CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

CASEY LEIGH RUTTER *v.* ADAM JANIS ET AL.
(AC 38699)

NANCY BEALE, ADMINISTRATRIX (ESTATE OF LINDSEY BEALE) *v.* LUIS MARTINS ET AL.
(AC 38792)

JASON FERREIRA *v.* LUIS MARTINS ET AL.
(AC 38793)

Keller, Elgo and Bear, Js.

Syllabus

The plaintiffs, in three separate actions, sought to recover damages from the defendant D Co., an automobile dealership, for personal injuries sustained in a motor vehicle accident. On May 9, 2013, the defendant M had purchased an automobile from D Co., but because the parties could not complete the transfer of the motor vehicle registration from M's previous vehicle to the new one, D Co. loaned a dealer plate number to M while the registration process was pending, and a loan agreement was signed at approximately 7 p.m. on that day. On June 8, 2013, at approximately 3 p.m., M was driving the vehicle when it was involved in an accident, injuring certain of the plaintiffs who were passengers. Pursuant to statute (§ 14-60), D Co. was permitted to loan a dealer number plate to M, as a purchaser of a vehicle, for a period of not more than thirty days while the registration of the new vehicle was pending, and a dealer that has complied with the requirements of § 14-60 is not liable for damages caused by the insured operator of the motor vehicle while it is displaying the loaned dealer number plate. The plaintiffs alleged that D Co. was liable for damages resulting from the accident because it occurred beyond the thirty day period set forth in § 14-60.

D Co. filed three substantially similar motions for summary judgment in each case, which the trial court granted, asserting that the accident occurred within the thirty day time period pursuant to § 14-60 and that it had complied with the requirements of the statute. From the judgments rendered thereon, the plaintiffs filed three appeals to this court, which consolidated the appeals. The plaintiffs claimed, inter alia, that the trial court erred in its computation of the thirty day period in § 14-60 (a) (3), which was based on their claim that the thirty day period began on the date the loan agreement was signed, and not the following day. *Held:*

1. The trial court properly granted D Co.'s motions for summary judgment and determined that the accident did not occur more than thirty days after the execution of the loan agreement; even if the thirty day period set forth in § 14-60 (a) began at approximately 7 p.m. on May 9, 2013, the only way for the thirty day period to have expired before June 8, 2013, the date of the accident, was if the five hours remaining in the day after the execution of the loan agreement were counted as one full day, and that was contrary to relevant precedent, which holds that when a period of time is to be calculated from a particular date or event, the day of such date or event is excluded from the computation, and because, on the basis of the general rule for the computation of days and the common understanding of a day, as used in case law, May 10, 2013, was the first day of the thirty day period, the accident on June 8, 2013 occurred not more than thirty days following the loan agreement and was within the time limit set forth in § 14-60 (a), and D Co., thus, was entitled to protection against liability to the plaintiffs.
2. The plaintiffs could not prevail on their claim that genuine issues of material fact existed concerning whether D Co. had failed to comply with two other requirements of § 14-60 (a) for protection from liability; the trial court did not err in concluding that D Co. had met its burden in demonstrating that the parties to the loan agreement intended for it to loan the dealer number plate for up to thirty days while the registration was pending, D Co. complied with the requirements of § 14-60 (a) by obtaining proof of insurance from M for that period of time, and the accident occurred within that time period, and although the parties failed to designate on the loan agreement form, via a check in a box, the specific category of the loan, the undisputed evidence submitted in support of the motions for summary judgment was that M did not borrow the dealer number plate to test drive a vehicle and did not have a vehicle that was undergoing repairs.

Argued October 16, 2017—officially released March 6, 2018

Procedural History

Action, in the first case, to recover damages for personal injuries sustained as a result of the defendants' alleged negligence, and action in the second case, to

recover damages for the wrongful death of the plaintiff's decedent as a result of the defendants' alleged negligence, and action in the third case, to recover damages for personal injuries sustained as a result of the defendants' alleged negligence, brought to the Superior Court in the judicial district of Waterbury, where the cases were consolidated; thereafter, the court, *Brazzel-Massaro*, *J.*, granted the motions for summary judgment filed by the defendant Danbury Fair Hyundai, LLC, in each case and rendered judgments thereon, from which the plaintiff in each case filed separate appeals to this court; subsequently, this court consolidated the appeals. *Affirmed.*

James J. Healy, with whom were *Joel T. Faxon* and *Cynthia C. Bott*, and, on the brief, *Nathan C. Nasser* and *J. Craig Smith*, for the appellants (plaintiff in each case).

James F. Shields, with whom, on the brief, was *David M. Houf*, for the appellee (defendant Danbury Fair Hyundai, LLC).

Opinion

BEAR, J. In these consolidated appeals,[1] a principal issue in each of the cases is the meaning and application

[1] In AC 38699, the plaintiff, Casey Leigh Rutter, commenced an action against the defendants Luis Martins, Jorge Martins, Danbury Fair Hyundai, LLC, Adam Janis, Eagle Electric Service, LLC, and State Farm Automobile Insurance Company.

In AC 38792, the plaintiff, Nancy Beale, Administratrix of the Estate of Lindsey Beale, commenced an action against the defendants Luis Martins, Jorge Martins, Danbury Fair Hyundai, LLC, Adam Janis and Eagle Electric Service, LLC.

In AC 38793, the plaintiff, Jason Ferreira, commenced an action against the defendants Luis Martins, Jorge Martins, Danbury Fair Hyundai, LLC, Adam Janis and Eagle Electric Service, LLC.

The complaints arise out of the same motor vehicle accident. The plaintiffs filed a motion to consolidate the three appeals, which this court granted on June 28, 2016. For the purposes of this opinion, all three plaintiffs will be collectively referred to as the plaintiffs.

of the phrase "not more than thirty days" set forth in General Statutes § 14-60 (a).[2] The trial court, in rendering summary judgment in each of the three consolidated cases, from which the plaintiffs have appealed, interpreted that phrase to require the exclusion of May 9, 2013, the date on which a "Temporary Loan of Motor Vehicles" agreement (loan agreement) between Luis Martins[3] and the defendant Danbury Fair Hyundai, LLC, was executed, from the computation of that thirty day period.[4] The plaintiffs claim on appeal that the court erred in determining that the loan of a dealer number plate,[5] pursuant to the loan agreement for use on a

[2] General Statutes § 14-60 (a) provides in relevant part: "No dealer or repairer may loan a motor vehicle or number plate or both to any person except for . . . (3) when such person has purchased a motor vehicle from such dealer, the registration of which is pending, and in any case for *not more than thirty days in any year*, provided such person shall furnish proof to the dealer or repairer that he has liability and property damage insurance which will cover any damage to any person or property caused by the operation of the loaned motor vehicle, motor vehicle on which the loaned number plate is displayed or both. Such person's insurance shall be the prime coverage. If the person to whom the dealer or repairer loaned the motor vehicle or the number plate did not, at the time of such loan, have in force any such liability and property damage insurance, such person and such dealer or repairer shall be jointly liable for any damage to any person or property caused by the operation of the loaned motor vehicle or a motor vehicle on which the loaned number plate is displayed. . . ." (Emphasis added.) See generally *Cook* v. *Collins Chevrolet, Inc.*, 199 Conn. 245, 506 A.2d 1035 (1986).

[3] Although Jorge Martins, who is described in the court's memorandum of decision as Luis Martins' father, did not sign the loan agreement, it is undisputed that he was a co-owner of the 2013 Hyundai Veloster automobile that was the subject of that agreement. We thus refer at times to both of them in connection with the purchase of that automobile and use of the defendant's dealer number plate.

[4] Danbury Fair Hyundai, LLC, filed the motions for summary judgment; therefore, in this opinion Danbury Fair Hyundai, LLC, will be referred to as the defendant. The other defendants, Luis Martins, Jorge Martins, Adam Janis, Eagle Electric Service, LLC, and State Farm Automobile Insurance Company are not parties to this appeal and will be referred to by name.

[5] In its memorandum of decision, the court referred to the loan of a "dealer plate." For the purposes of this opinion, we will refer to a number plate as a "dealer number plate."

2013 Hyundai Veloster automobile that the Martins had purchased, did not exceed the thirty day period set forth in § 14-60 (a). The plaintiffs also claim that the court erred in finding that the defendant fully complied with the requirements of § 14-60 (a), resulting in its protection from liability to the plaintiffs. We disagree, and, accordingly, affirm the judgments of the trial court.

The following facts, as set forth in the defendant's memoranda of law in support of its motions for summary judgment and in the plaintiffs' memoranda of law in opposition to summary judgment, are undisputed. On May 9, 2013, Luis Martins and his father, Jorge Martins, purchased a 2013 Hyundai Veloster automobile from the defendant. Because the defendant had not received the automobile manufacturer's certificate of origin, the parties could not complete the transfer of Luis Martins' motor vehicle registration from his previous vehicle, a 2007 Jeep Wrangler vehicle, to the new vehicle. The defendant loaned a dealer number plate to Luis Martins while the registration process was pending. The defendant and Luis Martins signed the loan agreement at approximately 7 p.m. on May 9, 2013.

On June 8, 2013, at approximately 3 p.m., Luis Martins, while driving the Hyundai Veloster automobile, was involved in a motor vehicle accident in Danbury. As a result of the accident, his passengers, Lindsey Beale, Casey Leigh Rutter and Jason Ferreira sustained traumatic injuries; Beale died from her injuries. At the time of the accident, the Hyundai Veloster automobile displayed the dealer number plate belonging to the defendant.

In separately filed complaints, the plaintiffs alleged that the defendant owned or controlled the automobile driven by Luis Martins and was, therefore, liable for any damages resulting from the June 8, 2013 accident. On February 17, 2015, the defendant filed a substantially

similar motion for summary judgment in each case, asserting that it was not liable to any of the plaintiffs because the accident occurred "twenty-nine days and [twenty] hours after the plates were loaned out, and thus well within the thirty day period of time required by Connecticut law." Attached as evidence in support of its motion, the defendant included an affidavit from William Sabatini, the chief financial officer of the defendant; a temporary insurance identification card issued to the Martins by Allstate Fire and Casualty Insurance Company for the Hyundai Veloster automobile with an effective date of May 9, 2013; an insurance declaration page for that automobile; copies of the Martins' drivers' licenses; a registration certificate and insurance identification card for Luis Martins' previous vehicle; a completed department of motor vehicles registration form for the 2013 Hyundai Veloster automobile signed by the Martins and dated May 9, 2013; purchase and finance documents relating to the sale of the 2013 Hyundai Veloster automobile, including a manufacturer's certificate of origin dated April 15, 2013; and the signed loan agreement. The plaintiffs filed a substantially similar memorandum of law in each of the cases in opposition to the motions for summary judgment, claiming, inter alia, that genuine issues of material fact existed regarding whether the defendant complied with the requirements of § 14-60 (a), and that the period of the loan agreement exceeded the thirty day time limit set forth in § 14-60 (a) (3). The sole evidence attached to their opposition memoranda was a transcript excerpt from Sabatini's January 6, 2015 deposition.

On November 27, 2015, the court issued a memorandum of decision rendering summary judgment in favor of the defendant in each of the cases. The court found that the defendant "satisfied its obligations pursuant to [§ 14-60] in that the Martins provided proof of valid insurance coverage during the dates of May 9, 2013,

and June 19, 2013," and that the Martins "had possession of the loaner vehicle for [twenty-nine] days and [twenty] hours at the time of the accident as they were awaiting the pending registration for the new vehicle." Accordingly, the court concluded that the defendant complied with § 14-60 and was protected from liability for the accident. These consolidated appeals followed.

We first set forth our standard governing review of a trial court's decision to grant a motion for summary judgment. "Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact which will make a difference in the result of the case. . . . Finally, the scope of our review of the trial court's decision to grant the plaintiff's motion for summary judgment is plenary." (Citations omitted; internal quotation marks omitted.) *DiPietro* v. *Farmington Sports Arena, LLC*, 306 Conn. 107, 116, 49 A.3d 951 (2012).

Additionally, because this appeal involves questions of statutory construction, we set forth our well established principles of statutory interpretation. "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine,

in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Connecticut Energy Marketers Assn.* v. *Dept. of Energy & Environmental Protection*, 324 Conn. 362, 372–73, 152 A.3d 509 (2016). "Statutory interpretation is a question of law, over which our review is plenary." *Gomes* v. *Massachusetts Bay Ins. Co.*, 87 Conn. App. 416, 423, 866 A.2d 704, cert. denied, 273 Conn. 925, 871 A.2d 1031 (2005).

I

On appeal, the plaintiffs assert that the court erred in its computation of the days in the § 14-60 (a) (3) thirty day period because it began on May 9, 2013, the day the loan agreement was signed, and not on May 10, 2013, the following day. Because § 14-60 (a) (3) limits the temporary loan of a dealer number plate to "not more than thirty days in any year," the plaintiffs maintain that the defendant is liable to them because the Hyundai Veloster automobile displayed the dealer number plate when the accident occurred on June 8, 2013, which they allege was the thirty-first day after the loan of the plate.

"[Section 14-60] reflects the legislative effort to protect the public from reckless driving of loaned motor vehicles. . . . By giving an injured person the statutory right to recover from the borrower's insurer when the borrower is at fault, § 14-60 (a) provides an incentive

to those who test drive motor vehicles to drive with the same care that they would exercise if they were driving a motor vehicle they owned." (Citation omitted.) *Sandor* v. *New Hampshire Ins. Co.*, 241 Conn. 792, 798, 699 A.2d 96 (1997). Section 14-60 "permits an automobile dealer to lend a dealer [number] plate to a purchaser of a motor vehicle, for a period not to exceed [thirty] days, while the purchaser's registration is pending . . . ." *Cook* v. *Collins Chevrolet, Inc.*, 199 Conn. 245, 249, 506 A.2d 1035 (1986). A dealer that has complied with the requirements set forth in § 14-60 is not liable for damages caused by the insured operator of the motor vehicle while that vehicle is displaying the loaned dealer number plate. Id.

The loan agreement was signed at approximately 7 p.m. on May 9, 2013. The accident occurred at approximately 3 p.m. on June 8, 2013. Depending on the method used to calculate the thirty day period set forth in § 14-60 (a), the accident occurred within or beyond the thirty day period. For example, if, as the plaintiffs argue, May 9, 2013, the date of the execution of the loan agreement, is included as the first day of the thirty day period, the accident occurred on the thirty-first day after such execution. If May 9, 2013, is not included as one of the thirty days, however, and the first day of the thirty day period begins on May 10, 2013, as the defendant argues, the accident would have occurred on the thirtieth day.

The plaintiffs argue that the parties intended for the loan of the dealer number plate to begin on May 9, 2013, and that common sense dictates that insurance coverage began the moment the vehicle left the defendant's lot. Specifically, the plaintiffs posit that by excluding May 9, 2013 in the counting of the thirty day period, "if the borrowing driver were to crash while driving off the lot or later that same day, then [§ 14-60] would not protect the dealer because the loan would not yet have begun." (Internal quotation marks omitted.) As

evidence in support of the parties' intent, the plaintiffs submitted a transcript excerpt from Sabatini's deposition, in which he stated that May 9 was the first day of the Martins' loan period.[6] In its memorandum of decision, the court determined that the plaintiffs' argument that "the court must accept the first date" is "contrary to [our] case law . . . ." Nevertheless, the court noted, even if it accepted, arguendo, the plaintiffs' argument, and used twenty-four hour periods beginning from 7 p.m. on May 9, 2013, to calculate the thirty day period, "the [Martins] had possession of the loaner vehicle for [no more than] [twenty-nine] days and [twenty] hours at the time of the accident . . . ."

We agree with the court that the accident did not occur more than thirty days after the execution of the loan agreement even if the thirty day period set forth in § 14-60 (a) began at approximately 7 p.m. on May 9, 2013. The only way for the thirty day period set forth in § 14-60 (a) to have expired before June 8, 2013, the date of the accident, was if the five hours remaining in the day after the execution of the loan agreement at approximately 7 p.m. on May 9, 2013, were counted as one full day, and no relevant Connecticut precedent was offered by the plaintiffs in support of this approach.[7]

[6] Section 14-60 (a) (3) requires that the person loaned a dealer number plate must provide proof of insurance to the dealer, which will cover, from the time of such loan, any damage to any person or property caused by the operation of the motor vehicle on which the loaned dealer number plate is displayed. Thus, the computation of time for insurance coverage purposes can be different from the computation of the statutory thirty day use limitation. See footnote 7 of this opinion.

[7] If such five hours were accepted as the first day, the period of the loan agreement in real time would be less than thirty days; it would be twenty-nine days and five hours in this case. Generalizing and applying the plaintiffs' suggested computation of the statutory thirty day period, the first day always would be less than a full day unless the operative act occurred on or before 12:01 a.m. on the day of that act. Pursuant to our precedent as discussed in this opinion, § 14-60 (a) (3) provides for thirty full days of use of a dealer number plate, even if it means that the total time of use exceeds thirty days by some amount of time less than a full day.

Section 14-60 (a) (3) provides in relevant part that "[n]o dealer or repairer may loan a motor vehicle or number plate . . . for not more than thirty days in any year . . . ." It appears that neither the computation method nor the interpretation of the phrase "not more than thirty days" contained in § 14-60 (a) (3) has been previously discussed by our appellate courts. We are mindful that "[i]n the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly. General Statutes § 1-1 (a). Where a statute does not define a term, it is appropriate to look to the common understanding expressed in the law . . . ." (Internal quotation marks omitted.) *Police Department* v. *State Board of Labor Relations*, 225 Conn. 297, 301 n.6, 622 A.2d 1005 (1993).

Neither § 14-60 nor title fourteen of the General Statutes includes a definition for the word "day." The statute also does not specify how to count days in order to meet the "not more than thirty days in any year" requirement. Our case law, however, beginning 200 years ago, provides for the general definition of a day. "It is a well known rule of the common law, that a day comprises twenty-four hours, extending from midnight to midnight, including morning, evening and night, and is called the natural day. When a day is spoken of in law, it comprehends that period of time. When an act is to be done on a particular day, it may be done at any time between those hours." *Fox* v. *Abel*, 2 Conn. 541, 542 (1818).

Approximately 125 years ago, our Supreme Court in *Miner* v. *Goodyear Glove Mfg. Co.*, 62 Conn. 410, 26 A. 643 (1892), also addressed the meaning of the word "day" in a statute. The court concluded that "[t]he current of authorities is substantially unvarying to the

effect that when the word 'day' is used in a statute or in a contract, it will, unless it is in some way restricted, be held to mean the whole twenty-four hours. Thus, when the statute above quoted fixes the period of sixty days, it must be taken to mean days in the sense of the law. . . . The day on which the proceedings were commenced must be excluded. For the day and the act being coterminous and of equal length, nothing could precede the act that did not also precede the day." (Citations omitted.) Id., 411.

Approximately 95 years ago, our Supreme Court in *Austin, Nichols & Co., Inc.* v. *Gilman*, 100 Conn. 81, 84, 123 A. 32 (1923), considered the issue of computation of days where a statute provided that a notice of intention had to be recorded in the town clerk's office not less than fourteen days prior to a sale. It similarly determined that "[u]nless settled practice or established custom, or the intention of the parties, or the terms of a statute, have included in the computation the date or act of accrual, it is to be excluded from the computation. This is not only our established rule, but the rule established by modern authority, applicable to all kinds of instruments, to statutes, and to rules and orders of court."[8]

Our courts have consistently followed this computation method. See, e.g., *Commissioner of Transportation* v. *Kahn*, 262 Conn. 257, 264, 811 A.2d 693 (2003) ("we are guided by the general rule . . . that where a period of time is to be calculated from a particular date or event, the day of such date or event is excluded from the computation" [internal quotation marks omitted]);

[8] The statute also provided that a bill of sale had to be filed for record at least fourteen days prior to the sale. The court held that the phrase "at least fourteen days" evidenced the intent of the legislature that the period should be fourteen full or clear days, and both the first and last days had to be excluded in making the computation. *Austin, Nichols & Co., Inc.* v. *Gilman*, supra, 100 Conn. 85.

Lamberti v. *Stamford*, 131 Conn. 396, 397–98, 40 A.2d 190 (1944) ("[i]t is well settled that the day of the act from which a future time is to be ascertained is to be excluded from the computation"); and *Wikander* v. *Asbury Automotive Group/David McDavid Acura*, 137 Conn. App. 665, 671–72, 50 A.3d 901 (2012) ("for purposes of determining when a filing period runs, we generally do not count the first day, the day of the act"); see also, annot., 98 A.L.R.2d 1338, § 3 (1964) ("[i]n the absence of anything showing an intention to count only 'clear' or 'entire' days, it is generally held that in computing the time for performance of an act or event which must take place a certain number of days before a known future day, one of the terminal days is included in the count and the other is excluded").[9]

The plaintiffs do not dispute the date and time on which the loan agreement was signed, or the date and time of the accident. Accordingly, viewing the evidence in the light most favorable to the plaintiffs, there are no genuine issues of material fact regarding the thirty day period to be applied pursuant to § 14-60 (a). The resolution of this claim depends, instead, on the legal issue of whether the computation of time starts on May 9, 2013, the date of the execution of the loan agreement, or on May 10, 2013, the first full day after such execution. On the basis of our general rule for the computation of days and the common understanding of a "day"

[9] In its memorandum of decision, the court, quoting *Midland Funding, LLC* v. *Garrett*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-11-6011332-S (December 23, 2011) (53 Conn. L. Rtpr. 161), noted: "In general there are four ways of counting days; (1) [c]ount no terminal days (beginning day or ending day); (2) [c]ount only one terminal day; (3) [c]ount both terminal days; and (4) [u]sing one of the above methods but count only business days." The approach to be used in a particular case, according to the court, is to be determined by one or more of the following: "statute, Practice Book rule and the language surrounding the mention of days in statutes, regulations, rules, contracts and case law." In this case, we rely primarily on our case law precedent.

as used in our case law, May 10, 2013, is the first day of the thirty day period. The accident on June 8, 2013, occurred not more than thirty days following the loan agreement and, therefore, was within the statutory time limit set forth in § 14-60 (a).[10] Because the accident occurred within the thirty day period set forth in § 14-60 (a), the defendant is entitled to its protection against liability to the plaintiffs.

II

The plaintiffs also claim that genuine issues of material fact exist in that the defendant failed to comply

[10] Because some sections of title fourteen of the General Statutes contain provisions that set hourly time measurements, they logically demonstrate that the legislature knows how to use a measurement of time other than a day when it intends to do so. See, e.g., General Statutes § 14-274 (prohibiting commercial drivers from operating motor vehicle if they have been on duty "more than sixteen hours in the aggregate in any twenty-four-hour period"); General Statutes § 14-382 (owners of snowmobiles or all-terrain vehicles required to file change of address with commissioner "[w]ithin forty-eight hours"). This court has recognized that "[i]t is a fundamental principle of statutory construction that courts must interpret statutes using common sense and assume that the legislature intended a reasonable and rational result." (Internal quotation marks omitted.) *Wikander* v. *Asbury Automotive Group/David McDavid Acura*, supra, 137 Conn. App. 672.

Additionally, § 14-60 (a) does not require that the thirty day loan period must occur consecutively. The statutory requirement is that the plate be used "not more than thirty days in any year." It can be reasonably inferred, therefore, that a dealer may loan a dealer number plate in fewer than thirty day increments, so long as the total loan period does not cumulate to more than thirty days in any year. It would add complexity to record keeping, for example, if dealerships had to maintain precise records of loan periods for fractional or partial days, e. g., by hours or minutes. If the legislature had intended to permit fractional hourly or minute counting of the time period, the statute would more likely have stated the time period in hours and/or minutes instead of days. See generally *Gomes* v. *Massachusetts Bay Ins. Co.*, supra, 87 Conn. App. 422–30.

Nevertheless, even if an hourly computation method were permissible in these cases, the accident still occurred twenty-nine days, twenty hours after the execution of the loan agreement at approximately 7 p.m. on May 9, 2013. Using the computation method required by our case law, however, the accident occurred on the fifteenth hour of the thirtieth day, i.e., at approximately 3:00 p.m. on June 8, 2013.

with two other requirements of § 14-60 (a) for protection from liability.[11] As support for their claim, they assert that the loan agreement submitted into evidence did not contain a selection of one of the three available options: "service customer," "prospective buyer," or "registration pending."[12] These terms parrot the options set forth in §§ 14-60 (a) (1), (2) and (3). The plaintiffs additionally claim that since the vehicle registration process was not completed until June 10, 2013, because the registration was not "pending," as required by § 14-60 (a) (3), until two days after the accident.

With respect to the plaintiffs' first claim, there is nothing in § 14-60 (a) that requires a written selection of one of the three statutory options, each of which contemplates the use of dealer number plates on vehicles for a limited duration. In this case, it is not disputed that the dealer number plate was going to be displayed on the new automobile that the Martins had purchased, and not on a vehicle to be used by them while their

[11] General Statutes § 14-60 (a) provides three purposes for which a dealer or repairer may loan a number plate: "(1) the purpose of demonstration of a motor vehicle owned by such dealer, (2) when a motor vehicle owned by or lawfully in the custody of such person is undergoing repairs by such dealer or repairer, or (3) when such person has purchased a motor vehicle from such dealer, the registration of which is pending . . . ."

[12] As in *Wells Fargo Bank, N.A.* v. *Strong*, 149 Conn. App. 384, 89 A.3d 392, cert. denied, 312 Conn. 923, 94 A.3d 1202 (2014), even if the parties to the loan agreement did not select one of the three boxes in the loan agreement, that alleged error did not impede the defendant's ability to meet its burden of proving that it was entitled to summary judgment as a matter of law. Id., 401.

In the present case, the plaintiffs were not parties to the loan agreement. "It is well settled that one who [is] neither a party to a contract nor a contemplated beneficiary thereof cannot sue to enforce the promises of the contract . . . . Under this general proposition, if the plaintiff is neither a party to, nor a contemplated beneficiary of, [the] agreement, she lacks standing to bring her claim for breach of [contract]." (Citations omitted; internal quotation marks omitted.) *Cimmino* v. *Household Realty Corp.*, 104 Conn. App. 392, 395–96, 933 A.2d 1226 (2007), cert. denied, 285 Conn. 912, 943 A.2d 470 (2008).

vehicle was being serviced, or on a vehicle being demonstrated to them. Additionally, with respect to the use of a dealer number plate pursuant to § 14-60 (a), it is clear that this statute is intended both to encourage dealers to ensure that the customer has insurance coverage; see *Cook* v. *Collins Chevrolet, Inc.*, supra, 199 Conn. 250–52; which requirement was indisputably satisfied in this case, and to encourage the user of the dealer number plate to drive with care. See *Sandor* v. *New Hampshire Ins. Co.*, supra, 241 Conn. 798.

With respect to the plaintiffs' second claim, the plaintiffs assert that the Martins' registration for the Hyundai Veloster automobile was a transfer of an existing registration and not a new "pending" registration under § 14-60 (a) (3).[13] We have not found any appellate interpretation of "pending registration" as set forth in § 14-60 (a). We, however, do not accept the plaintiffs' narrow interpretation of that statute, which would permit the loan of dealer number plates only for new pending registrations of purchased vehicles and not for the transfer of registrations between vehicles in connection with a purchase of a new vehicle. In other words, to accept the plaintiffs' interpretation and limit § 14-60 (a) (3) only to new registrations would mean that any purchaser of a motor vehicle from a dealership who also trades in a vehicle or transfers the number plates from an old vehicle to a new vehicle, would not be able to borrow a dealer number plate while the registration process was pending. "The purpose of [§ 14-60] is to make effective the statutory provision to require the registration of motor vehicles and to prevent avoidance thereof. . . . It was not intended that others, under cover of the general number or distinguishing mark of

[13] In support for this assertion, the plaintiffs rely on *Dugay* v. *Brothers' Toyota, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-97-0572734-S (September 11, 2000) (28 Conn. L. Rptr. 69), which, as a Superior Court case, is not binding precedent on this court.

the dealer, should be able to operate cars belonging to or controlled by themselves." (Citations omitted; internal quotation marks omitted.) *State* v. *Baron Motors, Inc.*, 2 Conn. Cir. Ct. 378, 381, 199 A.2d 355 (1964). Simply put, the statute permits the loan of dealer number plates, for a limited time, to a person who purchased a vehicle from the dealer, while waiting for that vehicle to be registered with the department of motor vehicles, or otherwise pending the registration process. The circumstances of the present case are akin to *Cook* v. *Collins Chevrolet, Inc.*, supra, 199 Conn. 247, where in that case, the dealer loaned a dealer number plate to the purchaser of a truck while the registration for the truck was pending. The truck owner was involved in an accident within the time period permitted under § 14-60 (a) (3) and the truck owner subsequently registered the truck in his own name two days after the accident. Id.

The court did not err in concluding that the defendant met its burden in demonstrating that the parties to the loan agreement intended for the defendant to loan the dealer number plate for up to thirty days while the registration was pending because of the missing certificate of origin for the newly purchased vehicle. The defendant complied with the requirements of § 14-60 (a) by obtaining proof of insurance from the Martins for that period of time. As discussed in part I of this opinion, the accident occurred within that time period. The plaintiffs have not demonstrated the existence of any genuine issues of material fact that contradict the defendant's compliance with § 14-60 (a). Although the parties failed to designate on the loan agreement form, via a check in a box, the specific category of the loan, the undisputed evidence submitted in support of the motions for summary judgment was that the Martins did not borrow the dealer number plate to test drive a vehicle nor did they have a vehicle undergoing repairs.

There are no other relevant factors that would raise a genuine issue of material fact regarding the defendant's compliance with § 14-60. See *Cook* v. *Collins Chevrolet, Inc.*, supra, 199 Conn. 252 (dealer entitled to summary judgment because of its full compliance with § 14-60 when purchaser was involved in accident with vehicle displaying dealer number plate while registration was pending). Accordingly, the court properly rendered summary judgments in favor of the defendant against each of the plaintiffs.

The judgments are affirmed.

In this opinion the other judges concurred.

BOBBY DAVIDSON *v.* CITY OF BRIDGEPORT ET AL.
(AC 38226)

Lavine, Elgo and Flynn, Js.

Syllabus

The plaintiff, a former Bridgeport police officer, sought to recover damages from the defendants, the city of Bridgeport, the Bridgeport Police Department, and N, a former Bridgeport chief of police, for an alleged violation of his right to privacy and negligent and intentional infliction of emotional distress. The plaintiff, who was the subject of an internal disciplinary proceeding, had attended a meeting with N, who observed the plaintiff launch into an outburst regarding alleged unjust treatment by the department's internal affairs division. Following the meeting, N requested the department's workers' compensation carrier to schedule the plaintiff, who was on disability leave for work related injuries, for a psychiatric independent medical examination. The plaintiff had received a notice instructing him to bring certain medical records related to his injury to the examination and was under the impression that he was to undergo a physical examination. When he reported for the examination and learned it was psychiatric in nature, he left before being examined but eventually underwent the psychiatric examination. A few months later, N requested that the Board of Police Commissioners afford the plaintiff a service related involuntary retirement, which the board granted. Thereafter, the plaintiff commenced the present action claiming, inter alia, that, by subjecting him to the psychiatric examination, the defendants invaded his privacy and that he was forced to retire

based on an alleged psychiatric disability. Following a trial, the trial court rendered judgment in favor of the defendants, from which the plaintiff appealed to this court. *Held*:

1. The trial court properly determined that the defendants did not violate the plaintiff's right to privacy; the record did not support the plaintiff's claim that the defendants released and disseminated the psychiatric evaluation of him, resulting in his involuntary termination from employment, as the trial court credited the testimony of two police officers that they never copied or disseminated the evaluation to anyone, and it was not for this court to disturb the trial court's credibility findings, there was substantial evidence in the record to support the court's finding that the plaintiff had been granted a service related, involuntary retirement on the basis of his physical disabilities, and the plaintiff failed to prove by a preponderance of the evidence that, by requiring him to undergo a psychiatric medical examination, the defendants unreasonably intruded on his seclusion and that the intrusion would have been offensive to a reasonable person, as the record supported the court's findings that N had sent the plaintiff for the examination out of concern for his welfare and to determine his fitness for duty, that the plaintiff's alleged emotional injury was the result of the internal affairs investigation, that N had the authority to refer the plaintiff for a psychiatric independent medical examination due to a concern for the plaintiff's well-being, and that the plaintiff had presented no credible evidence that the defendants had an improper intent to invade his privacy.
2. The plaintiff could not prevail on his claim that the trial court improperly concluded that the defendants did not negligently or intentionally cause him emotional distress; the record contained no evidence that the defendants intended to inflict emotional distress on the plaintiff or that emotional distress was the likely result of sending him for a psychiatric examination, the trial court found that the plaintiff's emotional distress was not caused by his going to the psychiatrist's office for the examination and that the plaintiff had been suffering emotional distress long before he had been ordered to undergo the psychiatric examination, as he was distressed by, and obsessed with, the outcome of the internal affairs investigation, and there was no evidence that, by requiring the plaintiff to undergo the psychiatric examination, the defendants created an unreasonable risk of emotional distress that resulted in illness or bodily harm.

Argued September 19, 2017—officially released March 6, 2018

Procedural History

Action to recover damages for, inter alia, the defendants' alleged violation of the plaintiff's right to privacy, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the matter was

removed to the United States District Court for the District of Connecticut, *Thompson*, *J.*, which granted in part the defendant Mark Rubinstein's motion for summary judgment and remanded the matter to the Superior Court on the remaining state law claims; thereafter, the plaintiff withdrew the matter as to the defendant Mark Rubinstein; subsequently, the matter was tried to the court, *Hon. Richard P. Gilardi*, judge trial referee; judgment for the defendants, from which the plaintiff appealed to this court. *Affirmed.*

John T. Bochanis, for the appellant (plaintiff).

Eroll V. Skyers, assistant city attorney, for the appellee (defendants).

Opinion

LAVINE, J. The plaintiff, Bobby Davidson, appeals from the judgment of the trial court, rendered after a trial to the court, in favor of the defendants, the city of Bridgeport (city), the Bridgeport Police Department (department), and Bryan T. Norwood, former Bridgeport chief of police.[1] On appeal, the plaintiff claims that the court improperly found that the defendants did not (1) violate his state right to privacy or (2) negligently or intentionally cause him emotional distress. We affirm the judgment of the trial court.

The court's memorandum of decision contains the following preface to its findings of fact. "This claim arises out of the plaintiff being sent to a certain doctor for an [independent medical examination (examination)]. As he was on a disability leave for cervical fusion, he assumed it was a physical exam. When he arrived at the appointment, he found the doctor was a psychiatrist

[1] In his complaint, the plaintiff also alleged that Mark Rubinstein, a psychiatrist, wrongfully intruded on his seclusion. The plaintiff later withdrew his claims against Rubinstein, who is not a party to this appeal. Our references to the defendants are to the city, the department and Norwood, collectively.

and it was to be a psychiatric exam. Solely as a result of the inadvertent mix-up in scheduling the exam, the plaintiff is claiming invasion of privacy, negligent infliction of emotional distress and intentional infliction of emotional distress.

"This incident took place in the middle of several contentious disputes involving the plaintiff and the [department]. All the clashes between the plaintiff and the department are presently subject to grievance procedures, including the actual referral for the psychiatric examination, and are not part of this litigation.[2] The circumstances, however, surrounding his referral for an examination are a necessary part of this litigation." (Footnote added.) The court, thereafter, made the following findings of fact.

The plaintiff was first employed by the city as a special police officer in 1977. He became a patrol officer in 1985 and a sergeant with supervisory responsibilities in 1992. Reynaldo Arriaga was one of the patrol officers whom the plaintiff supervised. In approximately 2004, Arriaga lodged six complaints against the plaintiff, alleging that he had violated department policy. The department internal affairs division investigated and found that five of the six complaints were unsubstantiated. As to the sixth complaint, the internal affairs division found that the plaintiff had violated department policy.[3] Officer Murphy Pierce witnessed the encounter between the plaintiff and Arriaga and corroborated Arriaga's version of the event that gave rise to his harassment complaint.

During the time the plaintiff was a police officer, he sustained several service-related injuries and was

[2] The court found that the plaintiff's involuntary retirement also is subject to a grievance proceeding.

[3] Arriaga complained that the plaintiff had asked him whether he had sustained certain injuries by falling off his "donkey" or by having "wild sex with [his] Brazilian women."

placed on inactive duty from time to time. In February, 2005, he was unable to perform his duties as a patrol officer and was placed on the department sick and injured management list. Captain A.J. Perez was responsible for the department's sick and injured management program and, therefore, kept track of the status and medical records of officers who were either sick or injured. The plaintiff was required to meet regularly with Perez. According to Perez, the plaintiff was consumed with the outcome of the internal affairs investigation. Whenever he met or saw Perez, the plaintiff launched into a litany of complaints about the internal affairs process, claiming that he had endured an injustice and that he suffered anguish as a result of the investigation. The plaintiff also talked about the matter to Captain Chapman, who over time "disappeared" whenever he saw the plaintiff coming. Sergeant Joseph Hernandez, the department clerk, was not friendly with the plaintiff, but when the two of them spoke, the plaintiff repeated his complaints about the internal affairs division and accused everyone involved of lying.

The court found that Norwood was appointed chief of police in April, 2006, and that he scheduled a meeting regarding the plaintiff's disciplinary matter for May 19, 2006. Officer Sean Ronan, president of the police union, attended the meeting to represent the plaintiff. The plaintiff began the meeting with an outburst regarding the unjust treatment he had received from the internal affairs division. He told Norwood that the incident had been on his mind for years and that he had written letters requesting a "true" disciplinary hearing. The meeting lasted approximately ten minutes and concluded when Norwood ended the plaintiff's "diatribe" and asked him to leave.

On the basis of his observations of the plaintiff's behavior during the meeting, Norwood asked the

department's workers' compensation carrier, Concentra Integrated Services (Concentra), to schedule the plaintiff for an examination with Mark Rubinstein, a psychiatrist.[4] Concentra sent the plaintiff a notice that stated in part that he was to undergo an examination with Rubinstein on June 22, 2006, and that he should take "any x-rays, CT scans, MRI studies and/or other medical records pertaining to" his injury to the examination. Given the instructions in the notice, the plaintiff was under the impression that he was to undergo a physical examination. The court found that there had been a mix-up and that no one had advised the plaintiff that he was to undergo a psychiatric examination. When the plaintiff arrived at Rubinstein's office and learned that he was to undergo a psychiatric examination, he "simply left."

The department rescheduled the plaintiff's examination with Rubinstein for July 7, 2006.[5] When the plaintiff strenuously objected to the examination, the department ordered him to attend.[6] The plaintiff inquired of

[4] Norwood wrote to Rubinstein on June 21, 2006, stating: "The Bridgeport Police Department requested an independent medical examination of [the plaintiff] after observing his behavior in the course of a conversation regarding a pending discipline matter. Several employees who witnessed and/or participated in the conversation raised concerns in relation to [the plaintiff's] conduct. Your assistance in this matter will be appreciated."

[5] Norwood again wrote to Rubinstein on June 23, 2006, stating: "On May 19, 2006, I conducted a disciplinary hearing regarding [the plaintiff]. The hearing was subsequently and prematurely suspended after I became very concerned about [the plaintiff's] well-being. Based on my personal observation, [the plaintiff] appeared to be suffering from extreme paranoia, anxiety and depression. He also displayed extreme difficulty articulating his statements in a coherent manner. Based on the above stated observation, it is my recommendation that [the plaintiff] be evaluated to determine his fitness for duty. Your assistance in this matter will be appreciated."

[6] Hernandez wrote to the plaintiff stating in part: "As you are aware, Dr. Rubinstein, with whom you were scheduled for an [Independent Medical Exam (IME)] contacted the Chief's office stating that although you arrived on time, you did not follow through with your scheduled exam. After my conversation with you on Thursday, June 22, it became apparent that there was a misunderstanding as to why the IME was scheduled, causing you some discomfort.

his union whether he had to undergo the examination; Ronan replied and informed the plaintiff that he had to attend the examination because it concerned his well-being.[7] The plaintiff returned to Rubinstein's office and was examined by him.

With respect to the plaintiff's work related injuries previously mentioned, the court found that the plaintiff fractured his left hip in 1987, injured his back, and in 1999 injured his neck and back. The plaintiff was awarded a permanent partial disability for which he received workers' compensation benefits. In November, 2005, the plaintiff underwent a cervical fusion at several levels of his spine. He did not return to work following the surgery; and according to Roger H. Kaye, a neurosurgeon, he would never be able to return to active duty as a patrol officer.[8] In October, 2006, Norwood requested that the Board of Police Commissioners (commissioners) afford the plaintiff a service related, involuntary retirement.[9] The commissioners granted the

"Chief Norwood is genuinely concerned for your well-being and has instructed me to re-schedule an Independent Medical Exam for you with the understanding that you are being examined [by] a Psychiatrist.

"I have been asked to advise you that this exam is not voluntary on your part and your presence is required per department policy 3.13."

[7] Ronan stated in part: "[T]he Executive Board was presented with your grievance on July [sixth] at our regularly scheduled Executive Board meeting. It is the Unions' belief that the City has particular rights concerning an Independent Medical Exam (IME), if the Department has a bona fide concern for 'fitness for duty.' "

[8] On July 25, 2006, Kaye conducted an examination of the plaintiff and wrote a letter to Concentra that day stating, in part, that the plaintiff "is partially disabled. His previous job was a field police sergeant. He cannot return to physical police work, but I see no reason he cannot function at a desk job."

[9] On October 6, 2006, Hernandez wrote to the plaintiff stating in part: "As a result of the findings in your recent independent medical exam(s), Chief Norwood has decided to invoke his rights under the departments sick and injury policy, rule 3.13.19 and article 42, and seek your retirement by the Honorable Board of Police Commissioners." The letter, which was admitted into evidence at trial, stated that a copy of the examination was attached, but no such copy is attached to the exhibit.

plaintiff a service related, involuntary retirement on November 28, 2006.

The plaintiff commenced the present action in May, 2008, and the defendants removed the case to federal court. The United States District Court for the District of Connecticut granted partial summary judgment in favor of the defendants[10] and, on March 31, 2011, remanded the case to the Superior Court for resolution of the plaintiff's state law claims. The plaintiff appealed

[10] In its decision, the District Court primarily addressed the plaintiff's claim against Rubinstein for wrongfully intruding on his right to seclusion. The District Court agreed with Rubinstein that summary judgment should be granted in his favor with respect to General Statutes § 52-146e, which protects a psychiatric patient's right to confidentiality. The court concluded that application of the statute to the present examination circumstances was not appropriate. The court reasoned that a principal purpose of the statute is to give a patient an incentive to make full disclosure to a physician in order to obtain effective treatment. However, "[c]ommunications that bear no relationship to the purpose for which the privilege was enacted do not obtain shelter under the statute . . . ." *Bieluch* v. *Bieluch*, 190 Conn. 813, 819, 462 A.2d 1060 (1983). Furthermore, a patient may claim the privilege of confidentiality only if he or she had a justified expectation that his or her communication would not be disclosed publicly. *State* v. *White*, 169 Conn. 223, 234, 363 A.2d 143, cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed. 2d 399 (1975). The court found that the plaintiff had no expectation of privacy as the notice from Concentra stated that no doctor-patient relationship was created during the examination. Also Rubinstein orally advised the plaintiff that his evaluation would not be kept confidential. The District Court found, therefore, that the plaintiff had waived his right to privacy.

The District Court found that the plaintiff "was not engaged in a therapeutic relationship with Rubinstein, but rather, was undergoing an evaluation at the request of his employer. The evaluation was arranged through his employer, with the doctor of his employer's choosing, paid for by his employer, and done for the purpose of evaluating [the plaintiff's] 'fitness for duty.' The purpose of [the plaintiff's] meeting with Rubinstein bears no relationship to the purpose for which the psychiatrist-patient privilege was enacted, and therefore is not sheltered by § 52-146e."

The District Court also granted the defendants' motion for summary judgment with respect to the plaintiff's federal law claims and declined to exercise jurisdiction pursuant to 28 U.S.C. § 1367 (c) over the plaintiff's remaining state law claims against any of the defendants. *Davidson* v. *Bridgeport*, United States District Court, Docket No. 3:08CV00971 (AWT) (D. Conn. March 31, 2011).

to the United States Court of Appeals for the Second Circuit, which affirmed the judgment of the District Court.[11] The decisions of the federal courts were attached as exhibits to Rubinstein's motion for summary judgment in the Superior Court.[12]

Thereafter, the plaintiff revised his complaint and alleged three claims, in multiple counts, against the defendants: wrongful invasion upon his seclusion, intentional infliction of emotional distress, and negligent infliction of emotional distress. The plaintiff alleged that as a consequence of the defendants' invasion of his privacy he was "told that he would be forced

[11] See *Davidson* v. *Bridgeport*, 487 Fed. Appx. 590 (2d Cir. 2012). The Court of Appeals concluded that the plaintiff could not prevail on his 42 U.S.C. § 1983 substantive due process and fourth amendment claims that the city invaded his privacy by subjecting him to a psychiatric examination because no jury could conclude that the city's request that the plaintiff undergo the examination was either arbitrary or unreasonable. The Court of Appeals also concluded that the *plaintiff could not prevail on his substantive due process claim* because he could not demonstrate that the city engaged in deliberate malfeasance by intending to injure or spite him.

The plaintiff's fourth amendment claim that the examination constituted an unreasonable search also failed. Although the District Court found that the plaintiff had waived his fourth amendment right to privacy by agreeing to the examination after he had been warned that Rubinstein's report would be shared with Norwood and the department, the Court of Appeals did not reach that issue as there was *no genuine issue of material fact as to the reasonableness of the city's request for the examination.* The city ordered the examination in the context of the plaintiff's employment, not the investigation of a crime or some other law enforcement objective. The examination, therefore, fell in the category of a special needs search. See *Lynch* v. *New York*, 589 F.3d 94, 102 (2d Cir. 2009), cert. denied, 562 U.S. 995, 131 S. Ct. 415, 178 L. Ed. 2d 344 (2010).

On the basis of the record, the Court of Appeals reasoned that there were no genuine issues of material fact and that a fact finder could only conclude that any search was reasonable. The plaintiff's privacy interest in his personal medical information is diminished to the extent that physical and mental fitness are essential to his work as an armed law enforcement officer. See *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 672, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989); *Lynch* v. *New York*, supra, 589 F.3d 103.

[12] We may take judicial notice of the trial court's file. *Dockter* v. *Slowik*, 91 Conn. App. 448, 459 n.7, 881 A.2d 479, cert. denied, 276 Conn. 919, 888 A.2d 87 (2005).

to retire based on an alleged psychiatric disability." The defendants denied that they invaded the plaintiff's privacy, that he was forced to retire on the basis of psychiatric disability, or that the alleged intrusion on his privacy caused him emotional distress.[13]

Following trial, the court found that the plaintiff had failed to submit credible evidence of the defendants' improper intent to invade his privacy. To the contrary, the court found that Norwood's motive for referring the plaintiff for a psychiatric evaluation was to ensure his welfare and well-being. The court also found that the plaintiff suffered no emotional distress with respect to Concerta's mistake in scheduling the examination with Rubinstein. The court found that the plaintiff's emotional distress began when the internal affairs division sustained the charges of improper conduct against him and continued to the time of trial. The court, therefore, rendered judgment in favor of the defendants. Additional facts will be addressed as necessary.

I

The plaintiff claims that the court erred in finding that the defendants did not violate his right to privacy by requiring him to undergo a psychiatric examination. As more specifically stated in his brief, the plaintiff claims that the defendants unreasonably intruded upon his privacy by forcing him to submit to a psychiatric examination and by releasing and disseminating Rubinstein's psychiatric evaluation of him. He further claims that the unreasonable intrusion upon his privacy forced him to retire involuntarily from the department, which

[13] In response to the revised complaint, the defendants asserted several special defenses, including governmental, municipal and sovereign immunity, res judicata, waiver, laches, collateral estoppel, and that the complaint failed to state a cause of action against the defendants. Our review of the record reveals that the defendants filed no motions to strike or for summary judgment predicated on their special defenses. See footnote 20 of this opinion.

resulted in the loss of benefits associated with his employment. The plaintiff's claim is without merit.

The plaintiff's claim presents a mixed question of law and fact to which we apply the plenary standard of review. *Winchester* v. *McCue*, 91 Conn. App. 721, 726, 882 A.2d 143, cert. denied, 276 Conn. 922, 888 A.2d 91 (2005). Our task is to determine whether the court's conclusions are legally and logically correct and find support in the facts that appear in the record. See *Tooley* v. *Metro-North Commuter Railroad Co.*, 58 Conn. App. 485, 492 n.8, 755 A.2d 270 (2000).

To the extent that the plaintiff claims that the defendants released and disseminated Rubinstein's psychiatric evaluation that resulted in his involuntary termination from employment, those assertions are not supported by the court's findings or the record. To begin with, the court found Perez and Hernandez to be credible witnesses, but found that the plaintiff's "entire testimony" was "replete with unfounded factual allegations and contradictions." Credibility determinations are not within the province of appellate courts; *Wheelabrator Bridgeport, L.P.* v. *Bridgeport*, 320 Conn. 361, 133 A.3d 402 (2016); and we will not disturb the court's credibility findings.

The court found that Perez and Hernandez were required to maintain the personnel files of members of the department. The two officers testified that they never copied Rubinstein's report or disseminated it to anyone. They also testified that Rubenstein's report was not mentioned at the commissioners' meeting when the plaintiff's retirement was voted on and that they had no knowledge that the commissioners had a copy of Rubinstein's report. The commissioners did have the plaintiff's orthopedic records, including the report that he was disabled. As to the plaintiff's claim that he lost

his employment with the department due to the psychiatric examination, the court found that the commissioners granted him a service related, involuntary retirement on the basis of his physical disabilities.[14] There is substantial evidence in the record to support the court's findings regarding the basis of the plaintiff's involuntary retirement.

Our Supreme Court has observed that "the law of privacy has not developed as a single tort, but as a complex of four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff to be [left] alone." (Internal quotation marks omitted.) *Foncello* v. *Amorossi*, 284 Conn. 225, 234, 931 A.2d 924 (2007). The four categories of invasion of privacy are: "([1]) unreasonable intrusion upon the seclusion of another; ([2]) appropriation of the other's name or likeness; ([3]) unreasonable publicity given to the other's private life; or ([4]) publicity that unreasonably places the other in a false light before the public." (Internal quotation marks omitted.) Id., quoting *Goodrich* v. *Waterbury Republican-American, Inc.*, 188 Conn. 107, 127–28, 448 A.2d 1317 (1982); see also 3 Restatement (Second), Torts, Invasion of Privacy § 652A, p. 376 (1977). "[P]rivacy actions involve injuries to emotions and mental suffering, while defamation actions involve injury to reputation." *Goodrich* v. *Waterbury Republican-American, Inc.*, supra, 128 n.19. The plaintiff's claim falls within the first category.

We now turn to the question of whether the court properly determined that the defendants did not violate the plaintiff's right to privacy by unreasonably intruding on his solitude when they ordered him to undergo a psychiatric evaluation. See W. Keeton et al., Prosser

[14] See footnotes 8 and 9 of this opinion.

and Keeton on the Law of Torts (5th Ed. 1984) § 117, pp. 854–56 (intentional interference with another's interest in solitude or seclusion); 3 Restatement (Second), Torts, Invasion of Privacy §§ 652A and 652B, pp. 376, 378 (1977).[15]

To prevail, the plaintiff had to prove by a preponderance of the evidence that by requiring him to undergo a psychiatric examination, the defendants unreasonably intruded on his seclusion and that the intrusion would be highly offensive to a reasonable person.[16] "It is the [fact finder's] exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses." (Internal quotation marks omitted.) *State* v. *Gauthier*, 73 Conn. App. 781, 787, 809 A.2d 1132 (2002), cert. denied, 262 Conn. 937, 815 A.2d 137 (2003).

The court found that Norwood sent the plaintiff for a psychiatric examination out of concern for his welfare and to determine his fitness for duty. Moreover, the court found that the plaintiff's alleged emotional injury was not the result of his having been sent to a psychiatric examination, but was the result of the internal affairs

[15] Section 652A of the Restatement (Second) of Torts provides in relevant part: "(1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other. (2) The right of privacy is invaded by (a) *unreasonable* intrusion upon the seclusion of another, as stated in § 652B . . . ." (Emphasis added.)

Section 652B of the Restatement (Second) of Torts provides: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."

Read together, § 652A instructs the reader to consult § 652B for the definition of what constitutes an unreasonable intrusion upon the seclusion of another. Section 652B states that one who intentionally intrudes on the seclusion of another is subject to liability if the intrusion would be highly offensive to a reasonable person.

[16] The parties have not identified a Connecticut case that clearly sets out the elements of a cause of action alleging invasion of privacy by unreasonable intrusion upon the seclusion of another in the context of a mandatory employment related psychiatric examination, and we have found none.

investigation. The court's findings and the record support its legal conclusions.

The court found that the plaintiff disagreed with and was upset by the outcome of the internal affairs investigation. When he met with Norwood in May, 2006, he began the meeting with an outburst regarding the unjust treatment he claimed he had received from the internal affairs division. He told Norwood that the incident had been on his mind for years and that he had written letters requesting a "true" disciplinary hearing. In addition, the plaintiff told Norwood that the charge was ridiculous, and that the officers, including Pierce, were lying. He wanted an opportunity to cross-examine Pierce. He informed Norwood that he could not function and was, in effect, consumed by the decision of the internal affairs division. At trial, the plaintiff testified that Norwood had conducted a kangaroo court, that Norwood did not know what was going on, and that "[h]e's probably manipulated himself." The court stated that the plaintiff "referenced" Norwood as an idiot. According to the plaintiff, he had presented exculpatory evidence to the internal affairs division that was completely stonewalled. As to Ronan, who was present at the meeting as a union representative, the plaintiff testified that Ronan was too intimidated by the officers in attendance.

In addition, the court found that Pierce was subpoenaed and testified at trial that he was present when the incident between the plaintiff and Arriaga took place. Despite Pierce's testimony, the plaintiff maintained throughout trial that Pierce was not present at the time of the incident.

As previously stated, the court found that Hernandez and Perez were credible witnesses. Both officers testified that the chief of police has the authority to request an examination. According to the department patrol

guide, the chief of police may direct an officer who is on extended sick leave or an injured list to submit to an examination by a physician designated by the city. The plaintiff himself testified that regardless of whether he was on active or inactive duty, if he behaved in a manner that may have constituted a danger to himself or others, the chief of police would be justified in requesting a psychiatric examination.[17] The plaintiff, however, denied that he was behaving in a manner that warranted a psychiatric evaluation. The court found that Norwood had the authority to refer the plaintiff for a psychiatric examination due to concern for the plaintiff's well-being. Moreover, the court was of the opinion that, as a result of the plaintiff's behavior, a supervising chief of police would be expected to confirm the welfare and well-being of an officer of the

[17] The plaintiff himself testified that the chief of police had authority to send an officer who was on active duty for a psychiatric examination. The following exchange took place between the defendants' counsel, the court, and the plaintiff:

"[The Defendants' Counsel]: [I]s it your testimony, your understanding that you're not within the authority of the police chief when you are not active as a police officer?

"[The Plaintiff]: I didn't say that. The police department has authority over me—he would have authority over me if I was out in the street doing something bizarre and everything like that then he could probably order me to see someone, but I wasn't doing anything like that. I was going about my affairs. I wasn't a danger to myself or to other people, and I wasn't contemplating coming back. I hadn't gotten a medical release. I hadn't reached maximum medical improvement.

"[The Defendants' Counsel]: But you're still under the auspices of the chief of police.

"[The Plaintiff]: Yes.

"The Court: Let me ask you this. If you were not active . . . but if you were a danger to yourself and other people . . .

"[The Plaintiff]: But I wasn't.

"The Court: That's not my question.

"[The Plaintiff]: All right.

"The Court: Assuming you were . . .

"[The Plaintiff]: Oh, yeah.

"The Court: . . . then they could have sent you for a . . .

"[The Plaintiff]: Yeah, I would have probably—they would have picked

department with respect to his fitness for duty. The court found that the plaintiff had presented no credible evidence that the defendants had an improper intent to invade his privacy; to the contrary, Norwood's motive for referring the plaintiff for a psychiatric evaluation was to ensure his welfare and well-being. See *International Brotherhood of Police Officers, Local 361* v. *New Milford*, 81 Conn. App. 726, 736 n.2, 841 A.2d 706 (2004) (municipality has legitimate interest in fitness and emotional stability of armed peace officers).[18]

The plaintiff claims that the defendants unreasonably intruded on his privacy by compelling him to undergo a psychiatric examination. Assuming for the sake of

me up and three days up in the psychiatric hospital and need to be, you know, somewhere else. Yes, I agree to that."

[18] In its decision affirming the judgment of the District Court in the present matter; see footnote 11 of this opinion; the United States Court of Appeals for the Second Circuit cited a United States Supreme Court case explaining why some federal law enforcement employees have a diminished expectation of privacy with respect to their performance or fitness for duty. *Davidson* v. *Bridgeport*, 487 Fed. Appx. 590, 592–93 (2d Cir. 2012).

In *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989), the United States Supreme Court evaluated whether requiring customs agents to submit to a urinalysis test violated the fourth amendment to the United States Constitution. The court stated, in part: "We think Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty likewise have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test. Unlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms. Because successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from the Service personal information that bears directly on their fitness. . . . While reasonable tests designed to elicit this information doubtless infringe some privacy expectations, we do not believe these expectations outweigh the Government's compelling interests in safety and in the integrity of our borders." (Citation omitted.) Id., 672. The interest of municipal governments in safety and the fitness for duty of its officers who carry firearms also diminishes an officer's expectation of privacy. *Davidson* v. *Bridgeport*, supra, 487 Fed. Appx. 593.

argument only that a psychiatric examination was an intrusion on the plaintiff's seclusion, we must determine whether the intrusion was unreasonable and whether a reasonable person would find the intrusion highly offensive. We conclude that because Norwood wanted to determine the plaintiff's fitness for duty as a Bridgeport police officer, his intrusion into the plaintiff's seclusion, if any, was reasonable and that a reasonable person would not find it highly offensive. See 3 Restatement (Second), supra, §§ 652A and 652B.

The court found through the plaintiff's own testimony that he was consumed by the outcome of the internal affairs investigation and could not function. Ronan's letter to the plaintiff confirming the city's right to order him to undergo a psychiatric examination if it had a bona fide concern about his fitness for duty is circumstantial evidence of the department's interest in determining an officer's fitness for duty. The record discloses evidence that Norwood and other members of the department were concerned about the plaintiff's well-being and thus his fitness for duty. See footnotes 4, 5, and 6 of this opinion. The plaintiff complained repeatedly about his emotional distress to members of the department. The plaintiff, therefore, invited concern for his welfare, which is at odds with his claim in this action that he wished to be left alone. The court found that Norwood wrote to Rubinstein asking him to evaluate the plaintiff's fitness for duty. We conclude that the court's findings that Norwood had a bona fide concern about the plaintiff's well-being and needed to be assured of the plaintiff's fitness for duty is not clearly erroneous. On appeal, the plaintiff has not argued or demonstrated that Norwood's concern for his fitness for duty was not a reasonable basis to order him to undergo a psychiatric examination.

The plaintiff has argued, contrary to the representations of the defendants, that § 3.13 of the patrol guide

does not authorize the chief of police to order him to submit to a psychiatric examination. The record includes copies of letters that the plaintiff received from the department ordering him to see Rubinstein pursuant to § 3.13. The court concluded that Norwood had the authority to refer the plaintiff for a psychiatric examination, but it made no finding that § 3.13 of the patrol guide permits the chief of police to send an officer for a *psychiatric* examination.

As to whether a reasonable person would find the defendants' intrusion on the plaintiff's seclusion, if any, highly offensive, the court made no finding in that regard.[19] On appeal, the plaintiff failed to address that aspect of the alleged tort. We, therefore, conclude that he failed to carry his burden to prove that the defendants invaded his privacy, and that the court properly found in favor of the defendants.

II

The plaintiff's second claim is that the court improperly concluded that the defendants did not negligently or intentionally cause him emotional distress.[20] We disagree.

The court made the following relevant findings of fact. The plaintiff suffered no emotional distress with

[19] We note that the trial court did not use the words "unreasonable intrusion," which is the language of the Restatement. The court used the words "improper motive," which we construe to mean, on the basis of the court's finding that Norwood was concerned about the plaintiff's welfare and fitness for duty, that the intrusion into the plaintiff's seclusion, if any, was not unreasonable.

[20] In their brief, the defendants argue that the plaintiff's claims for the infliction of emotional distress do not comport with the requirements of General Statutes § 7-465 (a) in that the plaintiff did not allege notice to the city, that the city is obligated to indemnify a defendant, or that the plaintiff commenced a separate action against a city employee. The trial court did not decide the case on the basis of any of the defendants' special defenses. See footnote 13 of this opinion. We do not review claims raised for the first time on appeal. See *Lawton* v. *Weiner*, 91 Conn. App. 698, 709 n.7, 882 A.2d 151 (2005).

respect to the mistake in Concentra's June 2, 2006 letter to the plaintiff, i.e., to take his X rays, CT scans, MRI studies, and/or other medical records to Rubinstein, or the department's failing to tell the plaintiff that he was being sent to a psychiatrist for an examination. The emotional distress from which the plaintiff suffered began and continued as a result of the internal affairs division's earlier finding that he had violated department policy. The plaintiff repeatedly told Perez and Hernandez the devastating emotional effect he felt as a result of the internal affairs investigation. He reported his subjective symptoms on a weekly basis beginning in 2004. The plaintiff started the May, 2006 meeting with Norwood with a litany of complaints, which caused Norwood to end the meeting. At trial, the plaintiff testified that he was consumed by the outcome of the internal affairs investigation and could not function. The plaintiff does not claim that the court's findings are clearly erroneous.

To prevail on a claim of intentional infliction of emotional distress, a plaintiff must prove by a preponderance of the evidence "(1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe." (Internal quotation marks omitted.) *Stancuna* v. *Schaffer*, 122 Conn. App. 484, 491–92, 998 A.2d 1221 (2010).

We have reviewed the record and find no evidence that the defendants intended to inflict emotional distress on him or that emotional distress was the likely result of sending the plaintiff for a psychiatric examination. Nor has the plaintiff brought such evidence to our attention. The court also found that the plaintiff's

emotional distress was not caused by his going to Rubinstein's office and learning that he was to undergo a psychiatric examination. The plaintiff had been suffering emotional distress long before the defendants ordered him to undergo a psychiatric examination. The plaintiff's preexisting emotional distress was, in fact, a factor motivating Norwood to order the psychiatric examination.

To prevail on a claim of "negligent infliction of emotional distress, the plaintiff must prove: (1) the defendant's conduct created an unreasonable risk of causing the plaintiff emotional distress; (2) the plaintiff's distress was foreseeable; (3) the emotional distress was severe enough that it might result in illness or bodily harm; and (4) the defendant's conduct was the cause of the plaintiff's distress." (Internal quotation marks omitted.) *Grasso* v. *Connecticut Hospice, Inc.*, 138 Conn. App. 759, 771, 54 A.3d 221 (2012). The plaintiff's claim that the court improperly found that the defendants did not negligently cause him emotional distress fails for the same reason that he cannot prevail on his claim of intentional infliction of emotional distress. Ordering the plaintiff to undergo a psychiatric examination was not the cause of his distress. He was distressed by, and obsessed with, the outcome of the internal affairs investigation. On the basis of our review of the record, we find no evidence that by requiring the plaintiff to undergo a psychiatric examination, the defendants created an unreasonable risk of emotional distress that resulted in illness or bodily harm. For the foregoing reasons, the plaintiff's second claim fails.

The judgment is affirmed.

In this opinion the other judges concurred.

ARC CAPITAL, LLC *v.* ASIA PACIFIC LIMITED ET AL. (AC 39319)

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

Syllabus

The plaintiff company brought this action seeking to enforce a judgment rendered in the Grand Court of the Cayman Islands awarding the plaintiff the attorney's fees and litigation expenses it had incurred in a prior action against the defendant A Co. and its principal, K, arising out of the winding up of a business venture. The trial court granted the defendants' motion to dismiss the present action for lack of subject matter jurisdiction, concluding that the foreign judgment that the plaintiff sought to enforce could only be enforced through chapter 15 of the United States Bankruptcy Code. From the judgment of dismissal rendered thereon, the plaintiff appealed to this court. *Held* that the trial court erred in concluding that chapter 15 of the United States Bankruptcy Code prevented it from deciding this action: the present action did not fall within any of the limited situations outlined in the federal statute (11 U.S.C. § 1501 [b]) requiring that a bankruptcy court in the United States approve an application for recognition from a foreign representative before foreign liquidation proceedings could be recognized in United States courts, as chapter 15 does not apply when a court in the United States simply gives preclusive effect to factual findings from an otherwise unrelated foreign liquidation proceeding, and here, the plaintiff alleged in its complaint that it is a corporation incorporated in the United States, not a foreign representative as defined by the Bankruptcy Code, and the present action was brought by the plaintiff as a private party to enforce a money judgment that was unconnected to any foreign or United States bankruptcy proceeding.

Argued November 29, 2017—officially released March 6, 2018

Procedural History

Action to, inter alia, enforce a foreign judgment, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Hon. Richard P. Gilardi*, judge trial referee, granted the plaintiff's application for a prejudgment remedy; thereafter, the matter was transferred to the Superior Court in the judicial district of Hartford, Complex Litigation Docket, where the court, *Miller*, *J.*, granted the defendants' motion to dissolve the prejudgment remedy; subsequently, the court, *Miller*, *J.*, granted the defendants'

motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed; further proceedings.*

Jillian McNeil, pro hac vice, with whom were *Stefan Savic* and, on the brief, *John G. Balestriere*, pro hac vice, for the appellant (plaintiff).

Andrew B. Bowman, for the appellees (defendants).

Opinion

DiPENTIMA, C. J. The plaintiff, ARC Capital, LLC, appeals from the judgment of the trial court dismissing, for lack of subject matter jurisdiction, this action against the defendants, Asia Pacific Limited (Asia Pacific) and Aashish Kalra, to enforce a judgment rendered in the Grand Court of the Cayman Islands (Cayman court). On appeal, the plaintiff claims that the court erred in concluding that the judgment the plaintiff sought to enforce could be enforced only through chapter 15 of the United States Bankruptcy Code; see 11 U.S.C. § 1501 et seq. (2012); and, therefore, improperly dismissed the action for lack of subject matter jurisdiction. We agree with the plaintiff and reverse the judgment of the trial court.

Knowledge of the following undisputed facts, as set forth by the United States Court of Appeals for the Second Circuit in the related case of *Trikona Advisors Ltd.* v. *Chugh*, 846 F.3d 22 (2017), is necessary for the resolution of this appeal. "[Trikona Advisors Ltd. (TAL)] is an investment advisory company. Its two beneficial owners, [Rakshitt] Chugh and Aashish Kalra, formed the company in 2006 as a vehicle for helping foreign investors invest in Indian real estate and infrastructure. Each man held a [50] percent equity stake in TAL through entities controlled by them. Chugh's shares were owned by ARC Capital LLC . . . and Haida Investments . . . and Kalra's shares were owned by Asia Pacific Investments, Ltd." Id., 26. By 2009, the relationship between Chugh and Kalra had deteriorated

to the point where they could no longer work together. Id., 27. Eventually, TAL's board of directors voted to remove Chugh as a director, leaving Kalra to treat TAL and its assets as his own. Id.

"On February 13, 2012, ARC [Capital, LLC] and Haida [Investments], which held Chugh's TAL shares and were controlled by Chugh, filed a petition in the [Cayman court] seeking to 'wind up' TAL, a Cayman corporation. The [petition] sought to liquidate the business and divide its assets between Chugh and Kalra. Asia Pacific, which held Kalra's TAL shares and was controlled by Kalra, opposed Chugh's petition. . . . The Cayman court tried the wind-up proceeding over seven days in January of 2013. At the trial's conclusion, the court granted Chugh's petition. It found that each of Chugh's allegations was supported by evidence, and that these allegations taken together supported a finding that it was just and equitable to wind up TAL. It also rejected each of Kalra's affirmative defenses, concluding that there was no merit whatsoever in the allegations made against Mr. Chugh. Kalra appealed from this judgment, first to the Court of Appeal of the Cayman Islands, and then to the Judicial Committee of the Privy Council in London. Both tribunals affirmed the judgment." (Internal quotation marks omitted.) Id., 27–28.

The plaintiff brought the present action against Asia Pacific[1] and Kalra,[2] seeking to domesticate and enforce

[1] We note that the plaintiff named and served "Asia Pacific Limited" as a defendant. The court in *Trikona Advisors Ltd.* v. *Chugh*, supra, 846 F.3d 26, however, indicated that Kalra's shares were owned by "Asia Pacific Investments, Ltd." Further, on the default costs certificate at issue in this case, the name "Asia Pacific Limited" was changed to "Asia Pacific Ventures Limited." As these discrepancies were not raised by either party, we will assume that the proper defendant is "Asia Pacific Limited."

[2] The plaintiff's complaint alleged that because Kalra had complete control over Asia Pacific, it was seeking to pierce Asia Pacific's corporate veil and enforce the costs order against Kalra. The defendants argue that the Uniform Foreign Money-Judgments Recognition Act, General Statutes § 50a-34 (a) (2) et seq., prohibits recognition and enforcement of the Cayman costs order against Kalra because Kalra was not a party to the wind up proceedings.

a subsequent costs order of the Cayman court. According to the complaint and accompanying exhibits, on February 7, 2013, the plaintiff and Haida applied to the Cayman court for attorneys' fees and litigation expenses incurred as petitioners in the winding up proceedings of TAL. On February 14, 2013, the Cayman court issued a costs order requiring that Asia Pacific reimburse the plaintiff and Haida for their litigation expenses. On May 15, 2013, the Cayman court issued a "default costs certificate" setting the final amount payable to the plaintiff and Haida at $760,067.65. In this action, the plaintiff sought to domesticate and enforce this order.

On August 24, 2015, the court, *Hon. Richard P. Gilardi*, judge trial referee, granted the plaintiff's application for a prejudgment remedy and ordered a disclosure of assets within two weeks of the date of the order. On August 27, 2015, the defendants filed an application to refer this case to the Complex Litigation Docket. The plaintiff consented to this referral and, on September 3, 2015, the court transferred the case to the Complex Litigation Docket.

On September 10, 2015, the defendants filed a motion to dissolve and/or modify the ex parte prejudgment remedy entered by Judge Gilardi and to dismiss the action in its entirety for lack of subject matter jurisdiction. On September 24, 2015, the court, *Miller*, *J.*, dissolved the prejudgment remedy. On May 31, 2016, the court, *Miller*, *J.*, granted the defendants' motion to dismiss the action in its entirety for lack of subject matter jurisdiction, concluding that "[t]he foreign 'judgment' which the plaintiff seeks to enforce can only be

The trial court, however, did not address this issue in its decision. Accordingly, we decline to consider this claim. See *Willow Springs Condominium Assn., Inc.* v. *Seventh BRT Development Corp.*, 245 Conn. 1, 52, 717 A.2d 77 (1998) ("we will not address issues not decided by the trial court").

enforced through chapter 15 of the United States Bankruptcy Act. Moreover, the Cayman 'Winding-Up' proceeding could never qualify, under chapter 15, as a type of proceeding (main or nonmain) subject to judicial review." The plaintiff then filed the present appeal, in which it argues that the court erred in dismissing this action for lack of subject matter jurisdiction.

"We first set forth the applicable standard of review and general principles of law. The standard of review for a court's decision on a motion to dismiss [under Practice Book § 10-30] is well settled. A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone. . . . In undertaking this review, we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Footnote omitted; internal quotation marks omitted.) *Cuozzo* v. *Orange*, 315 Conn. 606, 614, 109 A.3d 903 (2015).

The plaintiff argues that the court erred in holding that chapter 15 of the United States Bankruptcy Code[3]

[3] Title 11 of the United States Code § 1501, entitled "Purpose and scope of application," provides:

"(a) The purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of—

prevented it from deciding this action for enforcement of a money judgment between private Connecticut parties. According to the plaintiff, a plain reading of chapter 15 shows that it does not apply to the present case. We agree.

"Chapter 15 of the United States Bankruptcy Code . . . requires that under certain circumstances, before

"(1) cooperation between—

"(A) courts of the United States, United States trustees, trustees, examiners, debtors, and debtors in possession; and

"(B) the courts and other competent authorities of foreign countries involved in cross-border insolvency cases;

"(2) greater legal certainty for trade and investment;

"(3) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor;

"(4) protection and maximization of the value of the debtor's assets; and

"(5) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

"(b) This chapter applies where—

"(1) assistance is sought in the United States by a foreign court or a foreign representative in connection with a foreign proceeding;

"(2) assistance is sought in a foreign country in connection with a case under this title;

"(3) a foreign proceeding and a case under this title with respect to the same debtor are pending concurrently; or

"(4) creditors or other interested persons in a foreign country have an interest in requesting the commencement of, or participating in, a case proceeding under this title.

"(c) This chapter does not apply to—

"(1) a proceeding concerning an entity, other than a foreign insurance company, identified by exclusion in section 109 (b);

"(2) an individual, or to an individual and such individual's spouse, who have debts within the limits specified in section 109 (e) and who are citizens of the United States or aliens lawfully admitted for permanent residence in the United States; or

"(3) an entity subject to a proceeding under the Securities Investor Protection Act of 1970, a stockbroker subject to subchapter III of chapter 7 of this title, or a commodity broker subject to subchapter IV of chapter 7 of this title.

"(d) The court may not grant relief under this chapter with respect to any deposit, escrow, trust fund, or other security required or permitted under any applicable State insurance law or regulation for the benefit of the claim holders in the United States."

foreign liquidation proceedings may be recognized in United States courts, a bankruptcy court in the United States must approve an application for recognition from a 'foreign representative' appointed in connection with that foreign proceeding. . . . Chapter 15, enacted by Congress in 2005, incorporated into United States law the Model Law on Cross-Border Insolvency drafted by the United Nations Commission on International Trade. . . . The statute's primary purpose was to facilitate the consolidation of multinational bankruptcies into one single proceeding. . . . Chapter 15 addressed a persistent problem in cross-border liquidations: creditors would initiate multiple bankruptcy proceedings to recover assets from a debtor in jurisdictions other than the site of the principal liquidation. . . . This caused administrative inefficiency and also allowed creditors to bypass the priority restraints of the main bankruptcy proceeding and attempt to recover more than their fair share of the debtor's assets. . . . In the interests of uniformity and efficiency, Chapter 15 provides for the coordination of domestic and foreign proceedings into a single bankruptcy and . . . allows foreign representatives appointed in connection with foreign proceedings to seek recognition of those proceedings in United States courts as a means of requesting United States assistance in administering the main liquidation." (Citations omitted.) *Trikona Advisors Ltd.* v. *Chugh*, supra, 846 F.3d 30.

In *Trikona Advisors Ltd.*, a related action involving some of the same parties, the Second Circuit addressed whether chapter 15 prevented the United States District Court for the District of Connecticut from giving preclusive effect to the Cayman court's factual findings. Id., 29–31. In that case, TAL brought an action against Chugh, ARC Capital and other related corporate entities, alleging breach of fiduciary duty by Chugh, a former partner and 50 percent owner of TAL, and the other

defendants. Id., 26. The District Court granted summary judgment in favor of the defendants, concluding that TAL's claims previously had been determined in Chugh's favor in the proceeding in the Cayman court, and that TAL was collaterally estopped from asserting them in the District Court action. Id. On appeal, TAL argued, inter alia, that chapter 15 prevented the District Court from giving preclusive effect to the Cayman court's factual findings. Id.

In affirming the judgment of the District Court and concluding that chapter 15 did not apply, the Second Circuit stated: "Consistent with its limited purpose, 11 U.S.C. § 1501 (b) specifies four circumstances in which Chapter 15 applies. These are cases in which: (1) assistance is sought in the United States by a foreign court or a foreign representative in connection with a foreign proceeding; (2) assistance is sought in a foreign country in connection with a case under this title; (3) a foreign proceeding and a case under this title with respect to the same debtor are pending concurrently; or (4) creditors or other interested persons in a foreign country have an interest in requesting the commencement of, or participation in, a case proceeding under this title." (Internal quotation marks omitted.) *Trikona Advisors Ltd.* v. *Chugh*, supra, 846 F.3d 30–31. The court noted that "[t]hese scenarios assume that (1) a United States court is being asked either to assist in the administration of a foreign liquidation proceeding or to administer a liquidation proceeding itself, or (2) a foreign court is being asked to assist in administering a liquidation proceeding in the United States.

"Moreover, 11 U.S.C. § 1515 does not apply generally to parties, but, by its terms, requires only 'foreign representatives' to apply for recognition of a foreign judgment in bankruptcy. A 'foreign representative' is defined in 11 U.S.C. § 101 (24) [2012] as 'a person or body . . . authorized in a foreign proceeding to administer the

reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding.'[4]

"No party to the district court proceeding is a 'representative' of a 'foreign proceeding,' as those terms are defined in 11 U.S.C. § 101 (24) and (23) [2012]. And no party to the district court proceeding is seeking the assistance of the district court in enforcing or administering a foreign liquidation proceeding, 11 U.S.C. § 1501 (b) (1) [2012]; nor is any party seeking the assistance of a foreign country, 11 U.S.C. § 1501 (b) (2) [2012]; nor does the case involve a proceeding under the Bankruptcy Code pending concurrently with a foreign liquidation proceeding, 11 U.S.C. § 1501 (b) (3) [2012]; nor are foreign creditors seeking to commence an action under the Bankruptcy Code, 11 U.S.C. § 1501 (b) (4) [2012]. The instant nonbankruptcy action, brought in the District of Connecticut and governed by Connecticut law, is unconnected to any foreign or United States bankruptcy proceeding. Even assuming, arguendo, that the wind-up proceeding is the type of case that Chapter 15 would ordinarily cover, Chapter 15 does not apply when a court in the United States simply gives preclusive effect to factual findings from an otherwise unrelated foreign liquidation proceeding, as was done here." (Footnote in original.) *Trikona Advisors Ltd.* v. *Chugh*, supra, 846 F.3d 31.

As in *Trikona Advisors Ltd.*, the present action does not fall within any of the limited situations outlined in 11 U.S.C. § 1501 (b) in which chapter 15 would apply. In

[4] "The same section defines 'foreign proceeding' as 'a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.' 11 U.S.C. § 101 (23) [2012]." *Trikona Advisors Ltd.* v. *Chugh*, supra, 846 F.3d 31 n.1.

its complaint, the plaintiff alleges that it is a corporation incorporated in the United States, not a foreign representative as defined by the Bankruptcy Code. This is an action by the plaintiff, a private party, to enforce a money judgment that is unconnected to any foreign or United States bankruptcy proceeding.[5] The court erred, therefore, in dismissing this action for lack of subject matter jurisdiction on the ground that the judgment only could be enforced through chapter 15 of the Bankruptcy Code.[6]

[5] The defendants rely, however, on a footnote in *Trikona Advisors Ltd.* v. *Chugh*, supra, 846 F.3d 22, in which the Second Circuit made a specific reference to, and assumed, for the purposes of its analysis, the validity of, the trial court's order at issue in the present case. Specifically, footnote 2 of that opinion states: "In a Rule 28 (j) letter, TAL provided a copy of an order from the Superior Court of Connecticut, Judicial District of Hartford, dated May 31, 2016, holding that a complaint by ARC against Asia Pacific could only be enforced through Chapter 15. . . . Even assuming, arguendo, that the Superior Court's order was correctly decided, the facts here are distinguishable. In the state court proceeding, ARC sought the assistance of the Superior Court of Connecticut in enforcing an order that the Cayman court issued in connection with the wind-up proceeding, which awarded attorneys' fees to ARC and Haida Investments, Ltd. Because ARC requested the direct assistance of a court within the United Sates in enforcing an order issued in connection with a foreign liquidation proceeding, this is a scenario that arguably falls within the scope of Chapter 15. Here, by contrast, the Chugh Defendants argue only that the findings of fact made in the wind-up proceeding should be given preclusive effect. They do not seek the assistance of the District of Connecticut in enforcing any judgment of the Cayman court." Id., 31 n.2.

According to the defendants, it is implicit in this footnote that ARC Capital had the opportunity to seek certification from the Cayman court as a foreign representative to enforce the costs order in the United States under chapter 15. That footnote, however, simply assumes, without deciding, the validity of the order in the present case. It expresses no opinion as to its actual validity. Moreover, with the exception of that footnote, the opinion itself in *Trikona Advisors Ltd.* v. *Chugh*, supra, 846 F.3d 31, specifically held that chapter 15 did not apply and that it "does not apply generally to parties, but, by its terms, requires only 'foreign representatives' to apply for recognition of a foreign judgment in bankruptcy." (Internal quotation marks omitted.) Id., 31.

[6] In light of this conclusion, we need not address the court's statement that "the Cayman 'Winding-Up' proceeding could never qualify, under chapter 15, as a type of proceeding (main or nonmain) subject to judicial review."

The judgment is reversed and the case is remanded for further proceedings according to law.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* EVANDRO M. LIMA (AC 39400)

Sheldon, Elgo and Mihalakos, Js.

Syllabus

Convicted, following a plea of guilty, of the crime of conspiracy to commit larceny in the sixth degree, the defendant appealed to this court. He claimed that the trial court improperly denied his motion to vacate the judgment of conviction and to withdraw his plea because that court did not determine whether he understood the immigration consequences of his guilty plea prior to accepting it, as required by statute (§ 54-1j). *Held* that the trial court abused its discretion in denying the defendant's motion to vacate; at no time during the plea canvass did the trial court ask the defendant if he understood the potential immigration consequences of his guilty plea and, instead, simply advised him that his conviction could result in his removal or deportation from the United States, and, thus, the trial court did not substantially comply with the requirements of § 54-1j (a) prior to accepting the defendant's plea, and the court, in denying the defendant's motion to vacate, improperly relied on the facts that the defendant, when entering his guilty plea, had expressed his absolute satisfaction with his attorney's representation of him and told the court that there was no reason that his plea should not have been accepted, which were meaningless statements in the absence of some indication that the defendant knew and understood the potential consequences of his guilty plea.

Argued November 30, 2017—officially released March 6, 2018

Procedural History

Information charging the defendant with the crime of conspiracy to commit larceny in the sixth degree, brought to the Superior Court in the judicial district of New Britain, geographical area number seventeen, where the defendant was presented to the court, *Johnson, J.*, on a plea of guilty; judgment of guilty; thereafter,

We likewise need not address the plaintiff's additional argument that this court should afford comity to the money judgment in this case.

the court, *Dyer*, *J.*, denied the defendant's motion to vacate the judgment and withdraw his plea, and the defendant appealed to this court. *Reversed; further proceedings.*

Vishal K. Garg, for the appellant (defendant).

Linda F. Currie-Zeffiro, assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, and *Paul Rotiroti*, senior assistant state's attorney, for the appellee (state).

Opinion

SHELDON, J. The defendant, Evandro M. Lima, appeals from the judgment of the trial court denying his motion to vacate his conviction following his guilty plea to one count of conspiracy to commit larceny in the sixth degree in violation of General Statutes §§ 53a-48 and 53a-125b. The defendant claims that the trial court abused its discretion in denying his motion because, under General Statutes § 54-1j,[1] the court was required but failed to ask the defendant whether he understood the possible immigration consequences of

[1] General Statutes § 54-1j (a) provides: "The court shall not accept a plea of guilty or nolo contendere from any defendant in any criminal proceeding unless the court first addresses the defendant personally and determines that the defendant fully understands that if the defendant is not a citizen of the United States, conviction of the offense for which the defendant has been charged may have the consequences of deportation or removal from the United States, exclusion from readmission to the United States or denial of naturalization, pursuant to the laws of the United States. If the defendant has not discussed these possible consequences with the defendant's attorney, the court shall permit the defendant to do so prior to accepting the defendant's plea."

General Statutes § 54-1j (c) provides: "If the court fails to address the defendant personally and determine that the defendant fully understands the possible consequences of the defendant's plea, as required in subsection (a) of this section, and the defendant not later than three years after the acceptance of the plea shows that the defendant's plea and conviction may have one of the enumerated consequences, the court, on the defendant's motion, shall vacate the judgment, and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty."

pleading guilty before accepting his plea.[2] We agree with the defendant and reverse the judgment of the trial court.

The following procedural history is relevant to our resolution of this appeal. On August 1, 2014, the defendant entered a plea of guilty under the *Alford* doctrine[3] to conspiracy to commit larceny in the sixth degree after he conspired with another individual to commit a shoplifting at Price Chopper in Southington. During the plea canvass, the court asked the defendant several questions, including whether he was under the influence of alcohol, drugs or any other medication. The defendant answered in the negative. The court also asked the defendant whether he had had enough time to discuss his case with his attorney and was satisfied with his attorney's advice; whether his attorney had reviewed with him all of the evidence that the state claimed that it had to prove his guilt; and whether his attorney had informed him of the maximum possible penalty he was facing in the event of conviction. The court also asked the defendant if he knew that by pleading guilty, he was giving up his right to have a trial, to require the state to prove his guilt beyond a reasonable doubt, to confront and cross-examine witnesses and to present his own witnesses and his own testimony. The defendant responded in the affirmative to all of the

[2] The defendant also claims that the court failed to substantially comply with § 54-1j (a) because it did not advise him that one of said potential immigration consequences was the possible exclusion from readmission to the United States or denial of naturalization. Although the defendant did not assert this argument in his motion to vacate, the trial court addressed it. Because, however, we conclude that the court failed to determine whether the defendant understood the possible immigration consequences of his guilty plea in violation of § 54-1j, we need not address this additional claim of noncompliance.

[3] A defendant pleading guilty under the *Alford* doctrine neither admits guilt nor protests innocence, but merely acknowledges that the state can produce evidence that would be sufficient to obtain a conviction. See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

court's inquiries. The court then told the defendant: "If you are not a U.S. citizen, this conviction may result in your removal from the United States or deportation under federal law." The court followed that admonition with the question: "Has anyone forced or threatened you to enter your plea today?" The defendant responded in the negative and affirmed that he was entering his plea of his own free will. The court asked the defendant: "[I]s there any reason why I shouldn't accept your plea?" The defendant responded: "Not at all." The court found that the plea was "knowingly and voluntarily made with the assistance of competent counsel," and thus ordered that it be accepted.

Thereafter, on August 11, 2015, pursuant to § 54-1j (a) and (c), the defendant filed a motion to vacate his conviction and withdraw his guilty plea, claiming that the trial court improperly failed to determine whether he understood the immigration consequences of his guilty plea and that he had discussed the possible immigration consequences of the plea with his attorney before entering it. The trial court denied the defendant's motion, concluding: "By advising the defendant in this case that his conviction for conspiracy to commit larceny could result in his removal or deportation from the United States under federal law, the trial court adequately and substantially warned the defendant that his immigration status could be adversely affected as a consequence of his decision to plead guilty. Although the trial court did not specifically inquire of the defendant if he understood the potential immigration consequences, the transcript reflects that the trial court did personally address the defendant, and that the defendant was satisfied with his counsel's representation. Specifically, the defendant told the court that he was 'absolutely' satisfied with the representation that he received from his public defender. Additionally, subsequent to advising the defendant that his plea could result

in his deportation or removal from the United States, the court asked the defendant if there was any reason why his plea should not be accepted. The defendant responded: '[N]ot at all.' Viewed in its entirety, the transcript indicates that the defendant understood the trial court's questions and remarks during the plea canvass. The court found the defendant's plea was knowingly and voluntarily made with the assistance of competent counsel. Implicit in that finding by the trial court is a determination that the defendant understood the court's warning about the possible immigration consequences of his guilty plea." The court then concluded that: "Based on the foregoing, the undersigned finds that the trial court substantially complied with the provisions of . . . § 54-1j when the defendant pleaded guilty and was sentenced on August 1, 2014."

On appeal, the defendant claims that the court erred in denying his motion to vacate the judgment on his guilty plea because the court failed to determine that he understood the possible immigration consequences of his guilty plea as required under § 54-1j (a).[4] We agree.

"[A guilty] plea, once accepted, may be withdrawn only with the permission of the court. . . . The burden is always on the defendant to show a plausible reason for the withdrawal of a plea of guilty. . . . Whether such proof is made is a question for the court in its sound discretion, and a denial of permission to withdraw is reversible only if that discretion has been abused." (Citation omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Hall*, 303 Conn. 527, 532–33, 35 A.3d 237 (2012).

[4] The defendant does not claim on appeal that the court failed to ask whether he had spoken to his attorney about the potential immigration consequences of his guilty plea.

"Section 54-1j (a) provides that the court shall not accept a guilty plea without first addressing the defendant personally to ensure that he fully understands that, if he is not a United States citizen, his conviction may have certain enumerated immigration consequences under federal law, and, further, if the defendant has not discussed these possible consequences with his attorney, the court shall permit him to do so before accepting his plea offer. Section 54-1j (c) provides that, if the court fails to comply with the requirements of subsection (a), and the defendant can demonstrate that his conviction may have one of the enumerated immigration consequences, the court, upon motion of the defendant within three years of the plea, shall vacate the judgment and permit the defendant to withdraw his guilty plea and enter a plea of not guilty.

"Thus, by its terms, [§] 54-1j (a) permits a court to accept a defendant's plea only if the court conducts a plea canvass during which . . . the court determines that the defendant understands fully the possible immigration consequences that may result from entering a plea . . . ." (Internal quotation marks omitted.) *State* v. *Lima*, 325 Conn. 623, 629, 159 A.3d 651 (2017). "[I]t [is] not necessary for the trial court to read the statute verbatim . . . [and, instead] only substantial compliance with the statute is required to validate a defendant's guilty plea." (Internal quotation marks omitted.) *State* v. *Lage*, 141 Conn. App. 510, 517, 61 A.3d 581 (2013).

Here, at no time did the court ask the defendant if he understood the potential immigration consequences of his guilty plea. The court simply advised the defendant that his conviction could result in his removal or deportation from the United States. Rather than ask the defendant if he understood that advisement, which arguably was insufficient to comply with § 54-1j (a),[5]

[5] See footnote 2 of this opinion.

the court asked the defendant if anyone had forced or threatened him to plead guilty. In denying the defendant's motion to vacate, the court relied upon the facts that the defendant, when entering his guilty plea, had expressed his absolute satisfaction with his attorney's representation of him and told the court that there was no reason "at all" that his plea should not have been accepted. Those statements by the defendant, however, are meaningless in the absence of some indication that the defendant knew and understood the potential consequences of his guilty plea. In other words, there is nothing in the record to indicate that the defendant knew that his attorney should have discussed the potential immigration consequences with him, and thus there could have been no basis for the defendant to express a dissatisfaction with his attorney for not advising him of those potential consequences. Similarly, if the defendant did not understand the potential immigration consequences of his guilty plea, he could not have known that said potential consequences might be a valid reason to ask the court not to enter his guilty plea.

In support of its argument that the court substantially complied with § 54-1j (a), the state relies upon *State* v. *Hall*, supra, 303 Conn. 527. In *Hall*, our Supreme Court affirmed the judgment denying the motion to vacate the defendant's guilty plea and held that the court had substantially complied with § 54-1j (a) even though it had not addressed the defendant personally and determined whether he understood the immigration consequences of his guilty plea because it had, instead, asked the defendant's attorney if he had discussed those consequences with the defendant and whether the defendant understood them. Id., 536. In so ruling, the court explained that the trial court was entitled to rely upon the representations of the defendant's attorney that the defendant had been advised of and understood the potential immigration consequences of his guilty plea.

Id. Because the sentencing court in the present case did not determine whether the defendant understood the potential immigration consequences of his guilty plea, either by asking the defendant personally or by asking the defendant's attorney, this case is readily distinguishable from *Hall*.

The state also cites *State* v. *Lage*, supra, 141 Conn. App. 510, in support of its argument that the canvass of the defendant substantially complied with § 54-1j (a). In *Lage*, this court affirmed the judgment denying the motion to vacate the defendant's guilty plea. During its canvass, the court told the defendant, inter alia: " 'If you are not a citizen of the United States, this is a felony, it could result in deportation, removal, denial of admission, exclusion from readmission or denial of naturalization. . . . Any questions about anything I've said?' " Id., 518. The defendant responded, " 'No, ma'am.' " Id. The court then asked the defendant if he "agree[d] to all of that" and whether he had "discussed it all with [his] attorney." (Internal quotation marks omitted.) Id. The defendant responded affirmatively to both questions. Id. This court affirmed the denial of the defendant's motion to vacate his guilty plea and held that the canvass was "more than sufficient to determine, on the basis of his responses, that [the defendant] understood the possible immigration consequences of his pleas . . . ." Id., 520. Unlike the defendant in *Lage*, the defendant here was not asked whether he understood or had any questions regarding the court's advisement that his guilty plea could lead to his deportation. Thus, *Lage* also is distinguishable from the case before us.

Finally, the state asserts that *State* v. *James*, 139 Conn. App. 308, 57 A.3d 366 (2012), supports its argument that the court substantially complied with § 54-1j (a). In *James*, the court addressed the defendant, inter alia, as follows: "Finally, I would tell you . . . only if

it applied, if you are not a citizen of our country, such a conviction could possibly result in your deportation, exclusion from admission or denial of naturalization. Do you have any questions you would like to ask the court?" (Internal quotation marks omitted.) Id., 315. The defendant responded that she did not. Id., 316. *James* also is distinguishable from the present case because, here, the court did not ask the defendant if he had any questions about or understood the possibility of deportation, of which he had just been advised.

On the basis of the foregoing, we conclude that the court erred in finding that the canvass of the defendant substantially complied with § 54-1j (a) because there was no determination that the defendant understood the potential immigration consequences of his guilty plea before he entered it. Therefore, the court abused its discretion in denying the defendant's motion to vacate his guilty plea.

The judgment is reversed and the case is remanded with direction to grant the defendant's motion to vacate the judgment of conviction and withdraw his guilty plea and for further proceedings according to law.

In this opinion the other judges concurred.

ANTHONY GILCHRIST *v.* COMMISSIONER OF CORRECTION
(AC 39626)

Prescott, Elgo and Harper, Js.

Syllabus

The petitioner, who had been convicted, on a guilty plea, of the crime of robbery in the third degree, sought a writ of habeas corpus, claiming that because his plea bargain had not been followed, the habeas court should allow him to withdraw the guilty plea and that the court should vacate or dismiss the charge, or both. In his habeas petition, the petitioner alleged that his total effective sentence was an unconditional

discharge. The habeas court, sua sponte and without holding a hearing, dismissed the petition for a writ of habeas corpus for lack of subject matter jurisdiction pursuant to the applicable rule of practice (§ 23-29 [1]) because the petitioner no longer was in custody on the conviction that he was challenging at the time he filed the habeas petition. From the judgment rendered thereon, the petitioner, on the granting of certification, appealed to this court. He claimed, inter alia, that he was denied his constitutional and statutory rights to due process, to notice of a hearing, to assigned counsel and to be heard on his habeas petition. *Held* that the habeas court properly dismissed the petition for a writ of habeas corpus; because the petitioner did not allege sufficient facts to establish that he was, at the time he filed the habeas petition, in custody on the conviction he was challenging, the habeas court lacked jurisdiction over the habeas petition and, therefore, it had no obligation under § 23-29 (1) to grant a hearing to the petitioner prior to dismissing the petition.

Argued November 28, 2017—officially released March 6, 2018

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Oliver*, *J.*, dismissed the petition and rendered judgment thereon, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Adele V. Patterson, senior assistant public defender, for the appellant (petitioner).

James A. Killen, senior assistant state's attorney, with whom, on the brief, was *John C. Smriga*, state's attorney, for the appellee (respondent).

Opinion

HARPER, J. The petitioner, Anthony Gilchrist, appeals from the judgment of the habeas court dismissing his petition for a writ of habeas corpus for lack of subject matter jurisdiction because, at the time he filed the petition, he was not in custody as a result of the conviction that he challenges. On appeal, the petitioner asserts that he was denied his rights to due process, assigned counsel, and notice and a hearing, when the

court, sua sponte, dismissed his petition for lack of subject matter jurisdiction. The respondent, the Commissioner of Correction, contends that the court was not required to hold a hearing because the petitioner was not in custody at the time he filed the petition. We agree with the respondent and, accordingly, affirm the judgment of the habeas court.

The following facts and procedural history are relevant to this appeal. On June 24, 2016, the petitioner, representing himself, filed a petition for a writ of habeas corpus. In his petition, under the "details of conviction and sentence now being served" section, he listed the location of the court as "Bridgeport low court." The petitioner further stated that he pleaded guilty on "9/2013" in "CR-12-267383, robbery in the third degree," and listed the total effective sentence as "unconditional discharge." In a handwritten attachment to his petition, he stated, "[m]y plea bargain was not followed because my lawyer stated [specifically] that the robbery third charge would not make me 85 [percent] due to the unconditional discharge and it being on a completely separate [docket]." He also attached a letter that he received from the Board of Pardons and Paroles, which stated in relevant part: "[Y]ou are ineligible for parole until you have served not less than 85 [percent] of your definite sentence imposed by the court." As relief, the petitioner requested that the court allow him to withdraw his guilty plea and "vacate and/or dismiss [the] charge."

On July 28, 2016, the court, sua sponte and without holding a hearing, dismissed the petition for lack of subject matter jurisdiction pursuant to Practice Book § 23-29 (1),[1] explaining that "the petitioner was no

[1] Practice Book § 23-29 provides in relevant part: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that . . . (1) the court lacks jurisdiction . . . ."

longer in custody for the conviction being challenged at the time the petition was filed." The petitioner filed a motion to reconsider, which was denied on August 18, 2016. The court subsequently granted the petition for certification to appeal.

On appeal, the petitioner claims that he improperly was denied his constitutional and statutory rights to due process, to notice of a hearing, to assigned counsel, and to be heard on his petition, in violation of General Statutes § 52-470 (a) and Practice Book § 23-24.[2] Additionally, the petitioner claims that his pleadings could be construed to state a cognizable claim for relief, i.e., the court could infer, on the basis of the information in his petition, that he was incarcerated on a separate conviction for which his parole eligibility was affected by his plea of guilty to robbery in the third degree. The petitioner argues that once the "habeas case [was] docketed," the court is required to provide him with assigned counsel and the opportunity to attend any dispositive hearing. Moreover, the petitioner argues that because he filed his petition without the assistance of counsel, the court should have inferred that it had subject matter jurisdiction on the basis of a broad and liberal interpretation of the pleadings. In response, the respondent contends that the court's sua sponte dismissal for lack of subject matter jurisdiction was proper

[2] General Statutes § 52-470 (a) provides: "The court or judge hearing any habeas corpus shall proceed in a summary way to determine the facts and issues of the case, by hearing the testimony and arguments in the case, and shall inquire fully into the cause of imprisonment and thereupon dispose of the case as law and justice require."

Practice Book § 23-24 provides: "(a) The judicial authority shall promptly review any petition for a writ of habeas corpus to determine whether the writ should issue. The judicial authority shall issue the writ unless it appears that:

"(1) the court lacks jurisdiction;

"(2) the petition is wholly frivolous on its face; or

"(3) the relief sought is not available.

"(b) The judicial authority shall notify the petitioner if it declines to issue the writ pursuant to this rule."

and that the court appropriately construed the petition as challenging an expired conviction.

We first set forth our well established standard of review and relevant legal principles. "Subject matter jurisdiction for adjudicating habeas petitions is conferred on the Superior Court by General Statutes § 52-466, which gives it the authority to hear those petitions that allege illegal confinement or deprivation of liberty. . . . We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . Moreover, [i]t is a fundamental rule that a court may raise and review the issue of subject matter jurisdiction at any time. . . . Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Internal quotation marks omitted.) *Anthony A.* v. *Commissioner of Correction*, 159 Conn. App. 226, 234–35, 122 A.3d 730 (2015), aff'd, 326 Conn. 668, 166 A.3d 614 (2017). "Once the question of lack of jurisdiction of a court is raised, [it] must be disposed of no matter in what form it is presented. . . . The court must fully resolve it before proceeding further with the case. . . . Whenever a court finds that it has no jurisdiction, it must dismiss the case, without regard to previous rulings." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 258 Conn. 804, 813, 786 A.2d 1091 (2002).

"A habeas court has subject matter jurisdiction to hear a petition for habeas corpus *when the petitioner is in custody at the time that the habeas petition is filed.* . . . It is well settled that [t]he petition for a writ

of habeas corpus is essentially a pleading and, as such, it should conform generally to a complaint in a civil action. . . . The principle that a plaintiff may rely only upon what he has alleged is basic. . . . It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations of his complaint." (Citation omitted; emphasis added; internal quotation marks omitted.) *Arriaga* v. *Commissioner of Correction*, 120 Conn. App. 258, 262, 990 A.2d 910 (2010), appeal dismissed, 303 Conn. 698, 36 A.3d 224 (2012).

A habeas court lacks subject matter jurisdiction when the petitioner is not in custody on the conviction under attack at the time the petition was filed. *Lebron* v. *Commissioner of Correction*, 274 Conn. 507, 532, 876 A.2d 1178 (2005), overruled in part on other grounds by *State* v. *Elson*, 311 Conn. 726, 747, 754, 91 A.3d 862 (2014). The custody requirement "has never been extended to the situation where a habeas petitioner *suffers no present restraint from a conviction*." (Emphasis in original; internal quotation marks omitted.) Id., 531. Furthermore, "the collateral consequences of the petitioner's expired convictions, although severe, are insufficient to render the petitioner in custody on those convictions and, therefore, to invoke the jurisdiction of the habeas court." *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 541, 911 A.2d 712 (2006).

The petitioner alleged in his petition that his total effective sentence was an "unconditional discharge." General Statutes § 53a-34 (b) provides: "When the court imposes a sentence of unconditional discharge, the defendant shall be released with respect to the conviction for which the sentence is imposed without imprisonment, probation supervision or conditions. A sentence of unconditional discharge is for all purposes a final judgment of conviction." "[A] Connecticut habeas court has subject matter jurisdiction only over those cases brought by a petitioner who is legally confined

or deprived of his liberty under the challenged conviction. . . . A person is in custody when he is under a legal restraint." (Internal quotation marks omitted.) *Young* v. *Commissioner of Correction*, 104 Conn. App. 188, 191, 932 A.2d 467 (2007), cert. denied, 285 Conn. 907, 942 A.2d 416 (2008).

The petitioner claims that the court erred by not conducting a hearing before deciding that it did not have subject matter jurisdiction. We refer to our recent decision in *Pentland* v. *Commissioner of Correction*, 176 Conn. App. 779, 169 A.3d 851, cert. denied, 327 Conn. 978, 174 A.3d 800 (2017), in which we stated: "The habeas court did not conduct a hearing before it dismissed the petition because, as can be determined from a review of the petition, the petitioner had not satisfied his obligation to allege sufficient facts in his pleading, which, if proved, would establish that he was in custody at the time he filed the petition. The court thus lacked jurisdiction, and the habeas court at any time, upon its own motion, could dismiss the petition. Practice Book § 23-29. Under these circumstances, where § 23-29 did not require a hearing before dismissal, the habeas court did not have an obligation to grant a hearing to the petitioner prior to dismissing the petition." (Internal quotation marks omitted.) *Pentland* v. *Commissioner of Correction*, supra, 787.

Moreover, the circumstances of the present case are distinguishable from prior cases in which it was determined that the petition improperly was dismissed without a hearing. See, e.g., *Mercer* v. *Commissioner of Correction*, 230 Conn. 88, 92, 644 A.2d 340 (1994) (court improperly dismissed habeas petition based on underlying conviction of felony murder without holding hearing because petitioner was "entitled to an opportunity to present further evidence to support his claim that inadequate assistance of counsel deprived him of a fair trial"); *Boyd* v. *Commissioner of Correction*, 157 Conn. App.

122, 126, 115 A.3d 1123 (2015) (court improperly dismissed second habeas petition based on underlying conviction of murder without holding hearing, prior to conclusion of first habeas appeal, because petitioner alleged "new ground upon which his second habeas petition could have been granted"); *Mitchell* v. *Commissioner of Correction*, 93 Conn. App. 719, 726, 891 A.2d 25 (court improperly dismissed second habeas petition based on underlying convictions of kidnapping and sexual assault without holding hearing because petitioner raised new claims not raised before), cert. denied, 278 Conn. 902, 896 A.2d 104 (2006). In those prior cases, the court's subject matter jurisdiction was never challenged on the basis of the petitioner's "in custody" requirement.

On the basis of our interpretation of his pleadings, the petitioner has not alleged sufficient facts to establish that he was, at the time of filing, in custody on the conviction that was the subject of his petition to the habeas court for allegations of illegal confinement or deprivation of liberty.[3] See *Pentland* v. *Commissioner of Correction*, supra, 176 Conn. App. 779; *Arriaga* v. *Commissioner of Correction*, supra, 120 Conn. App. 263. Because the custody requirement is necessary to invoke the jurisdiction of the habeas court, the court lacked jurisdiction to hear the petition for a writ of habeas corpus.[4]

The judgment is affirmed.

In this opinion the other judges concurred.

[3] We are mindful that "[a]lthough we allow pro se litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law. . . . A habeas court does not have the discretion to look beyond the pleadings . . . . In addition, while courts should not construe pleadings narrowly and technically, courts also cannot contort pleadings in such a way so as to strain the bounds of rational comprehension." (Internal quotation marks omitted.) *Arriaga* v. *Commissioner of Correction*, supra, 120 Conn. App. 263.

[4] Because this conclusion is dispositive, we need not address the petitioner's other claims. See, e.g., *Kleen Energy Systems, LLC* v. *Commissioner*

JOSEPH DINUNZIO *v.* CATHERINE DINUNZIO
(AC 39008)

Sheldon, Bright and Beach, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court dissolving her marriage to the plaintiff and making certain financial orders regarding, inter alia, the plaintiff's military pension. *Held* that the trial court having erred in treating the plaintiff's military pension as a source of income rather than as property subject to equitable distribution, the court's financial orders could not stand: our Supreme Court has held previously that vested pension benefits constitute property, and are not a source of income, for purposes of equitable distribution pursuant to the statute (§ 46b-81) that governs the distribution of assets in a dissolution action, and this court found unavailing the plaintiff's claim that the trial court properly treated his pension as a source of income because it was in pay status, as pensions in pay status must be treated as property, valued and either distributed or considered as an offset or balance to the trial court's financial orders, and the record showed that the trial court in the present case improperly classified the plaintiff's pension only as a source of income, not as property subject to equitable distribution.

Argued December 4, 2017—officially released March 6, 2018

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Suarez, J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the court denied the defendant's motion for reconsideration and reargument, and the defendant appealed to this court. *Reversed in part; further proceedings.*

Brandon B. Fontaine, with whom, on the brief, was *C. Michael Budlong*, for the appellant (defendant).

James E. Mortimer, with whom, on the brief, was *Michael D. Day*, for the appellee (plaintiff).

of Energy & Environmental Protection, 319 Conn. 367, 380, 125 A.3d 905 (2015).

Opinion

SHELDON, J. The defendant, Catherine Dinunzio, appeals from the judgment of the trial court dissolving her marriage to the plaintiff, Joseph Dinunzio, on the ground that the court erred in treating the plaintiff's pension, from which he began to receive payments shortly after he commenced this action, only as a source of income and not as property subject to equitable distribution. We agree with the defendant and, accordingly, reverse the judgment of the trial court and remand this case for a new trial.[1]

The trial court set forth the following findings of fact in its January 25, 2016 memorandum of decision dissolving the parties' marriage. "The parties were married on May 17, 2003, in Orlando, Florida. . . . There is one minor child born to the parties since the date of the marriage . . . . The marriage between the parties has broken down irretrievably and there is no reasonable prospect of reconciliation.

"The plaintiff is sixty-one years old and in good health. He graduated from the [United States] Naval Academy, holds an aerospace engineering degree and has training in nuclear power. He served in the [United States] Navy on and off for twenty-eight years. He worked in the private sector for Northrop Grumman as a military consultant before being recalled to active duty. He retired as a Commander from the United States Navy [Navy] at age forty-nine. His last military assignment was in the country of Bahrain.

"When the plaintiff retired from the Navy, one month after the parties married, he started working for himself as a day trader. In 2003, his day trading account was

[1] The defendant also claims that the trial court's property distribution and alimony awards were inequitable. Because we reverse the court's financial orders in their entirety and remand the case for a new trial, we need not address these additional claims.

valued at $147,375. Since then, he has consistently lost money trading. The parties' 2008 income tax return shows a business loss of $7748; the 2009 income tax return shows a business loss of $9136; the 2011 income tax return shows a business loss of $14,274; and the 2013 income tax return shows a business loss of $11,535.

"He currently has $1000 left in his trading account. The plaintiff has not made any efforts to seek gainful employment since his retirement. In spite of the plaintiff's significant losses, his plans are to continue day trading as long as he has any money left in his trading account.

"In July, 2014, the plaintiff elected to receive his military pension without a right of survivorship. At that time, he received $20,000 in a lump sum. He currently receives $650 gross weekly from his pension with a net of $475. The plaintiff lists on his financial affidavit $681 in weekly expenses. That amount includes $70 per week on a first mortgage, $35 per week on a second mortgage, and $95 in property taxes. The plaintiff's assets include a Navy Federal Credit Union account with a current balance of $1000; a U.S.A. account with a current balance of $15; a TD Bank account with a current balance of $19; and savings bonds valued at $1130. He also has an [individual retirement account (IRA)] with a current balance of $600.

"The plaintiff's financial affidavit lists a total of $57,478 in liabilities. He has a USAA Visa with a balance of $14,920; a Navy Federal Credit Union debt in the amount of $25,000; a Lowes credit card with a balance of $1300; a Home Depot credit card with a balance of $400; a . . . debt in the amount of $9200 [that was owed to the mediator that the parties used before filing this action]; an outstanding dental bill in the amount of $1158; and $5500 in attorney's fees.

"The plaintiff is currently residing in a home located at 300 Main Street [in] Rocky Hill . . . . He purchased the home before the marriage and the deed is solely in his name. The home is valued at $180,000. It has a mortgage in the amount of $35,515 and an equity line of credit lien in the amount of $72,744. There is $71,741 in equity.

"The plaintiff kept a safe in the marital home containing 1173.5 ounces of silver valued at $15.76 per ounce, totaling [approximately] $18,494; two ounces of palladium with an unknown value; fifteen presidential dollars worth $15; two mint sets consisting of a penny, nickel and dime from 2007 and 2008; a 1985 commemorative coin set; and 2007 and 2008 dollar coins. The plaintiff values the coins at $16,800.

"The defendant is forty-two years old and in good health. She graduated from dental hygienist school and has a bachelor's degree in dental hygiene. Since 2003 she has worked as a dental hygienist. She earns $39 per hour and sometimes works on Saturdays. Her net weekly income is $830. She has $1136 in weekly expenses. She has [$67,321] in total liabilities including: a TD Bank and a USAA visa with a combined balance of $175; $24,946 in attorney's fees; $950 to the guardian ad litem; $14,000 to a mediator; $6000 to her sister; and $21,000 to her father. There is also a joint debt in the amount of $250 to the minor child's dentist.

"The defendant's assets include a TD Bank checking account with a balance of $974 and a jointly held TD Bank savings account with a $3 balance. She also has a 401(k) account with John Hancock with an approximate value of $100,000 and a [United States] savings bond with a value of $744.

"The parties first met in Bahrain. The plaintiff was there serving in the Navy and the defendant was a flight attendant stationed there. They married on May 17,

2003, and when the plaintiff retired from the Navy, they came to live in Connecticut. The plaintiff started working for himself as a day trader. The defendant has always wanted the plaintiff to get a job, but he has refused to do so. In 2007, the parties decided to have a child and the child was born on April 4, 2008. After the birth of the minor child, the defendant still wanted the plaintiff to seek employment, but he insisted that he would stay at home day trading and taking care of the minor child. . . .

"During the course of the marriage, the plaintiff managed the household bills, but it was the defendant's income that funded the expenses. The plaintiff was not working and his day trading business was deteriorating. In 2014, when this action started, the plaintiff told the defendant that she could stay in the home as long as she paid for the household expenses. On February 4, 2015, a court order entered wherein the plaintiff was responsible to pay for the two mortgages, taxes, homeowners [insurance], electricity, internet, cable, TV and home phone. The defendant was to pay $300 per week to the plaintiff for contributions to the household expenses as long as she resided in the home. The parties were to share the minor child's expenses equally. In April, 2015, the defendant moved out of the home.

"On September 23, 2015, a parenting plan was submitted to the court and it was accepted . . . . The agreement provides for joint legal custody, but it does not designate a primary residence. The agreement provides that the plaintiff is to parent the child each week from Sunday at 12 noon until Tuesday at 6:30/7 p.m., and Wednesday at 7 p.m. until Friday at 5 p.m. The defendant is to parent the child each week from Tuesday at 6:30/7 p.m. until Wednesday at 7 p.m., and from Friday at 5 p.m. until Sunday at 12 noon.

"The parenting plan does not provide for child support. According to the child support guidelines submitted by the plaintiff, assuming that he is the custodial parent, the presumptive child support is $166 per week from the defendant to the plaintiff. According to the Connecticut child support guidelines submitted by the defendant, assuming that she is the custodial parent, the presumptive child support is $105 per week from the plaintiff to the defendant.

"Since the date of separation, neither party has paid child support to the other. Moreover, the plaintiff has refused to pay for any of the child's extracurricular activities, including summer camp, karate and Girl Scouts (Brownies). The plaintiff does not want to contribute toward the child's expenses.

"The plaintiff claims that the marriage broke down in 2010 when the defendant was briefly hospitalized for depression. He also claims that the marriage suffered from lack of communication. The court does not find the plaintiff credible.

"The defendant claims the marriage broke down after the birth of their child. At that time, she felt depressed for the lack of help in the marriage, the loss of money from day trading, the accumulation of debt, the plaintiff's refusal to seek employment, and the plaintiff's heavy drinking." (Footnote omitted.)

On the basis of those factual findings, the court dissolved the marriage and adopted the parenting plan agreed to by the parties. The court did not award child support to either party, deviating from the child support guidelines due to the shared physical custody of the minor child. The court ordered the defendant to pay alimony to the plaintiff in the amount of $75 per week for four years, modifiable as to amount only, but terminable on the death of either party or the plaintiff's remarriage or cohabitation. The court ordered that the

defendant would be entitled to claim the minor child as a dependent for tax purposes. Each party would be responsible for his or her own debts as listed on their financial affidavits and for their respective attorney's fees.

The court awarded the marital home, located on Main Street in Rocky Hill, to the plaintiff. The court ordered that the plaintiff keep as his sole property all funds in his Navy Federal Credit Union, USAA, and TD Bank accounts and the savings bonds listed in his financial affidavit, and that the defendant keep as her sole property all funds in her TD Bank checking and savings accounts and the United States savings bonds listed in her financial affidavit. The court ordered the parties' jointly held TD Bank savings account to be liquidated and that all funds in it be shared equally. The court ordered that the plaintiff keep as his sole property the coins and the metals he kept in his safe.

The court further ordered that the plaintiff keep as his sole property the IRA listed on his financial affidavit and that the defendant transfer to the plaintiff, by way of a qualified domestic relations order (QDRO), 40 percent of her John Hancock 401(k), valued as of the date of judgment.

The defendant thereafter filed a motion for reconsideration and articulation, arguing, inter alia, that the court improperly treated the plaintiff's pension as an income stream rather than as property. The court denied the defendant's motion and this appeal followed.

The defendant claims on appeal that the trial court erred in treating the plaintiff's military pension as a source of income rather than as property subject to equitable distribution. In response, the plaintiff argues that the court properly treated his pension as a source

of income because it was in pay status.[2] We agree with the defendant.

"The purpose of a dissolution action is to sever the marital relationship, to fix the rights of the parties with respect to alimony and child support . . . [and] to divide the marital estate . . . ." (Internal quotation marks omitted.) *Kent* v. *DiPaola*, 178 Conn. App. 424, 430, 175 A.3d 601 (2017). "The distribution of assets in a dissolution action is governed by [General Statutes] § 46b-81, which provides in pertinent part that a trial court may assign to either the husband or the wife all or any part of the estate of the other. . . . In fixing the nature and value of the property, if any, to be assigned, the court, after hearing the witnesses, if any, of each party . . . shall consider the length of the marriage, the causes for the . . . dissolution of the marriage . . . the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates. . . . This approach to property division is commonly referred to as an all-property equitable distribution scheme. . . . It does not limit, either by timing or method of acquisition or by source of funds, the property subject to a trial court's broad allocative power. . . .

"There are three stages of analysis regarding the equitable distribution of each resource: first, whether the resource is property within § 46b-81 to be equitably distributed (classification); second, what is the appropriate method for determining the value of the property

[2] The plaintiff also argues that the defendant waived her claim to any interest in his pension by not asking for it at trial. The defendant's inclusion of the plaintiff's pension in her proposed orders belies this claim.

(valuation); and third, what is the most equitable distribution of the property between the parties (distribution)." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Krafick* v. *Krafick*, 234 Conn. 783, 792–93, 663 A.2d 365 (1995). The determination of whether a resource was properly classified by the trial court as income, instead of as property to be equitably distributed within the meaning of § 46b-81, is a matter of statutory interpretation, which is a matter of law, requiring plenary review. *Lopiano* v. *Lopiano*, 247 Conn. 356, 363, 752 A.2d 1000 (1998).

In *Krafick* v. *Krafick*, supra, 234 Conn. 783, our Supreme Court held that vested pension benefits constitute property for purposes of equitable distribution pursuant to § 46b-81. Id., 793. The court reasoned that the language of § 46b-81 must be interpreted broadly to include such benefits because they "represent a form of deferred compensation for services rendered"; (internal quotation marks omitted) id., 794; and "are widely recognized as among the most valuable assets that parties have when a marriage ends." Id., 796. The court in *Krafick* expressly rejected the proposition that pension benefits may be considered either as property or as a source of income for alimony. Id., 798 n.22. The court explained: "Section 46b-81 requires a trial court to make an equitable distribution of the parties' *property*; to go about doing so sensibly, a court must determine at the outset which of the parties' resources are subject to division and assignment under that provision. Although [General Statutes] § 46b-82 authorizes the trial court to award alimony in addition to or *in lieu of* [a distribution of property] pursuant to section 46b-81 . . . the trial court may decide to exchange alimony for property only *after* determining the value of the property in the estate.

"This classification is significant for two reasons. First, property, even if not so characterized by the trial court, will ultimately be awarded to one of the parties;

the statutory duty to distribute property equitably contemplates that the trial court effect such awards consciously rather than by default. Second, although it may be permissible in the distribution phase to exchange some form of alimony for a property award when equitable to do so . . . it must be remembered that these awards are of different quality and consequence for the recipient spouse. An award of property is final; the party who receives property pursuant to § 46b-81 owns it in his or her own right and controls it. Periodic alimony, on the other hand, is conditional, subject to modification or elimination. See General Statutes § 46b-86." (Emphasis in original; internal quotation marks omitted.) *Krafick* v. *Krafick*, supra, 234 Conn. 798 n.22.

"In determining whether alimony shall be awarded, and the duration and amount of the award, the court . . . shall consider . . . the award, if any, which the court may make pursuant to section 46b-81 . . . ." General Statutes § 46b-82. "Thus, where it is equitable to do so, the trial court may offset the allocation to one spouse of the entire value of the pension with alimony instead of or in addition to assets."[3] *Krafick* v. *Krafick*, supra, 234 Conn. 801 n.25.

The court in *Krafick* rejected the argument that "a trial court may assign a pension no value if the pension is taken into account as a source of alimony." Id., 804.

[3] The court in *Krafick* also rejected the "contention that to consider vested benefits for purposes of equitable distribution and also, as allocated, as a source of alimony constitutes impermissible 'double dipping.' " *Krafick* v. *Krafick*, supra, 234 Conn. 804–805 n.26. Our alimony statute provides that "[i]n determining whether alimony shall be awarded, and the duration and amount of the award, the court . . . shall consider . . . the award, if any, which the court may make pursuant to section 46b-81 . . . ." General Statutes § 46b-82. "Relying on the pension benefits allocated to the employee spouse under § 46b-81 as a source of alimony would be improper only to the extent that any portion of the pension assigned to the nonemployee spouse was counted in determining the employee spouse's resources for purposes of alimony." *Krafick* v. *Krafick*, supra, 805 n.26.

The court held that the trial court erred by effectively removing the pension "from the scales in determining an equitable division of all of the property before the [trial] court." Id., 806. The court's reasoning applies with equal force regardless of whether the pension is in pay status at the time of dissolution. Even in pay status it remains a valuable asset. It is no different than other property that is generating income, such as an annuity or a contract that provides for periodic payments due from the sale of a business.[4]

This court's recent decision in *Kent* v. *DiPaola*, supra, 178 Conn. App. 424, is also instructive. As in the present case, the trial court in *Kent* was faced with the question of the treatment of pensions in pay status. "[T]he trial court excluded the defendant's pensions from the marital assets when it awarded one third of the assets to the plaintiff and two thirds to the defendant." Id., 437. Consequently, the plaintiff argued that the court failed to value and distribute the pensions. Id. This court rejected that argument because the record was clear that the trial court determined the value of the pensions and distributed them. Id., 437–38. This court therefore concluded that, "unlike the trial court in *Krafick*, the court in the present case did not remove the defendant's pensions from the scales, but instead balanced them against the order of no child support, and in consideration of the fact that the majority of the pensions had been earned prior to the marriage." Id., 438 n.15. Thus, although this court in *Kent* did not require that the pensions in pay status be part of the property award, this court nonetheless concluded that such pensions be treated as property, valued and either distributed or considered as an offset or balance to the trial court's financial orders.

[4] It is worth noting that the plaintiff elected to receive payments from his pension approximately one month after he commenced this action.

Here, the trial court referenced the plaintiff's military pension only in setting forth its factual findings as to the plaintiff's gross and net weekly income and the fact that he received $20,000 upon his election to receive his pension benefits. The court did not mention the plaintiff's pension in its property distribution orders, omitting it completely from the category entitled: "Pension, IRA and Retirement Assets." It thus did not assign the pension a value, or order that it be distributed to either party. Nowhere in its decision, moreover, did the court state that it was considering the pension as an offset or a balance against any of its other financial orders.[5] It is therefore clear that the trial court improperly classified the plaintiff's pension only as a source of income, not as property subject to equitable distribution.[6]

"[T]he issues involving financial orders are entirely interwoven, [and] [t]he rendering of a judgment in a complicated dissolution case is a carefully crafted mosaic, each element of which may be dependent on the other." (Internal quotation marks omitted.) *Grant* v. *Grant*, 171 Conn. App. 851, 869, 158 A.3d 419 (2017). Because the trial court's failure to classify the plaintiff's pension as property for equitable distribution is not severable from its other financial orders, this case must be remanded for a new trial on all financial orders.

[5] The plaintiff argues that we must presume that the trial court properly classified and distributed his military pension as property because there is no evidence in the record that it did not. There is nothing in the court's memorandum of decision that could be construed as an acknowledgement that the plaintiff's pension was property. In fact, the court's mention of only the amount of income that the plaintiff is receiving undermines this argument. Moreover, if we were to presume that the court did, in fact, classify the plaintiff's pension as property, and order that he retain it in its entirety, such an order would further skew an already puzzling property distribution.

[6] The fact that the court assigned a value to the defendant's pension and awarded 40 percent of her pension to the plaintiff underscores its different classification of the parties' pensions.

The judgment is reversed as to all of the trial court's financial orders and the case is remanded for further proceedings on all financial issues in accordance with this opinion.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* DANIEL W.*

(AC 39844)

Prescott, Elgo and Norcott, Js.

Syllabus

Convicted of the crimes of sexual assault in the first degree, risk of injury to a child, sexual assault in the fourth degree, conspiracy to commit risk of injury to a child, attempt to commit sexual assault in the first degree and attempt to commit risk of injury to a child in connection with his alleged sexual abuse of the minor victim, A, the defendant appealed to this court. He claimed, inter alia, that the trial court improperly admitted certain evidence of his alleged uncharged, prior sexual misconduct as to another minor victim, C, and improperly allowed a social worker, who had testified as a constancy of accusation witness, to testify as an expert regarding delayed disclosures of and common behaviors by child victims of sexual abuse. The defendant, who was married to A's sister, J, had sexually abused A when A would visit their home to spend time with J and other relatives. The abuse occurred when the defendant and A were alone, and in the presence of J and M, the defendant's minor daughter from a previous marriage. J also engaged in certain sexual abuse of A at the defendant's behest, and when the defendant and J engaged in certain sexual conduct in front of A, he also had J ask A to join them in that conduct. *Held*:

1. The trial court did not abuse its discretion in admitting certain uncharged sexual misconduct evidence through the testimony of C in order to prove that the defendant had a propensity to sexually assault young girls: the defendant's initial advances toward C and A were sufficiently similar, as both girls were assaulted when they were overnight guests in his home, the defendant commenced the abuse while the girls were sleeping, the acts of assault were nearly identical in that C and A both

* In accordance with our policy of protecting the privacy interests of the victims of sexual abuse and the crime of risk of injury to a child, we decline to identify the victims or others through whom the victims' identities may be ascertained. See General Statutes § 54-86e.

testified that the defendant reached under their clothes and touched their vagina, and may have taken photographs of them, and the abuse occurred with others in the same room; moreover, C and A were similarly situated because they shared a similar relationship with the defendant through J and M, which facilitated the defendant's abuse of C and A by providing him access to them, C and A were both prepubescent and similar in age when certain of the abuse occurred, and the abuse of C occurred when she was only one year older than A had been when the abuse of A ended, and although the defendant's abuse of A was more severe and more frequent than his abuse of C, those differences were due to the fact that the defendant had access to C on only one occasion, whereas he had frequent access to A; furthermore, the uncharged misconduct evidence was not unduly prejudicial because it allowed the jury to conclude that the defendant had a propensity to sexually assault young girls, which is the precise purpose for which such evidence is allowed to be admitted, the defendant offered no explanation regarding how the uncharged misconduct evidence tended to show something other than that propensity, and it was unlikely that C's testimony improperly aroused the emotions of the jury, as the misconduct as to her was far less egregious than that as to A.

2. The defendant could not prevail on his claim that the trial court improperly permitted the social worker to testify as an expert on delayed disclosure by and common behaviors of child sexual abuse victims, which was based on the defendant's assertion that she was unqualified to testify as an expert and had previously testified as a constancy of accusation witness:

   a. The defendant's unpreserved claim that the social worker's testimony exceeded the bounds of permissible constancy of accusation evidence was not reviewable, as the record indicated that the trial court did not understand the defendant to have objected to her testimony because it exceeded the proper scope of the constancy of accusation doctrine, and the defendant's many stated bases for his objection at trial were not consistent with the claim he made on appeal.

   b. The trial court did not abuse its discretion in determining that the social worker was qualified to render an expert opinion on the topic of delayed disclosure; the social worker had practical experience and relevant educational background regarding the issue of delayed disclosure, as she had studied characteristics of child victims of sexual abuse in obtaining her bachelor's and master's degrees, she had received training on how to handle a student's first disclosure of abuse and, while she was employed as a school social worker and was the director of a youth group, she had been told by approximately fourteen students that they had been sexually abused.

3. The defendant's claim that he was deprived of a fair trial as a result of certain improprieties committed by the prosecutor during trial and closing argument was unavailing; even if the prosecutor's comments during

closing argument and questions on cross-examination constituted impropriety, the defendant was not deprived of a fair trial because even though the prosecutor's comments were not invited by the defendant and pertained to the critical issue of whether A and C had a motive to lie about the defendant's sexual abuse of them, the potential impropriety was neither severe nor frequent, the trial court's instructions to the jury were sufficient to correct any confusion the jury may have had regarding the state's burden of proof, and the state's case was strong overall, as A's testimony was directly corroborated in part by J, and A's allegations were further corroborated by C's testimony concerning certain uncharged misconduct by the defendant and by the defendant's own written statements in certain letters he had written to J that were admitted into evidence.

Argued November 16, 2017—officially released March 6, 2018

Procedural History

Substitute information charging the defendant with seven counts of the crime of risk of injury to a child, five counts of the crime of sexual assault in the first degree, and with one count each of the crimes of sexual assault in the fourth degree, conspiracy to commit risk of injury to a child, attempt to commit sexual assault in the first degree and attempt to commit risk of injury to a child, brought to the Superior Court in the judicial district of Tolland, where the court, *Graham*, *J.*, granted the state's motion to introduce certain evidence; thereafter, the matter was tried to the jury; subsequently, the court denied the defendant's motion to preclude certain evidence; verdict of guilty; thereafter, the court denied the defendant's motion for a new trial and rendered judgment in accordance with the verdict, from which the defendant appealed to this court. *Affirmed.*

Alice Osedach, senior assistant public defender, for the appellant (defendant).

Melissa Patterson, assistant state's attorney, with whom, on the brief, were *Matthew C. Gedansky*, state's attorney, and *Elizabeth C. Leaming*, senior assistant state's attorney, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, Daniel W., appeals from the judgment of conviction, rendered after a jury trial, of six counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2); five counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2); one count of attempt to commit sexual assault in the first degree in violation of General Statutes §§ 53a-70 (a) (2) and 53a-49; one count of sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (A); one count of risk of injury to a child in violation of General Statutes § 53-21 (a) (1); one count of conspiracy to commit risk of injury to a child in violation of General Statutes §§ 53-21 (a) (2) and 53a-48; and one count of attempt to commit risk of injury to a child in violation of General Statutes §§ 53-21 (a) (2) and 53a-49. On appeal, the defendant claims that (1) the trial court improperly admitted evidence of his prior misconduct; (2) the trial court improperly allowed a constancy of accusation witness to testify as an expert regarding delayed disclosure; and (3) the prosecutor committed improprieties that deprived the defendant of his right to a fair trial.[1] We disagree and, accordingly, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. A was seven years old when the defendant began sexually abusing her in 2004. A met the defendant one year earlier, when her brother was enrolled in one of his martial arts classes. A's older sister, J, brought their brother to and from the class.

When J became eighteen years old, she and the defendant, who was thirty-six years old at the time, began dating. Soon after, J moved out of her parents' house

[1] For ease of discussion, we address the defendant's claims in a different order than that in which they appear in his brief.

and began living with the defendant in an apartment in Rockville. She and the defendant married and eventually had three children together.

A often stayed at J's and the defendant's apartment on weekends. She enjoyed spending time with her sister, nieces and nephews, and the defendant's daughter from a previous marriage, M, who is close in age to A.[2] A slept in a bed in M's room when she visited.

On one such weekend when A was seven, the defendant came into M's room at night, where M and A were sleeping, put his hand underneath A's pajama shirt, and began touching her chest. The defendant then put his hands down A's pajama pants and touched her vagina. A pretended to be asleep during this encounter. Thereafter, the defendant abused A in a similar manner on multiple occasions.

Over time, the defendant's abuse of A increased in severity. Specifically, the defendant would enter M's room at night, go over to A's bed, rub A's vagina, and penetrate it with his finger. A recalled that the defendant abused her in this way "[t]oo many times to count." On other occasions, the defendant put his penis in A's mouth, at times ejaculating. Furthermore, A believes that the defendant often photographed her naked body, as he sometimes came into her room and pulled her clothes off, after which she would see flashes of light.

During each instance of abuse, A kept her eyes closed and pretended to be asleep because she was afraid that the defendant, who had a bad temper and held a fourth-degree black belt, might hurt her. A was still able to identify the defendant as her abuser, however, because (1) his hands felt like a man's hands, and the defendant was the only adult male in the apartment, and (2) the

[2] The defendant also had a son from a previous marriage, who occasionally spent the weekend at the defendant's apartment.

defendant, who drank often, smelled of alcohol. Despite the abuse, A continued to visit J's and the defendant's apartment, as she loved spending time with her relatives and was determined not to let the defendant "ruin [her] fun with them."

On another occasion when A was eight years old, the defendant came into M's room and picked A up from her bed. M woke up and asked her father what he was doing. The defendant told her that he was bringing A to the bathroom. The defendant then carried A to his and J's bedroom, laid her down on their bed, and performed oral sex on her. Afterward, he carried A back to her bed.

Another time, the defendant, J and A were in the living room watching a movie when J began performing fellatio on the defendant. The defendant told J to ask A if she wanted to join. J then twice asked A if she wanted to participate. A declined and stared at the television. When the movie finished, A walked into M's room. No further abuse occurred on that night.

When A was ten years old, the defendant again picked A up from her bed and carried her to his bedroom. A awoke and heard J ask the defendant, "what if she wakes up?" to which the defendant replied, "don't worry, she shouldn't." The defendant then encouraged J to fondle A, and J put her hand up A's shirt and began touching her chest. Meanwhile, the defendant pulled down A's pants and began performing oral sex on her. Eventually, the defendant stopped and carried A back to her bed.

The last instance of abuse occurred when A was twelve years old. On that night, A fell asleep on the couch in the living room while watching television. At some point, A heard the defendant come home from work. Thereafter, A heard a "rustling" sound, which she later learned was a condom being opened. The

defendant then climbed on top of A and attempted to penetrate her vagina with his penis. When he was unable to fully do so, he stopped and walked out of the room. Sometime later J came into the living room. A cried out to her, and revealed to her sister that the defendant had tried to molest her. J told A that she would yell at the defendant and that it would not happen again. J then walked out of the room and came back with the defendant, who was "freaking out, saying how he [was] going to go to jail . . . [and] not going to see his kids anymore." J told him not to worry and that "[A was] not going to do that." After this incident A rarely, if ever, returned to J's and the defendant's apartment.

In 2012, the defendant lost his job and he, J, and their children moved into J's parents' house, where A also lived. While he was living in the family home, A often voiced her dislike of the defendant and kept her bedroom door locked.

In June, 2013, the defendant was arrested on charges stemming from a domestic violence incident during which he struck J in the face in front of their son. J's and A's father subsequently ejected the defendant from the house, and he did not return.

For years, A did not disclose the abuse because she feared that the news would break up her sister's family. Furthermore, A felt betrayed by J's response to her revelation that the defendant had tried to molest her.

In 2013, however, the defendant was arrested for sexually abusing another girl.[3] When this happened, A's father asked her whether the defendant had also sexually abused her. A responded that the defendant had tried to put his hands down her pants, but refused to say anything more. When A's father suggested reporting the abuse to the police, she said that she did

[3] C, the victim of that abuse, testified for the state in the present case.

not want to because her classmates would find out. A's father, wanting to protect A, did not tell his wife or anyone else about the conversation.

On March 6, 2014, when A was seventeen years old, she attended a youth group meeting at her church. Suzy Williams, an adult mentor for the group and a social worker, often brought A to the meetings. After the meeting, A told Williams that it was the best day of A's life because the man who had sexually abused her for years had been arrested, and she would never have to see him again. A also told Williams that the abuser was her brother-in-law, who was married to her sister, J. Williams asked whether the defendant had had sex with A, and she responded that he had "went as far as he could go."

Williams, who was a mandated reporter of suspected child abuse, alerted the Department of Children and Families (department) and the police as to what A had told her. The defendant subsequently was arrested on charges arising from his abuse of A and tried before a jury.

At trial, the court admitted into evidence three letters written by the defendant to J.[4] In the letters, the defendant, angry that J was not writing him back, threatened to reveal her role in A's abuse. Specifically, the defendant stated that J "not only [knew] what was going on but . . . helped and supported in it," and that, on many nights, J made arrangements for the older children so that they were not in the house, presumably to facilitate the defendant's abuse of A. The defendant also wrote that the police wanted him "to confirm that [J] gave [him] a BJ in front of [A]."

[4] J was also arrested on charges stemming from the abuse of her sister after partially admitting to her own involvement. She later pleaded guilty and was convicted of conspiracy to commit sexual assault in the first degree, conspiracy to commit risk of injury to a child, risk of injury to a child, and sexual assault in the fourth degree.

The defendant was subsequently found guilty by the jury on all charges contained in the state's substitute information and sentenced to a total effective term of twenty-nine years incarceration followed by sixteen years of special parole. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the trial court improperly admitted into evidence uncharged misconduct of the defendant through C, who testified that the defendant sexually abused her. Specifically, the defendant argues that the uncharged misconduct was not sufficiently similar to the charged conduct, and that the prejudicial effect of its admission outweighed its probative value. We disagree.

The following additional facts and procedural history are relevant to the resolution of this claim. On July 30, 2015, the state filed a motion to join for trial three separate cases alleging sexual misconduct against the defendant. On August 26, 2015, the defendant filed an objection to the state's motion for joinder. That same day, the court held a hearing on the state's motion. At the hearing, the state amended its motion, requesting to join only two of the three cases—those involving A and C. The state argued that joining those two cases was appropriate because the evidence in each case would likely be cross admissible pursuant to the standard for introduction of uncharged sexual misconduct set forth in *State* v. *DeJesus*, 288 Conn. 418, 953 A.2d 45 (2008). The defendant responded that doing so would substantially prejudice him because the severity of misconduct alleged in the case involving A was far greater than that alleged in the case involving C.

The court denied the state's motion, finding that, although the respective incidents of alleged abuse as to A and C were not too remote in time, and C and A

were similarly situated, the alleged abuse of A and C was not sufficiently similar to warrant trying the cases together. Specifically, the court found that the defendant's abuse of A was far greater in duration, frequency, and invasiveness. Moreover, the court found that introducing evidence of the defendant's alleged abuse of A in the trial concerning his alleged abuse of C would be more prejudicial than probative. The court made clear, however, that its ruling did not preclude the admissibility of the defendant's alleged abuse of C in the trial concerning his abuse of A.

On September 28, 2015, the defendant filed a motion in limine in the present case, in which he sought to preclude the admission of uncharged misconduct evidence at trial, arguing that any such evidence was not relevant and, even if deemed relevant, its prejudicial effect outweighed its probative value. The next day, the state filed a notice of its intent to introduce uncharged misconduct evidence at trial "to establish the defendant's propensity to sexually assault young girls . . . ."

On October 5, 2015, the court heard argument on the defendant's motion in limine. At that time, the prosecutor made an offer of proof regarding the anticipated testimony of C. Specifically, the state proffered that (1) C, like A, was a minor when she was allegedly abused by the defendant; (2) C was friends with the defendant's daughter, M, and was "like a little sister" to J; (3) on the day of the alleged abuse, C spent the night at the defendant's house and fell asleep on the couch in the living room watching a movie with the defendant and J; (4) on three separate occasions throughout the night and into the morning the defendant attempted to touch C's vagina while she was sleeping, both over and under her clothes; and (5) C believed that the defendant also may have taken photographs of her.

The state argued that the uncharged misconduct evidence was relevant because it was not too remote in

time to the last alleged incident of abuse of A, which had occurred about one year prior. The state also argued that the charged and uncharged misconduct were sufficiently similar because C, like A, alleged that the defendant had touched her vagina over and under her clothes while she was sleeping. Furthermore, the state argued that the escalation of the abuse of A did not preclude admissibility of C's testimony because the defendant had access to C for only a short period of time and, therefore, the defendant did not have an opportunity to escalate his abuse of her. Finally, the state argued that the prejudicial effect of the uncharged misconduct evidence did not outweigh its probative value because it supported the defendant's propensity to sexually assault young girls, and the defendant's alleged abuse of C was far less severe than that of A. In response, the defendant argued that the uncharged misconduct evidence was "detrimental" to him, and requested that, because the state had not proffered the live testimony of C, the court defer ruling on its motion until the defense could voir dire her.

The court subsequently granted the state's motion to introduce uncharged misconduct evidence through C, provided that C testified consistently with the state's proffer at trial. In doing so, the court concluded that the state's proffer satisfied the test set forth in *DeJesus* and that the probative value of the evidence outweighed its prejudicial effect.

At trial, C testified consistently with the state's proffer. Specifically, she testified that she was a childhood friend of the defendant's daughter, M. During the fall of 2011, J reached out to C, who was thirteen years old at the time, to arrange a sleepover with M at the defendant's apartment. When C arrived, however, M was not there. Instead, C spent the day with J and her two sons. That evening, J and C watched movies in the

living room. The defendant arrived home at approximately 11 p.m. C fell asleep on the couch early the next morning, at about 3 a.m.

A short while later, C awoke to the defendant trying to touch her vagina over her sweatpants. C pushed him away, told him to move, and went back to sleep. Not long after that, C awoke again to the defendant touching her vagina—this time under her clothes. She pushed him away and asked him what he was doing. C then awoke a third time to the defendant grabbing her vagina over her sweatpants. This time, C asked the defendant, "[w]hat the hell was wrong with [him]." The defendant grabbed C's arm and told her not to say anything. C then told J, who was also in the living room during the three incidents, what had happened. J responded that the defendant must have thought C was her. C told J she was lying and called her guardian to come pick her up.

After C testified, the court gave the jury a limiting instruction regarding the proper use of uncharged misconduct evidence. Specifically, the court instructed the jury that evidence of the defendant's misconduct toward C was not sufficient to prove that the defendant was guilty of the crimes charged. The court further instructed the jury that the state still had the burden of proving every element of the crimes charged beyond a reasonable doubt. In its final charge, the court instructed the jury a second time about the proper use of uncharged misconduct evidence.[5]

[5] The defendant also argues that the court's limiting instruction to the jury regarding uncharged misconduct evidence was improper because it was given immediately after C's testimony, rather than prior to it. Furthermore, the defendant argues that the court's instructions in its final charge "would have led the jury to believe that C's claims had been proven, resulting in more prejudice to the defendant." Because the defendant did not object at trial to the court's instruction regarding uncharged misconduct evidence either immediately after C's testimony or during the court's final charge, and does not seek review under *Golding*; see *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn.

On October 26, 2015, after the defendant was found guilty, he filed a motion for a new trial wherein he claimed, inter alia, that the court improperly admitted the uncharged misconduct evidence. On January 8, 2016, after argument, the court denied the defendant's motion.

We begin our analysis of the defendant's claim by setting forth the applicable standard of review. "The admission of evidence of prior uncharged misconduct is a decision properly within the discretion of the trial court. . . . [Every] reasonable presumption should be given in favor of the trial court's ruling. . . . [T]he trial court's decision will be reversed only where abuse of discretion is manifest or where injustice appears to have been done." (Internal quotation marks omitted.) *State* v. *Heck*, 128 Conn. App. 633, 638, 18 A.3d 673, cert. denied, 301 Conn. 935, 23 A.3d 728 (2011).

Turning to the applicable law, as a general rule, prior misconduct evidence is inadmissible to prove the defendant's bad character or criminal tendencies. See Conn. Code Evid. § 4-5 (a) ("[e]vidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character, propensity, or criminal tendencies of that person except as provided in subsection [b]"). In *State* v. *DeJesus*, supra, 288 Conn. 470, however, our Supreme Court recognized "a *limited* exception to the prohibition on the admission of uncharged misconduct evidence in *sex crime* cases to prove that the defendant had a propensity to engage in aberrant and compulsive criminal sexual behavior." (Emphasis in original.) This exception to the admission of propensity evidence was subsequently codified in § 4-5 (b) of the Connecticut Code of Evidence.

Under § 4-5 (b) of the Connecticut Code of Evidence and *DeJesus*, evidence of uncharged sexual misconduct

773, 781, 120 A.3d 1188 (2015); or the plain error doctrine; Practice Book § 60-5; his claim is unpreserved. We therefore decline to review it.

is admissible "if it is relevant to prove that the defendant had a propensity or a tendency to engage in the type of aberrant and compulsive criminal sexual behavior with which he or she is charged." *State* v. *DeJesus*, supra, 288 Conn. 473. "[E]vidence of uncharged misconduct is relevant to prove that the defendant had a propensity or a tendency to engage in the crime charged only if it is: (1) . . . not too remote in time; (2) . . . similar to the offense charged; and (3) . . . committed upon persons similar to the [complaining] witness." (Internal quotation marks omitted.) Id. In addition, the court must also find that the probative value of the evidence "outweighs the prejudicial effect that invariably flows from its admission." (Internal quotation marks omitted.) Id.

To begin, the defendant concedes, and we agree, that the charged and uncharged misconduct was not too remote in time. The abuse of A occurred between 2004 and 2010, and the abuse of C occurred in 2011. Because the defendant's abuse of C occurred only one year after the last instance of abuse with respect to A, the uncharged conduct is not too remote in time relative to the charged conduct. See *State* v. *Acosta*, 326 Conn. 405, 415, 164 A.3d 672 (2017) (holding that twelve year gap between charged and uncharged conduct was not too remote); *State* v. *Jacobson*, 283 Conn. 618, 632–33, 930 A.2d 628 (2007) (ten year gap was not too remote); *State* v. *Romero*, 269 Conn. 481, 498, 849 A.2d 760 (2004) (nine year gap was not too remote).

The defendant does, however, challenge the court's finding that the uncharged misconduct is sufficiently similar to the charged conduct under *DeJesus* and § 4-5 (b) of the Connecticut Code of Evidence. The defendant argues that the uncharged and charged conduct is dissimilar because the defendant's abuse of A was more frequent and severe than his abuse of C.

"It is well established that the . . . conduct at issue need only be similar—not identical—to sustain the admission of uncharged misconduct evidence." (Internal quotation marks omitted.) *State* v. *Acosta*, supra, 326 Conn. 416. Although it is true that "frequency and severity are factors relevant to the similarity of abuse analysis"; *State* v. *Antonaras*, 137 Conn. App. 703, 719, 49 A.3d 783, cert. denied, 307 Conn. 936, 56 A.3d 716 (2012); "[i]n a number of cases, our Supreme Court and this court have looked to the initial sexual advances of the defendant in comparing the similarity of the uncharged misconduct to the charged abuse, especially when the uncharged misconduct witnesses *rebuffed the advances or the defendant otherwise was prevented from abusing them*." (Emphasis added.) Id., 717–18. Thus, "differences in the severity of misconduct may not illustrate a behavioral distinction of any significance when a victim rebuffs or reports the misconduct." (Internal quotation marks omitted.) *State* v. *Acosta*, supra, 416.

Undoubtedly, the defendant's abuse of A was more severe, and more frequent, than his abuse of C. The differences in severity and frequency of the abuse, however, are due to the fact that (1) the defendant had access to C on only one occasion, whereas he had frequent access to A, and (2) C rebuffed his advances. When these circumstances are present, our case law directs us to consider whether the defendant's initial sexual advances toward each witness were sufficiently similar in analyzing the second relevancy prong of *DeJesus*, rather than comparing the severity and frequency of the conduct overall. See *State* v. *Antonaras*, supra, 137 Conn. App. 717–19.

In the present case, there were significant similarities between the defendant's initial advances toward C and A. Both girls were assaulted when they were staying as overnight guests in the defendant's home. See id.,

719–21 (location of abuse is factor courts consider in evaluating similarity of charged and uncharged misconduct; abuse of three victims occurred either in defendant's vehicle or residence); see also *State* v. *L.W.*, 122 Conn. App. 324, 333–34, 999 A.2d 5 (charged and uncharged conduct sufficiently similar where, "[i]n both instances, the alleged sexual misconduct occurred surreptitiously and in the defendant's residence"), cert. denied, 298 Conn. 919, 4 A.3d 1230 (2010). Furthermore, the defendant commenced the abuse while the girls were sleeping. See *State* v. *Hickey*, 135 Conn. App. 532, 546, 43 A.3d 701 (charged and uncharged misconduct sufficiently similar in part because defendant's abuse of both victims occurred when they were asleep at his residence), cert. denied, 306 Conn. 901, 52 A.3d 728 (2012).

Moreover, the acts of assault themselves were nearly identical—both witnesses testified that the defendant reached underneath their clothes and touched their vagina, and may have taken photographs of them. Finally, the defendant's abuse of both witnesses occurred with others in the same room. The defendant abused A while she was sleeping in the same bedroom as his daughter, M, and abused C when J was in the room. See *State* v. *Eddie N. C.*, 178 Conn. App. 147, 161, 174 A.3d 803 (2017) (whether abuse occurred in vicinity of others is factor courts consider in evaluating similarity of charged and uncharged conduct; uncharged conduct was sufficiently similar to charged conduct in part because abuse of both witnesses occurred in vicinity of family members), cert. denied, 327 Conn. 1000, A.3d (2018). Thus, the defendant's initial advances toward C and A were sufficiently similar.[6]

[6] The defendant argues that the present case is similar to *State* v. *Gupta*, 297 Conn. 211, 998 A.2d 1085 (2010). In that case, our Supreme Court concluded that the trial court abused its discretion in consolidating three cases against the defendant for trial because the evidence in the case involv ing one of the complainants was not cross admissible in the other two cases under Conn. Code Evid. § 4-5 (b) and *DeJesus*. Id., 226.

The third relevancy prong of *DeJesus* requires us to evaluate whether the uncharged misconduct was committed against an individual similar to the complaining witness. *State* v. *DeJesus*, supra, 288 Conn. 473. The defendant appears to argue that A and C are dissimilar because "of the defendant's different relationship with each complainant." Specifically, C, unlike A, was not related to the defendant's wife. The defendant further argues that the two are dissimilar because A was seven years old when the abuse began while C was thirteen, making her "more likely to have reached puberty . . . ."

"As with conduct, the victim[s] . . . at issue need only be similar—not identical—to sustain the admission of uncharged misconduct evidence. . . . Age and familial status may suggest victim similarities. (Citation omitted; internal quotation marks omitted.) *State* v. *Acosta*, supra, 326 Conn. 417–18.

Specifically, the court found that the sexual misconduct alleged by one of the complainants was not sufficiently similar to the misconduct alleged by the complaining witnesses in the other two cases, because it was more severe. Id. All three alleged that the defendant, a physician, had molested them during their respective medical examinations with him. Id., 226–27. The first complainant alleged that the defendant had kissed her on her cheeks, remarked that her breasts were "soft and beautiful," pinched her nipples, tapped her pelvic bone and told her that she was "so hot," firmly massaged her breasts with his hands, asked if he could kiss her breasts, and proceeded to put his mouth on her breasts. (Internal quotation marks omitted.) Id. The other two complainants, however, alleged only that the defendant had improperly touched their breasts. Id., 226.

Gupta, however, is clearly distinguishable from the present case. In *Gupta*, the defendant's conduct toward two of the complainants did not escalate beyond inappropriate touching. The first and only time he molested the first complainant, however, the abuse was far more severe and included tapping her pelvic bone, putting his mouth on her breasts, and biting her in a sexual manner. Thus, the defendant's initial advances toward the other two complainants were dissimilar to his initial advance toward the first complainant. In the present case, unlike in *Gupta*, the defendant's initial advances toward C and A were nearly identical. *Gupta* therefore does not support the defendant's claim.

The defendant is incorrect that A and C are dissimilar because he shared a familial relationship with A and not C. Certainly, courts have taken into account whether the misconduct and complaining witness share a familial relationship with the defendant in evaluating the witnesses' similarity. The reason for this, however, is that the familial relationship often facilitates the abuse because it provides the defendant access to the victims. See *State* v. *Devon D.*, 321 Conn. 656, 667, 138 A.3d 849 (2016) ("[b]ecause of the familial relationship [that the misconduct and complaining witnesses shared with the defendant], the defendant had access to and time alone with each victim"). What is significant is not that those relationships are familial, but that the misconduct and complaining witness share a similar relationship with either the defendant, or another individual, through whom the defendant is able to gain access to them.

Here, it was each girl's relationship to J and M—not the defendant—that allowed the defendant access to them. During the hearing on the defendant's motion in limine to exclude uncharged misconduct evidence, the state proffered that A visited the defendant's apartment to spend time with her sister, J, as well as the defendant's daughter, M, with whom she shared a friendship. With respect to C, the state proffered that she spent the night at the defendant's apartment because of her friendship with M. The state further proffered that C was "like a little sister to [J] as well." Thus, A and C were similarly situated in that they were connected to the defendant through J and M, and those similar relationships "offered the defendant access to [them] and the opportunity for his actions." *State* v. *Acosta*, supra, 326 Conn. 418; see also *State* v. *George A.*, 308 Conn. 274, 297, 63 A.3d 918 (uncharged misconduct witness and complaining witness were sufficiently similar despite fact that only complaining witness was related to defendant).

Furthermore, A and C were both prepubescent and similar in age when the abuse occurred. Although the defendant's abuse of A began when she was seven, it continued until she was twelve years old. The defendant abused C when she was thirteen, only one year older than A had been when the abuse ended. Thus, the court did not abuse its discretion in concluding that A and C were sufficiently similar individuals. See *State* v. *Allen*, 140 Conn. App. 423, 434–35, 59 A.3d 351 (uncharged misconduct witness, who alleged that defendant abused her between ages of nine and fifteen, and complaining witness, who alleged that defendant abused her between ages of seven and eleven, were sufficiently similar), cert. denied, 308 Conn. 934, 66 A.3d 497 (2013).

Having determined that the court did not abuse its discretion in concluding that the uncharged misconduct evidence was relevant to prove that the defendant had a propensity to engage in aberrant sexual misconduct, we now address the defendant's claim that the prejudicial impact of the uncharged misconduct evidence "greatly outweighed [its] limited probative value . . . ." Specifically, the defendant argues that C's testimony allowed the state to argue that he "had a tendency or propensity to sexually abuse young girls," and caused the jury to believe that he "was a brazen and persistent abuser."

"In balancing the probative value of such evidence against its prejudicial effect . . . trial courts must be mindful of the purpose for which the evidence is to be admitted, namely, to permit the jury to consider a defendant's prior bad acts in the area of sexual abuse or child molestation for the purpose of showing propensity." (Internal quotation marks omitted.) *State* v. *DeJesus*, supra, 288 Conn. 473–74. "Although evidence of child sex abuse is undoubtedly harmful to the defendant, that is not the test of whether evidence is unduly

prejudicial. Rather, evidence is excluded as unduly prejudicial when it tends to have some adverse effect upon a defendant *beyond* tending to prove the fact or issue that justified its admission into evidence." (Emphasis in original; internal quotation marks omitted.) *State* v. *Antonaras*, supra, 137 Conn. App. 722–23. "The test for determining whether evidence is unduly prejudicial is not whether it is damaging to the defendant but whether it will improperly arouse the emotions of the jury." (Internal quotation marks omitted.) *State* v. *Morales*, 164 Conn. App. 143, 179, 136 A.3d 278, cert. denied, 321 Conn. 916, 136 A.3d 1275 (2016).

The defendant argues that the admission of the uncharged misconduct evidence was unduly prejudicial because it allowed the state to argue, and the jury to conclude, that he had a propensity to sexually assault young girls. This assertion does not support the defendant's contention that the evidence was unduly prejudicial, as propensity is the precise purpose for which our legislature and courts have allowed such evidence to be admitted and considered. See *State* v. *DeJesus*, supra, 288 Conn. 476. Moreover, the fact that the evidence is harmful to the defendant does not make it unduly prejudicial—uncharged misconduct evidence is always harmful. Such evidence crosses the threshold from harmful to unduly prejudicial only when it has some adverse effect *beyond* tending to show the defendant's propensity to commit that type of misconduct. The defendant offers no explanation regarding how the uncharged misconduct evidence tended to show something other than his propensity to sexually assault young girls and, as we have already noted, that is a proper purpose for which it may be considered. Furthermore, the defendant's misconduct as to C was far less egregious than that as to A. It is therefore unlikely that C's testimony improperly aroused the emotions of the jury.

We conclude that the court did not abuse its discretion in admitting the uncharged misconduct evidence.

II

Next, the defendant claims that the trial court improperly permitted Williams to testify as an expert on delayed disclosure and common behaviors of child sexual abuse victims because she (1) had already testified as a constancy of accusation witness, and (2) was unqualified[7] to testify as an expert. We decline to review the former assertion because it was not preserved at trial and, with respect to the witness' qualifications, we are not persuaded that the court abused its discretion in concluding that Williams was qualified to render her opinions.

The following additional facts are relevant to this claim. The defendant filed a motion in limine prior to

[7] The defendant argues in his reply brief that the state failed to give adequate notice that Williams would testify as an expert at trial. At oral argument, however, the defendant conceded that he never raised this claim in his principal brief on appeal. Thus, we decline to review the defendant's claim of inadequate notice. See *State* v. *Garvin*, 242 Conn. 296, 312, 699 A.2d 921 (1997) ("[i]t is a well established principle that arguments can not be raised for the first time in a reply brief" [internal quotation marks omitted]). The defendant also claims that the court improperly permitted Dawn Jackle, a department social worker who was assigned to the case, to testify as an expert because she was unqualified. Because the defendant did not object to Jackle's testimony at trial, his claim is unpreserved. Furthermore, the defendant's postverdict motion for a new trial, in which he argued for the first time that Jackle did not properly qualify as an expert and that her testimony was more prejudicial than probative, was likewise insufficient to preserve his claim for review. See *State* v. *Paris*, 63 Conn. App. 284, 294–95, 775 A.2d 994 (In refusing to review an evidentiary claim that was raised for the first time in a postverdict motion for a new trial, this stated, "[w]e are not persuaded that evidentiary claims, not made at trial, can be preserved for appeal by raising them in a motion for a new trial after a guilty verdict. The problems inherent in allowing counsel to wait until after an adverse verdict to raise such objections to evidence are too obvious to warrant discussion."), cert. denied, 257 Conn. 909, 782 A.2d 135 (2001). We therefore decline to review the defendant's claim with respect to Jackle's qualifications.

trial to prevent the state from eliciting testimony from A regarding her disclosure of abuse to others unless the state had good cause to believe that those individuals would be available to testify. During the state's direct examination of A, A testified that she had disclosed the abuse to Williams, J, and her father. On cross-examination, the defendant challenged A's credibility and elicited from her that she did not reveal the abuse to Williams until 2014, that she never revealed the abuse to her mother, and that she had never sought medical treatment or therapy as a result of the abuse.

After A testified, the state called Williams. Williams testified that she was employed as a social worker at a high school. Regarding her background, Williams testified that she had received both a bachelor's degree in psychology and master's degree in social work from the University of Connecticut. Williams further testified that she had received her first level of licensure three months before the trial, was working toward her final level, and hoped to become a licensed clinical social worker (LCSW) by the end of the year. To become an LCSW, students are required to complete three thousand working hours, one hundred of which must be supervised by a licensed clinician.

Williams testified that, in order to complete the required clinical hours, she had volunteered as a director for a church youth group for the past ten years. It was through this volunteer work that Williams met A. Williams then testified regarding A's disclosure of the defendant's abuse. When the state asked Williams whether she thought it was important to press A for specific details, Williams replied, "I did not. Oftentimes when dealing with kids—." The defendant then objected, citing as the basis of the objection that Williams was not "qualified to give an opinion at [that] point."

The court excused the jury and asked the state what line of questioning it intended to pursue. The state responded that Williams had completed her constancy of accusation testimony, but that it also wanted to elicit testimony from Williams regarding her experience as a social worker interacting with children who disclose sexual abuse. Specifically, the state wanted to elicit that, in Williams' experience, children often delay in disclosing abuse. The state argued that Williams was permitted to testify about her observations and experience as long as such testimony was relevant.

The court then asked the state to voir dire Williams and thereby lay a foundation for her testimony regarding delayed disclosure and common characteristics of sexual abuse victims. During voir dire, Williams testified as to the following: (1) while working as the director of the church youth program, eight teenagers had disclosed sexual abuse to her, (2) Williams had attended two different trainings on how, as a mandated reporter, she should properly handle disclosures of sexual abuse by children, (3) as part of her training, Williams was taught that she should not press children for details of sexual abuse, (4) Williams also learned, through training, of various behaviors that children who are sexually abused commonly exhibit, including delayed disclosure, (5) the purpose of Williams' training was to assist her in preparing to work with sexual abuse victims in the future, (6) during her work as a school social worker, five children had disclosed to Williams that they had been sexually abused, and (7) she had been the person to whom the students first disclosed abuse. Thereafter, the defendant also conducted a voir dire of Williams.

The state then clarified once again that it only sought to elicit from Williams (1) testimony as to how common it is for children to delay disclosing abuse, and (2) the

reasons for that phenomenon. The defendant again objected.

The court then ruled that Williams was qualified to answer questions regarding delayed disclosure. The court based its ruling on the fact that Williams had received her master's degree in social work and acquired her first level of licensure, was close to obtaining her LCSW license, had training and practical experience interacting with school-age students who disclose sexual abuse, and had worked with a total of fourteen students who had done so. The court reminded both the state and Williams that she could not testify about why A may have delayed her disclosure or how her conduct was consistent with someone who had been sexually abused.

Thereafter, the jury returned and the court provided a limiting instruction regarding constancy of accusation testimony. The prosecutor then proceeded to question Williams about her training as a mandated reporter and the topic of delayed disclosure. Williams testified that, through her work as a social worker and director of the youth group, approximately thirteen or fourteen children had disclosed to her that they had been sexually abused. Regarding delayed disclosure, Williams testified that children often wait to disclose abuse because (1) they do not want to upset family members or friends who would be affected by the news, (2) they fear what will happen if their friends find out about the abuse, and (3) children often feel as though they did something to deserve the abuse and do not want that fear validated.

The court, during its final charge to the jury, subsequently gave an instruction regarding the proper purpose for which the jury could consider constancy of accusation and expert testimony. Specifically, the court instructed the jury that the testimony of the constancy of accusation witnesses "was . . . limited in its scope

to the fact and timing of [A's] complaint, the place and nature of the alleged sexual assault, and the identity of the alleged perpetrator." Regarding expert testimony, the court instructed the jury that Williams had testified as an expert and that such testimony was entitled "to such weight as [the jury] find[s] the expert's qualifications in her field entitle it to receive . . . ."

A

The defendant first argues that the court improperly allowed Williams to testify as an expert regarding delayed disclosure because she had also testified as a constancy of accusation witness. Specifically, the defendant argues that Williams' testimony improperly exceeded the bounds of permissible constancy of accusation evidence set forth in *State* v. *Troupe*, 237 Conn. 284, 677 A.2d 917 (1996). Because the defendant did not preserve this claim at trial, we decline to review it.

"In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . Our rules of practice make it clear that when an objection to evidence is made, a succinct statement of the grounds forming the basis for the objection must be made in such form as counsel desires it to be preserved and included in the record. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling." (Citations omitted; internal quotation marks omitted.) *State* v. *Bush*, 249 Conn. 423, 427–28, 735 A.2d 778 (1999).

"These requirements are not simply formalities. They serve to alert the trial court to potential error while there is still time for the court to act. . . . Assigning error to a court's evidentiary rulings on the basis of objections never raised at trial unfairly subjects the court and the opposing party to a trial by ambush."

(Citation omitted.) Id., 428. "Where, however, there is a question as to whether the claim was preserved, as long as it is clear from the record that the trial court effectively was alerted to a claim of potential error while there was still time for the court to act . . . the claim will be considered preserved." (Citation omitted; internal quotation marks omitted.) *State* v. *Francis D.*, 75 Conn. App. 1, 8–9, 815 A.2d 191, cert. denied, 263 Conn. 909, 819 A.2d 842 (2003).

The issue of whether the defendant's claim is properly preserved in this case is almost identical to that presented in *Francis D.* See id., 8. In that case, the defendant argued on appeal that because a social worker who testified for the state at trial was "offered solely to prove constancy of accusation, her testimony regarding the theory of delayed disclosure was inadmissible." Id. There, this court similarly concluded that the defendant had not preserved his claim for appellate review. Id. In so concluding, the court found that "[n]one of the defendant's objections concerned whether the testimony of the social worker exceeded the limits of *Troupe*. Instead, the explicit ground asserted for the defendant's objections was that the social worker was not qualified as an expert witness and, therefore, her testimony regarding delayed disclosure violated his constitutional right to a jury trial because it allegedly usurped the jury's function of assessing the credibility of [the witness]." Id., 10. The court also noted that "[t]he defendant's objections failed to provide enough background to properly articulate the basis of the objection," and that "[a]t no time during the colloquy did the defendant raise *Troupe* or state that the witness was a constancy of accusation witness who could testify only within the parameters of *Troupe*." Id.

In the present case, as in *Francis D.*, the defendant did not at any point state as a basis for his objection that Williams' testimony improperly exceeded the scope

of constancy of accusation evidence under *Troupe* or its progeny. The defendant initially stated that the basis for his objection to Williams testifying further was that she was not qualified to give an opinion "at [that] point." After the court ruled that Williams would be allowed to testify regarding delayed disclosure, the defendant subsequently reiterated his objection. In doing so, the defendant stated three grounds as the basis for the objection: (1) the state had not disclosed to the defendant prior to trial that Williams would testify as an expert, (2) the state was attempting to improperly bolster A's credibility, and (3) Williams did not qualify as an expert in that field because she did not have the necessary experience.

The defendant also argued that Williams' testimony was improper because, as a mandated reporter, anything she asked A would have been in "preparation for the prosecutor's case." The court then asked defense counsel how Williams' actions as a mandated reporter rendered her ineligible to offer an opinion, to which defense counsel responded, "[w]ell, going back to, basically, she's not an expert witness, Your Honor, so she cannot . . . render an opinion." Finally, the defendant made one final objection on the ground that Williams might attempt to relate her testimony regarding the general phenomenon of delayed disclosure back to A's disclosure. None of the defendant's many stated bases for his objection, however, is consistent with the claim he now makes on appeal.

The court's response to the defendant's objections further supports our view that the defendant's claim is unpreserved, as the record indicates that the court did not understand the defendant to be objecting to Williams' prospective expert testimony because it exceeded the proper scope of the constancy of accusation doctrine. This is evidenced by the great lengths the court took to address the defendant's objection.

The court first addressed the defendant's argument that the state improperly failed to disclose Williams as an expert, asking whether there was anything in the defendant's request for disclosure that would have required the state to "specifically delineate who [its] experts were going to be . . . ." Second, per the defendant's request, the court cautioned Williams that she was not "in any way" to relate her testimony regarding delayed disclosure "to what [A] did or did not do," and confirmed with defense counsel that its instruction was satisfactory. Finally, the court noted that Williams' qualifications were "the core issue" with respect to the defendant's objection. Thus, it clearly explained why it believed that Williams was qualified to testify as an expert regarding delayed disclosure, citing her employment, experience, training, and education. At no point did the court indicate that it understood the defendant to be objecting to Williams' testimony on the ground that he now asserts on appeal. We therefore conclude that the defendant's claim is unpreserved and decline to review it.

B

The defendant next argues that the trial court improperly allowed Williams to testify as an expert because she was unqualified. Specifically, the defendant argues that Williams was unqualified because only fourteen children had disclosed to her that they had been sexually abused, she had never been deemed an expert in the field, and she had substantially less experience than witnesses who had testified as experts in other cases involving child victims of sexual abuse, citing *State* v. *Grenier*, 257 Conn. 797, 808, 778 A.2d 159 (2001) (testifying expert treated more than 900 victims of sexual abuse), and *State* v. *Spigarolo*, 210 Conn. 359, 376, 556 A.2d 112 (expert evaluated and treated 100 to 150 cases of child sexual abuse), cert. denied, 493 U.S. 933, 110 S. Ct. 322, 107 L. Ed. 2d 312 (1989). We disagree.

"The trial court has wide discretion in ruling on the qualification of expert witnesses and the admissibility of their opinions. . . . The court's decision is not to be disturbed unless [its] discretion has been abused, or the error is clear and involves a misconception of the law." (Internal quotation marks omitted.) *State* v. *Reid*, 254 Conn. 540, 550, 757 A.2d 482 (2000). "To the extent the trial court makes factual findings to support its decision, we will accept those findings unless they are clearly improper. . . . If we determine that a court acted improperly with respect to the admissibility of expert testimony, we will reverse the trial court's judgment and grant a new trial only if the impropriety was harmful to the appealing party." (Internal quotation marks omitted.) *State* v. *Edwards*, 325 Conn. 97, 123, 156 A.3d 506 (2017).

"Expert testimony should be admitted when: (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues. . . . [T]o render an expert opinion the witness must be qualified to do so and there must be a factual basis for the opinion." (Internal quotation marks omitted.) Id., 123–24. In finding that a witness may properly be qualified as an expert, "[s]ome facts must be shown as a foundation for an expert's opinion, but there is no rule of law declaring the precise facts which must be proved before such an opinion may be received in evidence." (Internal quotation marks omitted.) *Marandino* v. *Prometheus Pharmacy*, 294 Conn. 564, 593, 986 A.2d 1023 (2010). An expert witness' skill or knowledge "may emanate from a myriad of sources, such as teaching, scholarly writings, study or practical experience." *Davis* v. *Margolis*, 215 Conn. 408, 417, 576 A.2d 489 (1990).

Moreover, "[i]t is not essential that an expert witness possess any particular credential, such as a license, in order to be qualified to testify, so long as his [or her] education or experience indicate that he [or she] has knowledge on a relevant subject significantly greater than that of persons lacking such education or experience." (Internal quotation marks omitted.) *Beverly Hills Concepts, Inc.* v. *Schatz & Schatz, Ribicoff & Kotkin*, 247 Conn. 48, 62, 717 A.2d 724 (1998); see also *E & M Custom Homes, LLC* v. *Negron*, 140 Conn. App. 92, 110–11, 59 A.3d 262 (2013) (witness who lacked home improvement contractor's license, major contractor's license, and certificate of registration as new home construction contractor, but had completed approximately six new home constructions, was properly qualified as expert witness and allowed to testify about repairs needed to property at issue), appeal dismissed, 314 Conn. 519, 102 A.3d 707 (2014).

In the present case, the court determined that Williams was qualified to render an expert opinion "by reason of both her volunteer work and her paid employment, [and her] experience in dealing with . . . school-age students in disclosing sexual abuse . . . ." Williams' credentials support the court's conclusion. At the time of trial, Williams had both practical experience and the relevant educational background regarding the issue of delayed disclosure. She had studied characteristics of child victims of sexual abuse in obtaining her bachelor's and master's degrees. Moreover, Williams had received training through the department and other programs on how to handle, as a mandated reporter, a student's first disclosure of abuse. Furthermore, while employed as a school social worker and director of the youth group, Williams was told by approximately thirteen or fourteen students that they had been sexually abused. We therefore conclude that the court did not abuse its discretion in finding that Williams was

qualified to testify as an expert on the topic of delayed disclosure.

III

Finally, the defendant claims that his conviction should be reversed because the prosecutor committed various improprieties at trial that deprived him of his due process right to a fair trial. Specifically, the defendant argues that the prosecutor asked questions during cross-examination and made statements during closing argument that suggested that the defendant was required to provide an explanation as to why A and C would falsely accuse him of sexually abusing them. The defendant believes that the alleged improprieties diluted, distorted, and shifted the state's burden of proof, and were "tantamount to a direct statement that the defendant had the burden of proving or disproving the state's case." We are not persuaded that the prosecutor's conduct deprived the defendant of a fair trial.

The following additional facts and procedural history are relevant to the resolution of this claim. At trial, the defendant testified in his own defense. Specifically, the defendant testified that he never sexually abused A, either in concert with J or otherwise.

The defendant also denied that he ever sexually abused C. The defendant instead offered that he, J, and C had fallen asleep watching a movie on a couch in the defendant's living room, and that he overheard C complain to J that the defendant had rolled over and put his hand on her leg in his sleep.

The defendant further testified that, when he was unemployed, he began selling marijuana in order to support his family. On cross-examination, the defendant stated that J used to make marijuana deliveries for him on occasion, and that any incriminating statements in the letters he sent J from prison referred to his drug

dealing operation. The following exchange then occurred between the prosecutor and the defendant:

"Q. Did you ever offer this as an explanation for the letters we have—

"A. I've never—

"Q. —prior to today?

"A. I've never been put in a position to do so; so, no.

"Q. *And yet, how exactly does this explain why* [*A*] *and* [*C*] *have made allegations of sexual abuse against you?*

"A. It doesn't explain. I never stated that it did explain that. I stated what I was asked what those letters referred to.

"Q. *Okay. So, you have no explanation for why* [*A*] *and* [*C*] *would make allegations of sexual abuse against you.*

"A. I didn't say that, either. You asked if I was using those letters to explain that, and I said no.

"Q. Okay, so you've taken—

"A. We're going in circles.

"Q. You've taken the [witness] stand this afternoon.

"A. Yes.

"Q. You're charged with very serious crimes.

"A. Yes.

"Q. *And you have offered no explanation in your testimony as to why these girls would come forward and make allegations against you.*

"A. As of yet, no; I have not.

"Q. *And when do you plan on doing that, sir?*

"A. I'm not the one asking questions, ma'am. You are, and he is." (Emphasis added.)

Defense counsel did not object to this line of questioning. The prosecutor then referenced specific parts of the defendant's letters to J and asked him to explain how they pertained to his supposed drug dealing. The defendant maintained that his letters did not constitute admissions of sexual assault and were consistent with his admission that he sold marijuana.

Thereafter, during the state's closing argument, the prosecutor again addressed the defendant's letters to J, stating: "If that isn't enough to prove beyond a reasonable doubt the charges against the defendant, I also ask you to consider the defendant's testimony.

"Ask . . . yourselves, how credible did he come across? How credible was he in light of his letters? How credible was he in light of the fact that his testimony was contrary to practically every other witness that testified?

"Despite the length to which he liked to talk about irrelevant information, isn't it interesting *that he couldn't offer a single explanation as to why* [*A*] *would make up these allegations against him?*

"*He couldn't offer a cogent, reasonable explanation for why* [*J*] *would voluntarily tell the police that she was involved in sexual misconduct with him.*

"*He couldn't explain why* [*C*] *would make accusations against him. He couldn't explain the letters in any meaningful, credible way.*

"Given all that he did have to say over the course of two hours, he didn't offer a shred of testimony that made sense. He couldn't explain how not once did he accuse his wife of lying in his letters.

"He accused her of minimizing her involvement at times, but never once did he tell her she was lying. On the contrary, he yells at her in one breath to stop talking

to the police and [the department], and in the next, he tells her that he loves her and hopes that they can live happily ever after.

"And yet, he wants us to believe that all of these letters are really about some drug dealing operation that no one seems to know anything about. Not a shred of evidence to suggest he's being investigated for selling drugs, nor is he charged with that offense.

"It's just a convenient, if not very plausible, explanation for what he was hiding from the police and why he kept telling his wife not to talk to him. An explanation, sure, but not a very good one." (Emphasis added.)

Again, defense counsel did not object to the prosecutor's comments. Furthermore, the prosecutor stated in her closing argument that "[t]he judge will instruct you that . . . you must determine each element of each of the crimes; and . . . in order to find the defendant guilty of a particular charge or count, you must find . . . each of the elements to be proven beyond a reasonable doubt." The prosecutor then addressed the crimes of sexual assault in the first degree and risk of injury to a child and explained what the state must have proven with respect to each element of those crimes in order for the jury to find the defendant guilty.

In addition, the court instructed the jury regarding the presumption of innocence and stated multiple times that the state bore the burden of proving the elements of each crime beyond a reasonable doubt. The court also provided the jury with extensive instructions regarding the definition of proof beyond a reasonable doubt.

"In analyzing claims of prosecutorial impropriety, we engage in a two step analytical process. . . . We first examine whether the prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we

then examine whether it deprived the defendant of his due process right to a fair trial. . . . In other words, an impropriety is an impropriety, regardless of its ultimate effect on the fairness of the trial. Whether that impropriety was harmful and thus caused or contributed to a due process violation involves a separate and distinct inquiry." (Citations omitted; internal quotation marks omitted.) *State* v. *Fauci*, 282 Conn. 23, 32, 917 A.2d 978 (2007).

"[T]he touchstone of due process analysis in cases of alleged [harmful] prosecutorial [impropriety] is the fairness of the trial, and not the culpability of the prosecutor. . . . The issue is whether the prosecutor's [actions at trial] so infected [it] with unfairness as to make the resulting conviction a denial of due process. . . . In determining whether the defendant was denied a fair trial . . . we must view the prosecutor's [actions] in the context of the entire trial." (Internal quotation marks omitted.) Id.

Although the defendant did not object at trial to either the prosecutor's questions on cross-examination or her comments during closing argument, it is unnecessary for him to seek review under *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989).[8] See *State* v. *Stevenson*, 269 Conn. 563, 572–75, 849 A.2d 626 (2004). "The reason for this is that . . . appellate review of claims of prosecutorial [impropriety involves] a determination of whether the defendant was deprived of his right to a fair trial, and this determination must involve the application of the factors set out by [our Supreme Court] in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987)." *State* v. *Stevenson*, supra, 573. "The consideration of the fairness of the entire trial through the *Williams* factors duplicates, and, thus makes superfluous, a separate application of the *Golding* test."

[8] See *State* v. *Golding*, supra, 213 Conn. 239–40 (modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 [2015]).

(Internal quotation marks omitted.) *State* v. *Ciullo*, 314 Conn. 28, 35, 100 A.3d 779 (2014).

Even if we assume without deciding,[9] however, that the prosecutor's questions on cross-examination and comments during closing argument constituted impropriety,[10] we are not persuaded that the defendant was deprived of his due process right to a fair trial. "When a defendant demonstrates improper questions or remarks by the prosecutor during the course of trial, the defendant bears the burden of showing that, considered in light of the whole trial, the improprieties were so egregious that they amounted to a denial of due process. . . . The question of whether the defendant has been prejudiced by prosecutorial [impropriety] . . . depends on whether there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the improprieties. . . . This assessment is made through application of the factors set forth in *State* v. *Williams*, supra, 204 Conn. 540 . . . . These factors include: the extent to which the [impropriety] was invited by defense conduct or argument . . . the severity of the [impropriety] . . . the frequency of the [impropriety] . . . the centrality of the

[9] Although ordinarily we would first analyze whether the prosecutor's actions were improper, we have on occasion considered the *Williams* factors after assuming error if we are convinced that, despite the potential impropriety, it was not so egregious as to violate the defendant's due process rights. See *State* v. *Ciullo*, supra, 314 Conn. 57; see also *State* v. *Fernandez*, 169 Conn. App. 855, 869, 153 A.3d 53 (2016).

[10] Regarding the first prong of the analysis, i.e., whether an impropriety occurred, we find that the prosecutor's questions on cross-examination and comments during closing argument straddle the line between proper and improper. Although the state was entitled to argue that there did not appear to be any reason or motive for A or C to concoct a story that the defendant had sexually assaulted them, the form of the prosecutor's questions and the manner in which she presented a portion of her closing argument risked confusing the jury as to the appropriate burden of proof because they suggested that the state was entitled to a guilty verdict in the absence of the defendant coming forward with evidence, or at least a theory, as to the witnesses' motives to fabricate their claims.

[impropriety] to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's case." (Citations omitted; internal quotation marks omitted.) *State* v. *Albino*, 312 Conn. 763, 790–91, 97 A.3d 478 (2014). Applying these factors to the questions and statements at issue in the present case, we conclude that the defendant was not denied due process of law.

At the outset, we acknowledge that two of the *Williams* factors tend to support the defendant's claim. First, the potential impropriety was not invited by the defendant. The state concedes as much. Second, the potential impropriety concerned a critical issue in the case—whether A and C had a motive to lie about the defendant's sexual abuse of them. When considered in context with the remaining four factors, however, it is clear that the potential impropriety did not deprive the defendant of a fair trial.

Regarding the severity of the potential impropriety, it is significant that defense counsel did not object to either the prosecutor's line of questioning on cross-examination or her comments during closing argument. Our appellate courts have often given "considerable weight to the fact that defense counsel did not object to . . . [the alleged] improprieties" and considered it "a strong indicator that counsel did not perceive them as seriously jeopardizing the defendant's fair trial rights." *State* v. *Jones*, 320 Conn. 22, 38, 128 A.3d 431 (2015). Indeed, "counsel's failure to object at trial, while not by itself fatal to a defendant's claim, frequently will indicate on appellate review that the challenged comments do not rise to the magnitude of constitutional error . . . [necessary] . . . [to] clearly depriv[e] . . . the defendant of a fair trial . . . ." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Thompson*, 266 Conn. 440, 484, 832 A.2d 626

(2003). Thus, the defendant's failure to object in both instances suggests that any impropriety was not severe.

Furthermore, the severity of the impropriety is often "counterbalanced in part by the third *Williams* factor, namely, the frequency of the [impropriety] . . . ." (Internal quotation marks omitted.) *State* v. *Angel T.*, 292 Conn. 262, 289, 973 A.2d 1207 (2009). The defendant argues that the potential impropriety was "somewhat frequent" and not "just one brief isolated comment." The defendant takes issue, however, only with three questions contained in thirty-five transcribed pages of cross-examination, and a few isolated statements contained in the prosecutor's entire closing argument. "Improper statements that are minor and isolated will generally not taint the overall fairness of an entire trial." (Internal quotation marks omitted.) *State* v. *Felix R.*, 319 Conn. 1, 17, 124 A.3d 871 (2015). Thus, while the potential impropriety does not encompass merely one question or statement, it certainly cannot be characterized as "frequent" when considered in the context of a lengthy cross-examination and closing argument. See *State* v. *Payne*, 303 Conn. 538, 567, 34 A.3d 370 (2012) (three improper statements made by prosecutor during lengthy closing argument were not frequent); see also *State* v. *Salamon*, 287 Conn. 509, 552–55, 567, 949 A.2d 1092 (2008) (prosecutor's improper statements during closing and rebuttal arguments that encouraged jury to speculate that kidnapping case also involved uncharged attempted sexual assault were not particularly frequent when viewed in context of entire trial, which spanned several days).

With respect to the strength of the curative measures adapted, although it is true that "a general instruction does not have the same curative effect as a charge directed at a specific impropriety"; *State* v. *Warholic*, 278 Conn. 354, 401, 897 A.2d 569 (2006); "the defendant,

by failing to bring [the improper comment] to the attention of the trial court, bears much of the responsibility for the fact that [this] claimed impropriet[y] went uncured." (Internal quotation marks omitted.) Id., 402. Furthermore, even absent a specific curative instruction, the court's general written and oral instructions, in which it repeatedly stated that the prosecution had the burden of proving the elements of each crime charged in the information beyond a reasonable doubt and clearly explained the concept of the presumption of innocence, sufficiently cured any potential confusion by the jury. See *State* v. *Albino*, supra, 312 Conn. 792 (although defendant's "failure to object or to ask for such measures to be taken deprived the court of an opportunity to address the improprieties with any specificity," court's general instructions nonetheless likely mitigated effect of improprieties).

We now turn to the last *Williams* factor, which assesses the overall strength of the state's case. Here, the state's case was quite strong. To begin, A's testimony was directly corroborated in part by J, who was an eyewitness and, at times, a participant in the defendant's sexual abuse of A. J corroborated A's testimony that she had performed fellatio on the defendant in front of A and asked A to join in. J also corroborated A's testimony that the defendant had brought A to his bedroom on at least one occasion, and, on that occasion, J fondled A's breasts at the request of the defendant. A's allegations were further corroborated by C's testimony concerning uncharged misconduct of the defendant. The incident C described at trial—during which the defendant repeatedly tried to put his hands down her pants while she was asleep on the couch in his living room—was very similar to A's testimony that the defendant would often touch her when she was asleep in her bed or on the couch in the living room.

Moreover, C, like A, testified that she believed the defendant had secretly taken photographs or videos of her. C's testimony regarding the defendant's uncharged misconduct was properly introduced as propensity evidence. Therefore, the jury was free to conclude that because the defendant had sexually abused C, it was more likely that he had committed the sexual misconduct for which he was being tried. See Conn. Code Evid. § 4-5 (b).

Finally, A's allegations were corroborated by the defendant's own written statements, contained in his letters to J. Specifically, the defendant wrote: (1) "they want me to confirm that you gave me a BJ in front of your sister cause you said you did I say nothing if I did you would be in jail to[o]," (2) "not only did [J] know what was going on but [she] helped and supported in it," (3) on "many nights [J] . . . arranged so the older kids weren't home," and (4) that "had [J] said nothing they couldn't have made the charges stick but [she] sealed that deal." Thus, the defendant's own statements supported A's allegations that he had sexually abused her[11] and even referenced a specific instance of abuse testified to by J. Therefore, considering that A's testimony was corroborated extensively, we conclude that the state's case was strong despite the lack of physical evidence.[12]

[11] We do not find persuasive the defendant's explanation that his letters referred to a drug dealing operation, as his testimony was not supported by any other evidence at trial.

[12] The defendant argues that "[t]he case against the defendant cannot be considered strong . . . [because] no physical evidence corroborated her claims." Because the last instance of abuse occurred five years before A's disclosure, however, it was highly improbable that any physical evidence would still exist at that time and, in fact, none did. Furthermore, A's allegations were corroborated extensively in other ways. Therefore, the defendant is incorrect that the lack of physical evidence rendered the state's case weak. See *State* v. *Felix R.*, supra, 319 Conn. 18–19 (state's case was not weak due to lack of conclusive physical evidence of sexual assault considering other corroborating evidence introduced at trial, such as that abuser bought victim pregnancy test and morning after pills, as well as testimony of social workers and police officers who investigated case).

In sum, we conclude that (1) the potential impropriety was neither severe nor frequent, (2) the court's instructions were sufficient to correct any confusion the jury may have had regarding the state's burden of proof, and (3) the state's case was strong overall. We therefore conclude that the questions and statements made by the prosecutor and challenged by the defendant on appeal did not deprive him of his due process right to a fair trial.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JEROME F. MOORE (AC 39808)

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

Syllabus

The defendant, who had been sentenced to five years incarceration following his conviction of possession of narcotics, appealed to this court from the trial court's denial of his motion to correct an illegal sentence, in which he raised claims that his sentence exceeded the statutory maximum. On the date of the offense, possession of narcotics in violation of statute ([Rev. to 2013] § 21a-279) carried a sentence of imprisonment of up to seven years for a first offense. Prior to the defendant's conviction and sentencing, but subsequent to his arrest, the legislature amended § 21a-279 (a) in 2015 and reclassified a first offense of § 21a-279 (a) as a misdemeanor punishable by not more than one year of incarceration. On appeal, the defendant claimed that the trial court improperly determined that the 2015 amendment did not apply retroactively. He also claimed that his five year sentence constituted an excessive and disproportionate punishment in violation of the state and federal constitutions. *Held*:

1. The defendant could not prevail on his claim that his five year sentence exceeded the statutory maximum because the legislature expressed its intent that the 2015 amendment apply retroactively: the fact that the statute, as amended, contained no express statement that it applied retroactively did not render the statute ambiguous, as the absence of any language stating that the amendment applied retroactively indicated that the legislature intended for the amendment to apply prospectively

only, which was consistent with precedent holding that the law in existence on the date of the offense governs and with the legislature's enactment of savings statutes demonstrating an intent that defendants be prosecuted and sentenced in accordance with the statutes in effect at the time of the crime, and because the statutory language was not susceptible to more than one plausible interpretation, there was no ambiguity requiring this court to look to the legislative history of the amendment to ascertain the legislature's intent, and, therefore, the trial court correctly determined that the 2015 amendment did not apply retroactively; moreover, the defendant's claim that this court should adopt the amelioration doctrine and apply it to his sentence was unavailing, as our Supreme Court previously has determined that that doctrine is in direct contravention of our savings statutes and has expressly declined to establish that ameliorative changes to criminal statutes apply retroactively, and this court was bound by that precedent.

2. The defendant's claim that his five year sentence constituted an excessive and disproportionate punishment in violation of the state and federal constitutions was unavailing; because the defendant failed to provide an independent analysis of his state constitutional claim pursuant to the factors set out in *State* v. *Geisler* (222 Conn. 672), which controlled the defendant's state constitutional claim, that claim was inadequately briefed and deemed abandoned, and with respect to his federal constitutional claim, the defendant failed to demonstrate that his five year sentence for a violation of § 21a-279 (a) was disproportionate and excessive in violation of the eighth amendment to the United States constitution, and, therefore, the trial court did not abuse its discretion in denying his motion to correct an illegal sentence.

Argued November 29, 2017—officially released March 6, 2018

Procedural History

Substitute information charging the defendant with the crimes of possession of narcotics and possession of narcotics with intent to sell, brought to the Superior Court in the judicial district of Litchfield and tried to the jury before the court, *Shah, J.*; verdict and judgment of guilty of possession of narcotics; thereafter, the trial court denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed.*

Emily H. Wagner, assistant public defender, with whom was *Michael K. Courtney*, public defender, for the appellant (defendant).

Jennifer F. Miller, deputy assistant state's attorney, with whom, on the brief, were *David Shepack*, state's attorney, and *David R. Shannon*, senior assistant state's attorney, for the appellee (state).

Opinion

BISHOP, J. The defendant, Jerome F. Moore, appeals from the judgment of the trial court denying his motion to correct an illegal sentence. On appeal, the defendant claims that the court incorrectly concluded that (1) the 2015 amendment to General Statutes § 21a-279 (a), which the legislature passed during a special session in June, 2015; see Public Acts, Spec. Sess., June, 2015, No. 15-2, § 1; does not apply retroactively to his sentence,[1] and (2) his five year sentence does not violate the eighth amendment to the United States constitution

[1] On August 6, 2014, the date the defendant committed the offense for which he was convicted, General Statutes (Rev. to 2013) § 21a-279 (a) provided: "Any person who possesses or has under his control any quantity of any narcotic substance, except as authorized in this chapter, for a first offense, may be imprisoned not more than seven years or be fined not more than fifty thousand dollars, or be both fined and imprisoned; and for a second offense, may be imprisoned not more than fifteen years or be fined not more than one hundred thousand dollars, or be both fined and imprisoned; and for any subsequent offense, may be imprisoned not more than twenty-five years or be fined not more than two hundred fifty thousand dollars, or be both fined and imprisoned."

At the time of the defendant's conviction and sentencing, General Statutes (Supp. 2016) § 21a-279 (a) provided: "(1) Any person who possesses or has under such person's control any quantity of any controlled substance, except less than one-half ounce of a cannabis-type substance and except as authorized in this chapter, shall be guilty of a class A misdemeanor.

"(2) For a second offense of subdivision (1) of this subsection, the court shall evaluate such person and, if the court determines such person is a drug-dependent person, the court may suspend prosecution of such person and order such person to undergo a substance abuse treatment program.

"(3) For any subsequent offense of subdivision (1) of this subsection, the court may find such person to be a persistent offender for possession of a controlled substance in accordance with [General Statutes §] 53a-40."

Hereinafter, unless otherwise indicated, all references to § 21a-279 (a) in this opinion are to the 2013 revision of the statute.

or article first, §§ 8 and 9, of the Connecticut constitution. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. On August 6, 2014, the defendant was arrested for possession of twenty-eight bags of heroin and charged with possession of narcotics in violation of § 21a-279 (a), and possession of narcotics with intent to sell in violation of General Statutes § 21a-278 (b). On the date of the offense, a violation of § 21a-279 (a) carried a sentence of imprisonment of up to seven years for a first offense.[2] See General Statutes (Rev. to 2013) § 21a-279 (a). Prior to the defendant's conviction and sentencing, but subsequent to his arrest, the legislature amended § 21a-279 (a), with an effective date of October 15, 2015, and reclassified a first offense of § 21a-279 (a) as a misdemeanor punishable by not more than one year of incarceration. See General Statutes (Supp. 2016) § 21a-279 (a).

Following a jury trial, on April 1, 2016, the defendant was found not guilty of possession of narcotics with intent to sell in violation of 21a-278 (b), but guilty of possession of narcotics in violation of § 21a-279 (a). On May 27, 2016, the court, *Shah*, *J.*, sentenced the defendant, pursuant to § 21a-279 (a), to a period of five years of incarceration.

On June 8, 2016, the defendant filed a motion to correct an illegal sentence. On August 23, 2016, defense counsel filed an amended motion to correct an illegal sentence and a supporting memorandum of law, claiming that the defendant's five year sentence exceeded the statutory maximum set forth in § 21a-279 (a), as

[2] The defendant has prior drug convictions, and thus, the state initially charged the defendant as a persistent felony offender in a part B information. Prior to sentencing, however, the state's attorney withdrew that part B information. Therefore, the defendant was sentenced as a first offender pursuant to § 21a-279 (a).

amended by Spec. Sess. P.A. 15-2 (2015 amendment). On the same day, the court heard arguments on the amended motion.

On September 16, 2016, the court denied the defendant's motion to correct an illegal sentence, finding, inter alia, that (1) "there is no language in either the public act or its legislative history indicating a clear intent to apply the amendment retroactively" and (2) the sentence did not violate the defendant's right against excessive and disproportionate punishment under the federal and state constitutions. This appeal followed.

On appeal, the defendant claims that the court improperly denied his motion to correct an illegal sentence because (1) the legislature expressed its intent that the 2015 amendment applies retroactively; and (2) following the amendment to § 21a-279 (a), his sentence now constitutes excessive and disproportionate punishment in violation of the state and federal constitutions. "We review claims that the court improperly denied the defendant's motion to correct an illegal sentence under an abuse of discretion standard." *State* v. *Pagan*, 75 Conn. App. 423, 429, 816 A.2d 635, cert. denied, 265 Conn. 901, 829 A.2d 420 (2003). We address each claim in turn.

I

The defendant first claims that his five year sentence exceeds the statutory maximum set forth in § 21a-279 (a) because the legislature expressed its intent that the 2015 amendment applies retroactively. He claims, as well, that by reason of the rule of amelioration, the statute should be applied retroactively. We are not persuaded.[3]

[3] We also disagree with the defendant's contention that the principles set forth in *State* v. *Kalil*, 314 Conn. 529, 107 A.3d 343 (2014), are inapplicable to the present case. In *Kalil*, our Supreme Court addressed a situation analogous to that of the present case. See id., 550–59 (concluding that amendment to larceny statute did not apply retroactively, where defendant

Whether, as a matter of statutory interpretation, the 2015 amendment may be applied retroactively to crimes committed before its effective date of October 1, 2015, is a question of law over which our review is plenary. See *State* v. *Kalil*, 314 Conn. 529, 552, 107 A.3d 343 (2014); see also *State* v. *Jackson*, 153 Conn. App. 639, 643, 103 A.3d 166 (2014) ("Whether a statute is to be applied retroactively is a question of statutory construction. . . . Issues of statutory construction raise questions of law, over which we exercise plenary review." [Citation omitted; internal quotation marks omitted.]), cert. denied, 315 Conn. 912, 106 A.3d 305 (2015).

"In criminal cases, to determine whether a change in the law applies to a defendant, we generally have applied the law in existence on the date of the offense, regardless of its procedural or substantive nature." (Internal quotation marks omitted.) *State* v. *Kalil*, supra, 314 Conn. 552; accord *In re Daniel H.*, 237 Conn. 364, 377, 678 A.2d 462 (1996). "This principle is derived from the legislature's enactment of savings statutes such as General Statutes § 54-194, which provides that '[t]he repeal of any statute defining or prescribing the punishment for any crime shall not affect any pending prosecution or any existing liability to prosecution and punishment therefor, unless expressly provided in the repealing statute that such repeal shall have that effect,' and General Statutes § 1-1 (t), which provides that '[t]he repeal of an act shall not affect any punishment, penalty or forfeiture incurred before the repeal takes effect, or any suit, or prosecution, or proceeding pending at the time of the repeal, for an offense committed, or for the recovery of a penalty or forfeiture incurred under the act repealed.' " *State* v. *Kalil*, supra, 552. "It is obvious from the clear, unambiguous, plain language of the savings statutes that the legislature intended that [defendants] be prosecuted and sentenced in accordance with

committed crime prior to amendment but was convicted and sentenced thereafter).

and pursuant to the statutes in effect at the time of the commission of the crime. Our courts have repeatedly held that these savings statutes preserve all prior offenses and liability therefor so that when a crime is committed and the statute violated is later amended or repealed, defendants remain liable under the revision of the statute existing at the time of the commission of the crime." (Internal quotation marks omitted.) *State* v. *Jackson*, supra, 153 Conn. App. 644–45.

"We will not give retrospective effect to a criminal statute absent a clear legislative expression of such intent. . . . When the meaning of a statute initially may be determined from the text of the statute and its relationship to other statutes . . . extratextual evidence of the meaning of the statute shall not be considered. . . . When the meaning of a provision cannot be gleaned from examining the text of the statute and other related statutes without yielding an absurd or unworkable result, extratextual evidence may be consulted. . . . Thus . . . every case of statutory interpretation . . . requires a threshold determination as to whether the provision under consideration is plain and unambiguous. This threshold determination then governs whether extratextual sources can be used as an interpretive tool. . . . [T]he fact that . . . relevant statutory provisions are silent . . . does not mean that they are ambiguous. . . . [O]ur case law is clear that ambiguity exists only if the statutory language at issue is susceptible to more than one plausible interpretation." (Citations omitted; internal quotation marks omitted.) Id., 643–44.

The defendant argues that extratextual evidence should be considered in the present case because a "plain language reading of [the statute] results in an absurd and unworkable result." Specifically, the defendant asserts that Spec. Sess. "P.A. 15-2, § 1, was a budget

implementing bill and the legislature has a constitutional duty to pass a balanced budget." He further contends that "[i]t would be absurd to conclude that the legislature would vote to approve this budget implementing bill knowing that the projected fiscal savings in the bill would not be realized . . . ." We disagree.

We begin with the "threshold determination as to whether the provision under consideration is plain and unambiguous." *State* v. *Jackson*, supra, 153 Conn. App. 643. The effective date of the 2015 amendment is October 1, 2015. See Public Acts, Spec. Sess., June, 2015, No. 15-2, § 1 (section "21a-279 of the general statutes is repealed and the following is substituted in lieu thereof [Effective October 1, 2015] . . . ."). The amendment contains no express statement that it applies retroactively. Its silence in this regard, however, does not render it ambiguous. Rather, the absence of any language stating that the amendment applies retroactively indicates that the legislature intended the amendment to apply prospectively only. See *State* v. *Kalil*, supra, 314 Conn. 558; General Statutes §§ 54-194 and 1-1 (t).

Additionally, the legislature knows how to make a statute apply retroactively when it intends to do so. See *State* v. *Kevalis*, 313 Conn. 590, 604, 99 A.3d 196 (2014) ("it is a well settled principle of statutory construction that the legislature knows how to convey its intent expressly" [internal quotation marks omitted]). Thus, if the legislature had intended the 2015 amendment to apply retroactively, it could have used clear and unequivocal language indicating such an intent. It did not do so. A prospective only application of the statute is consistent with our precedent and the legislature's enactment of the savings statutes; see *State* v. *Kalil*, supra, 314 Conn. 552; and, therefore, the statutory language is not susceptible to more than one plausible interpretation. See *State* v. *Jackson*, supra, 153 Conn. App. 644. Because there is no ambiguity in the 2015

amendment, we need not look to its legislative history to ascertain the legislature's intent.[4] We conclude that the court correctly determined that the 2015 amendment does not apply retroactively to the defendant's sentence.

We also reject the defendant's argument that we should adopt the amelioration doctrine and apply it to his sentence. "The amelioration doctrine provides that amendments to statutes that lessen their penalties are applied retroactively." (Internal quotation marks omitted.) *State* v. *Kalil*, supra, 314 Conn. 552. Our Supreme Court expressly has declined to establish that ameliorative changes to criminal statutes apply retroactively, finding that "the doctrine is in direct contravention of Connecticut's savings statutes." (Footnote omitted.) Id., 553. We are bound by this precedent.

On the basis of the foregoing, we conclude that, in the absence of legislative intent that the 2015 amendment

[4] Even if we were to determine that the statute is ambiguous, so as to implicate a review of its legislative history, we are not persuaded that comments from legislators and the fiscal impact statement support the defendant's claim that a plain language reading of the statute leads to "absurd and unworkable results."

As the court aptly noted in its memorandum of decision, "the legislature was clearly aware of the many defendants waiting to be tried and sentenced under the then-existing version of § 21a-279 (a) when they discussed and passed [Spec. Sess.] P.A. 15-2. . . . [I]f the legislature had intended [Spec. Sess.] P.A. 15-2 to apply retroactively, it would have used language clearly indicating the act's retroactive effect, which it did not, either in the public act itself or the act's legislative history."

Additionally, our Supreme Court has recognized that fiscal impact statements are not evidence of legislative intent. See *Butts* v. *Bysiewicz*, 298 Conn. 665, 688 n.22, 5 A.3d 932 (2010). The fiscal impact statement for the 2015 amendment itself even contains a disclaimer, which provides, in relevant part: "The preceding Fiscal Impact statement is prepared for the benefit of the members of the General Assembly, solely for the purposes of information, summarization and explanation and *does not represent the intent of the General Assembly or either chamber thereof for any purpose*." (Emphasis added.) Thus, the fiscal impact statement cannot be utilized as a fulcrum to lever the statute's plain meaning into ambiguity.

applies retroactively, the defendant properly was sentenced pursuant to the statute in effect on the date of the offense for which he was convicted.

II

The defendant next claims that his five year sentence constitutes an excessive and disproportionate punishment in violation of the eighth amendment to the United States constitution and article first, §§ 8 and 9, of the Connecticut constitution. Specifically, the defendant asserts that his "sentence is no longer graduated to the offense" because Spec. Sess. "P.A. 15-2, § 1, and its surrounding legislative history express a change in criminal justice policy in this state, namely, that incarcerating rather than treating drug-dependent individuals no longer comports with our evolving standards of decency." In response, the state claims that the court properly denied the defendant's motion to correct because he failed to establish that his punishment was unconstitutional. The state further argues that this court should not review the defendant's state constitutional claim because he failed to adequately brief the claim under the well established *Geisler*[5] analysis. We agree with the state.

"Our review of the defendant's constitutional claims is plenary." (Internal quotation marks omitted.) *State* v. *Rivera*, 177 Conn. App. 242, 252, 172 A.3d 260 (2017); see also *State* v. *Taylor G.*, 315 Conn. 734, 741, 110 A.3d 338 (2015) ("[a] challenge to [t]he constitutionality of

[5] "In order to construe the contours of our state constitution and reach reasoned and principled results, the following tools of analysis should be considered to the extent applicable: (1) the textual approach . . . (2) holdings and dicta of [the Supreme Court], and the Appellate Court . . . (3) federal precedent . . . (4) sister state decisions or sibling approach . . . (5) the historical approach . . . and (6) economic/sociological considerations." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Geisler*, 222 Conn. 672, 684–85, 610 A.2d 1225 (1992); see also *State* v. *Saturno*, 322 Conn. 80, 102, 139 A.3d 629 (2016).

a statute presents a question of law over which our review is plenary" [internal quotation marks omitted]).

A

We first address the state's argument that the defendant's constitutional claim under article first, §§ 8 and 9, of the Connecticut constitution is inadequately briefed. Specifically, the state argues that the defendant failed to analyze his claim pursuant to the *Geisler* factors, and instead analyzed his claim under a two factor analysis set forth in *State* v. *Santiago*, 318 Conn. 1, 122 A.3d 1 (2015). The defendant maintains that, following S*antiago*, "[a] reviewing court engages in a two stage analysis in determining whether a challenged punishment is unconstitutionally excessive and disproportionate. . . . First, the court looks to 'objective factors' to determine whether the punishment at issue comports with contemporary standards of decency. . . . [Second, the] court must [then] decide whether the constitution permits imposition of the defendant's . . . sentence." We agree with the state that *Geisler* controls, and accordingly, we conclude that the defendant's state constitutional claim is inadequately briefed.

"It is well established that federal constitutional law establishes a minimum national standard for the exercise of individual rights and does not inhibit state governments from affording higher levels of protection for such rights. . . . In several cases, our Supreme Court has concluded that the state constitution provides broader protection of individual rights than does the federal constitution. . . . It is by now well established that the constitution of Connecticut prohibits cruel and unusual punishments under the auspices of the dual due process provisions contained in article first, §§ 8 and 9. Those due process protections take as their hallmark principles of fundamental fairness rooted in our

state's unique common law, statutory, and constitutional traditions. . . . Although neither provision of the state constitution expressly references cruel or unusual punishments, it is settled constitutional doctrine that both of our due process clauses prohibit governmental infliction of cruel and unusual punishments." (Citations omitted; internal quotation marks omitted.) *State* v. *Rivera*, supra, 177 Conn. App. 252–53. "In ascertaining the contours of the protections afforded under our state constitution, we utilize a multifactor approach that we first adopted in [*Geisler*]." *State* v. *Santiago*, 319 Conn. 935, 937 n.3, 125 A.3d 520 (2015). See footnote 5 of this opinion.

We reject the defendant's argument that our Supreme Court, in *State* v. *Santiago*, supra, 318 Conn. 1, abandoned the *Geisler* analysis for claims of cruel and unusual punishment and instead broadly adopted a two part test. Our review of *Santiago* does not support the defendant's interpretation. Contrary to the defendant's assertions, in *Santiago*, the Supreme Court did analyze the defendant's state constitutional claim pursuant to the *Geisler* factors.[6] See *State* v. *Santiago*, supra, 17–46. We therefore conclude that *Geisler* still controls. We note, as well, that this court recently has applied the *Geisler* factors to a claim of cruel and unusual punishment, and we are bound by this court's precedent. See

[6] As further support for our conclusion, subsequent to the release of the decision in *State* v. *Santiago*, supra, 318 Conn. 1, the state filed a motion to stay execution of the judgment in that case, arguing, inter alia, that it "lacked notice that [the Supreme Court] would consider [the various *Geisler*] factors *in evaluating the defendant's claim*." (Emphasis added.) *State* v. *Santiago*, supra, 319 Conn. 939. In denying the state's motion, the court noted that "the state's analysis of the various *Geisler* factors [in its supplemental brief] refutes its contention that it lacked notice." Id. The court further noted that "as long as the state constitutional claim is adequately briefed in accordance with *Geisler*, as it unarguably was in this case, it is this court's responsibility to identify and evaluate all of the relevant factors and considerations so that we may reach the correct constitutional result." (Emphasis omitted.) Id., 940.

State v. *Rivera*, supra, 177 Conn. App. 251–75 (analyzing, pursuant to *Geisler* factors, defendant's claim that "mandatory minimum sentence of twenty-five years of incarceration without the possibility of parole imposed on a juvenile homicide offender" constitutes cruel and unusual punishment).

Absent from the defendant's discussion of his state constitutional claim is an independent analysis of the *Geisler* factors. Accordingly, we deem abandoned his claim under the state constitution, and we decline to review it. See *State* v. *Bennett*, 324 Conn. 744, 748 n.1, 155 A.3d 188 (2017) ("The defendant has asserted various claims under both the state and federal constitutions, but he has not provided an independent analysis of the former in accordance with . . . *Geisler* . . . . Therefore, we deem abandoned any state constitutional claims." [Citation omitted.]); see also *Morrissey-Manter* v. *Saint Francis Hospital & Medical Center*, 166 Conn. App. 510, 526–27, 142 A.3d 363 (claim inadequately briefed on appeal deemed abandoned and court declined to review it), cert. denied, 323 Conn. 924, 149 A.3d 982 (2016).

B

We next address the defendant's argument that his sentence is excessive and disproportionate in violation of the eighth amendment to the United States constitution. The defendant argues that his sentence violates the eighth amendment because it "is out of step with our contemporary standards of decency and serves no penological purpose," given the change in criminal justice policy following the enactment of the 2015 amendment. We are unpersuaded.[7]

[7] We also reject the defendant's argument that his five year sentence is unconstitutional because it was not authorized by law. As we conclude in part I of this opinion, the court correctly sentenced the defendant pursuant to the statute that was in effect on the date he committed the crime, which permitted a sentence of up to seven years of incarceration for a first offense. See General Statutes (Rev. to 2013) § 21a-279 (a). Accordingly, the defen-

"[T]he eighth amendment [to the United States constitution] mandates that punishment be proportioned and graduated to the offense of conviction." *State* v. *Santiago*, supra, 318 Conn. 20. "The eighth amendment's prohibition against cruel and unusual punishment is made applicable to the states through the due process clause of the fourteenth amendment to the United States constitution. . . . [T]he United States Supreme Court has indicated that at least three types of punishment may be deemed unconstitutionally cruel . . . [including] excessive and disproportionate punishments." (Citation omitted; internal quotation marks omitted.) *Dumas* v. *Commissioner of Correction*, 168 Conn. App. 130, 135–36, 145 A.3d 355, cert. denied, 324 Conn. 901, 151 A.3d 1288 (2016).

In addressing an eighth amendment claim, "[a] reviewing court engages in a two stage analysis [to determine] whether a challenged punishment is unconstitutionally excessive and disproportionate. . . . First, the court looks to objective factors to determine whether the punishment at issue comports with contemporary standards of decency. . . . [This includes] the historical development of the punishment at issue, legislative enactments, and the decisions of prosecutors and sentencing juries." (Citations omitted; internal quotation marks omitted.) *State* v. *Santiago*, supra, 318 Conn. 21. Second, "courts must . . . bring their own independent judgments to bear, giving careful consideration to the reasons why a civilized society may accept or reject a given penalty. . . . Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for [the court] ultimately to judge whether the [constitution] permits imposition of the . . . penalty . . . . This analysis necessarily encompasses the question of whether the penalty at issue

dant's five year sentence was authorized by law. See *State* v. *Kalil*, supra, 314 Conn. 552.

promotes any of the penal goals that courts and commentators have recognized as legitimate: deterrence, retribution, incapacitation, and rehabilitation. . . . A sentence materially lacking any legitimate penological justification would be nothing more than the gratuitous infliction of suffering and, by its very nature, disproportionate." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 22–23.

The defendant first asserts that his five year sentence no longer comports to contemporary standards of decency. See id., 21. In support of this claim, the defendant relies primarily on the legislative history surrounding the 2015 amendment and remarks made by the governor about how the 2015 amendment indicates a "systematic change" in the treatment of those convicted of minor possession offenses.

The defendant's focus on the remarks of our legislators does little to support his claim. It bears repeating that the legislature knows how to make the application of a statute retroactive when it wants to do so. See *State* v. *Kevalis*, supra, 313 Conn. 604. It necessarily follows that if the legislature had felt that "extended periods of incarceration are no longer necessary or appropriate forms of punishment for nonviolent drugs offenders," or that a sentence of greater than one year for a first violation of § 21a-279 (a) constituted "cruel and unusual punishment," as the defendant argues, the legislature would have so indicated by making the statute apply retroactively. It did not do so. See part I of this opinion. Further undercutting the defendant's reliance on our legislators' comments is the fact that our legislature enacted the savings statutes, §§ 54-194 and 1-1 (t), to ensure "that [defendants] be prosecuted and sentenced in accordance with and pursuant to the statutes in effect at the time of the commission of the crime. . . . [T]hese savings statutes preserve all prior offenses and liability therefor so that when a crime is

committed and the statute violated is later amended or repealed, defendants remain liable under the revision of the statute existing at the time of the commission of the crime." (Internal quotation marks omitted.) *State* v. *Jackson*, supra, 153 Conn. App. 644–45.

Furthermore, as the court noted in its memorandum of decision, "contrary to the defendant's assertions, neither [Spec. Sess.] P.A. 15-2 nor its legislative history indicate that a five year prison sentence for possession of narcotics imposed based on a persistent history of drug offenses and a failure to complete probation is 'disproportionate and excessive . . . [as] judged by the contemporary, evolving standards of decency that mark the progress of a maturing society.' " We agree. As the defendant concedes, many jurisdictions still treat simple possession as a felony. Further, the 2015 revision to § 21a-279 (a) still permits a defendant to be charged with a felony in certain circumstances. See General Statutes (Supp. 2016) § 21a-279 (a) (3). Thus, the defendant has failed to demonstrate that his sentence no longer comports to contemporary standards of decency using objective indicia such as "the historical development of the punishment at issue, legislative enactments, and the decisions of prosecutors and sentencing juries." (Internal quotation marks omitted.) *State* v. *Santiago*, supra, 318 Conn. 21.

The defendant also has failed to demonstrate that his five year sentence serves no legitimate penological justification. Although the defendant argues that his sentence offers no deterrent value to others who will now receive a maximum sentence of up to one year incarceration for the same offense, he fails to adequately rebut other recognized penological purposes—retribution, incapacitation, and rehabilitation.[8] See *State* v. *Santiago*, supra, 318 Conn. 22.

[8] In its memorandum of decision, the court noted that its decision to impose a five year sentence included, in relevant part, "the need to achieve a specific [and] general deterrent effect, the need for incapacitation, the need to effect rehabilitation, and the need to achieve justice."

On the basis of the foregoing, we conclude that the court properly found that the defendant failed to demonstrate that his five year sentence for a violation of § 21a-279 (a) is disproportionate and excessive in violation of the eighth amendment to the United States constitution. Accordingly, the court did not abuse its discretion in denying the defendant's motion to correct an illegal sentence.

The judgment is affirmed.

In this opinion the other judges concurred.

IN RE KYLLAN V.*
(AC 40437)

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

Syllabus

The respondent father appealed to this court from the judgment of the trial court terminating his parental rights with respect to to his minor child, K. The petitioner, K's mother, sought to terminate the father's parental rights, pursuant to statute (§ 45a-717 [g] [2] [B]), on the ground that K had been denied, by reason of an act or acts of parental commission or omission, the care, guidance or control necessary for K's physical, educational, moral or emotional well-being. K was present in the home when the father had assaulted one of his other children, M, although K was in another room with her half-sister, P, at the time. This court previously upheld the trial court's decision to terminate the father's parental rights as to P and M. The trial court in the present case determined that K's exposure to the incident with M was the same as P's, concluded that the adjudicatory issues were therefore the same and had been fully and fairly litigated in P's case, and applied the doctrine of collateral estoppel in determining that the petitioner had proven the adjudicatory ground by clear and convincing evidence. The court then determined that terminating the father's parental rights was in K's best interest and rendered judgment terminating his parental rights, from which he appealed to this court. *Held* that the trial court improperly

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

applied the doctrine of collateral estoppel in determining that the petitioner had proven the adjudicatory ground by clear and convincing evidence and, thus, a new trial was warranted: although a child's status as a bystander to an act of abuse of a sibling can be sufficient for the termination of parental rights as an act of commission or omission under § 45a-717 (g) (2) (B), the only basis for the trial court's finding in the present case that K had been denied the care, guidance or control necessary for K's physical, educational, moral or emotional well-being as a result of the abuse of M was through collateral estoppel, but because the issue of whether the father's abuse of M resulted in a denial to K of care, guidance or control necessary for her physical, educational, moral or emotional well-being was neither actually litigated nor necessarily determined in the prior proceeding, and because the circumstances of the termination of the father's parental rights as to M and P were separate and distinct from those as to K, collateral estoppel could not apply to preclude the father from litigating whether his abuse of M resulted in the denial of care, guidance or control necessary for K's physical, educational, moral or emotional well-being; moreover, the petitioner's attempt to marshal the facts found by the trial court in support of her argument that the adjudicatory ground was proven without resort to collateral estoppel was unavailing, as the trial court did not state a basis for its finding that the denial of care, guidance or control was established by clear and convincing evidence other than through collateral estoppel, and it was not for this court to find facts.

Argued January 11—officially released February 27, 2018**

Procedural History

Petition by the mother of the minor child to terminate the respondent father's parental rights with respect to the child, brought to the Regional Probate Court for the district of New London and transferred to the Superior Court in the judicial district of New London, Juvenile Matters at Waterford, and tried to the court, *Driscoll, J.*; judgment terminating the respondent's parental rights, from which the respondent appealed to this court. *Reversed; new trial.*

David J. Reich, for the appellant (respondent).

James P. Sexton, with whom were *Megan L. Wade* and, on the brief, *Michael S. Taylor*, for the appellee (petitioner).

** February 27, 2018, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Opinion

NORCOTT, J. The respondent father appeals from the judgment of the trial court terminating his parental rights with respect to his biological daughter, K, pursuant to General Statutes § 45a-717 (g).[1] The respondent claims on appeal that the trial court improperly relied on the adjudicatory findings from a prior proceeding involving two of his other children to support the adjudicatory ground in the present case, namely, that because of a parental act of commission or omission, K was denied care, guidance, or control necessary for her physical, educational, moral, or emotional well-being as required by the statute. We agree with the respondent that the trial court improperly applied collateral estoppel in determining that K was denied the care, guidance, or control necessary for her physical, educational, moral, or emotional well-being as a result of the respondent's act of commission or omission. Accordingly, we reverse the judgment and remand the case for a new trial.

The following facts, which were found by the trial court in its memorandum of decision or are otherwise undisputed, and procedural history are pertinent to our decision. K was born to the petitioner mother and the respondent in 2001. Since shortly after K's birth, the petitioner and the respondent have been in almost constant litigation regarding custody, visitation, and support of K. During this time, the respondent has sought to exercise his parental rights, but the petitioner has opposed any contact between him and K.

[1] General Statutes § 45a-717 (g) provides in relevant part: "At the adjourned hearing or at the initial hearing where no investigation and report has been requested, the court may approve a petition terminating the parental rights . . . if it finds, upon clear and convincing evidence, that (1) the termination is in the best interest of the child, and (2) . . . (B) the child has been denied, by reason of an act or acts of parental commission or omission . . . the care, guidance or control necessary for the child's physical, educational, moral or emotional well-being. . . ."

On March 24, 2012, K was visiting the respondent along with two of her half-siblings, M and P.[2] On that day, the respondent assaulted M while P and K were in another room. On the basis of this assault, the respondent was arrested, convicted, and incarcerated. M and P's mother then filed petitions to terminate the respondent's parental rights as to the two children. *In re Payton V.*, 158 Conn. App. 154, 158, 118 A.3d 166, cert. denied, 317 Conn. 924, 118 A.3d 549 (2015). The court granted the petitions, concluding as to P that the adjudicatory ground of § 45a-717 (g) (2) (B) had been met because, as a result of the respondent's assault of M, which P heard, the respondent was arrested, convicted, and incarcerated, which resulted in the denial to the children of the respondent's financial and emotional support and guidance. Id. This court affirmed the termination of the respondent's parental rights as to M and P. Id., 167.

On June 16, 2015, six days after this court released its decision in *In re Payton V.*, the petitioner filed a petition in the Probate Court seeking to terminate the respondent's parental rights as to K pursuant to, inter alia, § 45a-717 (g) (2) (B). The case was then transferred to the Superior Court for Juvenile Matters. See General Statutes § 45a-715 (g).

Before trial, the petitioner's counsel moved the court, in essence, to apply the doctrine of collateral estoppel to the adjudicative facts underlying *In re Payton V.*, specifically, that the respondent had committed an assault through a deliberate and nonaccidental act that resulted in serious bodily injury to another child of the respondent. See General Statutes § 45a-717 (g) (2) (F). The respondent's counsel objected on the basis that the prior proceeding was not applicable to K. The court

[2] M and P share the same mother, who is different from K's mother, the petitioner in this case. The respondent is the father of all three children.

then stated: "[T]o the extent that [the petitioner] has filed a claim that [K] has been denied care, guidance, control necessary, et cetera, by reason of acts of parental commission or omission by [the respondent], that issue was . . . fully litigated." The court clarified that the finding in *In re Payton V.* that M had been abused was limited to whether M or P had been denied care, guidance, or control by reason of an act of commission or omission by the respondent; see *In re Payton V.*, supra, 158 Conn. App. 158; not whether M suffered serious bodily injury. See id., 158 n.3. After that clarification, the court granted the motion. The trial then ensued.

In its memorandum of decision terminating the respondent's parental rights, the court noted: "[K] also was present at [the respondent's] home at the time of [the respondent's] assault of the child's half-brother, [M], and her exposure to the incident was the same as her half-sister, [P]." The court then found by clear and convincing evidence that the criteria for § 45a-717 (g) (2) (B) had been met because "[K] is in privity with [P], so the adjudicatory issues are the same," and applied collateral estoppel as to the entire adjudicatory ground. After then finding that termination of parental rights was in the best interests of K, the court terminated the respondent's parental rights. This appeal followed.

On appeal, the respondent claims that the trial court improperly relied on the adjudicatory findings from a prior proceeding involving two of his other children to support the same adjudicatory ground in the present case, namely, that because of a parental act of commission or omission, K was denied care, guidance, or control necessary for her physical, educational, moral, or emotional well-being as required by statute. Specifically, the respondent argues that collateral estoppel would be appropriate only to determine whether the act of commission or omission had occurred, not whether

K was denied care, guidance, or control necessary for her physical, educational, moral, or emotional well-being. We agree with the respondent.

We begin with the applicable legal principles. Termination of parental rights is defined as "the complete severance by court order of the legal relationship, with all its rights and responsibilities, between the child and the child's parent . . . ." General Statutes § 45a-707 (8). "It is, accordingly, a most serious and sensitive judicial action." (Internal quotation marks omitted.) *In re Jessica M.*, 217 Conn. 459, 464, 586 A.2d 597 (1991).

General Statutes § 45a-715 (a) (1) permits a child's parent to petition the Probate Court to terminate the parental rights of that child's other parent. In order to terminate a parent's parental rights under § 45a-717, the petitioner must prove by clear and convincing evidence at least one of the seven grounds for termination delineated in § 45a-717 (g) (2) and that termination is in the best interest of the child. General Statutes § 45a-717 (g) (1).

"A hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more grounds for termination of parental rights set forth in . . . § 45a-717 (g) (2) has been proven by clear and convincing evidence. If the trial court determines that at least one of the statutory grounds for termination has been proved, then it proceeds to the dispositional phase. . . . In the dispositional phase, there must be a showing by clear and convincing evidence whether termination is in the best interests of the child." (Internal quotation marks omitted.) *In re Baciany R.*, 169 Conn. App. 212, 225–26, 150 A.3d 744 (2016).

"Clear and convincing proof is a demanding standard denot[ing] a degree of belief that lies between the belief

that is required to find the truth or existence of the [fact in issue] in an ordinary civil action and the belief that is required to find guilt in a criminal prosecution. . . . [The burden] is sustained if evidence induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist." (Internal quotation marks omitted.) *Chief Disciplinary Counsel* v. *Rozbicki*, 326 Conn. 686, 701, 167 A.3d 351 (2017).

Ordinarily, we review the trial court's subordinate factual findings for clear error and its determination that a ground for termination of parental rights has been proven for evidentiary sufficiency; *In re Egypt E.*, 327 Conn. 506, 525–26, 175 A.3d 21 (2018); however, "[a]pplication of the doctrine of collateral estoppel is a question of law over which we exercise plenary review." *Lighthouse Landings, Inc.*, v. *Connecticut Light & Power Co.*, 300 Conn. 325, 345, 15 A.3d 601 (2011).

"[C]ollateral estoppel precludes a party from relitigating issues and facts actually and necessarily determined in an earlier proceeding between the same parties or those in privity with them upon a different claim. . . . Furthermore, [t]o invoke collateral estoppel the issues sought to be litigated in the new proceeding must be identical to those considered in the prior proceeding." (Citations omitted; internal quotation marks omitted.) *Mazziotti* v. *Allstate Ins. Co.*, 240 Conn. 799, 812, 695 A.2d 1010 (1997).

"The common-law doctrine of collateral estoppel, or issue preclusion, embodies a judicial policy in favor of judicial economy, the stability of former judgments and finality. . . . Collateral estoppel means simply that when *an issue of ultimate fact* has once been determined by a valid and final judgment, that issue cannot

again be litigated between the same parties in any future lawsuit. . . . Issue preclusion arises when an issue is actually litigated and determined by a valid and final judgment, and that determination is essential to the judgment. . . . Collateral estoppel express[es] no more than the fundamental principle that once a matter has been fully and fairly litigated, and finally decided, it comes to rest." (Emphasis added; internal quotation marks omitted.) *In re Jah'za G.*, 141 Conn. App. 15, 26, 60 A.3d 392, cert. denied 308 Conn. 926, 64 A.3d 329 (2013). "An issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined. . . . An issue is necessarily determined if, in the absence of a determination of the issue, the judgment could not have been validly rendered." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Cadle Co.* v. *Gabel*, 69 Conn. App. 279, 294, 794 A.2d 1029 (2002).

Section 45a-717 (g) (2) (B) specifies certain actions that constitute prima facie evidence of an act of commission or omission, including sexual molestation and exploitation, severe physical abuse, or a pattern of abuse. The statute, however, does not limit acts of commission or omission to just these three types of acts. Recently, our Supreme Court noted the variety of cases in which this court has affirmed the termination of parental rights based on either § 45a-717 (g) (2) (B) or the corresponding statute for proceedings initiated by the Commissioner of Children and Families, General Statutes § 17a-112 (j) (3) (C). *In re Egypt E.*, supra, 327 Conn. 529–30. In listing cases that "demonstrate the statute's wide applicability"; id., 529; our Supreme Court cited specifically to *In re Payton V.*, as support that "abusing a sibling in a child's presence or within earshot" can constitute an act of commission or omission under either of the applicable statutes. Id., 530. The court then noted that "[i]n all of the foregoing cases

[including *In re Payton V.*], the children at issue suffered physical, emotional, and/or psychological harm as a result of their parents' various acts of commission or omission." Id.

Thus, it is beyond dispute that status as a bystander to an act of abuse of a sibling is grounds for termination as an act of commission or omission under § 45a-717 (g) (2) (B). The respondent does not dispute this notion nor that his abuse of M while K was in the same room as P could meet this criteria; he argues, however, that for the adjudicatory ground to be met, the petitioner must also "show that, *as a result* of the parental acts of commission or omission, the care, guidance, or control necessary for the child's well-being has been denied." (Emphasis altered; internal quotation marks omitted.) *In re Egypt E.*, supra, 327 Conn. 527.

In the present case, the only basis from which the trial court found the denial of the care, guidance, or control necessary for K's physical, educational, moral, or emotional well-being as a result of the abuse of M was through collateral estoppel. For collateral estoppel to apply to this finding via *In re Payton V.*, however, the issue must have been actually litigated and necessarily determined *as it pertains to K*. Neither happened here. When the trial court rendered judgment terminating the respondent's parental rights as to M and P, it was neither determined nor necessary to determine whether the respondent's abuse of M resulted in the denial to K of care, guidance, or control necessary for her physical, educational, moral, or emotional well-being. Because the circumstances of the termination of the respondent's parental rights as to M and P are separate and distinct from those as to K, collateral estoppel cannot apply to preclude the respondent from litigating whether his abuse of M resulted in the denial of care,

guidance, or control necessary for K's physical, educational, moral, or emotional well-being.[3]

In the alternative, the petitioner attempts to marshal the facts as found by the trial court to argue that the denial of care, guidance, or control necessary for K's physical, educational, moral, or emotional well-being is apparent without resort to collateral estoppel. The trial court, however, did not state a basis for its finding that the denial of care, guidance, or control was established by clear and convincing evidence other than through collateral estoppel. To determine whether there is sufficient evidence to terminate the respondent's parental rights as to K, there must be subordinate factual findings. *In re Egypt E.*, supra, 327 Conn. 525–26. "It is well settled that we do not find facts." (Internal quotation marks omitted.) *Kearse* v. *Taylor*, 165 Conn. App. 780, 791, 140 A.3d 389 (2016). Because we will not usurp the role of the fact finder, we leave it to the trial court to determine on remand if there is sufficient evidence to prove the adjudicatory ground.

Likewise, we find the petitioner's argument that *In re Payton V.* is binding on this court in determining whether the adjudicatory ground in this case has been met unpersuasive. We apply precedent to facts. See, e.g., *Green* v. *Commissioner of Correction*, 172 Conn.

[3] Although the trial court found that K and P are "in privity" with each other, we note that the use of this term in this context is inapposite because privity only concerns the party against whom collateral estoppel is claimed and because the respondent's parental rights as to K and P are separate and distinct. "While it is commonly recognized that privity is difficult to define, the concept exists to ensure that the interests of the party *against whom collateral estoppel . . . is being asserted* have been adequately represented because of *his* purported privity with a party at the initial proceeding." (Emphasis added; internal quotation marks omitted.) *Mazzioti* v. *Allstate Ins. Co.*, supra, 240 Conn. 813. Likewise, "[a] key consideration in determining the existence of privity is the sharing of the same legal right by the parties allegedly in privity." (Internal quotation marks omitted.) *Aetna Casualty & Surety Co.* v. *Jones*, 220 Conn. 285, 304, 596 A.2d 414 (1991).

App. 585, 599, 160 A.3d 1068, cert. denied, 326 Conn. 907, 163 A.3d 1206 (2017). There was no finding as to whether K has been denied the care, guidance, or control necessary for her physical, educational, moral, or emotional well-being other than through collateral estoppel, and that finding is not in accord with the law. We will not use precedent to make findings that the trial court did not. Such a holding would undermine and circumvent our collateral estoppel jurisprudence.

Because we hold that collateral estoppel was improperly applied and there were no other factual findings to support that the respondent denied K the care, guidance, or control necessary for her physical, educational, moral, or emotional well-being as required by § 45a-717 (g) (2) (B), the court improperly reached the dispositional phase to determine the best interests of the child. *In re Valerie D.*, 223 Conn. 492, 511, 613 A.2d 748 (1992) ("[o]ur statutes and case law make it crystal clear that the determination of the child's best interests comes into play only *after* statutory grounds for termination of parental rights have been established by clear and convincing evidence" [emphasis in original]).[4]

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

In this opinion the other judges concurred.

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[4] Because we determine that a new trial is necessary, we do not address whether this court's holding in *In re Carla C.*, 167 Conn. App. 248, 262, 143 A.3d 677 (2016), which pertained to the ground of no ongoing parent-child relationship pursuant to § 45a-717 (g) (2) (C), should be extended to include whether a parent who may be partially responsible for the denial of care, guidance, or control necessary for the child's physical, educational, moral, or emotional well-being by the other parent can then seek termination of parental rights on that ground.