* v. *Ledyard Zoning Commission*, Superior Court, judicial district of New Britain, Docket No. CV-10-6007515-S, 2011 WL 5307400 (October 19, 2011) (*Schuman, J.*) (considering overall character of area

in assessing impact on view). Balancing this with Highgate's common-law right to wharf as well as the statutory right under § 22a-92 (a) (1), the record does not support the claim that this new dock will degrade the "visual quality through significant alteration of the natural features of vistas and view points" under § 22a-93 (15) (F) or *unreasonably* impair or destroy the public trust in the natural resources of the state under § 22a-19 (a) (1). (ROR, Pl. # 114.00, Tr., 3/24/14, p. 195; Tr., 3/25/14, pp. 61–65; Tr., 3/27/14, pp. 92–93, 107.)

"It is clear that § 22a-19, consistent with the rest of the act, was intended, not as a mere impediment to developers, but rather as a means to protect the environment from unreasonable adverse impact." *Paige* v. *Town Plan & Zoning Commission*, 235 Conn. 448, 462, 668 A.2d 340 (1995). As previously stated, this case only concerns the visual impact of Highgate's proposed pier; there is no extant claim that it will unreasonably impair or destroy other natural resources. Indeed, the commissioner found that "the record . . . demonstrates that the impact of the proposed project to the tidal wetlands, the intertidal flat, wildlife and other natural resources in the area is minimal." (ROR, Pl. # 113.00, Final Decision, p. 6.) Further, "the record reflects that the dock is likely to have a positive impact on the vegetation in the tidal wetlands, due in part to the planned removal of stone debris in the area as required by the permit terms, which will create an additional 600 to 700 square feet of wetlands and allow tidal vegetation to repopulate the area. In addition, the dock will provide a way of accessing the water without walking through the tidal wetlands and thus will curb the physical breakage, uprooting and trampling of vegetation in the wetlands that is currently occurring." (ROR, # 113.00, Final Decision, p. 10.)

The commissioner was required to analyze the application in light of the applicable statutory provisions.

First, the commissioner was required to consider whether the pier constituted an adverse impact on coastal resources by "degrading visual quality through significant alteration of the natural features of vistas and view points" under § 22a-93 (15) (F). There is no dispute that he addressed this as a factor in his final decision. (ROR, # 113.00, Final Decision, pp. 3–5.) Moreover, the record contains substantial evidence for him to find that such degradation did not exist. See *Adriani* v. *Commission on Human Rights & Opportunities*, supra, 228 Conn. 550–51; see also *Wireless Towers, LLC* v. *Jacksonville*, supra, 712 F. Supp. 2d 1305 ("This Court is not unsympathetic to the difficulty an applicant has in meeting the aesthetic standard of [the ordinance], especially where opinions as to 'adverse impact' and 'compatibility' can differ. However, subjective though the standard may be, it is similar to other subjective determinations that local zoning and land use bodies routinely make. In any event, pursuant to the [ordinance], the Commission properly considered the Proposed Tower's 'potential adverse impact' on the Preserve and made a subjective determination, supported by objective evidence, that the Proposed Tower was aesthetically incompatible with the surrounding area."). The commissioner recognized that the claim is subjective and, as admitted by Lawrence, that "beauty is in the eye of the beholder." Nevertheless, the commissioner balanced this with the objective evidence in the record reflecting the current "heavy developed" character of the cove, including homes, hardened shorelines, existing docks, moorings, and boats;[14] reliance on past

[14] The developed nature of the cove is thus contrasted with the facts in *McCormick* v. *Lawrence*, 54 App. Div. 2d 123, 125, 387 N.Y.S.2d 919 (1976), leave to appeal denied, 41 N.Y.2d 801, 362 N.E.2d 626, 393 N.Y.S.2d 1025, and appeal dismissed, 41 N.Y.2d 900, 362 N.E.2d 641, 393 N.Y.S.2d 1029 (1977), in which the court concluded, "The area surrounding petitioners' property is in a relatively pristine state and the agency could reasonably find that the addition of several boathouses on petitioners' property would adversely affect the aesthetic quality of the area. The adverse effect is more

department practices and permits; his finding that the view of the rock outcropping will only be minimally obscured; and the positive impact on the tidal wetlands. (ROR, Pl. # 114.00, Tr., 4/2/14, p. 14; Tr., 4/3/14, pp. 13, 74, 137–38; Pl. # 113.00, Final Decision, pp. 3–5, 10.)

In addition to this factor, the commissioner was required to consider and balance the policies set forth in § 22a-92 (b) (1) (H) (ii) and (iv), i.e., to consider, where feasible, the utilization of "existing altered, developed or redevelopment areas," and "ramps and dry storage rather than slips in environmentally sensitive areas," which, in the present case, means the existing community boat launch.[15] See *Corcoran* v. *Connecticut Siting Council*, 50 Conn. Supp. 443, 449, 934 A.2d 870 (2006) ("[t]he council thus performed its statutory obligation . . . to balance competing concerns against the need for the coverage, and did not abuse its discretion"), aff'd, 284 Conn. 455, 934 A.2d 825 (2007). Related to this is the required finding under the regulation[16] of no feasible alternative. Whether Highgate should appropriately forgo its right to wharf because of the association's

apparent considering that the subject property fronts on a much traveled pleasure boat route."

[15] The department and Highgate maintain that § 22a-92 (b) (1) (H) applies only to state owned or commercial facilities. Specifically, the commissioner found that "§ 22a-92 (b) (1) (H) refers to commercial or public boating facilities such as marinas or state owned launch ramps, and not individual private docks." (ROR, Pl. # 113.00, Final Decision, p. 6.) In light of the commissioner's other findings, this court need not address that issue.

[16] The regulation more fully provides: "In order to make a determination that a proposed activity will preserve the wetlands of the state and not lead to their despoliation and destruction the commissioner shall, as applicable, find that: (1) There is no alternative for accomplishing the applicant's objectives which is technically feasible and would further minimize adverse impacts; (2) Any structure or fill will be no greater in length, width and height than necessary to accomplish its intended function; (3) Pile supported construction will be used to the fullest extent practicable; (4) All reasonable measures which would minimize the adverse impacts of the proposed activity on the wetlands of the state and adjoining coastal and tidal resources are incorporated as limitations on or conditions to the permit. . . ." Regs., Conn. State Agencies § 22a-30-10.

facility is not the question—the existence of the community facility does not automatically preclude the right of Highgate to construct its pier. Rather, the issue is whether the commissioner analyzed this application to construct a pier under the substantial evidence standard in light of our relevant environmental statutes, regulations, and other appropriate factors.

The commissioner noted the salutary purpose of § 22a-92 (b) (1) (H) to " 'utilize existing altered, developed or redevelopment areas,' where feasible, is aimed at encouraging the smart development of coastal areas particularly facilities like marinas or state boat launches that are not necessarily limited to one particular upland parcel." (ROR, Pl. # 113.00, Final Decision, p. 6.) Yet, this goal must be balanced with the littoral owner's right to wharf and is subject to reasonable regulation. See General Statutes § 22a-92 (a) (1); see also *Port Clinton Associates* v. *Board of Selectmen*, supra, 217 Conn. 598. Highgate's first two proposals were rejected. See footnote 2 of this memorandum of decision. While cases may exist where a structure could be modified, or perhaps even rejected, due to the existence of another facility, nothing in the statute[17] suggests that such a policy was meant to preclude a private property owner's right to wharf in the first instance.[18] Indeed, as noted

[17] "The principles that govern statutory construction are well established. When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Southern New England Telephone Co.* v. *Cashman*, 283 Conn. 644, 650, 931 A.2d 142 (2007).

[18] This would not prevent, however, the enforcement of a restrictive covenant by those it was intended to protect. See, e.g., *Contegni* v. *Payne*, 18 Conn. App. 47, 557 A.2d 122, cert. denied, 211 Conn. 806, 559 A.2d 1140 (1989).

by the commissioner, the express language of the regulation; see footnote 16 of this memorandum of decision; "speaks in terms of impact minimization rather than avoidance." (ROR, Pl. # 113.00, Final Decision, p. 7.) The commissioner considered this statutory and regulatory framework; (ROR, Pl. # 113.00, Final Decision, pp. 5–7.); and substantial evidence supports his decision. (ROR, Pl. # 113.00, Final Decision, pp. 6, 9–11; Pl. # 114.00, Tr., 3/24/14, pp. 178–79; Tr., 3/25/14, p. 176; Tr., 3/27/14, p. 96; Pl. # 117.00, DEEP-1-DEEP-3.)

Finally, Lawrence alleges that the commissioner violated § 22a-359 of the Structures, Dredging and Fill Act for failing to give proper regard to the restrictive covenants of the association, which state that "no building or structure shall be erected or maintained upon the premises hereby conveyed other than one single family dwelling house with garage, if any, attached, except with the written consent of the grantor or its successors or assigns." The commissioner found that "[a]bsent an express bar to construction, the mere existence of restrictive covenants that may impact a proposed project or require third party approvals does not preclude DEEP from issuing a permit." (ROR, Pl. # 113.00, Final Decision, p. 7.) Indeed, the commissioner noted, "[s]ecuring a DEEP permit does not excuse the Applicant from securing other necessary approvals, and the language of the permit . . . makes clear that the permittee remains obligated to obtain any other approvals required by federal, state and local law, including any approval required through a deed restriction." (ROR, Pl. # 113.00, Final Decision, pp. 7–8.)

"[T]he law is well established that restrictive covenants in a deed as to [the] use of property are distinct and separate from [the] provisions of [a] zoning law and have no influence or part in the administration of [a] zoning law." (Internal quotation marks omitted.) *Anniello* v. *Planning & Zoning Commission*, Superior

Court, judicial district of Tolland, Docket No. CV-93-0052916-S, 1995 WL 493781, *3 (August 14, 1995) (*Klaczak, J.*), quoting 83 Am. Jur. 2d, Zoning and Planning § 1006 (1992). In *Moscowitz* v. *Planning & Zoning Commission*, 16 Conn. App. 303, 311–12 n.8, 547 A.2d 569 (1988), the court noted, "[A] planning commission cannot base its denial of subdivision approval on the existence of a deed restriction if the application otherwise meets the regulations. . . . The responsibility of enforcing restrictive covenants in deeds is allocated to neighboring landowners, not to a municipal commission." (Citations omitted.) See also *Gagnon* v. *Municipal Planning Commission*, 10 Conn. App. 54, 58, 521 A.2d 589 ("[t]he commission does not have authority to determine whether the claimed right of way was a legally protected and enforceable prescriptive easement, since that conclusion can only be made by judicial authority in a quiet title action"), cert. denied, 203 Conn. 807, 525 A.2d 521 (1987); *Lunn* v. *Darien Zoning Board of Appeals*, Superior Court, judicial district of Fairfield, Docket Nos. CV-92-0299972-S and CV-92-0299973-S, 1994 WL 65284, *3 (February 25, 1994) (*Fuller, J.*) ("[w]hen a land use agency reviews applications to it, it cannot properly consider private property interests and deed restrictions"). Similarly, in the present case, it was not the commissioner's duty to enforce those restrictions.[19] Moreover, the commissioner analyzed this issue and made a decision "with proper regard for the rights and interests of all persons concerned" in

[19] The department could have a permitting process requiring the applicant to receive all restrictive covenant approvals prior to submitting an application. That would not necessarily resolve this type of issue since it is likely that those conducting the first inquiry would probably want to know what is being constructed, which could not necessarily be answered, as the proposal could change as it did in this case. Hence, such a procedure might not be useful; it is impossible to know what the other agency will require. The commissioner's policy of only examining the application without dealing with the restrictive covenant (unless the covenant contained an absolute ban) is thus not unreasonable.

accordance with § 22a-359 (a). (ROR, Pl. # 113.00, Final Decision, pp. 7–8.)

In sum, Lawrence has failed to prove that the proposed pier construction will unreasonably pollute, impair or destroy the public trust in the air, water or other natural resources of the state. Additionally, he has not shown that the commissioner's decision was not based on substantial evidence in the record or that he failed to consider any of the statutes[20] or the regulation. Therefore, the appeal is dismissed.

ARMAND CUOZZO *v.* TOWN OF ORANGE
(AC 39097)

Lavine, Elgo and Flynn, Js.

Syllabus

The plaintiff sought to recover damages from the defendant town of Orange for personal injuries he allegedly sustained when his motor vehicle hit a pothole while he was driving on a private entrance/exit driveway, which abutted a public highway and led to a plaza in which S Co. was located. The plaintiff alleged that, under the municipal liability statute (§ 52-557n), the town was liable for his injuries and damages. Thereafter, the city of West Haven was cited in as a defendant. The town filed a motion to dismiss, claiming that the plaintiff's complaint fell within the purview of the municipal highway defect statute (§ 13a-149) and that the plaintiff had failed to comply with the ninety day notice provision contained in § 13a-149. After the trial court granted the town's motion to dismiss, the plaintiff appealed to this court, which reversed the trial court's judgment and remanded the case for further proceedings, and the defendant appealed to the Supreme Court, which affirmed this court's judgment. On remand, the trial court granted the motions for summary judgment filed by the town and the city, and rendered judgment thereon, concluding that the plaintiff's claims of negligence implicated the exercise of discretionary, rather than ministerial, acts, and that, as a matter

[20] "[W]hen there is an environmental legislative and regulatory scheme in place that specifically governs the conduct that the plaintiff claims constitutes an unreasonable impairment under CEPA, whether the conduct is unreasonable under CEPA will depend on whether it complies with that scheme." *Waterbury* v. *Washington*, 260 Conn. 506, 557, 800 A.2d 1102, (2002).

of law, both defendants were entitled to governmental immunity, regardless of who owned the property. The court thereafter granted the plaintiff's motions to reargue, but denied the relief requested, and the plaintiff appealed to this court, claiming, inter alia, that the trial court improperly granted the defendants' motions for summary judgment because a genuine issue of material fact existed as to the location of the pothole. *Held* that the trial court properly determined that the defendants were entitled to summary judgment, as the evidence supported that court's conclusion that there was no genuine issue of material fact as to whether the pothole was located in the private driveway that led to S Co.; the plaintiff stated in both his complaint and deposition testimony that the pothole was in the entrance/exit driveway of S Co., the defendants presented affidavits by licensed engineers stating that the pothole was within the property of S Co. and, thus, that the pothole was not the responsibility of either defendant, and the plaintiff failed to present evidence to dispute that the defect was controlled by S Co. and not the defendants.

Argued September 19—officially released December 12, 2017

Procedural History

Action to recover damages for personal injuries sustained as a result of the defendant's alleged negligence, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *Hiller*, *J.*, granted the plaintiff's motion to cite in the city of West Haven as a party defendant; thereafter, the court, *Keegan*, *J.*, granted the named defendant's motion to dismiss and rendered judgment thereon, and the plaintiff appealed to this court, which reversed the judgment and remanded the case for further proceedings; subsequently, the named defendant appealed to the Supreme Court, which affirmed this court's judgment; thereafter, the court, *Stevens*, *J.*, granted the defendants' motions for summary judgment and rendered judgment thereon; subsequently, the court, *Stevens*, *J.*, granted the plaintiff's motions to reargue and denied the relief requested, and the plaintiff appealed to this court. *Affirmed.*

Karen E. Souza, for the appellant (plaintiff).

Logan E. Carducci, with whom, on the brief, was *Mark L. Perkins*, for the appellee (named defendant).

Jerome A. Lacobelle, Jr., deputy corporation counsel, with whom, on the brief, was *Aimee L. Mahon*, for the appellee (defendant city of West Haven).

Opinion

ELGO, J. In this personal injury action, the plaintiff, Armand Cuozzo, appeals from the summary judgment rendered in favor of the defendants, the town of Orange (town) and the city of West Haven (city). The plaintiff claims that the trial court improperly granted summary judgment because (1) there is a genuine issue of material fact as to the location of the pothole at issue and (2) the acts performed by the defendants were not discretionary in nature. Because we conclude that there is no genuine issue of material fact as to the location of the pothole, we need not reach the plaintiff's second claim. Accordingly, we affirm the judgment of the court.

The following facts and procedural history are relevant to this appeal. The plaintiff commenced this action in November, 2011, and subsequently filed an amended complaint dated February 3, 2012. In the operative complaint, the plaintiff alleged that the "property located at #2 Boston Post Road in Orange, Connecticut," contained an "entrance/exit driveway" that had a "pothole approximately two feet in diameter . . . ." The property abutted Meloy Road, a public highway in Orange, and was connected to Meloy Road by "an entrance/exit driveway" that intersected Meloy Road. The plaintiff alleged that "at approximately 4:30 p.m. on July 31, 2008, the plaintiff . . . was operating [his] 1990 Volvo motor vehicle in a general northerly direction on such entrance/exit driveway" when his motor vehicle "suddenly and without warning came into contact" with the pothole. The plaintiff alleged that he was "a business invitee" at the time he was operating his vehicle and that the pothole was located "some three feet in from [the entrance/exit driveway's] intersection with Meloy

Road." The plaintiff alleged that, at all times relevant, the property was owned by and was "controlled, maintained, managed, operated and/or supervised" by the defendants, their "agents, servants and/or employees . . . ."

As this court noted in a previous appeal involving the plaintiff, *Cuozzo* v. *Orange*, 147 Conn. App. 148, 82 A.3d 647 (2013), aff'd, 315 Conn. 606, 109 A.3d 903 (2015), his complaint alleged that "[t]he collision led to personal injury and damages that were caused by the negligence and carelessness of the [town] . . . its agents, servants and/or employees in that, among other things, they allowed and permitted the condition to exist, failed to take steps to remedy it, and failed to take reasonable measures to prevent motor vehicles from coming into contact with it. The plaintiff further alleged that, pursuant to General Statutes § 52-557n, the [town] was liable for his injuries and damages.[1]

"Thereafter, the [town] filed a motion to dismiss pursuant to Practice Book § 10-33 on the ground that the court lacked subject matter jurisdiction. Specifically, the [town] argued that the plaintiff's claim fell within the purview of the municipal highway defect statute, [General Statutes] § 13a-149, and that the plaintiff failed to comply with the notice requirement of the statute. In support of its motion, the [town] submitted a memorandum of law as well as an affidavit of Pat O'Sullivan, the town clerk for the [town]. O'Sullivan averred, in relevant part, that the [town] had not been given notice of the present action until October 21, 2011, when it was served with the plaintiff's complaint, and well after

[1] The plaintiff's operative, amended revised complaint was brought in two counts, one of which was brought against the town of Orange and the other of which was brought against the city of West Haven. The subject of the previous appeal was the motion to dismiss filed by the town of Orange. The city of West Haven was not a party to that appeal.

the ninety day notice requirement set forth in § 13a-149. The [town] did not submit an affidavit that contained facts indicating that the typical and expected use of the driveway at issue rendered it open to the traveling public. Additionally, the [town] asserted that the action was not brought within the applicable statute of limitations.

"By way of objection, the plaintiff submitted a memorandum of law in which he argued that the [town's] claims were not a proper subject of a motion to dismiss. He asserted that the [town] failed to set forth a jurisdictional defect to justify the motion to dismiss, a claim that notice was insufficient under § 13a-149 was properly raised by means of a motion to strike, and any statute of limitations claim should be addressed in a motion for summary judgment. The plaintiff argued that, if the [town's] claims were a proper subject of a motion to dismiss, the motion should be denied on its merits because the action did not fall within the purview of the highway defect statute insofar as the accident did not occur on a public highway, but a private driveway. Also, addressing the [town's] statute of limitations claim, the plaintiff argued that the action was timely under General Statutes § 52-593 because it was brought within the one year time limit codified therein. Attached to his memorandum of law in opposition to the [town's] motion was the plaintiff's affidavit, in which he averred in relevant part that the collision involving the pothole occurred in [a] private driveway that exclusively leads to the Wal-Mart Plaza, which includes Sam's Club.

"Following a hearing related to the motion to dismiss, during which the court heard argument concerning the motion but was not presented with evidence, the court issued a memorandum of decision. Initially, the court concluded that the [town's] claim concerning notice pursuant to § 13a-149 implicated subject matter jurisdiction and, therefore, was a proper subject of a motion

to dismiss. Next, the court examined the allegations in the plaintiff's complaint as well as relevant principles of law. The court concluded: In the present case, based on the plaintiff's own allegations, the driveway where the alleged accident occurred was on property owned by the [town], connecting a public road to another town owned property. Based on these claims, it is reasonable to anticipate that the public would make use of the driveway. As a matter of law, therefore, the facts alleged in the plaintiff's complaint amount to a highway defect, and necessarily invoke . . . § 13a-149 as the exclusive remedy. Because the plaintiff failed to provide proper notice to the [town] within ninety days of the alleged accident, this court lacks subject matter jurisdiction over this action." (Internal quotation marks omitted.) Id., 151–53. The trial court granted the town's motion to dismiss. From that judgment, the plaintiff appealed to this court, which reversed the judgment on the ground that the facts in the record, viewed in the light most favorable to the plaintiff, did not support a determination that the driveway at issue had a public character such that it fell within the ambit of § 13a-149. Id., 164–65. The Supreme Court affirmed the judgment of this court, and the case was remanded for further proceedings according to law. *Cuozzo* v. *Orange*, 315 Conn. 606, 109 A.3d 903 (2015).

On remand, each defendant filed a motion for summary judgment, arguing that it did not own, control, or possess the property on which the plaintiff was allegedly injured and that it was entitled to governmental immunity. The plaintiff filed an objection to both summary judgment motions, claiming that there is a genuine issue of fact as to who owns the driveway and that the acts performed by the defendants were not discretionary in nature. On February 1, 2016, the trial court granted the town's motion for summary judgment, stating that "as a matter of law, the claims of negligence

alleged in the complaint implicate the exercise of discretionary, rather than ministerial, acts." The court reasoned that "[t]he allegations of negligence on their face necessarily involve the exercise of judgment. For example, the complaint contains no allegations that the town was required to perform the alleged duties either unequivocally or in a prescribe[d] manner." On February 2, 2016, the court granted the city's motion for the same reasons. As a result, the court determined that both defendants were entitled to governmental immunity regardless of who owned the property.

On February 22, 2016, the plaintiff filed motions to reargue, claiming that the defendants were not entitled to governmental immunity because the allegations in the complaint were proprietary in nature and the negligence alleged was that the defendants did not perform the functions at all. In response, the town objected to the plaintiff's motion to reargue and claimed that the allegations of negligence were not proprietary in nature and that the town was protected by governmental immunity because the acts alleged to constitute negligence are considered discretionary. Also in its objection, the town requested reconsideration of whether there was a genuine dispute of a material fact as to the location of the defect because the uncontested evidence demonstrated that the defect was in the driveway of the Sam's Club, over which it had no possession, ownership, or control. The city filed a similar objection to the plaintiff's motion to reargue.

The court granted the plaintiff's motions to reargue and, after hearing and reconsideration, denied the requested relief. The court issued identical orders for each defendant and stated that "(1) based on the complaint, the plaintiff's deposition and the defendant's submissions, the evidence establishes that there is no factual dispute that the alleged defect was in the driveway of the Sam's Club, an area owned by Sam's Club

that the defendant neither possessed nor controlled; and (2) the allegations of negligence as described in the complaint clearly implicate discretionary, rather than proprietary, acts precluding liability under [§] 52-557n (a) (2) (B)." The plaintiff now appeals from that judgment.

The plaintiff first claims that because there is a genuine issue of material fact as to the location of the defect, the court improperly granted the defendants' motions for summary judgment.[2] We address this claim first because if the plaintiff fails to prevail with respect to this claim, we need not address the remaining claim. We disagree with the plaintiff and affirm the court's judgment.

"Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

[2] In a separate claim of error, the plaintiff contends that the trial court improperly decided on reconsideration that there was no genuine issue of material fact as to the ownership of the property because the plaintiff did not specifically request reargument of that issue in his motion to reargue. We do not agree. The issue was briefed by both parties in the underlying summary judgment motion. In its objection to the plaintiff's motion for reargument and at the hearing, the town asked the court to also determine whether there was a genuine issue of material fact as to the location of the defect, which the court previously found unnecessary in light of its ruling on the governmental immunity claim. When granting the plaintiff's motion, the court stated: "I'm going to review on the basis of submissions of the parties, both issues, or all of the issues, which involve both argument regarding governmental immunity, and more specifically the issues of discretionary versus ministerial function as applicable here, as well as the issue of responsibility, which, in turn, is related to the location of the defect." At that time, there was no request or apparent need to further brief the issue. Following reconsideration, the court determined that there was no genuine issue of material fact as to the ownership of the property. Because the parties were provided with adequate notice and a full opportunity to be heard on the issue, this court does not find an abuse of discretion or prejudice. Accordingly, the issue was properly before the trial court.

. . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . [I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *DiMiceli* v. *Cheshire*, 162 Conn. App. 216, 221–22, 131 A.3d 771 (2016).

"The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury. . . . If a plaintiff cannot prove all of those elements, the cause of action fails. . . . The status of an entrant on another's land, be it trespasser, licensee or invitee, determines the duty that is owed to the entrant while he or she is on a landowner's property." (Citations omitted; internal quotation marks omitted.) *Grignano* v. *Milford*, 106 Conn. App. 648, 651–52, 943 A.2d 507 (2008). "[T]he dispositive issue in deciding whether a duty exists is whether the [defendant] has any right to possession and control of the property. . . . Retention of control is essentially a matter of intention to be determined in the light of all the significant circumstances. . . . The word control has no legal or technical meaning distinct from that

given in its popular acceptation . . . and refers to the power or authority to manage, superintend, direct or oversee." (Internal quotation marks omitted.) *Sweeney* v. *Friends of Hammonasset*, 140 Conn. App. 40, 50, 58 A.3d 293 (2013).

The evidence in the record supports the court's conclusion that there was no genuine issue of material fact as to whether the alleged defect was in the driveway of Sam's Club. In the operative complaint, the plaintiff alleged that the defective condition, the pothole, was located some three feet in from the entrance/exit driveway's intersection with Meloy Road. The plaintiff's deposition testimony detailed the location of the pothole as being in the driveway of Sam's Club.[3] During that deposition, the plaintiff marked an "x" and a circle on a photograph of the driveway, exhibit 5, where he believed the pothole was located. The mark was located on the entrance/exit driveway to Sam's Club. The plaintiff's affidavit, dated May 18, 2012, stated that he was injured when his "motor vehicle hit a pot hole in the driveway of #2 Boston Post Road in Orange, Connecticut . . . [and] this is the private driveway that exclusively leads to the Wal-Mart Plaza, which includes Sam's Club."

The town presented a signed affidavit by the town engineer, Robert J. Hiza, who is a licensed engineer

[3] The following colloquy occurred during the plaintiff's deposition:

"[The Town's Counsel]: Sir, I want to be clear. While you can't remember exactly where this pothole was, are you certain that it was somewhere in this area of the driveway?

"[The Plaintiff]: Yes.

"[The Town's Counsel]: It was not on [Meloy] Road?

"[The Plaintiff]: No.

"[The Town's Counsel]: And do you know what town you are in when you're on that driveway? . . .

"[The Plaintiff]: But in the driveway, it's Orange.

"[The Town's Counsel]: How do you know it's Orange?

"[The Plaintiff]: Because Sam's Club is in Orange. If you look on the address, it doesn't say West Haven, it says Orange. Doesn't it?"

and surveyor. Hiza's affidavit described his review of the deed to the property known as #2 Boston Post Road, the Sam's Club site layout plan, and his inspection of the area where the plaintiff indicated the pothole was located. Ultimately, Hiza concluded that "[t]he alleged pothole was either located within the property lines for #2 Boston Post Road, and therefore the responsibility of Sam's Real Estate Business Trust, the property owner, or within the City of West Haven's right of way for Meloy Road."

Further, the city presented an affidavit by the city engineer, Abdul Quadir, who is a licensed engineer. On the basis of the review of the deed, the Sam's Club site layout plan, and an inspection of the area where the plaintiff indicated that the pothole was located, Quadir concluded that "the alleged pothole was within the property lines for #2 Boston Post Road, Orange, Connecticut and therefore is not the responsibility of the City of West Haven." The plaintiff failed to present any evidence to dispute that the defect was on Sam's Club property.

The plaintiff argues that even if the pothole was located as depicted in exhibit 5, there still is a genuine issue of material fact as to whether the town controlled the area. To provide evidence of the town's control of the entrance/exit driveway, the plaintiff references his exhibits attached to his objection to the defendants' summary judgment motions. The exhibits referenced include three letters from Paul Dinice, the zoning administrator and enforcement officer for the town of Orange, addressed to Sam's Club regarding landscaping and traffic concerns along Meloy Road. The plaintiff also references a traffic study performed by the town as to the plaza located on the property at #2 Boston Post Road to show that the town had control of the

defective area. The traffic study and the letters, however, merely demonstrate the town's relaying of information and evaluation of traffic patterns; they do not provide evidence of the town's power or authority to manage, superintend, direct or oversee the allegedly defective area of the entrance/exit driveway. Therefore, the plaintiff failed to present evidence to dispute that the defect was controlled by Sam's Club and not the town.

On the basis of our plenary review of the pleadings and submissions of the parties, we conclude that the plaintiff has failed to provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. Because it was legally and logically correct for the trial court to conclude that there was no genuine issue that the alleged defect was in the driveway of Sam's Club, an area owned by Sam's Club that the defendants neither possessed nor controlled, the court properly determined that the defendants were entitled to summary judgment.

The judgment is affirmed.

In this opinion the other judges concurred.

DAVID WEAVING *v.* COMMISSIONER OF CORRECTION (AC 39566)

Keller, Elgo and Flynn, Js.

Syllabus

The petitioner, who had been convicted of the crime of manslaughter in the second degree in connection with a motor vehicle accident in which the petitioner's vehicle struck and killed a child, filed a second petition for a writ of habeas corpus, claiming that his criminal trial counsel and his first habeas counsel had rendered ineffective assistance. The petitioner claimed that his trial counsel was ineffective in failing to present the testimony of an accident reconstruction expert and that his prior habeas counsel was ineffective in failing to advance that claim in

the first habeas action. The habeas court rendered judgment denying the petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court did not abuse its discretion in denying the petition for certification to appeal; that court properly determined that the petitioner's criminal trial counsel was not deficient in failing to present unfavorable testimony from an accident reconstruction expert, as trial counsel made a reasonable, tactical decision to pursue an alternate theory of defense, and her representation of the petitioner resulted in an acquittal on the most serious charge against him, and because the petitioner's claim against his trial counsel failed, his claim of ineffective assistance on the part of his prior habeas counsel also failed.

Argued October 4—officially released December 12, 2017

Procedural History

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

Samuel Allan Greenberg, assigned counsel, for the appellant (petitioner).

Laurie N. Feldman, special deputy assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Marc G. Ramia*, senior assistant state's attorney, for the appellee (respondent).

Opinion

ELGO, J. The petitioner, David Weaving, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his petition for a writ of habeas corpus. The petitioner contends that the habeas court abused its discretion by denying his petition for certification to appeal and by rejecting his claims that counsel at both his criminal trial and his first habeas proceeding rendered ineffective assistance. Having thoroughly reviewed the record, we conclude that the habeas court properly denied the

petition for certification to appeal and, thus, dismiss the appeal.

The facts underlying the petitioner's criminal conviction are set forth in this court's decision on his direct appeal. "Shortly before 7 p.m. on April 27, 2007, the [petitioner] was driving his motor vehicle south on Route 69 in Prospect. In Prospect, Route 69 is a residential, two lane road, with one northbound and one southbound lane of travel. Although it was a foggy evening and the road surface was damp, the [petitioner] was traveling at approximately 80 miles per hour, well in excess of the posted speed limit of 45 miles per hour. As he crested a small hill near Radio Tower Road, the [petitioner] came upon another car traveling in his lane at or below the posted speed limit. Approaching a permitted passing zone, the [petitioner] accelerated and began to cross over into the northbound lane in order to pass the slower moving vehicle. Just as he was doing so, the [petitioner] noticed a young boy standing on the pedals of a bicycle near the center of the northbound lane. The boy was dressed in dark clothing, the bicycle he was riding was black and there was no headlamp on the bicycle. The [petitioner] immediately applied his brakes and attempted to steer back into the southbound lane in an effort to avoid hitting the boy. The [petitioner's] speed, however, coupled with the conditions of the roadway, made avoiding the boy impossible. The [petitioner's] vehicle collided with the bicycle, throwing the boy onto the hood and windshield and tossing debris along the side of the road. Despite the efforts of emergency medical personnel and physicians, the boy died from his injuries. The [petitioner] subsequently was arrested and charged with manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (3) and manslaughter in the second degree in violation of [General Statutes] § 53a-56 (a) (1)." *State* v. *Weaving*,

125 Conn. App. 41, 43–44, 6 A.3d 203 (2010), cert. denied, 299 Conn. 929, 12 A.3d 569 (2011).

At the petitioner's criminal trial, "a central tenet of the defense was that the [petitioner] was traveling at or near the posted speed limit of 45 miles per hour as he entered the northbound lane to pass the slower moving vehicle in front of him. Both parties presented expert testimony as to the [petitioner's] speed moments before the collision, focusing particularly on the time when the [petitioner] first applied his brakes. The state's expert, a specialist in accident reconstruction, testified that, according to his forensic and mathematical analyses, the [petitioner] 'was traveling at a minimal speed of 83 miles per hour.' This determination was based primarily on the length of skid marks caused by the [petitioner's] sudden braking, which measured over 360 feet, but also took account of the condition of the roadway at the time of the accident. The defense offered the expert testimony of a behavioral psychologist trained in principles of human reaction and response time. During recross-examination, the defense expert conceded that the length of the skid marks was consistent with a finding that the [petitioner] was traveling 83 miles per hour at the moment when he began braking." (Footnote omitted.) Id., 44–45. At the conclusion of trial, the jury found the petitioner not guilty of manslaughter in the first degree and guilty of manslaughter in the second degree. This court affirmed that judgment of conviction on direct appeal. Id., 57.

On August 31, 2009, the petitioner commenced his first habeas action, with Attorney Andrew J. Cates serving as habeas counsel. His operative petition for a writ of habeas corpus advanced nineteen claims of ineffective assistance on the part of the petitioner's criminal trial counsel, Attorney Cheryl Heffernan. In particular, the petitioner alleged that Heffernan was deficient in failing to "properly vet the credentials" of both "the

human factors expert whose testimony she presented at trial," and "the accident reconstructionist retained by her" to determine whether they were "truly qualified to render opinions which contradicted and/or impeached the testimony of the State's accident reconstructionist . . . ." The petition also alleged that Heffernan "failed to instruct her accident reconstructionist to undertake an independent investigation into the accident, the conditions of the petitioner's motor vehicle, and the like . . . ."

A habeas trial followed, at which Heffernan testified. She explained that she had prior experience with accident reconstruction cases and was familiar with the techniques and methods utilized therein. Heffernan testified that, in handling such cases, she necessarily relies on experts. As she put it, "I am a lawyer. . . . I'm not an engineer. I'm not a reconstructionist. I have to rely on my experts." Prior to the petitioner's criminal trial, Heffernan obtained authorization from the state to procure experts on his behalf. She testified that she initially sought the assistance of Richard Hermance, an accident reconstruction expert, due to his solid reputation, and the fact that her law partner had utilized him "a number of times [and] found him to present very well [with] a tremendous amount of credibility and professionalism and skill . . . ." After securing his services, Heffernan furnished Hermance with copies of all the evidence from the scene of the accident, including police reports, photographs and statements.[1]

Heffernan testified that, after Hermance reviewed the evidence, he notified her that he could not offer testimony to challenge the state's calculations with respect

[1] In her testimony, Heffernan acknowledged that, aided by an investigator, she conducted her own inspection of the scene of the accident, and the skid marks from the petitioner's vehicle in particular. She nonetheless testified that, because the scene had changed since the date of the accident and the skid marks had faded, that investigation was of no value.

to the speed of the petitioner's vehicle. Heffernan nevertheless "talked to him numerous times and tried to see if [she] could work something out" to present his expert testimony. Although those efforts were unsuccessful, Hermance did suggest the retention of a human factors expert as the "best way" to proceed with the petitioner's defense. Heffernan then contacted Patrick McGuire, a human factors expert, who provided expert testimony at the petitioner's criminal trial that, irrespective of the speed of the petitioner's vehicle, the accident could not have been avoided. Heffernan's trial strategy was to rely on that testimony to establish that "regardless of the speed of [the] vehicle, that [the petitioner] could not have avoided striking this child because the child had been in the road improperly and it was a bad situation." In so doing, Heffernan sought to negate the elements of extreme indifference to human life and recklessness, which are essential to the charged offenses under §§ 53a-55 (a) (3) and 53a-56 (a) (1), respectively. As she testified, "[o]ur argument was that the speed is not what caused the accident. It was the circumstances that existed that were beyond [the petitioner's] control. He could not have reacted in time regardless of how fast he was going. . . . [T]hat's where the reaction time was relevant. So, [McGuire] was there to testify that [if the petitioner had been] driving at forty-five miles an hour, which . . . was the speed limit on that road, that he still would have hit this child."

In addition, Heffernan confirmed in her habeas testimony that she consulted with Hermance, her accident reconstruction expert, in challenging the expert evidence offered by the state. She testified, and the record confirms, that a *Porter* hearing[2] was held at her behest

[2] See *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998).

prior to the petitioner's criminal trial, at which the opinions offered by the state's accident reconstruction expert were scrutinized. At the conclusion of that hearing, the trial court concluded that the methodology of the state's expert was valid.

In its memorandum of decision on the petitioner's first habeas action, the court determined, as to all nineteen allegations of ineffective assistance, that the petitioner had not established "that he was prejudiced in any way." The court also rejected the petitioner's contention that Heffernan was deficient in failing to properly vet the credentials of McGuire and Hermance. The court then addressed the petitioner's claim that Heffernan failed to instruct Hermance to perform an independent investigation of the accident, stating in relevant part: "[T]he court finds [that] [t]he petitioner has failed to prove any prejudice because the testimony by counsel was that after she consulted with her expert about the calculations and evidence and diagrams that she presented, the expert indicated [that he] would not be able to challenge the results of the state police. [Heffernan] also indicated that she and her investigator both went out and rechecked the measurements . . . that were provided by the . . . state police and the various diagrams, and the court took that testimony reasonably to indicate that since she raised no challenge, that she and her investigator also must have come up with similar or the same calculations. . . . [T]he petitioner has failed to present—and again, it's their affirmative obligation to provide and present evidence here that, if that evidence was presented, there would have been some different or more favorable result; the petitioner has failed to do that or to present that evidence, so either—again, for the reason that the petitioner has failed to present any evidence, the court finds the claim to be abandoned and it is dismissed. The small amount of evidence that was presented here all indicated that

counsel had consulted thoroughly with her expert witness and simply was not able to get the results that the petitioner wanted, and the court finds that . . . there was no showing of deficient performance in counsel's respect on that issue." *Weaving* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-09-4003183-S, 2012 WL 6965414, *2 (October 2, 2012).

In addition, the court addressed certain claims regarding Heffernan's investigation of the accident reconstruction prepared by the state. In concluding that those claims were without merit, the court noted that "in all of these issues or questions regarding the troopers and their qualifications . . . [Heffernan] filed and litigated an entire *Porter* hearing, and if that doesn't seek to call into question the qualifications and conclusions raised by the state's expert witness, I don't know what does. I mean, that's a claim by counsel that says this is junk science or these people aren't qualified to testify to the conclusions they're giving [and should not be admitted into evidence]; she litigated that motion, the court denied the motion. And so, going all the way back to the *Porter* hearing, the court frankly finds that it's [unsure] what else the petitioner claims counsel should have done; she sought to keep the testimony, frankly, out of trial, and the court overruled that after a lengthy hearing on the officer's qualifications and the conclusions he reached. And so, that's an additional basis why any and all of the claims related to counsel's failure to properly cross-examine or question the state's expert witnesses and the police officers, who testified about accident reconstruction, have failed to be proven." Id., *4. Accordingly, the court denied the petition for a writ of habeas corpus. The petitioner did not appeal from that judgment.

The petitioner commenced a second habeas action in 2013. His amended petition for a writ of habeas corpus contained two counts of ineffective assistance. The first

alleged that Heffernan was deficient in failing to present the testimony of an accident reconstruction expert at his criminal trial. In the second count, the petitioner alleged that Cates was deficient in failing to advance that claim in the first habeas action. At the subsequent habeas trial, the petitioner presented the testimony of only one expert witness, Kent E. Boots, an accident reconstructionist from California. On the basis of certain assumptions that he made regarding the petitioner's vehicle at the time of the accident, Boots opined that its speed "at the area of impact was somewhat less than the . . . conclusion that the state police . . . came to." Utilizing his own friction value, Boots estimated that the petitioner's vehicle was "travelling approximately forty-nine miles per hour at impact."

On cross-examination, Boots acknowledged, consistent with McGuire's expert testimony at the petitioner's criminal trial, that the accident would have occurred whether the vehicle was travelling forty-nine or eighty-three miles per hour. Boots further noted that, at the criminal trial, the petitioner had testified that he could not see over or around the vehicle in front of him just prior to the accident, and that he made the decision to pass that vehicle without being able to see if there was a hazard ahead. For that reason, Boots opined that, irrespective of the speed of the petitioner's vehicle, it would have been impossible for the petitioner to perceive the boy in the road when he attempted to pass in the opposite lane. On the basis of his training and experience as both a law enforcement officer and an accident reconstructionist, Boots also opined that it was not safe for the petitioner to enter the opposite lane in such circumstances.

By memorandum of decision filed July 25, 2016, the habeas court rejected the petitioner's claims. It stated: "[T]he dispositive flaw in the petitioner's accusation of legal incompetence by Attorney Heffernan is that she

did, in fact, consult with an experienced and well-regarded accident reconstructionist, [Hermance], a person whom her law firm had utilized in other cases. Hermance reviewed the pertinent materials concerning the fatal accident and concluded that the state's expert opinion as to the petitioner's speed of about eighty-three miles per hour was correct. Based on that unfavorable conclusion, Attorney Heffernan chose to rely exclusively on the expert testimony of McGuire that the collision was inevitable even if the petitioner was traveling at the speed limit; i.e., speed did not contribute to causing the fatality. The petitioner presented no criminal defense expert who criticized Attorney Heffernan's decision. The court is unaware of any professional obligation of defense counsel to keep consulting with different experts until one can be found whose opinions comport with those desired by the defense. . . . Attorney Heffernan sought advice from an appropriate source. She acted reasonably in relying on that advice, especially because Hermance's opinions matched those of the state's accident reconstructionist. Her approach of utilizing, instead, the human factor specialist appears to this court to have been professionally sound and resourceful and even a bit ingenious. Certainly, this tactic met or exceeded the skill possessed by ordinarily competent defense lawyers. Consequently, the court determines that the petitioner has failed to satisfy his burden of proving, by a preponderance of the evidence, that Attorney Heffernan's representation" was deficient. In light of that determination, the court also rejected the claim of ineffective assistance on the part of Cates. The court therefore denied the petition for a writ of habeas corpus. The petitioner then filed a petition for certification to appeal to this court, which the habeas court denied, and this appeal followed.

At the outset, we note that "[t]he standard of review and legal principles that govern our consideration of

the petitioner's claims on appeal are well settled. The use of a habeas petition to raise an ineffective assistance of habeas counsel claim . . . was approved by our Supreme Court in *Lozada* v. *Warden*, 223 Conn. 834, 613 A.2d 818 (1992). In *Lozada*, the court determined that the statutory right to habeas counsel for indigent petitioners provided in General Statutes § 51-296 (a) includes an implied requirement that such counsel be effective, and it held that the appropriate vehicle to challenge the effectiveness of habeas counsel is through a habeas petition. . . . [T]he court explained that [t]o succeed in his bid for a writ of habeas corpus, the petitioner must prove *both* (1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective. . . . As to each of those inquiries, the petitioner is required to satisfy the familiar two-pronged test set forth in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. First, the [petitioner] must show that counsel's performance was deficient. . . . Second, the [petitioner] must show that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . In other words, a petitioner claiming ineffective assistance of habeas counsel on the basis of ineffective assistance of trial counsel must essentially satisfy *Strickland* twice . . . ." (Emphasis in original; internal quotation marks omitted.) *Abreu* v. *Commissioner of Correction*, 172 Conn. App. 567, 574–75, 160 A.3d 1077, cert. denied, 326 Conn. 901, 162 A.3d 724 (2017). Our Supreme Court has characterized that task as a "herculean" one. *Lozada* v. *Warden*, supra, 843.

Having reviewed the record of the present appeal, we can improve little on the habeas court's well reasoned analysis. As this court previously has observed, "[a] trial

attorney is entitled to rely reasonably on the opinion of an expert witness . . . and is not required to continue searching for a different expert." (Citation omitted.) *Stephen S.* v. *Commissioner of Correction*, 134 Conn. App. 801, 816, 40 A.3d 796, cert. denied, 304 Conn. 932, 43 A.3d 660 (2012). Moreover, it is well established that when a criminal defense attorney consults with "an expert in a relevant field" who thereafter apprises counsel that he or she cannot provide favorable testimony, counsel is "entitled to rely reasonably on [that] opinion . . . and [is] not required to continue searching for a different expert." Id., 817; see also *Brian S.* v. *Commissioner of Correction*, 172 Conn. App. 535, 544, 160 A.3d 1110 ("[t]he fact that the petitioner later was able to present testimony at his habeas trial from . . . a different expert, perhaps more specialized than [the expert originally consulted by his criminal trial counsel] . . . did not establish that counsel's performance was deficient for relying on [the original] expert opinion in preparation for the petitioner's criminal trial"), cert. denied, 326 Conn. 904, 163 A.3d 1204 (2017).

As the United States Supreme Court has explained in the context of ineffective assistance of counsel claims, "[t]he selection of an expert witness is a paradigmatic example of the type of 'strategic choic[e]' that, when made 'after thorough investigation of [the] law and facts,' is 'virtually unchallengeable.' " *Hinton* v. *Alabama*, U.S. , 134 S. Ct. 1081, 1089, 188 L. Ed. 2d 1 (2014); accord *Brian S.* v. *Commissioner of Correction*, supra, 172 Conn. App. 543–44 (rejecting claim of deficient performance when trial counsel consulted with expert, made strategic decision not to present his testimony at trial or to seek another opinion, and "strategized that the best course of action" was alternate theory of defense); *Bharrat* v. *Commissioner of Correction*, 167 Conn. App. 158, 170, 143 A.3d 1106 (rejecting claim of deficient performance when trial counsel consulted

with expert but ultimately "made the reasonable, strategic decision not to call an expert witness at the underlying criminal trial"), cert. denied, 323 Conn. 924, 149 A.3d 982 (2016); *Stephen S.* v. *Commissioner of Correction*, supra, 134 Conn. App. 817 (emphasizing that "trial counsel is entitled to make strategic choices in preparation for trial"). The record in the present case indicates that, after consulting with an expert in accident reconstruction and utilizing his expertise to challenge the state's expert testimony in a pretrial *Porter* hearing, Heffernan made a reasonable, tactical decision to pursue an alternate theory of defense, rather than offering that expert's unfavorable testimony. The record also indicates that Heffernan's representation of the petitioner ultimately resulted in an acquittal on the most serious charge before the jury.

We conclude that the petitioner has failed to demonstrate that Heffernan rendered deficient performance at his criminal trial. He has not established that Heffernan's conduct was not reasonably competent, or that it fell outside the range of competence displayed by lawyers with ordinary training and skill in the criminal law. Accordingly, the petitioner cannot prevail on his claims that his criminal trial counsel and his first habeas counsel rendered ineffective assistance. See *Abreu* v. *Commissioner of Correction*, supra, 172 Conn. App. 583 ("because the petitioner failed to establish that he had a viable claim of ineffective assistance of trial counsel, his assertion that his prior habeas counsel provided ineffective assistance by failing to raise that claim similarly lacks merit"). We therefore conclude that the court did not abuse its discretion by denying the petition for certification to appeal. See *Lozada* v. *Deeds*, 498 U.S. 430, 432, 111 S. Ct. 860, 112 L. Ed. 2d 956 (1991); *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994).

The appeal is dismissed.

In this opinion the other judges concurred.