STATE OF CONNECTICUT *v.* AMANDA AZEVEDO (AC 38124)

Lavine, Kahn and Bishop, Js.

Syllabus

Convicted of the crimes of arson in the first degree, attempt to commit insurance fraud, attempt to commit larceny in the first degree, conspiracy to commit arson in the first degree, conspiracy to commit insurance fraud and conspiracy to commit larceny in the first degree in connection with an arson that destroyed her home, the defendant appealed to this court. She claimed, inter alia, that certain out-of-court statements that D, her coconspirator, had made to an insurance company fire investigator and to two police officers, and certain testimony that D had given in a deposition in a related civil action, should not have been admitted into evidence because they constituted inadmissible hearsay and violated her sixth amendment right to confrontation. D had told the investigator about the defendant's actions and whereabouts on the morning of the fire, and testified similarly in the deposition. After a memorial service for the defendant's late husband, D asked to speak to the police officers privately and told them that the defendant was responsible for setting her house on fire and how she set the fire, that he was present while items were being removed from the defendant's home prior to the fire and that there was a video of the items being removed. The trial court determined, on the basis of D's deposition testimony and statements to the investigator, that the state had established, by a fair preponderance of the evidence, the existence of a conspiracy between D and the defendant, and, therefore, that D's deposition testimony and statements to the investigator were admissible under § 8-3 (1) (D) of the Connecticut Code of Evidence as statements of a coconspirator in furtherance of a conspiracy. The trial court further determined that D's statements to the police officers inculpated both himself and the defendant, and, thus, were admissible as dual inculpatory statements under § 8-6 (4) of the Connecticut Code of Evidence. *Held*:

1. The defendant could not prevail on her claim that the trial court improperly admitted into evidence D's deposition testimony and statements to the investigator as statements of a coconspirator in furtherance of a conspiracy under § 8-3 (1) (D) of the Connecticut Code of Evidence: although that court admitted D's statements and deposition testimony for their substantive use, the statements were not admitted to prove their contents but, rather, were admitted as verbal acts in furtherance of a conspiracy, and, therefore, because the statements and testimony were not testimonial in nature, the defendant's right of confrontation was not implicated; moreover, in light of the extrinsic evidence of the conspiracy

presented by the state, which included evidence of discrepancies concerning the defendant's activities and whereabouts on the morning of the fire, and showing D's presence at the defendant's home days prior to the fire when the defendant's belongings were removed from the home and that D wanted the defendant's husband to receive the insurance proceeds from the fire, it was not clearly erroneous for the trial court to conclude that the state had proven the existence of a conspiracy between D and the defendant by a fair preponderance of the evidence so as to permit the jury to consider D's deposition testimony and statements as evidence of the continuing conspiracy under § 8-3 (1) (D).

2. The trial court properly characterized D's statements to the police officers as dual inculpatory statements under § 8-6 (4) of the Connecticut Code of Evidence: D's statements to the police officers reasonably could be characterized as inculpating both himself and the defendant, as D reasonably understood that his statements were against his penal interest in that they implicated him in the conspiracy to commit insurance fraud, D was unavailable to testify at the defendant's trial in that he would have invoked his fifth amendment right against self-incrimination had he been called to testify, and his statements presented sufficient indicia of reliability; moreover, given the substantial amount of admissible evidence adduced at trial that supported the defendant's conviction, any possible error in the court's admission of D's statements to the officers as dual inculpatory statements was harmless beyond a reasonable doubt.

3. The record was inadequate to review the defendant's unpreserved claim that the state's use of cell site location information pertaining to her phone records violated her rights under article first, § 7, of the state constitution; for the defendant to prevail on her claim, she had to demonstrate that the state or an entity acting on behalf of the state obtained the phone records, but the trial record was silent in that regard, as it was unclear from the record who had issued the subpoena to obtain the records, and, thus, the defendant could not establish that the claimed violation of her constitutional rights was the result of state action.

Argued September 11—officially released December 19, 2017

Procedural History

Substitute information charging the defendant with the crimes of arson in the first degree, attempt to commit insurance fraud, attempt to commit larceny in the first degree, conspiracy to commit arson in the first degree, conspiracy to commit insurance fraud and conspiracy to commit larceny in the first degree, brought to the Superior Court in the judicial district of Fairfield, where the court, *Blawie*, *J.*, denied the defendant's

motion to preclude certain evidence; thereafter, the matter was tried to the jury; verdict and judgment of guilty, from which the defendant appealed to this court; subsequently, the court, *Blawie*, *J.*, issued an articulation of its decision. *Affirmed*.

John R. Williams, for the appellant (defendant).

Robert J. Scheinblum, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Howard S. Stein*, senior assistant state's attorney, for the appellee (state).

Opinion

BISHOP, J. The defendant, Amanda Azevedo, appeals from the judgment of conviction, rendered after a jury trial, of the following six counts: (1) arson in the first degree in violation of General Statutes § 53a-111 (a) (3); (2) attempt to commit insurance fraud in violation of General Statutes §§ 53a-215 and 53a-49; (3) attempt to commit larceny in the first degree in violation of General Statutes §§ 53a-49, 53a-119 and 53a-122 (a) (2); (4) conspiracy to commit arson in the first degree in violation of General Statutes §§ 53a-48 and 53a-111 (a) (3); (5) conspiracy to commit insurance fraud in violation of General Statutes §§ 53a-48 and 53a-215; and (6) conspiracy to commit larceny in the first degree in violation of General Statutes §§ 53a-48, 53a-119 and 53a-122 (a) (2). On appeal, the defendant argues that (1) out-of-court statements of a coconspirator that the trial court admitted into evidence constituted inadmissible hearsay and violated the confrontation clause of the sixth amendment to the United States constitution, and (2) that the state's use of cell site location information violated article first, § 7, of the constitution of Connecticut. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On January 28, 2008, at approximately 9:50 a.m.,

the defendant's neighbor called 911 to report a fire at the defendant's residence. The neighbor saw the flames through a window in front of the defendant's home. No one was home at the time the neighbor called 911, and the defendant was the last person to have been in the house before the fire. The fire destroyed the defendant's home. After firefighters extinguished the flames, state and local fire marshals began examining the circumstances of the fire, as well as the defendant's behavior. Lengthy police and insurance company investigations ensued.

The police and insurance company investigations revealed the following details of the defendant's personal life and financial situation at the time of the fire. The defendant was unemployed and her husband, Joao Azevedo, owned a small flooring business, which was the family's sole source of income. Azevedo's business was failing, however, due to his opioid addiction. On the day of the fire, the defendant's husband was set to be released from an inpatient treatment program for his opioid addiction. At the time of the fire, the defendant and her husband were making late payments to various creditors and had trouble paying for necessities such as home heating oil, health insurance, and property insurance premiums. Additionally, the defendant and her husband had federal and state tax liens of nearly $145,000 filed against their home as a result of unpaid income taxes. Two weeks prior to the fire, Norwalk police arrested the defendant's husband on a charge of writing a bad check to a supplier for more than $25,000 worth of hardwood flooring.

On January 10, 2008, eighteen days prior to the fire, the defendant called her local insurance agent to inquire about the status and expiration date of her homeowner's insurance policy. Although the defendant's insurance carrier had threatened cancellation due to late payments, the policy was in effect on the date of the

fire. Additionally, days prior to the fire, the defendant and coconspirator Diniz Depina removed items from the defendant's home such as furniture, jewelry, and personal documents. After the fire, the defendant filed a claim with her insurance company for payment of $1,235,087.45 in losses caused by the fire.

Due to the suspicious circumstances surrounding the fire, the defendant's insurance company hired investigator Robert Corry, who conducted a detailed cause and origin investigation. After completing his investigation, Corry reached the conclusion that the fire at the defendant's home had been intentionally set.

On January 5, 2015, the state charged the defendant in an amended information with arson in the first degree; conspiracy to commit arson in the first degree; attempt to commit insurance fraud; conspiracy to commit insurance fraud; attempt to commit larceny in the first degree; and conspiracy to commit larceny in the first degree. On March 6, 2015, a jury found the defendant guilty of all charges. On April 24, 2015, the court sentenced the defendant to a total effective sentence of ten years of imprisonment, execution suspended after four years, and three years of probation. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

On appeal, the defendant argues that the admission of certain statements made by Depina constituted inadmissible hearsay and violated the confrontation clause of the sixth amendment to the United States constitution. The statements at issue are Depina's statements to Corry; Depina's deposition testimony, which echoes his statements to Corry; and Depina's statements to Laura Azevedo Rasuk and Johanna Angelo, both of whom are family friends and Bridgeport police officers. The state responds that Depina's statements to Corry

and Depina's deposition testimony were admissible as statements of a coconspirator in furtherance of a conspiracy under § 8-3 (1) (D) of the Connecticut Code of Evidence. The state further argues, with respect to Depina's statements to Rasuk and Angelo, that the defendant waived her right to claim a confrontation clause violation under *Crawford* v. *Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), and that the statements were properly admitted as dual inculpatory statements. We agree with the state.

"The [c]onfrontation [c]lause . . . bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule." (Internal quotation marks omitted.) *State* v. *Camacho*, 282 Conn. 328, 347–48, 924 A.2d 99, cert. denied, 552 U.S. 956, 128 S. Ct. 338, 169 L. Ed. 2d 273 (2007). "[W]hen faced with the issue of the contested admission of hearsay statements against the accused in a criminal trial, courts first must determine whether the statement is testimonial." Id., 349. Although the Supreme Court declined to define the term "testimonial," it noted, however, that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a formal trial; and to police interrogations." *Crawford* v. *Washington*, supra, 541 U.S. 68. "Various formulations of this core class of testimonial statements exist: ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to use prosecutorially . . . ." (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id., 51–52.

Accordingly, even though the Supreme Court did not establish a "comprehensive definition of testimonial, it is clear that much of the [United States] Supreme

Court's and our jurisprudence applying *Crawford* largely has focused on the reasonable expectation of the declarant that, under the circumstances, his or her words later could be used for prosecutorial purposes." (Internal quotation marks omitted.) *State* v. *Slater*, 285 Conn. 162, 172, 939 A.2d 1105, cert. denied, 553 U.S. 1085, 128 S. Ct. 2885, 171 L. Ed. 2d 822 (2008). "[T]his expectation must be *reasonable* under the circumstances and not some subjective or far-fetched, hypothetical expectation that takes the reasoning in *Crawford* and *Davis* [v. *Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)] to its logical extreme." (Emphasis in original.) *State* v. *Slater*, supra, 175.

"[T]he threshold inquiries that determine the nature of the claim are whether the statement was hearsay, and if so, whether the statement was testimonial in nature, questions of law over which our review is plenary." *State* v. *Smith*, 289 Conn. 598, 618–19, 960 A.2d 993 (2008). "To the extent a trial court's admission of evidence is based on an interpretation of the [Connecticut] Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. They require determinations about which reasonable minds may not differ; there is no judgment call by the trial court." (Internal quotation marks omitted.) *State* v. *Miller*, 121 Conn. App. 775, 780, 998 A.2d 170, cert. denied, 298 Conn. 902, 3 A.3d 72 (2010).

A

Depina's Statements to Corry and Depina's Deposition Testimony

We begin with the defendant's argument that the admission into evidence of Depina's statements to

Corry and Depina's deposition testimony violated the defendant's right to confrontation under the sixth amendment to the United States constitution and were improperly admitted under § 8-3 (1) (D) of the Connecticut Code of Evidence as statements of a coconspirator in furtherance of a conspiracy. We disagree.

The following additional facts and procedural history are relevant in part to our decision. In the course of his investigation on behalf of the defendant's insurance company, Corry interviewed Depina. Depina also gave a deposition during the course of the civil litigation stemming from the defendant's insurance claim after the fire. Depina told Corry, and testified in his deposition, that the defendant called him at approximately 9 a.m. on the morning of the fire. Depina testified that the defendant then stopped by his house after visiting her husband at Griffin Hospital, which was close to Depina's house. Depina told Corry that the defendant was at his house because he was borrowing money from her. He stated, as well, that the defendant had stopped by to drop off money so he could purchase food for a party the defendant was throwing to welcome her husband home from the hospital. The defendant remained at Depina's residence for approximately fifteen minutes. The next communication between Depina and the defendant occurred when she called him and exclaimed that her house was on fire.

Initially, the trial court admitted Depina's statements to Corry for the limited purpose of showing only that the statements were "in fact, made by Mr. Depina to this witness, Mr. Corry." The court gave the jury a limiting instruction to that effect. Later, the court found from the introduction of additional evidence, that the state had established the existence of a conspiracy between Depina and the defendant by a fair preponderance of the evidence. On that basis, the court removed the limiting instruction and admitted Depina's statements to Corry

for their substantive use under § 8-3 (1) (D) of the Connecticut Code of Evidence. The court also admitted Depina's deposition transcript into evidence for its substantive use pursuant to the same section of the code.

In assessing the propriety of the court's decision to permit into evidence Depina's statements to Corry and Depina's deposition testimony, we first must determine whether the statements and deposition testimony were testimonial in nature. This is a question of law over which our review is plenary. See *State* v. *Smith*, supra, 289 Conn. 618–19. The defendant argues that both the statements to Corry and the deposition testimony are testimonial in nature. The state argues, on the other hand, that the court properly admitted Depina's statements to Corry and deposition testimony as verbal acts in furtherance of a conspiracy and that, because the statements were not admitted for the truth of their contents, they cannot be considered testimonial in nature. We agree with the state.

"In Connecticut, an out-of-court statement offered to prove the truth of the matter asserted is hearsay. . . . If such a statement is offered for a purpose other than establishing the truth of the matters contained in the statement, it is not hearsay." (Citation omitted.) *State* v. *Esposito*, 223 Conn. 299, 315, 613 A.2d 242 (1992). "[T]he matter asserted [is] the matter asserted by the [statement], not the matter asserted by the proponent of the evidence." (Internal quotation marks omitted.) Id. "If the state again introduces [a declarant's] statement for the nonhearsay purpose of simply proving that it was made, the defendant's right of confrontation will not be implicated." Id., 316. Even *Crawford* acknowledged that, generally speaking, the admission of out-of-court statements for purposes other than their truth, such as statements in furtherance of a conspiracy, do not raise confrontation clause issues. See *Crawford* v. *Washington*, supra, 541 U.S. 56 ("[m]ost of the hearsay

exceptions covered statements that by their nature were not testimonial—for example . . . statements in furtherance of a conspiracy"); see also id., 60 n.9 ("The [c]lause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it. [The (c)lause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. . . .]" [Citation omitted.]).

Section 8-3 of the Connecticut Code of Evidence provides in relevant part: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness . . . (1) . . . (D) a statement by a coconspirator of a party while the conspiracy is ongoing and in furtherance of a conspiracy . . . ." Before the court can admit statements made in furtherance of a conspiracy, the court must find the existence of a conspiracy by a fair preponderance of the evidence. See *State* v. *Camacho*, supra, 282 Conn. 354. "[T]he evidence will be construed in a way most favorable to sustaining the preliminary determinations of the trial court; its conclusions will not be disturbed on appeal unless found to be clearly erroneous." (Citation omitted.) Id.

The defendant contends that the court admitted Depina's statements to Corry and Depina's deposition testimony for the truth of their contents. The record belies this claim, however. Although the court subsequently admitted Depina's statements to Corry and Depina's deposition testimony for their substantive use, the statements were not admitted to prove their contents. Rather, the state sought to admit these statements as verbal acts. Indeed, the state expressly stated its position that the statements were false, but that they evidenced a false interlocking alibi between the defendant and Depina.[1] Therefore, they were, in short, verbal acts

[1] At a hearing prior to the start of evidence, the state explained, with respect to Depina's statements to Corry and deposition testimony that "[t]he state is offering those statements as verbal acts, verbal deeds, the fact that those statements were given, not that they're necessarily true because

in furtherance of a conspiracy. The matters asserted by the statements at issue here were that the defendant had gone to Depina's house to give him money after visiting her husband in the hospital. The state's position was that these statements were false and were made as part of a continuing conspiracy. Accordingly, because the statements made in furtherance of the conspiracy were not admitted for the truth of the matters asserted therein, the defendant's claim under the confrontation clause of the sixth amendment to the United States constitution must fail with respect to Depina's statements to Corry and his deposition testimony. See *State* v. *Carpenter*, 275 Conn. 785, 821, 882 A.2d 604 (2005), cert. denied, 547 U.S. 1025, 126 S. Ct. 1578, 164 L. Ed. 2d 309 (2006); see also *State* v. *Foster*, 293 Conn. 327, 334–35, 977 A.2d 199 (2009) (concluding that *Crawford* not violated because trial court admitted statements for purpose other than for truth of matter asserted, and, therefore, statements were not inadmissible either on hearsay grounds or pursuant to rule in *Crawford*).

Additionally, at the time the court admitted Depina's statements to Corry and Depina's deposition testimony, the court had heard extrinsic evidence of the conspiracy. Thus, it was not clearly erroneous for the court to conclude that the state had proven the existence of a conspiracy between the defendant and Depina by a fair preponderance of the evidence, so as to then permit the jury to consider Depina's statements to Corry and deposition testimony as evidence of the continuing conspiracy. The extrinsic evidence that the state presented to demonstrate the existence of the conspiracy included a transcript of the defendant's interview with Corry, in which she detailed her activities on the morning of the fire. The state also produced the defendant's cell phone

obviously the state's position is, is the fact that they're not true, but they are part of [the] concept of the interlocking false alibi."

records, which contradicted the timing and locations that the defendant described in her interview with Corry. In addition, the state produced Depina's cell phone records, which contradicted the timing he described in his interview with Corry and in his deposition regarding his communications with the defendant on the morning of the fire. The court also heard testimony regarding Depina's presence at the defendant's home days prior to the fire when the defendant's belongings were removed from the home, and that Depina wanted the defendant's husband to receive the insurance proceeds from the fire.

Before admitting these statements pursuant to § 8-3 (1) (D), the trial court needed to find only that the state had proven the existence of a conspiracy by a fair preponderance of the evidence. This standard is substantially lower than the "beyond a reasonable doubt" standard required to convict a criminal defendant. On the basis of the evidence that the state presented, it was not clearly erroneous for the court to find the existence of a conspiracy by a fair preponderance of the evidence. Accordingly, the trial court properly interpreted Depina's statements to Corry and Depina's deposition testimony as statements of a coconspirator in furtherance of a conspiracy under § 8-3 (1) (D) of the Connecticut Code of Evidence, and admitted them as further evidence of the conspiracy between Depina and the defendant.

B

Depina's Statements to Rasuk and Angelo

Turning next to Depina's statements to Rasuk and Angelo, the defendant relies on *Crawford* v. *Washington*, supra, 541 U.S. 36, to support her argument that admission of these statements violated her right to confrontation under the sixth amendment to the United States constitution. The defendant also claims that the

court abused its discretion by admitting the statements as dual inculpatory statements. The state's response is threefold: that the defendant waived any *Crawford* claim at trial; that, even if *Crawford* was not waived, the statements were not testimonial and, thus, their admission into evidence was not proscribed by *Crawford*; and, finally, even if the court incorrectly admitted Depina's statements to Rasuk and Angelo, the court's error was harmless beyond a reasonable doubt in light of the strength of the properly admitted evidence of the conspiracy.

The following additional facts and procedural history are relevant to this portion of our opinion. The state called Angelo to testify about statements that Depina made to her and Rasuk. At the time of her testimony, Angelo had been a Bridgeport police officer for thirteen years. On December 19, 2010, Angelo was at the home of Rasuk, a friend and fellow Bridgeport police officer. Rasuk is also the defendant's sister-in-law. Rasuk was hosting a reception at her home following a memorial service for the defendant's husband, who had died a couple of days prior. Depina was present at the memorial reception, and at one point during the evening asked to speak to Rasuk in private. Angelo was present during the conversation, along with Depina's girlfriend, Carla Silva. Depina stated that he wanted to speak to the group "with regards to the Monroe residence being set on fire by [the defendant]." He told the group that the defendant was responsible for setting the house on fire, and made statements regarding his communications with the defendant before and after the morning of the fire.

Depina explained that several days prior to the fire, numerous items were removed from the defendant's home. These items included jewelry, furniture, family pictures, and other personal items. Depina stated that he was present while the items were being removed

and videotaped the items being removed. Additionally, he stated that prior to the fire, he warned the defendant against setting the fire. He also told the group that on the morning of the fire, the defendant called him and stated that "it was done," meaning that the fire had been set. Depina detailed that the defendant had "lit a match in the stove and also she had lit a sheet in the chimney."

While speaking to the group, Depina stated that he wanted to see the defendant's husband get the insurance money from the fire. He also explained "that if he had to, he would go to the police. And that if he had to go to jail, he would go to jail . . . ." Finally, Depina stated "just to leave his girlfriend [Silva] out of everything."

Prior to Angelo's testimony in front of the jury, the court heard arguments on the admissibility of Depina's statements to Rasuk and Angelo. The state argued that Depina's statements should be admitted as dual inculpatory statements under § 8-6 (4) of the Connecticut Code of Evidence. Defense counsel responded that Depina's statements were not admissible as dual inculpatory statements because they were not against Depina's penal interest and did not meet the second prong of *Ohio* v. *Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), overruled in part on other grounds by *Crawford* v. *Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).[2] In fact, defense counsel stated that "[t]his is not a *Crawford* issue."[3] The court

[2] The second prong of *Roberts* requires that a statement bear "adequate 'indicia of reliability.' " *Ohio* v. *Roberts*, supra, 448 U.S. 66.

[3] To give context to defense counsel's statement, we highlight portions from an on-the-record hearing that occurred the day prior to the start of evidence. Our review of this colloquy makes clear that the court was concerned about a potential *Crawford* issue regarding Depina's statements and alerted both the state and defense counsel to its concern. For example, while discussing the admissibility of Depina's statements, the court stated that "the court has a *Crawford* issue here; that's what I'm trying to figure out, which way we go with this." Shortly thereafter, the court noted, "I think

determined that Depina's statements to Rasuk and Angelo were admissible as dual inculpatory statements, and that admission of the statements satisfied the second prong of *Roberts*.

Before discussing the state's claim that the defendant waived reliance on *Crawford* v. *Washington*, supra, 541 U.S. 36, we turn to the question of whether Depina's statements to Rasuk and Angelo reasonably can be characterized as inculpating both himself and the defendant pursuant to § 8-6 (4) of the Connecticut Code of Evidence. "To the extent a trial court's admission of evidence is based on an interpretation of the [Connecticut] Code of Evidence, our standard of review is plenary." (Internal quotation marks omitted.) *State* v. *Miller*, supra, 121 Conn. App. 780.

"Section 8-6 (4) of the Connecticut Code of Evidence creates an exception to the hearsay rule for an out-of-court statement made by an unavailable declarant if that statement was trustworthy and, at the time of its making, so far tended to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. . . . That section further

the court has to conduct a *Crawford* analysis in light of all of these facts and circumstances . . . . I think *Crawford* is in the case, but whether or not I find that it does not apply to—to these statements, that's a different issue." Additionally, the court directed defense counsel's attention to *Crawford* when it stated:

"The Court: [Y]ou don't cite *Crawford* by name, [counsel], but you do, in your motion, clearly in the first paragraph, [d]o talk about her rights of confrontation and due process under the fifth, sixth and fourteenth [a]mendment.

"[Defense Counsel]: Right.

"The Court: It's implicated.

"[Defense Counsel]: It is. And I just see a potential can of worms being opened here if the state is allowed to bring in witnesses, and let's say Mr. Depina has a different view of the conversation that took place, and he's claiming the fifth [amendment], and I can't call him; I think then we're running into some problems. But again, it's all fact dependent."

instructs that, [i]n determining the trustworthiness of a statement against penal interest, the court shall consider (A) the time the statement was made and the person to whom the statement was made, (B) the existence of corroborating evidence in the case, and (C) the extent to which the statement was against the declarant's penal interest. . . . Additionally, this court has held that, it is not necessary that the trial court find that all of the factors support the trustworthiness of the statement. The trial court should consider all of the factors and determine whether the totality of the circumstances supports the trustworthiness of the statement." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Camacho*, supra, 282 Conn. 358–59.

"A dual inculpatory statement is a statement that inculpates both the declarant and a third party, in this case the defendant. . . . We evaluate dual inculpatory statements using the same criteria we use for statements against penal interest. . . . Whether a statement is against a declarant's penal interests is an objective inquiry of law, rather than a subjective analysis of the declarant's personal legal knowledge. Under § 8-6 (4) [of the Connecticut Code of Evidence], we must evaluate the statements according to a reasonable person standard, not according to an inquiry into the declarant's personal knowledge or state of mind." (Citations omitted; internal quotation marks omitted.) Id., 359.

Our Supreme Court's decision in *Camacho* informs our analysis of this issue. In *Camacho*, the trial court admitted the testimony of two witnesses (Martin and Fusco), who testified regarding statements that the defendant's coconspirator (Henry) made to them. Id., 341. Henry detailed to Martin and Fusco, on separate occasions, that he and the defendant went to the residence of one of the victims (Votino) to collect a drug debt. Id., 345. When another person in the home taunted

the defendant, the defendant shot that person and Votino. Id. Henry then instructed the defendant to shoot the final two victims so no one could identify him and the defendant. Id.

On appeal, the defendant argued that the trial court improperly concluded that Henry's statements fell within the exception for dual inculpatory statements under the Code of Evidence.[4] Id., 358. Our Supreme Court disagreed and concluded that "Henry's statements to Fusco were not blame-shifting because they exposed him to potential liability for the same crimes with which the defendant is now charged, thereby implicating both himself and the defendant equally." (Footnote omitted.) Id., 360. The court further noted that "Henry understood the legal implications of his statements." Id. For example, while speaking to Martin, Henry stated "that [Martin] could put him in the electric chair," and "repeatedly warned [Martin] not to talk to the police and questioned whether he could trust her . . . ." Id., 360–61. The court concluded that these statements "indicat[e] that [Henry] reasonably understood that his statements were against his penal interest." Id., 361.[5]

Here, Depina's statements to Rasuk and Angelo follow a line similar to Henry's statements to Martin and Fusco. Depina asked Rasuk if he could speak to her in private, away from the other guests who were attending the memorial reception for the defendant's husband. Rasuk, Angelo, Silva, and Depina then gathered in the

[4] In *Camacho*, the defendant also argued that admission of Fusco's testimony violated the confrontation clause of the sixth amendment to the United States constitution; our Supreme Court rejected that argument. *State* v. *Camacho*, supra, 282 Conn. 351.

[5] The Supreme Court noted that "[a]lthough Henry made these statements to Martin, not Fusco, because he told both women essentially the same story, it is clear that he understood the legal ramifications of both statements." *State* v. *Camacho*, supra, 282 Conn. 361.

hallway of Rasuk's home, away from the other guests. Depina stated that the defendant was responsible for setting her house on fire and detailed how the defendant set the fire that destroyed her home. Depina explained that he knew this information because he was in contact with the defendant on the day of, as well as the days prior to, the fire. He also explained that he was present while items were being removed from the defendant's home prior to the fire and that there was a video of the items being removed. Regarding the consequence of his admissions, Depina stated "that he knew that what he was telling [the group] would possibly have him arrested, and that he . . . doesn't care, he would go to the police [and] if he had to be arrested, he would be arrested." Depina also stated that "if he had to go to jail, he would go to jail," and "to keep his girlfriend out of this, and that if he had to go to the police, he would go to the police."

The foregoing demonstrate that Depina "reasonably understood that his statements" to Rasuk and Angelo "were against his penal interest." *State* v. *Camacho*, supra, 282 Conn. 361. Depina similarly understood the legal implications of his statements, as he indicated that he knew his statements could result in his being arrested, and that, if necessary, he would go to the police and go to jail. Like Henry's statements in *Camacho*, Depina's statements here were not blame-shifting, as the statements exposed him to liability for the same crimes for which the defendant was charged.[6] See id., 360–61.

It is undisputed that Depina was unavailable to testify at the defendant's trial, as he would have invoked his fifth amendment right against self-incrimination if

[6] In fact, Depina was charged with acting as the defendant's coconspirator. See *State* v. *Azevedo*, Superior Court, judicial district of Fairfield, Docket No. CR-13-270435T, 2015 WL 5626280, *2 (August 21, 2015).

called to testify. Additionally, Depina's statements to Rasuk and Angelo present sufficient indicia of reliability. As noted in the preceding paragraphs, Depina asked to speak to Rasuk and Angelo in private. Depina made this request during a memorial reception that Rasuk was hosting following the death of the defendant's husband. The statements were against Depina's penal interest as they implicated Depina in the conspiracy to commit insurance fraud. Although the statements were made three years after the fire, taking all the relevant factors into consideration, we conclude that the court properly characterized Depina's statements to Rasuk and Angelo as dual inculpatory statements under § 8-6 (4) of the Connecticut Code of Evidence. See *State* v. *Smith*, supra, 289 Conn. 631–32.

We acknowledge that whether counsel's statement that "[t]his is not a *Crawford* issue" waived the defendant's claim under *Crawford* presents a close question. If counsel's statement did not waive the *Crawford* claim, whether Depina's statements to Rasuk and Angelo were testimonial for *Crawford* purposes presents another close question of law. As to waiver, it is apparent that the court was mindful, before trial, of the potential *Crawford* implications surrounding Depina's statements to Rasuk and Angelo; see footnote 3 of this opinion; but at trial, counsel expressly disclaimed *Crawford* on this issue. We are also mindful, too, that decisional law regarding the contours of waiver is evolving.[7]

[7] See, e.g., *State* v. *Davis*, 311 Conn. 468, 485, 88 A.3d 445 (2014) (*Palmer*, *J.*, concurring) ("If the majority now has second thoughts about . . . [*State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 947 (2011)]—as it should . . . then the majority should say so. . . . I continue to believe that our decision in *Kitchens* was manifestly incorrect."); *State* v. *Bellamy*, 323 Conn. 400, 454, 147 A.3d 655 (2016) (*Rogers*, *C. J.*, concurring) ("I agree with the defendant . . . that this court's marked expansion of the doctrine of implied waiver of claims of jury instructional error in . . . *Kitchens* . . . was mistaken and, therefore, I would overrule that decision and return to the much narrower conception of implied waiver that previously governed our jurisprudence in this area"); id., 470 (*Palmer*, *J.*, concurring in the judgment) ("[T]he

Regarding whether Depina's statements were testimonial, it is apparent from the record that Depina perceived that his statements to the police officers could subsequently be used against him. Reciprocally, it is evident that the officers did not interrogate Depina or otherwise question him in any way, behavior that *Crawford* expressly found rendered a person's statements testimonial.

From the record, however, it is abundantly clear that whether or not the court erroneously admitted evidence of this conversation between Depina and the Bridgeport police officers as dual inculpatory statements, there was an abundance of admissible evidence adduced at trial to render this mistake, if any, harmless beyond a reasonable doubt.[8] For example, the jury heard evidence about the defendant's deteriorating financial situation. Specifically, there was evidence that the

court [in *Kitchens*] concluded that, for various reasons of public policy, it is desirable and appropriate to treat such challenges as waived and unreviewable on appeal. . . . Both of these conclusions are indefensible." [Citation omitted.]).

[8] In deciding this case based on harmlessness, we have not concluded that the trial court abused its discretion in admitting Depina's statements to Rasuk and Angelo. The question of whether these statements are testimonial is a very close call, as is the question of whether defense counsel's statement that "[t]his is not a *Crawford* issue" constituted a waiver of the defendant's right to claim a confrontation clause violation under *Crawford*. Additionally, it appears from the record that defense counsel's argument steered the court away from *Crawford*. Under these circumstances, and because the contours of waiver are the subject of a continuing discussion in our Supreme Court; see footnote 7 of this opinion; considerations of judicial efficiency and fundamental fairness warrant assessing this issue on the basis of harmless error analysis.

We note that we are disposing of this claim pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). The defendant here has failed to satisfy the fourth prong of *Golding*, which requires that the state fail to demonstrate the harmlessness of an alleged constitutional violation beyond a reasonable doubt. See id., 240. In *Golding*, the court explained that "[when] the state is able to demonstrate the harmlessness of such alleged violation beyond a reasonable doubt . . . it would be a waste of judicial resources, and a pedantic exercise, to delve deeply into the constitutional merits of a

defendant and her husband were late making payments to creditors, they had state and federal tax liens of nearly $145,000 filed against their home, they could not pay for necessities such as home heating oil, and the defendant's husband's business was failing because of his opioid addiction. This evidence provided a strong motive for the defendant to burn down her house to obtain the insurance proceeds.

Moreover, the jury heard that the defendant contacted her insurance carrier days before the fire to inquire about whether her homeowner's insurance policy was still active. Additionally, Corry testified that "after ruling all of [the] other potential sources of ignition out, that this was an intentionally set fire." Corry also testified that the defendant claimed she had valuable jewelry in her bedroom, but that after an extensive search of the bedroom, he never located the valuable jewelry. From this evidence, the jury could infer that the valuable jewelry was removed from the home prior to the fire.

The state presented the transcript of the defendant's interview with Corry, as well as a recording of Depina's interview with Corry and Depina's deposition testimony. In these exhibits, the defendant and Depina detailed their activities on the morning of the fire. The state then presented cell site location information evidence, which contradicted the times and locations that the defendant and Depina told Corry and the police. The state used this evidence of a false interlocking alibi to establish the existence of a conspiracy between the defendant and Depina. Taken together, the substantial

claim that can appropriately be resolved in accordance with the relevant harmless error analysis." (Citations omitted.) Id., 241–42. Here, given the amount of independent, admissible evidence of the defendant's guilt, we decline to "delve deeply into the constitutional merits"; id. 242; of the defendant's claim, and resolve this issue through harmless error analysis.

amount of admissible evidence supporting the defendant's conviction renders any mistake by the trial court, if any, harmless beyond a reasonable doubt. Accordingly, the defendant's first claim on appeal fails.

II

The defendant's second claim on appeal is that the state's use of cell site location information to convict her violated her rights under article first, § 7, of the constitution of Connecticut.[9] Although the defendant did not raise this claim at trial, she argues that review of the claim is appropriate under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). The state maintains that the record is inadequate for review of this claim, and that if reviewed, the defendant has not shown state action to establish a violation under article first, § 7. We agree with the state.

The following additional facts and procedural history are relevant to the defendant's second claim. On February 4, 2015, the state presented the testimony of Ryan Harger, a representative of Sprint Corporation (Sprint). The defendant and her husband were customers of Sprint. The state, through Harger, introduced the defendant's Sprint phone records (records) from January, 2008. Harger explained that Sprint often receives court orders or subpoenas from law enforcement agencies ordering Sprint to produce phone records. Although Harger stated that Sprint produced the defendant's records pursuant to a subpoena, he did not testify from what agency Sprint received the subpoena.

The state then called Deputy United States Marshal James Masterson. Masterson testified that he had

[9] Article first, § 7, of the Connecticut constitution provides: "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."

reviewed the records from the morning of the fire and analyzed the defendant's movements on that morning. Masterson explained that, even though the defendant stated that she left her house at approximately 9 a.m. on the morning of the fire, she made a phone call to Depina at 9:36:14 a.m. that began and ended on the same cell towers as the defendant's previous calls from home. Additionally, the defendant received a phone call from her security system with ADT Security Services, Inc., at 9:39:47 a.m., which also began and ended on the same towers as the defendant's previous calls from home. It was not until the defendant received a phone call at approximately 9:50 a.m. that her phone accessed a cell tower other than the ones typically accessed when the defendant made a call from home.

Moreover, Masterson opined that, by 9:56 a.m. on the morning of the fire, the defendant's phone had not arrived in Ansonia or connected to any cell tower in Ansonia. He testified that at 10:45 a.m., the defendant received a phone call that connected to a cell tower near Depina's home. Masterson explained that, at 10:52 a.m., the defendant received a phone call that connected to a cell tower near Griffin Hospital. At about 11:22 a.m., the defendant's phone accessed a cell tower typically accessed from the defendant's home.

The defendant argues that the court improperly admitted the cell site location information evidence that the state presented because admission of the cell site location information violated her rights under article first, § 7, of the constitution of Connecticut. We disagree.

"[I]f an [evidentiary] impropriety is of constitutional proportions, the state bears the burden of proving that the error was harmless beyond a reasonable doubt. . . . We recognize, of course, that a violation of constitutional magnitude may be established even though

there has not been a complete abridgement or deprivation of the right. A constitutional violation may result, therefore, when a constitutional right has been impermissibly burdened or impaired by virtue of state action that unnecessarily chills or penalizes the free exercise of the right." (Citation omitted; internal quotation marks omitted.) *State* v. *Johnson*, 171 Conn. App. 328, 348, 157 A.3d 120, cert. denied, 325 Conn. 911, 158 A.3d 322 (2017).

Key to our analysis is whether the action under review is state action, which includes action directly by the state as well as action by a private actor at the behest of the state. See, e.g., *State* v. *Colvin*, 241 Conn. 650, 657, 697 A.2d 1122 (1997) ("[t]he initial determination is, therefore, whether the challenged evidence is in some sense the product of illegal government activity" [internal quotation marks omitted]); see also *State* v. *Betts*, 286 Conn. 88, 96, 942 A.2d 364 (2008) ("[a] private citizen's actions may be considered state action, however, if he acts as an instrument or agent of the state" [internal quotation marks omitted]). Thus, in order for the defendant to prevail on this issue, she must, as a preliminary matter, point to trial evidence that the state or an entity acting on behalf of the state obtained the phone records from Sprint. The trial record, however, is silent in that regard.

"The defendant bears the responsibility for providing a record that is adequate for review of his claim of constitutional error. If the facts revealed by the record are insufficient, unclear or ambiguous as to whether a constitutional violation has occurred, we will not attempt to supplement or reconstruct the record, or to make factual determinations, in order to decide the defendant's claim. . . . The defendant also bears the responsibility of demonstrating that his claim is indeed a violation of a fundamental constitutional right. Patently nonconstitutional claims that are unpreserved at

trial do not warrant special consideration simply because they bear a constitutional label." (Citations omitted.) *State* v. *Golding*, supra, 213 Conn. 240.

On the basis of our review of the record, it is unclear from whom Sprint received the subpoena to produce the defendant's phone records. The defendant did not produce any evidence establishing the source of the subpoena that ordered Sprint to produce her phone records. Because the defendant cannot establish that the production of the records was the result of state action, the defendant cannot, therefore, establish that the claimed violation of article first, § 7, of the constitution of Connecticut resulted from state action. We conclude that the record is inadequate to review, and, accordingly, the defendant's second claim on appeal fails.

The judgment is affirmed.

In this opinion the other judges concurred.

MARVIN SALMON *v.* COMMISSIONER OF CORRECTION
(AC 39095)

DiPentima, C. J., and Prescott and Mihalakos, Js.

Syllabus

The petitioner, who had been convicted of the crime of murder in connection with the shooting death of the victim, sought a writ of habeas corpus, claiming that his pretrial counsel, C, had provided ineffective assistance by failing to advise him during pretrial plea negotiations of the existence of H, a second eyewitness to the murder, and that he was prejudiced by counsel's deficient performance. After the murder, H and another eyewitness, O, provided statements to the police and identified the petitioner in a photographic array as the individual who had shot the victim. A probable cause hearing was held at which the state presented testimony from a number of witnesses, including O, but H did not testify, and the state did not elicit any testimony regarding him, nor was he mentioned by any of the testifying witnesses. C also did not mention H in a letter that he wrote to the petitioner summarizing the events of the

hearing. Thereafter, the petitioner was extended two plea offers during a pretrial conference. C wrote the petitioner a letter in which he summarized the offers and stated that O was the only eyewitness available to the state and that there were serious questions as to his reliability and credibility. The petitioner subsequently rejected the plea offers and, following a jury trial during which he was represented by C's law partner, N, the petitioner was convicted of murder. At his habeas trial, the petitioner testified that C never advised him of the existence of H during pretrial plea negotiations. The habeas court rendered judgment denying the habeas petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The habeas court abused its discretion in denying the petition for certification to appeal; the resolution of the petitioner's underlying claim involved issues that were debatable among jurists of reason and could have been resolved by a court in a different manner, as the habeas court made a clearly erroneous factual finding relating to the issue of whether C had rendered deficient performance by failing to advise the petitioner of H's existence during pretrial plea negotiations.
2. The habeas court improperly concluded that the petitioner failed to establish that C had provided ineffective assistance of counsel: that court's factual finding that C must have informed the petitioner of H's existence during plea negotiations was clearly erroneous, as there was no evidence in the record to support that finding and, despite the language of C's second letter to the petitioner, the habeas court relied on speculative testimony of N and the prosecutor, who were not involved in the case during pretrial plea negotiations and testified at the habeas trial only as to their respective general practices; moreover, because it was unclear whether, in the absence of the habeas court's erroneous factual finding, it would have credited the petitioner's testimony that C never told him about H, and because questions of credibility are for the fact finder to decide, the case had to be remanded for a new trial on that issue.
3. The petitioner's claim that he was prejudiced by C's allegedly deficient performance during plea negotiations was not reviewable; the habeas court, which found that the petitioner had failed to show deficient performance by C, did not address prejudice or make any factual findings as to whether the petitioner had demonstrated a reasonable probability that he would have accepted one of the plea offers had C afforded him effective assistance of counsel, and because the question of prejudice presents a mixed question of fact and law, this court was unable to determine whether the petitioner was prejudiced by C's alleged deficient performance without the habeas court's complete factual findings concerning prejudice.

Argued September 7—officially released December 19, 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, *Fuger*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Reversed; new trial.*

Naomi T. Fetterman, for the appellant (petitioner).

Lisa A. Riggione, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Angela R. Macchiarulo*, senior assistant state's attorney, for the appellee (respondent).

Opinion

MIHALAKOS, J. The petitioner, Marvin Salmon, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court (1) abused its discretion in denying his petition for certification to appeal and (2) improperly concluded that he failed to establish the ineffectiveness of his pretrial counsel. For the reasons set forth herein, we agree with the petitioner, and conclude that the habeas court abused its discretion in denying the petition for certification to appeal. We further conclude that the habeas court made a clearly erroneous factual finding that underlies its determination that pretrial counsel did not render deficient performance. We also determine that the habeas court did not make a determination regarding whether any assumed deficient performance prejudiced the petitioner. Accordingly, we reverse the judgment of the habeas court and remand the case for a new trial.

The record discloses the following facts and procedural history. Our prior decision on the petitioner's direct appeal in *State* v. *Salmon*, 66 Conn. App. 131, 133–34, 783 A.2d 1193 (2001), cert. denied, 259 Conn. 908, 789 A.2d 997 (2002), set forth the following facts:

"During the afternoon of October 22, 1994, the victim, Claven Hunt, stood at the end of the driveway at 90 Irving Street [in Hartford] talking to another resident of the building. A red Subaru drove up to the victim, and a black man with his hair in dreadlocks exited from the vehicle. The man fired a .38 caliber handgun at the victim. The victim then ran and his assailant pursued him. The assailant fired several more bullets; two bullets hit the victim in the back and three bullets hit a drain spout and the doors to a garage. Soon thereafter, the police found the unconscious victim, who was later pronounced dead at Saint Francis Hospital and Medical Center in Hartford.

"The red Subaru left the area of the shooting, and an off-duty Hartford police officer, Matt Rivera, noticed it moving quickly through traffic on Blue Hills Avenue. Rivera heard a dispatch that a vehicle matching the description of the red Subaru had been involved in a shooting. Although Rivera did not pursue the vehicle because he was off duty and driving his own car, he informed the dispatcher that while he was driving on Blue Hills Avenue he had noticed a vehicle matching the description of the red Subaru. In addition, Rivera provided the license plate number of the vehicle. The police determined that the vehicle belonged to the [petitioner's] mother and found it parked at the [petitioner's] mother's address.

"The Hartford police picked up the vehicle and brought it to the evidence garage. The police dusted the car for latent fingerprints and found a fingerprint that matched that of the [petitioner]. In addition, the police determined that there were traces of gunshot residue from a .38 caliber bullet in the car.

"Subsequently, Detective Keith Knight handled the investigation of the shooting. During the course of the investigation, the [victim's] family provided Knight with

two witnesses to interview, Theodore Owens and Duane Holmes. On the basis of [a photographic identification made by Owens on May 2, 1996], Knight was able to obtain an arrest warrant for the [petitioner]."

During a pretrial conference on November 20, 1998, the petitioner was extended two plea offers. On December 11, 1998, the petitioner formally rejected both plea offers. In February, 2000, following a jury trial, the petitioner was convicted of murder in violation of General Statutes § 53a-54a (a), as enhanced pursuant to General Statutes § 53-202k for using a firearm. Thereafter, the court sentenced the petitioner to a total effective term of forty-five years of incarceration. This court affirmed the petitioner's conviction on direct appeal. See id., 131.

Thirteen years later, on July 17, 2013, the self-represented petitioner filed a petition for writ of habeas corpus. On November 2, 2015, the petitioner, represented by appointed counsel, filed the amended petition operative in this appeal. In the sole count of the amended petition, the petitioner alleged that his constitutional right to the effective assistance of counsel was violated because his pretrial counsel, Attorney Donald Cardwell, failed to inform him of Holmes, the second eyewitness, during plea negotiations.[1] Specifically, the petitioner alleged that Attorney Donald Cardwell's performance was deficient, in that he: "[1] failed to meaningfully explain a plea offer to the petitioner; [2] failed and neglected to properly and adequately advise the petitioner of the desirability of a plea offer; [3] failed to adequately inform and advise the petitioner with regards to the relative strength of the state's case and the possibility of success at trial; and [4] affirmatively misadvised the petitioner regarding the desirability of

[1] In the amended petition, the petitioner also initially alleged the ineffective assistance of his trial counsel, Attorney Nicholas Cardwell. That count, however, was withdrawn on March 3, 2016.

proceeding to trial." The petitioner further claimed that "but for [his] counsel's deficient performance, the result of [his] criminal proceedings would have been different and more favorable to [him]."

The habeas trial was held on March 3, 2016. Following the trial, the habeas court, *Fuger*, *J.*, denied the habeas petition in an oral decision in which it concluded that the petitioner failed to establish that Attorney Donald Cardwell had provided ineffective assistance of counsel.[2] Thereafter, the petitioner, pursuant to General Statutes § 52-470, petitioned the habeas court for certification to appeal the following issue: "Whether the petitioner's constitutional right to the effective assistance of counsel was violated." The habeas court denied the petition for certification to appeal, and this appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The petitioner claims that the habeas court abused its discretion in denying his petition for certification to appeal from the denial of his amended petition for a writ of habeas corpus with respect to his claim of ineffective assistance of counsel. We agree with the petitioner.

"Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn.

[2] Although the court discussed the performance and prejudice prongs of *Strickland* v. *Washington*, 466 U.S. 668, 686–87, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), in its statement of law, it never expressly addressed either prong in its analysis of the petitioner's claim. Upon our review of the habeas trial transcript, we conclude that the court, in finding that that the petitioner had been "properly advised" by Attorney Donald Cardwell during plea negotiations, implicitly held that the petitioner failed to establish that Attorney Donald Cardwell rendered deficient performance. We are unable to conclude, however, that the court made an implicit finding as to prejudice.

178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, [the petitioner] must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . . To prove that the denial of his petition for certification to appeal constituted an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification." (Citations omitted; internal quotation marks omitted.) *Sanders* v. *Commissioner of Correction*, 169 Conn. App. 813, 821–22, 153 A.3d 8 (2016), cert. denied, 325 Conn. 904, 156 A.3d 536 (2017).

As discussed subsequently in part II A of this opinion, we conclude that the habeas court made a clearly erroneous factual finding relating to the issue of whether Attorney Donald Cardwell rendered deficient performance by failing to advise the petitioner of Holmes' existence during pretrial plea negotiations. Because the resolution of the petitioner's underlying claim involves

issues that are debatable among jurists of reason and could have been resolved by a court in a different manner, we conclude that the habeas court abused its discretion in denying his petition for certification to appeal from the denial of his amended petition for a writ of habeas corpus.

II

We now turn to the petitioner's substantive claim that the habeas court improperly concluded that he had failed to establish the ineffectiveness of his pretrial counsel. Specifically, he argues that (1) Attorney Donald Cardwell rendered deficient performance in that he failed to advise the petitioner of Holmes' existence during pretrial plea negotiations, and (2) he was prejudiced by Cardwell's deficient performance.

As a preliminary matter, we set forth our standard of review and the legal principles governing ineffective assistance of counsel claims. "[I]t is well established that [a] criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. *Strickland* v. *Washington*, [466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution." (Internal quotation marks omitted.) *Thomas* v. *Commissioner of Correction*, 141 Conn. App. 465, 471, 62 A.3d 534, cert. denied, 308 Conn. 939, 66 A.3d 881 (2013). "The United States Supreme Court, long before its recent decisions in *Missouri* v. *Frye*, 566 U.S. 134, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012), and *Lafler* v. *Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012), recognized that the two part test articulated in *Strickland* . . . applies to ineffective assistance of counsel claims arising out of the plea negotiation stage. *Hill* v. *Lockhart*, 474 U.S. 52, 57, 106 S. Ct. 366, 88 L.

Ed. 2d 203 (1985) . . . .'' (Citation omitted; internal quotation marks omitted.) *Barlow* v. *Commissioner of Correction*, 150 Conn. App. 781, 792, 93 A.3d 165 (2014); see also *Duncan* v. *Commissioner of Correction*, 171 Conn. App. 635, 647, 157 A.3d 1169 (''[i]t is well established that the failure to adequately advise a client regarding a plea offer from the state can form the basis for a sixth amendment claim of ineffective assistance of counsel''), cert. denied, 325 Conn. 923, 159 A.3d 1172 (2017).

''The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . Historical facts constitute a recital of external events and the credibility of their narrators. . . . Accordingly, the habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review. . . .

''As enunciated in *Strickland* v. *Washington*, supra, 466 U.S. 687, this court has stated: It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . To satisfy the prejudice prong, [the petitioner] must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . The [petitioner's] claim will succeed only if both

prongs are satisfied." (Internal quotation marks omitted.) *Thomas* v. *Commissioner of Correction*, supra, 141 Conn. App. 470–71. The court, however, "can find against a petitioner . . . on either the performance prong or the prejudice prong, whichever is easier." Id., 471.

A

The petitioner first claims that the habeas court improperly concluded that Attorney Donald Cardwell's performance was not deficient. Specifically, he argues that the "record is bereft of support for [the court's] finding" that Attorney Donald Cardwell informed him of Holmes' existence during pretrial plea negotiations. We agree that the court's factual finding was clearly erroneous.

The following additional facts are relevant to our analysis of this claim. On May 2, 1996, Owens gave a statement and identified the petitioner in a photographic array. On the basis of Owens' identification, Detective Knight obtained an arrest warrant for the petitioner on May 28, 1996. On June 11, 1996, Holmes gave a statement and identified the petitioner in a photographic array. A probable cause hearing was conducted on April 22, 1998. At the hearing, the prosecution presented testimony from Detective Knight, Officers Clayton Winslow and Tracey Carter, Owens, Delray Coomes and Gary Rakestrau.[3] Holmes did not testify at the probable cause hearing, the state did not elicit any testimony regarding him, and he was never mentioned by any of the testifying witnesses. On April 24, 1998, Attorney

[3] Rakestrau was an eyewitness to the October 22, 1994 incident. At the probable cause hearing, he testified to hearing gunshots and to seeing a "black gentleman getting inside a red car." Rakestrau, however, did not get a clear view of the suspect and, therefore, was unable to identify the petitioner when he was interviewed by Detective Knight. Attorney Donald Cardwell viewed Rakestrau as a favorable witness for the defense.

Donald Cardwell wrote a letter to the petitioner, summarizing the events of the probable cause hearing: "I am providing you with copies of all the reports and statements given to me by the assistant state's attorney on the morning of the [probable cause] hearing and ask that you review all of these documents carefully as we will have to go over them together when we next meet."

During a pretrial conference on November 20, 1998, the petitioner was extended two plea offers. The court, *Clifford J.*, offered the petitioner twenty-five years for a guilty plea to murder. Alternatively, Assistant State's Attorney Rosita Creamer offered the petitioner thirty years for a guilty plea to manslaughter in the first degree with a firearm. On November 22, 1998, Attorney Donald Cardwell wrote a letter to the petitioner summarizing the events of the pretrial conference: "I gave our view of the evidence and submitted copies of the photographs of the scene which support our contention that no one could get a clear view of the individual's face from the gas station where [Owens] testified he was standing at the time of this incident. This is important to the defense as *there is only one eyewitness available to the state* and there are serious questions as to his reliability and credibility.

"The state on the other hand has tied in your mother's vehicle and, in addition, has evidence of your thumb print being found in the car as well as gun powder residue. While this does not place you in the automobile at the time of the shooting it allows the state to argue that since you were in the automobile at some time and since gun powder residue was found in the automobile, *the witness who identifies you* can be believed. This becomes the critical question for the jury.

"Judge Clifford, who is the presiding Judge, agreed with me that the case is defensible. At the same time, we all know from experience that a jury is absolutely

unpredictable so that every trial involves a certain amount of risk.

"If the state stays with the charge of murder Judge Clifford will give you the absolute bottom of the range which is 25 years. You should keep in mind that a conviction would most likely result in a sentence of around 50 years so that the offer is approximately [one half] of your exposure. In response to my question as to whether the state would change the charge from murder to manslaughter, the prosecutor said she would do so but that she would then add a charge of possession of a weapon and want 25 years on the manslaughter charge and 5 years on the weapon for a total effective sentence of 30 years. I see absolutely no gain to you from this change in charge as you would most likely do 85 [percent] of your time under either charge and 85 [percent] of 25 years is obviously preferable to 85 [percent] of 30 years.

"I plan to meet with you prior to . . . your next court date at which time we will discuss the contents of this letter carefully and fully. At the same time I wanted you to have this information in advance so that you would have an opportunity to consider it before our next meeting. Please understand that I am not making any recommendation at this time. I am simply communicating to you what was discussed at the pretrial conference." (Emphasis added.)

On December 8, 1998, Attorney Donald Cardwell met with the petitioner and reviewed the contents of the November 22, 1998 letter "to make further sure that he understood" the available plea offers. On December 11, 1998, the petitioner formally rejected both plea offers. Attorney Donald Cardwell's brother and law partner, Attorney Nicholas Cardwell, represented the petitioner at his criminal trial. On January 20, 2000, during voir dire, the state filed its witness list, disclosing both

Owens and Holmes. On January 25, 2000, the petitioner filed a motion for disclosure and production, which, in addition to general discovery requests, also sought information concerning Owens and Holmes. Attorney Donald Cardwell passed away in 2002.

At his habeas trial, the petitioner testified that in November, 1998, Attorney Donald Cardwell informed him of the two available plea offers. The petitioner further testified that they discussed the offers as well as his possible sentence exposure if he continued to trial and was found guilty. The petitioner explained that he rejected the plea offers because "[Donald] Cardwell advised [him] that the state didn't have a strong case against [him] . . . [and] [t]here was only one eyewitness, and he [wasn't] credible . . . ." The petitioner testified that he never was advised of the existence of Holmes during plea negotiations, and that he could only recall Cardwell discussing three witnesses: Owens, Rakestrau and Donna McNair.[4] The petitioner averred that he did not become aware of Holmes' statement and identification until January, 2000, after Attorney Nicholas Cardwell had taken over his representation.

Attorney Nicholas Cardwell also testified at the petitioner's habeas trial. Because the underlying criminal matter concluded in 2000, he could not recall many specifics of his firm's representation of the petitioner and had no recollection as to what was in the petitioner's file when he took over his representation. Furthermore, he stated that he could not recall providing the petitioner with Holmes' statement in January, 2000. Cardwell spoke generally regarding his firm's criminal trial practices and policies, including how he would review

[4] McNair was a witness to the October 22, 1994 incident. McNair stated that she heard four to five gunshots, after which she saw two black males in a red car traveling at a high rate of speed on Irving Street. She provided a license plate number that was only one digit different from that of the red Subaru.

the state's file and make copies pursuant to the state's attorney's office "open file policy." He also testified that it was his practice to review all of the reports, police statements, witness statements and anything else that could be relevant to the trial. Cardwell further testified that he could not "imagine trying a murder case without reviewing all the evidence and giving the defendant a complete understanding of the risks, and the strengths, the weaknesses so that the defendant could make an intelligent decision; and also what the likelihood would be if you lost in terms of a sentence."

Assistant State's Attorney John Fahey, the prosecutor in the petitioner's criminal trial, testified regarding his office's discovery practices and procedures. Fahey stated that the Hartford Police Department sent all documents related to their investigation to the prosecutor's office. Fahey described Creamer, the assistant state's attorney handling the matter during pretrial, as "the most thorough attorney in that office at that point in terms of securing everything possible . . . ." He attested that Holmes' statement, which was taken on June 11, 1996, would have been disclosed to defense counsel "the minute it came in." Fahey further stated that there were no surprise witness statements disclosed on the eve of trial.

Attorney Kenneth Simon, a qualified expert in criminal defense matters in state court, also testified at the habeas trial as the petitioner's expert. Attorney Simon testified as to the standard of care with respect to defending criminal cases. He also testified regarding the "open file policy" and how discovery was handled in the judicial district of Hartford at the time of the petitioner's criminal trial. Simon stated that he had reviewed the arrest warrant, search warrants, criminalistics reports, police reports, witness statements and the various letters from Attorney Donald Cardwell to the petitioner prior to testifying. Simon then opined as

to the adequacy of the information conveyed by Cardwell to the petitioner in the November 22, 1998 letter. He testified that "in [his] view there was information that [he] was given that is not referenced in that letter that looks like a fairly important piece of evidence." Simon, however, also acknowledged that he was looking at the letter in a "vacuum" and could not be sure without seeing what Attorney Donald Cardwell had in his file at the time.

The habeas court acknowledged the evidentiary issues that this case presented, given that Attorney Donald Cardwell had passed away, stating that "[t]he only other person who can testify as to what . . . may have transpired between the two men would be [the petitioner], and of course, he testified in a somewhat inconsistent manner." The court then concluded: "[I]t's clear to me, *based upon the testimony of* [*Attorney*] *Nicholas Cardwell of how he conducted his practice being a partner with* [*Attorney*] *Donald Cardwell*, when I look at [the November 22, 1998 letter], I do not believe that to be the entirety of the advice offered to [the petitioner] by Attorney Donald Cardwell. I believe that [Attorney] Donald Cardwell amplified upon that letter. Consequently, this court concludes that [the petitioner] was, in fact, properly advised. The plea offer was clearly explained. [The petitioner] was eminently aware of the relative strength of the state's case, and this court is convinced that [the petitioner] . . . had been notified by his lawyers of the risk of taking the case to trial." (Emphasis added.)

We next set forth the legal principles that govern ineffective assistance of counsel claims in the context of plea negotiations. "Pretrial negotiations implicating the decision of whether to plead guilty is a critical stage in criminal proceedings . . . and plea bargaining is an integral component of the criminal justice system and essential to the expeditious and fair administration of

our courts. . . . For counsel to provide effective assistance, he must adequately investigate each case to determine relevant facts. . . . This court has held that [because] a defendant often relies heavily on counsel's independent evaluation of the charges and defenses, the right to effective assistance of counsel includes an adequate investigation of the case to determine facts relevant to the merits or to the punishment in the event of conviction." (Internal quotation marks omitted.) *Mahon* v. *Commissioner of Correction*, 157 Conn. App. 246, 253, 116 A.3d 331, cert. denied, 317 Conn. 917, 117 A.3d 855 (2015).

"In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. . . . Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." (Internal quotation marks omitted.) *Helmedach* v. *Commissioner of Correction*, 168 Conn. App. 439, 453, 148 A.3d 1105, cert. granted, 323 Conn. 941, 151 A.3d 845 (2016).

"[C]ounsel performs effectively and reasonably when he . . . provides a [defendant] with adequate information and advice upon which the [defendant] can make

an informed decision as to whether to accept the state's plea offer. . . . We are mindful that [c]ounsel's conclusion as to how best to advise a client in order to avoid, on the one hand, failing to give advice and, on the other, coercing a plea enjoys a wide range of reasonableness . . . . Accordingly, [t]he need for recommendation depends on countless factors, such as the defendant's chances of prevailing at trial, the likely disparity in sentencing after a full trial compared to the guilty plea . . . whether [the] defendant has maintained his innocence, and the defendant's comprehension of the various factors that will inform [his] plea decision." (Citations omitted; internal quotation marks omitted.) *Sanders* v. *Commissioner of Correction*, supra, 169 Conn. App. 828.

With the foregoing facts and legal principles in mind, we now review the habeas court's conclusion that Attorney Donald Cardwell did not render deficient performance. The record indicates that Holmes gave his statement to Detective Knight on June 11, 1996, twenty-three months prior to the probable cause hearing, and twenty-nine months prior to the pretrial conference at which the plea offers were made. Attorney Donald Cardwell, however, never referenced Holmes in his April and November, 1998 letters to the petitioner. Importantly, the November 22, 1998 letter, which was written while the two plea offers were pending, specifically states that "there is only one eyewitness available to the state and there are serious questions as to his reliability and credibility." Despite the language of this letter, the habeas court relied on the speculative testimony of Attorneys Nicholas Cardwell and Fahey, who were not involved in the case during pretrial plea negotiations and could testify only as to their respective general practices. Because there is no evidence in the record to support the finding that Attorney Donald Cardwell informed the petitioner of Holmes' existence during plea negotiations and the habeas court relied on

the speculative testimony of Attorneys Nicholas Cardwell and Fahey, we conclude that this factual finding was clearly erroneous. See *Rosa* v. *Commissioner of Correction*, 171 Conn. App. 428, 434, 157 A.3d 654 ("[a] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" [internal quotation marks omitted]), cert. denied, 326 Conn. 905, 164 A.3d 680 (2017); see also *State* v. *Smith*, 40 Conn. App. 789, 801, 673 A.2d 1149 ("[i]f the trial court's conclusions or findings of fact rest on speculation rather than on sufficient evidence, they are clearly erroneous"), cert. denied, 237 Conn. 915, 675 A.2d 886, cert. denied, 519 U.S. 873, 117 S. Ct. 191, 136 L. Ed. 2d 128 (1996).

Although we conclude that the court's affirmative finding of fact that Attorney Donald Cardwell must have told the petitioner about Holmes' statement in November, 1998, was clearly erroneous, that error does not necessarily compel a conclusion that the petitioner met his burden of persuasion that Attorney Donald Cardwell never informed him about the existence of Holmes as a witness.[5] Although the petitioner testified that Attorney Donald Cardwell never told him about Holmes, it is unclear whether, in the absence of the habeas court's erroneous factual finding, it would have credited the petitioner's testimony that he was never told about Holmes. Because questions of credibility are for the

[5] In similar contexts, our courts have been mindful that a lack of proof as to fact "A" does not establish the existence of fact "B." See *Wyszomierski* v. *Siracusa*, 290 Conn. 225, 245 n.19, 963 A.2d 943 (2009) ("difference between the failure to draw a particular conclusion and the embrace of an *opposite* conclusion"[emphasis added]); *DiVito* v. *DiVito*, 77 Conn. App. 124, 138–39, 822 A.2d 294 (fact finder may not predicate finding of fact simply on disbelief of evidence to contrary), cert. denied, 264 Conn. 921, 828 A.2d 617 (2003).

finder of fact, we conclude that the case must be remanded for a new trial on this issue.

B

We now turn to the prejudice prong of *Strickland*. The petitioner claims that he was prejudiced by Attorney Donald Cardwell's deficient performance because he would have accepted one of the available plea offers had he been properly advised during pretrial plea negotiations. At oral argument before this court, the petitioner's counsel argued that habeas court's oral decision addressed only the performance prong and stopped short of addressing prejudice. We agree and, accordingly, do not address the prejudice prong of *Strickland* on appeal because the habeas court did not address prejudice as it relates to Attorney Donald Cardwell's allegedly deficient performance during plea negotiations.

As we previously stated, *Strickland* requires that a petitioner prove both deficient performance and resulting prejudice, and thus a court can find against a petitioner on either ground. See *Thomas* v. *Commissioner of Correction*, supra, 141 Conn. App. 471. In the present case, the habeas court concluded that the petitioner had failed to satisfy the performance prong of *Strickland*, and, therefore, it did not need to determine whether the petitioner also had failed to satisfy the prejudice prong. See id.; see also *Elsey* v. *Commissioner of Correction*, 126 Conn. App. 144, 162, 10 A.3d 578 ("[b]ecause both prongs . . . [of the *Strickland* test] must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong" [internal quotation marks omitted]), cert. denied, 300 Conn. 922, 14 A.3d 1007 (2011).

We note that the habeas court made certain factual findings that tend to indicate that the petitioner could

have accepted a plea offer prior to or during trial.[6] The habeas court, however, did not make any findings as to whether the petitioner had demonstrated "a reasonable probability [that he] would have accepted the earlier plea offer had [he] been afforded effective assistance of counsel." (Internal quotation marks omitted.) *Mahon* v. *Commissioner of* Correction, supra, 157 Conn. App. 253, quoting *Missouri* v. *Frye*, supra, 566 U.S. 147; see also *Ebron* v. *Commissioner of Correction*, 307 Conn. 342, 357, 53 A.3d 983 (2012) (to show prejudice in lapsed plea case, petitioner must establish: "[1] it is reasonably probable that, if not for counsel's deficient performance, the petitioner would have accepted the plea

[6] The petitioner testified that he was not aware that the plea offers remained open after he had rejected them. The petitioner testified that after receiving Holmes' statement he told Attorney Nicholas Cardwell that he wanted to take the plea offer, but Cardwell told him that the offer had expired and that his only choice was to proceed with the trial. The petitioner further testified that he was not aware that he could negotiate plea offers during the trial. Although the petitioner professed his innocence throughout the underlying criminal matter and the habeas trial, he testified that he would have pleaded guilty because he had seen a lot of innocent people go to trial and be found guilty. The court, however, heard the petitioner's testimony to that effect and did not credit it.

The petitioner's testimony was contradicted by the testimony of both Attorneys Nicholas Cardwell and Fahey. Attorney Nicholas Cardwell testified that he could not recall giving the petitioner Holmes' statement during voir dire in January, 2000. He also testified that it was the petitioner's decision to go to trial. He could not recall the petitioner ever "express[ing] any interest in [him] approaching the state with any plea negotiations . . . either prior to or during the course of the trial." Cardwell testified that if the petitioner had told him that he wanted to plead guilty, he would have taken that information to Fahey and that given his firm's practice and the "murder blitz" that was taking place in Hartford at the time, he could not imagine telling the petitioner that the offer had expired and that the state was not willing to make another offer.

Fahey testified that although the state's plea offers were rejected and withdrawn, he extended Attorney Creamer's offer to Attorney Nicholas Cardwell on the eve of the trial, subject to the approval of Judge Clifford. Fahey further testified that he likely kept this offer open throughout trial given that his office was trying "murder case after murder case after murder case," and his belief that the jury would not find the petitioner guilty. Specifically, Fahey described the petitioner's case as one of the weakest cases of his career.

offer, and [2] the trial judge would have conditionally accepted the plea agreement if it had been presented to the court"), cert. denied sub nom. *Arnone* v. *Ebron*, 569 U.S. 913, 133 S. Ct. 1726, 185 L. Ed. 2d 802 (2013). Because the question of prejudice presents a mixed question of fact and law; *Thomas* v. *Commissioner of Correction*, supra, 141 Conn. App. 470; we cannot determine whether the petitioner was prejudiced by Attorney Donald Cardwell's alleged deficient performance without the habeas court's complete factual findings concerning prejudice.

In sum, we conclude that the habeas court abused its discretion when it denied the petitioner's petition for certification to appeal because the resolution of the petitioner's underlying claim involves issues that are debatable among jurists of reason and a court could resolve the issues in a different manner. We further conclude that the habeas court made an erroneous factual finding underlying its conclusion that Attorney Donald Cardwell did not render deficient performance during pretrial plea negotiations. We therefore remand the case to the habeas court for a new trial.[7]

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

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JACQUI SMITH
(AC 38832)

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

Syllabus

The defendant, who had been on probation in connection with his conviction of certain drug related offenses, appealed to this court from the judgment

[7] We note that a sua sponte motion for articulation, pursuant to Practice Book § 60-5, is unavailable as Judge Fuger retired from the bench in January, 2017.

of the trial court revoking his probation and imposing a sentence of five years incarceration. The defendant was arraigned on a violation of probation charge after the police had observed him driving a motor vehicle while his driver's license was under suspension in violation of the applicable statute (§ 14-215 [a]). Thereafter, the defendant moved to dismiss the probation violation charge on the ground that a hearing did not occur within 120 days of his arraignment in violation of the statute (§ 53a-32 [c]) pertaining to violation of probation, which the trial court denied. Subsequently, the court found, by a preponderance of the evidence, that the defendant had wilfully violated the terms and condition of his probation, and that the beneficial aspects and purposes of probation were no longer being served. In addition to finding that the defendant had violated his probation by violating § 14-215 (a), the court also found that he had violated certain other conditions of his probation regarding reporting his whereabouts to his probation officer. *Held*:

1. The defendant could not prevail on his claim that, pursuant to § 53a-32 (c), the trial court improperly denied his motion to dismiss the violation of probation charge because the plain language of § 53a-32 (c) establishes a mandatory time period, 120 days from the arraignment, in which the probation violation hearing must occur, and the state failed to establish good cause for extending that time period; this court previously has determined that the 120 day limitation of § 53a-32 (c) is advisory and not jurisdictional in nature, as neither the text of § 53a-32 (c) nor the legislative history concerning the addition of the 120 day language to the statute indicated that that time period implicated the subject matter jurisdiction of the trial court, our Supreme Court also has concluded that the 120 day time limitation was a guideline that was advisory, and not mandatory, on the trial court, and this court was not at liberty to disregard the decisions from our Supreme Court or the decisions from another panel of this court.
2. The evidence was insufficient to prove that the defendant had operated a motor vehicle while his driver's license was under suspension in violation of § 14-215 (a), as the state did not produce any evidence that the Department of Motor Vehicles had mailed a notice of suspension to the defendant's last known address, which is a necessary element for a violation of that statute; moreover, because the trial court expressly relied on the violation of § 14-215 (a) in sentencing the defendant to five years incarceration, the defendant was entitled to a new sentencing hearing.

Argued October 11—officially released December 19, 2017

Procedural History

Information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Fairfield, where the court, *Devlin, J.*, denied

the defendant's motion to dismiss; thereafter, the matter was tried to the court, *Kavanewsky, J.*; judgment revoking the defendant's probation, from which the defendant appealed to this court. *Reversed in part; further proceedings.*

Laila M. G. Haswell, senior assistant public defender, for the appellant (defendant).

Robert J. Scheinblum, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *C. Robert Satti, Jr.*, supervisory assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, C. J. The defendant, Jacqui Smith, appeals from the judgment of the trial court revoking his probation and sentencing him to five years incarceration. The defendant claims that (1) the court improperly denied his motion to dismiss the probation violation charge on the basis that the hearing did not occur within 120 days of his arraignment in violation of General Statutes § 53a-32 (c) and (2) the evidence was insufficient to prove that he had operated a motor vehicle while his driver's license was under suspension in violation of General Statutes § 14-215 (a) and, therefore, he is entitled to a new sentencing hearing. The state counters that, pursuant to *State* v. *Kelley*, 164 Conn. App. 232, 137 A.3d 822 (2016), aff'd, 326 Conn. 731, 167 A.3d 961 (2017), the 120 day time frame of § 53a-32 (c) is directory and, additionally, that the court properly found good cause for the delay. The state concedes, however, that there was insufficient evidence for the court to conclude that the defendant had violated § 14-215 (a), and, therefore, under these facts and circumstances, the defendant is entitled to a new sentencing hearing. We conclude that the court properly determined that the 120 day time period of § 53a-32 (c) is a nonmandatory "guideline." Further, we agree that a

new sentencing hearing is required. Accordingly, we affirm in part and reverse in part the judgment of the trial court.

The following facts and procedural history are necessary for our discussion. The defendant was convicted of drug related offenses in January, 2013, and sentenced to ten years incarceration, execution suspended after three years, and three years of probation. He was released from custody on April 1, 2015, and first reported to his probation officer on April 9, 2015. During this meeting, the probation officer reviewed the conditions of probation with the defendant.

The standard conditions of probation provided, inter alia, that the defendant was not to violate any criminal law of the United States or the state of Connecticut, that he was to report as instructed to the probation officer and that he was to inform the probation officer if he was arrested. The specific conditions of probation required the defendant to complete a mental health evaluation, to complete a substance abuse evaluation and treatment, if necessary, to obtain full-time employment and/or educational/vocational training, to attend one "Project Safe Neighborhood Meeting" within the first three months of probation and not to possess drugs, narcotics or weapons. The defendant signed a form listing the conditions of his probation.

On June 15, 2015, the state charged the defendant with violating his probation. See General Statutes § 53a-32 (a). It alleged that on May 25, 2015, Bridgeport police officers observed the defendant driving a motor vehicle and noticed that the occupants were not wearing seatbelts. After a brief investigation, the officers issued the defendant a misdemeanor summons for operating a motor vehicle while his driver's license was under suspension in violation of § 14-215 (a) and without minimum insurance in violation of General Statutes § 14-213b. The state also claimed that the defendant had

missed four appointments for an integrated mental health and substance abuse assessment. The defendant was arraigned on the violation of probation charge on June 30, 2015.

On December 16, 2015, the defendant moved to dismiss the probation violation charge pursuant to § 53a-32 (c). Specifically, the defendant argued that he had "been held on this charge for more than 120 days in violation of said statute." On December 21, 2015, the court, *Devlin*, *J.*, held a hearing on the defendant's motion. After hearing from the parties, the court ruled as follows: "[A]s I read this statute, it is advisory. This is a statute which advises the court of the legislature's concern. . . . [T]he statute does not provide that the remedy for not having someone adjudicated on their violation of probation case is a dismissal of the charge. It doesn't provide for that. . . . So, I'm going to deny this motion to dismiss."

The next day, the court, *Kavanewsky*, *J.*, conducted a hearing on the probation violation charge. At the conclusion of the adjudicatory phase,[1] the court found the following facts. "The state has established that the defendant violated the terms and conditions of his probation in several different respects, including reporting as the probation officer directed him to, keep the probation officer advised of his general whereabouts, also more specific conditions relating to the defendant obtaining mental health, regarding substance abuse and

[1] "Our Supreme Court has recognized that revocation of probation hearings, pursuant to § 53a-32, are comprised of two distinct phases, each with a distinct purpose. . . . In the evidentiary phase, [a] factual determination by a trial court as to whether a probationer has violated a condition of probation must first be made. . . . In the dispositional phase, [i]f a violation is found, a court must next determine whether probation should be revoked because the beneficial aspects of probation are no longer being served." (Internal quotation marks omitted.) *State* v. *Altajir*, 123 Conn. App. 674, 680–81, 2 A.3d 1024 (2010), aff'd, 303 Conn. 304, 33 A.3d 193 (2012); see also *State* v. *Preston*, 286 Conn. 367, 375–76, 944 A.2d 276 (2008).

regarding attendance at, at least one project safe neighborhood meeting." It further found that the defendant had been advised of these conditions in April, 2015, but essentially "dropped off the radar" in May, 2015.

The court also expressly found, on the basis of the testimony of two police officers, that the defendant had operated a motor vehicle in violation of § 14-215 (a) on May 25, 2015. Accordingly, the court found, by a preponderance of the evidence,[2] that the defendant wilfully had violated the terms and conditions of his probation.

During the dispositional phase, the court determined that the beneficial aspects and purposes of probation were no longer being served. The court then stated: "[The defendant] was previously sentenced to ten years, suspended after three years, with three years' probation. The judgment previously entered is reopened. The sentence is vacated and the defendant is sentenced . . . to a period of five years to serve . . . ." This appeal followed.

On October 4, 2016, the trial court issued a memorandum of decision further explaining the oral decision denying the defendant's motion to dismiss. It concluded that our decision in *State* v. *Kelley*, supra, 164 Conn. App. 232, was dispositive. Specifically, the court noted that in *Kelley*, which had been released after the hearing and oral decision on the defendant's motion to dismiss, we concluded that the 120 day limitation of § 53a-32 (c) is a "goal" and a "guideline," not a jurisdictional requirement. Id., 240. Additional facts will be set forth as necessary.

[2] See *State* v. *Fisher*, 121 Conn. App. 335, 345, 995 A.2d 105 (2010) (state bears burden of proving by fair preponderance of evidence that defendant violated terms of his probation).

I

The defendant first claims that the court improperly denied his motion to dismiss the violation of probation charge. Specifically, he argues that the plain language of § 53a-32 (c) establishes a mandatory time period, 120 days from the arraignment, in which the probation violation hearing must occur. He also contends that the state failed to establish good cause for extending this time period. We are not persuaded.

We begin with our standard of review. "A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . [O]ur review of the trial court's ultimate legal conclusion and resulting [denial] of the motion to dismiss will be de novo. . . . Factual findings underlying the court's decision, however, will not be disturbed unless they are clearly erroneous. . . . The applicable standard of review for the denial of a motion to dismiss, therefore, generally turns on whether the appellant seeks to challenge the legal conclusions of the trial court or its factual determinations." (Internal quotation marks omitted.) *State* v. *Pittman*, 123 Conn. App. 774, 775, 3 A.3d 137, cert. denied, 299 Conn. 914, 10 A.3d 530 (2010); see also *State* v. *Soldi*, 92 Conn. App. 849, 852–53, 887 A.2d 436, cert. denied, 277 Conn. 913, 895 A.2d 792 (2006). The defendant also challenges the court's interpretation of § 53a-32 (c), and we consider this question of law under the plenary standard of review. See, e.g., *State* v. *Smith*, 289 Conn. 598, 608, 960 A.2d 993 (2008).

Section 53a-32 (c) provides: "Upon notification by the probation officer of the arrest of the defendant or upon an arrest by warrant as herein provided, the court shall cause the defendant to be brought before it without unnecessary delay for a hearing on the violation

charges. At such hearing the defendant shall be informed of the manner in which such defendant is alleged to have violated the conditions of such defendant's probation or conditional discharge, shall be advised by the court that such defendant has the right to retain counsel and, if indigent, shall be entitled to the services of the public defender, and shall have the right to cross-examine witnesses and to present evidence in such defendant's own behalf. *Unless good cause is shown, a charge of violation of any of the conditions of probation or conditional discharge shall be disposed of or scheduled for a hearing not later than one hundred twenty days after the defendant is arraigned on such charge.*" (Emphasis added.)

In *State* v. *Kelley*, supra, 164 Conn. App. 239, the defendant claimed, inter alia, that the 2008 amendment to § 53a-32 (c) created a jurisdictional requirement that a probation revocation hearing occur within 120 days of the arraignment, absent good cause. We rejected that argument for two reasons. Id. First, we noted that "[t]he existence of the 'good cause' exception specified in § 53a-32 (c) undermines that contention, as subject matter jurisdiction is a prerequisite to adjudication that 'cannot be waived by anyone, including [the] court.' . . . The trial court's ability to waive the 120 day limitation for good cause cannot be reconciled with that fundamental precept." (Citation omitted.) Id., 239–40.

Second, we noted the legislative history regarding the 2008 enactment of the 120 day limitation demonstrated that it was intended to be "a goal, rather than a jurisdictional bar." Id., 240. Specifically, Representative Michael P. Lawlor "distinguished the 120 day limitation from 'the speedy trial mechanism,' noting that 'the speedy trial is a right . . . . [T]his [120 day limitation] is not the same thing, this is basically a guideline, [a] goal being articulated by the Legislature imposed on the judge really to bring a case to hearing.' " Id. Lawlor

emphasized that "[t]here would be no right of the defendant to have a hearing in 120 days under [§ 53a-32 (c)] . . . . It is advisory on the part of the Legislature . . . ." (Internal quotation marks omitted.) Id., 241. In response to a question from Representative Arthur J. O'Neil, Lawlor stated that the only penalty for noncompliance with the 120 day limitation would be questions that the trial judge would have to face at a future reconfirmation proceeding before the legislature. Id. Thus, we concluded "[t]hat [the] legislative history further persuades us that the 120 day limitation of § 53a-32 (c) is not jurisdictional in nature." Id. See also *State* v. *Brown*, Superior Court, judicial district of New Britain, Docket No. CR-05-0224052-S (July 5, 2012) (court concluded that 120 day period was not a right, but rather "a guideline," and dismissal not appropriate remedy).

In the present case, the court held the hearing on December 22, 2015, 175 days after the June 30, 2015 arraignment. The court initially concluded, in its oral decision, that the 120 day limitation of § 53a-32 (c) was advisory, and, thus, a violation of that limitation would not require a dismissal. Following the release of our decision in *State* v. *Kelley*, supra, 164 Conn. App. 232, the trial court issued a memorandum of decision on October 4, 2016. In addition to relying on *Kelley* for the denial of the motion to dismiss,[3] the court also found good cause for the delay of the hearing.[4]

[3] Specifically, the court stated: "Although not decided at the time of the hearing, the present motion [to dismiss] is governed by the Appellate Court's decision in *State* v. *Kelley*, [supra], 164 Conn. App. 232 . . . . *Kelley* is persuasive authority for the proposition that a violation of the 120 day limitation does not require dismissal of the [violation of probation] charge. There is nothing in either the wording of § 53a-32 (c) or in its legislative history suggesting that dismissal should be the sanction for a failure to dispose of a [violation of probation] case within 120 days of arrest. To the contrary, the advisory nature of the time limitation is apparent."

[4] With respect to the issue of good cause, the court determined that "the reason that the defendant's [violation of probation] was not adjudicated within 120 days of his arrest was due to an attempt to resolve all of his pending cases in a comprehensive plea agreement. Such an approach is

On appeal, the defendant argues that the plain language of § 53a-32 (c) establishes a mandatory, rather than a directory,[5] rule that the hearing must occur within 120 days, absent good cause. The defendant, in essence, urges us to ignore the judicial gloss placed on § 53a-32 (c) by both this court and our Supreme Court in the *Kelley* decisions. See, e.g., *Williams* v. *Commission on Human Rights & Opportunities*, 257 Conn. 258, 271, 777 A.2d 645 (2001) (Supreme Court considered "well established judicial gloss" from prior cases in interpreting statute). Although the specific issue in *State* v. *Kelley*, supra, 164 Conn. App. 240–41, was whether the 120 day limitation was jurisdictional, we concluded that the 120 day time period was a "goal," a "guideline" and "advisory on the part of the Legislature . . . ." (Internal quotation marks omitted.) Following its granting of certification to appeal, our Supreme Court agreed, noting the legislative history that the 120 time period of § 53a-32 (c) was "advisory on the court" and did not create a right to a hearing within that time period. (Emphasis omitted; internal quotation marks omitted.) *State* v. *Kelley*, 326 Conn. 731, 740, 167 A.3d 961 (2017). We are not at liberty to disregard the decisions from our Supreme Court; see *State* v. *Holley*, 174 Conn. App. 488, 495, 167 A.3d 1000, cert. denied, 327 Conn. 907, 170 A.3d 3 (2017); or the decisions from another panel of this court. *State* v. *Jahsim T.*, 165 Conn. App. 534, 545, 139 A.3d 816 (2016). Accordingly, we conclude that the trial court properly denied the defendant's motion to dismiss.[6]

usually in the defendant's interest and would support a good cause reason to delay resolving the [violation of probation] independently of the other pending cases."

[5] See, e.g., *State* v. *Banks*, 321 Conn. 821, 848, 146 A.3d 1 (2016) (*Rogers, C. J.*, concurring) (mandatory statutes must be strictly complied with while directory statutes provide direction and are of no obligatory force). We also note that the 120 day time frame of § 53a-32 (c) has been determined to be discretionary. *State* v. *Flores*, Superior Court, judicial district of Fairfield, Docket No. CR-00-0161287-T (June 18, 2012).

[6] We also note that the court's finding of good cause offers an alternative path to affirming the denial of the motion to dismiss.

II

The defendant next claims that the evidence was insufficient to prove that he had operated a motor vehicle while his driver's license was under suspension and, therefore, that he is entitled to a new sentencing hearing. Specifically, he argues that the state did not produce any evidence that the Department of Motor Vehicles had mailed a notice of suspension to his last known address, a necessary element for a violation of § 14-215 (a).[7] The state concedes that this element was not met, and that resentencing is required in this case. We agree with the parties.

At the outset, we set forth our standard of review. "The law governing the standard of proof for a violation of probation is well settled. . . . [A]ll that is required in a probation violation proceeding is enough to satisfy the court within its sound judicial discretion that the probationer has not met the terms of his probation. . . . It is also well settled that a trial court may not find a violation of probation unless it finds that the predicate facts underlying the violation have been established by a preponderance of the evidence at the hearing—that is, the evidence must induce a reasonable belief that it is more probable than not that the defendant has violated a condition of his or her probation. . . . In making its factual determination, the trial court is entitled to draw reasonable and logical inferences from the evidence. . . . Accordingly, [a] challenge to the sufficiency of the evidence is based on the court's factual findings. The proper standard of review is

[7] General Statutes § 14-215 (a) provides: "No person to whom an operator's license has been refused, or, except as provided in section 14-215a, whose operator's license or right to operate a motor vehicle in this state has been suspended or revoked, shall operate any motor vehicle during the period of such refusal, suspension or revocation. No person shall operate or cause to be operated any motor vehicle, the registration of which has been refused, suspended or revoked, or any motor vehicle, the right to operate which has been suspended or revoked."

whether the court's findings were clearly erroneous based on the evidence. . . . A court's finding of fact is clearly erroneous and its conclusions drawn from that finding lack sufficient evidence when there is no evidence in the record to support [the court's finding of fact] . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *State* v. *Acker*, 166 Conn. App. 404, 407, 141 A.3d 938 (2016).

In *State* v. *Valinski*, 254 Conn. 107, 130, 756 A.2d 1250 (2000), our Supreme Court stated that a conviction under § 14-215 (a) requires two elements: "(1) that the defendant was operating a motor vehicle; and (2) that the defendant's license or operating privileges were under suspension at the time." (Internal quotation marks omitted.) The second element, "suspension by the commissioner, requires proof of compliance with General Statutes § 14-111 (a).

"[Section] 14-111 (a) does not require personal service of a notice of suspension but provides that a notice forwarded by bulk certified mail to the address of the person registered as owner or operator of any motor vehicle as shown by the records of the commissioner shall be sufficient notice to such person . . . . The statute does not require that a defendant actually receive notice, or that a motor vehicle department receive a return receipt. Constructive notice by the motor vehicle department is all that is required. . . . The requirements of § 14-111 (a) were satisfied by a showing of competent evidence that notice of the suspension was mailed to the defendant at his last known address as indicated by the records of the commissioner." (Citation omitted; internal quotation marks omitted.) *State* v. *Torma*, 21 Conn. App. 496, 501, 574 A.2d 828 (1990).

In the present case, the state failed to produce any evidence that notice of the suspension had been mailed to the defendant at his last known address. The state agrees that the absence of such evidence prevents a finding that the defendant violated § 14-215 (a). The state further agrees that the defendant is entitled to a new sentencing hearing because the court expressly relied on the violation of § 14-215 (a) in sentencing the defendant to five years incarceration. See *State* v. *Johnson*, 75 Conn. App. 643, 660–61, 817 A.2d 708 (2003).

The judgment is reversed only as to the sentence imposed and the case is remanded with direction to resentence the defendant; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

CHASE HOME FINANCE, LLC *v.* DANIEL SCROGGIN (AC 39191)

Keller, Prescott and Bear, Js.

Syllabus

The plaintiff C Co. sought to foreclose a mortgage on certain real property owned by the defendant, S, who was defaulted for failure to plead. The trial court thereafter permitted C Co. to add as a defendant B Co., which held a mortgage on the property securing a line of credit. Thereafter, C Co. filed an amended complaint, to which S filed no objection. Count one of the amended complaint sought foreclosure of C Co.'s mortgage as in the original complaint, counts two through four concerned whether B Co.'s mortgage should be equitably subrogated to C Co.'s mortgage, and counts five and six alleged that S was unjustly and fraudulently enriched as he continued to borrow against B Co.'s line of credit after it was closed, all to C Co.'s loss and detriment. Subsequently, T Co. was substituted as the plaintiff and filed a motion for judgment with respect to counts two through six of the amended complaint and a motion for a judgment of strict foreclosure as to count one. Without seeking leave of the court to open the default entered against him, S filed an answer to the amended complaint and objections to T Co.'s motions. The trial court concluded that S's answer was not operative because he did not

move to open the default entered against him five years previously and had waited until after the motions for judgment were filed in order to file a responsive pleading. The court, inter alia, rendered a judgment of strict foreclosure in favor of T Co. On appeal to this court, S claimed that the trial court improperly granted the motion for judgment of strict foreclosure because that judgment was based on a default for failure to plead in response to the original complaint, but C Co., thereafter, had significantly amended the pleadings and added additional parties, which extinguished the default. *Held* that, under the circumstances of the present case, the trial court improperly failed to set aside the default entered against S and abused its discretion by failing to give effect to his answer to the amended complaint: the filing of an amended complaint following a finding of default effectively extinguishes the default and affords a defendant an opportunity to plead in response only when the amendment reflects a substantial change to the pleadings in effect at the time that the default was entered, and a comparison of the original and amended complaints revealed that the amended complaint filed following the default interjected new material factual allegations and new legal theories in the case, which were not merely technical in nature and concerned whether the line of credit extended by B Co. should be considered as a prior or subsequent lien on the subject property and whether S had engaged in fraudulent conduct or was unjustly enriched; moreover, although a default acts as a judicial admission of the facts set forth in a complaint, the default entered against S with respect to the original complaint could not be interpreted to apply to the materially new claims to which he was exposed as set forth in the amended complaint, which included, but were not limited to, claims of fraud and unjust enrichment on his part, and in light of the changes to T Co.'s case that were reflected in the amended complaint, it was inequitable for the court not to have considered the default entered against S to have been extinguished.

(*One judge dissenting*)

Argued September 12—officially released December 19, 2017

Procedural History

Action to foreclose a mortgage on certain real property owned by the defendant, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the defendant was defaulted for failure to plead; thereafter, Bank of America National Association was cited in as a defendant and the plaintiff filed an amended complaint; subsequently, AJX Mortgage Trust 1 was substituted as the party plaintiff; thereafter, the court, *Aurigemma*, *J.*, granted the substitute

plaintiff's motion for judgment as to counts two through six of the amended complaint; subsequently, the court granted the substitute plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon, from which the named defendant appealed to this court. *Reversed in part; further proceedings.*

Michael J. Habib, with whom, on the brief, was *Thomas P. Willcutts*, for the appellant (named defendant).

Benjamin T. Staskiewicz, for the appellee (substitute plaintiff).

Opinion

KELLER, J. The defendant, Daniel J. Scroggin also known as Daniel F. Scroggin also known as Daniel Scroggin, appeals from the judgment of strict foreclosure rendered by the trial court in favor of the substitute plaintiff, AJX Mortgage Trust 1, a Delaware Trust, Wilmington Savings Fund Society, F.S.B., Trustee.[1] The

[1] In December, 2009, the named plaintiff, Chase Home Finance, LLC (Chase), commenced this action against the defendant, Daniel J. Scroggin also known as Daniel F. Scroggin also known as Daniel Scroggin.

In September, 2010, Chase filed a motion to cite in Bank of America, N.A. (Bank of America), as a third party defendant. The court granted this motion. Subsequently, the plaintiff served Bank of America with an amended complaint that alleged that Bank of America was a lien holder. In March, 2011, Bank of America was defaulted for failure to appear. In January, 2012, Middconn Federal Credit Union sought to be made a party defendant to the action as a postjudgment lis pendens holder. The court granted the request. Later, Middconn Federal Credit Union was defaulted for failure to plead and failure to disclose a defense.

In June, 2012, Chase moved to substitute JPMorgan Chase Bank, N.A., as plaintiff in the action. The court granted the motion. In June, 2014, JPMorgan Chase Bank, N.A., moved to substitute Ventures Trust 2013-I-H-R by MCM Capital Partners, LLC, its Trustee, as plaintiff in the action. The court granted the motion. In July, 2015, Ventures Trust 2013-I-H-R by MCM Capital Partners, LLC, its Trustee, moved to substitute AJX Mortgage Trust I, a Delaware Trust, Wilmington Savings Fund Society, F.S.B., Trustee as plaintiff in the action. The court granted the motion. Ultimately, the court rendered judgment in favor of AJX Mortgage Trust I, a Delaware Trust, Wilmington Savings Fund Society, F.S.B., Trustee and, in this opinion, we will refer to that entity

defendant claims that the court improperly granted the plaintiff's motion for judgment of strict foreclosure because (1) the judgment was based upon a default for failure to plead in response to the original complaint, but the plaintiff's predecessor in this action, thereafter, had significantly amended the pleadings and added additional parties to the action, and (2) by operation of General Statutes § 52-121 (a),[2] he was entitled to, and did, file an answer prior to the hearing on the plaintiff's motion for judgment.[3] We agree with the defendant's first claim. Accordingly, we reverse the judgment of the trial court and remand the case to that court for further proceedings.

The relevant procedural history is as follows. In December, 2009, Chase commenced the present foreclosure action against the defendant. In its original one count complaint, Chase alleged, in relevant part, that on July 20, 2007, the defendant executed a promissory note in the amount of $217,500 in favor of Chase Bank USA, N.A., and that the loan was secured by a mortgage of the premises located at 25 Church Street in Portland, which was owned by and in the possession of the defendant. Chase alleged that the mortgage was recorded on the Portland land records, that the mortgage was assigned to it, and that it was the holder of the note and mortgage. Chase alleged that beginning on July 1, 2009, the defendant failed to make installment payments of principal and interest required by the note and that it had exercised its option to declare the entire

as the plaintiff, and we will refer to Daniel J. Scroggin also known as Daniel F. Scroggin also known as Daniel Scroggin as the defendant.

[2] General Statutes § 52-121 (a) provides: "Any pleading in any civil action may be filed after the expiration of the time fixed by statute or by any rule of court until the court has heard any motion for judgment by default or nonsuit for failure to plead which has been filed in writing with the clerk of the court in which the action is pending."

[3] In light of our resolution of the plaintiff's first claim, which is dispositive of the appeal, we need not reach the merits of the second claim.

unpaid balance of the note (in the amount of $214,939.97) due and payable to it. Chase further alleged that several encumbrances of record were prior in right to its mortgage interest, but that no interests were claimed which were subsequent to its mortgage interest. By way of relief, Chase sought, among other things, a foreclosure of the mortgage and the immediate possession of the subject premises.[4]

On June 7, 2010, Chase filed a motion for default for failure to plead. On that same day, Chase filed a motion for judgment of strict foreclosure and a finding that it was entitled to possession of the subject premises. On June 16, 2010, the clerk of the court granted the motion for default but, at that time, the court did not rule on the motion seeking a judgment of strict foreclosure.

On September 8, 2010, Chase filed a request for leave to amend its complaint and attached a proposed amended complaint. The defendant did not object.[5] The amended complaint consisted of six counts. The first count brought against the defendant sought a foreclosure and generally was consistent with the allegations brought against the defendant in the original one count complaint, except that in the amended complaint, Chase alleged in relevant part: "On the aforementioned piece of property, the following interests are claimed which are subsequent to plaintiff's said mortgage: A mortgage in favor of . . . [Bank of America] in the original amount of $100,000, dated 18, 2007, and recorded February 7, 2007 in . . . the Portland land records."

[4] During parts of 2010, the defendant, with the court's permission, participated in a foreclosure mediation program. In January, 2011, the mediator issued a final report terminating mediation and referring the matter back to the court.

[5] Pursuant to Practice Book § 10-60 (a) (3), if the defendant did not object to the proposed amended complaint within fifteen days, the amendment was deemed to have been filed by the consent of the defendant.

The second, third, and fourth counts of the amended complaint were brought against Bank of America.[6] In these counts, Chase, among other things, raised a claim of equitable subrogation with respect to Bank of America's mortgage interest in the subject property, which, Chase alleged, was recorded prior to its own interest in the property.[7] In count two, Chase alleged in part

[6] On September 8, 2010, the plaintiff filed a motion to cite in Bank of America as a party defendant on the ground that it "[had] an interest in this action subsequent in right to that of the plaintiff, and therefore, is or may be liable to the plaintiff, as set forth in the . . . amended complaint." On September 21, 2010, the court granted the motion. We observe that, in its proposed amended complaint, the plaintiff alleged that Bank of America's mortgage lien was recorded prior to the time that it recorded its interest in the subject property, but that Bank of America's interest should be equitably subrogated to its interest in the property.

[7] We note that these allegations are somewhat confusing. In its brief to this court, the plaintiff indicates that the changes reflected in the amended complaint were because Chase sought equitable subrogation with respect to Bank of America's prior mortgage lien on the subject property. The plaintiff states that the lien was related to an equity line of credit which was paid off at the closing transaction between Chase and the defendant on June 20, 2007, but that Bank of America never released its lien and thereafter continued to advance funds to the defendant. We note that in its complaint Chase used the term "equitable subrogation" but, in its brief, the plaintiff uses the term "equitable subordination."

"In mortgage law, [a] fundamental principle is that a mortgage that is recorded first is entitled to priority over subsequently recorded mortgages provided that every grantee has a reasonable time to get his deed recorded. . . . This principle is referred to as the first in time, first in right rule. . . . The doctrine of equitable subrogation provides an exception to the first in time, first in right rule . . . .

"Subrogation is a doctrine which equity borrowed from the civil law and administers so as to secure justice without regard to form or mere technicality. . . . It is broad enough to include every instance in which one party pays a debt for which another is primarily answerable, and which, in equity and good conscience, should have been discharged by the latter. It is a legal fiction through which one who, not as a volunteer or in his own wrong and where there are no outstanding and superior equities, pays the debt of another, is substituted to all the rights and remedies of the other, and the debt is treated in equity as still existing for his benefit. . . .

"In numerous cases it has been held that one who advances money to discharge a prior lien on real or personal property and takes a new mortgage as security is entitled to be subrogated to the rights under the prior lien against the holder of an intervening lien of which he was ignorant. . . . The intention of the parties to the transaction is the controlling consider-

that "[the] plaintiff paid off, as proceeds of its mortgage set forth herein, a mortgage prior in right to that of [Bank of America] . . . intending to then obtain a first mortgage on the property herein being foreclosed, and, therefore, should be equitably subrogated to the position of that prior mortgage."

In count three, Chase alleged in part: "The plaintiff, by its agent or attorney, received a payoff letter on or about July 23, 2007, and [the defendant] . . . executed . . . Bank of America's authorization to terminate the line of credit and authorized the payment in full along with the closing of a line of credit under . . . Bank of America's mortgage. . . . Subsequent thereto . . . Bank of America . . . made further advances to [the defendant] . . . after issuing this payoff letter and, as a result, its mortgage should be equitably subrogated to the interest of the plaintiff's mortgage herein."

In count four, Chase alleged in part: "Bank of America, through its actions in accepting funds after the credit line was ordered closed, has unjustly enriched itself."

Counts five and six of the amended complaint, both of which were directed at the defendant, also are related to Chase's allegations with respect to Bank of America's mortgage interest in the subject property. In count five, Chase alleged in part: "Authorizing the payoff of the mortgage of . . . Bank of America, [the defendant] . . . continued to obtain further borrowings against said mortgage and, further [un]justly enriched himself, all to [the] plaintiff's loss and damage." In count six, Chase alleged in part: "After authorizing the plaintiff, its agents, and/or attorneys to close the credit line contained in . . . [Bank of America's] mortgage, the

ation. . . . Ultimately, as our Supreme Court has noted, [t]he object of [legal or equitable] subrogation is the prevention of injustice." (Citations omitted; internal quotation marks omitted.) *AJJ Enterprises, LLP* v. *Jean-Charles*, 160 Conn. App. 375, 395–96, 125 A.3d 618 (2015).

[defendant] . . . continued to obtain further funds pursuant to said credit line, either by fraud or mistake, all to [the] plaintiff's loss and damage."

At no time did the defendant move to set aside the default for failure to plead entered on June 16, 2010. On November 2, 2015, however, the defendant disclosed a defense, stating that he "intend[ed] to challenge the plaintiff's alleged right and standing to foreclose upon the subject mortgage." On the same day, the defendant filed an answer to Chase's original complaint.

The plaintiff did not file a motion for default for failure to plead against the defendant with respect to the amended complaint. On November 24, 2015, however, the plaintiff filed a motion for judgment against the defendant with respect to counts two, three, four, five, and six of the amended complaint. On the same day, the plaintiff moved that the court enter a judgment of strict foreclosure and asked that separate law days be assigned to the defendant, Middconn Federal Credit Union, and Bank of America. Before the court considered the plaintiff's motions, the plaintiff filed an appraisal of the subject property, a foreclosure worksheet, an affidavit of debt, and an affidavit of attorney's fees.

On April 4, 2016, the defendant filed an answer to the plaintiff's amended complaint. In his answer to the amended complaint, the defendant, among other things, admitted portions of the allegations made in the first count and, with respect to other portions of the first count, left the plaintiff to its proof. Also, on April 4, 2016, the defendant filed an objection to the plaintiff's motion for judgment as to count six of the amended complaint and an objection to the plaintiff's motion for judgment of strict foreclosure. On that date, the court held a hearing on the plaintiff's motion for judgment. By order dated April 4, 2016, the court granted the

plaintiff's motion for judgment with respect to counts two, three, four, and five of the amended complaint, but did not rule with respect to counts one or six of the amended complaint.

Following the hearing, the plaintiff replied to the defendant's objection to its motion for judgment of strict foreclosure, and the defendant filed a memorandum of law in which he further articulated the reasons underlying his objection to the motion for judgment of strict foreclosure. At a hearing on April 18, 2016, the parties appeared and presented additional arguments. In support of his objection, the defendant argued that (1) after Chase filed its motion for judgment of strict foreclosure in 2010, it filed an amended complaint that substantially changed the nature of the claims and cited in Bank of America so that the plaintiff would be recognized as a first mortgagee; (2) he answered the amended complaint and was not defaulted with respect to the amended complaint; and (3) any delays in the litigation following the default entered in 2010 were occasioned by the plaintiff and its predecessors, who did not act in a timely manner. Essentially, the defendant argued that the plaintiff had not sought or obtained a default against him with respect to the amended complaint. Additionally, the defendant relied on the fact that, pursuant to § 52-121 (a), he had filed a responsive pleading with respect to the amended complaint prior to the hearing on the plaintiff's motion for judgment, and the court should consider it as the operative answer.

The plaintiff argued that because the court did not set aside the default entered in 2010, the defendant's answer and disclosed defense were inoperative. The plaintiff emphasized that at no time did the defendant ask the court to set aside the default and that nearly six years had passed since it had been entered against the defendant. Moreover, the plaintiff argued, any claim that Chase's request to amend its complaint somehow

extinguished the default was not persuasive because the defendant did not object to the amended complaint and did not timely replead after it had been filed. Additionally, the plaintiff argued, the amended complaint did not substantially change the original one count complaint against the defendant. The plaintiff argued that "the amended complaint was brought to allege additional counts against . . . Bank of America. There has been no change to the foreclosure count whatsoever, there is no prejudice shown to the defendant by the amendment, nor does the defendant allege such prejudice."

The court, having heard the parties' arguments, addressed the defendant as follows: "Well, in my view, you should have moved to open a default. You didn't. I'll allow them to go forward with their foreclosure." Thereafter, when the defendant asked the court to address the applicability of § 52-121 (a), the court stated: "You didn't move to [open] the default, waiting five years. And you just can't file an answer once a motion for judgment has been filed."[8] The court stated

[8] The plaintiff argues that the court's decision to disregard the defendant's answer was proper in light of Practice Book §§ 17-32 (b) and 17-42. Practice Book § 17-32 (b) provides: "If a party who has been defaulted under this section files an answer before a judgment after default has been rendered by the judicial authority, the default shall automatically be set aside by operation of law unless a claim for a hearing in damages or a motion for judgment has been filed. If a claim for a hearing in damages or a motion for judgment has been filed, the default may be set aside only by the judicial authority. A claim for a hearing in damages or motion for judgment shall not be filed before the expiration of fifteen days from the date of notice of issuance of the default under this subsection." Practice Book § 17-42 provides: "A motion to set aside a default where no judgment has been rendered may be granted by the judicial authority for good cause shown upon such terms as it may impose. As part of its order, the judicial authority may extend the time for filing pleadings or disclosure in favor of a party who has not been negligent. Certain defaults may be set aside by the clerk pursuant to Sections 17-20 and 17-32." As we will discuss further in this opinion, this rationale does not apply when, as in the present case, subsequent to obtaining a default, the plaintiff files an amended pleading that materially alters the claims.

its belief that the defendant's actions "were solely for the purpose of delay," observing that the despite the passage of five years, the defendant did not move to open the default. The court granted the plaintiff's motion for judgment of strict foreclosure, set a law day of May 23, 2016, and rendered judgment on count six of the plaintiff's amended complaint in the plaintiff's favor. This appeal followed.[9]

The defendant claims that the court improperly granted the judgment of strict foreclosure because the court's judgment was based upon a default for failure to plead in response to the original complaint, but Chase, thereafter, had significantly amended the pleadings and added additional parties to the action. We agree with the defendant.

Although, in general terms, the defendant challenges the court's ruling granting the plaintiff's motion for judgment of strict foreclosure, a careful review of the defendant's brief reflects that the substance of this claim is that under the circumstances that existed at the time that it rendered judgment, "the trial court should have permitted the defendant's pleading to the plaintiff's amended allegations and opened the default, which was [entered] as to the original complaint only." The defendant argues that, following the default entered with respect to the original complaint, Chase, by filing the amended complaint, materially changed the allegations in the case by seeking equitable subrogation. Additionally, the defendant observes, the party claiming a right to foreclose upon the mortgage evolved from Chase to the plaintiff. Following the filing of the amended complaint, he disclosed a defense and answered both complaints. The defendant argues that, in fairness to

[9] The present appeal is from the strict foreclosure judgment entered on count one of the amended complaint. The defendant has not appealed from the judgment rendered against him on counts five or six of the amended complaint.

him, the default should have been extinguished by the filing of the amended complaint and that the court should have given effect to his answer and disclosed defense.

As is reflected in our recitation of the relevant procedural history, the court did not prohibit the defendant from filing an answer in response to the amended complaint. The court, however, indicated that it would not give any effect to the answers filed by the defendant to the original and amended complaints (and, presumably, the defendant's disclosed defense) on the ground that such filings were untimely, having been presented to the court more than five years following the default. The court observed, as well, that in the lengthy period of time that ensued following the default, the defendant did not move to set aside that default. To the extent that the defendant argues that the court should have "opened the default," his argument implies that the court should have done so sua sponte.

"In order for foreclosure cases to move as swiftly as possible through our court system, it is imperative that a defendant disclose any defenses to the mortgage debt prior to the hearing. . . . The entry of a default constitutes an admission by the [defaulted party] of the truth of the facts alleged in the complaint." (Citation omitted; internal quotation marks omitted.) *TD Banknorth, N.A.* v. *White Water Mountain Resorts of Connecticut, Inc.*, 133 Conn. App. 536, 545, 37 A.3d 766 (2012). Practice Book § 17-33 (b) provides in relevant part that "the effect of a default is to preclude the defendant from making any further defense in the case so far as liability is concerned . . . ." It also provides that "at or after the time it renders the default, [the judicial authority] . . . may also render judgment in foreclosure cases . . . provided the plaintiff . . . also [has] made a

motion for judgment and provided further that any necessary affidavits of debt or accounts or statements verified by oath, in proper form, are submitted to the judicial authority." Practice Book § 17-33 (b).

The abuse of discretion standard of review applies to a court's ruling on a motion to set aside a default; *Higgins* v. *Karp*, 243 Conn. 495, 508, 706 A.2d 1 (1998); to a motion to strike a matter from a hearing in damages list; *Spilke* v. *Wicklow*, 138 Conn. App. 251, 270, 53 A.3d 245 (2012), cert. denied, 307 Conn. 945, 60 A.3d 737 (2013); and to a ruling prohibiting a defendant from filing pleadings with respect to an amended complaint. *Willamette Management Associates, Inc.* v. *Palczynski*, 134 Conn. App. 58, 69, 38 A.3d 1212 (2012). In the present case, the court made clear that it would not give effect to the defendant's answer and did not set aside the default entered against him. This court previously has applied the abuse of discretion standard to the type of claim under consideration, one that involved a court's refusal to give effect to a defendant's answer that was filed following a default and the court's refusal to set aside a default. *Richards* v. *Trudeau*, 54 Conn. App. 859, 863, 738 A.2d 215 (1999).

"[A] foreclosure action constitutes an equitable proceeding. . . . In an equitable proceeding, the trial court may examine all relevant factors to ensure that complete justice is done. . . . The determination of what equity requires in a particular case, the balancing of the equities, is a matter for the discretion of the trial court. . . . This court must make every reasonable presumption in favor of the trial court's decision when reviewing a claim of abuse of discretion. . . . Our review of the trial court's exercise of legal discretion is limited to the question of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did." (Citations omitted; internal quotation marks omitted.) *Webster Bank* v. *Zak*,

71 Conn. App. 550, 556–57, 802 A.2d 916, cert. denied, 261 Conn. 938, 808 A.2d 1135 (2002).

In analyzing the issue before us, we are guided by principles set forth in two decisions of this court, *Willamette Management Associates, Inc.* v. *Palczynski*, supra, 134 Conn. App. 63–69, and *Spilke* v. *Wicklow*, supra, 138 Conn. App. 265–72. In *Willamette Management Associates, Inc.*, a defendant in a breach of contract action was defaulted for failure to plead. *Willamette Management Associates, Inc.* v. *Palczynski*, supra, 62. Subsequently, the court granted the plaintiff's motion to amend the writ of summons and complaint to correct what it deemed to be a scrivener's error, specifically, a defective return date on the writ of summons. Id., 63. After the plaintiff filed an amended complaint, the defendant filed an answer and special defense. Id. At the hearing in damages, the court declined to give effect to the answer because it was filed following the default and the amended complaint had not substantively changed the allegations brought against the defendant. Id. Thereafter, the court rendered judgment in the plaintiff's favor. Id.

On appeal to this court, the defendant in *Willamette Management Associates, Inc.*, argued in relevant part that, in light of the filing of the amended complaint, the court erroneously had prohibited her from filing the answer to the amended complaint. Id. In considering whether the court abused its discretion, this court appears to have focused on whether it was inequitable for the court to have permitted the amendment but not the responsive pleading thereto. In rejecting the defendant's claim, this court determined that because the amended complaint did not reflect a substantial change in the pleadings, it was not inequitable for the court to have exercised its discretion in the manner that it did. Id., 68–69. This court reasoned: "From all appearances, the defect in the writ and summons had

nothing at all to do with . . . [the defendant's] subsequent defaults, and there is, therefore, no equitable reason why a technical amendment to the writ of summons should create the opportunity to plead responsively. The only change between the original complaint and the amended complaint was the return date and the date of the complaint. All substantive allegations in the complaint remained precisely the same. The court did not vacate its entry of a default against the defendant, and the purpose of amending the complaint was solely to remedy a typographical error. The defendant's substantive rights were not affected by the amendment, and she has not demonstrated prejudice. If the effect of an amendment of a complaint so made is to substantially change the cause of action originally stated, the defendant is entitled to file new or amended pleadings and present further evidence. Also, if the amendment interjects material new issues, the adversary is entitled to reasonable opportunity to meet them by pleading and proof. . . . No change of any kind, and thus certainly not a substantial change, was made to the cause of action in the present case." (Citation omitted; internal quotation marks omitted.) Id.

In *Spilke* v. *Wicklow*, supra, 138 Conn. App. 265–72, this court relied on the rationale set forth in *Willamette Management Associates, Inc.* After judgment was rendered in favor of the plaintiff in *Spilke*, the defendants in *Spilke* argued, in relevant part on appeal to this court, that the trial court had abused its discretion by striking the action against them from the trial list and failing to open the default against them. Id., 265–66. The defendants in *Spilke* relied on the fact that, after the court had entered a default against them, the plaintiff filed an amended complaint. Id. In *Spilke*, this court observed that the issue in the case before it and *Willamette Management Associates, Inc.*, "primarily was whether the filing of an amended complaint after a finding of default

extinguished the default and allowed the defendant to plead in response. In the present case, the plaintiff filed four amended complaints after the defendants were defaulted. . . . Although the complaints differed in some respects from the original complaint, the substantive allegations remained the same. . . . [W]e conclude that the amendments worked no substantial change in the cause of action and that the defendants have not demonstrated any prejudice suffered." Id., 270. This court concluded that the court did not abuse its discretion in denying the defendants' motion to strike the matter from the hearing in damages list or in denying the defendants' motion to set aside the default judgment. Id., 270–72.

The analysis set forth in *Willamette Management Associates, Inc.*, and *Spilke* reflects that, in determining whether the filing of an amended complaint following a finding of default effectively extinguished the default and afforded a defendant an opportunity to plead in response, the dispositive inquiry is whether the amendment reflected a substantial change to the pleadings in effect at the time that the default was entered.[10] In *Willamette Management Associates, Inc.*, this court, citing *Mazulis* v. *Zeldner*, 116 Conn. 314, 317, 164 A. 713 (1933), stated that a primary consideration in this inquiry was whether the amendment interjected "material new issues" in the case. (Internal quotation marks

[10] This approach is consistent with 49 C.J.S. 300, Judgments § 263 (2009), which provides: "Where the declaration or complaint is amended in a matter of substance after the defendant has defaulted, the amendment opens the case in default, and a valid default judgment cannot thereafter be entered on the amended pleading unless the defaulting defendant is properly notified of or served with the amended pleading and given an opportunity to plead, and then fails to do so within the proper time, particularly when the damages are increased in the amended petition. However, where the amendment is not as to a matter of substance, but only as to an immaterial or formal matter, notice or service of the amendment is not necessary before entering judgment by default.

"The filing of an amended complaint invalidates the original complaint, for purposes of taking a default judgment." (Footnotes omitted.)

omitted.) *Willamette Management Associates, Inc.* v. *Palczynski*, supra, 134 Conn. App. 69.

Although we have characterized our general inquiry in these types of cases as a review of the trial court's exercise of discretion, there is no dispute in our decisional law that, insofar as our review of the court's exercise of discretion requires us to interpret the pleadings, we do not afford the court discretion with respect to this aspect of its ruling. As we have stated, "[t]he interpretation of pleadings is always a question [of law] for the court . . . . The modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . Although essential allegations may not be supplied by conjecture or remote implication . . . the complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties." (Internal quotation marks omitted.) *American First Federal, Inc.* v. *Gordon*, 173 Conn. App. 573, 584–85, 164 A.3d 776, cert denied, 327 Conn. 909, A.3d (2017). "Construction of pleadings is a question of law. Our review of a trial court's interpretation of the pleadings therefore is plenary." *Kovacs Construction Corp.* v. *Water Pollution & Control Authority*, 120 Conn. App. 646, 659, 992 A.2d 1157, cert. denied, 297 Conn. 912, 995 A.2d 639 (2010).

Our comparison of the original and amended complaints readily reveals that the amended complaint filed following the default interjected material new issues in the case, thereby substantially changing the pleadings. As set forth previously in this opinion, in contrast to the original, one count complaint brought against the defendant by Chase, the amended, six count complaint subsequently brought by Chase raised the issue of whether the line of credit held by Bank of America should be considered as a prior or subsequent lien on

the subject property. The amended complaint contained new counts in which the plaintiff sought equitably to subordinate the interest of Bank of America to its mortgage interest, and two new counts directed at the defendant. The original complaint, sounding in foreclosure, invoked the court's equitable powers. Count five of the amended complaint sounded in unjust enrichment and count six accused the defendant of engaging in fraudulent conduct. The amended complaint, which was filed by Chase, interjected new material factual allegations and new legal theories on which the plaintiff relied.

The new material factual allegations and legal theories set forth in the amended complaint were not merely technical in nature. In counts five and six of the amended complaint, Chase alleged that the defendant caused it "loss and damage" when he continued to draw on Bank of America's line of credit. In its prayer for relief in the amended complaint, Chase sought, inter alia, attorney's fees, costs, and "such other relief . . . as may be required."[11] The amended complaint reasonably could be interpreted to seek monetary damages for the fraud and unjust enrichment claims set forth in counts five and six of the amended complaint, and, thus, the amended complaint materially altered the nature of the claims against the plaintiff. Because a default acts as a judicial admission of the facts set forth in a complaint, it is difficult to afford weight to the plaintiff's argument that the default entered with respect to the original complaint could be interpreted to apply to the

[11] Consistent with the prayer for relief set forth in the original complaint, the prayer for relief in the amended complaint also sought: "(1) A foreclosure of said mortgage.

"(2) Immediate possession of the mortgaged premises.

"(3) A deficiency judgment. . . .

"(4) The appointment of a receiver to collect rents and profits accruing from the premises.

"(5) Reasonable attorney's fees and costs.

"(6) Such other relief and further equitable relief as may be required."

materially new claims to which the defendant was exposed as set forth in the amended complaint, which included, but were not limited to, claims of fraud and unjust enrichment on his part.[12]

In light of the changes to the plaintiff's case that were reflected in the amended complaint, it was inequitable for the court not to have considered the default entered in 2010 to have been extinguished.[13] Thus, the court should have considered the defendant's answer to the amended complaint as well as his disclosed defense. Although it was appropriate for the court to have considered the lengthy period of time that followed the entry of the default, it nonetheless abused its discretion by failing to consider the effect of the amended complaint upon that default. "If the effect of an amendment of a complaint . . . is to substantially change the cause of action originally stated, the defendant is entitled to file new or amended pleadings and present further evidence. Also, if the amendment interjects material new issues, the adversary is entitled to reasonable opportunity to meet them by pleading and proof." *Mazulis* v. *Zeldner*, supra, 116 Conn. 317.

[12] The plaintiff, while acknowledging that the changes made by way of the amended complaint were not merely to address a scrivener's error, nonetheless argues that the amended complaint did not constitute a material change in the action. At the time of oral argument before this court, the plaintiff conceded that, if the changes that it made by means of the amended complaint were material in nature, then, in light of its failure to obtain a default with respect to the amended complaint, the court acted improperly by granting the motion for judgment of strict foreclosure.

[13] The dissent argues in part that because the defendant only has appealed from the judgment rendered on the foreclosure count, there is no error to consider because that particular count was not materially altered by virtue of the amended complaint. Assuming, arguendo, that count one was not materially altered by the allegation regarding Bank of America's mortgage, we respectfully suggest that the dissent appears to overlook the fact that, by failing to consider the defendant's answer, the court deprived the defendant of an opportunity to extinguish the default on the foreclosure count, which would have permitted him to defend the foreclosure action in count one.

In light of the foregoing analysis, the proper remedy is to reverse the judgment of strict foreclosure and to remand the case to the trial court for further proceedings consistent with this opinion.

The judgment granting strict foreclosure is reversed and the case is remanded for further proceedings consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion PRESCOTT, J., concurred.

BEAR, J., dissenting. The defendant, Daniel Scroggin also known as Daniel J. Scroggin also known as Daniel F. Scroggin, appeals from the judgment of strict foreclosure[1] rendered against him by the trial court on April 18, 2016, in favor of the substitute plaintiff, AJX Mortgage Trust 1, a Delaware Trust, Wilmington Savings Fund Society, F.S.B., Trustee.[2] On appeal, the defendant argues that the court erred in rendering the judgment of strict foreclosure (1) based on a default for failure to plead, because Chase Home Finance, LLC (Chase), significantly amended the pleadings after the default entered, and he was, therefore, entitled to answer prior to the hearing on the motion for judgment of strict foreclosure, and (2) in violation of General Statutes § 52-121 (a).[3] The majority agrees with the defendant

[1] The defendant has not appealed from the judgment rendered against him on the counts alleging unjust enrichment and fraud.

[2] As the majority explains in footnote 1 of its opinion, Chase Home Finance, LLC, commenced this action in 2009; following the grant of three motions to substitute the plaintiff, the court rendered judgment in favor of the substitute plaintiff, AJX Mortgage Trust 1, a Delaware Trust, Wilmington Savings Fund Society, F.S.B. For purposes of clarity, in this dissenting opinion, I refer to AJX Mortgage Trust 1, a Delaware Trust, Wilmington Savings Fund Society, F.S.B., Trustee as the plaintiff and to Chase Home Finance, LLC (Chase), by name.

[3] General Statutes § 52-121 (a) provides: "Any pleading in any civil action may be filed after the expiration of the time fixed by statute or by any rule of court until the court has heard any motion for judgment by default or nonsuit for failure to plead which has been filed in writing with the clerk of the court in which the action is pending."

as to his first claim and concludes that the court abused its discretion in rendering the judgment of strict foreclosure. I respectfully disagree with the majority's disposition of the defendant's first claim, and I disagree with the defendant's second claim, which the majority does not reach in light of its disposition of the first claim. Accordingly, I would affirm the judgment of the trial court.

I

The defendant first argues that the court erred in rendering the judgment of strict foreclosure based on the entry of the June 16, 2010 default for failure to plead. Specifically, the defendant asserts that Chase significantly amended the pleadings after the default entered, which extinguished the default, and he, therefore, was entitled to answer the first count, inter alia, prior to the hearing on the motion for judgment of strict foreclosure. Despite the additional facts and legal theories set forth in the amended complaint, the first count seeking strict foreclosure, the only count in the original complaint, was not substantially changed in the amended complaint to the point where such default was deemed to be vacated.

The majority looks to the changes in and the additions to the amended complaint as a whole in concluding that those changes and additions effectively vacated the default entered on the first count of the original complaint.[4] The focus of the inquiry in this appeal, however, should not be on the amended complaint as a

[4] As the majority notes in its opinion, a "comparison of the original and amended complaints readily reveals that the amended complaint filed following the default interjected material new issues in the case, thereby substantially changing the pleadings. . . . [I]n contrast to the original, one-count complaint brought against the defendant by Chase, the amended, six-count complaint . . . contained new counts in which the plaintiff sought equitably to subordinate the interest of Bank of America to its mortgage interest, and two new counts directed at the defendant . . . and interjected new material factual allegations and new legal theories . . . ."

whole. Because the defendant has not appealed from the judgment rendered against him on the fifth and sixth counts of the amended complaint, alleging unjust enrichment and fraud, and he had no legal interest in the dispute between Chase and Bank of America as alleged in the second, third, and fourth counts of the amended complaint, the proper inquiry in this appeal is whether the amended complaint substantially changed the original count for strict foreclosure, the judgment rendered on which is the sole basis for the defendant's appeal, to the point where it had the effect of extinguishing the default entered thereon. The case law cited by the majority readily supports my conclusion that the court did not abuse its discretion in determining that the amended complaint did not have the effect of extinguishing the default entered on the first count, so as to permit the defendant to file an answer thereto prior to or instead of filing a motion to open and vacate that default.

As conceded in the majority opinion, the analyses of this court in *Willamette Management Associates, Inc.* v. *Palczynski*, 134 Conn. App. 58, 38 A.3d 1212 (2012), and *Spilke* v. *Wicklow*, 138 Conn. App. 251, 53 A.3d 245 (2012), cert. denied, 307 Conn. 945, 60 A.3d 737 (2013), are pertinent to and instructive in this case. "[I]n both cases the question primarily was whether the filing of an amended complaint after a finding of default extinguished the default and allowed the defendant to plead in response." *Spilke* v. *Wicklow*, supra, 270.

In *Willamette Management Associates, Inc.*, following a default against the defendant for failure to plead, the plaintiff filed an amended complaint to correct a scrivener's error. *Willamette Management Associates, Inc.* v. *Palczynski*, supra, 134 Conn. App. 63. The trial court declined to give effect to the defendant's answer filed in response to the amended complaint because "[n]othing changed in the substantive pleadings and

[the defendant had] been defaulted." (Internal quotation marks omitted.) Id., 64. On appeal, this court concluded that the trial court did not abuse its discretion in prohibiting the defendant from filing an answer because "[n]o change of any kind, and thus certainly not a substantial change, was made to the *cause of action*"; (emphasis added) id., 69; and thus it was not inequitable for the court to have exercised its discretion in the manner that it did. Id., 68–69.

In *Spilke*, "the plaintiff filed four amended complaints after the defendants were defaulted. . . . Although the complaints differed in some respects from the original complaint, the substantive allegations remained the same." *Spilke* v. *Wicklow*, supra, 138 Conn. App. 270. The defendants filed a motion to strike the case from the hearing in damages list, "arguing that the plaintiff had amended her complaint numerous times since the entry of default against the defendants, which, in turn, extinguished the default." Id., 266. The trial court denied the defendant's motion. Id. On appeal, this court concluded that the court did not abuse its discretion in denying the motion to strike because "[a]s in *Willamette Management Associates, Inc.* . . . the amendments worked no substantial change in the *cause of action* and . . . the defendants have not demonstrated any prejudice suffered." (Emphasis added.) Id., 270.

Our Supreme Court stated in *Mazulis* v. *Zeldner*, which is cited in *Willamette Management Associates, Inc.*, that "[i]f the effect of an amendment of a complaint . . . is to substantially change the *cause of action* originally stated, the defendant is entitled to file new or amended pleadings and present further evidence." (Emphasis added.) *Mazulis* v. *Zeldner*, 116 Conn. 314, 317, 164 A. 713 (1933). Therefore, the focus of our inquiry should be whether the amendment substantially changed the cause of action, i.e., in this appeal, the first count for strict foreclosure.

Here, the cause of action for strict foreclosure in the original complaint was not substantially changed in the amended complaint. Although, unlike in *Willamette Management Associates, Inc.*, the amended complaint in the present case did contain more than a scrivener's error, since it added new causes of action and an additional party, the defendant has not appealed from the judgment with respect to those new causes of action against him. The only portion of the judgment appealed from—that of strict foreclosure—was not rendered on a substantially changed original complaint, although, as the majority sets forth in its opinion, there was an equitable subrogation reference added in the amended complaint to the language of the original cause of action.[5] The additional language in the first count of the amended complaint, however, merely reflects Chase's change in position from second mortgagee to first mortgagee, as a result of paying off Bank of America's mortgage.[6] The additional language does not change the substance of the cause of action for strict foreclosure against the defendant.

In summary, despite the additional counts added against the defendant in the amended complaint, both

[5] The first count in the amended complaint included the additional language that: "On the aforementioned piece of property, the following interests are claimed which are subsequent to [Chase's] said mortgage: A mortgage in favor of Bank of America, N.A., in the original principal amount of $100,000, dated 18, 2007 and recorded February 7, 2007 in Volume 662, Page 195 of the Portland land records." In contrast, the first count in the original complaint stated: "On the aforementioned piece of property, the following interests are claimed which are subsequent to [Chase's] said mortgage: None."

[6] At the time that the complaint was filed, Bank of America maintained first mortgagee status. The amended complaint requested that Chase be subrogated to Bank of America's position as first mortgagee. The reason for the request for subrogation is in the new count two of the amended complaint against Bank of America: "[Chase] paid off, as proceeds of its mortgage set forth herein, a mortgage prior in right to that of the Defendant Bank of America intending to then obtain a first mortgage upon the property herein being foreclosed, and, therefore, should be equitably subrogated to the position of that prior mortgage."

the first, and only, count of the original complaint and the first count of the amended complaint sought a judgment of strict foreclosure against the defendant on the basis of essentially the same allegations. Because the amended complaint did not substantially alter the cause of action that is the subject of this appeal, pursuant to *Willamette* and *Spilke* the default in the original complaint was not deemed to be vacated by the filing of the amended complaint despite the addition of two causes of action against the defendant and three causes of action against Bank of America.[7]

Because I conclude that the defendant's first claim should be rejected, I must consider the defendant's second claim.

II

The defendant argues in his second claim that, by operation of § 52-121 (a), he was entitled to file an operative answer prior to the hearing on the motion for judgment of strict foreclosure filed on June 7, 2010.

Section 52-121 (a) provides: "Any pleading in any civil action may be filed after the expiration of the time fixed by statute or by any rule of court until the court has

[7] Our law concerning the effect of a default is that "[t]he entry of a default constitutes an admission by the [defaulted party] of the truth of the facts alleged in the complaint. . . . Practice Book § 17-33 (b) provides in relevant part that the effect of a default is to preclude the defendant from making any further defense in the case so far as liability is concerned . . . ." (Citation omitted; internal quotation marks omitted.) *TD Banknorth, N.A.* v. *White Water Mountain Resorts of Connecticut, Inc.*, 133 Conn. App. 536, 545–46, 37 A.3d 766 (2012). Thus, the entry of the default on the first count of the original complaint had the effect of an admission by the defendant of the material facts alleged in that count. Because the first count of the amended complaint did not substantially change the first count of the original complaint, the defendant's admission of the facts of that count remained binding on him. Accordingly, the defendant has not demonstrated any prejudice suffered by him from the amended complaint insofar as it relates to the count for strict foreclosure. Cf. *Spilke* v. *Wicklow*, supra, 138 Conn. App. 270.

heard any motion for judgment by default or nonsuit for failure to plead which has been filed in writing with the clerk of the court in which the action is pending." A court, in the exercise of its discretion, may refuse to consider a pleading, although it is filed prior to judgment on the default, but doing so is "plain error if, prior to rendering a judgment upon default, the court fails to accept for filing a defaulted party's pleading solely on the ground that the pleading is untimely." (Internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Cornelius*, 170 Conn. App. 104, 117, 154 A.3d 79, cert. denied, 325 Conn. 922, 159 A.3d 1171 (2017); see also *Deutsche Bank National Trust Co.* v. *Bertrand*, 140 Conn. App. 646, 662, 59 A.3d 864, appeal dismissed, 309 Conn. 905, 68 A.3d 661 (2013). Thus, the question is whether the court in the present case found § 52-121 (a) inapplicable for any reason other than timeliness.[8]

This court has previously rejected an argument that the trial court violated § 52-121 (a) in refusing to accept the defaulted party's answer solely on the basis of timeliness when there was another reason pursuant to which the court decided not to allow an answer to be filed. In *Deutsche Bank National Trust Co.* v. *Bertrand*, supra, 140 Conn. App. 662, this court noted: "We acknowledge that there is support for the proposition that a court commits plain error if, prior to rendering a judgment upon default, the court fails to accept for filing a defaulted party's pleading solely on the ground that the pleading is untimely. . . . Our review of the hearing transcript reveals, however, that the plaintiff objected to the court accepting the answer not only because of the extensive history of delay but also

[8] The defendant did not appeal the judgment rendered against him on the counts alleging unjust enrichment and fraud; therefore, it is not necessary to address whether he was entitled to file a pleading pursuant to § 52-121 (a) to answer or specially defend against those new counts.

because the pleading had not been electronically filed. We again note that the record before us does not contain a precise statement by the court for its ruling; however, the court suggests two possible reasons for rejecting the defendant's request to file his answer and special defenses. In refusing to accept the pleading for filing, the court stated both that 'it's too late for that' and 'you're going to have to e-file it.' Because it is not clear from the record that the court rejected the defendant's pleading solely on the basis that it was untimely, and the defendant has not addressed the electronic filing issue on appeal, we must reject the defendant's claim that § 52-121 provides a basis for concluding that the court abused its discretion in refusing to accept his answer when it was offered for filing at the hearing." (Citation omitted; footnote omitted.) Id.

Similarly here, it is not clear from the record that the court rejected the defendant's answer solely on the basis that it was untimely. At the hearing on the motion for judgment of strict foreclosure, the defendant's counsel asserted that § 52-121 (a) "is controlling, as it indicates that notwithstanding any other statute or court rule, a pleading may be filed until the court has heard any motion for judgment by default." In response, the plaintiff's counsel stated that "[t]his really comes down to timeliness, and the defendant not [repleading] and not moving to open the default." The court concluded: "Well, in my view, [the defendant] should have moved to open a default. [The defendant] didn't. I'll allow [the plaintiff] to go forward with [its] foreclosure." At the end of the hearing, the defendant's counsel again inquired "as to the court's position on the applicability of § 52-121 (a)." The court then explained its reasons for declining to consider the answer and rendering the judgment of foreclosure:

"The Court: You didn't move to [open], waiting five years. And you just can't file an answer once a motion for judgment has been filed.

"[The Defendant's Counsel]: Notwithstanding the statute?

"The Court: I'm entering a foreclosure.

"[The Defendant's Counsel]: Very well, Your Honor.

"The Court: I think your actions were solely for the purpose of delay."

The court thus had before it multiple grounds it could consider in deciding whether to render the judgment of foreclosure, including: (1) the timeliness of the answer; (2) that the defendant never moved to open the default; and (3) that the defendant's actions were solely for the purpose of delay. Similarly to the court in *Bertrand*, where the court considered that the answer was not e-filed in addition to considering the timeliness of the answer, the court here did not expressly reject the pleading solely because it was not filed on time, but also, inter alia, because the defendant had not filed a motion to open the default prior to the filing of the answer. See *Deutsche Bank National Trust Co.* v. *Bertrand*, supra, 140 Conn. App. 662.

The court's ruling, based in part on its consideration of the defendant's failure to move to open, is supported by this court's conclusion in *Deutsche Bank National Trust Co.* v. *Cornelius*, supra, 170 Conn. App. 117, in which this court recently rejected a defendant's argument that "§ 52-121 requires a trial court to consider the merits of a motion to strike even after a default has been entered so long as no judgment has been rendered." This court quoted *Bertrand*, stating: "We acknowledge that there is support for the proposition that a court commits plain error if, prior to rendering a judgment upon default, the court fails to accept for filing a defaulted party's pleading solely on the ground that the pleading is untimely." (Internal quotation marks omitted.) Id. However, this court found that "the court

did not deny the defendant's motion to strike because it was untimely"; id., 117; but that it "correctly concluded that it could not consider the defendant's motion to strike until the default was set aside." Id., 117–18.

As discussed in part I of this dissenting opinion, the first count for strict foreclosure in the amended complaint was not sufficiently different from the count in the original complaint so as to result in the setting aside or extinguishing of the default. The plaintiff's motion for judgment on the first count was filed on June 7, 2010, the default for failure to plead was entered on June 16, 2010, and, although no motion to open and vacate the default had been filed, the defendant's answer to the first count was filed on November 2, 2015, while the plaintiff's motion for judgment was pending. During the approximately five year period between the default and the hearing on the motion for judgment, the defendant did not move to open the default. Instead, the defendant waited approximately five years after the filing of the amended complaint to file an answer to a cause of action on which he had previously been defaulted, without moving to open and set aside the default prior to filing his answer.[9] As the court stated,

[9] Practice Book § 17-42 provides in relevant part: "A motion to set aside a default where no judgment has been rendered may be granted by the judicial authority for good cause shown upon such terms as it may impose. . . ." It is well established that "[the] determination of whether to set aside [a] default is within the discretion of the trial court . . . and [such a determination] will not be disturbed unless that discretion has been abused or where injustice will result. In the exercise of its discretion, the trial court may consider not only the presence of mistake, accident, inadvertence, misfortune or other reasonable cause . . . [and] factors such as [t]he seriousness of the default, *its duration*, the reasons for it and the degree of contumacy involved . . . but also, the totality of the circumstances, including whether the delay has caused prejudice to the nondefaulting party." (Citations omitted; emphasis added; internal quotation marks omitted.) *Higgins* v. *Karp*, 243 Conn. 495, 508, 706 A.2d 1 (1998); see also *Chevy Chase Bank, F.S.B.* v. *Avidon*, 161 Conn. App. 822, 833, 129 A.3d 757 (2015). In *Spilke*, this court considered the time that the default was in effect, stating that the defendants did not file a pleading, which they denominated a motion to strike, for more than three years after the entry of a default against each

the defendant "didn't move to [open], waiting five years. And you just can't file an answer once a motion for judgment has been filed." The court thus reasonably understood that " '[t]he effect of a default is to preclude the defendant from making any further defense in the case so far as liability is concerned . . . .' Practice Book § 17-33 (b)"; *Bank of New York Mellon* v. *Talbot*, 174 Conn. App. 377, 383, 165 A.3d 1253 (2017); unless it granted the motion to open and vacated the default. "Practice Book § 17-33 (b) provides that when a party is in default for failure to plead, 'the judicial authority, at or after the time it renders the default . . . may also render judgment in foreclosure cases . . . .' If the defaulted party has filed an answer before judgment is rendered, however, the default is automatically set aside by operation of law. Practice Book § 17-32 (b). *If a motion for judgment already has been filed by the adverse party at the time the defaulted party files his answer, however, 'the default may be set aside only by the judicial authority.'* Practice Book § 17-32 (b)." (Emphasis added.) *Bank of New York Mellon* v. *Talbot*, supra, 383. Similarly to the court in *Cornelius*, once the court here determined that the default was not set aside or vacated sub silentio by the amended first count, it had the discretion to decide that it would not consider the defendant's answer while the default on the first count for strict foreclosure remained in effect, and the court did not violate § 52-121 (a) in doing so. See *Deutsche Bank National Trust Co.* v. *Cornelius*, supra, 170 Conn. App. 117.

To summarize, making every reasonable presumption in favor of the trial court's decision, as we are required

of them. *Spilke* v. *Wicklow*, supra, 138 Conn. App. 270. This court took that duration into consideration in its determination that the court did not abuse its discretion in denying that motion to strike the matter from the hearing in damages list. Id. In the present case, more than five years had elapsed before the defendant filed his answer and special defenses while the default was still in effect.

to do; see *Webster Bank* v. *Zak*, 71 Conn. App. 550, 556–57, 802 A.2d 916, cert. denied, 261 Conn. 938, 808 A.2d 1135 (2002); the court did not err in deciding that the amended complaint did not extinguish the default, and it was not plain error, but instead was within the court's discretion, for it to decline to consider the defendant's answer to the first count of the amended complaint because the defendant had not filed a motion to open and set aside the default, which default precluded the defendant from making any further defense in the case as to his liability. The court, therefore, did not violate § 52-121 (a) by declining to consider the defendant's answer to the first count and by rendering a judgment of strict foreclosure against him.

Accordingly, I would affirm the judgment of the court.

THERESA D. S. HEYWARD ET AL. *v.* JUDICIAL DEPARTMENT OF THE STATE OF CONNECTICUT ET AL.
(AC 39232)

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

Syllabus

The plaintiff T, a clerk in a state courthouse, sought to recover damages from her employer, the defendant Judicial Department, and her supervisor, the defendant A, for their alleged employment discrimination in violation of the applicable provision (§ 46a-60 [a]) of the Connecticut Fair Employment Practices Act. In an amended complaint, T claimed, inter alia, that the defendants had created a hostile work environment and had discriminated against her on the basis of her race. The trial court dismissed all counts of the complaint as against A and all but the hostile work environment and race discrimination counts as against the state, and T appealed to this court, which dismissed the appeal in part and affirmed the judgment in part. Thereafter, the trial court granted the state's motion to strike the remaining two counts of the complaint, concluding, inter alia, that the complaint failed to allege sufficient facts to support her claims of hostile work environment and race discrimination. On T's appeal to this court, *held*:

1. The trial court properly struck T's hostile work environment claim; the conduct alleged by T in her complaint was not sufficiently severe or pervasive so as to alter the conditions of her employment and to create a hostile work environment, as T alleged only two instances of racial remarks, with one of those remarks having been made toward a third person, and two instances of inappropriate conduct alleged to have occurred within a one year span did not meet the high standard of severe and pervasive, and the remainder of T's allegations concerned routine workplace matters, such as requests for time off, lunch breaks, performance evaluations and favoritism, which were not unreasonable conditions to be subjected to in the employment context.

2. The trial court properly struck T's claim of race discrimination, T having pleaded insufficient facts to establish a prima facie case of discrimination; T did not allege any facts demonstrating that she had been subjected to an adverse employment action by her employer, as her allegations that A had placed a disciplinary e-mail in her personnel file and had yelled at her in front of coworkers and members of the public for having given incorrect information did not constitute an adverse employment action in the absence of evidence showing that T had been terminated, demoted or given diminished responsibilities, or that she suffered a decrease in salary or material loss in benefits.

Argued October 10—officially released December 19, 2017

Procedural History

Action to recover damages for, inter alia, alleged employment discrimination, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the court, *Zemetis*, *J.*, granted in part the defendants' motion to dismiss, rendered judgment thereon, and transferred the matter to the judicial district of Hartford; thereafter, the plaintiffs appealed to this court, which dismissed the appeal in part and affirmed the judgment in part; subsequently, the court, *Noble*, *J.*, granted the named defendant's motion to strike, and the plaintiffs appealed to this court; thereafter, the court, *Noble*, *J.*, granted the named defendant's motion for judgment and rendered judgment thereon, and the plaintiffs filed an amended appeal. *Affirmed.*

Eddie Z. Zyko, for the appellants (plaintiffs).

Ann E. Lynch, assistant attorney general, with whom, on the brief, was *George Jepsen*, attorney general, for the appellee (named defendant).

Opinion

PELLEGRINO, J. In this action arising out of alleged workplace discrimination, the plaintiff Theresa D. S. Heyward appeals from the judgment of the trial court rendered in favor of the defendant Judicial Department of the state of Connecticut.[1] On appeal, the plaintiff claims that the court erred in granting the defendant's motion to strike her hostile work environment and racial discrimination claims. We disagree and, accordingly, affirm the judgment of the trial court.

In *Heyward* v. *Judicial Department*, 159 Conn. App. 794, 797–98, 124 A.3d 920 (2015), this court set forth the following undisputed facts and procedural history: "[The plaintiff], who is African-American, was employed as an administrative clerk in the clerk's office

[1] On August 8, 2013, Theresa Heyward and her husband, the plaintiff Kevin Heyward, filed a six count amended complaint against the defendants, the Judicial Department of the state of Connecticut (state) and Robert A. Axelrod, the chief clerk for the judicial district of New Haven at Meriden. The first five counts were brought by Theresa Heyward against the defendants, and Kevin Heyward alleged a derivative cause of action for loss of consortium in count six. Thereafter, the defendants filed a motion to dismiss the complaint. On February 4, 2014, the trial court dismissed all counts as to Axelrod, and counts three through six as to the state. On appeal, this court dismissed the appeal as to the state for lack of subject matter jurisdiction and affirmed the judgment as to Axelrod. See *Heyward* v. *Judicial Department*, 159 Conn. App. 794, 805, 124 A.3d 920 (2015). Consequently, Axelrod is not a party to this appeal, and, therefore, all references in this opinion to the defendant are to the state. Furthermore, although initially raised in their preliminary statement of the issues, the plaintiffs have not briefed any claimed error regarding the trial court's February 4, 2014 ruling on the motion to dismiss. Therefore, the sole issue on appeal is whether the trial court properly granted the state's motion to strike the first and second counts of the amended complaint. Accordingly, Kevin Heyward is not involved in this appeal, and, therefore, all references in this opinion to the plaintiff are to Theresa Heyward.

for the Superior Court in Meriden. At all relevant times, she was the only nonwhite employee working in the Meriden clerk's office.

"On July 18, 2012, [the plaintiff] filed a complaint with the Commission on Human Rights and Opportunities (CHRO), alleging that she had been subjected to harassment, discrimination and denied time off for medical appointments due to her race and gender, and as retaliation for engaging in protected activities. In her CHRO complaint, [the plaintiff] named the [defendant] as the sole respondent. She alleged that her supervisor, [Robert A.] Axelrod, had subjected her to a hostile work environment on the basis of her sex and race . . . .

"On March 7, 2013, [the plaintiff] received a release of jurisdiction letter from the CHRO, authorizing her to bring an action in the Superior Court for the claims alleged in her CHRO complaint. On August 8, 2013, [the plaintiff and her husband][2] filed a six count amended complaint [in the Superior Court] against the [defendant and Axelrod]. The first five counts were brought by [the plaintiff] against [the defendant and Axelrod], and alleged, respectively, creation of a hostile work environment, race based discrimination, disability discrimination, negligent infliction of emotional distress, and defamation. . . .

"The [defendant] moved to dismiss the amended complaint on August 14, 2013, arguing that the court lacked subject matter jurisdiction to hear the case for a number of reasons. With respect to the [defendant], the court granted the motion to dismiss . . . [as to] counts [three] four, five, and six . . . ." (Footnotes added and omitted.)

On February 21, 2014, the plaintiff appealed from the court's dismissal of the latter four counts of her

[2] See footnote 1 of this opinion.

amended complaint. On September 15, 2015, this court dismissed the appeal as to the defendant for lack of subject matter jurisdiction, concluding that the plaintiff had not appealed from a final judgment. See id., 805. While that appeal was pending, the defendant moved to strike the remaining two counts of the plaintiff's amended complaint, alleging hostile work environment and race discrimination. On December 10, 2015, the plaintiff filed her memorandum in opposition to the defendant's motion to strike. On April 12, 2016, the court issued a memorandum of decision granting the defendant's motion to strike on the ground that the plaintiff's amended complaint did not allege sufficient facts to support claims of hostile work environment or race discrimination, and, in the alternative, that the plaintiff's memorandum in opposition was inadequately briefed.[3] This appeal followed.[4] Additional facts will be set forth as necessary.

The plaintiff claims that the court improperly struck her hostile work environment and race discrimination claims and contends that she is "entitled to the broadest construction of the allegations of the amended complaint without [formulaic words] being required." We disagree and conclude that the plaintiff has pleaded insufficient facts to state a claim of hostile work environment or race discrimination.

[3] Because we conclude that the plaintiff's amended complaint was legally insufficient and this is an adequate basis on which to affirm the judgment of the trial court, we need not address the court's alternative basis for granting the defendant's motion to strike.

[4] On May 19, 2016, the plaintiff filed her appeal. On May 25, 2016, the defendant filed a motion for judgment. On June 6, 2016, the court granted the defendant's motion and rendered judgment in the defendant's favor. On June 16, 2016, the plaintiff amended her appeal to include the final judgment rendered on the stricken counts, effectively curing the jurisdictional defect. See Practice Book § 61-9 ("[i]f the original appeal is dismissed for lack of jurisdiction, the amended appeal shall remain pending if it was filed from a judgment or order from which an original appeal properly could have been filed").

We first set forth the appropriate standard of review in an appeal from the granting of a motion to strike. "Because a motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court, our review of the court's ruling . . . is plenary." (Internal quotation marks omitted.) *Amato* v. *Hearst Corp.*, 149 Conn. App. 774, 777, 89 A.3d 977 (2014). "The role of the trial court [is] to examine the [complaint], construed in favor of the [plaintiff], to determine whether the [pleading party has] stated a legally sufficient cause of action." (Internal quotation marks omitted.) *Szczapa* v. *United Parcel Service, Inc.*, 56 Conn. App. 325, 328, 743 A.2d 622, cert. denied, 252 Conn. 951, 748 A.2d 299 (2000). "It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted. . . . For the purpose of ruling upon a motion to strike, the facts alleged in a complaint, though not the legal conclusions it may contain, are deemed to be admitted. . . . A motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged." (Internal quotation marks omitted.) *Amato* v. *Hearst Corp.*, supra, 777–78.

The following additional facts are necessary for our discussion. Our decision in the plaintiff's prior appeal summarizes the well-pleaded facts set forth in paragraphs nine and ten of the amended complaint as follows: "Axelrod allegedly told an African-American police officer that he 'must be working hard' because he was 'black.' Margaret Malia, [the plaintiff's] coworker, allegedly stated that she 'did not believe in interracial relationships . . . .' [The plaintiff] was also denied vacation time and medical leave because of 'operational need,' even though Axelrod routinely granted other employees requests for time off. Axelrod yelled at [the

plaintiff] in front of coworkers and members of the public, and interrupted [the plaintiff's] conversations, both during work and while she was on breaks, to discuss work-related matters. [The plaintiff] felt that Axelrod showed Malia 'preferential treatment' at her expense. Axelrod placed a 'defamatory, accusatory and baseless' e-mail in [the plaintiff's] personnel file. [The plaintiff] believed that the state did not do enough to protect her from the favoritism that Axelrod showed other employees." *Heyward* v. *Judicial Department*, supra, 159 Conn. App. 798 n.3.

In granting the defendant's motion to strike, the court stated: "[The plaintiff] has not asserted in her objection that in fact the conduct alleged in her complaint created a workplace 'permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment.' *Brittel* v. *Dept. of Correction*, [247 Conn. 148, 166–67, 717 A.2d 1254 (1998)]. The court does not find that such has been alleged. Similarly, the plaintiff has not objected to the defendant's motion to strike on the ground that her complaint in fact alleges an adverse employment action as a consequence of the state's conduct as is required to state a claim for [race] discrimination. *Buster* v. *Wallingford*, [557 F. Supp. 2d 294 (D. Conn. 2008)]. A review of the complaint indicates no such pleading."

With these factual allegations and legal principles in mind, we address the sufficiency of the plaintiff's pleadings with respect to her hostile work environment and race discrimination claims.

I

We first address the plaintiff's hostile work environment claim. The plaintiff, in count one of her amended complaint, alleges the following: "The conduct of the

[defendant and Axelrod] created a hostile work environment for [the plaintiff] in violation of the Connecticut Fair Employment Practices Act, [General Statutes § 46a-51 et seq.] insofar as the conduct was sufficiently severe and pervasive so as to alter the terms and conditions of her employment and . . . Axelrod's conduct was egregiously not in compliance with the pertinent law/regulations/policies he was charged with abiding by/enforcing that the defendant . . . did not, or improperly so, train him to do/oversee him." The plaintiff contends that the court improperly struck this count because she pleaded in accordance with *Brittel* v. *Dept. of Correction*, supra, 247 Conn. 166–67. We disagree and conclude that the facts alleged by the plaintiff are not sufficiently severe or pervasive so as to alter the conditions of her employment and to create a hostile work environment.

We begin by setting forth the applicable legal framework. General Statutes § 46a-60 (a) (1) provides in relevant part: "It shall be a discriminatory practice . . . [f]or an employer, by the employer or the employer's agent . . . to discriminate against such individual in compensation or terms, conditions or privileges of employment because of the individual's race . . . ." In order for the plaintiff "[t]o establish a claim of hostile work environment, [under § 46a-60 (a) (1)] the workplace [must be] permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the [plaintiff's] employment and create an abusive working environment . . . . In order to be actionable . . . [the working] environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the [plaintiff] in fact did perceive to be so. . . . [W]hether an environment is sufficiently hostile or abusive [is determined] by looking at all the circumstances . . . ." (Citations

omitted; internal quotation marks omitted.) *Brittell* v. *Dept. of Correction*, supra, 247 Conn. 166–67; see also *Patino* v. *Birken Mfg. Co.*, 304 Conn. 679, 699, 41 A.3d 1013 (2012). "[T]here must be more than a few isolated incidents of racial enmity . . . meaning that [i]nstead of sporadic racial slurs, there must be a steady barrage of opprobrious racial comments . . . . Thus, whether racial slurs constitute a hostile work environment typically depends on the quantity, frequency, and severity of those slurs . . . considered cumulatively in order to obtain a realistic view of the work environment . . . ." (Internal quotation marks omitted.) *Feliciano* v. *Autozone, Inc.*, 316 Conn. 65, 85, 111 A.3d 453 (2015).

In the present case, the plaintiff alleged only two instances of racial remarks, with one of those remarks being made toward a third person. "Although not bound by it, we review federal precedent concerning employment discrimination for guidance in enforcing our own antidiscrimination statutes." (Internal quotation marks omitted.) *Thomson* v. *Dept. of Social Services*, 176 Conn. App. 122, 131, 169 A.3d 256, cert. denied, 327 Conn. 962, A.3d (2017). The United States Supreme Court has held that the "mere utterance of an . . . epithet which endangers offensive feelings in an employee . . . does not sufficiently affect the conditions of employment to implicate Title VII [of the Civil Rights Act of 1964]." (Citation omitted; internal quotation marks omitted.) *Harris* v. *Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993). Furthermore, two instances of inappropriate conduct within a one year span do not meet the high standard of severe and pervasive. See, e.g., *Quinn* v. *Green Tree Credit Corp.*, 159 F.3d 759, 768 (2d Cir. 1998) (holding that two isolated incidents of inappropriate sexual conduct not sufficient to establish liability for hostile work environment); *Stembridge* v. *New York*, 88 F. Supp. 2d 276, 286 (S.D.N.Y. 2000) (holding that seven instances

over three year span, which included indirect racial remarks, direct racial slurs, and hanging of black doll near plaintiff's workstation, were insufficient to support finding of hostile work environment); *Carter* v. *Cornell University*, 976 F. Supp. 224, 232 (holding that six racial remarks over three years did not constitute hostile work environment), aff'd, 159 F.3d 1345 (2d Cir. 1998). Additionally, the remainder of the plaintiff's allegations concern routine workplace matters, such as requests for time off, lunch breaks, performance evaluations and favoritism. These are not unreasonable conditions to be subjected to in the employment context. See *Perodeau* v. *Hartford*, 259 Conn. 729, 757, 792 A.2d 752 (2000) ("individuals reasonably should expect to be subject to other vicissitudes of employment, such as workplace gossip, rivalry, personality conflicts and the like"). We therefore conclude that the conduct alleged by the plaintiff is not sufficiently severe or pervasive to establish a claim of hostile work environment, and, accordingly, the trial court properly struck the plaintiff's hostile work environment claim.

II

We next address the sufficiency of the plaintiff's race discrimination claim. The plaintiff, in count two of her amended complaint, alleges the following: "The conduct of the defendants was race discrimination against [the plaintiff] in violation of the Connecticut Fair Employment Practices Act and . . . Axelrod's conduct was egregiously not in compliance with the pertinent law/regulations/policies he was charged with abiding by/enforcing that the defendant . . . did not, or improperly so, train him to do/oversee him." The plaintiff contends that this language, when read in conjunction with paragraphs nine and ten, "manifestly means that an adverse employment action . . . has been alleged . . . ." We disagree and conclude that the plaintiff did not allege any facts demonstrating that she was

subjected to an adverse employment action by the defendant.

The following legal principles guide our analysis of the plaintiff's discrimination claim. "The [legal] framework this court employs in assessing disparate treatment discrimination claims under Connecticut law was adapted from the United States Supreme Court's decision in *McDonnell Douglass Corp.* v. *Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and its progeny."[5] (Internal quotation marks omitted.) *Tomick* v. *United Parcel Services, Inc.*, 157 Conn. App. 312, 325, 115 A.3d 1143 (2015), aff'd, 324 Conn. 470, 153 A.3d 615 (2016). Accordingly, under our state law, in order for the plaintiff to prevail on her claim of race discrimination based on disparate treatment, she must first establish a prima facie case of discrimination. "To establish a prima facie case of discrimination . . . the [plaintiff] must demonstrate that (1) [she] is in a protected class; (2) [she] was qualified for the position; (3) [*she*] *suffered an adverse employment action*; and (4) that the adverse action occurred under circumstances giving rise to an inference of discrimination." (Emphasis added; internal quotation marks omitted.) *Jones* v. *Dept. of Children & Families*, 172 Conn. App. 14, 25, 158 A.3d 356 (2017). "A plaintiff sustains an adverse employment action if he or she endures a materially adverse change in the terms and conditions of employment. . . . To be materially adverse a change in working conditions must be more disruptive than a mere inconvenience or an alteration of job responsibilities. . . . [A]n adverse employment action [has been defined] as a significant change in employment status,

[5] "[D]isparate treatment simply refers to those cases where certain individuals are treated differently than others. . . . The principal inquiry of a disparate treatment case is whether the plaintiff was subjected to different treatment because of his or her protected status." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Levy* v. *Commission on Human Rights & Opportunities*, 236 Conn. 96, 104, 671 A.2d 349 (1996).

such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." (Citation omitted; internal quotation marks omitted.) *Amato* v. *Hearst Corp.*, supra, 149 Conn. App. 781; id., 783 (holding that employee failed to allege adverse employment action as result of being placed on performance improvement plan because she did not additionally allege that her salary or benefits had decreased, or that there was change in employment status).

In the present case, the plaintiff alleges that Axelrod placed a disciplinary e-mail in her personnel file and also yelled at her in front of coworkers and members of the public for giving incorrect information. Federal courts, however, have held that a disciplinary letter does not constitute a materially adverse employment action.[6] See, e.g., *Chang* v. *Safe Horizons*, 254 Fed. Appx. 838, 839 (2d Cir. 2007) (holding that oral and written warnings do not constitute adverse employment actions); *Joseph* v. *Leavitt*, 465 F.3d 87, 91 (2d Cir. 2006) ("[t]he application of the [employer's] disciplinary policies to [the employee], without more, does not constitute [an] adverse employment action"); *Mattern* v. *Eastman Kodak Co.*, 104 F.3d 702, 708 (5th Cir. 1997) (holding that disciplinary filings and supervisor's reprimands are not adverse employment actions), cert. denied, 522 U.S. 932, 118 S. Ct. 336, 139 L. Ed. 2d 260 (1997).

The reprimands and admonishments alleged by the plaintiff, in the absence of evidence showing that she was terminated, demoted or given diminished responsibilities, or that she suffered a decrease in salary or material loss in benefits, do not constitute an adverse

[6] A review of our case law does not provide any controlling authority. We therefore turn to federal precedent for guidance in reaching our conclusion. See *Thomson* v. *Dept. of Social Services*, supra, 176 Conn. App. 131.

employment action. We therefore conclude that the trial court properly struck the plaintiff's race discrimination claim.

The judgment is affirmed.

In this opinion the other judges concurred.

PASCAL BARONIO *v.* DONNA M. STUBBS ET AL.
(AC 38940)

Alvord, Prescott and Beach, Js.

Syllabus

The defendant mother appealed to this court from the judgment of the trial court awarding her and the plaintiff father joint legal custody of their minor child. The defendant claimed that the trial court erred in presuming that shared physical custody was in the child's best interest where there was not an agreement by the defendant to an award of joint legal custody, and that it committed plain error by stating during certain pendente lite proceedings that it wanted to see an increase in the plaintiff's parenting time and indicating before it heard all the evidence that it was inclined to award joint legal custody to the plaintiff. *Held*:

1. The trial court properly concluded under the circumstances of this case that the parties had agreed upon an award of joint legal custody and that shared physical custody was in the best interest of the child; the defendant's trial counsel represented to the court at the start of an evidentiary hearing that she did not object to joint legal custody and further represented to the court at the close of evidence that she was requesting joint legal custody, the plaintiff had requested joint legal custody in certain proposed orders, and the defendant did not file any opposing proposed orders.

2. The defendant's claim that the trial court committed plain error by expressing preconceived inclinations to increase the plaintiff's parenting time and to award joint legal custody was unavailing, as the record did not reveal any apparent bias or predetermination by the court against the defendant or in favor of the plaintiff; although the court may have interrupted the defendant's testimony, it was apparent that the court was attempting to keep the testimony focused on pertinent evidence, a statement of the court regarding the plaintiff's opportunity to have overnight parenting time was made at the conclusion of the hearing after both parties had testified and following the court's finding that overnight stays with the plaintiff were in the best interest of the child,

and the court's determination of joint legal custody was consistent with the parties' requests at the beginning of the hearing.

Submitted on briefs October 12—officially released December 19, 2017

Procedural History

Action for custody of the parties' minor child, brought to the Superior Court in the judicial district of New Haven, where the court, *Goodrow, J.*, approved a temporary agreement of the parties regarding a parenting plan; thereafter, the court denied the plaintiff's request for modification of the agreement; subsequently, the court granted the plaintiff's application for joint custody and rendered judgment thereon, from which the named defendant appealed to this court; thereafter, the court approved an agreement of the parties regarding a parenting plan. *Affirmed.*

Albert J. Oneto IV filed a brief for the appellant (named defendant).

Christopher M. Hansen filed a brief for the appellee (plaintiff).

Opinion

ALVORD, J. The defendant, Donna Stubbs, appeals from the judgment of the trial court awarding her and the plaintiff, Pascal Baronio, joint legal custody of their minor child. On appeal, the defendant claims that the court: (1) "erred in presuming that shared physical custody was in the child's best interest where there was not an agreement by the defendant to an award of joint legal custody within the meaning of General Statutes § 46b-56a (b)"; and (2) "committed plain error by stating during pendente lite proceedings that it wanted to see an increase in the plaintiff's parenting time, and by indicating before it heard all the evidence at trial that it was inclined to award joint legal custody to the plaintiff." We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our decision. The parties were involved in a relationship for approximately thirteen years and have one child together. The parties lived together until October, 2014, when the plaintiff moved out. The plaintiff filed an application for joint custody on December 1, 2014. The defendant filed an objection to the plaintiff's application on December 11, and an application for emergency ex parte order of custody on December 16. The court scheduled a hearing on January 8, 2015. On that date, the parties agreed upon a temporary parenting plan, which was made an order of the court. The parents' agreement permitted the plaintiff to see their child every Sunday from 9 a.m. to 6 p.m., to have telephone contact daily, and to see their child at school. On January 14, 2015, the plaintiff filed a motion for appointment of a guardian ad litem, which the court granted.

On February 11, 2015, the parties appeared before the court, *Goodrow*, *J.* The court heard testimony from both parties regarding, inter alia, the plaintiff's request for additional parenting time. The court found that it was in the best interest of their child to have overnights with the plaintiff, and ordered that the plaintiff have parenting time on alternating weekends from 10 a.m. on Saturday until 4 p.m. on Sunday. The parties were ordered to report back to the court on March 3, 2015, to address any concerns. On that date, the parents entered into a further agreement, and were again ordered to report back on March 31, 2015. On March 31, the plaintiff made a request for additional parenting time. Specifically, he requested parenting time with their child through Monday morning to bring their child to school on those weekends that he had overnight parenting time. Counsel for the defendant objected to the request as did the guardian ad litem, Attorney David Crow, citing the child's adjustment to a new environment in the plaintiff's home. The court denied the plaintiff's

request without prejudice, ordered the parties to return in two weeks, and ordered the guardian ad litem to provide a report on that date. On April 14, 2015, the guardian ad litem recommended that the plaintiff's parenting time be increased to include Sunday night through Monday morning. The parents entered into an agreement, which the court adopted, that included this additional parenting time.

The parties next appeared before the court on September 11, 2015, for a contested hearing on the plaintiff's application for joint custody. The plaintiff filed with the court proposed orders in which he requested joint legal and shared physical custody. The defendant did not file proposed orders with the court. In addition to the testimony of the plaintiff and the defendant, the court also heard testimony from Susan Falato, an art therapist with Shoreline Wellness in West Haven, Cheryl Iannucci, a care coordinator for Beacon Health Options in Rocky Hill, Allyson Popel, the child's kindergarten teacher, and Attorney Crow. The court issued an oral decision on February 1, 2016, in which it ordered joint legal custody and shared physical custody, and further ordered the plaintiff's proposed parenting time. The parties subsequently agreed upon a parenting plan, which the court approved. This appeal followed.

I

We first address the defendant's claim that the court "misapplied the law governing awards of joint legal custody under General Statutes § 46b-56a." Specifically, she claims that the statute permits a presumption that joint custody is in the best interests of the child only if the parties have agreed to an award of joint custody. She claims that "the record was insufficient to support a finding that the defendant agreed to share joint legal custody" with the plaintiff, and thus, "there was no legal basis upon which the family court could presume,

as it did, that shared physical custody was in the child's best interests." We disagree.

The following additional facts are relevant to this claim. On September 11, 2015, at the start of the contested hearing on custody, the plaintiff provided the court with proposed orders in which he requested joint legal and shared physical custody. Specifically, the plaintiff sought a biweekly custodial plan, pursuant to which he would have parenting time with their child from 10 a.m. Saturday through Wednesday morning on week one, and from 6 p.m. Sunday through Wednesday morning on week two. The defendant did not submit proposed orders to the court. When the court therefore inquired as to what the defendant was requesting, her counsel stated that "the status quo should be maintained. The present orders should be maintained." The court then inquired as to whether the defendant was objecting to joint legal custody, and her counsel replied that she was not.

During the testimony of Attorney Crow on the final day of the hearing, the court inquired as to whether he had "a recommendation as to custody, whether it should be joint or sole." Attorney Crow responded that he wanted to see joint legal custody, to which the court responded: "I do, too. Here's my concern, they don't seem to be able to communicate." Attorney Crow then expressed his opinion that the parties, despite a number of minor issues on both sides, had been working together. At the conclusion of evidence, the court heard argument from both parties. The court specifically requested that the parties address what they were asking the court to order and the statutory factors the court has to consider. The following colloquy occurred between the court, Attorney Christopher Hansen for the plaintiff, and Attorney Joseph DePaola for the defendant:

"The Court: [A]s I understand it, Attorney Hansen, you're asking for joint legal custody with a split fifty/fifty time split. Is that correct?

"[The Plaintiff's Counsel]: Not in—Judge, we are asking for shared physical, but it's actually about fifty-five/forty-five, the fifty-five being with the mother.

"The Court: All right. That's based on your last—what you put on the record when we began.

"[The Plaintiff's Counsel]: Yes. And it's . . . in the proposed orders, Your Honor.

"The Court: And, Attorney DePaola, what is it, specifically, that you're asking for?

"[The Defendant's Counsel]: I'm asking for the current order to remain in effect, taking into account the [guardian ad litem's (GAL)] suggestion that an additional evening be inserted.

"The Court: And joint legal custody?

"[The Defendant's Counsel]: Joint legal custody, primary physical residence with my client, final decision making authority with my client, and the current order is to remain in effect except for that extra day during the week that was suggested by Mr. Crow.

"The Court: How does the court entertain a join—your—you're—I infer you're also requesting joint custody—legal custody. Is that right?

"[The Defendant's Counsel]: Yeah, I thought I said that. Yeah.

"The Court: I'm sorry. I must have missed it.

"[The Defendant's Counsel]: I'm sorry.

"The Court: How—

"[The Defendant's Counsel]: Joint legal custody, primary physical residence with the defendant mother; defendant mother to have final decision making authority, current visitation schedule to remain in effect with

an additional evening per the recommendation of the GAL.

"The Court: My question—and this is—I'm going to ask Attorney Hansen the same question, how does the court enter a joint legal custody order, particularly from your perspective, Attorney DePaola, where your client has said that she doesn't have the ability to communicate with the plaintiff father regarding important decisions?

"[The Defendant's Counsel]: Well, I—I think they've come a long way from where they started, Judge. I'm not sure that's a foregone conclusion at this point.

"The Court: Do you understand why that raises a concern for the court when your client [is] saying she can't communicate with the father?

"[The Defendant's Counsel]: I—I think it would be a concern, but in this case, I think in view of all of the circumstances and with the testing and the coparenting class that they're going to attend; I think they'll be able to overcome that."

The court, noting that it had considered the statutory factors in the evidence, ordered joint legal custody and further ordered the plaintiff's proposed parenting time. The court ordered the parties to agree on a schedule, which they did, and the court approved the parents' agreement.

We first note the well settled standard of review in family matters. "An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Appellate

review of a trial court's findings of fact is governed by the clearly erroneous standard of review. The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Therefore, to conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did." (Internal quotation marks omitted.) *Keenan* v. *Casillo*, 149 Conn. App. 642, 644–45, 89 A.3d 912, cert. denied, 312 Conn. 910, 93 A.3d 594 (2014).[1]

"There shall be a presumption, affecting the burden of proof, that joint custody is in the best interests of a minor child where the parents have agreed to an award of joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor child . . . ." General Statutes § 46b-56a (b). "This section does not mandate joint custody; it only creates a presumption that joint custody would be in the best interests of a minor child under certain circumstances. It is still for the trial court to decide whether joint custody has been agreed to by the parties." *Timm* v.

[1] The defendant argues that this court should engage in plenary review of her claim because she challenges the trial court's application of governing law. We disagree. The gravamen of the defendant's claim is that the court improperly awarded joint custody after erroneously finding that the parties had agreed to joint legal custody. Such a claim is properly reviewed under the abuse of discretion standard. See, e.g., *Timm* v. *Timm*, 195 Conn. 202, 209–10, 487 A.2d 191 (1985) (reviewing under abuse of discretion standard defendant's claim that trial court erred in declining to award joint custody, where defendant claimed both parties had agreed to joint custody); *Keenan* v. *Casillo*, supra, 149 Conn. App. 644–48 (reviewing under abuse of discretion standard claim that court erred in ordering joint custody because it lacked statutory authority).

Timm, 195 Conn. 202, 209, 487 A.2d 191 (1985). Whether the parties have agreed to such an award is a question for the trial court. See *Emerick* v. *Emerick*, 5 Conn. App. 649, 657, 502 A.2d 933 (1985), cert. dismissed, 200 Conn. 804, 510 A.2d 192 (1986).

On the basis of the record before it, the court in the present case reasonably could have concluded that the parties had agreed upon an award of joint legal custody.[2] The defendant's counsel represented to the court at the start of the hearing that she did not object to joint legal custody. The defendant's counsel further represented to the court at the close of evidence that she was requesting joint legal custody. Moreover, the plaintiff had requested joint legal custody in his proposed orders, and the defendant did not file proposed orders. "[J]udicial review of a trial court's exercise of its broad discretion is limited to the questions of whether the court correctly applied the law and could reasonably have concluded as it did." (Internal quotation marks omitted.) *Timm* v. *Timm*, supra, 195 Conn. 210. The

[2] The defendant relies primarily upon *Timm* v. *Timm*, supra, 195 Conn. 210, in which our Supreme Court held that the trial court reasonably could have concluded that a joint custody award was not agreed upon by the parties. In *Timm*, although the plaintiff had testified at one point that she thought joint custody was "in the best interest of the children"; (internal quotation marks omitted) id., 208 n.2; she had earlier testified, in answering a question requesting that she explain why she would not be willing to have joint custody: "I don't know, specifically the way we have been getting along. And we can't get along. And, I think, the tension between us if we were to have joint custody at this point; we can't communicate at all. And I just think it would be too difficult at this stage of the game." (Internal quotation marks omitted.) Id., 209.

In the present case, even with both parties requesting joint legal custody, and the guardian ad litem recommending joint legal custody, the court still gave careful consideration to the parties' ability to communicate with each other. The defendant's counsel represented to the court that the parties had come a long way and would be able to overcome communication issues. On the basis of this record, we determine that the court, after hearing all of the evidence and the testimony of each of the witnesses, reasonably could have concluded as it did.

court reasonably could have concluded, under the circumstances of this case, that a joint custody award was both agreed upon and was in the best interests of the child.[3]

II

We next address the defendant's claim that the court committed plain error because it "publicly committed itself, prior to the start of trial, to increasing the plaintiff's parenting time, and because the family court announced before hearing all of the evidence that it wanted to give joint legal custody of the child to the plaintiff." The defendant, who was represented by counsel throughout the custody proceedings, did not file a motion for disqualification pursuant to Practice Book § 1-23, nor did she file a motion for a mistrial. Conceding that "ordinarily the Appellate Court will not review a claim of judicial bias unless the claim was properly presented to the trial court through a motion for mistrial," the defendant requests review under the plain error doctrine. We conclude that the court did not commit plain error.

We first note that "[o]ur Supreme Court has criticized the practice whereby an attorney, cognizant of circumstances giving rise to an objection before or during trial, waits until after an unfavorable judgment to raise the

[3] The defendant further claims that the court erred in awarding joint legal custody in light of her counsel's request for "[j]oint legal custody, primary physical residence with [the defendant], final decision making authority with [the defendant]," which she argues served as a clear request for sole legal custody. We disagree. As this court has previously recognized, "final decision making authority" in one parent is distinct from sole legal custody. See *Desai* v. *Desai*, 119 Conn. App. 224, 230, 987 A.2d 362 (2010) (noting Appellate Court's rejection of argument that grant of ultimate decision-making authority to one parent is, in effect, order of sole custody); *Tabackman* v. *Tabackman*, 25 Conn. App. 366, 368–69, 593 A.2d 526 (1991) (rejecting argument that award of joint legal custody with ultimate decision-making authority in one parent is "the functional equivalent of an award of sole custody").

issue. We have made it clear that we will not permit parties to anticipate a favorable decision, reserving a right to impeach it or set it aside if it happens to be against them, for a cause which was well known to them before or during the trial." (Internal quotation marks omitted.) *Weyher* v. *Weyher*, 164 Conn. App. 734, 749, 138 A.3d 969 (2016). Nevertheless, "[b]ecause an accusation of judicial bias or prejudice strikes at the very core of judicial integrity and tends to undermine public confidence in the established judiciary," this court has reviewed unpreserved judicial bias claims under the plain error doctrine. (Internal quotation marks omitted.) Id., 749–50. "Plain error exists only in truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings." (Internal quotation marks omitted.) Id., 750.

The defendant claims that the court expressed "preconceived inclination[s]" to grant the plaintiff's request for additional parenting time, and later, shared custody, on two occasions, February 11 and March 31, 2015. She further claims that the "taint of predetermination" was evident in "the manner in which the court permitted the plaintiff's case to be presented."

Specifically, the defendant first claims that the court interrupted her testimony during the February 11 hearing to admonish her.[4] She states that when asked why

[4] The following colloquy occurred:

"[The Defendant's Counsel]: Tell the judge why you think it's in [the child's] best interest not to have overnight[s] with Mr. Baronio at this point in time?

"[The Defendant]: Because, Your Honor, I have been his sole caretaker. I have taken my son to every single one of his doctor's appointments. My attorney has his records with proof of that.

"The Court: With all due respect, ma'am—

"[The Defendant]: Yes.

"The Court: —this actually isn't about you.

"[The Defendant]: Okay.

"The Court: It's about your son.

"[The Defendant]: Right.

she thought it was in the child's best interest not to have overnight visits with the plaintiff, the defendant explained that she was the child's sole caretaker and that she had taken the child to all of his doctor's appointments. The court then stated: "this actually isn't about you" and further stated "[i]t's about your son." The court told the defendant that although it did not consider the plaintiff's request unreasonable, if the defendant thought it was not in the child's best interest, the court wanted to know about that. The defendant claims that the court interrupted her testimony a second time to permit the plaintiff to ameliorate concerns raised by the defendant about access to inappropriate material on television.[5] Next, she points to the court's oral decision

"The Court: So the question is, he's five years old . . . this court and your lawyer will . . . tell you this, [your lawyer] knows me well enough . . . believes that parents, both parents . . . should be actively involved . . . in their children's lives. . . . And so I don't think that it is unreasonable . . . what father is asking for. . . . But if you think it's not in your child's best interest . . . then I want to know about . . . that."

[5] Immediately following the court's inquiry of the plaintiff regarding television access, the defendant's counsel asked the defendant what visitation schedule would be fair. The following exchange, which the defendant emphasizes in her brief, occurred:

"[The Defendant]: . . . He's more than welcome to take him from 9 o'clock and I would like him home at 4 o'clock so I can feed my son because of the incident that happened this past weekend, again, when he's had him and I've brought him to him on time every time like it was ordered. I've continued to take my son to school in Milford.

"The Court: What's the incident this weekend?

"[The Defendant]: My son had chicken on Thursday night with me, Friday with me—no, excuse—Friday night with me, Saturday night with me, and he fed him chicken twice on a Sunday.

"The Court: You're not seriously telling the court that you—

"[The Defendant]: What—

"The Court: —let me—

"[The Defendant]: No—

"The Court: —finish.

"[The Defendant]: —no, no, no. Okay.

"The Court: Let me finish. You're not seriously telling the court that you think father shouldn't have an overnight because your son's eating chicken four nights in a row?

"[The Defendant]: No, no, no. He threw up when he came home. . . .

granting the plaintiff's request for additional parenting time, in which the court stated: "The court finds that it is in the best interest of the child to have overnights with his father. . . . [T]his order and decision does not take away at all from the hard work that mother's been doing, but I feel strongly father should have the opportunity to have overnights and child should have the opportunity to be with father."

The defendant also claims that the court "reinforced" the appearance of a predetermined inclination to grant the plaintiff's request for shared custody on March 31, 2015, when it ordered the parties to return in two weeks, ordered the guardian ad litem to provide a report on that date, and stated that it "intend[ed] to extend father's parenting time." Lastly, the defendant suggests that the court erred in remarking, during Attorney Crow's testimony on February 1, 2016, that it too wanted to see joint legal custody prior to the defendant concluding her rebuttal evidence.

Our thorough review of the transcripts of the hearings does not reveal any apparent bias or predetermination against the defendant or in favor of the plaintiff. Although the court may have interrupted the defendant's testimony, we conclude that it was apparent that the court was attempting to keep the testimony focused on pertinent evidence.[6] See *Wiegand* v. *Wiegand*, 129 Conn. App. 526, 535, 21 A.3d 489 (2011) (although the

"The Court: —and you attribute—

"[The Defendant]: —I—

"The Court: —that to father's chicken?

"[The Defendant]: I attribute it to him—three things, maybe not taking him out when he was sick and he had the flu. He vomited, he had a fever, he had diarrhea. So I asked his father, what did he eat? I was trying to figure out if he had food poisoning."

[6] We likewise find no error in the court seeking clarification from the then self-represented plaintiff in response to the defendant's testimony regarding television access.

court, at times, "demonstrated some frustration and impatience with the plaintiff," the court's statements were "impartial and were meant to keep the plaintiff focused on relevant evidence that properly could be considered by the court"); *Giordano* v. *Giordano*, 9 Conn. App. 641, 644, 520 A.2d 1290 (1987) (rejecting defendant's claim that the court, inter alia, "had a preconceived opinion which raise[d] questions about the impartiality of the proceeding" where defendant's claim was based on "a few comments carefully culled from the course of the entire trial"). The court's statement regarding the plaintiff's opportunity to have overnight parenting time was made at the conclusion of the hearing after both parties had testified, and the statement immediately followed the court's finding that overnights were in the best interest of the child.[7] Lastly, we find no error in the court's agreement with Attorney Crow that it wanted to see joint legal custody, where joint legal custody was consistent with the parties' requests at the beginning of the hearing. See part I of this opinion. Because we find no merit to the defendant's claim of judicial impropriety, the defendant has failed to demonstrate the existence of plain error.

The judgment is affirmed.

In this opinion the other judges concurred.

[7] The cases cited by the defendant are factually distinct from the matter before this court. See *Cameron* v. *Cameron*, 187 Conn. 163, 170, 444 A.2d 915 (1982) (holding that trial judge should have ordered mistrial after stating several times that he believed defendant or his counsel was "attempting to perpetrate" fraud on the court and that defendant had lied during deposition, and where the court had invited defendant to testify and immediately held him in contempt); *Havis-Carbone* v. *Carbone*, 155 Conn. App. 848, 867, 112 A.3d 779 (2015) (finding plain error where the trial court granted plaintiff permission to relocate to another state with parties' child prior to conducting hearing, at which plaintiff bore burden of proving by preponderance of evidence that, inter alia, relocation was in best interests of child).

MALKIE WIEDERMAN *v.* ISAAC HALPERT ET AL. (AC 39274)

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

Syllabus

The plaintiff sought to recover damages from the defendants, H and M, for breach of fiduciary duty, fraud, conversion, and violations of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.), arising out of a real estate investment agreement. The agreement created several limited liability companies that purchased properties for development and, although the plaintiff was supposed to receive a percent of the profits, she alleged that the defendants commingled accounts, misappropriated and withheld funds, converted the funds for their own personal use, and secured the funds by use of fraudulent documents. The court entered a default as to H and M when, on the date of a scheduled trial management conference, only the plaintiff and her counsel appeared. Thereafter, following a hearing in damages at which H failed to appear despite having been subpoenaed to testify, the trial court rendered judgment in favor of the plaintiff and awarded her compensatory damages, punitive damages in the amount of $175,000, and attorney's fees and costs. After the trial court denied the motion to open the judgment filed by H and M, they appealed to this court raising claims of error that were not raised in their motion to open. They claimed that the judgment should be opened because their claims of error implicated the trial court's subject matter jurisdiction or because the court's actions constituted plain error that resulted in manifest injustice. *Held*:

1. H and M could not prevail on their claim that the trial court lacked subject matter jurisdiction, which was based on their claim that the plaintiff did not have standing to assert her claims because the injuries that she allegedly sustained were derivative of injuries to the limited liability companies; the plaintiff established a colorable claim of direct injury and, thus, that she was aggrieved by the defendants' conduct, as the complaint did not allege that she had standing solely by reason of being a member of the limited liability company but, rather, alleged that H conducted the day-to-day management of the companies in a manner that damaged her personally and directly in that she never received any portion of the profits or distributions from the properties, and her allegations that H and M had misappropriated, wasted, and mismanaged the funds that were due to her, and that they forged her signature on certain financial documents, claimed injuries that were not remote, indirect or derivative, but were peculiar to her.
2. H and M's claim the trial court committed plain error by failing to make explicit determinations as to the legal sufficiency of the plaintiff's claims, and by assuming that the entry of default against them had conclusively

established their liability was unavailing; the trial court specifically found that the plaintiff proved damages on her counts of breach of fiduciary duty, conversion, fraud and bad faith, but that she failed to meet her burden of establishing a violation of CUTPA, which demonstrated that the court considered the sufficiency of the plaintiff's pleading and proof in determining whether to award her damages, and although the trial court did not explicitly address the legal sufficiency of each of the plaintiff's claims, it necessarily found them sufficient when it awarded damages on those claims.

3. The trial court did not commit plain error in finding M liable to the plaintiff for fraud, the plaintiff having properly set forth a claim of fraud against both H and M in her complaint; the plaintiff alleged that she was induced by representatives of H and M to invest in the companies, that she relied on the representations of both H and M as to the organization, structure, and day-to-day management of the investment endeavor, and that both H and M deposited rent checks, to which she was entitled to 50 percent, into their personal bank accounts, used the companies' accounts for personal matters, were involved in forging the plaintiff's name on financial documents, and refused to account for the funds to which she claimed she was entitled.
4. The trial court improperly found M liable to the plaintiff for conversion, as the plaintiff's complaint did not sufficiently allege a claim of conversion against M; the conversion count of the complaint clearly and unequivocally applied only to H, both by its title and by the allegations set forth therein, which described only H's conduct.
5. This court could not conclude that the trial court committed a patent, readily discernible or obvious error in its award of compensatory damages as to the plaintiff's claims for breach of fiduciary duty, fraud, conversion, and bad faith, as the plaintiff's testimony and exhibits provided abundant support for the award of damages, and H and M did not ask the court to explicitly identify the damages awarded on each of the plaintiff's claims.
6. The trial court erred in awarding the plaintiff punitive damages in addition to attorney's fees and costs; the plaintiff having failed to prove the count alleging a violation of CUTPA, the award of punitive damages could only have been made with respect to her claim of fraud, and because an award of punitive damages on a claim of common-law fraud may include only attorney's fees and costs, both of which the court awarded to the plaintiff separate and apart from its punitive damages award, the court committed plain error in awarding her an additional $175,000 in punitive damages.

Argued October 11—officially released December 19, 2017

Procedural History

Action to recover damages for, inter alia, breach of fiduciary duty, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where

the action was withdrawn as against the defendant Judah Liberman, and the defendant 58 N. Walnut, LLC, et al., were defaulted for failure to appear; thereafter, the named defendant et al. filed a counterclaim; subsequently, the named defendant et al. were defaulted for failure to appear at a trial management conference; thereafter, following a hearing in damages, the court, *Brazzel-Massaro, J.*, rendered judgment for the plaintiff; subsequently, the court denied the motion to open filed by the named defendant et al., and the named defendant et al. appealed to this court. *Reversed in part; vacated in part; judgment directed.*

Kerry M. Wisser, with whom, on the brief, was *Sarah Black Lingenheld*, for the appellants (named defendant et al.).

Taryn D. Martin, with whom, on the brief, was *Robert A. Ziegler*, for the appellee (plaintiff).

Opinion

SHELDON, J. In this action arising from a real estate investment agreement, the defendants Isaac Halpert and Marsha Halpert[1] appeal from the judgment of the trial court denying their motion to open the judgment rendered against them following a hearing in damages held after they had been defaulted for failing to appear at a trial management conference. The trial court held a hearing in damages and awarded the plaintiff, Malkie

[1] The original complaint also named as defendants Judah Liberman, 58 N. Walnut, LLC, 94 Cherry Street, LLC, 100 Burton Street, LLC, 44 Linden, LLC, 49 Webb Street, LLC, 15 Cossett, LLC, 31 Webb, LLC, and MJM Management, LLC. The plaintiff withdrew the complaint as to Judah Liberman on February 2, 2016. After the original counsel for the Halperts and the various limited liability companies was permitted to withdraw his appearance in August, 2012, no new appearance was filed on behalf of the LLCs and those parties therefore were defaulted for failing to appear. Judgment has not been entered with respect to those parties and they are not parties to this appeal. Any references to the defendants in this opinion are to Isaac Halpert and Marsha Halpert.

Wiederman, $600,892.58 in compensatory and punitive damages, attorney's fees and costs, on her claims of breach of fiduciary duty, fraud, conversion and bad faith. The defendants claim on appeal that (1) the trial court lacked subject matter jurisdiction to hear the plaintiff's claims because the plaintiff did not have standing to assert them; (2) the trial court failed to make a determination as to the legal sufficiency of the plaintiff's claims of breach of fiduciary duty, fraud, conversion and bad faith; (3) there was no causal connection between the defendants' allegedly wrongful conduct and the losses for which the court awarded the plaintiff compensatory damages; (4) the trial court erred in finding Marsha Halpert liable for fraud and conversion absent sufficient allegations of those claims against her; and (5) the court erred in awarding the plaintiff punitive damages in addition to attorney's fees on her claim of fraud. The defendants concede that they failed to raise any of the foregoing claims in their motion to open the judgment, and thus that the law ordinarily precludes this court from considering those claims on appeal. The defendants nevertheless seek review of their claim that court erred in denying their motion to open on the grounds that the plaintiff lacked standing to assert her claims against the defendants and thus that the trial court lacked subject matter jurisdiction, and that the judgment contained plain errors that resulted in manifest injustice. We agree that the plaintiff failed to properly plead a claim for conversion against Marsha Halpert, and thus that the court's judgment finding her liable for conversion must be reversed. We also agree with the defendants' claim that the court committed plain error in awarding the plaintiff punitive damages in addition to attorney's fees on her claim of fraud, and thus we conclude that the award of punitive damages must be vacated.[2]

[2] The defendants also ask this court to exercise our supervisory powers to review and reverse the judgment of the trial court. As our Supreme Court previously has explained, "bypass doctrines permitting the review of

The trial court set forth the following factual and procedural history in its February 5, 2016 memorandum of decision. "The plaintiff . . . filed this action on November 13, 2008 . . . and filed an amended complaint dated June 14, 2011, which is the operative complaint. . . . The amended complaint contains eleven separate counts. The case has been in the court for a number of years and has an extensive history. The court entered a scheduling order for trial of this matter for March 3, 2015, which was continued until March 17, 2015 and thereafter until October 20, 2015. Counsel for the defendants requested the latest continuance to a trial date of January 28, 2016, with the trial management conference scheduled for January 14, 2016. Counsel for the . . . defendants failed to appear on January 14, 2016 for the trial management conference. The court, as well as [the] plaintiff's counsel, attempted to contact [counsel for the defendants,] Attorney [David] Rosenberg, for the conference. The notice of the conference was sent to all parties after the court granted the defendants' request for a continuance on October 13, 2015. The notice required that the parties submit a joint trial

unpreserved claims such as [*Golding*] . . . and plain error [claims], are generally adequate to protect the rights of the defendant and the integrity of the judicial system . . . . [T]he supervisory authority of this state's appellate courts is not intended to serve as a bypass to the bypass, permitting the review of unpreserved claims of case specific error—constitutional or not—that are not otherwise amenable to relief under *Golding* or the plain error doctrine. . . . Consistent with this general principle, we will reverse a [judgment] under our supervisory powers only in the rare case that fairness and justice demand it. [T]he exercise of our supervisory powers is an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of [the] utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole." (Citations omitted; internal quotation marks omitted.) *State* v. *Reyes*, 325 Conn. 815, 822–23, 160 A.3d 323 (2017); see *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). This case presents no such circumstances.

management report and appear at 9:30 a.m. On January 14, 2016, only the plaintiff and the plaintiff's counsel appeared. Counsel [for the plaintiff] represented that [Attorney Rosenberg] did not respond to requests to supplement the proposed joint trial management report provided to him. The court requested that counsel [for the plaintiff] contact Attorney Rosenberg and wait for a reasonable time period for the defendants to appear. [Attorney Rosenberg] did not appear and at 11:07 a.m., the court entered a default for failure to attend the conference. Notice was sent to counsel for the defendants that the court would conduct a hearing [in] damages on the scheduled January 28, 2016 trial date. Counsel for the plaintiff subpoenaed . . . Isaac Halpert, to appear on January 28, 2016. [Isaac] Halpert did not appear for the trial management conference or appear in response to the subpoena on the trial date.

"The court . . . proceeded on the hearing [in] damages on January 28, 2016. . . . Neither [Attorney Rosenberg] nor the subpoenaed defendant [Isaac Halpert] appeared for the hearing [in] damages. The court heard testimony from [the plaintiff] and received exhibits in support of her claim for damages." (Footnote omitted.)

After noting that, "[u]pon default, the plaintiff ordinarily becomes entitled to recover damages," the court reasoned: "The defendant failed to appear for the trial management conference on January 14, 2016, or at the trial which was scheduled as a hearing [in] damages as a result of the default entered on January 14, 2016. The court entered a default as to all parties but for purposes of this decision, the court is addressing only the two individuals, Isaac Halpert and Marsha Halpert. At the hearing, the plaintiff . . . proceeded as to count one, count four, count five, count six, and count ten [alleging, respectively] breach of fiduciary duty . . . fraud . . . conversion . . . bad faith and . . . [violation of the

Connecticut Unfair Practices Act (CUTPA), General Statutes § 42-110a et seq.].[3]

"The plaintiff offered testimony and exhibits at the hearing. She testified that she met Isaac Halpert and he presented himself as an experienced real estate developer. He took her to several properties in Waterbury which he had redeveloped and thereafter she invested in the several properties with him. This action arises out of the agreement between the plaintiff and the defendants, which created several limited liability companies [LLCs] for a number of development properties and the actions of the defendants which are clearly set forth in the complaint and further supported with the exhibits that were admitted during the hearing before this court. The plaintiff introduced 51 separate exhibits during her testimony.

"The plaintiff became a 50 [percent] member in the following limited liability companies: (1) 58 North Walnut, LLC; (2) 94 Cherry Street, LLC; (3) 100 Burton Street, LLC; (4) 44 Linden Street, LLC; (5) 49 Webb Street, LLC; (6) 15 Cossett Street, LLC; and (7) 31 Webb Street, LLC. Each of the [LLCs] purchased property in the city of Waterbury for development. In addition to these properties, the plaintiff was also involved in the purchase of property at 35 Adams Street in the city of Waterbury. This property was resold to the city of Waterbury and the sale proceeds of $65,262.19 were to be divided with 50 [percent] to the plaintiff for her investment. As to the remaining properties for each of the LLCs the plaintiff invested sums of money and she was to receive 50 [percent] of the investment and profits. The defendants, Isaac Halpert, Marsha Halpert, and Judah Liberman each had a percentage interest in the

[3] Although the plaintiff asserted additional claims against the defendants in her complaint, she abandoned those claims at the beginning of the hearing in damages.

properties which consumed the remaining 50 [percent]. The defendant Isaac Halpert agreed to conduct the day-to-day management of the properties.

"At the hearing, the plaintiff provided the court with a number of exhibits, including e-mails that questioned expenses, payments, payouts, location of checks, funds, and actions of Isaac Halpert which follow the allegations in the complaint regarding his commingling of the accounts, misappropriation of funds, withholding of funds, failing to account for or deposit funds collected, converting the funds to his and his wife's own personal use, and the securing of funds by use of fraudulent documents.

"The exhibits provide abundant support for damages as to counts one, four, five and six of the complaint. The plaintiff has made a [CUTPA] claim in count ten for damages pursuant to [General Statutes] § 42-110b. The exhibits and testimony of the plaintiff do not indicate that she has satisfied the requirements pursuant to [General Statutes] § 42-110g (c) and thus the court does not award a judgment for the plaintiff on this count only. As to the remaining counts, the court awards judgment and damages after review of the exhibits admitted in support of the plaintiff's testimony. In particular, the plaintiff has supported her testimony with an exhibit prepared by her that identifies the funds taken by [Isaac] Halpert and the investment summary for purposes of the claims of breach of fiduciary duty, fraud, conversion and bad faith. As to the claim for compensatory damages for these counts, the evidence supports an award of compensatory damages in the amount $271,250 and $95,797.79 for the funds proven by the [plaintiff] as alleged in the conversion count. The court awards punitive damages as claimed in [the] complaint in the amount of $175,000. The court awards attorney fees in the amount of $57,337.50 on the counts

for fraud and conversion, and costs in the amount of $1,507.29. . . .

"Based upon the above, judgment is entered in favor of the plaintiff in the amount of $367,047.79 compensatory damages and punitive damages in the amount of $175,000 as to counts four and five. The court awards attorney fees in the amount of $57,337.50 and costs of $1,507.29." (Footnotes added and omitted.)

Thereafter, on May 10, 2016, the defendants filed a motion to open the judgment, to which the plaintiff filed an objection. The court held a hearing on the defendants' motion to open the judgment and the plaintiff's objection thereto, after which the court issued a written order, in which it denied the defendants' motion as follows: "The plaintiff has objected and the court noted specifically that in addition to the attempts by the plaintiff to contact [Attorney Rosenberg] when he failed to appear for a trial management conference and thereafter for the trial date which was requested by him, the defendant[s] had received notices by the court, the defendant Isaac Halpert had been served in hand with a subpoena to testify on January 28, 2016, when the matter was scheduled for a hearing and failed to come, and months have passed before the defendant[s] [sought] to open although notices were sent to [Attorney Rosenberg's] old office address as well as his old and new e-mail addresses and he failed to respond. Counsel for the plaintiff as well as this court made many attempts to keep the defendant[s] aware of the status of the action but the defendant[s] remained unresponsive."

This appeal followed. The defendants now raise several claims of error as to the court's judgment, as set forth herein, none of which were raised in their motion to open the judgment. "The denial of a motion to open is an appealable final judgment. . . . Although a

motion to open can be filed within four months of a judgment . . . the filing of such a motion does not extend the appeal period for challenging the merits of the underlying judgment unless filed within the [twenty day period provided by Practice Book § 63-1]. . . . When a motion to open is filed more than twenty days after the judgment, the appeal from the denial of that motion can test only whether the trial court abused its discretion in failing to open the judgment and not the propriety of the merits of the underlying judgment. . . . This is so because otherwise the same issues that could have been resolved if timely raised would nevertheless be resolved, which would, in effect, extend the time to appeal. . . .

"The principles that govern motions to open or set aside a civil judgment are well established. Within four months of the date of the original judgment, Practice Book [§ 17-4] vests discretion in the trial court to determine whether there is a good and compelling reason for its modification or vacation. . . .

"Because opening a judgment is a matter of discretion, the trial court [is] not required to open the judgment to consider a claim not previously raised. The exercise of equitable authority is vested in the discretion of the trial court and is subject only to limited review on appeal. . . . We do not undertake a plenary review of the merits of a decision of the trial court to grant or to deny a motion to open a judgment. The only issue on appeal is whether the trial court has acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action." (Emphasis omitted; internal quotation marks omitted.) *Sabrina C.* v. *Fortin*, 176 Conn. App. 730, 746–47, 170 A.3d 100 (2017).

In light of the foregoing principles, the defendants acknowledge that "[t]he merits of the underlying judgment are ordinarily not reviewable when a party appeals only the denial of a motion to open judgment." The defendants do not argue that the trial court abused its discretion in denying their motion to open the judgment. The defendants argue, rather, that the judgment should be opened because their claims of error either implicate the trial court's subject matter jurisdiction or the court's actions constituted plain error that resulted in manifest injustice. We address the defendants' claims in turn.

I

We first address the defendants' claim that the trial court did not have jurisdiction to hear the plaintiff's claims because the plaintiff lacked standing to assert them. The defendants argue that the injuries allegedly sustained by the plaintiff were derivative of injuries to the LLCs, and thus that the plaintiff did not have standing to assert those claims. We disagree.

"If a party is found to lack standing, the court is without subject matter jurisdiction to determine the cause. . . . [A] claim that a court lacks subject matter jurisdiction may be raised at any time during the proceedings . . . including on appeal . . . . Because the defendants' claim implicates the trial court's subject matter jurisdiction, we conclude that it is reviewable even though the defendants have raised it for the first time on appeal." (Citations omitted; internal quotation marks omitted.) *Perez-Dickson* v. *Bridgeport*, 304 Conn. 483, 506, 43 A.3d 69 (2012). "A determination regarding a trial court's subject matter jurisdiction is a question of law." (Internal quotation marks omitted.) *Fairchild Heights Residents Assn., Inc.* v. *Fairchild Heights, Inc.*, 310 Conn. 797, 821, 82 A.3d 602 (2014).

"[S]tanding is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction

of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . Nevertheless, [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.) Id., 820–21. "These two objectives are ordinarily held to have been met when a complainant makes a colorable claim of direct injury he has suffered or is likely to suffer, in an individual or representative capacity. Such a personal stake in the outcome of the controversy . . . provides the requisite assurance of concrete adverseness and diligent advocacy." (Internal quotation marks omitted.) *Pond View, LLC* v. *Planning & Zoning Commission*, 288 Conn. 143, 155, 953 A.2d 1 (2008).

"Standing requires no more than a colorable claim of injury; a [party] ordinarily establishes . . . standing by allegations of injury [that he or she has suffered or is likely to suffer]. Similarly, standing exists to attempt to vindicate arguably protected interests. . . . Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved. . . . 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 challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming

aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]. . . . 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.) *Wilcox* v. *Webster Ins., Inc.*, 294 Conn. 206, 214–15, 982 A.2d 1053 (2009). "For purposes of standing, the plaintiffs need only allege a *colorable* claim of injury as standing exists to attempt to vindicate *arguably* protected interests." (Emphasis added; internal quotation marks omitted.) Id., 216–17. "It is well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *New England Pipe Corp.* v. *Northeast Corridor Foundation*, 271 Conn. 329, 335, 857 A.2d 348 (2004).

"[A]s a general rule, a plaintiff lacks standing unless the harm alleged is direct rather than derivative or indirect." *Connecticut State Medical Society* v. *Oxford Health Plans (CT), Inc.*, 272 Conn. 469, 481, 863 A.2d 645 (2005). "[I]f the injuries claimed by the plaintiff are remote, indirect or derivative with respect to the defendant's conduct, the plaintiff is not the proper party to assert them and lacks standing to do so. Where, for example, the harms asserted to have been suffered directly by a plaintiff are in reality derivative of injuries to a third party, the injuries are not direct but are indirect, and the plaintiff has no standing to assert them." *Ganim* v. *Smith & Wesson Corp.*, 258 Conn. 313, 347–48, 780 A.2d 98 (2001).

"A distinction must be made between the right of a shareholder to bring suit in an individual capacity as the sole party injured, and his right to sue derivatively on behalf of the corporation alleged to be injured. . . .

Generally, individual stockholders cannot sue the officers at law for damages on the theory that they are entitled to damages because mismanagement has rendered their stock of less value, since the injury is generally not to the shareholder individually, but to the corporation—to the shareholders collectively. . . . In this regard, it is axiomatic that a claim of injury, the basis of which is a wrong to the corporation, must be brought in a derivative suit, with the plaintiff proceeding 'secondarily,' deriving his rights from the corporation which is alleged to have been wronged. . . . It is, however, well settled that if the injury is one to the plaintiff as a stockholder, and to him individually, and not to the corporation, as where an alleged fraud perpetrated by the corporation has affected the plaintiff directly, the cause of action is personal and individual. . . . In such a case, the plaintiff-shareholder sustains a loss separate and distinct from that of the corporation, or from that of other shareholders, and thus has the right to seek redress in a personal capacity for a wrong done to him individually."[4] (Citations omitted; footnote omitted.) *Yanow* v. *Teal Industries, Inc.*, 178 Conn. 262,

[4] "For example, where a sole minority stockholder . . . is the victim of a fraud perpetrated by the sole controlling stockholder . . . the injury, and the action for redress, cannot be said to belong merely to the corporation. If the controlling majority stockholder seeks to injure the minority stockholder through the means of looting the corporation or so wrecking it that the minority stockholder would get nothing out of his assets, the claim resulting therefrom is sufficient to constitute an individual action. . . . Likewise, where an injury sustained to a shareholder's stock is peculiar to him alone, and does not fall alike upon other stockholders, the shareholder has an individual cause of action." (Citations omitted.) *Yanow* v. *Teal Industries, Inc.*, 178 Conn. 262, 282 n.9, 422 A.2d 311 (1979).

Moreover, our Supreme Court has recognized that partners are generally "bound in a fiduciary relationship and act as trustees toward each other and toward the partnership." (Internal quotation marks omitted.) *Spector* v. *Konover*, 57 Conn. App. 121, 127, 747 A.2d 39, cert. denied, 254 Conn. 913, 759 A.2d 507 (2000). "[I]t is a thoroughly well-settled equitable rule that any one acting in a fiduciary relation shall not be permitted to make use of that relation to benefit his own personal interest. This rule is strict in its requirements and in its operation. It extends to all transactions where the individual's personal interests may be brought into conflict with his acts in

281–82, 422 A.2d 311 (1979). "When a party meets the requirements of the test for determining classical aggrievement, it is irrelevant for purposes of standing whether such party also is a member of a limited liability company that may or may not have related claims of its own." *Wilcox* v. *Webster Ins., Inc.*, supra, 294 Conn. 220–21.

The defendants argue that "the allegations in the operative complaint and [the] plaintiff's testimony at the hearing in damages make clear that [the] plaintiff based her claims on harm to the LLCs." We disagree. The plaintiff did not allege that she had standing solely by reason of being a member of the LLCs. The plaintiff's complaint contained allegations of harm to her, separate and distinct from the harm potentially sustained by the LLCs. Here, the plaintiff alleged that Isaac Halpert, who allegedly conducted the day-to-day management of the LLCs, did so in a manner that damaged her directly. The plaintiff claimed that she never received any portion of the profits or distributions from the properties and that the defendants, instead of fulfilling their contractual and fiduciary obligations to so distribute those funds to her, misappropriated, wasted and mismanaged them. She alleged that her investment was "misappropriated, used to maintain properties unrelated to this investment endeavor, and/or wasted." The plaintiff further claimed that the defendants failed to provide to her an accounting of their use of funds to which she allegedly was entitled and forged her signature on certain financial documents. The injuries claimed by the plaintiff were not remote, indirect or derivative, but were peculiar to her. We conclude that the plaintiff established a colorable claim of injury, and

the fiduciary capacity, and it works independently of the question whether there was fraud or whether there was good intention. . . . The rule applies alike to agents, *partners*, guardians, executors and administrators." (Emphasis in original; internal quotation marks omitted.) Id., 128.

thus that she was aggrieved by the defendants' alleged conduct. Accordingly, we reject the defendants' claim that the trial court lacked subject matter jurisdiction to hear the plaintiff's claims.

II

We next address with the defendants' claim that their motion to open should have been granted because the trial court's judgment is rife with errors, and those errors are so plain that they resulted in manifest injustice.

"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. A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice. . . . [Previously], we 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. . . .

"It is axiomatic that, [t]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment . . . for reasons of policy. . . . Put another way, plain error review is reserved for only the most egregious errors. When an error of such a magnitude exists, it necessitates reversal." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *State* v. *McClain*, 324 Conn. 802, 812–14, 155 A.3d 209 (2017). With these principles in mind, we address the defendants' claims of plain error in turn.

A

The defendants' first claim of plain error is that the trial court failed to make explicit determinations as to the legal sufficiency of the plaintiff's claims. The defendants claim that in stating, "[u]pon default, the plaintiff ordinarily becomes entitled to recover damages," the trial court "glossed over the qualifier of 'ordinarily' " and, "incorrectly assumed that the entry of default had conclusively established liability as to such claims." We disagree.

We first note that the trial court's statement of the law was correct and there was nothing in the record that indicates that the court "glossed over" any aspect of that law. In its memorandum of decision, the court specifically found that the plaintiff proved damages on her counts of breach of fiduciary duty, conversion, fraud and bad faith, but that she failed to meet her burden of establishing a CUTPA violation. It is evident from these statements that the court considered the sufficiency of the plaintiff's pleading and proof in determining whether to award damages to the plaintiff.

Moreover, it is well established that "[u]nless the contrary appears in the record, we will presume that the trial court acted properly and considered applicable legal principles. . . . Stated slightly differently, this court does not presume error by the trial court where the party challenging the court's ruling failed to satisfy its burden of demonstrating that it was factually or legally untenable." (Citations omitted; internal quotation marks omitted.) *Luongo Construction & Development, LLC* v. *MacFarlane*, 176 Conn. App. 272, 285–86, 170 A.3d 157 (2017). Although the court did not explicitly address the legal sufficiency of the plaintiff's claims, it necessarily found them sufficient when it awarded damages on those claims. We cannot conclude that the court committed plain error in this regard.

B

The defendants next claim that the court committed plain error in finding Marsha Halpert liable to the plaintiff for fraud and conversion where the plaintiff's allegations against her failed to make such a claim.

"The interpretation of pleadings is always a question of law for the court . . . . Our review of the trial court's interpretation of the pleadings therefore is plenary. . . . Furthermore, we long have eschewed the notion that pleadings should be read in a hypertechnical manner. Rather, [t]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . [T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . . Our reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted

in such a way so as to strain the bounds of rational comprehension. . . . As long as the pleadings provide sufficient notice of the facts claimed and the issues to be tried and do not surprise or prejudice the opposing party, we will not conclude that the complaint is insufficient to allow recovery." (Citations omitted; internal quotation marks omitted.) *Flannery* v. *Singer Asset Finance Co., LLC*, 312 Conn. 286, 299–300, 94 A.3d 553 (2014).

1

The defendants argue that it was plain error for the trial court to find Marsha Halpert liable for fraud because the plaintiff did not properly assert a claim of fraud against her. We disagree.

"The essential elements of an action in common law fraud . . . are that: (1) a false representation was made as a statement of fact; (2) it was untrue and known to be untrue by the party making it; (3) it was made to induce the other party to act upon it; and (4) the other party did so act upon that false representation to his injury. . . . [T]he party to whom the false representation was made [must claim] to have relied on that representation and to have suffered harm as a result of the reliance." (Internal quotation marks omitted.) *Sturm* v. *Harb Development, LLC*, 298 Conn. 124, 142, 2 A.3d 859 (2010).

A fair reading of the plaintiff's complaint as a whole reveals that the plaintiff properly set forth a claim of fraud against both Isaac Halpert and Marsha Halpert. In count four of her complaint, the plaintiff alleged that she was induced by the representations of Isaac Halpert to invest in the LLCs and that he knew, when he so induced her, that her investment would be "misappropriated, used to maintain properties unrelated to this investment endeavor, and/or wasted." She further alleged that she relied upon the representations of both

Isaac Halpert and Marsha Halpert "as to the organization, structure and day-to-day management of the investment endeavor." The plaintiff also alleged that both Isaac Halpert and Marsha Halpert deposited rent checks, to which she was entitled to 50 percent, into their personal bank accounts, have used LLC accounts for personal matters and that they both were involved in forging her name on financial documents and refused to account for the funds to which she was claiming she was entitled. Considering the plaintiff's complaint in its entirety, we conclude that the allegations therein sufficiently set forth a claim of fraud against Marsha Halpert.

2

The defendants also claim that the court erred in finding Marsha Halpert liable to the plaintiff for conversion because the plaintiff's complaint did not sufficiently allege a claim of conversion against Marsha Halpert. We agree.

The plaintiff's claim for conversion, which "occurs when one, without authorization, assumes and exercises ownership over property belonging to another, to the exclusion of the owner's rights"; (internal quotation marks omitted) *Wellington Systems, Inc.* v. *Redding Group, Inc.*, 49 Conn. App. 152, 169, 714 A.2d 21, cert. denied, 247 Conn. 905, 720 A.2d 516 (1998); is set forth in the fifth count of her complaint, which is entitled, "As Against Isaac Halpert." The title of each count of the plaintiff's complaint indicates the subject of the allegations, but only some of those titles list the name of Marsha Halpert. The conversion count clearly and unequivocally applies only to Isaac Halpert, both by its title and by the allegations set forth therein which describe only the conduct of Isaac Halpert. The plaintiff's count for conversion contains no allegations whatsoever that reasonably can be construed to apply to

Marsha Halpert. The court's finding of liability for conversion against Marsha Halpert thus cannot stand.[5]

C

The defendants also claim that the court committed plain error in awarding compensatory damages to the plaintiff in the absence of a causal connection between the losses for which she was awarded and the defendants' allegedly wrongful conduct.

"[T]he trial court has broad discretion in determining damages. . . . The determination of damages involves a question of fact that will not be overturned unless it is clearly erroneous. . . . Damages are recoverable only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty. . . . Thus, [t]he court must have evidence by which it can calculate the damages, which is not merely subjective or speculative, but which allows for some objective ascertainment of the amount." (Internal quotation marks omitted.) *Milford Bank* v. *Phoenix Contracting Group, Inc.*, 143 Conn. App. 519, 525, 72 A.3d 55 (2013).

Here, the court found that the plaintiff's exhibits provided "abundant support for damages" as to her claims for breach of fiduciary duty, fraud, conversion and bad faith. The court awarded "compensatory damages in the amount of $271,250 and $95,797.79 for the funds proven by the defendant as alleged in the conversion count." In so doing, the court specifically referred to the plaintiff's testimony and "an exhibit prepared by her that identifies the funds taken by [Isaac] Halpert and the investment summary for purposes of the claims

[5] Although the court improperly found Marsha Halpert liable for conversion, it did not apportion its award of damages on the conversion count between the two defendants and the defendants did not ask the court to do so. The court's award of damages on the conversion count thus remains intact, but applies to Isaac Halpert only.

of breach of fiduciary duty, fraud, conversion and bad faith." The court did not explicitly identify the damages awarded on each of the plaintiff's claims, nor did the defendants ask it to do so. We cannot conclude, on the record before us, that the court committed a patent, readily discernible or obvious error in awarding damages as claimed by the defendants.

D

The defendants finally claim that the court erred in awarding the plaintiff punitive damages in addition to attorney's fees in the absence of any legal authority to do so. In her complaint, the plaintiff sought punitive damages and attorney's fees on her claims for fraud and violation of CUTPA. Because the court determined that the plaintiff failed to prove her CUTPA claim, its award of punitive damages could only have been made on her claim of fraud.

"Punitive damages may be awarded upon a showing of fraud." *Plikus* v. *Plikus*, 26 Conn. App. 174, 180, 599 A.2d 392 (1991). Common-law punitive damages, however, are limited, under well established Connecticut law, "to litigation expenses, such as attorney's fees, less taxable costs." *Hylton* v. *Gunter*, 313 Conn. 472, 484, 97 A.3d 970 (2014).

Here, the plaintiff submitted an affidavit of attorney's fees totalling $58,817.50, all of which the trial court awarded, with the exception of $1180, which represented time spent by an individual unknown to the court. The plaintiff also submitted a bill of costs totalling $1777.29. The court awarded costs in the amount of $1507.29, not allowing the plaintiff's claim of $270 for "depositions of in-state witnesses" because the plaintiff failed to submit proof of payment of those costs. The court awarded punitive damages in the amount of $175,000. The court did not articulate the legal or factual basis of that award, nor is any such basis ascertainable

from the record. Because an award of punitive damages on a claim of common-law fraud may include only attorney's fees and costs, both of which the court awarded to the plaintiff separate and apart from its punitive damages award, the court committed plain error in awarding her an additional $175,000 in punitive damages. That award, which is patently erroneous, cannot stand.

The judgment is reversed as against Marsha Halpert for conversion; the award of punitive damages in the amount of $175,000 is vacated; and the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

ELIZABETH ISENBURG *v.* MATTHEW ISENBURG
(AC 38669)

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

Syllabus

The plaintiff sought to recover damages from the defendant for, inter alia, breach of contract. The plaintiff and the defendant were in a relationship and lived together for fourteen years, and although the parties never married, the plaintiff legally changed her last name to that of the defendant. Before their relationship began, the defendant owned a photographic collection, which he sold in 2012 for fifteen million dollars. Several months after the sale, the parties' relationship ended. The plaintiff brought this action claiming, inter alia, that the defendant had breached certain contracts he had entered into with her, under which they had agreed that she would contribute to the defendant's household and to certain of his businesses, investment and collection ventures in exchange for which he would share equally with her income from such businesses and ventures and ownership of all assets he acquired after the formation of the contracts. Following a court trial, the court rendered judgment in part for the plaintiff, awarding her certain property. The plaintiff appealed to this court claiming, inter alia, that the trial court erred by excluding large portions of exhibits she had offered into evidence at trial and by not recusing itself sua sponte from the case. *Held*:

1. The plaintiff's claim that the trial court improperly excluded certain evidence lacked merit; the trial court never made the challenged ruling

as alleged by the plaintiff, as each of the allegedly excluded documents was actually admitted into evidence.

2. The trial court did not abuse its discretion in failing to recuse itself from the case; the plaintiff, in claiming that the trial judge, as a married man, was biased against her because she was living with the defendant as an unmarried couple, failed to present any basis for finding that a reasonable person would question the trial judge's impartiality or that the judge's disqualification from the case was warranted.

3. The trial court's findings that there was no express or implied contract between the plaintiff and the defendant, that the parties' relationship was purely social, and that the defendant did not owe the plaintiff any fiduciary duty were not clearly erroneous: the trial court, which cited to and relied on substantial evidence in the record in reaching its conclusion that there was no contract between the plaintiff and the defendant, found that the defendant never made any promise to the plaintiff, spoken or unspoken, that if she worked with him, he would give her any portion of his photographic collection, and that the plaintiff had never made any meaningful contribution to the defendant's investment ventures or photographic collection, which was well established long before the plaintiff's relationship and alleged collaboration with the defendant began, and in light of the court's finding regarding the nature of the parties' relationship, which was not clearly erroneous, the court did not err in rejecting the plaintiff's claim that the defendant breached a fiduciary duty to her; moreover, to the extent that the plaintiff attempted to reclassify her claim of breach of fiduciary duty as a claim arising from the parties' business relationship, the claim was never presented to or decided by the trial court and, thus, was not properly preserved for review on appeal.

4. The plaintiff could not prevail on her claim that the trial court erred in not fashioning a remedy that awarded her certain specific damages or other relief; that court did not abuse its discretion in determining what damages and other relief to award the plaintiff, who failed to show that she was entitled to certain claimed damages.

Argued September 25—officially released December 19, 2017

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of New London; thereafter, the matter was transferred to the judicial district of Hartford, Complex Litigation Docket; subsequently, the court, *Moukawsher*, *J.*, granted the defendant's motion to strike the matter from the jury docket; thereafter,

the matter was tried to the court, *Moukawsher*, *J.*, judgment in part for the plaintiff, from which the plaintiff appealed to this court. *Affirmed.*

Elizabeth Isenburg, self-represented, the appellant (plaintiff).

Andrew W. Krevolin, with whom was *Denise Lucchio*, for the appellee (defendant).

Opinion

SHELDON, J. The plaintiff, Elizabeth Isenburg,[1] appeals from the judgment of the trial court, rendered after a trial to the court, awarding her limited damages and other relief against the defendant, Matthew Isenburg, on multiple claims against him.[2] The following facts, as found by the trial court, are relevant to this appeal. The plaintiff and the defendant were in a relationship for fourteen years, from 1998 to 2012. During that period, the plaintiff lived in the defendant's home. Long before the parties' relationship began, the defendant owned an extensive collection of early photographs and photographic ephemera (photographic collection), which he ultimately sold in 2012 for fifteen million dollars. Several months after the sale of the photographic collection, the parties' relationship ended, and the plaintiff moved out of the defendant's home.

At trial, the plaintiff claimed that the defendant had breached express and implied contracts he had entered

[1] The parties were never married, however, in the course of their relationship, the plaintiff legally changed her name to the defendant's last name.

[2] The case originally was assigned for oral argument on January 9, 2017, but was stayed on December 20, 2016, due to the death of the defendant. Pursuant to General Statutes § 52-599 (b), the plaintiff filed a motion to substitute the temporary administrator of the defendant's estate for the defendant, which this court granted. The court ordered the temporary administrator to file a written statement regarding whether he had the authority to defend this appeal. The temporary administrator filed a letter with the court stating that he did have the authority, and thereafter, the stay was lifted.

into with her, under which they had agreed that she would contribute her time, efforts, talents and resources to the defendant's household, businesses, and investment and collection ventures, in exchange for which he would share equally with her both the income from such businesses and other ventures and the ownership of all assets he acquired after the formation of the contract. The plaintiff further claimed that: the defendant had fraudulently misrepresented to her his intentions concerning the foregoing agreement in order to induce her to devote herself completely to him, and that she had relied on those fraudulent misrepresentations to her injury, loss and damage; the defendant had defrauded her by taking great pains to gain her undivided trust and loyalty, causing her to enter into a confidential and/or special relationship with him, in which she became wholly dependent upon him for her support and sustenance and he assumed a fiduciary duty to her to provide for her material needs; the defendant breached his fiduciary duty to her by unilaterally closing several joint bank accounts that he had opened in order to provide for her support and causing her to move out of his home without compensation for the services she had provided to the defendant and his businesses and other ventures; the defendant had been unjustly enriched because the plaintiff's contributions to his home and business and other ventures had spared him substantial expenses, for which he had failed to pay her; the defendant had converted certain items of her personal property by selling such items, without her knowledge or consent, as part of his photographic collection; and finally, the defendant's conduct in repudiating their agreement by causing her to vacate his home, then denying her claim to having a financial interest in his real or personal property, had given rise to a constructive and/or resulting trust in her favor with respect to such property.

The court rejected all of the foregoing claims, finding that the plaintiff and the defendant had always had only a social, not a business, relationship, and that all of the defendant's promises to the plaintiff concerning the future had always been conditioned upon the continuation of their social relationship. The court agreed with the plaintiff that the defendant had given her certain specific items[3] during the course of their relationship, and thus ordered the defendant to return those items to the plaintiff. The court also ordered the defendant to return to the plaintiff certain items of her personal property that were still in his or his agent's control, including: the contents of a storage unit; items that the plaintiff brought with her when she moved into the defendant's home; and all of the plaintiff's clothing that she had left in his home when she moved out. Finally, the court ordered the defendant to pay the plaintiff $900 to replace certain items of her personal property that were broken while they were being stored in the storage unit. The court ruled, however, that the plaintiff was not entitled to, and thus it did not award her, any proceeds from the sale of the defendant's photographic collection, any of the money that had been in any joint banking accounts that the defendant had opened and maintained in the course of their relationship, or any funds compensating her for her claimed one-half interest in the defendant's home.

On appeal, the plaintiff claims that the trial court erred by: (1) excluding large portions of certain exhibits she had offered into evidence at trial; (2) not recusing itself, sua sponte, from the case; (3) finding that there was no express or implied contract between her and

[3] Ultimately, the court awarded the plaintiff any *carte de visite* photographs acquired exclusively by or for the plaintiff that were contained in the defendant's home as of January 1, 2013; a Katherine Hepburn related lithograph; a 1910 landscape in oil of a farm; and the following items that were in the defendant's home in May, 2002: a piano, two oil paintings by George M. Bruestle, a large crane from China, and any decorative screens.

the defendant; (4) finding that the defendant did not owe her any fiduciary duty, much less breach such a duty to her; and (5) failing to award her certain other specific damages and property.[4] We affirm the judgment of the trial court.

I

As her first claim of error, the plaintiff challenges the trial court's alleged exclusion of certain exhibits which she offered into evidence at trial. The plaintiff claims, more particularly, that the trial court erred by excluding large portions of a compendium of documents that she had attempted to introduce, admitting from it only three poems that the defendant had written to her. The excluded evidence allegedly included: documents concerning the establishment of a U.S. Trust wealth management account;[5] two certificates of deposit opened in the names of the plaintiff and the defendant; a commercial promissory note in the principal amount of $317,690.41, payable to the plaintiff and the defendant, which was held by the attorney for the defendant's estate, Theodore N. Phillips; and documents establishing a joint checking account for the plaintiff and the defendant with Bank of America.

[4] The plaintiff also claims on appeal that the trial court erred in finding that the plaintiff did not "[contribute] anything to the joint venture" she alleged that she engaged in with the defendant. Pursuant to her complaint, the trial court evaluated her "joint venture" claims under the auspices of her stated claims in contract, implied contract, promissory estoppel, and fraud. For the purposes of this appeal, we address the plaintiff's "joint venture" claim in the context of her claims of express and implied contract, which is the only claim addressed by the trial court that the plaintiff has raised on appeal.

[5] The plaintiff introduced evidence of both an incomplete application for a U.S. Trust wealth management account and the records of a different U.S. Trust wealth management account that had been opened. The incomplete application had signature lines for both the plaintiff's and the defendant's names, although only her signature was on the document. The account that had been opened was in the defendant's name only, and contained six million dollars.

"The trial court's decision to admit or preclude evidence, and its determination as to whether evidence is relevant and probative, are subject to review for an abuse of discretion." *Fleming* v. *Dionisio*, 317 Conn. 498, 512, 119 A.3d 531 (2015). Here, however, we have no occasion to review whether the trial court abused its discretion in ruling as the plaintiff claims because the court never made the challenged ruling. In fact, each of the allegedly excluded documents was actually admitted into evidence.[6] For that reason, the plaintiff's first claim of error must obviously be rejected.

II

As her second claim of error, the plaintiff argues that the trial judge should have recused himself from her case because he, as a married man, was biased against her because her claims arose at a time when she and the defendant were living together as an unmarried couple. Although the plaintiff never raised that concern at trial, much less moved for the judge's recusal on that or any other basis, she now asserts that the court erred by failing to recuse itself from this case sua sponte.

Pursuant to Practice Book § 1-22 (a), "[a] judicial authority shall, upon motion of either party or upon its own motion, be disqualified from acting in a matter if such judicial authority is disqualified from acting therein pursuant to Rule 2.11 of the Code of Judicial Conduct . . . ." Pursuant to Practice Book § 1-23, "[a] motion to disqualify a judicial authority . . . shall be filed no less than ten days before the time the case is called for trial or hearing, unless good cause is shown for failure to file within such time." Our Supreme Court

[6] The incomplete U.S. Trust wealth management account application is plaintiff's exhibit 29; the statements of the opened U.S. Trust wealth management account are in plaintiff's exhibit 89; records of the certificates of deposit are in defendant's exhibit 524; the commercial promissory note is in plaintiff's exhibit 33; and the records of the joint checking accounts are in plaintiff's exhibit 27.

recently has held, however, that there is no "per se rule that noncompliance with the . . . procedural requirements [of Practice Book § 1-23] is fatal to review." *State* v. *Milner*, 325 Conn. 1, 5, 155 A.3d 730 (2017). "Indeed, such review is authorized in part because a judge has an independent obligation to recuse herself or himself from a matter . . . sua sponte . . . if such judicial authority is disqualified from acting therein pursuant to [c]anon 3 (c) [now rule 2.11] of the Code of Judicial Conduct . . . . Practice Book § 1-22 (a)." (Internal quotation marks omitted.) Id., 7–8.

We review the plaintiff's claim for abuse of discretion. "Pursuant to our rules of practice; see Practice Book § 1-22; a judge should disqualify himself from acting in a matter if it is required by rule 2.11 of the Code of Judicial Conduct, which provides in relevant part that [a] judge shall disqualify himself . . . in any proceeding in which the judge's impartiality might reasonably be questioned including, but not limited to, the following circumstances . . . [t]he judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding. Code of Judicial [Conduct, Rule] 2.11 (a) (1). . . . In applying this rule, [t]he reasonableness standard is an objective one. Thus, the question is not only whether the particular judge is, in fact, impartial but whether a reasonable person would question the judge's impartiality on the basis of all the circumstances. . . . Moreover, it is well established that [e]ven in the absence of actual bias, a judge must disqualify himself in any proceeding in which his impartiality might reasonably be questioned, because the appearance and the existence of impartiality are both essential elements of a fair exercise of judicial authority. . . . Nevertheless, because the law presumes that duly elected or appointed judges, consistent with their oaths of office, will perform their duties impartially

. . . and that they are able to put aside personal impressions regarding a party . . . the burden rests with the party urging disqualification to show that it is warranted." (Citation omitted; internal quotation marks omitted.) *Stefanoni* v. *Darien Little League, Inc.*, 160 Conn. App. 457, 464–65, 124 A.3d 999 (2015).

The plaintiff has failed to present any basis for finding that a reasonable person would question the trial judge's impartiality in this case, or thus that his disqualification from the case was warranted. Accordingly, we find that the court did not abuse its discretion in not recusing itself.

III

The plaintiff's third and fourth claims assert error in the trial court's rejection of several alternative theories upon which she claimed she was entitled to money damages against the defendant. She alleges the existence of express and implied contracts between her and the defendant. She also alleges that the defendant owed her a fiduciary duty, which he breached by withdrawing all of the money from joint accounts which she claims to have been opened and maintained for her financial support.

In resolving these claims at trial, the court was required to make factual findings as to the nature of the plaintiff's relationship with the defendant. "[T]he trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . We cannot retry the facts or pass on the credibility of the witnesses. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . .

"In reviewing factual findings, [w]e do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the trial court's ruling." (Citation omitted; internal quotation marks omitted.) *Lyme Land Conservation Trust, Inc.* v. *Platner*, 325 Conn. 737, 755, 159 A.3d 666 (2017).

The court found that the plaintiff's relationship with the defendant was purely a social one, in which the defendant supported the plaintiff financially while they were together without undertaking any obligation to support her in the future if and when their relationship ended. It also found that the defendant did not owe the plaintiff any fiduciary duty.

A

As her third claim of error, the plaintiff argues that the trial court erred in finding that there was no express or implied contract between her and the defendant. "Whether a contract exists is a question of fact for the court to determine." (Internal quotation marks omitted.) *Joseph General Contracting, Inc.* v. *Couto*, 317 Conn. 565, 574–75, 119 A.3d 570 (2015).

The trial court cited to and relied upon substantial evidence in the record in reaching its conclusion that there was no contract between the plaintiff and the defendant. First, it held that no cause of action based upon a promise or requiring reasonable reliance could be based upon any of the poems the defendant had written to the plaintiff. Second, it found that the defendant repeatedly had made statements to the plaintiff inconsistent with the plaintiff's claim that he ever intended to give her any part of his valuable photographic collection. In a letter written in 2002 (2002 letter), for example, wherein the defendant promised to give the plaintiff several specific items of property from

his home, he pointedly noted that the gift in question did not include "any items from my photographic collection." Later, in a 2006 memorandum (2006 memorandum) to his then current will, wherein the defendant stated his intention to leave the plaintiff several of his books, he similarly noted that no such book "related to the collection." Consistent with those writings, the court found that the defendant had never made any promise to the plaintiff, spoken or unspoken, that if she worked with him, he would give her any portion of his photographic collection.

The court further found that the plaintiff never had made any meaningful contribution to the defendant's investment ventures or photographic collection. To the contrary, it found that the photographic collection already was well established and the defendant already was active in collector's circles long before the plaintiff's relationship and alleged collaboration with the defendant began. The court thus found that the plaintiff's express and implied contract claims had no merit. Because there is evidence in the record to support the findings of fact upon which the trial court based that decision, and we are not left with the conviction that a mistake has been made, we conclude that such findings were not clearly erroneous, and that the court's rejection of the plaintiff's contract claims must be affirmed.

B

As her fourth claim of error, the plaintiff argues that the trial court erred in failing to find that the defendant had breached a fiduciary duty to her arising from the nature of their relationship. In her complaint and at trial, the plaintiff alleged that the defendant owed her a fiduciary duty based upon the close, confidential relationship they shared in which she had been induced to become solely dependent upon him and in which he

would handle all of their finances and major responsibilities for every aspect of their life together. She claimed that the defendant breached this duty to her by unilaterally withdrawing funds from accounts and financial instruments he allegedly had opened and maintained to provide for her support. The trial court rejected this claim based upon its findings that the parties' relationship was purely social and that any suggestion by the defendant to the plaintiff that he would provide for her care in the future had always been predicated on the assumption that such support would only be provided for so long as they maintained their social relationship. Hence, although the court also found that the defendant handled all of the bank accounts in which the plaintiff claimed an interest, it found that he did so primarily for his own benefit, not for the plaintiff's. The trial court's finding as to the nature of the parties' relationship is a factual determination, which we review to determine if it was clearly erroneous.

We have set forth previously the applicable standard of review. Measured by that standard, the court's findings were not clearly erroneous because they are supported by the record and they do not leave us with the conviction that a mistake has been made.

On appeal, unlike before the trial court, the plaintiff has attempted to reclassify her claim of breach of fiduciary duty as a claim arising from the parties' business relationship, which she now describes as a joint venture or a partnership, rather than from what she initially claimed to have been their dependency-inducing social relationship. This claim never was presented to or decided by the trial court. It is not the practice of this court to address such unpreserved claims on appeal. See generally *Connecticut Bank & Trust Co.* v. *Munsill-Borden Mansion, LLC*, 147 Conn. App. 30, 36, 81 A.3d 266 (2013) ("[w]e have said many times that [we] will not review a claim that is not distinctly raised at trial"

[internal quotation marks omitted]); *Augeri* v. *Planning & Zoning Commission*, 24 Conn. App. 172, 179, 586 A.2d 635 ("this court cannot review a nonexistent ruling"), cert. denied, 218 Conn. 904, 588 A.2d 1381 (1991).

Against this background, to the extent that the plaintiff's breach of fiduciary duty claim was raised and decided by the trial court, we reject that claim on the basis that the trial court's determinations as to the nature of the parties' relationship, and the resulting lack of any fiduciary duty between them, were not clearly erroneous.

IV

As the plaintiff's fifth and final claim of error, she argues that the trial court erred in not fashioning a remedy that awarded her certain specific damages or other relief. In particular, she argues that the court should have awarded her: damages for dividends and income she should have received from her personal shares in Mattri Reinsurance Co., Ltd. (Mattri Reinsurance);[7] transfer of the personal property gifted to her in the defendant's 2002 letter; transfer of the personal property listed in the 2006 memorandum to the defendant's then-current will; damages for the money in two certificates of deposit which the defendant had opened in his own and the plaintiff's names, but which the defendant had closed unilaterally after his relationship with the plaintiff ended and she moved out of his home; money in the U.S. Trust wealth management account that the defendant had opened in his own name only, which represented approximately one-half of the proceeds from the sale of the defendant's photographic collection;[8] damages for the money in a joint checking

[7] Mattri Reinsurance is a company created by the defendant in which the plaintiff owned shares.

[8] The plaintiff does not make a claim on appeal to the other half of the proceeds from the sale of the collection.

account that the defendant had closed unilaterally in January, 2013; damages for the value of the commercial promissory note signed by Attorney Phillips to the plaintiff and the defendant; the benefits from the defendant's veteran's life insurance policy; damages representing one third of the defendant's estate, as described in his wills of 2003 and 2010; and the sum of one and one-half million dollars, which the plaintiff claims that the defendant offered her to move out of his home after their relationship ended.

"Because a trial court has broad discretion to determine whether damages are appropriate, we . . . review a damages award only for a clear abuse of discretion." *Lyme Land Conservation Trust, Inc.* v. *Platner*, supra, 325 Conn. 763. We conclude that the trial court did not abuse its discretion in determining what damages and other relief to award the plaintiff.

The court concluded that the plaintiff owned shares in Mattri Reinsurance, but that there was no credible evidence that the defendant had blocked her from receiving dividend payments on those shares. Any claims she had against the company or its other shareholder regarding her ownership of shares or right to receive dividends were not part of this lawsuit, and thus it was not an abuse of discretion for the trial court to refuse to address such claims.

Regarding the gifted personal property that was listed in the defendant's 2002 letter, the court did award the plaintiff as much of that property as she proved was to have been given to her by that document. The plaintiff failed to prove any other contents of the document, and the court was thus unable to award any other items to her.

The court found that the 2006 memorandum to the defendant's then current will was a document intended by the defendant to accompany that earlier will, as long

as it remained in full force and effect, and thus that the items listed in it were to be given to the plaintiff only if the defendant died before the will was destroyed, superseded or amended.[9]

The funds in the certificates of deposit and joint bank accounts, which the defendant opened and maintained in his and the plaintiff's names, were held in those accounts for their joint benefit for as long as they maintained their relationship, and any right of survivorship in them arising from their status as joint accounts could only be exercised if the accounts remained open until the defendant's death. The court also concluded that, while the defendant might at one time have contemplated opening a joint U.S. Trust account with the six million dollars from the sale of the photographic collection in both his and the plaintiff's names, he ultimately opened such an account solely in his own name, and thus did not establish a trust for the plaintiff's benefit with that money.

The court further held that, although the plaintiff had a right to be paid on the commercial promissory note held by Attorney Phillips, her claim for that money must be brought against Phillips, not against the defendant. The life insurance policy the plaintiff describes was an exhibit for identification only (plaintiff's exhibit 73), and therefore the court did not abuse its discretion in not considering it as a basis for awarding the plaintiff damages. The court also did not abuse its discretion in not awarding the plaintiff what she would have inherited under previous drafts of the defendant's will, for the defendant's will would only be enforceable if it was still in force and effect at the time of his death.

Finally, the court did not abuse its discretion in not awarding the plaintiff the one and one-half million dollars to which she claimed she was entitled as consideration for leaving the defendant's home. The court found

[9] At the time of the trial court's decision, the defendant was still alive.

that the plaintiff did not have any right to the home because the parties had never jointly owned it, and that even if the defendant had once told the plaintiff that the home would one day be hers, that promise would have been conditioned upon the continuation of their social relationship until the time of his death. As to the plaintiff's additional claim that the defendant had promised her one and one-half million dollars as consideration for her moving out of his home, the court found that she had undermined any legal basis for that claim by arguing that the defendant was completely incompetent when he allegedly made that promise. For this reason, the court did not abuse its discretion in not awarding the plaintiff any portion of the home's value in damages.

The judgment is affirmed.

In this opinion the other judges concurred.