STATE OF CONNECTICUT *v.* JEFFREY SMITH
(AC 40398)

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

Syllabus

The defendant, who had been convicted of two counts of the crime of kidnapping in the first degree, and of felony murder, robbery in the first degree, and manslaughter in the first degree, appealed from the trial court's denial of his motion to correct an illegal sentence. *Held*:

1. The defendant's claim that his sentence violated his fifth amendment protection against double jeopardy was unavailing: the defendant's sentence for both felony murder and the underlying offenses of kidnapping and robbery did not violate double jeopardy, as the legislature clearly intended multiple punishments for felony murder and the predicate offenses, and although a conviction for felony murder and manslaughter required proof that the defendant caused the victim's death, there was no such requirement for the counts charging robbery and kidnapping; furthermore, although the defendant was convicted of two counts of kidnapping of a single victim, each count alleged a violation of a different subdivision of the kidnapping statute (§ 53a-92 [a] [2] [A] and [B]), which were separate offenses for double jeopardy purposes given that they each required proof of a fact that the other did not.
2. The trial court did not abuse its discretion in denying the defendant's motion to correct an illegal sentence and determining that the sentencing court did not improperly merge the defendant's convictions for felony murder and manslaughter in the first degree instead of vacating the manslaughter conviction; although the defendant claimed that vacatur was required pursuant to *State* v. *Polanco* (308 Conn. 242), which established that the proper remedy for a defendant convicted of greater and lesser included offenses in violation of double jeopardy was vacatur and not merger, and *State* v. *Miranda* (317 Conn. 741), which extended the rule of *Polanco* to cases involving cumulative homicide convictions arising from the killing of a single victim, the rules announced in *Polanco* and *Miranda* did not apply retroactively to the defendant's sentence, as the defendant's conviction had long been final at the time when the rules in *Polcano* and *Miranda* were established, and both *Polanco* and *Miranda* involved the exercise of our Supreme Court's supervisory authority and announced rules that were based strictly on policy considerations that did not carry constitutional implications.

Argued December 7, 2017—officially released March 27, 2018

Procedural History

Substitute information charging the defendant with two counts of the crime of kidnapping in the first degree, and with the crimes of capital felony, murder, felony murder and robbery in the first degree, brought to the Superior Court in the judicial district of New London and tried to the jury before the court, *Schimelman, J.*; verdict and judgment of guilty of two counts of kidnapping in the first degree, and of felony murder, robbery in the first degree and the lesser included offense of manslaughter in the first degree; thereafter,

the court, *Strackbein*, *J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed. *Affirmed*.

Jeffrey Smith, self-represented, the appellant (defendant).

Michael L. Regan, state's attorney, for the appellee (state).

Opinion

BISHOP, J. The defendant, Jeffrey Smith, appeals from the judgment of the trial court denying his motion to correct an illegal sentence. On appeal, the defendant argues that the court abused its discretion in denying his motion. Specifically, the defendant claims that his sentence violates his fifth amendment protection against double jeopardy, which is applied to the states through the fourteenth amendment to the United States constitution. The defendant also argues that the principles our Supreme Court established in *State* v. *Polanco*, 308 Conn. 242, 61 A.3d 1084 (2013), and *State* v. *Miranda*, 317 Conn. 741, 120 A.3d 490 (2015), should be applied retroactively to the circumstances of his case. We affirm the judgment of the trial court.

The court's memorandum of decision sets out the relevant facts and procedural history. "The defendant . . . was charged in a six count information dated July 9, 2001, with capital felony . . . in violation of [General Statutes (Rev. to 1997) § 53a-54b (5)], murder in violation of [General Statutes (Rev. to 1997) § 53a-54a], felony murder in violation of [General Statutes (Rev. to 1997)] § 53a-54c, [two counts of] kidnapping in the first degree . . . in violation of [General Statutes §§] 53a-92 (a) (2) (A) [and (B)] and robbery in the first degree in violation of [General Statutes] § 53a-134 (a) (1).[1]

[1] Hereinafter, unless otherwise indicated, all references to §§ 53a-54a, 53a-54b, and 53a-54c are to the 1997 revision of the statutes.

"On August 18, 2005, after a jury trial before the *Hon. Stuart Schimelman*, the jury returned verdicts of guilty on felony murder, manslaughter [in the first degree in violation of General Statutes § 53a-55], both kidnapping counts and the robbery count. [The defendant] was acquitted on capital felony and murder.[2]

"The trial court merged the conviction on manslaughter with the felony murder [conviction] and sentenced the defendant to sixty years [of] imprisonment. The defendant was also sentenced to concurrent sentences of twenty-five years on each kidnapping count concurrently and twenty years on the robbery count all concurrent to each other but consecutive to the felony murder sentence. The total effective sentence was eighty-five years to serve." (Footnotes added.)

On August 6, 2015, the defendant, representing himself,[3] filed a motion to correct an illegal sentence pursuant to Practice Book § 43-22, and filed an amended motion on November 10, 2015. In his motions, the defendant made the following claims to support his double jeopardy argument: (1) he was unconstitutionally charged with three homicide offenses for a single act of homicide; (2) his acquittal on the capital felony charge barred prosecution on the kidnapping charges because the capital felony incorporated the kidnapping counts; (3) he was unlawfully convicted of felony murder as well as the underlying predicate offenses of kidnapping and robbery; (4) he was unlawfully convicted of two counts of kidnapping for a single act of kidnapping;

[2] Although acquitted on the murder charge, the defendant was convicted of the lesser included offense of manslaughter in the first degree.

[3] On November 10, 2015, the Public Defender's Office filed an *Anders* brief, moving to withdraw from representing the defendant on his motion to correct an illegal sentence, concluding that the motion was without merit. See *Anders* v. *California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). After the court granted counsel's motion to withdraw, the defendant continued to pursue the motion to correct as a self-represented party.

and (5) the court's merger of the felony murder and manslaughter convictions was improper under *Polanco* and *Miranda*, and the court instead should have vacated the manslaughter conviction. For relief, the defendant requested that the court vacate the conviction as to the offenses that he alleged violated double jeopardy and release him on the basis of time served on the robbery conviction.

The court denied the defendant's motion on June 27, 2016. In its decision, the court stated: "The defendant believes that the [s]tate cannot charge him with multiple counts of murder and/or kidnapping. This is erroneous. The information in a criminal prosecution may charge various aspects of the crimes alleged. The jury, after hearing the evidence and the instructions to the jury by the judge may find a defendant guilty or not guilty on any or all of the charges. Here, the jury found the defendant guilty of felony murder, manslaughter, robbery and two counts of kidnapping. The jury did not find the defendant guilty of capital felony and murder. The defendant erroneously believes [that] an acquittal on capital felony murder should exonerate him on all counts of murder. The elements of the charges for which the defendant was found guilty were met and the judge sentenced him accordingly." The court also determined that, based on principles of retroactivity, "the 2013 decision in *Polanco* and 2015 decision in *Miranda*, which were based on our Supreme Court's supervisory authority, do not apply retroactively to the defendant's case." This appeal followed.

"We review claims that the court improperly denied the defendant's motion to correct an illegal sentence under an abuse of discretion standard. . . . The jurisdiction of the sentencing court terminates when the sentence is put into effect, and that court may no longer take any action affecting the sentence unless it has been expressly authorized to act. . . . The judicial authority

may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner. . . . An illegal sentence is essentially one which exceeds the relevant statutory maximum limits, violates the defendant's right against double jeopardy, is ambiguous, or is internally contradictory." (Citations omitted; internal quotation marks omitted.) *State* v. *Pagan*, 75 Conn. App. 423, 429, 816 A.2d 635, cert. denied, 265 Conn. 901, 829 A.2d 420 (2003).

I

On appeal, the defendant argues that the court abused its discretion in denying his motion to correct an illegal sentence and he asserts several claims to support the alleged double jeopardy violations. The state responds that the defendant's double jeopardy arguments are without merit. We agree with the state.

"The double jeopardy clause of the fifth amendment to the United States constitution provides: [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. The double jeopardy clause [applies] to the states through the due process clause of the fourteenth amendment. . . . This constitutional guarantee prohibits not only multiple trials for the same offense, but also multiple punishments for the same offense in a single trial. . . . Although the Connecticut constitution does not include a double jeopardy provision, the due process guarantee of article first, § 9, of our state constitution encompasses [the] protection against double jeopardy. . . .

"Double jeopardy analysis in the context of a single trial is a two-step process. First, the charges must arise out of the same act or transaction. Second, it must be determined whether the charged crimes are the same

offense. Multiple punishments are forbidden only if both conditions are met. . . .

"Traditionally we have applied the *Blockburger* [v. *United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932)] test to determine whether two statutes criminalize the same offense, thus placing a defendant prosecuted under both statutes in double jeopardy: [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. . . . This test is a technical one and examines only the statutes, charging instruments, and bill of particulars as opposed to the evidence presented at trial." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Nixon*, 231 Conn. 545, 549–51, 651 A.2d 1264 (1995).

"[T]he *Blockburger* rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history. . . . Double jeopardy protection against cumulative punishments is only designed to ensure that the sentencing discretion of the courts is confined to the limits established by the legislature. . . . Where . . . a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the same conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial. . . . The *Blockburger* test is a rule of statutory construction, and because it serves as a means of discerning [legislative] purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent. . . . The language, structure and legislative history of a statute can provide evidence of this intent." (Citations omitted; internal quotation marks omitted.)

State v. *Greco*, 216 Conn. 282, 292–93, 579 A.2d 84 (1990). A defendant properly may be convicted and sentenced for the crimes of felony murder and the predicate offenses. See id., 297–98; see also *State* v. *Gonzalez*, 302 Conn. 287, 318, 25 A.3d 648 (2011).

The defendant's double jeopardy claim fails with respect to the convictions for felony murder and its predicate offenses. In *State* v. *Greco*, supra, 216 Conn. 297, our Supreme Court concluded that the legislature clearly intended multiple punishments for felony murder and the underlying predicate offenses. This conclusion relieves us of the need to apply the *Blockburger* test to this aspect of the defendant's claim. See id., 292–93. Therefore, the defendant's kidnapping and robbery convictions do not violate double jeopardy even though they are the predicate offenses for the defendant's felony murder conviction.[4]

The defendant's alleged double jeopardy violations regarding his remaining convictions lack merit because each crime with which the defendant was charged and of which he was convicted requires proof of a fact that the others do not. For example, the capital felony count pursuant to § 53a-54b (5) requires proof of an intent to kill. In contrast, a conviction for manslaughter in the first degree and felony murder, in violation of §§ 53a-55 and 53a-54c, respectively, does not require proof of such an intent and, instead, requires proof that the defendant caused the victim's death. It goes without saying that the kidnapping and robbery counts neither

[4] The defendant also argues that his sixty year sentence for felony murder exceeded the statutory maximum. We reject this claim pursuant to *State* v. *Adams*, 308 Conn. 263, 273, 63 A.3d 934 (2013), which concluded that felony murder was punishable as a class A felony. See id., 274 (The appropriate sentence "for the class A felony of murder, [is] a term not less than twenty-five years nor more than life . . . . General Statutes § 53a-35b, in turn, provides that [a] sentence of life imprisonment means a definite sentence of sixty years . . . ." [Internal quotation marks omitted.]).

require proof of an intent to kill nor proof that the defendant caused the victim's death. See General Statutes §§ 53a-92 (a) (2) (A) and (B) (kidnapping in first degree) and 53a-134 (a) (1) (robbery in first degree).

Finally, we reject the defendant's claim that his convictions for two counts of kidnapping of a single victim violate double jeopardy. The defendant was convicted of one count under § 53a-92 (a) (2) (A), and one count under § 53a-92 (a) (2) (B).[5] Our Supreme Court has held that subdivisions (A) and (B) are separate offenses for double jeopardy purposes. *State* v. *Tweedy*, 219 Conn. 489, 496, 594 A.2d 906 (1991) ("the charged crimes of kidnapping in the first degree under subdivisions [A] and [B] of § 53a-92 [a] [2] are separate offenses for double jeopardy purposes" because each requires proof of element that other does not). Accordingly, the defendant's claim of a double jeopardy violation is unavailing.

II

The defendant also claims that the court abused its discretion in denying his motion to correct an illegal sentence because during the sentencing phase, the court merged his convictions for felony murder and manslaughter in the first degree. The defendant argues that *Polanco* and *Miranda* require vacatur, not merger, when sentencing a defendant for cumulative homicide convictions. The state responds that, because our Supreme Court acted pursuant to its supervisory authority when it established the rules of *Polanco* and *Miranda*, the guidance of these cases does not apply retroactively to the defendant's case. Although our

[5] General Statutes § 53a-92 (a) provides in relevant part: "A person in guilty of kidnapping in the first degree when he abducts another person and . . . (2) he restrains the person abducted with intent to (A) inflict physical injury upon him or violate or abuse him sexually; or (B) accomplish or advance the commission of a felony . . . ."

Supreme Court has not addressed the issue of whether *Polanco* and *Miranda* apply retroactively, we conclude that, on the basis of well established principles of retroactivity, *Polanco* and *Miranda* do not apply retroactively and, accordingly, they provide no relief to the defendant.

"It is well settled that [a]ppellate courts possess an inherent supervisory authority over the administration of justice. . . . The exercise of our supervisory powers is an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of the particular trial but also for the perceived fairness of the judicial system as a whole. . . .

"We recognize that this court's supervisory authority is not a form of free-floating justice, untethered to legal principle. . . . Rather, the rule invoking our use of supervisory power is one that, as a matter of policy, is relevant to the perceived fairness of the judicial system as a whole, most typically in that it lends itself to the adoption of a procedural rule that will guide lower courts in the administration of justice in all aspects of the [adjudicatory] process. . . . Indeed, the integrity of the judicial system serves as a unifying principle behind the seemingly disparate use of [this court's] supervisory powers." (Citations omitted; internal quotation marks omitted.) *In re Yasiel R.*, 317 Conn. 773, 789–90, 120 A.3d 1188 (2015).

"Our Supreme Court has specifically stated: In exercising our supervisory power we have frequently given only prospective effect to changes strictly on policy considerations that do not carry constitutional implications." (Internal quotation marks omitted.) *Holloway* v. *Commissioner of Correction*, 72 Conn. App. 244, 250, 804 A.2d 995, cert. denied, 261 Conn. 944, 808 A.2d 1136

(2002); see also *In re Daniel N.*, 323 Conn. 640, 150 A.3d 657 (2016) (holding retroactive application of rule would exceed scope of supervisory authority). "In the past, we have not been consistent in how we have applied such new rules. In some cases, we have announced rules under the court's supervisory power only prospectively. . . . Yet, in other cases, we have applied such rules retroactively to the facts of the case in which the rule is announced. . . . [T]here has been no rhyme or reason as to when the court has applied a new rule prospectively or retroactively." (Citations omitted; footnote omitted.) *In re Yasiel R.*, supra, 317 Conn. 799–801 (*Zarella*, *J.*, concurring in part and dissenting in part).

"We undermine the rule of law when we promulgate a new rule under the court's supervisory authority and then reverse a trial court's judgment on the ground that the trial court had failed to comply with that new rule, which did not exist at the time of trial." Id., 802 (*Zarella*, *J.*, concurring in part and dissenting in part). "Most importantly, whatever the cost to individual litigants of not applying a rule retroactively, it would be vastly outweighed by the benefits of adhering to the rule of law." Id., 804 (*Zarella*, *J.*, concurring in part and dissenting in part). "Limiting our use of supervisory authority to creating only prospective rules therefore will not constrain our ability to appropriately oversee and administer the system of justice." (Footnote omitted.) Id., 805 (*Zarella*, *J.*, concurring in part and dissenting in part).

"[J]udgments that are not by their terms limited to prospective application are presumed to apply retroactively . . . [and] this general rule applies to cases that are pending and not cases that have resulted in final judgments." (Internal quotation marks omitted.) *State* v. *Elias G.*, 302 Conn. 39, 45, 23 A.3d 718 (2011). "State

convictions are final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari [to the United States Supreme Court] has elapsed or a timely petition has been finally denied." (Internal quotation marks omitted.) *Beard* v. *Banks*, 542 U.S. 406, 411, 124 S. Ct. 2504, 159 L. Ed. 2d 494 (2004). Where the court has not announced a constitutional procedural rule, it should not be given retroactive application. *Johnson* v. *Warden*, 218 Conn. 791, 797–98, 591 A.2d 407 (1991).

The application of these norms leads us to the conclusion that the rule of *Polanco* and *Miranda* should not be accorded retroactive application. The following additional procedural facts are relevant to this conclusion. The defendant was convicted and sentenced in 2005. After this court affirmed his conviction, our Supreme Court denied his petition for certification in 2008. See *State* v. *Smith*, 107 Conn. App. 746, 946 A.2d 926, cert. denied, 288 Conn. 905, 953 A.2d 650 (2008). There is nothing in the record showing that the defendant filed a petition for a writ of certiorari to the United States Supreme Court, and pursuant to rule 13 of the Rules of the Supreme Court of the United States, such a petition must be filed within ninety days after entry of the judgment by our Supreme Court. Accordingly, when the rules in *Polanco* and *Miranda* were established in 2013 and 2015 respectively, the defendant's 2005 conviction had long been final.

In *State* v. *Polanco*, supra, 308 Conn. 259–60, our Supreme Court exercised its supervisory authority to establish that the proper remedy for a defendant convicted of greater and lesser included offenses in violation of double jeopardy was vacatur and not merger. The court concluded that "[i]n the present case . . .

we are not inclined to express an opinion on the constitutionality of the merger of convictions approach, specifically, whether after *Rutledge* [v. *United States*, 517 U.S. 292, 116 S. Ct. 1241, 134 L. Ed. 2d 419 (1996)], that approach remains a constitutionally permissible alternative to vacatur. . . . [O]ur supervisory powers are invoked only in the rare circumstance where [the] traditional protections are inadequate to ensure the fair and just administration of the courts . . . . In the present case, invocation of those powers is appropriate, because, first, the jurisprudential underpinnings to this court's approval of the merger approach . . . have since been repudiated, and, second, [that] remedy . . . is now at odds with the remedy utilized almost uniformly by the Circuit Courts of Appeals." (Citations omitted; internal quotation marks omitted.) Id., 256–58. Later, in *State* v. *Miranda*, supra, 317 Conn. 751, the court extended the rule of *Polanco* to cases involving cumulative homicide convictions arising from the killing of a single victim. In so doing, the court cited the same policy considerations that bore on its decision in *Polanco*. See id., 750–53.

The court in *Polanco* expressly declined to opine on the constitutional aspect of the merger of convictions approach. Instead, the court made clear that it was for policy reasons that vacatur was preferred over merger in a situation involving multiple homicide convictions. Similarly, in *Miranda*, the court ruled on the basis of policy, not constitutional considerations. In order to avoid "undermin[ing] the rule of law"; *In re Yasiel R.*, supra, 317 Conn. 802 (*Zarella*, *J.*, concurring in part and dissenting in part); and because our Supreme Court decided *Polanco* and *Miranda* on the basis of policy considerations, we decline to apply *Polanco* and *Miranda* retroactively in this case. Accordingly, the court did not abuse its discretion in denying the defendant's motion to correct and concluding that the sentencing court did not improperly merge the defendant's

convictions for felony murder and manslaughter in the first degree instead of vacating the manslaughter conviction as *Polanco* and *Miranda* now require.

The judgment is affirmed.

In this opinion the other judges concurred.

LUZ E. BUENO ET AL. *v.* MICHAEL FIRGELESKI ET AL.
(AC 39074)

Lavine, Elgo and Harper, Js.

Syllabus

The plaintiff landowners sought a judgment declaring void and unenforceable a restrictive covenant contained in a deed to certain of their real property to enable them to subdivide the property and to sell a portion of it for development. The plaintiffs' property was originally part of thirty acres of farmland in Darien that included a homestead. The defendants own lots that are adjacent to the plaintiffs' property and were created from a portion of the farmland. Certain of the defendants own land in the B subdivision, and other defendants own land in the W subdivision. In 1934, the beneficiaries of a life estate in the farmland initiated a partition action seeking permission to sell the land, due to changing economic and societal circumstances. Thereafter, M acquired approximately two acres of the farmland that included the homestead. In 1941, the Superior Court ordered a committee to convey to V approximately one and one-half acres of the farmland that were adjacent to M's property. The committee deed conveying the property contained the subject restrictive covenant, which, inter alia, permitted only one dwelling on the premises and set certain building setback requirements. M and V subsequently conveyed their properties to S and his wife, who, in turn, sold a portion of the property they had acquired from V to the plaintiffs, and that property was subject to the restrictive covenant. S and his wife then sold the remainder of their property, including a triangularly shaped area of land, and the deed of conveyance stated that the property was subject to the restrictive covenant insofar as it affected the premises. That property is now the W subdivision, which is comprised of three lots with single-family houses on them. Lot 2 contains the original homestead and lot 3, now owned by two of the defendants, includes the triangularly shaped area. The deed to lot 3 stated that the premises were subject to the effect, if any, of the restrictive covenant. The remainder of the original farmland is now the B subdivision, which

is comprised of thirty-one lots, four of which are owned by the other defendants. None of the deeds to the lots in the B subdivision contained the restrictive covenant. After a trial to the court, the trial court rendered judgment in favor of the plaintiffs, declaring that the relevant portions of the restrictive covenant were unenforceable by the defendants due primarily to a significant and permanent change of circumstances that frustrated the purpose for creating the restriction. On the defendants' appeal to this court, *held*:

1. The defendants could not prevail on their claim that three of the trial court's factual findings were not supported by the evidence, as those findings were not clearly erroneous and the defendants failed to demonstrate how those findings affected the court's ultimate, and dispositive, conclusion that the restriction was unenforceable due to a permanent and substantial change in circumstances:

   a. The trial court properly found that lot 3 violated the restrictive covenant in its chain of title; when the W subdivision was created and houses were constructed on lots 1 and 3 in addition to the preexisting homestead on lot 2, the restriction that limited the number of dwellings on the entire premises to one was violated, the house on lot 3 violated the restriction that no building was to be erected within twenty-five feet of the southerly boundary of the premises, and even if the court's finding was erroneous, the defendants were not harmed by it, as it was not the basis of the court's conclusion that the restrictive covenant was unenforceable due to a significant change in circumstances.

   b. The trial court properly found that the homestead was the intended beneficiary of the restrictive covenant; when viewed in the context of the historical development of the original farmland property, including the W and B subdivisions, and the language, or lack thereof, contained in the relevant deeds, the restrictive covenant clearly was intended to protect the homestead from the suburban development and encroachment taking place in Darien at the time the committee conveyed the approximately one and one-half acres of the farmland to V.

   c. The trial court's finding that the dominant estate did not include the B subdivision was supported by the evidence; the restrictive covenant was intended to benefit the homestead and was not contained in any of the deeds to the lots in the B subdivision, and if the grantor had intended to benefit the lots in the B subdivision by restricting development, it could fairly be assumed that the grantor would have similarly restricted development there.

2. The defendants could not prevail on their claim that the court erred by going beyond the four corners of the relevant deeds in interpreting the "effect, if any" language in the chain of title to lot 3: the descriptions of the restrictive covenant in the deeds conveying all or a portion of the land belonging to the parties were not consistent, and, given that ambiguity, it was not improper for the court to look beyond the four corners of the deeds to determine the intent of the parties to the various

deeds; moreover, contrary to the defendants' assertion, the trial court did not err in concluding that the entire W subdivision and not just the triangularly shaped area of land was subject to the restrictive covenant, as the relevant deed did not set off and describe a triangularly shaped area of land that by itself was subject to the restriction.

3. This court found unavailing the defendants' claim that the trial court misapplied the facts of the present case to the tests set forth in *Shippan Point Assn., Inc.* v. *McManus* (34 Conn. App. 209), and *Fidelity Title & Trust Co.* v. *Lomas & Nettleton Co.* (125 Conn. 373), which was based on their claim that the court improperly focused its change of circumstances analysis on the surrounding area rather than on the property that was subject to the restrictive covenant, and erred in finding that the homestead was the intended beneficiary of the restrictive covenant rather than the B subdivision; whether the homestead or the B subdivision was the intended beneficiary of the restrictive covenant had no effect on the outcome of the case, and the trial court properly determined that the restrictive covenant was not enforceable by the defendants because its purpose had been frustrated by a substantial and permanent change in circumstances, it had been abandoned by lack of enforcement and it did not benefit any of the parties' properties.

Argued October 4, 2017—officially released March 27, 2018

Procedural History

Action for a declaratory judgment declaring void and unenforceable a restrictive covenant in the deed to certain of the plaintiffs' real property, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Hon. A. William Mottolese*, judge trial referee; judgment for the plaintiffs, from which the defendants appealed to this court. *Affirmed.*

Colin B. Connor, with whom was *Robert D. Russo III*, for the appellants (defendants).

Edward R. den Dooven, self-represented, with whom was *Luz Elena Bueno*, self-represented, the appellees (plaintiffs).

Opinion

LAVINE, J. "A covenant that is a servitude 'runs with the land'." 1 Restatement (Third), Property, Servitudes § 1.3 (1), p. 23 (2000). "When a change has taken place

since the creation of a servitude that makes it impossible as a practical matter to accomplish the purpose for which the servitude was created, a court may modify the servitude to permit the purpose to be accomplished. If modification is not practicable, or would not be effective, a court may terminate the servitude." 2 Restatement (Third), Property, Servitudes § 7.10 (1), p. 394 (2000).[1]

This declaratory judgment action concerns the viability of a restrictive covenant (restriction) contained in a 1941 committee deed conveying 1.544 acres of a thirty acre farm in Darien that was once owned by Wilbur N. Waterbury (Waterbury land). The plaintiffs, Luz E. Bueno and Edward R. den Dooven,[2] own 1.38 acres of the Waterbury land.[3] The defendants, Michael Firgeleski, Allison Firgeleski, Pole M. Chan, Jessica M. Chan, Richard B. Myers, Margaret Q. Myers, Scott J. Cronin, and Eileen M. Cronin (collectively, Briar Brae defendants), and Kenneth S. Martin and Rachel P. Martin (Martins), own lots that were created from a portion of the remainder of the thirty acres of the Waterbury land and are adjacent to the plaintiffs' property. The plaintiffs sought a judgment declaring the restriction void and unenforceable to permit the sale of a portion of their property.[4] In its judgment, the court declared

[1] "Because servitudes create property interests that are generally valuable, courts apply the changed-conditions doctrine with caution. . . . The test is stringent: relief is granted only if the purpose of the servitude can no longer be accomplished. When servitudes are terminated under this rule, it is ordinarily clear that the continuance of the servitude would serve no useful purpose and would create unnecessary harm to the owner of the servient estate." 2 Restatement (Third), supra., § 7.10, comment (a), p. 395.

[2] The plaintiffs represented themselves in the trial court and wrote their appellate brief, but were represented by counsel for oral argument before this court.

[3] The property is commonly known as 123 Hoyt Street in Darien.

[4] The court found that the plaintiffs' lot is on the eastern side of Hoyt Street. Their house lies north of the center line, which makes the southern portion of the lot available for development pursuant to Darien Zoning Regulations. To build a single-family house on the southern portion of the lot, the plaintiffs must subdivide their land and create a building lot of at

unenforceable the portion of the restriction that limits the plaintiffs' use of their property to one dwelling house, prohibits the erection of any building within twenty-five feet of the southern boundary, and requires approval of the grantor before erecting a structure on the property.

The defendants appealed, claiming that three of the court's factual findings are erroneous in that they are not supported by the evidence. With respect to the court's legal conclusions, the defendants claim that the court (1) improperly looked beyond the four corners of the deeds and (2) misapplied the facts of the present case to *Fidelity Title & Trust Co.* v. *Lomas & Nettleton Co.*, 125 Conn. 373, 5 A.2d 700 (1939) (restriction's purpose frustrated) and *Shippan Point Assn., Inc.* v. *McManus*, 34 Conn. App. 209, 215, 641 A.2d 144 (same), cert. denied, 229 Conn. 923, 642 A.2d 1215 (1994).[5] We affirm the judgment of the trial court.

Before turning to our legal analysis, we describe in detail the history of the many land transactions that underlie the present appeal. In the early 1930s, the estate of Wilbur N. Waterbury included a thirty acre farm on the eastern side of Hoyt Street. Beginning with a 1934 partition action that was followed years later by certain land transactions, the character of the Waterbury land transformed from a farm to a suburban subdivision. A 1941 committee deed conveying 1.544 acres of the Waterbury land contains the restriction at the heart of the present matter. The resolution of this appeal turns on our construction of that restriction given the

least one-half acre. A dwelling on a lot created from the plaintiffs' land that complies with Darien Zoning Regulations would violate the restriction's twenty-five foot southern border setback.

[5] The defendants do not claim that the court improperly concluded that the restriction requiring grantor approval before erecting a dwelling on the plaintiffs' lot is unenforceable.

circumstances surrounding its creation.[6] The restriction or a variation of it is contained in the deeds to lots owned by the plaintiffs and the Martins, but it is not contained in the deeds to the lots owned by the Briar Brae defendants.

Prior to the events giving rise to this appeal, three of Waterbury's nieces were the beneficiaries of a life estate in the Waterbury land.[7] In 1934, due to changing economic and societal circumstances, the Waterbury nieces initiated a partition action seeking permission to sell the Waterbury land in whole or in part. In 1937, Mary Alice Vaughan acquired 2.11 acres of the Waterbury land, which included the Waterbury homestead, consisting of a single-family home and outbuildings. See appendix to this opinion.

In 1941, the Superior Court ordered Arthur I. Crandall, committee,[8] to convey 1.544 acres of the Waterbury land to Clyde E. Vaughan (Vaughan). Crandall's deed to Vaughan contains the subject restriction. See footnote 6 of this opinion. Vaughan's land was adjacent to the land owned by Mary Alice Vaughan on the south and

[6] The court found that the restriction was "set forth in a deed from Arthur I. Crandall, Committee, to Clyde E. Vaughan dated June 5, 1941 . . . . This deed is given by the grantor and accepted by the grantee upon the following restrictive covenants and agreements, which shall run with the land hereby conveyed and be binding upon the grantee, his heirs and assigns forever viz: (1) said premises shall be used for private residential purposes only, and shall be limited to the erection thereon of one dwelling house and accessory buildings; (2) no building shall be erected within fifty (50) feet of the Easterly line of said premises, nor within twenty-five (25) feet of the Southerly line thereof; and (3) no building, structure or erection of any kind shall be erected or maintained on said premises, unless the plans therefore shall have been approved in writing by the grantor, or his successors, provided, that such approval shall not be unreasonably withheld." (Internal quotation marks omitted.)

[7] Waterbury's nieces were Ethel Waterbury Campbell, Florance Waterbury, and Gladys Wynne-Finch. In this opinion, we refer to them as the Waterbury nieces.

[8] The original committee was Crandall, deceased. Richard W. Fitch, deceased, succeeded Crandall as the committee.

on the east; the area of land on the east was triangular in shape. See appendix to this opinion. Together the Vaughans[9] owned 3.654 acres of adjoining land that fronted on Hoyt Street. The Waterbury nieces retained the remainder of the Waterbury land that surrounded the Vaughans' properties.

In 1953, Mary Alice Vaughan and Vaughan, individually, conveyed their respective properties to Robert G. Shepherd and Helen D. Shepherd (Shepherds). The deed from Mary Alice Vaughan conveying her property did not contain the restriction, but the deed conveying Vaughan's property to the Shepherds contained the restriction. Specifically the deed from Vaughan stated, "[s]aid premises are subject to . . . restrictive covenants and agreements of record . . . ." In 1954, the Shepherds conveyed a portion of the land they acquired from Vaughan, specifically 1.38 acres, to Robert W. E. Anderson and Ingeborg Smith Anderson (Andersons). The Shepherds' deed of conveyance contained the restriction and stated, "[b]eing a portion of the premises conveyed to the said grantors by" Vaughan in 1953. The Shepherds did not convey to the Andersons the triangularly shaped area of land that lay to the east of the 2.11 acres once owned by Mary Alice Vaughan.

In 1956, the Shepherds conveyed the remainder of their land, including the triangularly shaped area, to Richard L. Webb and Nina H. Webb (Webbs). The deed to the Webbs subjected their property to the restriction "insofar as they affect the above described premises . . . ." In 1971, the Webbs created a three lot subdivision by dividing the land they had acquired from the Shepherds, i.e., lot 1, lot 2, and lot 3 (Webb subdivision).[10] Lot 2 contained the Waterbury homestead. The

[9] Although Bueno testified that Mary Alice Vaughan and Vaughan were husband and wife, the court made no finding in that regard.

[10] The court found that each of the lots in the Webb subdivision is approximately 0.75 acres in area. It also found that the creation of the three lot subdivision violated the restriction. When lot 2 was laid out, its southerly

Martins now own lot 3, which includes a portion of the triangularly shaped area of land that Crandall deeded to Vaughan in 1941. The Martins' deed states that the premises are subject to "[t]he effect, *if any*, of restrictive covenants and agreements contained in" the deed to Vaughan. (Emphasis added.) Lot 3 is adjacent to the plaintiffs' lot on the north.

In 2008, the plaintiffs acquired 1.38 acres of land from the Andersons. The land was once part of the 1.544 acres deeded to Vaughan in 1941, less the triangularly shaped piece of land. The plaintiffs' deed contains the restriction. See footnote 6 of this opinion.

In 1954, the remaining thirty acres of Waterbury land, land that had not been owned by either of the Vaughans, was acquired by Arthur Olsen Associates, Inc. The deed conveying the remaining Waterbury land does not contain the restriction. The Darien Planning and Zoning Commission thereafter approved a thirty-one lot subdivision of single-family homes to be built on the land acquired by Arthur Olsen Associates, Inc. The subdivision is known as Briar Brae, and none of the deeds to the lots in the subdivision contains the restriction. The lots owned by the Briar Brae defendants are adjacent to the land once owned by Mary Alice Vaughan and Vaughan on the east and south.[11]

The plaintiffs commenced the present action in September, 2013.[12] Pursuant to their substitute complaint,

boundary rendered the existing residence in violation of the restriction's twenty-five foot setback, as the residence on lot 2 was setback only fifteen feet. The court also found that when a single-family home was later built on lot 1 and on lot 3, no one made an effort to enforce the restriction permitting only one dwelling on the premises.

[11] The owners of lots in Briar Brae that are not adjacent to the land formerly owned by either Mary Alice Vaughan or Vaughan are not parties to the present action.

[12] The court found that the plaintiffs commenced the action because Pole M. Chan remarked to den Dooven that "we have some property interests in common," the plaintiffs need to know who the beneficiaries of the restriction are, and an attorney the plaintiffs consulted informed them that "there

the plaintiffs sought a declaratory judgment that the restriction in their deed is void and unenforceable. Such a declaration would enable them to subdivide their land into two lots: one for their own home and one for development. The plaintiffs alleged several reasons why the restriction should be declared void and unenforceable: (1) the 1941 deed violated the Superior Court's order to the committee,[13] (2) the circumstances of the neighborhood surrounding the Waterbury land have changed significantly, (3) the restriction has been abandoned, (4) the restriction benefits no one, (4) the restriction is unfair to the plaintiffs as they cannot reach an agreement with the beneficiaries of the restriction, (5) the restriction is barred by laches, and (6) the restriction has been extinguished by the Marketable Title Act, General Statutes § 47-33b et seq.

The court tried the matter in the fall of 2015. Numerous maps and deeds were placed into evidence, and the court viewed the thirty acres of Waterbury land in the company of the parties' counsel. The court issued its memorandum of decision on January 20, 2016.[14] We now examine the court's adjudication of the plaintiffs' claims.

The court first considered the beneficiary of the restriction. It found that the restriction first appeared in the deeds of the Martins' predecessors in title in 1956

might be a deed restriction that might prevent the sale of the lot." Chan testified that he did not want a second house built on the plaintiffs' lot because "it would create a quality of life issue."

[13] The plaintiffs argued that Crandall had no right to create the restriction. The court found that the restriction did not violate the Superior Court's partition order because the court confirmed the committee sale to Vaughan thereby legitimizing both the sale and the deed. None of the parties has challenged that determination on appeal.

[14] In its memorandum of decision, the court denied the defendants' motion to dismiss the plaintiffs' cause of action filed during the course of the proceedings. The defendants have not challenged the denial of their motion to dismiss.

when the Shepherds conveyed the land formerly owned by Mary Alice Vaughan and the triangularly shaped area of land formerly owned by Vaughan to the Webbs. The deed from the Shepherds to the Webbs stated in part: "Said premises are conveyed subject to restrictive covenants and agreements as set forth in a deed given by . . . Crandall . . . to . . . Vaughan . . . *insofar as they affect* the above described premises . . . ." (Emphasis added.)

The court also found that in 1971, when the Webbs subdivided the land into three building lots, they acted in disregard of the restriction. If the restriction had been applied before the Webb subdivision was created, dwellings would have been limited to the Waterbury homestead on lot 2. Moreover, when lot 2 was created, its southerly boundary rendered the Waterbury homestead in violation of the twenty-five foot setback requirement because the setback created by the subdivision was only fifteen feet.

When the Martins took title to lot 3 in 2006, schedule A attached to their deed stated in part: "Said premises are subject to . . . [t]he *effect, if any*, of restrictive covenants and agreements contained in a deed from . . . Crandall . . . to Vaughan . . . ." (Emphasis added.) The court found it "apparent that the uncertainty concerning the applicability of the restriction . . . manifest[ed] itself by the use of the words 'effect, if any.' " None of the deeds to the lots owned by the Briar Brae defendants contains the restriction. The plaintiffs' lot, therefore, is the only one of thirty-five lots created from the thirty acres of the Waterbury land that is expressly made subject to the restriction without the qualifying words, "effect, if any."

The court's memorandum of decision demonstrates its familiarity with the applicable law. Generally, "restrictive covenants fall into three classes: (1) mutual

covenants in deeds exchanged by adjoining landowners; (2) uniform covenants contained in deeds executed by the owner of property who is dividing his property into building lots under a general development scheme; and (3) covenants exacted by a grantor from his grantee presumptively or actually for the benefit and protection of his adjoining land which he retains. *Stamford* v. *Vuono*, 108 Conn. 359, 364, 143 A. 245 (1928). With respect to the third class of covenants, the original grantor, who is the owner of the property benefited, and his assigns may enforce [the covenant] against subsequent purchasers of the property burdened. If the restrictive covenant is for the benefit of the remaining land of the grantor, it is an easement running with the land and may be enforced by a subsequent purchaser of the remaining land against the prior grantee and his successors in title . . . .'' (Internal quotation marks omitted.) *Grady* v. *Schmitz*, 16 Conn. App. 292, 296, 547 A.2d 563, cert. denied, 209 Conn. 822, 551 A.2d 755 (1988).

The court noted that ''[w]here the owner of two adjacent parcels conveys one with a restrictive covenant and retains the other, whether the grantor's successor in title can enforce, or release, the covenant depends on whether [the covenant] was made for the benefit of the land retained by the grantor in the deed containing the covenant, and the answer to that question is to be sought in the intention of the parties to the covenant as expressed therein, *read in the light of the circumstances attending the transaction and the object of the grant*. *Bauby* v. *Krasow*, 107 Conn. 109, 112–13, 139 A. 508 (1927).'' (Emphasis added; internal quotation marks omitted.) *Marion Road Assn.* v. *Harlow*, 1 Conn. App. 329, 335, 472 A.2d 785 (1984). ''The meaning and effect of the reservation are to be determined, not by the actual intent of the parties, but by the intent expressed in the deed, considering all its relevant provisions and

reading it in the light of the surrounding circumstances . . . .'' (Emphasis added; internal quotation marks omitted.) Id., 332.

The court found that, at the time the restriction was created, the only dwelling on the Waterbury land was the Waterbury homestead. Given the circumstances under which the Waterbury land was developed, the court inferred that the grantor intended the restriction to benefit only that portion of his remaining land containing the Waterbury homestead and its service buildings. The court buttressed its conclusion with the fact that the restriction is not contained in the deeds to any of the lots in Briar Brae and that lot 3 was conveyed subject only to the ''effect, if any'' of the restriction. The court concluded, therefore, that the Waterbury estate manifested an intent not to restrict the remainder of the Waterbury land, stating that the indicia of the grantor's intent not to burden all of the Waterbury land outweighed any other evidence, including the ambivalent deed references. The court reasoned that the language ''effect, if any'' and similar words was consistent with the grantor's intent. Relying on *Marion Road Assn.* v. *Harlow*, supra, 1 Conn. App. 335, the court found that the restriction in this case was intended to benefit the grantor's retained land and could have no purpose other than to protect the grantor's homestead.

In considering the plaintiffs' claim that the circumstances of the Waterbury land have changed so significantly since the restriction was created that it is no longer enforceable, the court assumed given the language of the restriction, i.e., ''[i]t shall run with the land hereby conveyed and be binding upon the grantee, his heirs assigns forever,'' that the restriction was appurtenant to the land conveyed to the plaintiffs. Where a restrictive covenant contains words of succession, i.e., heirs and assigns, a presumption is created that the parties intended the restrictive covenant to run with

the land. See *Kelly* v. *Ivler*, 187 Conn. 31, 39–40, 450 A.2d 817 (1982).

In analyzing the evidence, the court was cognizant of the rule that "[w]here a party seeks by way of affirmative relief to have a restrictive covenant modified or nullified on the basis of a change of circumstances . . . he must make it manifest that its purpose has been permanently frustrated, and that the change is so great as to defeat the object of the covenant." *Grady* v. *Schmitz*, supra, 16 Conn. App. 301. The relief "should be granted with caution and only when the motivating considerations are not only ample but so settled and lasting that it is manifest that the purpose of the original restriction has been permanently frustrated. The changes must be so great as clearly to neutralize the benefits of the restrictions to the point of defeating the object and purpose of the covenant." (Internal quotation marks omitted.) *Fidelity Title & Trust Co.* v. *Lomas & Nettleton Co.*, supra, 125 Conn. 376–77. The change of circumstances may not be transient, and they must be drastic and permanent. Id. 378. Abandonment of a right requires the "voluntary and intentional renunciation [of a right] but the intent may be inferred as a fact from the surrounding circumstances." (Internal quotation marks omitted.) *Blum* v. *Lisbon Leasing Corp.*, 173 Conn. 175, 182, 377 A.2d 280 (1977).

In deciding whether there has been a change of circumstances sufficient to warrant nullification of the restriction, the court compared the circumstances of the Waterbury land as they were in 1941 when the restriction was created with present circumstances. The court found that the plaintiffs successfully had proved that seven years before the restriction was created, the land Crandall conveyed to Vaughan was part of a thirty acre farm on undeveloped land. In 1934, the Waterbury nieces commenced a partition action that resulted in Crandall's appointment to sell the Waterbury

land.[15] From those facts, the court inferred that in 1934, the character of the neighborhood in the vicinity of the Waterbury land was changing from agricultural to suburban. Suburban housing had begun to appear in the section of Darien where the Waterbury land was located, but the Waterbury land was not yet part of the suburban transition. In 1937, only one residential structure with outbuildings existed on the Waterbury land. None of the remaining land was developed until 1954 when Arthur Olson Associates, Inc., received approval from the Darien Planning and Zoning Commission to create the thirty-one lot Briar Brae subdivision.

The court also found that lot 3 is approximately 0.75 acres in size, which is approximately the size of the lot the plaintiffs would like to "spin off" from their land. Briar Brae is fully developed in predominantly one-half acre lots, each of which contains a single-family home that has existed for many years. By their very nature and purpose, the homes are intended to remain permanently in their present locations. The lots owned by the plaintiffs, the Martins and the Cronins front on Hoyt Street, also known as Route 106, which is an access road to the Merritt Parkway.

The court further reasoned that *if* the restriction runs with the land, *and*, *if arguendo*, it was intended to benefit Briar Brae, it falls within the class of covenants known as the retained land theory. See *Shippan Point Assn., Inc.* v. *McManus*, supra, 34 Conn. App. 213

[15] The Waterbury nieces alleged that they had a life estate in the Waterbury land that entitled them to the income produced by the land for life but that the income from the farm was declining and expenses were increasing. The court quoted some of the allegations in the partition action, to wit: "In recent years, many properties in the section of . . . Darien in which the premises described in paragraph 2 hereof are located, have been sub-divided, and many homes erected thereon, so that the character of the neighborhood has changed from a farming section to a suburban neighborhood." (Internal quotation marks omitted.) The Waterbury nieces also alleged that the Waterbury land was no longer adapted for farming purposes.

(restrictions imposed by grantee for benefit of adjoining land grantor retained). The court assumed for purposes of its analysis that the restriction runs with the land. The court applied the *Fidelity Title & Trust Co.* change of circumstances test to its factual findings and concluded that the plaintiffs had "amply satisfied" the change of circumstances test. The court found manifest that the purpose of the restriction has been frustrated permanently as the very land that it was intended to benefit, Briar Brae, had itself been subdivided into numerous building lots each of which is free of any such restriction and approximately the size of the lot that the plaintiffs seek to create.

Moreover, the court found that lot 3, which is nominally similarly restricted as the plaintiffs' land, has been in flagrant violation of the restriction for many years. The court noted that repeated violations of a restriction without effective action to enforce it constitute grounds for nullification of the restriction. See *Cappo* v. *Suda*, 126 Conn. App. 1, 9, 10 A.3d 560 (2011) (court obligated to enforce restriction unless defendant can show enforcement inequitable). To establish abandonment of an easement by the acts of the owner of the dominant tract, one must prove that the owner's acts are "of so decisive and conclusive a character as to indicate and prove his intent to abandon the easement."[16] (Internal quotation marks omitted.) *American Brass Co.* v. *Serra*, 104 Conn. 139, 148, 132 A. 565 (1926). In addition, the owner must act voluntarily. Id. The court found that if the restriction requiring approval to build runs with the land, the right to enforce the restriction had been abandoned over a period of seventy-four years by the

[16] "An easement creates a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement . . . . The burden of an easement . . . is always appurtenant." 1 Restatement (Third), supra, § 1.2 (1) and (3), p. 12. "A 'negative easement' is a restrictive covenant." Id., § 1.3 (3), p. 23.

failure of anyone to exercise it with respect to any of the thirty-five lots in the Waterbury land, except the plaintiffs' lot. In finding that the restriction had been abandoned by failure to enforce it, the court compared the facts of the present case with *Shippan Point Assn., Inc.*, in which twelve of twenty-five lots comprising the dominant estate in a development contravened a restrictive covenant. In the present case, thirty-four of thirty-five lots contravene the restriction.

The court found that lot 3 is the southern portion of the land that the Shepherds conveyed to the Webbs and that the deed conveyed the entire parcel subject to the restriction.[17] If the parcel was subject to the restriction, development of the parcel was limited to the Waterbury homestead. Sometime after 1956, when houses were constructed on lots 1 and 3 of the Webb subdivision, that portion of the restriction that limited the number of dwelling houses to one was violated. When a house was built on lot 3, that portion of the restriction that prohibits the erection of a building within twenty-five feet of the southern boundary applied not to the property as a three lot subdivision, but to the land as a single parcel. The court concluded that when more than one dwelling was constructed on the Webbs' land, the purpose of the twenty-five foot setback became meaningless not only as to the Webb subdivision, but also as to the only property that could possibly benefit from it, i.e., the plaintiffs' property, because it adjoins the Webb subdivision on the south and the plaintiffs seek to avoid the restriction.

The court further found that the plaintiffs' property itself is in violation of the restriction. In 1959, a two

[17] The deed from the Shepherds to the Webbs states in relevant part: "All that certain piece, parcel or tract of land . . . containing in area 2.274 acres . . . . Said premises are conveyed subject to restrictive covenants and agreements as set forth in a deed given by . . . Crandall . . . to . . . Vaughan . . . insofar as they affect the above described premises . . . ."

vehicle garage was constructed on the land without the grantor having approved the plan. In 2004, the main house was expanded by more than 2500 square feet and a shed was constructed eighteen feet from the southern border. Neither improvement was approved by the grantor. A perimeter fence also was added to the premises without approval.

On the basis of the foregoing, the court declared so much of the restriction that limits the plaintiffs' lot to one dwelling house, prohibits the erection of any building within twenty-five feet of the southern border of the plaintiffs' lot, or requires grantor approval of structures on the plaintiffs' lot unenforceable by the defendants. The defendants filed a motion for reargument, which the court denied.[18] The defendants appealed.

On appeal, the defendants claim that in declaring certain portions of the restriction unenforceable, the court found three facts that are not supported by the evidence and also committed legal error by going beyond the four corners of the deeds and misapplying the tests enunciated in *Fidelity Title & Trust Co.* and *Shippan Point Assn., Inc.* In response, the plaintiffs repeatedly noted that the trial court correctly declared portions of the restriction void and unenforceable due to a significant and permanent change of circumstances that frustrate the purpose of the restriction and that the defendants are not benefited by the servitude created by the restriction. We agree with the plaintiffs.

In the final analysis, the resolution of this appeal turns on the construction of the restriction in the 1941 committee deed to Vaughan and subsequent deeds to

[18] The defendants also filed a motion for articulation, which the court denied. Thereafter, the defendants filed a motion for review, which this court denied.

the land formerly owned by Vaughan and the circumstances surrounding its creation. "The principles governing the construction of instruments of conveyance are well established. In construing a deed, a court must consider the language and terms of the instrument as a whole. . . . Our basic rule of construction is that recognition will be given to the expressed intention of the parties to a deed or other conveyance, and that it shall, if possible, be so construed as to effectuate the intent of the parties. . . . In arriving at the intent expressed . . . in the language used, however, *it is always admissible to consider the situation of the parties and the circumstances connected with the transaction*, and every part of the writing should be considered with the help of that evidence. . . . The construction of a deed in order to ascertain the intent expressed in the deed presents a question of law and requires consideration of all its relevant provisions in light of the surrounding circumstances." (Emphasis altered; internal quotation marks omitted.) *Bolan* v. *Avalon Farms Property Owners Assn., Inc.*, 250 Conn. 135, 140–41, 735 A.2d 798 (1999).

I

FACTUAL CLAIMS

The defendants claim that three of the court's interrelated factual findings are erroneous because there is no evidence to support the findings (1) that lot 3 violates the restriction, (2) that the Waterbury homestead was the intended beneficiary of the restriction, and (3) that the dominant estate does not include the Briar Brae subdivision. We disagree.

We review the trial court's findings of fact by the clearly erroneous standard. *Valley National Bank* v. *Marcano*, 174 Conn. App. 206, 217, 166 A.3d 80 (2017). "[W]e will upset a factual determination of the trial court only if it is clearly erroneous. The trial court's

findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the records as a whole. . . . We cannot retry the facts or pass on the credibility of the witnesses. A finding is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Surrells* v. *Belinkie*, 95 Conn. App. 764, 767, 898 A.2d 232 (2006).

On the basis of our review of the record, the court's memorandum of decision, and the briefs of the parties, we conclude that the court's factual findings are not clearly erroneous, and we are not left with a firm conviction that a mistake has been made. Moreover, even if we were to assume that the three findings are clearly erroneous, the defendants have not demonstrated how those findings affected the court's ultimate, and dispositive, conclusion that the restriction is unenforceable due to a permanent and substantial change in circumstances. For these reasons, the defendants cannot prevail on their claim that the court's findings are not supported by the evidence.

A

The defendants claim that the court's finding that lot 3 violates the restriction is not supported by the evidence. We disagree.

The court found that the restriction in the deeds to the Martins' predecessors in title first appeared in 1956 when the Shepherds conveyed their property to the Webbs. The deed from the Shepherds to the Webbs states in part: "All that certain piece . . . of land, together with the buildings and improvements thereon . . . containing in area 2.274 acres . . . and bounded . . . as follows: Northerly 293.48 feet . . . Easterly

317.17 feet . . . Southerly 251.56 feet . . . Westerly 385.27 feet . . . . The major portion of said premises is shown and delineated on a certain map entitled Map Showing Property to be conveyed to Mary Alice Vaughan . . . 1937 . . . and the Easterly portion of said premises is . . . shown . . . on a certain map entitled, Map of Parcel No. 5 . . . . *Said premises are conveyed subject to restrictive covenants and agreements as set forth in a deed given by . . . Crandall* . . . to . . . *Vaughan* . . . insofar as they affect the above described premises . . . .'' (Emphasis added; internal quotation marks omitted.) The plain language of the deeds makes clear that all of the land being conveyed, i.e., ''said premises,'' is subject to the restriction *insofar as it may be affected*. When the Martins took title to lot 3 in 2006, their deed contained the following language: ''Said premises are subject to . . . [t]he *effect*, *if any*, of restrictive covenants and agreements contained in a deed from . . . Crandall . . . to . . . Vaughan . . . .'' (Emphasis added.) The applicable restrictions are that ''said premises shall be used for private residential purposes only, and shall be limited to the erection thereon of one dwelling house and accessory buildings . . . and no building shall be erected . . . within twenty-five . . . feet of the Southerly line thereof . . . .''

The court found that when the Webbs subdivided the land into three lots, they did so in disregard of the one dwelling house and setback restrictions. The court explained that the restriction limited the number of dwellings on the premises to one. At the time the Webbs purchased the land, one dwelling, the Waterbury homestead, existed on the premises. The construction of houses on lot 1 and lot 3 violated the restriction that limited the number of dwellings to one. When a dwelling was erected on lot 3 of the Webb subdivision, it violated the restriction that no building shall be erected within

twenty-five feet of the southerly boundary of the premises. The restriction appears in the chain of title to lot 3 in the deed from Vaughan to the Shepherds and in the deed from the Shepherds to the Webbs and in the deed to the Martins. The court found that the Webbs violated the restriction when they constructed houses on each lot of their subdivision, including lot 3. We conclude, therefore, that the court's finding that lot 3 violates the restriction is not clearly erroneous.

Moreover, the defendants have failed to persuade us that they have been harmed by the finding. An appellant bears the burden of demonstrating that a court's erroneous finding was harmful because it likely affected the result. See *Sander* v. *Sander*, 96 Conn. App. 102, 118, 899 A.2d 670 (2006). Even if we assume that the court's finding that lot 3 violates the restriction is not supported by the evidence, that error, if any, is harmless as it is not the basis of the court's ultimate conclusion that the restriction was unenforceable due to a permanent, substantial change in circumstances. The finding that lot 3 violates the restriction is but one part of the court's analysis of whether the restriction should be declared void and unenforceable. See *73-75 Main Avenue, LLC* v. *PP Door Enterprise, Inc.*, 120 Conn. App. 150, 162, 991 A.2d 650 (2010) (court did not base finding on single fact). As the plaintiffs repeatedly point out, the primary reason the court concluded that the restriction was unenforceable was due to a significant change of circumstances.

B

The defendants claim that the court's finding that the Waterbury homestead was the intended beneficiary of the restriction is clearly erroneous. We do not agree.

"[L]anguage in a deed that purports to create a restrictive covenant must be construed *in light of the circumstances attending and surrounding the transaction.*

. . . The meaning and effect of the reservation are to be determined, not by the actual intent of the parties, but by the intent expressed in the deed, considering all its relevant provisions *and reading it in light of the surrounding circumstances* . . . . The primary rule of interpretation of such [restrictive] covenants is to gather the intention of the parties from their words, by reading, not simply a single clause of the agreement but the entire context, *and*, *where the meaning is doubtful*, *by considering such surrounding circumstances as they are presumed to have considered when their minds met.*" (Citations omitted; emphasis altered; internal quotation marks omitted.) *Wykeham Rise*, *LLC* v. *Federer*, 305 Conn. 448, 480–81, 52 A.3d 702 (2012) (*Vertefeuille*, *J.*, concurring.)

"[T]he law is clear that the description in the deed, if clear and unambiguous, must be given effect. In such a case, there is no room for construction. The inquiry is not the intent of the parties but the intent which is expressed in the deed. . . . Where the deed is ambiguous, however, the intention of the parties is a decisive question of fact. . . . In ascertaining the intention of the parties, it [is] proper for the trial court to consider *the surrounding circumstances*." (Emphasis added; internal quotation marks omitted.) *Har* v. *Boreiko*, 118 Conn. App. 787, 795–96, 986 A.2d 1072 (2010). "Where a deed is ambiguous the intention of the parties is a decisive question of fact. . . . In case of doubt, the grant will be taken most strongly against the grantor." (Citations omitted; internal quotation marks omitted.) *Faiola* v. *Faiola*, 156 Conn. 12, 18, 238 A.2d 405 (1968).

"[E]vents too distantly removed in time from the original [developer's] conveyances to reflect [the developer's] intent one way or another are not relevant . . . *although they would bear on the equitable issue of enforceability of the covenants due to changed circumstances*." (Emphasis in original; internal quotation

marks omitted.) *Shippan Point Assn., Inc.* v. *McManus*, supra, 34 Conn. App. 214, quoting *Contegni* v. *Payne*, 18 Conn. App. 47, 55, 557 A.2d 122, cert. denied, 211 Conn. 806, 559 A.2d 1140 (1989).

The 1941 committee deed to Vaughan states: "This deed is given by the grantor and accepted by the grantee upon the following restrictive covenants and agreements, which shall run with the land hereby conveyed and be binding upon the grantee, his heirs and assigns forever . . . ." The court, being familiar with the classes of restrictive covenants, unsurprisingly determined that the restriction falls into the category of one exacted by a grantor from his grantee " 'presumptively or actually for the benefit and protection of his adjoining land which he retains,' " citing *Stamford* v. *Vuono*, supra, 108 Conn. 364. If the restriction is for the benefit of the remaining land of the grantor, it runs with the land and may be enforced by a subsequent purchaser of the remaining land against the grantee and his or her successors in title. Id., 365; see also *Grady* v. *Schmitz*, supra, 16 Conn. App. 296.

The court searched the defendants' posttrial briefs to identify a legal theory under which they claimed to enjoy the right to enforce the restriction. In their posttrial brief, the defendants asserted that they may enforce the restriction, "as owners of the benefitted remaining land, against the [p]laintiffs upon the equitable principle that prevents one having knowledge of the just rights of others from defeating those rights."[19]

[19] The defendants cited *Stamford* v. *Vuono*, supra, 108 Conn. 365, for the *equitable* principle upon which they rely. The principle may be traced in Connecticut jurisprudence to *Bauby* v. *Krasow*, supra, 107 Conn. 112. In *Bauby*, the plaintiff sought an injunction, and the underlying issue concerned *notice* to the party against whom the restriction was sought to be enforced. Id., 112. The equitable principle, therefore, is inapplicable to the present case.

In *Bauby*, Minnie J. Dalton owned adjoining lots. She lived in a single-family house on one of the lots; the other lot was vacant until she conveyed it to Catharine McCarthy. Id., 110–11. The warranty deed to McCarthy con-

Despite their assertion, the court found that the defendants failed to analyze how the *equitable* principle supports their position.[20] The defendants have not offered us an explanation on appeal, and we find the principle inapplicable. See footnote 19 of this opinion.

The court found on the basis of the evidence that at the time the restriction was created in 1941, the remainder of the land was undeveloped farmland. Mary Alice Vaughan's land was adjacent to the plaintiffs' property to the north and also fronted on Hoyt Street. The court inspected the entire thirty acre parcel in the company of the parties' counsel and found that with the exception of the lots owned by the Martins and the Cronins, the remaining thirty acres of the Waterbury land is topographically distinct from the plaintiffs' property in that it is situated at a high elevation and is

tained the clause: " 'Grantee agrees that in the event she shall erect a house on said property that same will be a single family house.' " Id. When Dalton died, her home was conveyed to Frederick C. Bauby, who had actual knowledge of the restrictive covenant in the deed to McCarthy. Id., 111. McCarthy sold the vacant lot to Annie Krasow by deed warranting the lot to be free of all "incumbrances." Id. Krawow began to build a three-family house on the lot, and Bauby commenced an injunctive action to enforce the restrictive covenant. Id. "The question whether [a restrictive] covenant runs with the land is material in equity only on the question of notice. If it runs with the land, it binds the owner whether he had knowledge of it or not. If it does not run with the land, the owner is bound only if he has taken the land with notice of it." Id., 112.

[20] As noted in footnote 19 of this opinion, the principle relied on by the defendants applies in equity, not in the present case in which the plaintiffs seek a judicial declaration that the restriction is void and unenforceable. This court has stated that there is a distinction between an action to enforce a restrictive covenant and one seeking to modify the restriction in perpetuity. See *Grady* v. *Schmitz*, supra, 16 Conn. App. 301. "In an action for removal or relaxation of restrictions the issues are not the same as in one seeking to enforce them by enjoining breach thereof, and the judgment is more drastic. Injunction may be denied because of conditions existing at the time, while as to a judgment which affects the covenants for all time it is to be considered that it is quite possible that another change may occur subsequently which would remove or materially affect the ground upon which the judgment was based." (Internal quotation marks omitted.) Id., quoting *Fidelity Title & Trust Co.* v. *Lomas & Nettleton Co.*, supra, 125 Conn. 376.

physically isolated from the plaintiffs' property. The court therefore inferred that when viewed in the context of the development of the Waterbury land, including Briar Brae and the Webb subdivision, the restriction was intended to benefit only that portion of the grantor's remaining land depicted on the plaintiffs' exhibit 23, which is the Waterbury homestead. The court found that its inference was buttressed by the fact that the restriction is not contained in any of the deeds to the thirty-one lots comprising Briar Brae. Lot 3 was conveyed to the Martins only subject to the "effect, if any" of the restriction. The court, therefore, concluded that the Waterbury estate manifested an intent not to restrict the remainder of the thirty acres, which is now Briar Brae.

The court found that the language "effect, if any" and similar words was consistent with the grantor's intent. In coming to its conclusion, the court relied on *Marion Road Assn.* v. *Harlow*, supra, 1 Conn. App. 335–36, stating that the present facts "bring this conveyance within the class of cases in which the restrictions will generally be construed to have been intended for the benefit of the [retained] land, since in most cases it could obviously have no other purpose, the benefit to the grantor being usually a benefit to him as owner of the land, and . . . if the adjoining land retained by the grantor is manifestly benefitted by the restriction, it will be presumed that it was so intended." (Internal quotation marks omitted.) In applying the *Marion Road Assn.* rationale, the court stated that it is "obvious" that the restriction could have no other purpose than to protect the grantor's homestead.

On the basis of our review of the evidence and the historical development of the Waterbury land, we agree

with the court that the grantor intended to protect the Waterbury homestead from the suburban development and encroachment taking place in Darien at the time Crandall conveyed the 1.544 acres of the Waterbury land to Vaughan.[21] We thus conclude that the court's finding that the Waterbury homestead was the intended beneficiary of the restriction is not clearly erroneous.

C

The defendants' third claim of factual error is that the court improperly found that the dominant estate did not include Briar Brae. We again disagree that the court's finding is unsupported by the evidence.

In its memorandum of decision, the court concluded that the Waterbury homestead was the beneficiary of the restriction. In reaching that conclusion, it stated: "If the restriction runs with the land and if, arguendo, it was intended to benefit Briar Brae, it falls within the . . . class [of restrictions] which is known as the retained land theory." As we concluded in part I B of this opinion, the court properly found that the restriction was for the benefit of the Waterbury homestead. Most significantly, the restriction is not contained in any of the deeds to the lots in Briar Brae. If the grantor had intended to benefit the lots in Briar Brae by restricting development, it can fairly be assumed that the grantor would have similarly restricted development there.

Finally, the defendants claim that the court's three alleged erroneous findings are interconnected and have caused them prejudice. Despite this assertion, the defendants have offered no explanation as to how they

[21] Despite their claim, the defendants failed to analyze the facts and the case law relied on by the court, i.e., *Stamford*, *Grady*, and *Marion Road Assn.*

have been prejudiced or harmed by the court's findings. The defendants reside in single-family homes on lots of approximately one-half acre in size. They have not explained how permitting the plaintiffs to subdivide their lot into two lots of approximately 0.75 acres in size will cause them harm. The defendants, therefore, cannot prevail on their claim that three of the court's factual findings are not supported by the evidence.

II

LEGAL CLAIMS

The defendants claim that the court erred as a matter of law by (1) going beyond the four corners of the deeds in its interpretation of the "effect, if any" language in the Martins' chain of title, and (2) misapplying the significant change of circumstances test of *Fidelity Title & Trust Co.* and the abandonment test of *Shippan Point Assn., Inc.* We disagree with the defendants' claims.

"The trial court's legal conclusions are subject to plenary review. [W]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision . . . ." (Internal quotation marks omitted.) *Hartford Fire Ins. Co.* v. *Warner*, 91 Conn. App. 685, 687–88, 881 A.2d 1065, cert. denied, 276 Conn. 919, 888 A.2d 88 (2005).

A

The defendants first claim that the court erred by going beyond the four corners of the deeds in its interpretation of the "effect, if any" language in the Martins' chain of title. We disagree.

"[Th]e determination of the intent behind language in a deed, considered in the light of all the surrounding circumstances, presents a question of law on which our

scope of review is . . . plenary. . . . Thus, when faced with a question regarding the construction of language in deeds, the reviewing court does not give the customary deference to the trial court's factual inferences. . . .

"The meaning and effect of the [restrictive covenant] are to be determined, not by the actual intent of the parties, but by the intent expressed in the deed, considering all its relevant provisions and reading it in the light of the surrounding circumstances . . . . The primary rule of interpretation of such [restrictive] covenants is to gather the intention of the parties from their words, by reading, not simply a single clause of the agreement but the entire context, and, *where the meaning is doubtful, by considering such surrounding circumstances as they are presumed to have considered when their minds met.* . . . A restrictive covenant must be narrowly construed and ought not to be extended by implication. . . . Moreover, if the covenant's language is ambiguous, it should be construed against rather than in favor of the covenant." (Citations omitted; emphasis added; internal quotation marks omitted.) *Alligood* v. *LaSaracina*, 122 Conn. App. 479, 482, 999 A.2d 833 (2010).

The restriction appeared in the 1941 committee deed to Vaughan and stated in relevant part: "This deed is given by the grantor and accepted by the grantee upon the following restrictive covenants and agreements, which shall run with the land hereby conveyed and be binding upon the grantee, his heirs and assigns forever . . . ." The 1953 deed from Vaughan conveying his property to the Shepherds contained the restriction stated in the following manner: "Said premises are subject to . . . restrictive covenants and agreements of record . . . ." In 1954, the Shepherds conveyed 1.38 acres of land to the Andersons; the deed contained the following

pertinent language: "Said premises . . . [b]eing a portion of the premises conveyed to the said grantors by . . . Vaughan by a deed dated . . . 1953 . . . [s]aid premises are conveyed subject to . . . [r]estrictive covenants contained in a deed from . . . Crandall . . . to . . . Vaughan . . . ." In 1956, the Shepherds sold 2.274 acres of their land to the Webbs and signed a deed that stated in relevant part: "Said premises are conveyed subject to restrictive covenants and agreements as set forth in a deed given by . . . Crandall . . . to . . . Vaughan . . . insofar as they affect the above described premises . . . ." Schedule A attached to the Martins' deed states in relevant part that the premises are subject to "[t]he effect, if any, of restrictive covenants and agreements contained in a deed from . . . Crandall . . . to . . . Vaughan . . . ." The plaintiffs' deed states in relevant part that the premises are subject to "[r]estrictive covenants and agreements set forth in a deed from . . . Crandall . . . to . . . Vaughan . . . ."

The descriptions of the restriction in the deeds conveying all or a portion of the land belonging to the parties are not consistent. The court found that language such as "effect, if any" in the deeds raised a question as to the applicability of the restriction to the present day. "Where legal conclusions are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts found by the [finder of facts]." (Internal quotation marks omitted.) *Shippan Point Assn., Inc.* v. *McManus*, supra, 34 Conn. App. 214. Given that ambiguity in the deeds, we conclude that it was not improper for the court to look beyond the four corners of the deeds to determine the intent of the parties to the deeds, as it was entitled to do pursuant to our decisional law. See, e.g., *Wood* v. *Amer*, 54 Conn. App. 601, 605, 736 A.2d

162 (1999), aff'd, 253 Conn. 514, 755 A.2d 175 (2000). The defendants' claim therefore fails.

B

The defendants' second legal claim is that the court erred by concluding that the restriction that encumbered the triangular area of land acquired by Vaughan expanded to encumber the entire Webb subdivision when it was conveyed by the Shepherds to the Webbs. We disagree.

As we have stated throughout this opinion, the intent of the parties is to be determined by the language of the deed. In their appellate brief, the defendants have not looked to the language of the relevant deed but rely instead on testimony and the stated beliefs of the parties. Their claim and argument ignores the plain language of the deed from the Shepherds to the Webbs: "All that certain piece . . . of land, together with the buildings and improvements thereon . . . containing in area 2.274 acres . . . and bounded . . . as follows: Northerly 293.48 feet . . . Easterly 317.17 feet . . . Southerly 251.56 feet . . . Westerly 385.27 feet . . . . The major portion of said premises is shown and delineated on a certain map entitled Map Showing Property to be conveyed to Mary Alice Vaughan . . . 1937 . . . and the Easterly portion of said premises is . . . shown . . . on a certain map entitled, Map of Parcel No. 5 . . . . *Said premises are conveyed subject to restrictive covenants and agreements as set forth in a deed given by . . . Crandall . . .* to . . . *Vaughan* . . . insofar as they affect the above described premises . . . ." (Emphasis added; internal quotation marks omitted.) The entire parcel acquired by the Webbs was made subject to the restriction "insofar as they affect the above described premises . . . ." The premises described in the deed is roughly rectangular in shape.

No portion of the deed sets off and describes a triangularly shaped area of land that by itself is subject to the restriction. On the basis of our construction of the Webbs' deed, we conclude that the court did not err by concluding that the entire premises purchased by the Webbs is subject to the restriction.

C

The defendants third legal claim is that the court improperly applied the facts of the present case to the tests enunciated in *Shippan Point Assn., Inc.*, and *Fidelity Title & Trust Co.* We do not agree.

The defendants acknowledge that the basis of the plaintiffs' action is the legal theory that there has been a permanent change of circumstances that frustrates the purpose of the restriction in the deed to Vaughan, that the restriction has been abandoned, and that the restriction does not benefit anyone. After hearing the evidence and reviewing the briefs and arguments of the parties, the court agreed with the plaintiffs' arguments. In coming to its conclusions, the court found that the restriction was violated by the Webbs and the plaintiffs, and that no one sought to enforce the restriction at the time the violations were committed. Moreover, the restriction was established when there was but one residential building on thirty acres of farm land. Those thirty acres have now been subdivided into thirty-five lots with one permanent dwelling on each of them.

"[W]hen presented with a violation of a restrictive covenant, the court is obligated to enforce the covenant unless the defendant can show that enforcement would be inequitable." (Internal quotation marks omitted.) *Grady* v. *Schmitz*, supra, 16 Conn. App. 301–302. "Such a change in circumstances is decided on a case by case basis, and the test is whether the circumstances show an abandonment of the original restriction making

enforcement inequitable because of the altered condition of the property involved." (Internal quotation marks omitted.) Id., 302. "Any such change in conditions must be so substantial so as to frustrate completely the intent of the original covenant so that it should be inequitable to enforce it. *Shippan Point Assn., Inc.* v. *McManus*, [supra, 34 Conn. App. 214]. Such a change in circumstances includes repeated violations of the restrictions without effective action to enforce them." *Cappo* v. *Suda*, supra, 126 Conn. App. 9. "Change in circumstances, such as use of the benefited property for purposes other than those contemplated by the original covenant, may justify the withholding of equitable relief to enforce a covenant." *Grady* v. *Schmitz*, supra, 302.

On appeal, the defendants argue that the court improperly focused its change of circumstances analysis on the surrounding area rather than on the property subject to the restrictive covenant. The defendants also argue that the court erred in finding that the Waterbury homestead was the intended beneficiary of the restriction rather than Briar Brae. Although we agree with the court that the Waterbury homestead was the intended beneficiary of the restriction, in the final analysis, whether Briar Brae or the Waterbury homestead was the intended beneficiary, has no effect on the outcome. The purpose of the restriction has been frustrated given a permanent, substantial change in circumstances of the Waterbury land since Crandall deeded the land to Vaughan.[22] See *Shippan Point Assn., Inc.* v. *McManus*, supra, 34 Conn. App. 209.

[22] The defendants claim that the court improperly applied the *Shippan Point Assn., Inc.*, change of circumstances test to the facts of this case, as the change of circumstances test is difficult to meet. We conclude that the change of circumstances test applied in that case was properly applied to the present facts.

In *Shippan Point Assn., Inc.*, the plaintiff sought to enjoin the defendants from constructing more than one dwelling on their lot. *Shippan Point Assn., Inc.* v. *McManus*, supra, 34 Conn. App. 210. The land belonging to the parties originally was part of approximately twenty-five lots formed in 1909. Id., 211. Each of the deeds contained a restrictive covenant limiting each lot to

At the time the Waterbury nieces commenced the partition action, the Waterbury land contained thirty acres of farmland and one dwelling house. The nieces alleged that the character of Darien was changing from rural farmland to suburban subdivisions. The first piece of land they partitioned—2.11 acres—contained the Waterbury homestead. The next piece of land partitioned was 1.544 acres adjacent to the Waterbury homestead. The committee's deed stated that no more than

a dwelling house for a single family. Id. The defendants alleged numerous special defenses, including that the restrictive covenant was no longer effective due to changed circumstances. Id., 213. The matter had been referred to an attorney trial referee who found that twelve of the twenty-five original lots "had been implicated either in subdivision or in having more than two residential buildings . . . on individual lots." Id. This court applied the substantial change of circumstances test in *Grady* v. *Schmitz*, supra, 16 Conn. App. 301–302. In addition to its finding that twelve of the original twenty-five lots now contained two houses, the attorney trial referee found that many properties had carriage houses that were rented in violation of the covenant. Id., 216. This court concluded that due to a substantial change in the conditions, the "original covenant has now been completely frustrated and it would be inequitable to enforce it." Id.

In the present case, the defendants rely on several Superior Court cases to support their argument that the facts of this case do not warrant a finding that the restriction has been frustrated due to a change of circumstances. After reviewing the cases cited by the defendants, we conclude that they do not support their position. See *Discala* v. *Arcamone*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-06-4007607-S, 2006 WL 1644533, *8 (May 24, 2006) (lots in subdivision developed in strict accordance with restrictions, no lots subdivided for sale or other purposes and no nonresidential uses of properties); *Revonah Woods Property Owners Assn., Inc.* v. *Rubino*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-03-0197808-S, 2004 WL 2094889, *4 (August 23, 2004) (plaintiff had not abandoned effort to enforce side yard setback and three violations out of twenty-five homes does not indicate substantial change of circumstances); *Sturges* v. *Rissolo*, Superior Court, judicial district of Fairfield, Docket No. CV-01-0384369-S, 2003 WL 22205927, *4 (September 9, 2003) (no widespread rejection or disobedience of restrictive covenant and no abandonment of restrictive covenant such that there is no longer benefit to permitting only one house per lot); *Murphy* v. *Kelly*, Superior Court, judicial district of Tolland, Docket No. CV-02-0077886-S, 2002 WL 31600858, *4 (November 7, 2002) (33 Conn. L. Rptr. 424) (injunction requiring removal of vinyl siding on new construction under claim that substantial change in quality of such siding in subdivision where vinyl siding restriction defined in deed).

one dwelling was to be constructed on the 1.544 acres. The partition was predicated on an assumption that change was coming to the Waterbury land, and the restriction was intended to limit density and to protect the Waterbury homestead. The benefit of the restriction, therefore, inured to the Waterbury homestead.

Almost fifteen years later, the remainder of the Waterbury land was sold without restriction, save for the Darien Zoning Regulations. Since that time, that land then conveyed has been subdivided into thirty-one one-half acre lots, more or less, i.e., Briar Brae. If Briar Brae was to benefit from the restriction on the plaintiffs' land, the beneficial purpose is not obvious. Briar Brae is the embodiment of what the restriction was intended to avoid. The restriction, therefore, has been frustrated.[23]

[23] The defendants claim that the court improperly applied the *Fidelity Title & Trust Co.* test to Briar Brae. The restrictive covenant at issue in *Fidelity Title & Trust Co.* v. *Lomas & Nettleton Co.*, supra, 125 Conn. 373, concerned, among other things, the cost of any house initially built on a lot facing a particular street. Id., 374. The properties were conveyed prior to the Great Depression and subsequent economic events made enforcement of the restrictive covenant problematic. Id., 374–75. The complaint sought a declaratory judgment decreeing a modification of the building restrictions. Id., 375. Certain of the defendants demurred to the complaint on the ground that the changes in economic conditions and in building costs and other attendant circumstances were not so permanent as to justify a modification in the restrictive covenant. Id., 376. Out of *Fidelity Title & Trust Co.* came the significant change in circumstances test identified by the court in the present matter.

"Most of the cases in which general relief from restrictive covenants has been obtained involve situations where, since the time when restrictions were established, there has been such a radical and permanent change in use or occupancy of premises in the neighborhood—as from residential to business purposes—as to defeat the objects sought to be achieved by the restriction." Id., 377. The trial court found that the test had been satisfied if Briar Brae was the intended beneficiary of the restriction because the very land it was intended to benefit—farmland—has itself been subdivided into numerous suburban lots that are each free of any such restriction. Moreover, the deed to the Martins' lot has a similar restriction and has been in violation of the restriction for years. The court found that the houses on the various lots, by their very nature, were permanent. The changes were

Assuming that the restriction was to benefit the Waterbury homestead from increased suburban density, the benefit was further eroded when the Webbs created their own three lot subdivision on what was the Waterbury homestead. Although the Webbs' deed contains the "effect, if any" restriction to the entire parcel, no one in Briar Brae, if it was the intended beneficiary of the restriction, sought to enforce it when the Webbs subdivided their land or when more than one structure and a fence were erected on the plaintiffs' land. The restriction, therefore, was abandoned when none of the owners of lots in either Briar Brae or the Webb subdivision sought to enforce it.

Finally, even assuming that the purpose of the restriction was to protect the Waterbury homestead or Briar Brae, neither of the properties is benefiting from it today. Although the defendants claim that they are prejudiced by the trial court's having declared the restriction null and unenforceable, none of the owners of what was the original Waterbury land is served by preventing the plaintiffs from dividing their land roughly in half so that it conforms in approximate size to every other lot that surrounds it on three sides.

For the foregoing reasons, we conclude that the trial court properly determined that the restriction in the plaintiffs' deed is not enforceable because its purpose has been frustrated by a substantial and permanent change in circumstances, it has been abandoned by lack of enforcement, and it benefits no land.

The judgment is affirmed.

In this opinion the other judges concurred.

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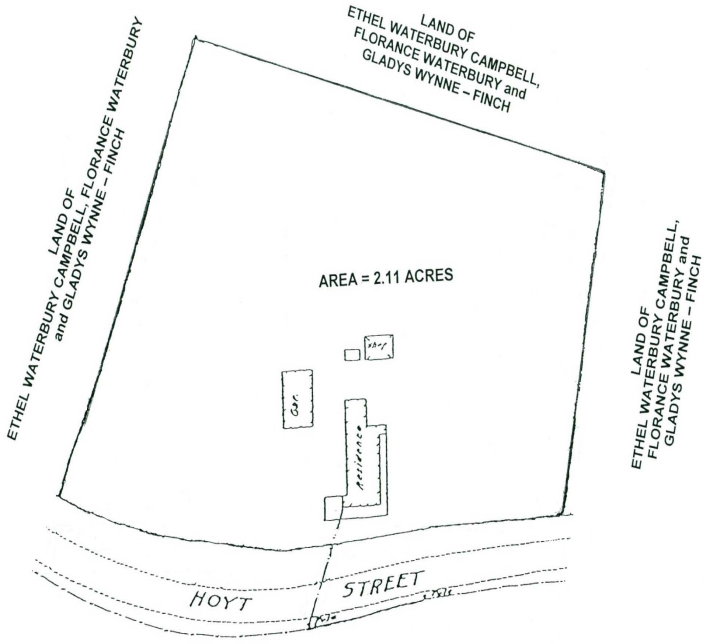
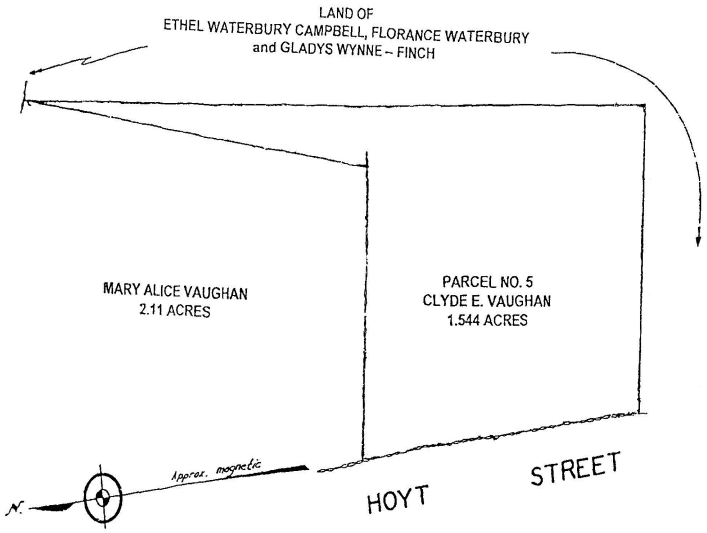
found to be substantial and permanent and, therefore, frustrated the purpose of the restriction.

APPENDIX



MAP SHOWING LAND OF MARY ALICE VAUGHAN

APPENDIX



MAP SHOWING PROPERTIES OF MARY ALICE VAUGHAN
and CLYDE E. VAUGHAN

ELIANA NASSRA *v.* GEORGE A. NASSRA
(AC 38615)

Sheldon, Elgo and Mihalakos, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court ordering the payment of court-ordered visitation supervisor fees to N. Co., a nonparty. The guardian ad litem had engaged S, a principal of N. Co., to provide supervised visitation services to the defendant and his children as part of court-ordered reunification therapy, beginning in 2009. In February, 2010, the defendant had filed a motion for payment, requesting permission to deduct additional funds from his life insurance policy to pay outstanding bills for a psychologist and S, who had assisted the psychologist in providing the supervised visitation services. In March, 2010, the trial court, by agreement of the parties, entered an order authorizing the defendant to borrow an additional $25,000 from the life insurance policy to pay additional outstanding bills to certain parties, including S. After N. Co. terminated its services with the defendant in July, 2010, for lack of payment for services rendered, it filed an appearance in the present dissolution action and, thereafter, filed a motion for order of payment. The defendant then filed a motion to dismiss N. Co.'s motion on the ground that the court lacked subject matter jurisdiction because N. Co. lacked standing. The trial court denied the defendant's motion to dismiss and, subsequently, granted N Co.'s motion for order of payment, ordering the plaintiff and the defendant to be equally responsible for the debt to N. Co. *Held*:

1. The trial court properly determined that N. Co., which satisfied the requirements of classical aggrievement, had standing to bring an action against the defendant and, therefore, that it had subject matter jurisdiction over the action; the record supported that court's finding that a valid oral contract existed between the defendant and N. Co., which met the first prong of classical aggrievement by demonstrating a specific, personal and legal interest in the cause of action sounding in breach of an oral contract, as well as the second prong of classical aggrievement concerning whether it had been injured by the challenged action, as the record demonstrated that N. Co. provided the defendant with supervised visitation services and was not paid for those services, thereby establishing that N. Co had been specially and injuriously affected by the defendant's failure to pay.
2. The defendant could not prevail on his claim that even if an agreement existed with N Co., it was an oral one and, thus, was time barred by the three year statute of limitations (§ 52-581 [a]); § 52-581 (a) does not

apply to an oral contract that has been executed, and because, at the time N. Co. terminated its services for lack of payment, it had fully performed its contractual obligations and the oral contract, thus, was executed, § 52-581 did not apply and, instead, a six year statute of limitations (§ 52-576) was applicable to this case, and N Co.'s claim, which was brought less than six years after the completion of its services, was not time barred.

3. The defendant could not prevail on his claim that the trial court improperly ordered the parties to be equally responsible for the debt to N Co. after they had already complied with the separation agreement that had been incorporated into the dissolution agreement, which was based on his claim that the parties had no notice of the issue of the fees; the defendant had notice of the issue through N. Co.'s motion for order of payment, he addressed the issue through his motion to dismiss and at oral argument at the hearing on N Co.'s motion, the trial court decided an issue that was raised in the pleadings and its calculation of debt was supported by the record, and, therefore, it acted within its discretion in ordering the parties to be equally responsible for the debt to N Co.

Submitted on briefs November 30, 2017—officially released March 27, 2018

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Bridgeport and tried to the court, *Frankel*, *J.*; judgment dissolving the marriage and granting certain other relief; thereafter, N.J. Sarno and Company, LLC, filed a motion for order of payment, which the court, *Adelman*, *J.*, granted, and the defendant appealed to this court. *Affirmed.*

Thomas J. Weihing, *Adam J. Tusia*, and *Joseph D. Compagnone* filed a brief for the appellant (defendant).

Logan A. Forsey and *Timothy J. McGuire* filed a brief for the appellee (N.J. Sarno and Company, LLC).

Opinion

MIHALAKOS, J. This appeal arises from an action in which a nonparty, N.J. Sarno and Company, LLC (N.J. Sarno), filed a motion for order of payment of court-ordered visitation supervisor fees in connection with

the underlying dissolution action between the plaintiff[1] and the defendant, George A. Nassra. After the court held a hearing on the motion, it rendered judgment for N.J. Sarno, finding the parties jointly and severally liable in the amount of $8785. On appeal, the defendant claims that the trial court: (1) lacked subject matter jurisdiction over the action because N.J. Sarno lacked standing; (2) improperly determined that an oral contract existed between N.J. Sarno and the defendant;[2] (3) improperly determined that N.J. Sarno's contract claim was not time barred by the three year statute of limitations provided by General Statutes § 52-581 (a); and (4) improperly rendered judgment in favor of N.J. Sarno after the parties had complied with the terms of the separation agreement. We disagree and, accordingly, affirm the judgment of the trial court.

The record reflects the following facts and procedural history. The plaintiff and the defendant were married on July 4, 1993. On December 15, 2008, the plaintiff

[1] The plaintiff, Eliana Nassra, now known as Eliana Kouchary, is not a participating party in this appeal.

[2] Although the defendant and N.J. Sarno have briefed standing and contract formation as separate issues, our determination with respect to standing is dependent on the existence of a contract, to which N.J. Sarno was a party. We therefore address both issues in part I of this opinion.

Furthermore, notwithstanding the defendant's position that no contract existed, in his reply brief, the defendant further claims that "[Sarno] materially breached the terms of the alleged oral contract." We decline to consider this claim because it was never raised in the defendant's initial brief. See, e.g., *Hurley* v. *Heart Physicians, P.C.*, 298 Conn. 371, 378 n.6, 3 A.3d 892 (2010) ("[W]e consider an argument inadequately briefed when it is delineated only in the reply brief. [W]e generally decline to consider issues that are inadequately briefed . . . ." [Internal quotation marks omitted.]); *Commissioner* v. *Youth Challenge of Greater Hartford, Inc.*, 219 Conn. 657, 659 n.2, 594 A.2d 958 (1991) ("Claims of error by an appellant must be raised in his original brief . . . so that the issue as framed by him can be fully responded to by the appellee in its brief, and so that we can have the full benefit of that written argument. Although the function of the appellant's reply brief is to respond to the arguments and authority presented in the appellee's brief, that function does not include raising an entirely new claim of error." [Citation omitted; internal quotation marks omitted.]).

filed an action seeking the dissolution of the marriage and custody of the parties' two minor children. Attorney Brian Kaschel subsequently was appointed by the court as guardian ad litem for the parties' two minor children. The parties agreed to deduct funds from the defendant's Northwest Mutual life insurance policy, which were to be held by Kaschel, to pay for attorney, expert and guardian ad litem fees.

On October 16, 2009, in connection with court-ordered reunification therapy, Kaschel referred the parties to David J. Israel, a psychologist, for an evaluation of the minor children and the development of a parenting plan. Kaschel also engaged Nicholas Sarno, a principal of N.J. Sarno, to provide supervised visitation services for the defendant and his children. In December, 2009, Israel began reunification therapy between the defendant and his two children. Sarno was present and "supervised" at each of these sessions with Israel. In February, 2010, Sarno and Donald Jacques, another employee of N.J. Sarno, began to facilitate and supervise visitation between the defendant and his children outside of sessions with Israel. On February 25, 2010, the defendant filed a motion for payments, in which he requested permission to deduct additional funds from his life insurance policy to pay outstanding bills for "[Israel] . . . and [Sarno], who is assisting [Israel] with supervised visitation." On March 17, 2010, N.J. Sarno sent a letter to the defendant, stating: "Please be advised that if [N.J. Sarno] does not receive payment in full on your [six] outstanding invoices by . . . March 19, 2010, we will no longer be able to continue providing [s]upervised [v]isitation services. . . . Sincerely, Nicholas Sarno . . . [N.J. Sarno]." On March 18, 2010, the court, *by agreement of the dissolution parties*, entered an order authorizing the defendant to borrow an additional $25,000 from the life insurance policy "for the payment of fees to Kaschel . . . [Israel] and his assistant

[Sarno]. [Kaschel] will hold and distribute [these] funds." Thereafter, the defendant brought his account current and N.J. Sarno continued to provide supervised visitation services. On July 29, 2010, N.J. Sarno terminated its services on the basis of lack of payment dating back to June 11, 2010.

Approximately four years later, on July 24, 2014, N.J. Sarno brought an action in the small claims session of the Superior Court. On March 6, 2015, the court determined that it lacked jurisdiction and dismissed the action. Four days later, N.J. Sarno filed an appearance in the underlying dissolution action and, thereafter, on March 18, 2015, moved for an order of payment of court-ordered visitation supervisor fees. In its motion, N.J. Sarno alleged that the defendant owed it $8785 for court-ordered supervised visitation services rendered between June 11, 2010 and July 29, 2010.

On April 1, 2015, the defendant moved to dismiss N.J. Sarno's motion, claiming that the court lacked subject matter jurisdiction because N.J. Sarno did not have standing to bring the action. Specifically, the defendant argued that N.J. Sarno lacked standing because it "was not involved in the instant action," "ha[d] never been referred to throughout the case," and "is a different entity than [Sarno] in his capacity as [Israel's] assistant." The defendant attached as an exhibit the court's March 18, 2010 order, which refers to Sarno as Israel's assistant. On April 21, 2015, N.J. Sarno filed an objection to the defendant's motion to dismiss the order of payment. N.J. Sarno attached as an exhibit the March 17, 2010 letter.

On June 24, 2015, the court, *Sommer*, *J.*, issued a written order denying the defendant's motion to dismiss. In its order, the trial court made the following findings: "In this action, there is no dispute that the defendant received the services rendered by individuals

employed by [N.J. Sarno] over a significant period of time beginning in January, 2010, in compliance with court ordered reunification therapy for the defendant and his children, that the defendant paid a portion of the bill for said services and requested the family court's permission to utilize certain financial resources to pay for court-ordered supervised visitation provided by individuals under the auspices of [N.J. Sarno]. . . . As noted by [N.J. Sarno], the [defendant] has failed to submit any proof to rebut [N.J. Sarno's] jurisdictional allegations or any evidence which would call them into question. . . . [T]he court finds that the defendant has failed to establish a basis for the court to dismiss the motion for order of payment of court-ordered visitation supervisor fees. . . ."

On July 7, 2015, the defendant moved the court for reconsideration, or in the alternative, articulation of certain factual findings underlying its denial of his motion to dismiss. Specifically, the defendant requested that the court articulate its findings that: (1) "there is no dispute that the defendant received the services rendered by the individuals employed by [N.J. Sarno]" and (2) "the defendant paid a portion of the bill for said services." The court, *Adelman, J.*, denied the defendant's motion on July 20, 2015.[3]

On December 14, 2015, Judge Adelman conducted a hearing on N.J. Sarno's motion for order of payment. The court heard testimony from Sarno, who explained that he was a co-owner of N.J. Sarno, which was an active limited liability company at all times it provided services to the defendant. Sarno testified that he was

[3] We note that Judge Adelman, not Judge Sommer, ruled on the defendant's motion for reconsideration and articulation. See Practice Book § 11-12 (c) ("The motion to reargue shall be considered by the judge who rendered the decision or order. Such judge shall decide, without a hearing, whether the motion to reargue should be granted.") The defendant, however, has not raised this issue on appeal.

not Israel's assistant, had no formal working relationship with Israel and that he became involved at the request of Kaschel. Sarno further testified that, initially, there was an agreement that Kaschel would pay N.J. Sarno's invoices until the money ran out of escrow. Sarno explained that in March, 2010, there was an unpaid balance of approximately $4000 and that "[he] could no longer carry [the defendant]" because "[he] had a responsibility not only to [his] company and [himself], but also to one of [his] employees." Sarno informed the defendant that he could not continue to provide visitation services if he was not paid. Sarno testified that the defendant replied "please, don't leave. . . . I promise to pay you" and that, thereafter, the defendant would pay him "now and then."

At the hearing, N.J. Sarno submitted into evidence eight invoices that were billed by N.J. Sarno to the defendant for services performed between April 1, 2010 and July 29, 2010. Four invoices were marked "paid"; the four remaining invoices were unpaid, totaling $8785. Sarno testified that the invoices accurately represented the services that were provided to the defendant. Sarno stated that he hand delivered an invoice to the defendant on a weekly basis. Sarno further testified that he would always provide receipts for payments made by the defendant, stating: "[I]f [the defendant] made a payment and if it was not by check, if it was cash, we wrote out a . . . hand receipt that would say to [the defendant] from [N.J. Sarno], subject cash payment towards balance. Then in the body we would write received from [the defendant] . . . the sum . . . to be placed against balance outstanding, and then signed. . . . We have never . . . stopped that procedure in twenty-three years." Sarno acknowledged that he has no record of specific payments made by Kaschel or the defendant, or copies of receipts, just that the invoices were paid.

The defendant also testified. He disagreed with the dates of service listed on the invoices. He further testified that he sometimes paid Sarno in cash but that he was never given a receipt. After hearing testimony, the court stated that it was "certainly familiar with [Sarno's] company and the services that [N.J. Sarno] has rendered. . . . [E]verything in this file indicates, in agreements and orders, that this was . . . a joint debt of the parties." The court then ordered that the plaintiff and defendant "shall be equally responsible for the debt to [N.J. Sarno] in the amount of $8785." This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

We first address the defendant's standing claim because it implicates subject matter jurisdiction and, thus, presents a threshold issue for our determination. See, e.g., *Dow & Condon, Inc.* v. *Brookfield Development Corp.*, 266 Conn. 572, 579, 833 A.2d 908 (2003) ("[o]nce the question of lack of jurisdiction of a court is raised, [however, it] must be disposed of no matter in what form it is presented . . . and the court must fully resolve it before proceeding further with the case" [internal quotation marks omitted]). The defendant claims that N.J. Sarno, a limited liability company, lacks standing because it does not have a legal or equitable right, title or interest in the subject matter of this controversy. Specifically, the defendant argues that "[a]lthough [Sarno] acted as [Israel's] assistant to facilitate and supervise the visitation . . . [N.J. Sarno] was not involved in the instant action," and that "there is no evidence that a contract, either oral or written, existed between N.J. Sarno and [the defendant]." In response, N.J. Sarno argues that "there was ample evidence that [it] had standing to [enforce the terms of the oral contract] and bring [an action] and, therefore, the court had subject matter jurisdiction." We agree with N.J. Sarno.

We initially note that although the defendant has appealed from the court's determination regarding liability, he renews his argument, previously raised in his motion to dismiss, that the court lacked subject matter jurisdiction because N.J. Sarno lacked standing.[4] "If a party is found to lack standing, the court is without subject matter jurisdiction to hear the case. Because standing implicates the court's subject matter jurisdiction, the [nonparty] ultimately bears the burden of establishing standing. A trial court's determination of whether a [nonparty] lacks standing is a conclusion of law that is subject to plenary review on appeal. We conduct that plenary review, however, in light of the trial court's findings of fact, which we will not overturn unless they are clearly erroneous. . . . 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. . . . This involves a two part function: where the legal conclusions of the court are challenged, we must determine whether they are

[4] We clarify this point because N.J. Sarno, in its brief, focuses solely on the trial court's denial of the defendant's motion to dismiss. Specifically, it concludes that "[the] undisputed evidence, along with the allegations of the motion for order of payment, viewed in the light most favorable to N.J. Sarno, support the trial court's determination that the court had subject matter jurisdiction over the present matter." Although N.J. Sarno correctly states that our review of a trial court's ultimate legal conclusion is plenary, we disagree that our review is limited to the allegations of N.J. Sarno's motion for order of payment and undisputed evidence before the trial court at the time it decided the defendant's motion to dismiss.

This court has previously stated that: "[S]ubject matter jurisdiction can be raised at any time. . . . Consequently, it may be raised after significant discovery has occurred, at trial, or even on appeal. The possibility that the court's subject matter jurisdiction may be challenged at each stage of litigation militates against requiring litigants to use the motion to dismiss at all times to bring the issue to the court's attention. If the motion to dismiss was the only procedural vehicle by which subject matter jurisdiction could be contested, courts may not consider evidence produced through discovery that is relevant to the determination." (Citation omitted; emphasis omitted.) *Manifold* v. *Ragaglia*, 94 Conn. App. 103, 121, 891 A.2d 106 (2006).

legally and logically correct and whether they find support in the facts set out in the [record]; where the factual basis of the court's decision is challenged we must determine whether the facts . . . are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous. . . . A court's determination is clearly erroneous only in cases in which the record contains no evidence to support it, or in cases in which there is evidence, but the reviewing court is left with the definite and firm conviction that a mistake has been made." (Citations omitted; internal quotation marks omitted.) *R.S. Silver Enterprises, Inc.* v. *Pascarella*, 163 Conn. App. 1, 7–8, 134 A.3d 662, cert. denied, 320 Conn. 929, 133 A.3d 460 (2016).

"Standing is the right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . [W]hen standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue and not whether the controversy is otherwise justiciable, or whether, on the merits, the [nonparty] has a legally protected interest [that may be remedied]. . . .

"Standing is established by showing that the party claiming it is authorized by statute to bring an action, in other words statutorily aggrieved, or is classically aggrieved. . . . The fundamental test for determining [classical] aggrievement encompasses a well-settled twofold determination: [F]irst, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole.

Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]. . . . Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Internal quotation marks omitted.) *Chiulli* v. *Zola*, 97 Conn. App. 699, 704–705, 905 A.2d 1236 (2006); accord *May* v. *Coffey*, 291 Conn. 106, 112, 967 A.2d 495 (2009); *Heinonen* v. *Gupton*, 173 Conn. App. 54, 60, 162 A.3d 70, cert. denied, 327 Conn. 902, 169 A.3d 794 (2017).

"A limited liability company is a distinct legal entity whose existence is separate from its members. . . . A limited liability company has the power to sue or to be sued in its own name . . . or may be a party to an action brought in its name by a member or manager. . . . A member or manager, however, may not sue in an individual capacity to recover for an injury based on a wrong to the limited liability company." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Channing Real Estate, LLC* v. *Gates*, 326 Conn. 123, 137–38, 161 A.3d 1227 (2017); *O'Reilly* v. *Valletta*, 139 Conn. App. 208, 214, 55 A.3d 583 (2012), cert. denied, 308 Conn. 914, 61 A.3d 1101 (2013).

In the present case, whether N.J. Sarno has been classically aggrieved and, therefore, has standing, hinges on whether a contractual relationship existed between N.J. Sarno and the defendant. "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 [nonparty] is neither a party to, nor a contemplated beneficiary of, [the] agreement, [it] lacks standing to bring [its] claim for breach of [contract]." (Citation omitted; internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Cornelius*, 170

Conn. App. 104, 116 n.10, 154 A.3d 79, cert. denied, 325 Conn. 922, 159 A.3d 1171 (2017); *Dow & Condon, Inc.* v. *Brookfield Development Corp.*, supra, 266 Conn. 579; see also *Chila* v. *Stuart*, 81 Conn. App. 458, 464, 840 A.2d 1176 ("[i]t is axiomatic that an action upon a contract or for breach of a contract can be brought and maintained by one who is a party to the contract sued upon" [citation omitted; internal quotation marks omitted]), cert. denied, 268 Conn. 917, 847 A.2d 311 (2004).

"[Where] there [is] no written agreement, and, therefore, no definitive contract language to interpret, determining who was a party to the contract and the intent of those parties with respect to the terms of any contractual agreement involve[s] factual determinations that we will reverse only if clearly erroneous." (Internal quotation marks omitted.) *Computer Reporting Service, LLC* v. *Lovejoy & Associates, LLC*, 167 Conn. App. 36, 45, 145 A.3d 266 (2016).

In the present case, Judge Sommer found that the defendant: (1) "received the services rendered by individuals employed by [N.J. Sarno] over a significant period of time"; (2) "paid a portion of the bill for said services"; and (3) "requested . . . permission to [deduct funds from the life insurance policy] to pay for court ordered supervised visitation provided by individuals under the auspices of [N.J. Sarno]." Furthermore, at the December 14, 2015 hearing on the motion for order of payment, Judge Adelman acknowledged that "there [was] no written contract, there [was] simply an oral contract." We note that the court made very few factual findings relative to the formation of an oral contract other than its existence;[5] however, our review of the record before the trial court reveals that there was sufficient evidence to support the court's finding that a valid oral contact existed.

[5] The defendant did not seek an articulation of the factual or legal basis for Judge Adelman's December 14, 2015 ruling.

The record indicates that N.J. Sarno, through its agents Sarno and Jacques, provided the defendant with supervised visitation services between January and July, 2010. N.J. Sarno's invoices were initially paid with the defendant's funds, which were held in escrow by Kaschel. When those funds were depleted, the defendant acknowledged his obligation to pay for N.J. Sarno's services by way of his February 25, 2010 motion for payments and subsequent March 18, 2010 agreement, which was "incorporated by reference into the order . . . of the court" pursuant to General Statutes § 46b-66 (a).[6] On the basis of this court order, the defendant argues that "the authority for [Sarno] to do anything came from [Israel] and the court's authorization to allow [Sarno] to work for [Israel] as his assistant," and that N.J. Sarno "must be forced to show that [it] has standing based on the [March 18, 2010 agreement] alone." Such an argument ignores the fact that this language originated from a handwritten agreement between the defendant and the plaintiff, an agreement that N.J. Sarno was not a party to, and was incorporated as an order of the court. To the extent the defendant asserts that he did not know he was dealing with a limited liability company, the record before this court belies that assertion.[7]

Furthermore, although the defendant argues that "N.J. Sarno has not provided sufficient evidence to demonstrate the existence of a contract independent [of

[6] General Statutes § 46b-66 (a) provides in relevant part: "In any case under this chapter where the parties have submitted to the court a final agreement concerning the custody, care, education, visitation, maintenance or support of any of their children . . . the court shall . . . determine whether the agreement of the spouses is fair and equitable under all the circumstances. If the court finds the agreement fair and equitable, it shall become part of the court file, and if the agreement is in writing, it shall be incorporated by reference into the order or decree of the court."

[7] For example, on November 8, 2010, the plaintiff filed her witness list, which included "Mr. Nicholas J. Sarno, N.J. Sarno & Company" and "Mr. Don Jacques, N.J. Sarno & Company."

the March, 2010] agreement," he did not dispute Sarno's testimony that the defendant promised to pay him in March, 2010, that Sarno hand delivered invoices from N.J. Sarno on a weekly basis, and that the defendant paid him on occasion thereafter. On the basis of our review, we conclude that the court's finding that an oral agreement existed between N.J. Sarno and the defendant was supported by the record. We conclude that N.J. Sarno has met the first prong of classical aggrievement by demonstrating a specific, personal and legal interest in the cause of action, which sounds in breach of an oral contract. See, e.g., *Padawer* v. *Yur*, 142 Conn. App. 812, 66 A.3d 931 (limited liability company was proper party to sue on contract where party acted as agent of limited liability company and not as an individual), cert. denied, 310 Conn. 927, 78 A.3d 145 (2013); *Kadar Development Corp.* v. *Masulli*, 33 Conn. Supp. 613, 364 A.2d 851 (1976) (corporation had standing to sue on oral contract entered into between corporation's president and defendant).

We also conclude that N.J. Sarno has met the second prong of classical aggrievement, which "involves a determination of whether [it] has been injured by the challenged action." *Chiulli* v. *Zola*, supra, 97 Conn. App. 705. The record demonstrates that N.J. Sarno provided supervised visitation services to the defendant and was not paid for those services. We therefore conclude that N.J. Sarno has established that it has been specially and injuriously affected by the defendant's failure to pay. Because N.J. Sarno has satisfied the requirements of classical aggrievement, we conclude that it had standing to bring an action against the defendant and, therefore, that the trial court had subject matter jurisdiction over the action.

II

Notwithstanding the defendant's claim that no contract existed, in the final paragraph of his initial brief,

he argues that "if an agreement existed . . . the agreement . . . would have been oral" and, therefore, time barred by the three year statute of limitations provided by § 52-581 (a). We conclude, however, that N.J. Sarno's claim is not time barred.

We begin by setting forth the applicable standard of review and the relevant legal principles that guide our analysis. "The question of whether a party's claim is barred by the statute of limitations is a question of law, which this court reviews de novo. . . . The factual findings that underpin that question of law, however, will not be disturbed unless shown to be clearly erroneous." (Citation omitted; internal quotation marks omitted.) *Village Mortgage Co.* v. *Veneziano*, 175 Conn. App. 59, 75–76, 167 A.3d 430, cert. denied, 327 Conn. 957, 172 A.3d 205 (2017).

Section 52-581 (a) provides that: "No action founded upon any express contract or agreement which is not reduced to writing, or of which some note or memorandum is not made in writing and signed by the party to be charged therewith or his agent, shall be brought but within three years after the right of action accrues." General Statutes § 52-576 (a), however, provides in relevant part: "No action for an account, or on any simple or implied contract, or on any contract in writing, shall be brought but within six years after the right of action accrues . . . ."

This court has previously addressed the distinction between §§ 52-581 and 52-576. "These two statutes, each establishing a different period of limitation, can both be interpreted to apply to actions on oral contracts. Our Supreme Court has distinguished the statutes, however, by construing § 52-581, the three year statute of limitations, as applying only to *executory* contracts. . . . A contract is *executory* when neither party has

fully performed its contractual obligations and is *executed* when one party has fully performed its contractual obligations. . . . It is well established, therefore, that the issue of whether a contract is oral is not dispositive of which statute applies. Thus, the . . . argument that § 52-581 automatically applies to [an] oral contract . . . is incorrect. The determinative question is whether the contract was executed." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Bagoly* v. *Riccio*, 102 Conn. App. 792, 799, 927 A.2d 950, cert. denied, 284 Conn. 931, 934 A.2d 245 (2007); accord *John H. Kolb & Sons, Inc.* v. *G & L Excavating, Inc.*, 76 Conn. App. 599, 610, 821 A.2d 774, cert. denied, 264 Conn. 919, 828 A.2d 617 (2003).

The defendant recognizes this statutory distinction and argues that the alleged oral agreement is executory in nature because neither he nor N.J. Sarno has fully performed their contractual obligations.[8] We are not persuaded. The record demonstrates that at the time N.J. Sarno terminated its services for lack of payment it had fully performed its contractual obligations, specifically, providing supervised visitation services. The oral contract, therefore, is executed. See, e.g., *John H. Kolb & Sons, Inc.* v. *G & L Excavating, Inc.*, supra, 76 Conn. App. 610 (contract executed where "plaintiff had performed all of its contractual obligations fully by obtaining the insurance on behalf of the defendant . . . [and] [a]ll that remained was for the defendant to provide payment for the plaintiff's services"); *Tierney* v. *American Urban Corp.*, 170 Conn. 243, 249, 365 A.2d 1153 (1976) (oral contract executed when plaintiff had done everything he had contracted to do); *Campbell* v.

[8] The defendant argues that N.J. Sarno could not have completed its contractual obligations because it materially breached the contract. Specifically, the defendant argues that "[N.J. Sarno] and [Sarno] did not perform the job that he was hired to do and was required of him." We previously declined to address the defendant's claim of material breach because it was inadequately briefed. See footnote 2 of this opinion.

Rockefeller, 134 Conn. 585, 587–88, 59 A.2d 524 (1948) (oral contract executed where "everything that was to have been done by the plaintiff had been done, and all that remained was [for the defendant] to pay him"); *Hitchcock* v. *Union & New Haven Trust Co.*, 134 Conn. 246, 259, 56 A.2d 655 (1947) (contract executed where plaintiff worker had performed overtime and had not been paid).

We conclude that because the oral contract was executed, § 52-576, not § 52-581, is applicable in this case. N.J. Sarno terminated its services on July 31, 2010 and filed a motion for order of payment on March 18, 2015, less than six years after the completion of its services. Because we conclude that § 52-576, the six year statute of limitations, applies in this case, it is clear that N.J. Sarno's contract claim is not time barred.

III

The defendant's final claim is that the court improperly awarded N.J. Sarno $8785 after the parties had already complied with the separation agreement that had been incorporated into the dissolution judgment. Specifically, the defendant, citing to General Statutes § 46b-62,[9] claims that "the parties . . . had no notice that the issue of fees for the [guardian ad litem], previously addressed [on March 18, 2010 and November 9, 2010], would be an issue to be determined by a subsequent judge." In response, N.J. Sarno contends that "the defendant improperly characterizes the issue . . . as one involving court-ordered payment of fees for a guardian ad litem."

[9] General Statutes § 46b-62 (b) provides in relevant part: "If, in any proceeding under this chapter . . . the court appoints counsel or a guardian ad litem for a minor child, the court may not order the father, mother or an intervening party, individually or in any combination, to pay the reasonable fees of such counsel or guardian ad litem . . . ."

The following additional facts and procedural history are necessary to our resolution of this claim. On November 9, 2010, the court, *Frankel*, *J.*, dissolved the marriage and incorporated the terms of the parties' separation agreement and parental responsibility plan for their two minor children into the dissolution judgment.[10] At the December 14, 2015 hearing on N.J. Sarno's motion for order of payment, Judge Adelman indicated that he was troubled by the November 9, 2010 judgment, but made no legal rulings as to its effect.[11]

With that factual background in mind, we turn to the standard of review and applicable legal principles that

[10] Article 5.3 of the separation agreement provided: "The [defendant] shall contribute the sum of [$16,323] from the cash surrender value of the life insurance policy referred to in Paragraph [6.7] herein to an interest bearing escrow account to cover the following expenses for the minor children: the outstanding fees of the [guardian ad litem], [Israel] and the costs of supervision. [The defendant's counsel] shall hold the funds in escrow and in the event that there is any money left in this account after the termination of supervised visitation, the parties shall divide the remaining balance in this account equally. [The defendant's counsel] shall provide counsel with a reasonable accounting of expenditures made from this account."

[11] The following exchanged occurred between the court and counsel for N.J. Sarno:

"The Court: The issue that I find troubling is that I have a judgment in November, 2010. I have an order for supervised visitation to be paid by the parties through certain funds. I have the final order in November directing the money to be paid. It's a court-ordered supervision. So if it wasn't taken care of in the judgment in November of 2010, what jurisdiction does the court have now to deal with it?

"[N.J. Sarno's Counsel]: [Sarno's] company was not the court-ordered supervisor when . . . the company was providing services. That was done through the [guardian ad litem] and the custody evaluator as part of an attempt to get [the defendant] seeing his children again. . . .

"The custody supervision that was court-ordered and dealt with in that payment order was for that JBM Investigations Company. It had nothing to do with the services that [Sarno] provided. . . .

"The Court: Well, you know, I am not worried about that. I am worried about having a final judgment that dealt with the issue.

"[N.J. Sarno's Counsel]: It deals with the issue of supervised visitation . . . going forward with . . . JBM Investigations. The judgment is silent as to in previous nonspecifically court-ordered . . . supervision services that [N.J. Sarno] provided to [the defendant]. . . .

"The Court: No. It talks about . . . the outstanding fees of the guardian ad litem, [Israel] and the cost of supervision. . . .

guide our analysis. "An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Thus, unless the trial court applied the wrong standard of law, its decision is accorded great deference because the trial court is in an advantageous position to assess the personal factors so significant in domestic relations cases." (Internal quotation marks omitted.) *Antonucci* v. *Antonucci*, 164 Conn. App. 95, 106, 138 A.3d 297 (2016). "We have often stated that the power to act equitably is the keystone to the court's ability to fashion relief in the infinite variety of circumstances that arise out of the dissolution of a marriage. . . . These equitable powers give the court the authority to consider all the circumstances that may be appropriate for a just and equitable resolution of the marital dispute." (Internal quotation marks omitted.) *Callahan* v. *Callahan*, 157 Conn. App. 78, 100, 116 A.3d 317, cert. denied, 317 Conn. 913–14, 116 A.3d 812–13 (2015).

In support of his position that the court improperly awarded N.J. Sarno $8785 after the parties had already complied with the separation agreement, the defendant relies on *Kavanah* v. *Kavanah*, 142 Conn. App. 775, 66 A.3d 922 (2013). In that case, the court, *Prestley*, *J.*, incorporated into the dissolution judgment the parties' initial agreement to appoint a guardian ad litem and share costs equally. Id., 783. The defendant subsequently filed a motion to be excused from paying fees

"[It] does not say who. It just says the cost of supervision shall be paid.

"[N.J. Sarno's Counsel]: That goes from the [July, 2010] to the [November, 2010] period in which JBM Investigations was providing supervised visitation. . . .

"[The] separation agreement which became an order of the court is silent as to [N.J. Sarno's] services."

on the basis of financial hardship and Judge Prestley ordered that "[the guardian ad litem is] to be paid at state rates by the state." Id. After trial, the court, *Dolan, J.*, ordered the parties, sua sponte, to pay the guardian ad litem an additional sum of $5000. Id., 778, 783. On appeal, this court held that the court's order was improper because there was: (1) "no motion or request seeking a different payment arrangement for [the guardian ad litem]"; (2) "no opportunity for the parties to address the issue prior to the court's ruling"; and (3) no evidence of [the guardian ad litem's] services from which the court could calculate her fees." Id., 784.

We do not find support for the defendant's position in *Kavanah*, as it is distinguishable from the facts presented by this case. Here, the defendant had notice of the issue through N.J. Sarno's motion for order of payment. Thereafter, the defendant addressed the issue through his motion to dismiss and oral argument at the December 14, 2015 hearing. The trial court decided an issue that was raised in the pleadings and its calculation of debt was supported by the record. We therefore conclude that, under the facts of the present case, the court acted within its discretion in ordering the parties to be equally responsible for the debt to N.J. Sarno.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ANTHONY HUDSON
(AC 38647)

Sheldon, Keller and Bishop, Js.

Syllabus

Convicted of the crime of conspiracy to commit assault in the first degree, the defendant appealed to this court, claiming that there was insufficient evidence to support his conviction. The defendant was allegedly involved in the beating death of the victim that was committed by R, who lived

in an apartment with the defendant and the victim. The defendant and R allegedly had discussed the assault beforehand, and R carried out the assault in the shared apartment, which resulted in the victim's death. *Held* that the evidence was sufficient to support the defendant's conviction of conspiracy to commit assault in the first degree, as the jury reasonably could have drawn the inference that the beating of the victim had been administered by R in furtherance of a mutual plan between R and the defendant that the assault of the victim be carried out, which each man had entered into for his own reasons: although the killing of the victim and the disposal of his body were perpetrated by R without help from the defendant, in light of the evidence presented showing, inter alia, that the defendant had been advised of R's plan before it was set in motion, was present in the apartment when the beating took place but did nothing before or during the beating either to warn the victim of its likely occurrence or to stop it once it had begun, and expressed relief and satisfaction after he saw what R had done to the victim, the jury reasonably could have found beyond a reasonable doubt that the defendant had conspired with R to commit assault in the first degree by inflicting serious physical injury on the victim by means of a dangerous instrument and that R had committed an overt act in furtherance of that conspiracy.

Argued October 17, 2017—officially released March 27, 2018

Procedural History

Substitute information charging the defendant with the crimes of assault in the first degree as an accessory and conspiracy to commit assault in the first degree, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Mullarkey*, *J.*; verdict and judgment of guilty of conspiracy to commit assault in the first degree, from which the defendant appealed to this court. *Affirmed.*

Douglas H. Butler, assigned counsel, for the appellant (defendant).

Rita M. Shair, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Thomas Garcia*, former assistant state's attorney, for the appellee (state).

Opinion

SHELDON, J. The defendant, Anthony Hudson, appeals from the judgment of conviction rendered

against him following a jury trial on the charge of conspiracy to commit assault in the first degree in violation of General Statutes §§ 53a-48 and 53a-59 (a) (1). On appeal, the defendant claims that there was insufficient evidence to support his conviction. We disagree, and thus affirm the judgment of the trial court.

On July 19, 2013, two hikers reported a "very unusual" odor to the Suffield Police Department, which they discovered while out on a bike path in a wooded area in West Suffield. Officer John Lacic was dispatched to investigate the hikers' report. Upon arriving in the wooded area, Lacic also noticed a strong odor, which he determined to be coming from a blue duffle bag containing a dead human body. Lacic was later joined at the scene by other personnel from the Suffield Police Department and the Connecticut State Police Major Crime Squad. The hands and feet of the man in the duffle bag had been tied behind his back with rope, and tape had been wrapped around his head, feet and body. The body was taken to the Chief Medical Examiner's Office in Farmington for autopsy and identification. Based upon his fingerprints, the victim was identified as Peter Boateng.

After identifying Boateng, a police investigation into his death ensued. Detective Joseph Fargnoli, of the Major Crimes Division of the Hartford Police Department, went to 171 South Marshall Street to verify Boateng's address. Fargnoli observed Boateng's name on the apartment's mailbox. Upon returning to his vehicle, which he had parked in the rear of the building, Fargnoli was approached by three individuals: Megan Cowles, Jose Rodriguez and the defendant. Fargnoli told them that Boateng was at the Hartford police station filing a complaint that his property had been taken from the apartment, which appeared to surprise them. When Fargnoli asked them if Boateng resided with them, they responded that Boateng had moved out of

the apartment approximately one week earlier, then invited Fargnoli into the apartment. Upon entering the apartment through the kitchen, Fargnoli observed a bedroom area with a crib in it. He also "noticed what appeared to be a blood stain on the carpet" and detected a smell "like there had been a dead body in the apartment."

On July 22, 2013, Fargnoli returned to 171 South Marshall Street with a warrant to search the apartment. While conducting the search, he noticed that there were bloodstains on the wall and ceiling of the apartment. Members of the search team seized the bloodstained area of carpeting that he had observed when he initially entered the apartment earlier, in addition to a baby blanket that had been used to cover up that stain. They also seized a hatchet, a hammer and a baseball bat. Two cadaver dogs were brought in to search the apartment for the scent of human remains. Both alerted at a bedroom just inside the front door and at the carpet beneath the crib. One of the dogs was also directed to search the interior of Boateng's car, which had been towed from the apartment. The dog alerted to the interior of the trunk of the car.

Fargnoli, along with three additional law enforcement officers, interviewed the apartment's occupants. They first approached the defendant, who was "trembling" and "shaking" as he told the officers that Boateng had moved out of the apartment the week before. The defendant agreed to accompany the officers to the police station for further discussion. During that discussion, the defendant changed his story, explaining that Rodriguez had killed Boateng due to an escalating conflict between himself and Boateng regarding the rent. While the interrogation of the defendant continued, Rodriguez and Cowles also were brought to the

police station for questioning, during which the following information, which ultimately led to the arrest of all three of them, was learned.

In May, 2013, Rodriguez was kicked out of the Salvation Army shelter in Hartford, where he had been living with Cowles and their infant daughter. Soon thereafter, Rodriguez ran into the defendant while walking down the street. Although they had known each other since approximately 1989, they had not seen each other for several years. Upon learning that Rodriguez was homeless, the defendant invited Rodriguez to stay at his two-bedroom apartment on South Marshall Street. Rodriguez accepted the defendant's offer and moved into the apartment with the defendant and Peter Boateng. The defendant and Boateng each stayed in one of the bedrooms, while Rodriguez slept in the living room.

Eventually, Cowles and her daughter also moved into the defendant's apartment, where they slept in the living room with Rodriguez. Shortly after Cowles moved in, Rodriguez overheard Boateng heatedly yelling and cursing at Cowles and his daughter. Rodriguez intervened by yelling at Boateng to stop disrespecting Cowles, and Boateng apologized.

At one point, a conflict arose between the defendant and Boateng because Boateng had paid his share of the rent to the defendant's estranged wife instead of paying it to the defendant so he could pay the landlord. As a result, the defendant was unable to fulfill his obligation to pay the landlord. Thereafter, the defendant repeatedly asked Boateng for the rent, but Boateng refused, causing the conflict between them to escalate. Although the police were called to the apartment on two occasions to respond to arguments between the defendant and Boateng, neither was arrested as a result of those calls. Because of this conflict, the defendant wanted Boateng to move out of the apartment.

Not surprisingly, the events leading up to and culminating in the beating and death of Boateng on July 10, 2013, and the events of that evening, as conveyed by the defendant, Rodriguez and Cowles, were disputed. The defendant and Rodriguez signed written statements to the police upon their respective arrests, which were admitted into evidence at trial. The defendant did not testify at trial, but Rodriguez did. Cowles did not give a written statement to the police when she was arrested, but she testified at trial. We examine each of these key pieces of evidence as the jury was free to believe all or any portion of each of them.

We begin with the defendant's July 23, 2013 written statement to the police, in which the defendant explained that a dispute had arisen between him and Boateng because Boateng had paid his rent to the defendant's estranged wife instead of the defendant, which left the defendant unable to fulfill his obligation to pay their landlord. The defendant repeatedly asked Boateng for the rent, but Boateng refused, causing the conflict between them to escalate, which led to the police being called to their home a couple of times. Nobody was arrested as a result of those calls. The defendant averred, inter alia: "[On July 10, 2013,] I told [Rodriguez] I was going to take [Boateng] to court. [Rodriguez] said no, it was going to take too long. I said I was going to take care of it and [Rodriguez] said no he would take care of it. [Rodriguez] said [Boateng] was going to disappear and that I shouldn't say anything about it. [Rodriguez] said he was used to it. I didn't take [Rodriguez'] word for it. [Rodriguez] said I better not open my mouth and his eyes turned like the devil came out. I told [Rodriguez] don't do that, don't make that man disappear. [Rodriguez] said he was going to dispose of all of [Boateng's] stuff. [Rodriguez] said he was going to burn all of [Boateng's] stuff and it would be gone. [Rodriguez] said he was going to dump [Boateng's] body where

nobody was going to find it. [Boateng] was in his room when me and [Rodriguez] talked. Me and [Rodriguez] were in [Rodriguez'] room. I didn't do anything because I didn't take [Rodriguez] at his word. I didn't tell [Boateng] because [Rodriguez] said all of this right [at Boateng's] bedroom door and I thought [Boateng] heard everything.

"Later that night I was getting ready to go to sleep and [Rodriguez] told me [Boateng] was leaving and was going to disappear tonight. I went to bed. I heard a noise like someone saying 'Ugh' and it was coming from [Boateng's] room. A little while later, about midnight, I got up to go to the bathroom. I saw [Boateng] in his room and he was tied up with a little ball in his mouth. He was on the floor with his head aiming toward my bedroom door. His hands were tied behind his back and his feet were tied behind him. He was tied like cattle. [Boateng] was only wearing blue shorts. [Boateng] looked at me like why? I couldn't do anything. I saw [Rodriguez] and [Cowles] were in [Boateng's] room with him. [Rodriguez] was wearing all black. I don't remember what [Cowles] was wearing. I saw that [Rodriguez] was beat on the head, he was bleeding, blood was just dripping off his head. [Rodriguez] told me to go use the bathroom and go back to my room. I went to the bathroom and then I heard another sound like 'Ugh' and the sound of something popping him. It was [Boateng] making that sound and the other sound was him getting hit. [Boateng] couldn't say anything because of the ball in his mouth. I came out of the bathroom and saw [Rodriguez] and [Cowles] in [Boateng]'s room and [Boateng] was still on the floor tied up, but he wasn't moving. [Rodriguez] told me to go back to bed and in the morning everything would be taken care of and [Boateng] would be gone. [Rodriguez] said [Boateng's] body would be dumped somewhere where it would never be found. When I went into my

bedroom [Rodriguez] and [Cowles] were still in [Boateng's] room and [Boateng] was still on the floor. I went back to bed and laid on my bed. I fell asleep. I heard some more hits. It sounded like [Boateng] was being beat. [Boateng] had stopped making sound. [Rodriguez] and [Cowles] were whispering, it was quiet so I couldn't hear what they were saying. Then everything went silent in [Boateng's] room." The defendant heard Boateng's car "[peel] out of the backyard down the driveway" at about 4:00 or 5:00 a.m. When he awoke at 10:00 a.m., nobody was home and everything but a bed and chair had been removed from Boateng's room. The defendant saw "blood all over the rug and the room smelled like someone died in there."[1]

Rodriguez also gave a written statement to the police when he was arrested on July 23, 2013. In his statement, he explained that the defendant argued frequently with Boateng because Boateng had paid his rent to the defendant's estranged wife instead of directly to him. Rodriguez also stated that Boateng was "always coming into the apartment after work drunk and acting obnoxious" and that Boateng "treated [Cowles] very disrespectfully." Rodriguez asked Boateng "to have some respect and not be disrespectful to [Cowles] all the time."

Rodriguez averred: "[On] July 10th or the 11th [the defendant] told me that he couldn't take [Boateng] anymore. I knew that night I was going to take care of [Boateng] and I was planning on taking a bat that I had in the apartment and I wanted to hit [Boateng] and just scare him to teach him a lesson. I told [the defendant] not to sweat it, that he should rest easy and I was going

[1] In his statement, the defendant went on to explain the events subsequent to Boateng's death, including how Boateng's room was cleaned and that Rodriguez and Cowles moved into that room with their baby. Because the state did not argue at trial that anything that happened after the night of Boateng's murder formed the basis of its conspiracy charge against the defendant, we need not go into detail about those events in this opinion.

to take care of [Boateng]. Later that night [Boateng] came home and was acting stupid slamming doors and knocking around pots and pans in the kitchen. I don't know what happened I took the bat and went into [Boateng's] bedroom and I hit him in the head with the bat a few times. [Boateng] fell to the floor and I knew I was past the point of no return and I was committed. I hit [Boateng] a few more times in the head and I knew I had killed him. As I was hitting [Boateng] [the defendant] came into the room. I told him everything was all set, go to the bathroom and [the defendant] walked out of the room.

"I took some rope that I had in the apartment from moving in and I tied [Boateng's] hands and feet up behind his back. I took [Boateng's] body and I put him into a big blue suit case with wheels that I have had for years. As I was putting the body into the bag [Cowles] walked into the bedroom and freaked out and got really scared. I told her I was sorry and I didn't mean to fuck up this bad. I told her I was sorry and that I wanted to make things right with her and my family." Rodriguez then explained that Cowles helped him dispose of Boateng's body in a wooded area in Suffield.[2]

Rodriguez also testified for the defendant at the defendant's trial. Rodriguez testified that on the night of July 10, 2013, sometime after midnight, everybody was asleep when he awoke, got up and went to use the bathroom. Rodriguez explained that after he used the bathroom, he opened the door and, "[Boateng] took a swing at me and we tussled. . . . [M]e and him got into it, we tussled. I tussled him into the bedroom because the way the bathroom, the living space where me and my spouse and my child was sleepin' and his

[2] Rodriguez also told the police, in his written statement, how he cleaned Boateng's bedroom and disposed of his belongings. Because those actions did not form the basis of the state's conspiracy charge at trial, we need not recite them in detail herein.

bedroom, like his door and the bathroom door were only probably not even three feet away from each other. And so we were in between his bedroom door and the bathroom door. . . . So we tussled into his room because I didn't want it to—I didn't want the physical violence to end up on top of my daughter or [Cowles]. So I preferred that—since it got to this level to just try to tussle him into the bedroom and I did. We were going—we were going shot for shot." Rodriguez testified that Boateng "dropped to the ground" where he "started to grab a hammer." In response, Rodriguez left the bedroom to retrieve an aluminum bat. Upon his return to the bedroom, Boateng swung at Rodriguez with the hammer, but Rodriguez knocked the hammer out of Boateng's hands with the bat. At that point, Rodriguez testified that he "lost it" and "started [hitting] him with the bat" and that he hit Boateng several times until Boateng fell to the floor. Rodriguez testified that Boateng was bleeding and moaning from pain and "eventually lost consciousness." Rodriguez stopped hitting Boateng, but he knew that he "had hit him already one too many times." He then saw Cowles and the defendant in the doorway, and "they looked like they were in shock." He stated that the defendant never entered Boateng's room that night. Twenty minutes passed after Boateng became unresponsive before Rodriguez thought to get some garbage bags from the kitchen to dispose of Boateng's body. He tied a bandana over Boateng's mouth and used a piece of rope to tie Boateng's ankles and hands together behind his back. Rodriguez testified that he put Boateng's body into a garbage bag and then into the trunk of Boateng's car. He stated that he then "just drove," not knowing where he was going, and then exited the highway onto a dark road. He testified that Cowles was not with him.

Rodriguez confirmed that the defendant did not have anything to do with the incident that night and that

the incident "just transpired in split seconds prior to a dispute." Rodriguez testified that although there had been an incident about a week earlier, when Boateng had verbally disrespected Cowles, he had not had any further conflicts with Boateng until Boateng attacked him as he emerged from the bathroom on the night of July 10, 2013. He interpreted Boateng's attack as "very personal" and worried for the safety of Cowles and his daughter. Rodriguez explained that he had not planned to kill Boateng, but that it just "transpired in—within minutes."

Cowles testified at the defendant's trial on behalf of the state.[3] Cowles testified that between the time when she moved into the apartment and the night when Boateng was killed, she had several opportunities to observe the defendant and Boateng interact. She described those interactions as 40 percent "casual" and 60 percent "confrontational." She indicated that "[t]hey had been in several fights after consuming alcohol. There were two instances where the police were called because of physical altercations between them."

Cowles testified that about three days before July 10, 2013, she observed the defendant standing in the doorway to Boateng's bedroom with a hammer in one hand and a hatchet in the other, and heard him tell Boateng, "you're gonna leave here peacefully or you're going to leave here in pieces." On another occasion, when Cowles heard the defendant discussing Boateng's continued residence in the apartment with Rodriguez, she heard him tell Rodriguez that he wanted Boateng out of the apartment, and that he did not "care how he goes, dead or alive, that he wanted him out."

At about 11:30 p.m. on July 10, 2013, Cowles was awakened by the "sound of . . . Boateng being hit with

[3] The written statement that Cowles gave to the police was not introduced into evidence at the defendant's trial.

the baseball bat." She then went into Boateng's room, where she found Rodriguez, who was still holding a baseball bat, and saw Boateng "on the floor kind of making convulsion movements." She then observed "a large laceration in the back of [Boateng's] head" and saw, looking around the bedroom, that there was "a lot of blood everywhere."

Cowles testified that she saw the defendant enter Boateng's room one time. When the defendant entered Boateng's room, Boateng's arms had been tied and a small ball had been shoved into his mouth, held in place by a "bandana [tied] around his face." The defendant went over to Boateng and "forcibly moved [Boateng's] head out of the way" with his foot, "like you would push over a rock to see what's underneath it." The defendant then said to Boateng: "[L]ook at you now, motherfucker, you should have just paid me." The defendant also exclaimed, "hallelujah," and stated "that he was finally going to get the peace that he had been looking for." As the defendant left Boateng's room, he shook Rodriguez' hand "like he was grateful." Cowles testified that she later helped Rodriguez to remove Boateng's dead body from the apartment.[4]

The defendant was charged initially with murder as an accessory, conspiracy to commit murder, and tampering with physical evidence. Later, however, by way of a substitute long form information filed on July 8, 2015, the state reduced the charges to one count each of accessory to assault in the first degree in violation of § 53a-59 (a) (1) and General Statutes § 53a-8, and

[4] Cowles testified that Boateng was dead when they were transporting him to Suffield. She confirmed that she had tested his pulse and it wasn't there. It is not clear from the record exactly when she did this or when Boateng died. Cowles also testified that she tried to clean Boateng's room after the murder. Again, because the state did not base its conspiracy charge against the defendant on anything that took place after the murder, we need not recite those events in detail.

conspiracy to commit assault in the first degree in violation of §§ 53a-48 and 53a-59 (a) (1). After a jury trial on the substituted charges, the defendant was acquitted of accessory to assault in the first degree but convicted of conspiracy to commit assault in the first degree. The defendant was ultimately sentenced on his conspiracy conviction to a term of eighteen years incarceration. This appeal followed.

On appeal, the defendant claims that the evidence adduced at trial was insufficient to support his conviction of conspiracy to commit assault in the first degree. For the following reasons, we are not persuaded.

"It is well settled that a defendant who asserts an insufficiency of the evidence claim bears an arduous burden. . . . [F]or the purposes of sufficiency review . . . we review the sufficiency of the evidence as the case was tried . . . . [A] claim of insufficiency of the evidence must be tested by reviewing no less than, and no more than, the evidence introduced at trial. . . . In reviewing a sufficiency of the evidence claim, we apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict. . . .

"[T]he jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to

consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . . Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact . . . but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [jury] is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [jury] may draw whatever inferences from the evidence or facts established by the evidence [that] it deems to be reasonable and logical. . . .

"[O]n appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty. . . . Claims of evidentiary insufficiency in criminal cases are always addressed independently of claims of evidentiary error. . . . [T]he trier of fact may credit part of a witness' testimony and reject other parts. . . . [W]e must defer to the jury's assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Raynor*, 175 Conn. App. 409, 424–26, 167 A.3d 1076, cert. granted, 327 Conn. 969, 173 A.3d 952 (2017).

"A person is guilty of assault in the first degree when . . . [w]ith intent to cause serious physical injury to another person, he causes such injury to such person . . . by means of a deadly weapon or a dangerous instrument . . . ." General Statutes § 53a-59 (a) (1). A "[d]angerous instrument" is defined as "any instrument,

article or substance which, under the circumstances in which it is used or attempted or threatened to be used, is capable of causing death or serious physical injury . . . .'' General Statutes § 53a-3 (7). ''Serious physical injury'' is defined as ''physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ . . . .'' General Statutes § 53a-3 (4). ''Assault in the first degree is a specific intent crime. It requires that the criminal actor possess the specific intent to cause serious physical injury to another person.'' (Internal quotation marks omitted.) *State* v. *Sivak*, 84 Conn. App. 105, 110, 852 A.2d 812, cert. denied, 271 Conn. 916, 859 A.2d 573 (2004).

''To establish the crime of conspiracy under § 53a-48 . . . it must be shown that an agreement was made between two or more persons to engage in conduct constituting a crime and that the agreement was followed by an overt act in furtherance of the conspiracy by any one of the conspirators. The state must also show intent on the part of the accused that conduct constituting a crime be performed. . . . Conspiracy is a specific intent crime, with the intent divided into two elements: (a) the intent to agree or conspire and (b) the intent to commit the offense which is the object of the conspiracy. . . . Thus, [p]roof of a conspiracy to commit a specific offense requires proof that the conspirators intended to bring about the elements of the conspired offense.'' (Citation omitted; internal quotation marks omitted.) *State* v. *Danforth*, 315 Conn. 518, 531–32, 108 A.3d 1060 (2015). ''Although mere presence at a crime scene, standing alone, generally is insufficient to infer an agreement, a defendant's knowing and willing participation in a conspiracy nevertheless may be inferred from his presence at critical stages of the conspiracy that could not be explained by happenstance

. . . .” (Internal quotation marks omitted.) *State* v. *Rosado*, 134 Conn. App. 505, 511, 39 A.3d 1156, cert. denied, 305 Conn. 905, 44 A.3d 181 (2012).

“[T]he existence of a formal agreement between the conspirators need not be proved [however] because [i]t is only in rare instances that conspiracy may be established by proof of an express agreement to unite to accomplish an unlawful purpose. . . . [T]he requisite agreement or confederation may be inferred from proof of the separate acts of the individuals accused as coconspirators and from the circumstances surrounding the commission of these acts. . . . Further, [c]onspiracy can seldom be proved by direct evidence. It may be inferred from the activities of the accused persons. . . . Finally, [b]ecause direct evidence of the accused’s state of mind is rarely available . . . intent is often inferred from conduct . . . and from the cumulative effect of the circumstantial evidence and the rational inferences drawn therefrom.” (Citation omitted; internal quotation marks omitted.) *State* v. *Danforth*, supra, 315 Conn. 532–33.

“[T]o be convicted of conspiracy, a defendant must specifically intend that every element of the planned offense be accomplished, even an element that itself carries no specific intent requirement.” *State* v. *Pond*, 315 Conn. 451, 453, 108 A.3d 1083 (2015). “[T]he question of intent is purely a question of fact. . . . The state of mind of one accused of a crime is often the most significant and, at the same time, the most elusive element of the crime charged. . . . Because it is practically impossible to know what someone is thinking or intending at any given moment, absent an outright declaration of intent, a person’s state of mind is usually proven by circumstantial evidence. . . . Intent may be and usually is inferred from conduct. . . . [W]hether such an inference should be drawn is properly a question for the jury to decide. . . . [T]he defendant’s state

of mind may be proven by his conduct before, during and after the [conduct constituting the overt act in furtherance of the conspiracy]." (Citation omitted; internal quotation marks omitted.) *State* v. *Douglas*, 126 Conn. App. 192, 204, 11 A.3d 699, cert. denied, 300 Conn. 926, 15 A.3d 628 (2011).

There is no question, on this record, that the killing of Boateng was perpetrated by Rodriguez without help from the defendant, either in administering the fatal beating or in setting it up. The jury's acquittal of the defendant on the charge of accessory to assault in the first degree was entirely consistent with the evidence in this regard. It is also clear from the evidence that the defendant played no role in removing Boateng's body from the apartment or the disposing of it in West Suffield. All of these aspects of Rodriguez' plan to "take care of" Boateng were handled by Rodriguez, with the assistance of Cowles, before they returned to the apartment and moved into Boateng's blood-stained bedroom with their infant child.

On the other hand, the defendant admits, and the testimony of Rodriguez and Cowles clearly confirms, that the defendant had been advised of Rodriguez' plan before it was set in motion, and he was present in the apartment when the beating took place, but he did nothing before or during the beating either to warn Boateng of its likely occurrence or to stop it once it had begun. Furthermore, the defendant expressed only relief and satisfaction after he saw what Rodriguez had done to Boateng, as evidenced by his cry of "hallelujah," his exclamation that now he would be able to live in peace, and his handshake with Rodriguez as he walked out of the bedroom after seeing Boateng on the floor and being told by Rodriguez that Boateng would be gone from the apartment by morning.

The question presented by this evidence is whether it showed only passive acquiescence in or approval of

criminal conduct that the defendant had played no role at all in bringing about, or supported a reasonable inference, in light of all the other evidence presented at trial, that the beating had been administered by Rodriguez in furtherance of a mutual plan between Rodriguez and the defendant that the assault of Boateng be carried out. We conclude that the jury reasonably could have drawn the latter inference, and on that basis, considering all of the evidence in the light most favorable to the state, reasonably could have found the defendant guilty of conspiring with Rodriguez to commit assault in the first degree.

First, although Rodriguez undoubtedly had his own personal reasons for disliking Boateng based upon Boateng's disrespectful treatment of Cowles and his loud, disruptive behavior in the apartment, he was also well aware of the defendant's disgruntlement with Boateng because of Boateng's failure to pay his share of the rent. Thus, although Rodriguez had no involvement in either of the angry confrontations between the defendant and Boateng that led to the police being called to the apartment, he had witnessed those incidents and fully understood why the defendant felt as he did.

Second, Rodriguez knew that the extent of the defendant's unhappiness with Boateng was so substantial that he had threatened Boateng with physical violence, a fact that he had confirmed for Rodriguez shortly before the assault by telling him that he wanted to have Boateng removed from the apartment, dead or alive. Thus, when Rodriguez announced his plan to "take care of" Boateng by disposing of his body where no one would ever find it, he was doing no more than proposing to act on the defendant's own prior threats to Boateng, which was something that he, Rodriguez, claimed to have experience in doing. Although the defendant, who claimed that he only wanted to sue Boateng for eviction,

stated that he did not believe Rodriguez was serious about his plan to make Boateng disappear, he still claims to have felt it necessary to tell Rodriguez not to "make that man disappear." The jury, of course, could freely have disbelieved that claim. Even, however, if the defendant did make such a statement to Rodriguez, he was admittedly told by Rodriguez later that same day that the plan to take care of Boateng would be executed that very evening.

Third, when the defendant entered Boateng's bedroom after hearing the sounds of a beating and of a man moaning, he admittedly saw Boateng, gagged and hog-tied on the floor but still alive, yet did nothing to help Boateng or to renew his claimed protest to Rodriguez not to make Boateng disappear. To the contrary, according to Cowles, he acted disrespectfully toward Boateng, turning his head over with his foot and telling him, "motherfucker, you should have just paid me." By these words, the defendant made it clear that, at least in his eyes, the reason why Rodriguez had assaulted Boateng was to punish him for not paying his share of the rent—a matter in which Rodriguez had no personal interest. That causative link between Boateng's refusal to pay rent and his beating by Rodriguez, which the defendant expressly admitted to in his written statement to the police, supports the inference that Rodriguez had administered the beating in furtherance of a mutual agreement to do so between himself and the defendant, which each man had entered into for his own personal reasons.

Fourth, the defendant's spontaneous expressions of joy and satisfaction upon seeing the initial results of Rodriguez' beating of Boateng support the inference, which Cowles suggested in her testimony, that he was thereby thanking Rodriguez for what he had done. Their handshake at the end of that brief encounter, which followed Rodriguez' statement to the defendant that

Boateng would be gone from the apartment by morning, could reasonably have supported the inference that, in the defendant's view, the beating was being carried out in furtherance of his and Rodriguez' mutual plan.

Fifth and finally, when the defendant walked out of Boateng's bedroom after he and Rodriguez shook hands, knowing that Boateng was still alive but that he would be dead and gone by morning, the jury could reasonably have inferred that he and Rodriguez had agreed that Rodriguez should finish the job by using the bat to beat Boateng further, thereby causing him additional serious physical injury involving a substantial risk of death, before removing his body from the apartment and disposing of it where no one would ever find it. On the basis of such inferences, the jury could reasonably have found beyond a reasonable doubt that the defendant had conspired with Rodriguez to commit assault in the first degree by inflicting serious physical injury upon Boateng by means of a dangerous instrument, and that Rodriguez had committed an overt act in furtherance of that conspiracy.

The judgment is affirmed.

In this opinion the other judges concurred.

SYLVESTER TRAYLOR *v.* CATHY GAMBRELL ET AL.
(AC 39641)

Alvord, Prescott and Beach, Js.

Argued January 16—officially released March 27, 2018

Procedural History

Action to recover personal property, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk; thereafter, the plaintiff withdrew the matter as to the defendant Bruce Wollschlager;

subsequently, the matter was transferred to the judicial district of Waterbury, Complex Litigation Docket; thereafter, the court, *Dooley, J.*, granted the motion to strike filed by the defendant Maciej A. Piatkowski et al.; subsequently, the matter was transferred to the judicial district of Stamford-Norwalk, Complex Litigation Docket; thereafter, the court, *Genuario, J.*, granted the defendants' motions for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Sylvester Traylor, the appellant (plaintiff).

Adam J. Tusia, with whom was *Mark A. Milano*, for the appellees (named defendant et al.).

Maciej A. Piatkowski, self-represented, for the appellees (defendant Maciej A. Piatkowski et al.).

Ronald J. Houde, Jr., for the appellee (defendant town of Waterford).

Opinion

PER CURIAM. The plaintiff, Sylvester Traylor, appeals from the summary judgment rendered by the trial court in favor of the defendants, Cathy Gambrell, Connecticut Interlocal Risk Management Agency (agency), the town of Waterford, Ryan Ryan Deluca LLP, and Maciej A. Piatkowski.[1] On appeal, the plaintiff claims that the trial court improperly rendered summary judgment in favor of the defendants on his claims of spoliation of evidence and in favor of the agency on his claim of unfair trade practices in violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and that the court erred in striking his CUTPA claim against Ryan Ryan Deluca LLP.

[1] Although Bruce Wollschlager was also named as a defendant, the action was withdrawn as to him on November 6, 2014.

After examining the record and the briefs and considering the arguments of the parties, we are persuaded that the judgment rendered by the trial court should be affirmed. The issues raised by the plaintiff were resolved properly in the thoughtful and comprehensive memorandum of decision filed by the trial court. Further discussion by this court would serve no useful purpose. See *Socha* v. *Bordeau*, 289 Conn. 358, 362, 956 A.2d 1174 (2008).

The judgment is affirmed.

JOHN RYAN *v.* PAUL A. CASSELLA
(AC 38910)

Sheldon, Elgo and Shaban, Js.

Syllabus

The plaintiff brought an action seeking to collect a debt allegedly owed by the defendant, C, in connection with an agreement for certain advertising services. The plaintiff's amended writ of summons and complaint identified the defendant as C doing business as C Co., and included C's business address in Woodbridge and his residential address in Orange. C's name was misspelled by one letter in both the summons and the complaint and was misspelled throughout the proceedings. The marshal's return of service indicated that service of process was made at the Orange address. The plaintiff thereafter filed a motion for default for failure to appear, which the trial court granted against C doing business as C Co. A copy of the order granting the motion was sent to C. After a hearing in damages at which C did not appear, the trial court rendered judgment in favor of the plaintiff, who mailed notice of the judgment to C at both of his addresses. Following C's failure to appear at a scheduled hearing on the plaintiff's application for an examination of judgment debtor, the court clerk sent a letter on the court's behalf to C at the Orange address requesting his appearance at a rescheduled hearing on the application and warning him that his failure to appear would result in the issuance of a capias for his arrest. The next day, the court received a letter from C's attorney stating, inter alia, that C was the sole resident at the Orange address, that the party named in the clerk's letter did not reside there and that C should not be served with any capias related to the case. The plaintiff then filed a motion to correct the default judgment requesting that the court recognize that the named defendant and C are the same person for purposes of the

case because the misspelling of C's name constituted a circumstantial defect that was correctable pursuant to the applicable statute (§ 52-123), which permits in certain circumstances the correction of a misnomer when it does not result in prejudice to the parties. The trial court summarily granted the plaintiff's motion to correct and, thereafter, denied C's motion to open and vacate the court's order granting the motion to correct, and C appealed to this court. Subsequently, the trial court issued an articulation clarifying its decision on the plaintiff's motion to correct. *Held*:

1. C could not prevail on his claim that the trial court improperly granted the plaintiff's motion to correct because it failed to specify a legal basis for its decision, as that court's decision was in accordance with well established law: the motion to correct the subject misnomer fell squarely within the purview of § 52-123, as C had actual notice of the proceedings as evinced by his attorney's acknowledgement in his letter to the trial court and at oral argument before this court that C resided at the Orange address and had received numerous pleadings and other communications related to the collection action, C knew that he was the proper defendant in the action and never disputed that he lived at the Orange address, he was aware that there was only one defendant in the action and the record did not contain any averment by him that he did not enter into the agreement detailed in the plaintiff's complaint, and C did not raise a claim of prejudice before the trial court or in his appellate brief; moreover, contrary to C's contention, the trial court had the authority to grant the plaintiff's motion to correct more than four months after the default judgment had been rendered, as the court was not precluded by the relevant statute (§ 52-212a) from correcting a technical defect in a party's name pursuant to § 52-123.
2. The trial court did not abuse its discretion in refusing to open and vacate its order granting the plaintiff's motion to correct; although C asserted that the judgment should have been opened to cite in his business, I Co., as a party defendant, the default judgment was rendered against C in his personal capacity, as the trial court emphasized in its articulation.

Argued December 11, 2017—officially released March 27, 2018

Procedural History

Action to collect a debt, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the defendant was defaulted for failure to appear; thereafter, following a hearing in damages, the court, *Hon. Edward F. Stodolink*, judge trial referee, rendered judgment for the plaintiff; subsequently, the court granted the plaintiff's motion to correct; thereafter, the

court denied the defendant's motion to open the judgment, and the defendant appealed to this court; subsequently, the court, *Hon. Edward F. Stodolink*, judge trial referee, issued an articulation of its decision. *Affirmed.*

Joshua A. Winnick, for the appellant (defendant).

Opinion

ELGO, J. This is a case about a misspelled last name. The defendant, Paul A. Cassella, appeals from the denial of his motion to open the judgment of the trial court, following the granting of a motion to correct the default judgment rendered in favor of the plaintiff, John Ryan,[1] in the amount of $8429.42. On appeal, the defendant claims that the court (1) improperly granted the motion to correct filed by the plaintiff and (2) abused its discretion in denying his motion to open. We disagree and, accordingly, affirm the judgment of the trial court.

The relevant facts are not in dispute. In early 2014, the plaintiff commenced a collection action with a

[1] Although the plaintiff is identified as "John Ryan dba JSR Advertising" in the operative complaint, our Supreme Court has explained that "the use of a fictitious or assumed business name does not create a separate legal entity . . . [and] [t]he designation [doing business as] . . . is merely descriptive of the person or corporation who does business under some other name . . . . [I]t signifies that the individual is the owner and operator of the business whose trade name follows his, and makes him personally liable for the torts and contracts of the business . . . ." (Internal quotation marks omitted.) *Monti* v. *Wenkert*, 287 Conn. 101, 135, 947 A.2d 261 (2008); see also *Edmands* v. *CUNO, Inc.*, 277 Conn. 425, 454 n.17, 892 A.2d 938 (2006) ("The plaintiffs have neither asserted nor provided us with any authority that the designation of Edmands as an individual 'doing business as' Eastern precludes Edmands' personal liability. Our research suggests a contrary rule."); Black's Law Dictionary (9th Ed. 2009) p. 455 (explaining that dba abbreviation "precedes a person's or business's assumed name . . . [and] signals that the business may be licensed or incorporated under a different name").

We further note that although the plaintiff filed an appearance in this appeal, he did not submit an appellate brief. Accordingly, pursuant to this court's April 10, 2017 order, the present appeal will be considered on the basis of the defendant's brief and appendices and the record of this case.

return date of February 25, 2014. His writ of summons and complaint both identified the defendant as "Paul Cascella dba CIA Integrated Marketing Systems"[2] whose principal place of business was located at 27 Lucy Street in Woodbridge (Woodbridge address). State Marshal William Stuart, in his return of service to the court, attested that "[a]bode service was made upon Paul Cascella at 101 Derby Avenue, Orange, Connecticut" (Orange address) on February 4, 2014.

In his nine sentence complaint, the plaintiff alleged that the parties entered into an agreement in October, 2012, regarding certain advertising services that the plaintiff would perform on the defendant's behalf for the sum of $10,000. The complaint further alleged that, after the plaintiff fully performed his obligations under the contract, the defendant made an initial payment of $2000 but thereafter refused to pay the remaining $8000 due to the plaintiff. The defendant did not file an appearance or otherwise respond to that pleading.

On May 28, 2014, the plaintiff moved for permission to file an amended writ of summons and complaint pursuant to Practice Book § 10-60, which the court granted. As the plaintiff indicated in his motion to the court, the primary purpose of that amendment was to include the Orange address, which he claimed was the defendant's residential address. The amended writ of summons and complaint both included the Woodbridge and the Orange addresses.[3] In the certification to the amended writ of summons and complaint, the plaintiff's

[2] We reiterate that, under Connecticut law, inclusion of the acronym "dba" in a party's name does not create a separate legal entity. See footnote 1 of this opinion. Accordingly, the inclusion of "dba CIA Integrated Marketing Systems" in the plaintiff's complaint merely was descriptive of the named defendant, Paul Cascella, and signified that he was personally liable for the torts and contracts of that business. See *Monti* v. *Wenkert*, 287 Conn. 101, 135, 947 A.2d 261 (2008).

[3] The breach of contract allegations in the amended complaint are identical to those set forth in the original complaint.

counsel stated that "a copy of the foregoing was mailed, USPS postage prepaid, to . . . Paul Cascella dba CIA Integrated Marketing Systems" at both his Woodbridge and his Orange addresses. The return of service provided by the state marshal indicates that service of process of the amended writ of summons and complaint was made at the defendant's Orange address on May 22, 2014. The defendant again did not respond in any manner to the amended pleading.

On June 16, 2014, the plaintiff filed a motion for default due to the defendant's failure to appear. By order dated June 24, 2014, the trial court clerk granted that motion against "Paul Cascella dba CIA Integrated Marketing Systems." The order further indicated that if the defendant filed an appearance before judgment was rendered, "the default for failure to appear shall automatically be set aside by operation of law." A copy of that order was sent to the defendant.

When the defendant did not file an appearance or otherwise respond to the order, the plaintiff, on July 25, 2014, filed a certificate of closed pleadings and a claim for a hearing in damages on the previously entered default. A hearing in damages was held on September 11, 2014, at which two checks were admitted into evidence. The first, dated January 17, 2013, was drawn on the account of "Integrated Marketing Sys Inc. 27 Lucy St. Woodbridge, CT 06525-2213." That check, in the amount of $1000, was made payable to "John Ryan Advertising." The authorized signature on that check is indecipherable. The second check, dated January 20, 2013, was drawn on the account of "On The Road Again LLC 27 Lucy St. Woodbridge, CT 06525." That check, also in the amount of $1000, was made payable to "John Ryan Advertising." Although the authorized signature on that check also is indecipherable, it closely resembles the first check that was admitted into evidence as exhibit 1. At the conclusion of the hearing, the court

rendered judgment in favor of the plaintiff in the amount of $8429.42. The court also ordered postjudgment interest at the rate of 6 percent.

In accordance with Practice Book § 17-22, the plaintiff mailed notice of that judgment to "Defendant Paul Cascella dba CIA Integrated Marketing Systems" at both his Woodbridge and his Orange addresses. On October 22, 2014, the plaintiff obtained a financial institution execution pursuant to General Statutes § 52-367b against "Paul Cascella dba CIA Integrated Marketing Systems" as the judgment debtor.

On June 2, 2015, the plaintiff filed an application for an examination of judgment debtor, which the court granted. A hearing thereon was scheduled for July 20, 2015. The marshal's return of service filed with the court indicates that a copy of the plaintiff's application and notice of the July 20, 2015 hearing were served on "Paul Cascella dba CIA Integrated Marketing" at his Orange address on July 7, 2015. When the defendant did not appear at that hearing, an assistant clerk of the Superior Court, acting on behalf of the court, *Bellis*, *J.*, sent a letter addressed to "Paul Cascella" at the Orange address. That correspondence stated in relevant part: "You were ordered to appear before the court for an Examination of Judgment Debtor on July 20, 2015. You failed to appear on that date. You are now requested to appear on August 3, 2015 . . . to comply with the request . . . . If you fail to appear on that day, a *capias* will be issued for your *arrest*." (Emphasis in original.)

The very next day, the court received a written response from Attorney Joshua A. Winnick. In his letter, Winnick stated: "Please be advised that I represent Paul A. Cassella, the sole male resident [at the Orange address] and President of Integrated Marketing Systems, Inc. Mr. Cassella is not now, nor has he ever been, known as Paul Cascella, nor has he ever done business

as CIA Integrated Marketing Systems (redacted copy of Mr. Cassella's Connecticut driver's license and printout from the Secretary of State for Integrated Marketing Systems, Inc. enclosed).[4] Marshal William Stuart attempted to make service on Paul Cascella by leaving a complaint and Petition/Application for Examination of Judgment Debtor at [the Orange address]. Similarly, [the plaintiff's attorneys] have [sent] certified copies of pleadings to Paul Cascella at that address, and the court has attempted to give notice to Paul Cascella at that address that a capias will be issued against him if he does not appear in Bridgeport Superior Court on August 3, 2015 (copy of July 20, 2015 letter enclosed). Obviously, since Paul Cascella does not reside at [the Orange address], all of the documents served on him and mailed to him at that address are not valid and have no legal consequence. Finally, if a capias is issued for Paul Cascella as a result of his failure to appear in court on August 3, 2015, it should not be served on Paul A. Cassella. Please contact me if you have any questions about this letter." (Emphasis in original; footnote added.)

In response, the plaintiff filed a motion to correct that was predicated on Winnick's representations in the July 21, 2015 letter. Specifically, the plaintiff asked the court to "recognize that 'Paul Cascella' and 'Paul A. Cassella' be known to this court for purposes of this proceeding as one [and] the same person. Additionally, [the plaintiff] moves this court to recognize that 'CIA Integrated Marketing Systems' and 'Integrated Marketing Systems, Inc.' be known to this court for purposes of this proceeding as one [and] the same entity." That motion further stated that it was predicated on the misstatement of the defendant's name and that "[p]ursuant to General Statutes § 52-123, this circumstantial

[4] The name on the Connecticut driver's license furnished to the court is "Paul A. Cassella." The address specified on that license is the Orange address.

defect shall have no bearing on the judgment in this case." The plaintiff served a copy of that motion to correct on the defendant on September 8, 2015, at both the Orange address and at 17 Anns Farm Road in Hamden, as documented in the marshal's return of service filed with the court. The defendant did not respond in any manner to that pleading. By order dated October 6, 2015, the court summarily granted the plaintiff's motion to correct.

On October 19, 2015, Winnick filed an appearance on behalf of the defendant. On that date, he also filed a motion to reargue the motion to correct. In that one page motion, the defendant stated that he sought reargument "on the grounds that Paul A. Cassella dba Integrated Marketing Services, Inc. does not properly describe a party, as required by [General Statutes] § 52-45a and Practice Book § 8-1. A party can be an individual, or a party can be a corporation. A party cannot be an individual doing business as a corporation. An individual doing business as a corporation is not a valid legal entity."[5]

The court held a hearing on the defendant's motion to reargue, wherein Winnick reiterated the foregoing argument. In so doing, he repeatedly noted that "[t]here's always been one defendant" in the case. As Winnick stated: "[T]he point is there's only one defendant. That defendant was and still according to the docket sheet, remains a gentleman by the last name of Cascella; C-A-S-C-E-L-L-A. That is not the individual in court with me today." The plaintiff's counsel at that time advised the court that the plaintiff had "pursued

[5] We note that although the defendant in his motion to reargue claimed that "Paul A. Cassella dba Integrated Marketing Services, Inc., does not properly describe a party," the plaintiff did not utilize such nomenclature in his motion to correct. The court likewise never referred to the defendant as "Paul A. Cassella dba Integrated Marketing Services, Inc.," at any time.

this action against [the defendant] in his personal capacity. . . . [W]e've had a . . . judgment in place for over a year against [the defendant] in his personal capacity." The plaintiff's counsel further reminded the court that the motion to correct was due to a "single letter and a misspelling to a party that knows [he is] the proper party . . . . [T]he party had actual notice. . . . [I]f Mr. Cassella wanted to contend that he was not the proper party here . . . then he should've appeared and . . . stated as such." The plaintiff's counsel also indicated to the court that he had no objection to the removal of all references to the defendant's business entity, stating: "[I]f the court wanted to do away with this Integrated Marketing Systems, Inc., that would be perfectly fine. . . . [T]he reality is [that the plaintiff has] a judgment against [the defendant] in his personal capacity . . . ." Following that hearing, the court issued an order denying the defendant's motion to reargue.

On December 9, 2015, the defendant filed a motion to open and vacate the October 6, 2015 judgment granting the plaintiff's motion to correct. In that motion, the defendant alleged that the court improperly permitted the correction of the defendant's name to include "dba Integrated Marketing Systems, Inc." because that entity is a corporation registered with the state of Connecticut and not a fictitious entity. The defendant alleged that, in granting the plaintiff's motion to correct, the court "created the defendant Paul A. Cassella dba Integrated Marketing Systems, Inc., or an individual doing business as a corporation, and a corporation being the trade name of an individual." Appended to that motion was a document from the office of the Secretary of the State indicating that "Integrated Marketing Systems, Inc." was incorporated on December 15, 1993. That document further listed "Paul A. Cassella" as both the president and sole director of that corporation. The plaintiff

filed an objection to the defendant's motion, on which the court heard argument on February 4, 2016.

At that hearing, the defendant argued that the inclusion of "dba Integrated Marketing Systems, Inc." rendered the defendant an "invalid legal entity." In response, the plaintiff reminded the court that it had obtained a default judgment against the defendant in his personal capacity and thereafter brought a motion to correct the misspelling of his last name pursuant to § 52-123. As the plaintiff's counsel stated, "we inadvertently put a C where there should have been an S in [the defendant's] name." The plaintiff thus asked the court "to continue to recognize that [the plaintiff has] a judgment against [the defendant] in his personal capacity." At the conclusion of the hearing, the court orally denied the defendant's motion to open and vacate the judgment and issued an order to that effect later that day. When the defendant requested a statement of that decision, the court issued a further order on March 2, 2016, which stated: "Memorandum of Decision. Attorney Joshua Alan Winnick by his appearance dated October 19, 2015, appeared for 'Paul Cascella dba Integrated Marketing Systems.' There is no appearance for 'Integrated Marketing Systems, Inc.' By motion dated July 22, 2015, the defendant's name was corrected to Paul A. Cassella rather than Paul Cascella. Motion to open and vacate judgment dated December 9, 2015, against Paul A. Cassella individually is denied."

Following the commencement of this appeal, the defendant filed a motion for articulation with the trial court. In its written response, the court stated: "The complaint in this matter was served on Paul A. Cassella by abode service at [the Orange address] on February 4, 2014. The original writ, summons and complaint misspelled the defendant's last name as Cascella, an obvious scrivener's error of one letter. There is no affidavit in the file claiming that Paul A. Cassella was not living

at [the Orange address] on February 4, 2014. The issues raised by the defendant concerning 'doing business as' are not relevant to the validity of the original judgment dated September 11, 2014, against [the defendant]. Further articulation is not necessary."

The defendant thereafter filed a motion for review with this court, which sought an articulation of the factual and legal basis of the court's decision. This court granted that motion and ordered the court to articulate "the name(s) of the defendant(s) in the underlying matter following the trial court's order . . . granting the plaintiff's motion to correct" and "the legal basis for its decision granting the plaintiff's motion to correct." The trial court issued a written response on November 23, 2016, in which it clarified that "[t]here is only one defendant, the individual whose name is spelled Paul A. Cassella. He was properly served by abode service with a summons and complaint with a scrivener's error spelling the defendant's name as Paul A. Cascella . . . . Abode service was made at [the Orange address]. At no time did the defendant claim that his abode was other than at said address. The dba [designation] does not add a second defendant. The court corrected the record to indicate the proper spelling of the sole defendant's name." (Emphasis in original.)

I

The defendant's principal contention is that the court improperly granted the plaintiff's motion to correct. He claims that the court failed to specify a legal basis for so doing in either its ruling on the motion to correct or its subsequent articulation. The defendant further argues that such correction was improper, as it was beyond the four month proscription of General Statutes § 52-212a.

A

We first address the defendant's claim that the court failed to articulate the legal basis of its decision to

grant the motion to correct. We note in this regard that, following the court's November 23, 2016 articulation, the defendant did not request a further articulation or file a motion for review with this court. The aim of such requests is to enable meaningful appellate review when the basis of a court's decision is unclear. See *Grimm* v. *Grimm*, 276 Conn. 377, 389, 886 A.2d 391 (2005), cert. denied, 547 U.S. 1148, 126 S. Ct. 2296, 164 L. Ed. 2d 815 (2006). In the present case, the basis of the court's decision is abundantly clear.

When the plaintiff moved to correct the identity of the defendant in this case, he did so pursuant to § 52-123, claiming that the correction of "this circumstantial defect shall have no bearing on the judgment in this case." As the plaintiff stated at the hearing on the defendant's motion to reargue, his motion to correct was properly granted because he had misspelled the defendant's name by "a single letter" and the defendant had actual notice of the proceedings against him. The plaintiff further submitted that such correction was consistent with the ample body of case law on § 52-123.[6] In summarily granting the plaintiff's motion to correct and denying the defendant's motion to reargue, the trial court plainly agreed with that contention, as do we.

Section 52-123 provides: "No writ, pleading, judgment or any kind of proceeding in court or course of justice shall be abated, suspended, set aside or reversed for any kind of circumstantial errors, mistakes or defects, if the person and the cause may be rightly understood and intended by the court." As our Supreme Court has observed, § 52-123 is "a remedial statute and therefore it must be liberally construed in favor of those whom the legislature intended to benefit. . . . The statute applies

[6] The defendant does not cite or otherwise acknowledge § 52-123 in his appellate brief.

broadly to any writ issued in a civil action . . . .'' (Citations omitted; internal quotation marks omitted.) *Andover Ltd. Partnership I* v. *Board of Tax Review*, 232 Conn. 392, 396, 655 A.2d 759 (1995). Moreover, that statutory imperative ''is mandatory rather than directory . . . .'' Id., 401.

As we previously have recognized, ''this court, as well as our Supreme Court, has held in numerous circumstances that the mislabeling or misnaming of a *defendant* constituted a circumstantial error that is curable under § 52-123 when it did not result in prejudice to either party.'' (Emphasis in original.) *America's Wholesale Lender* v. *Pagano*, 87 Conn. App. 474, 478, 866 A.2d 698 (2005). Our Supreme Court likewise has described ''a defendant designated by an incorrect name'' as a ''classic example'' of a ''misnomer'' that qualifies as ''a circumstantial defect anticipated by . . . § 52-123 . . . .'' *Lussier* v. *Dept. of Transportation*, 228 Conn. 343, 350, 636 A.2d 808 (1994). As the court explained in another case involving a misnamed defendant: ''The identity of the defendant was originally and at all times the same in the mind of the plaintiff and the entity is one and the same whether it be a contractual entity (a partnership), an artificial entity (a corporation), or a personal entity (an individual); its name is the same and its liability is the same and enforceable by the same remedies. . . . The change made by the amendment did not affect the identity of the party sought to be described, but merely made correct the description of the real party sued; it did not substitute or bring in a new party.'' *World Fire & Marine Ins. Co.* v. *Alliance Sandblasting Co.*, 105 Conn. 640, 643, 136 A. 681 (1927). The court further stated that ''[t]he effect given to such a misdescription usually depends upon the question whether it is interpreted as merely a misnomer or defect in description, or whether it is deemed a substitution or entire change of party; in the former case an amendment

will be allowed, in the latter it will not be allowed." (Internal quotation marks omitted.) Id., 643–44.

Consideration of whether "an amendment simply corrects a misnomer, rather than substitutes a new party" is guided by three factors. *Pack* v. *Burns*, 212 Conn. 381, 385, 562 A.2d 24 (1989). Those factors "are that the proper party defendant (1) [had] actual notice of the institution of the action; (2) knew that it was the proper defendant in the action, and (3) was not in any way misled to its prejudice." (Internal quotation marks omitted.) Id.

It is undisputed that the defendant had actual notice of the proceedings in the present case. As Winnick acknowledged in his July 21, 2015 letter to the court, the defendant received copies of numerous pleadings, which is further evidenced by the multiple returns of service filed with the court by state marshals.[7] Those pleadings were sent to the Orange address. In his July 21, 2015 letter to the court, Winnick also appended a copy of the defendant's driver's license, which confirmed that he resided at the Orange address. At oral argument before this court, Winnick acknowledged that the defendant resided at that address and received those communications.

The trial court also properly could conclude that the defendant knew that he was the proper defendant in this collection action. As the court emphasized in both

[7] The record indicates that, prior to filing an appearance in this case, the defendant received copies of the original summons and complaint, the May 21, 2014 amended summons and complaint, multiple motions for default for failure to appear, the June 24, 2014 notice of default, the July 25, 2014 certificate of closed pleadings, the September 11, 2014 notice of judgment, the October 15, 2014 bill of costs, the June 2, 2015 application for an examination of the judgment debtor, the court's July 20, 2015 letter regarding the defendant's failure to appear, and the plaintiff's July 22, 2015 motion to correct. As was the case in *Dyck O'Neal, Inc.* v. *Wynne*, 56 Conn. App. 161, 166–67, 742 A.2d 393 (1999), the defendant "was aware of every step of the proceedings" in this case.

its June 29, 2016 and November 23, 2016 articulations, at no time has the defendant disputed that he resided at the Orange address. The record also does not contain any averment, such as a sworn affidavit, that the defendant did not enter into the agreement detailed in the plaintiff's complaint. Moreover, the defendant was aware that there was only one defendant in the action.[8] As Winnick conceded at the December 3, 2015 hearing on the motion to reargue, "[t]here's always been one defendant . . . . [T]he point is there's only one defendant." In light of the foregoing, the court reasonably could conclude that, despite the misspelling of his last name by one letter on the numerous pleadings sent to his home address, the defendant knew that he was the proper defendant in this action. To paraphrase *Andover Ltd. Partnership I* v. *Board of Tax Review*, supra, 232 Conn. 400, it is evident that the defendant, rather than an individual with the uncannily similar name of Paul Cascella, was the intended defendant and that the defendant had actual notice of the institution of this action.

In addition, the defendant at no time advanced a claim of prejudice before the trial court. He likewise raised no such claim in his appellate brief to this court. Although at oral argument before this court he claimed that such prejudice was "implicit" in his position, it is well established that "claims on appeal must be adequately briefed, and cannot be raised for the first time at oral argument before the reviewing court." *Grimm* v. *Grimm*, supra, 276 Conn. 393; see also *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, 172 Conn. App. 160, 171 n.19, 159 A.3d 684, cert. denied, 326 Conn. 901, 162 A.3d 724 (2017).

To the extent that the defendant professes any confusion as to the proper identity of the defendant in this

[8] The inclusion of a "dba" designation in the operative complaint did not add a second party to the action. See footnotes 1 and 2 of this opinion.

case, we repeat that the court, in its November 23, 2016 articulation, confirmed that "[t]here is only one defendant, the individual whose name is spelled Paul A. Cassella. He was properly served by abode service with a summons and complaint with a scrivener's error spelling the defendant's name as Paul A. Cascella . . . . The dba [designation] does not add a second defendant. The court corrected the record to indicate the proper spelling of the sole defendant's name." (Emphasis in original.)

The foregoing plainly indicates that the court was presented with a motion to correct a misnomer pursuant to § 52-123 and granted that motion in accordance with well established law. Because the plaintiff's motion to correct "falls squarely within the purview of § 52-123"; *Lussier* v. *Dept. of Transportation*, supra, 228 Conn. 352–53; we conclude that the court properly granted that motion.

B

The defendant also claims that the court lacked authority to grant the plaintiff's motion to correct, as that motion was filed more than four months after the default judgment was rendered, in contravention of § 52-212a. He is mistaken.

Section 52-212a provides in relevant part: "Unless otherwise provided by law and except in such cases in which the court has continuing jurisdiction, a civil judgment or decree rendered in the Superior Court may not be opened or set aside unless a motion to open or set aside is filed within four months following the date on which it was rendered or passed. . . ." As our Supreme Court has explained, "the substantive provisions of § 52-212a are fully enforceable as a limitation on the authority of the trial court to grant relief from a judgment after the passage of four months. Thus construed, § 52-212a operates as a constraint, not on the

trial court's jurisdictional authority, but on its substantive authority to adjudicate the merits of the case before it." *Kim* v. *Magnotta*, 249 Conn. 94, 104, 733 A.2d 809 (1999).

In *Dyck O'Neal, Inc.* v. *Wynne*, 56 Conn. App. 161, 742 A.2d 393 (1999), this court was presented with, and rejected, the very claim advanced by the defendant in this appeal. The defendant in that case appealed from the judgment of the trial court granting a motion to correct a party's name. Id., 163. On appeal, the defendant claimed that the trial court lacked authority to grant that motion because it "was filed beyond the four month period allowed by . . . § 52–212a." Id. This court disagreed. After reviewing § 52-123 and related case law regarding circumstantial defects involving misnomers, the court concluded that "the trial court had the authority to correct the judgment to reflect the proper name of the substitute plaintiff." Id., 164. The court further opined that the defendant's argument to the contrary "would provide her with a windfall as a result of a misnomer." Id., 167. Such is the case here. We therefore conclude that § 52-212a did not preclude the court from granting the plaintiff's motion to correct a technical defect in a party's name pursuant to § 52-123.

II

As a final matter, the defendant claims that the court improperly denied his motion to open and vacate its October 6, 2015 judgment granting the plaintiff's motion to correct. That claim is reviewed under the abuse of discretion standard, which requires this court to "give every reasonable presumption in favor of [the] decision's correctness and . . . disturb the decision only where the trial court acted unreasonably or in a clear abuse of discretion." *GMAC Mortgage, LLC* v. *Ford*, 178 Conn. App. 287, 295, 175 A.3d 287 (2017). Although the defendant maintains that the court should have opened

the judgment to cite in Integrated Marketing Services, Inc., as a party defendant, the fact remains that the default judgment in this case was rendered against the defendant in his personal capacity, as the court emphasized in its November 23, 2016 articulation. On the particular facts and circumstances of this case, we conclude that the court did not abuse its discretion in refusing to open and vacate its decision on the plaintiff's motion to correct.

The judgment is affirmed.

In this opinion the other judges concurred.

THE METROPOLITAN DISTRICT *v.* COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES (AC 39371)

Sheldon, Elgo and Mihalakos, Js.

Syllabus

The plaintiff municipal entity, which was the respondent in several proceedings pending before the defendant Commission on Human Rights and Opportunities, commenced this action seeking a declaratory judgment, as well as injunctive and other relief, against the commission, which is a state agency governed by the provisions of the Uniform Administrative Procedure Act (act) (§ 4-166 et seq.). The plaintiff alleged that the commission, as a matter of practice, had assumed and retained jurisdiction over complaints without conducting a proper merit assessment review and made improper reasonable cause determinations, in contravention of its statutory and regulatory obligations and in violation of the plaintiff's right to due process. The commission filed a motion to dismiss the action for lack of subject matter jurisdiction due to the plaintiff's failure to exhaust its administrative remedies. The trial court granted the motion to dismiss and rendered judgment dismissing the plaintiff's action, from which the plaintiff appealed to this court. *Held*:

1. The plaintiff had adequate administrative remedies that it was required, but failed, to exhaust prior to commencing the present civil action: although the complaint primarily complained of certain routine practices allegedly engaged in by the commission, the present action was predicated on the commission's conduct in five specific proceedings before the commission in which the plaintiff was the respondent, three of which were pending before the commission at the time the plaintiff commenced

the present action and concerned the same conduct that formed the basis for the declaratory relief requested, namely, that the commission had not complied with its statutory and regulatory obligations and had improperly assumed jurisdiction over complaints against the plaintiff filed by independent contractors, and, therefore, the plaintiff was required to exhaust its remedies in those pending administrative proceedings, including filing an administrative appeal pursuant to § 4-183 in the Superior Court following the commission's decision, if necessary; moreover, because, during the pendency of those administrative actions, the plaintiff could not resort to the avenues of declaratory relief available under the act to bypass its obligation to exhaust its remedies in the context of a pending administrative proceeding, it likewise was foreclosed from seeking declaratory relief via an independent action in the Superior Court, and to the extent that any issues remained following the culmination of those proceedings, the plaintiff could then properly seek declaratory relief as provided by §§ 4-175 and 4-176.

2. The plaintiff could not prevail on its claim that it qualified for an exception to the exhaustion of administrative remedies requirement for situations in which resort to the administrative remedy would be futile or inadequate: the plaintiff failed to establish demonstrable futility in pursuing its administrative remedies before the commission, as proceedings before the commission are not futile where, as here, a plaintiff's claims can be addressed by way of defenses to the complaint, the plaintiff did not establish that it could not prevail before the commission in the pending proceedings, and although the plaintiff claimed that it was unlikely that the commission would rule in its favor and declare its own conduct to be improper, that contention was based on speculation, which could not establish the requisite futility; moreover, the plaintiff was not permitted to bypass the available administrative procedures even though that process might prove more costly and less convenient than going directly to Superior Court, it could pursue an administrative appeal pursuant to § 4-183, in which it could challenge the agency's determinations, and it failed to articulate any reason why such an appeal would be inadequate, particularly when the statute expressly encompasses allegations that an agency has acted in violation of statutory provisions, in excess of its statutory authority, or upon unlawful procedure.

3. The plaintiff could not prevail on its claim that because it was contesting the jurisdiction of the commission it did not need to comply with the exhaustion requirement, which was based on its claim that there exists a broad exception to the exhaustion requirement that is implicated when the jurisdiction of the administrative agency is challenged: our Supreme Court previously has rejected a similar argument and determined that an administrative agency must first be given the opportunity to determine its own jurisdiction, and, therefore, the plaintiff was obligated to raise

its challenge to the jurisdiction of the commission in the pending administrative proceedings and, if necessary, in an appeal pursuant to § 4-183 or a subsequent declaratory petition pursuant to § 4-176; moreover, the inclusion of requests for injunctive relief and a writ of mandamus in the complaint did not obviate the need for the plaintiff to comply with the exhaustion requirement.

4. The plaintiff's claim that the exhaustion of administrative remedies requirement did not apply to the count of its complaint alleging a violation of its federal due process rights was unavailing; the inadequacy of an available legal remedy is a standard prerequisite for injunctive relief in a state court, and where, as here, an adequate administrative remedy existed, no form of injunctive relief, under the applicable federal statute (42 U.S.C. § 1983) or otherwise, was justified as an exception to the exhaustion requirement.

Argued November 30, 2017—officially released March 27, 2018

Procedural History

Action seeking, inter alia, a judgment declaring that the defendant Commission on Human Rights and Opportunities had engaged in improper rule making, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Scholl*, *J.*, granted the defendant's motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Jeffrey J. Mirman, with whom, on the brief, was *Amy E. Markim*, for the appellant (plaintiff).

Emily V. Melendez, assistant attorney general, with whom, on the brief, was *George Jepsen*, attorney general, for the appellee (defendant).

Opinion

ELGO, J. In this civil action, the plaintiff, The Metropolitan District,[1] appeals from the judgment of the trial

[1] We note that the plaintiff has been identified alternatively as the Metropolitan District and the Metropolitan District Commission in our case law. See, e.g., *Blonski* v. *Metropolitan District Commission*, 309 Conn. 282, 284, 71 A.3d 465 (2013); *Metropolitan District* v. *Burlington*, 241 Conn. 382, 384, 696 A.2d 969 (1997); *Brusby* v. *Metropolitan District*, 160 Conn. App. 638, 641, 127 A.3d 257 (2015); *Metropolitan District Commission* v. *Connecticut Resources Recovery Authority*, 130 Conn. App. 132, 134, 22 A.3d 651 (2011). In the present case, the plaintiff identifies itself as "The Metropolitan Dis-

court granting the motion to dismiss filed by the defendant, the Connecticut Commission on Human Rights and Opportunities (commission). On appeal, the plaintiff claims that the court improperly dismissed the action for lack of subject matter jurisdiction due to the plaintiff's failure to exhaust its administrative remedies. We disagree and, accordingly, affirm the judgment of the trial court.

The plaintiff is a municipal entity that was created in 1929 by a special act of the General Assembly "for the purpose of water supply, waste management and regional planning." *Martel* v. *Metropolitan District Commission*, 275 Conn. 38, 41, 881 A.2d 194 (2005); see also *Rocky Hill Convalescent Hospital, Inc.* v. *Metropolitan District*, 160 Conn. 446, 450–51, 280 A.2d 344 (1971). The commission is a state agency whose "primary role . . . is to enforce statutes barring discrimination . . . ." *Commission on Human Rights & Opportunities* v. *Hartford*, 138 Conn. App. 141, 144 n.2, 50 A.3d 917, cert. denied, 307 Conn. 929, 55 A.3d 570 (2012). With respect to certain nondiscrimination statutes, the legislature expressly has deemed the plaintiff "to be a state agency" within the jurisdiction of the commission. General Statutes § 46a-68 (a).

In late December, 2015, the plaintiff commenced this action seeking a declaratory judgment against the commission, as well as injunctive relief and a writ of mandamus. In its complaint, the plaintiff alleges that the commission, "as a matter of practice," assumes and retains jurisdiction over complaints without conducting a proper merit assessment review and makes improper reasonable cause determinations, in contravention of its statutory and regulatory obligations. More specifically, the plaintiff alleges that the commission routinely fails to comply with the strictures of General Statutes § 46a-83 and §§ 46a-54-42a (a) and 46a-54-49a (b) of

trict" in its complaint and has been referred to as such throughout this litigation.

the Regulations of Connecticut State Agencies.[2] By so doing, the commission allegedly has engaged in improper rulemaking and has violated the plaintiff's due process rights, as secured by 42 U.S.C. § 1983. Those allegations are predicated in part on the commission's conduct in five specific proceedings in which the plaintiff was the respondent.[3] The complaint also alleges that the commission lacks jurisdiction over complaints made by independent contractors against the plaintiff.

[2] General Statutes § 46a-83 "outlines the procedure that the commission must follow" upon receiving a complaint. *Lyon* v. *Jones*, 291 Conn. 384, 398, 968 A.2d 416 (2009). General Statutes (Rev. to 2015) § 46a-83 (b) provides in relevant part: "Within ninety days of the filing of the respondent's answer to the complaint, the executive director [of the commission] or the executive director's designee shall conduct a merit assessment review. The merit assessment review shall include the complaint, the respondent's answer and the responses to the commission's requests for information, if any, and the complainant's comments, if any, to the respondent's answer and information responses. If the executive director or the executive director's designee determines that the complaint fails to state a claim for relief or is frivolous on its face, that the respondent is exempt from the provisions of this chapter or that there is no reasonable possibility that investigating the complaint will result in a finding of reasonable cause, the executive director or the executive director's designee shall dismiss the complaint . . . ."

Section 46a-54-42a (a) of the Regulations of Connecticut State Agencies provides in relevant part that "[p]rior to service of a complaint or an amended complaint upon the respondent, the commission shall review the complaint to determine jurisdiction over the complaint. The review shall include a determination of whether the complaint is timely filed, alleges a discriminatory practice . . . and contains other matters necessary to the commission's jurisdiction over the complaint . . . ."

Section 46a-54-49a (b) of the Regulations of Connecticut State Agencies provides: "The executive director or the executive director's designee shall dismiss the complaint if he or she determines:

"(1) The complaint fails to state a claim for relief;

"(2) The complaint is frivolous on its face;

"(3) The respondent is exempt from the provisions of chapter 814c of the Connecticut General Statutes; or

"(4) There is no reasonable possibility that investigating the complaint will result in a finding of reasonable cause."

[3] As examples of the commission's allegedly improper conduct, the plaintiff in its complaint cites to *Dixon* v. *Metropolitan District Commission*, Docket No. 1210313; *Smith* v. *Metropolitan District Commission*, Docket No. 1210147; *Sotil* v. *Metropolitan District Commission*, Docket No. 1410490; *Cipes* v. *Metropolitan District Commission*, Docket No. 1440395; and *Wills* v. *Metropolitan District Commission*, for which no docket number was provided.

The request for relief in the plaintiff's complaint is primarily declaratory in nature. The plaintiff seeks a declaratory judgment that the commission has engaged in improper rulemaking by engaging in certain "routine practices"[4] and has "violated the procedural and substantive due process rights of the [plaintiff] by engaging in [those] practices." The complaint also seeks a declaratory judgment "that General Statutes § 46a-71[5] does not apply to the [plaintiff], and that the [commission] does not have jurisdiction over complaints filed by independent contractors against the [plaintiff]." (Footnote added.)

Apart from such declaratory relief, the complaint requests a permanent injunction "enjoining the [commission] from engaging in improper rulemaking . . .

[4] The complaint alleges in relevant part that the commission "engaged in the following routine practices:

"1. Issuing complaints to respondents without first determining that the [commission] has jurisdiction over the complaint allegations;

"2. Retaining jurisdiction over complaints without conducting the merit assessment review required by statute and regulations;

"3. Ordering the parties to mandatory mediation without conducting the necessary merit assessment review;

"4. Issuing reasonable cause findings by [commission] employees who have not conducted the investigation required by the statute and regulations;

"5. Issuing reasonable cause findings without providing respondents with an opportunity to comment on draft reasonable cause findings."

[5] Titled "[d]iscriminatory practices by state agencies prohibited," General Statutes § 46a-71 provides: "(a) All services of every state agency shall be performed without discrimination based upon race, color, religious creed, sex, gender identity or expression, marital status, age, national origin, ancestry, intellectual disability, mental disability, learning disability, physical disability, including, but not limited to, blindness.

"(b) No state facility may be used in the furtherance of any discrimination, nor may any state agency become a party to any agreement, arrangement or plan which has the effect of sanctioning discrimination.

"(c) Each state agency shall analyze all of its operations to ascertain possible instances of noncompliance with the policy of sections 46a-70 to 46a-78, inclusive, and shall initiate comprehensive programs to remedy any defect found to exist.

"(d) Every state contract or subcontract for construction on public buildings or for other public work or for goods and services shall conform to the intent of section 4a-60."

and requiring [it] to follow its statutory mandate to engage in proper merit assessment reviews, to dismiss complaints during the merit assessment review process where no reasonable cause exists, to engage in proper substantive review during the early legal intervention process, and to refrain from attempting to assume jurisdiction over matters outside the jurisdiction of the agency."[6] The complaint further requests a writ of mandamus ordering the commission "to review all of its files regarding complaints of discriminatory employment practices since 2011" to determine whether the commission engaged in any of the routine practices enumerated in its complaint. See footnote 4 of this opinion.

In response, the commission filed a motion to dismiss the plaintiff's complaint for lack of subject matter jurisdiction due to the plaintiff's failure to exhaust its administrative remedies.[7] Following the filing of memoranda

[6] The complaint also requests an injunction "enjoining the [commission] from holding its fact-finding conference in the *Sotil* [v. *Metropolitan District Commission*, Docket No. 1410490] case scheduled for February 4, 2016," which was pending before the commission at the time that the plaintiff's complaint was filed. It is undisputed that the fact-finding conference before the commission transpired on February 4, 2016, and that the commission thereafter determined that it had jurisdiction over the matter, as evidenced by the February 19, 2016 written notice to the parties furnished by Brian D. Festa, a human rights attorney with the commission. That notice was appended as an exhibit to the commission's March 15, 2016 reply to the plaintiff's objection to the motion to dismiss.

[7] In its motion to dismiss, the commission also alleged that the plaintiff lacked standing to request a writ of mandamus pursuant to General Statutes § 52-485 and Practice Book § 23-45, the latter of which provides in relevant part that "[a]n action of mandamus may be brought *in an individual right* by any person who claims entitlement to that remedy to enforce *a private duty owed to that person* . . . ." (Emphasis added.) The commission thus argued that the plaintiff lacked standing because it "seeks a writ that is not based upon an individual right to enforce a private duty owed it." The court did not address that argument in its memorandum of decision, and the plaintiff has raised no claim related thereto in this appeal. We therefore confine our review to the claims distinctly presented in this appeal, which pertain solely to the issue of exhaustion of administrative remedies.

of law by the parties, the court heard argument on the motion. In its subsequent memorandum of decision, the court concluded that the plaintiff had adequate administrative remedies that it failed to exhaust prior to commencing this action. Accordingly, the court granted the motion to dismiss for lack of subject matter jurisdiction, and this appeal followed.

As a preliminary matter, we note that "[i]n an appeal from the granting of a motion to dismiss on the ground of subject matter jurisdiction, this court's review is plenary. A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record. . . . Jurisdiction of the subject matter is the power [of the court] to hear and determine cases of the general class to which the proceedings in question belong. . . . A court has subject matter jurisdiction if it has the authority to adjudicate a particular type of legal controversy." (Internal quotation marks omitted.) *Francis* v. *Chevair*, 99 Conn. App. 789, 791, 916 A.2d 86, cert. denied, 283 Conn. 901, 926 A.2d 669 (2007). "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." (Internal quotation marks omitted.) *Bellman* v. *West Hartford*, 96 Conn. App. 387, 393, 900 A.2d 82 (2006). Further, in addition to admitting all facts well pleaded, the motion to dismiss "invokes any record that accompanies the motion, including supporting affidavits that contain undisputed facts." (Internal quotation marks omitted.) *Henriquez* v. *Allegre*, 68 Conn. App. 238, 242, 789 A.2d 1142 (2002).

This appeal concerns the proper application of the exhaustion doctrine. "The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law. . . . Under that doctrine, a trial court lacks subject matter jurisdiction over an action that seeks a remedy that could be provided through an administrative proceeding, unless and until that remedy has been sought in the administrative forum. . . . In the absence of exhaustion of that remedy, the action must be dismissed." (Internal quotation marks omitted.) *Republican Party of Connecticut* v. *Merrill*, 307 Conn. 470, 477, 55 A.3d 251 (2012); see also *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51, 58 S. Ct. 459, 82 L. Ed. 638 (1938) ("no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted").

The exhaustion doctrine is rooted in both prudential and constitutional considerations. As our Supreme Court has explained, "separation of powers principles [underlie] the exhaustion doctrine, namely, to foster an orderly process of administrative adjudication and judicial review, offering a reviewing court the benefit of the agency's findings and conclusions. It relieves courts of the burden of prematurely deciding questions that, entrusted to an agency, may receive a satisfactory administrative disposition and avoid the need for judicial review. . . . Moreover, the exhaustion doctrine recognizes the notion, grounded in deference to [the legislature's] delegation of authority to coordinate branches of [g]overnment, that *agencies*, *not the courts*, *ought to have primary responsibility for the programs that* [*the legislature*] *has charged them to administer*. . . . Therefore, exhaustion of remedies serves dual functions: it protects the courts from becoming unnecessarily burdened with administrative appeals and it

ensures the integrity of the agency's role in administering its statutory responsibilities." (Emphasis in original; internal quotation marks omitted.) *Lopez* v. *Board of Education*, 310 Conn. 576, 598–99, 81 A.3d 184 (2013); see also *McKart* v. *United States*, 395 U.S. 185, 194, 89 S. Ct. 1657, 23 L. Ed. 2d 194 (1969) (exhaustion doctrine an expression of executive autonomy); *American Federation of Government Employees* v. *Resor*, 442 F.2d 993, 994 (3d Cir. 1971) ("[f]or the courts to act prematurely, prior to the final decision of the appropriate administrative agency, would raise a serious question regarding the doctrine of separation of powers, and in any event would violate a [legislative] decision that the present controversy be initially considered by the [agency]"); *Pet* v. *Dept. of Health Services*, 207 Conn. 346, 351–52, 542 A.2d 672 (1988) ("[A] favorable outcome [in an administrative proceeding] will render review by the court unnecessary as . . . [a] complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene." [Internal quotation marks omitted.]). Accordingly, "[i]t is a settled principle of administrative law that, if an adequate administrative remedy exists, it must be exhausted before the Superior Court will obtain jurisdiction to act in the matter." (Internal quotation marks omitted.) *Fairchild Heights Residents Assn., Inc.* v. *Fairchild Heights, Inc.*, 310 Conn. 797, 808, 82 A.3d 602 (2014).

I

We first consider the question of whether administrative remedies were available to the plaintiff in the present case. In this regard, we note that the plaintiff's complaint is twofold in nature. Although it primarily complains of certain "routine practices" allegedly engaged in by the commission, it also is predicated on the commission's conduct in five specific proceedings

in which the plaintiff was the respondent. See footnote 3 of this opinion.

With respect to the former, we note that the complaint generally alleges that the commission routinely fails to comply with certain statutory and regulatory obligations. In addition, the plaintiff seeks a declaratory judgment "that [§] 46a-71 does not apply to the [plaintiff], and that the [commission] does not have jurisdiction over complaints filed by independent contractors against the [plaintiff]." In granting the motion to dismiss, the court concluded, inter alia, that the plaintiff had "the ability to request a declaratory ruling from the commission as to the issues it raises," which it failed to exhaust before commencing this civil action in the Superior Court.[8] That determination merits closer scrutiny.

The commission is a state agency governed by the provisions of the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq. See *Commission on Human Rights & Opportunities* v. *Board of Education*, 270 Conn. 665, 673, 855 A.2d 212 (2004). Pursuant to General Statutes § 4-176 (a), "[a]ny person may petition an agency, or an agency may on its own motion initiate a proceeding, for a declaratory ruling as to the validity of any regulation, or the applicability to specified circumstances of a provision of the general statutes, a regulation, or a final decision on a matter within the jurisdiction of the agency." If the agency issues a declaratory ruling in response to a request made pursuant to § 4-176, "[a]n aggrieved party can appeal from a declaratory ruling to the Superior Court

[8] The court also concluded that it lacked jurisdiction over the plaintiff's complaint "because the plaintiff failed to exhaust the administrative remedies available through the agency proceedings and the appellate process available after them."

pursuant to General Statutes § 4-183. See General Statutes §§ 4-166 (3)[9] [now (5)] and 4-176 (h).[10] In addition, if an agency declines to issue a declaratory ruling, the person who requested the ruling may bring a declaratory judgment action [in the Superior Court] pursuant to General Statutes § 4-175 (a).[11]'' (Footnotes in original.) *Republican Party of Connecticut* v. *Merrill*, supra, 307 Conn. 477–78.

Compliance with § 4-176 is not a discretionary option for a party such as the plaintiff, but rather is a ''precondition'' to the commencement of a declaratory action in the Superior Court. *Financial Consulting, LLC* v. *Commissioner of Ins.*, 315 Conn. 196, 199, 105 A.3d 210 (2014). As our Supreme Court has explained, ''[i]n 1988, the legislature passed No. 88-317 of the 1988 Public Acts (P.A. 88-317), which substantially revised the

[9] ''General Statutes § 4-166 (3) provides in relevant part: ' ''Final decision'' means . . . (B) a declaratory ruling issued by an agency pursuant to section 4-176. . . .' '' *Republican Party of Connecticut* v. *Merrill*, supra, 307 Conn. 477 n.6. Since that case was decided, what had been subdivision (3) of § 4-166 was renumbered as subdivision (5). See Public Acts 2014, No. 14-187, § 1.

[10] ''General Statutes § 4-176 (h) provides in relevant part: 'A declaratory ruling shall be effective when personally delivered or mailed or on such later date specified by the agency in the ruling, shall have the same status and binding effect as an order issued in a contested case and shall be a final decision for purposes of appeal in accordance with the provisions of section 4-183. . . .' '' *Republican Party of Connecticut* v. *Merrill*, supra, 307 Conn. 477 n.7.

[11] ''General Statutes § 4-175 (a) provides: 'If a provision of the general statutes, a regulation or a final decision, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff and if an agency (1) does not take an action required by subdivision (1), (2) or (3) of subsection (e) of section 4-176, within sixty days of the filing of a petition for a declaratory ruling, (2) decides not to issue a declaratory ruling under subdivision (4) or (5) of subsection (e) of said section 4-176, or (3) is deemed to have decided not to issue a declaratory ruling under subsection (i) of said section 4-176, the petitioner may seek in the Superior Court a declaratory judgment as to the validity of the regulation in question or the applicability of the provision of the general statutes, the regulation or the final decision in question to specified circumstances. The agency shall be made a party to the action.' '' *Republican Party of Connecticut* v. *Merrill*, supra, 307 Conn. 478 n.8.

UAPA. . . . The purpose of this revision, in part, was to simplify the [circumstances] that require appeal [from declaratory rulings] as oppose[d] to independent action. . . . Accordingly, the legislature subjected declaratory rulings . . . in both contested and noncontested cases, to judicial review by way of [administrative] appeal . . . and *limited direct petitions to the Superior Court for declaratory judgments to those circumstances wherein the petitioner first had requested a declaratory ruling from the agency, but did not receive one*." (Citations omitted; emphasis added; internal quotation marks omitted.) *Sastrom* v. *Psychiatric Security Review Board*, 291 Conn. 307, 322–23, 968 A.2d 396 (2009). For that reason, the Supreme Court "repeatedly has held that when a plaintiff can obtain relief from an administrative agency by requesting a declaratory ruling pursuant to § 4-176, the failure to exhaust that remedy deprives the trial court of subject matter jurisdiction over an action challenging the legality of the agency's action." *Republican Party of Connecticut* v. *Merrill*, supra, 307 Conn. 478; see also *Polymer Resources, Ltd.* v. *Keeney*, 227 Conn. 545, 558, 630 A.2d 1304 (1993) ("[b]ecause [the plaintiff] could have appealed to the Superior Court pursuant to § 4-183 from any adverse declaratory ruling by the commissioner . . . [it] was required to request such a declaratory ruling before seeking redress in court"); *Connecticut Mobile Home Assn., Inc.* v. *Jensen's, Inc.*, 178 Conn. 586, 589–91, 424 A.2d 285 (1979) (plaintiff improperly bypassed administrative remedy by failing to seek declaratory ruling from agency prior to commencing action in Superior Court). It is undisputed that the plaintiff did not avail itself of the administrative remedy provided by § 4-176 prior to commencing this declaratory action.

Whether the plaintiff properly was entitled to avail itself of that administrative remedy is another question. While the essence of the plaintiff's complaint is that

the commission allegedly has failed, as a matter of practice, to comply with certain statutory and regulatory obligations, the complaint also is predicated on the commission's conduct in five specific proceedings before the commission in which the plaintiff was the respondent. The inclusion of such allegations requires us to consider whether the pendency of any of those proceedings precluded resort to the avenues of declaratory relief afforded under §§ 4-175 and 4-176, in light of our Supreme Court's decision in *Financial Consulting, LLC* v. *Commissioner of Ins.*, supra, 315 Conn. 196.

The plaintiffs in that case were insurance producers that were licensees of the defendant administrative agency. Id., 200–201. When an insurance company notified the agency that it was terminating the plaintiffs as its agents due to their "alleged misconduct while selling life insurance policies," the agency began an investigation of the plaintiffs to determine whether they had violated any state insurance laws. Id., 201. During the course of that investigation, the agency issued " 'second chance' " notices to the plaintiffs "informing them of the allegations and offering them an opportunity to show their compliance with the law in order to retain their licenses." Id.

While that investigation was pending, the plaintiffs filed a petition for a declaratory ruling pursuant to § 4-176 with the agency,[12] which took no action thereon. Id., 202–203. After sixty days had passed, the plaintiffs brought a declaratory action in the Superior Court pursuant to § 4-175. Id., 203. Because the agency at that time was engaged in an investigation of the plaintiffs, the trial court concluded that the investigation constituted a pending " 'agency proceeding' " under the

[12] In their petition, the plaintiffs in that case sought a declaratory ruling "with respect to seven questions concerning the legality of their conduct in the sale of life insurance policies." *Financial Consulting, LLC* v. *Commissioner of Ins.*, supra, 315 Conn. 202.

UAPA. Id., 204. The court therefore "rejected the plaintiffs' claim that §§ 4-175 and 4-176 authorized them to use the declaratory judgment procedure to bypass the [agency's] pending administrative process" and dismissed the matter for lack of subject matter jurisdiction due to the plaintiffs' failure to exhaust their administrative remedies. Id., 204–205.

On appeal, the Supreme Court addressed, as a matter of first impression, the issue of "whether the declaratory ruling and judgment procedures [set forth in §§ 4-175 and 4-176] are available when an agency proceeding, such as an investigation, is already pending with respect to the conduct at issue." Id., 211; see also id., 215 n.15. The court answered that query in the negative, stating that "[t]he utility of that statutory procedure is . . . largely vitiated if agency proceedings have already been commenced with respect to the same conduct that forms the basis for the petition for declaratory relief. An administrative proceeding affords its subject numerous potential remedies including . . . judicial relief in an administrative appeal pursuant to § 4-183 from the final agency decision against them. . . . Thus, once an administrative proceeding has commenced, the prudential concerns underlying the exhaustion doctrine counsel against permitting parties to pursue a judicial remedy such as a declaratory judgment." Id., 214–15. The court further noted authority from sister states that "supports the position . . . that the declaratory judgment procedures under §§ 4-175 and 4-176 may not be used to bypass a party's obligation to exhaust its remedies in the context of a pending administrative proceeding." Id., 215–16. The court nevertheless held that, because the agency had "not yet instituted formal license revocation proceedings" against the plaintiffs; id., 221; the trial court had "improperly dismissed this declaratory judgment action on the ground that the

plaintiffs had failed to exhaust their administrative remedies." Id., 222.

In so doing, the court in *Financial Consulting, LLC*, distinguished those proceedings before the defendant Commissioner of Insurance from investigatory proceedings before the commission, stating that "in contrast to the relatively informal second chance process that is a precursor to license revocation proceedings [before the Commissioner of Insurance, proceedings before the commission] involve formal agency proceedings . . . ." Id., 222 n.21. That distinction is consistent with *Greater Bridgeport Transit District* v. *Commission on Human Rights & Opportunities*, 211 Conn. 129, 131, 557 A.2d 925 (1989), which recognized that the commission's "investigation of a complaint of employment discrimination"; id., 133; constituted a pending administrative proceeding that required exhaustion prior to "a judicial challenge" to the commission's actions. Id., 131; see also id. ("we have recognized the delay and disruption in the administrative process that would result from judicial interference with statutorily authorized administrative investigations intended to determine whether there is a factual basis for the initiation of formal proceedings"); *Commission on Human Rights & Opportunities* v. *Archdiocesan School Office*, 202 Conn. 601, 605, 608, 522 A.2d 781 (holding that respondent in pending commission proceeding could not raise issues in Superior Court proceeding challenging administrative action because "the investigatory stage" had not concluded and stating that "the [commission's] investigation may not be forestalled at this point in the proceeding simply because [constitutional] issues may later be raised if the outcome of the investigatory process is adverse to the defendants"), appeal dismissed, 484 U.S. 805, 108 S. Ct. 51, 98 L. Ed. 2d 15 (1987).

In accordance with the foregoing, we must examine the record to determine (1) whether any of the five

proceedings before the commission detailed in the plaintiff's complaint were pending at the time that this action was commenced and (2) if so, whether the proceeding concerns "the same conduct that forms the basis for the petition for declaratory relief." *Financial Consulting, LLC* v. *Commissioner of Ins.*, supra, 315 Conn. 214. At oral argument before the trial court on the motion to dismiss, the plaintiff's counsel conceded that the *Dixon* and *Smith* matters; see footnote 3 of this opinion; were not pending.[13] Nevertheless, the commission, in its motion to dismiss, acknowledged that the other three proceedings, identified as *Sotil* v. *Metropolitan District Commission*, *Cipes* v. *Metropolitan District Commission*, and *Wills* v. *Metropolitan District Commission*, in the plaintiff's complaint, were "currently pending" before the commission.

Guided by the precedent of our Supreme Court in *Financial Consulting, LLC* v. *Commissioner of Ins.*, supra, 315 Conn. 214, we therefore look to whether any of those three proceedings concern the same conduct that forms the basis for the present declaratory action. In this regard, we are mindful of the procedural posture of this case, in which the court, in considering the merits of a motion to dismiss, must construe the allegations of the complaint in the light most favorable to the pleader. *Wilkins* v. *Connecticut Childbirth & Women's Center*, 314 Conn. 709, 718, 104 A.3d 671 (2014).

So construed, the plaintiff's complaint indicates that the *Sotil* matter involves the same conduct complained

[13] At the March 31, 2016 hearing before the trial court, counsel for the commission informed the court that administrative appeals before the Superior Court already had transpired in the *Dixon* and *Smith* matters. The plaintiff's counsel acknowledged those appeals and informed the court that the *Smith* matter had "settled" and that "[t]he *Dixon* matter is also over . . . . [W]e brought these cases to the court's attention in our complaint not because they hadn't been resolved but because they show the pattern and practice of the agency exceeding its statutory and regulatory jurisdiction."

of in this civil action—namely, the commission's alleged noncompliance with its statutory and regulatory obligations, and its jurisdiction over complaints filed by independent contractors against the plaintiff.[14] The parties have not argued otherwise in this appeal. In addition, both the commission and the plaintiff, in their respective memoranda of law submitted on the motion to dismiss, appended various documents regarding the *Sotil* matter that plainly evince a dispute as to whether the commission had improperly retained jurisdiction over the matter, as the plaintiff alleges in its complaint.[15]

[14] Paragraphs nine and ten of the complaint allege in relevant part: "[I]n *Sotil* v. *Metropolitan District Commission*, Docket No. 1410490, by letter dated September 18, 2014, and by various letters thereafter, counsel for the [plaintiff] advised counsel for the [commission] that the [commission] did not have jurisdiction over the claims alleged in the Complaint. Nevertheless, the [commission] issued a notice of retention following merit assessment review, and before the [plaintiff] had an opportunity to timely reply to the Complainant's response to its position statement. Thereafter, by letter dated June 12, 2015, counsel for the [plaintiff] advised counsel for the [commission] that . . . the [commission] does not have jurisdiction over claims arising under 42 U.S.C. [§] 1981 against the [plaintiff]. Nevertheless, the [commission] refused to dismiss the claim. In short, the [commission] has failed and continues to fail to conduct proper merit assessments and reviews. Upon information and belief, the [commission] has instituted a practice of routinely retaining jurisdiction over cases without engaging in the merit assessment review process. . . .

"Prior to service of a complaint or an amended complaint upon the respondent, the commission shall review the complaint to determine jurisdiction over the complaint. . . . Upon information and belief, the [commission] has routinely failed to review complaints filed with it to determine whether the [commission] has jurisdiction over the complaint. Rather, the [commission] only has jurisdiction of claims against the [plaintiff] by 'employees,' as that term is defined in the statute. . . . [I]n *Sotil*, the [commission] served a complaint upon the [plaintiff] notwithstanding the [complainant was] not [an employee] of the [plaintiff] but admittedly [is an] independent [contractor]."

[15] As previously noted, the motion to dismiss, in addition to admitting all facts well pleaded, "invokes any record that accompanies the motion, including supporting affidavits that contain undisputed facts." (Internal quotation marks omitted.) *Henriquez* v. *Allegre*, supra, 68 Conn. App. 242. Appended to the plaintiff's memorandum of law in opposition to the motion to dismiss was, inter alia, a copy of an e-mail chain among commission officials from May of 2014, regarding the *Sotil* matter. Susan Horn, identified

The plaintiff's complaint also indicates that although "[i]n the position statement filed on September 29, 2015, in connection with the *Sotil* case . . . counsel for the [plaintiff] advised the [commission], inter alia, that (1) all of the claims were filed beyond the 180 day limitation period and are time barred, and (2) that the [commission] is without jurisdiction over those claims brought pursuant to 42 U.S.C. [§] 1981," the commission refused to address those jurisdictional issues. The complaint likewise alleges that the *Cipes* matter involves the issue of whether the complainant was an independent contractor over which the commission had jurisdiction, while the *Wills* matter pertains to whether the commission improperly had retained jurisdiction over an untimely complaint. Like the plaintiffs in *Financial Consulting, LLC* v. *Commissioner of Ins.*, supra, 315 Conn. 202–203, the plaintiff here was a respondent in administrative agency proceedings that concerned the very issues on which it sought declaratory relief.

The existence of those pending administrative proceedings, which concern the same conduct that forms the basis for the plaintiff's request for declaratory relief, precluded the plaintiff from seeking such relief pursuant to §§ 4-175 and 4-176. As our Supreme Court observed, those declaratory judgment procedures, which are the only statutory mechanisms by which a

therein as a "HRO Representative" with the commission, states in relevant part that "[a]fter reviewing the intake sheet and the fifty-four pages of emails, I have come to the conclusion that the complainant [in *Sotil*] has exceeded the 180 days to file his complaint. . . ." After reviewing the commission's handling of the *Sotil* matter, Horn then states: "This situation presents an essential issue: How will the commission be handling the processing of contract compliance complaints in the future? Should the effort be centralized like [h]ousing?" In addition, appended to the commission's reply to the plaintiff's objection to the motion to dismiss was the February 19, 2016 notice to the parties from Brian D. Festa, an attorney with the commission, informing them in relevant part that, "[a]fter a thorough examination of the evidence in the record . . . I have concluded that [the *Sotil*] complaint is timely."

party to an administrative proceeding may bring a direct petition for declaratory relief to the Superior Court; *Sastrom* v. *Psychiatric Security Review Board*, supra, 291 Conn. 322; "may not be used to bypass a party's obligation to exhaust its remedies in the context of a pending administrative proceeding."[16] *Financial Consulting, LLC* v. *Commissioner of Ins.*, supra, 315 Conn. 216. If resort to the declaratory relief afforded by §§ 4-175 and 4-176 is foreclosed due to the pendency of the aforementioned administrative proceedings identified in the plaintiff's complaint, logic dictates that declaratory relief via an independent civil action in the Superior Court likewise is foreclosed. To conclude otherwise would run afoul of both the prudential and the constitutional underpinnings of the exhaustion doctrine.

Pursuant to that doctrine, the plaintiff was required to exhaust its remedies in those pending administrative proceedings. Should the plaintiff prevail therein, unnecessary judicial intervention would be averted, consistent with the well recognized principle that "whenever possible, courts will stay their hand with respect to addressing matters that are within the cognizance of administrative agencies." Id., 212. If the plaintiff does not prevail, it nevertheless would have "access to an

[16] To the extent that the plaintiff seeks to avail itself of General Statutes § 52-29, rather than § 4-175, in pursuing this declaratory action in the Superior Court, our Supreme Court has noted that "declaratory judgment actions under § 4-175 are legally indistinguishable for exhaustion purposes from actions brought pursuant to § 52-29, the general declaratory judgment statute." *Financial Consulting, LLC* v. *Commissioner of Ins.*, supra, 315 Conn. 216 n.15. The court further has explained that "§ 52-29, granting declaratory judgment jurisdiction to the Superior Court, does not qualify as the type of separate statutory authorization . . . that allows for a complete bypassing of an administrative agency with undeniable jurisdiction over the subject matter . . . . [O]ur case law makes clear that . . . broad statutory grants of jurisdiction, such as § 52-29, are not intended to circumvent the well established principles of exhaustion." (Citations omitted; internal quotation marks omitted.) *River Bend Associates, Inc.* v. *Water Pollution Control Authority*, 262 Conn. 84, 105–106, 809 A.2d 492 (2002). Invoking § 52-29, therefore, does not obviate a party's obligation to exhaust its administrative remedies before commencing an action in the Superior Court.

administrative remedy"; id., 207; in the form of an administrative appeal pursuant to § 4-183.

As our Supreme Court has observed, "§ 4-183[17] provides the proper avenue for reviewing an agency's actions. . . . Not only does that statute provide a right of appeal from a final agency decision by an aggrieved party, but it also includes an immediate right to appeal from an adverse preliminary ruling if review of the final agency decision would not provide an adequate remedy.[18] Moreover, the statutory framework includes a means of staying an agency decision pending appeal.[19] . . . Thus, a potentially aggrieved party is well protected by statute."[20] (Citation omitted; footnotes

[17] General Statutes § 4-183 (a) provides in relevant part: "A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court as provided in this section. . . ."

[18] General Statutes § 4-183 (b) provides: "A person may appeal a preliminary, procedural or intermediate agency action or ruling to the Superior Court if (1) it appears likely that the person will otherwise qualify under this chapter to appeal from the final agency action or ruling and (2) postponement of the appeal would result in an inadequate remedy."

[19] General Statutes § 4-183 (f) provides in relevant part: "The filing of an appeal shall not, of itself, stay enforcement of an agency decision. An application for a stay may be made to the agency, to the court or to both. Filing of an application with the agency shall not preclude action by the court. . . ."

[20] At the hearing on the motion to dismiss, counsel for the commission attested that, in two of the matters cited in the plaintiff's complaint known as *Dixon* v. *Metropolitan District Commission* and *Smith* v. *Metropolitan District Commission*, the plaintiff availed itself of the remedies provided by § 4-183 by bringing interlocutory administrative appeals raising issues similar to those presented in this case. As counsel stated, "these [administrative appeals] were heard in the [Superior Court] . . . and it's the very same issues that they put in their complaint here." Attorney Kevin Shea, who was present at that hearing due to his representation of the plaintiff in other matters, confirmed that those administrative appeals were commenced in the Superior Court. Counsel for the commission thus requested that the court take judicial notice of those administrative appeals, which request the court granted when the plaintiff's counsel indicated that he had no objection thereto.

In its memorandum of decision, the court noted that the plaintiff "has, in fact, utilized the provisions of . . . § 4-183 to seek judicial review of

added.) *Pet* v. *Dept. of Health Services*, supra, 207 Conn. 352. In commencing this civil action while the *Sotil*, *Cipes*, and *Wills* matters remained pending before the commission, the plaintiff, to paraphrase our Supreme Court, chose not to avail itself of the safeguards afforded by § 4-183. See id.

In its memorandum of decision, the trial court concluded that "[i]t is clear to the court that all the issues raised by the [plaintiff] can be litigated and resolved in the context of the [pending commission] proceedings, and, if the [plaintiff] is unsuccessful, can be appealed to the court or be the subject of a petition for a declaratory ruling to [the commission]." We agree with that assessment. If the plaintiff does not prevail in the pending *Sotil*, *Cipes*, and *Wills* matters, it may bring an administrative appeal—interlocutory if necessary—before the Superior Court pursuant to § 4-183. If the plaintiff ultimately prevails in the *Sotil*, *Cipes*, and *Wills* matters, its interests ostensibly will be vindicated, but to the extent that any issues remain following the culmination of those proceedings, the plaintiff then properly may seek declaratory relief as provided by §§ 4-175 and 4-176. In light of the pendency of the *Sotil*, *Cipes*, and *Wills* proceedings before the commission, we conclude that administrative remedies were available to the plaintiff that it was required to exhaust, including an appeal pursuant to § 4-183, rather than commencing an independent civil action for declaratory relief in the Superior Court.[21] See *Housing Authority* v. *Papandrea*, 222

interlocutory decisions of [the commission]. For example, in the *Dixon* and *Smith* cases cited in [the plaintiff's] complaint, the [plaintiff] filed interlocutory appeals from [the commission's] reasonable cause finding. See *Metropolitan District Commission* v. *Commission on Human Rights & Opportunities*, Superior Court, judicial district of New Britain, Docket No. CV-14-6024208; *Metropolitan District Commission* v. *Commission on Human Rights & Opportunities*, Superior Court, judicial district of New Britain, Docket No. CV-14-6024368."

[21] If those administrative proceedings were *not* pending, we reiterate that, absent an applicable exception to the exhaustion requirement, the plaintiff would be required to avail itself of the remedy provided by § 4-176 prior to

Conn. 414, 423–24, 610 A.2d 637 (1992) ("[w]hen a party has a statutory right of appeal from a decision of the administrative agency, [it] may not, instead of appealing, bring an independent action to test the very issues which the [administrative] appeal was designed to test" [internal quotation marks omitted]).

II

The plaintiff nonetheless claims that it qualifies for two exceptions to the exhaustion requirement. First, it argues that its administrative remedies are futile and inadequate. Second, the plaintiff claims that it need not comply with the exhaustion requirement when challenging the jurisdiction of the commission. We disagree with both contentions.

A

We begin by noting that "[n]otwithstanding the important public policy considerations underlying the exhaustion requirement, [our Supreme Court] has carved out several exceptions from the exhaustion doctrine . . . although only infrequently and only for narrowly defined purposes. . . . Such narrowly defined purposes include when recourse to the . . . remedy would be futile or inadequate. . . . A remedy is futile or inadequate if the decision maker is without authority to grant the requested relief." (Citations omitted; internal quotation marks omitted.) *Garcia* v. *Hartford*, 292

commencing an independent action for declaratory relief in the Superior Court. See, e.g., *Financial Consulting, LLC* v. *Commissioner of Ins.*, supra, 315 Conn. 199 (compliance with § 4-176 a "precondition" to commencement of declaratory action in Superior Court); *Republican Party of Connecticut* v. *Merrill*, supra, 307 Conn. 478 ("[t]his court repeatedly has held that when a plaintiff can obtain relief from an administrative agency by requesting a declaratory ruling pursuant to § 4-176, the failure to exhaust that remedy deprives the trial court of subject matter jurisdiction over an action challenging the legality of the agency's action"). Moreover, if the commission denied a request for declaratory relief pursuant to § 4-176, the plaintiff could appeal from that ruling to the Superior Court pursuant to § 4-183. Id., 477.

Conn. 334, 340, 972 A.2d 706 (2009). "It is futile to seek a remedy only when such action could not result in a favorable decision . . . ." *O & G Industries, Inc.* v. *Planning & Zoning Commission*, 232 Conn. 419, 429, 655 A.2d 1121 (1995); see also *Polymer Resources, Ltd.* v. *Keeney*, supra, 227 Conn. 563 ("[d]irect adjudication even of constitutional claims is not warranted when the relief sought by a litigant might conceivably have been obtained through an alternative [statutory] procedure . . . which [the litigant] has chosen to ignore" [internal quotation marks omitted]). To avail itself of the futility exception, a plaintiff must establish "demonstrable futility in pursuing an available administrative remedy." *Pet* v. *Dept. of Health Services*, supra, 207 Conn. 356.

The plaintiff has not satisfied that burden. It is undisputed that, at the time that it commenced this action, the *Sotil*, *Cipes*, and *Wills* matters remained pending before the commission. In each instance, the plaintiff was the respondent. As this court has noted, proceedings before the commission are not futile when "the plaintiff's claims can be addressed by way of defenses to [the complainant's] complaint." *Flanagan* v. *Commission on Human Rights & Opportunities*, 54 Conn. App. 89, 92, 733 A.2d 881, cert. denied, 250 Conn. 925, 738 A.2d 656 (1999). Furthermore, the plaintiff has not even argued, much less demonstrated, that it cannot prevail before the commission in those pending proceedings. This case thus resembles *Johnson* v. *Dept. of Public Health*, 48 Conn. App. 102, 114, 710 A.2d 176 (1998), in which we observed that the futility exception did not apply because "[t]he plaintiff may prevail before the agency. He has available an adequate remedy, recognized under [§ 4-183], namely, to resort to the agency proceedings that have been instituted, which he now wants to bypass."

In its appellate reply brief, the plaintiff insists that it is unlikely that the commission would rule in the plaintiff's favor and declare its own conduct to be improper. We decline to view an administrative agency of this state with such a jaundiced eye. As the United States Supreme Court has noted, "[j]udicial intervention into the agency process denies the agency an opportunity to correct its own mistakes." *Federal Trade Commission* v. *Standard Oil Co. of California*, 449 U.S. 232, 242, 101 S. Ct. 488, 66 L. Ed. 2d 416 (1980). Moreover, the plaintiff's contention is pure speculation, which cannot establish the requisite futility. See *Polymer Resources, Ltd.* v. *Keeney*, supra, 227 Conn. 562 ("a mere conclusory assertion that an agency will not reconsider its decision does not excuse compliance with the exhaustion requirement"); *O & G Industries, Inc.* v. *Planning & Zoning Commission*, supra, 232 Conn. 429 (when party's suspicion of bias on part of zoning commission is purely speculative, such suspicion does not render exhaustion of administrative remedies futile); *LaCroix* v. *Board of Education*, 199 Conn. 70, 84–85, 505 A.2d 1233 (1986) ("the statutory remedies are not rendered futile by the plaintiff's conclusory assertion that requesting and attending a hearing before the defendant board would have been pointless in the face of the board's earlier decision to terminate his employment"); *Johnson* v. *Dept. of Public Health*, supra, 48 Conn. App. 113 ("[t]he mere allegation that [resort to agency action] will prove [futile] is not cognizable"). As one court aptly observed, "[n]o doubt denial is the likeliest outcome [in the administrative proceeding], but that is not sufficient reason for waiving the requirement of exhaustion. Lightning may strike; and even if it doesn't, in denying relief the [agency] may give a statement of its reasons that is helpful to the [court] in considering the merits of the claim." (Emphasis omitted.) *Greene* v. *Meese*, 875 F.2d 639, 641 (7th Cir. 1989).

The record plainly reflects that the plaintiff is dismayed by the resources which it must expend in responding to complaints made with the commission. The plaintiff also bemoans what, at times, can be a protracted process before the commission. As its counsel stated at oral argument before this court, an independent action before the Superior Court provides a much "quicker" avenue of redress than what it describes in its appellate reply brief as the "painfully slow process utilized by the [commission]." That argument is contrary to our precedent, which instructs that "[i]t is no answer for the plaintiff, in refusing to avail himself of that administrative remedy, to claim that to do so may prove more costly and less convenient than going directly to Superior Court." *Johnson* v. *Dept. of Public Health*, supra, 48 Conn. App. 114; see also *Federal Trade Commission* v. *Standard Oil Co. of California*, supra, 449 U.S. 244. Moreover, the plaintiff has not argued, either before the trial court or on appeal, that the present case qualifies under the "immediate and irreparable harm" exception to the exhaustion requirement. See, e.g., *Polymer Resources, Ltd.* v. *Keeney*, supra, 227 Conn. 561.

The plaintiff's claim of futility and inadequacy is further undermined by the fact that if it does not prevail in the pending proceedings before the commission, an avenue of administrative appeal awaits the plaintiff pursuant to § 4-183.[22] In such an appeal, an aggrieved party may challenge an agency's determinations on the basis that they are "(1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4)

[22] For that reason, *Sastrom* v. *Psychiatric Security Review Board*, 105 Conn. App. 477, 938 A.2d 1233 (2008), is plainly distinguishable. In *Sastrom*, this court concluded that review pursuant to § 4-183 was not available to the plaintiff due to the specific statutory provisions that govern review of rulings by the defendant psychiatric security review board. Id., 484–85.

affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." General Statutes § 4-183 (j). The plaintiff has not articulated any reason why such an appeal would be inadequate. Section 4-183 "[n]ot only . . . [provides] a right of appeal from a final agency decision by an aggrieved party, but it also includes an immediate right to appeal from an adverse preliminary ruling if review of the final agency decision would not provide an adequate remedy. Moreover, the statutory framework includes a means of staying an agency decision pending appeal. . . . Thus, a potentially aggrieved party is well protected by statute." (Citation omitted; footnote omitted.) *Pet* v. *Dept. of Health Services*, supra, 207 Conn. 352. As our Supreme Court has observed, "a claim that an administrative agency has exceeded its statutory authority or jurisdiction may be the subject of an administrative appeal." *Payne* v. *Fairfield Hills Hospital*, 215 Conn. 675, 679, 578 A.2d 1025 (1990).

The gravamen of the plaintiff's complaint is that the commission has acted in contravention of its statutory and regulatory obligations.[23] The plaintiff has offered no explanation as to why an appeal pursuant to § 4-183 would be inadequate to review such claims, particularly when that statute expressly encompasses allegations that an agency has acted in violation of statutory provisions, in excess of its statutory authority, or upon unlawful procedure; General Statutes § 4-183 (j); or why the Superior Court in such an appeal could not provide the plaintiff with adequate relief.[24] Indeed, the record

[23] Ironically, the plaintiff, in commencing the present action, seeks to bypass the statutory procedures contained in the UAPA that govern proceedings before state agencies such as the commission.

[24] As the Supreme Court observed in *Laurel Park, Inc.* v. *Pac*, 194 Conn. 677, 686, 485 A.2d 1272 (1984): "Despite the plaintiffs' protestations to the contrary, it is difficult to comprehend why a court would have been less

before us reflects, and the trial court in this case found, that the plaintiff availed itself of its avenue of appeal pursuant to § 4-183 with respect to the *Dixon* and *Smith* matters referenced in its complaint. See footnote 19 of this opinion.

Moreover, in the pending *Sotil*, *Cipes*, and *Wills* administrative proceedings, the plaintiff is free to advance, as defenses to the complainants' allegations; see *Flanagan* v. *Commission on Human Rights & Opportunities*, supra, 54 Conn. App. 92; its claims that § 46a-71 does not apply to the plaintiff and that the commission lacks jurisdiction over complaints filed by independent contractors, as alleged in the present complaint. If the commission ultimately rejects those contentions, the plaintiff could appeal that adverse ruling to the Superior Court pursuant to § 4-183. See *Cannata* v. *Dept. of Environmental Protection*, 215 Conn. 616, 629, 577 A.2d 1017 (1990) ("[i]f the commissioner denies the plaintiffs [relief in the administrative proceeding], they can then pursue an appeal to the Superior Court pursuant to § 4-183 challenging the commissioner's jurisdiction and her decision"). In that event, the reviewing court may find helpful the stated basis of the commission's ruling in considering the merits of the plaintiff's claim. *Greene* v. *Meese*, supra, 875 F.2d 641. To the extent that the plaintiff asserts something vaguely resembling a capable of repetition, yet evading review argument with respect to the disposition of such administrative proceedings; see generally *Loisel* v. *Rowe*, 233 Conn. 370, 382, 660 A.2d 323 (1995); we reiterate that,

inclined to order a stay of the commissioner's order upon a proper application in the pending administrative appeal than to issue a temporary injunction achieving the same result in a separate action. The same evidence presented to the court in this action would have warranted the same relief in the pending [administrative] appeal if the plaintiffs had followed the procedure prescribed by the UAPA."

once those pending matters have concluded, the plaintiff properly may seek declaratory relief as provided by §§ 4-175 and 4-176. See footnote 20 of this opinion.

In considering the proper role of the exhaustion requirement in the administrative context, this nation's highest court has cautioned that judicial review of agency action "should not be a means of turning prosecutor into defendant before adjudication concludes." *Federal Trade Commission* v. *Standard Oil Co. of California*, supra, 449 U.S. 243. We concur with that sentiment, and conclude that the plaintiff has not established demonstrable futility in pursuing its administrative remedies before the commission. See *Pet* v. *Dept. of Health Services*, supra, 207 Conn. 356. Accordingly, the plaintiff's failure to exhaust its administrative remedies cannot be salvaged by the futility exception.

B

The plaintiff also argues that, because it is contesting the jurisdiction of the commission, it need not comply with the exhaustion requirement. It posits that there exists a broad exception to the exhaustion requirement that is implicated when the jurisdiction of an administrative agency is challenged. A review of Connecticut precedent reveals otherwise.

The appellate courts of this state repeatedly have recognized that "a claim that an administrative agency has exceeded its statutory authority or jurisdiction may be the subject of an administrative appeal." *Payne* v. *Fairfield Hills Hospital*, supra, 215 Conn. 679; see also *Republican Party of Connecticut* v. *Merrill*, supra, 307 Conn. 479; *Housing Authority* v. *Papandrea*, supra, 222 Conn. 424; *Sastrom* v. *Psychiatric Security Review Board*, 105 Conn. App. 477, 481, 938 A.2d 1233 (2008); *Johnson* v. *Dept. of Public Health*, supra, 48 Conn. App. 112. The plaintiff nonetheless argues that the jurisprudence of this state's highest court has established a

jurisdictional exception to the exhaustion requirement, relying principally on *Aaron* v. *Conservation Commission*, 178 Conn. 173, 422 A.2d 290 (1979). That reliance is unavailing.

Aaron did not involve an administrative proceeding pursuant to the UAPA, but rather a municipal land use proceeding. Id., 174–75. In discussing exceptions to the exhaustion requirement, the court stated: "[O]ne such exception is that resort to administrative agency procedures will not be required when the claims sought to be litigated are jurisdictional. . . . Another exception is that exhaustion of administrative remedies will not be required when the remedies available are futile or inadequate." (Citations omitted.) Id., 179. The court's subsequent analysis of those two exceptions consisted of two sentences: "In the present case there is some question as to whether the plaintiff's claims could properly be litigated by way of appeal because of the rule that a party who seeks some advantage under a statute or ordinance, such as a permit or a variance, is precluded from subsequently attacking the validity of the statute or ordinance. . . . In light of the above, this court is compelled to conclude that the trial court erred in declining to assume jurisdiction on the ground that the plaintiff should be left to seek redress by other forms of procedure." (Citations omitted.) Id., 179–80. In so doing, the court recognized the procedural uniqueness of that case, in that it involved the standing of a party that has secured a land use permit or variance from a municipal land use agency.

Ten years after *Aaron* was decided, our Supreme Court directly addressed the exhaustion requirement in the context of a party's challenge to the jurisdiction of an administrative agency. In *Greater Bridgeport Transit District* v. *Local Union 1336*, 211 Conn. 436, 559 A.2d 1113 (1989), the court framed the issue before it as "whether the trial court erred in dismissing, for lack

of subject matter jurisdiction, an independent action challenging the scope of an administrative agency's jurisdiction . . . ." Id., 436. It then determined that the exclusive power to determine the agency's jurisdiction in the first instance belonged to the agency, and not to the courts. As it stated: "The present appeal requires us to determine whether an administrative agency has exclusive initial power to determine its own jurisdiction in a particular case. . . . A claim that an administrative agency has acted beyond its statutory authority or jurisdiction properly may be the subject of an administrative appeal. . . . Where there is in place a mechanism for adequate judicial review, such as that contained in § 4-183, [i]t is [the] general rule that an administrative agency may and must determine whether it has jurisdiction in a particular situation. When a particular statute authorizes an administrative agency to act in a particular situation it necessarily confers upon such agency authority to determine whether the situation is such as to authorize the agency to act—that is, to determine the coverage of the statute—and this question need not, and in fact cannot, be initially decided by a court. . . . We are persuaded that the jurisdictional claim raised in the plaintiff's complaint to the Superior Court *is properly, and exclusively, within the power of the board to decide in the first instance.* The plaintiff may then, if necessary, raise the jurisdictional issue on administrative appeal pursuant to . . . § 4-183."[25]

[25] In so holding, *Greater Bridgeport Transit District* comports with *Myers* v. *Bethlehem Shipbuilding Corp.*, supra, 303 U.S. 41. In *Myers*, the defendant had obtained an injunction in federal court against the National Labor Relations Board prohibiting it from holding certain hearings on the basis that they were beyond the jurisdiction of the board. In reversing that injunctive order, the United States Supreme Court rejected the claim that, because the defendant had challenged the board's jurisdiction, it would be subject "to irreparable damage, rights guaranteed by the Federal Constitution will be denied unless it be held that the District Court has jurisdiction to enjoin the holding of a hearing by the Board." Id., 50. The court explained that "[s]o to hold would . . . in effect substitute the District Court for the Board as the tribunal to hear and determine what Congress declared *the Board*

(Citations omitted; emphasis added; internal quotation marks omitted.) Id., 438–40. That decision did not acknowledge *Aaron* in any manner.

The Supreme Court revisited the issue one year later. In *Cannata* v. *Dept. of Environmental Protection*, supra, 215 Conn. 616, the plaintiffs—like the plaintiff here—relied on *Aaron* for their argument that a challenge to the jurisdiction of an administrative agency qualifies for "an exception to the exhaustion requirement." Id., 621. The court rejected that argument and, in light of *Greater Bridgeport Transit District*, held that the agency "must first be given the opportunity to determine its own jurisdiction." Id., 622–23. Significantly, the court also addressed the apparent conflict between *Aaron* and *Greater Bridgeport Transit District* on this issue. It stated: "Although it may be possible to distinguish the two cases on the basis of differences in the relief sought and the availability of an administrative remedy, we regard *Greater Bridgeport Transit District* as implicitly overruling [*Aaron*] with respect to the absence of an exhaustion requirement for the determination of an agency's jurisdiction when an adequate administrative remedy is available." Id., 622 n.7. The Supreme Court has not cited to or relied on *Aaron* since. In subsequent years, our appellate courts have adhered to the precept that such jurisdictional challenges properly are within the purview of the administrative agency in the first instance. See, e.g., *Polymer*

exclusively should hear and determine in the first instance. The contention is at war with the long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. That rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter." (Emphasis added.) Id., 50–51. Accordingly, the court concluded that there was "no reason why the Board should be prevented from exercising the *exclusive initial jurisdiction* conferred upon it by Congress." (Emphasis added; footnote omitted.) Id., 53.

Resources, Ltd. v. *Keeney*, supra, 227 Conn. 558; *O & G Industries, Inc.* v. *Planning & Zoning Commission*, supra, 232 Conn. 425; *Canterbury* v. *Deojay*, 114 Conn. App. 695, 708–709, 971 A.2d 70 (2009); *Wilkinson* v. *Inland Wetlands & Watercourses Commission*, 24 Conn. App. 163, 167, 586 A.2d 631 (1991).

Equally misplaced is the plaintiff's reliance on *Heslin* v. *Connecticut Law Clinic of Trantolo & Trantolo*, 190 Conn. 510, 461 A.2d 938 (1983), for the proposition that "a respondent before an administrative agency need not wait until the agency issues a final decision before taking an appeal pursuant to [§ 4-183], but instead may bring a declaratory judgment action [in the Superior Court] to challenge the agency's exercise of jurisdiction." *Heslin* did not involve a question of the agency's jurisdiction, but rather involved a question of "the legislature's constitutional power to regulate attorney conduct." Id., 515. In addressing that question, the court explained that "[i]t is presumed that, in authorizing [administrative] investigations, the legislature has delegated to the administrative body a power which the legislature lawfully possesses. Where, however, a colorable claim is made that the preliminary investigation *is not within the power of* [*the legislature*] to command . . . that presumption is rebutted." (Citation omitted; emphasis added; internal quotation marks omitted.) Id. When such a colorable claim is raised, *Heslin* instructs that "[i]t then becomes necessary and proper for the trial court to determine, before proceeding further, the authority of [the] administrative agency to act." Id.; see also *Commission on Human Rights & Opportunities* v. *Archdiocesan School Office*, supra, 202 Conn. 606–607 (noting that *Heslin* exception applies "where the legislative authority to empower the agency to conduct the investigation itself is challenged"). In this case, the plaintiffs have not raised any claim as to the legislature's

authority with respect to commission conduct. *Heslin*, therefore, is inapposite to the present case.

Consistent with the ample body of Connecticut authority adhering to the precept that such jurisdictional challenges properly are within the purview of the administrative agency, and the mandate of *Cannata* v. *Dept. of Environmental Protection*, supra, 215 Conn. 622 n.7 in particular, we reject the plaintiff's assertion that there exists a broad exception to the exhaustion requirement for challenges to the jurisdiction of an administrative agency. Such challenges are "properly, and exclusively, within the power of the board to decide in the first instance." *Greater Bridgeport Transit District* v. *Local Union 1336*, supra, 211 Conn. 439–40. Accordingly, the plaintiff was obligated to raise its challenge to the jurisdiction of the commission in the pending administrative proceedings and, if necessary, an appeal pursuant to § 4-183 or a subsequent declaratory petition pursuant to § 4-176.

C

We further note that, in addition to seeking declaratory relief, the plaintiff's complaint requests injunctive relief and a writ of mandamus. The inclusion of those requests does not obviate the need for the plaintiff to comply with the exhaustion requirement.

It well established that a plaintiff's preference for particular relief has little bearing on the adequacy of an administrative remedy. As our Supreme Court has observed, "it does not matter for exhaustion purposes that [the available] administrative remedies could not provide the relief the plaintiffs preferred . . . . It is well established . . . [t]he plaintiff's preference for a particular remedy does not determine the adequacy of that remedy. [A]n administrative remedy, in order to be adequate, need not comport with the [plaintiff's] opinion of what a perfect remedy would be." (Internal

quotation marks omitted.) *Lopez* v. *Board of Education*, supra, 310 Conn. 601 n.23; see also *Concerned Citizens of Sterling* v. *Sterling*, 204 Conn. 551, 559, 529 A.2d 666 (1987) ("we have never held that the mere possibility that an administrative agency may deny a party the specific relief requested is a ground for an exception to the exhaustion requirement").

In addition, this court has held that a plaintiff cannot bypass the exhaustion requirement simply by including a variety of requests in its prayer for relief. In *Johnson* v. *Dept. of Public Health*, supra, 48 Conn. App. 120, we stated in relevant part: "[T]he plaintiff may not bypass the UAPA exhaustion requirement by filing this self-styled independent civil action. . . . In attempting to circumvent his available administrative remedy by this independent civil action, the plaintiff maintains that he can do this because he is seeking other relief whether it sounds contract or tort, declaratory judgment or injunctive relief and the like. This approach fails because, on analysis, the factual predicate for his claims relate back to the alleged statutory violations, which provide for a statutory remedy. When the legislature enacts a comprehensive remedial scheme such as the UAPA with procedural safeguards by which claims are to be determined by an administrative agency before judicial review is made available, it has laid that down as the public policy most likely to produce results. To effectuate this public policy, the legislative intent is that the trial court should not, generally speaking, act or be called upon to act, until there has been compliance with the statutory scheme. . . . [O]ur Supreme Court . . . [has] frequently held that where a statute has established a procedure to redress a particular wrong a person must follow the specific remedy and may not institute a proceeding that might have been permissible in the absence of such a statutory procedure. . . . The plaintiff's independent civil action contravenes [that

precedent]. He is attempting, under circumstances that are impermissible, to prevent the making of a proper record of agency action, including a decision on the issues, for proper judicial review." (Citations omitted; internal quotation marks omitted.) See also *Housing Authority* v. *Papandrea*, supra, 222 Conn. 423 ("[w]e affirm the principle . . . that a claim for injunctive relief does not negate the requirement that the complaining party exhaust administrative remedies").

In *Savoy Laundry, Inc.* v. *Stratford*, 32 Conn. App. 636, 642, 630 A.2d 159, cert. denied, 227 Conn. 931, 632 A.2d 704 (1993), this court similarly observed that "[t]he plaintiff may not choose its administrative remedy through the framing of its own complaint. If that were possible, the purpose of the exhaustion doctrine would be thwarted." That precedent is wholly consistent with our Supreme Court's admonition that "a party who has a statutory right of appeal from a decision of the administrative agency may not bring an independent action to test the very issues that the [administrative] appeal was designed to test." *Payne* v. *Fairfield Hills Hospital*, supra, 215 Conn. 679; accord *McNish* v. *American Brass Co.*, 139 Conn. 44, 53, 89 A.2d 566 (1952) ("[w]hen an administrative remedy is provided by law, relief must be sought by exhausting this remedy before resort to the courts").

III

As a final matter, the plaintiff claims that the court improperly dismissed its due process count. Because that count was brought pursuant to 42 U.S.C. § 1983, the plaintiff maintains that the exhaustion doctrine does not apply.

To be sure, the United States Supreme Court, in *Patsy* v. *Board of Regents of the State of Florida*, 457 U.S. 496, 501, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982), held

that exhaustion of administrative remedies is not a prerequisite to an action under § 1983.[26] The Connecticut Supreme Court nonetheless has held that, "notwithstanding *Patsy* v. *Board of Regents of the State of Florida*, supra, the fundamental requirement of inadequacy of an available legal remedy in order to obtain injunctive relief remains in full force."[27] *Pet* v. *Dept. of Health Services*, supra, 207 Conn. 369. The court continued: "The inadequacy of an available legal remedy is a standard prerequisite for injunctive relief. We do not view [*Patsy*] as having abrogated this fundamental requirement for injunctive relief . . . . A fortiori, it remains a condition precedent to injunctive relief in a state court . . . ." (Internal quotation marks omitted.) Id. When an adequate administrative remedy exists, the court held that "no form of injunctive relief, under § 1983 or otherwise, is justified as an exception to the exhaustion requirement . . . ." Id. The court thus concluded that the plaintiff's inclusion of a § 1983 count in his complaint "does not permit the plaintiff to avoid the exhaustion doctrine." Id., 370; see also *Laurel Park, Inc.* v. *Pac*, 194 Conn. 677, 691, 485 A.2d 1272, 1279 (1984); *Flanagan* v. *Commission on Human Rights & Opportunities*, supra, 54 Conn. App. 95.

On appeal, the plaintiff acknowledges that precedent, but claims that it may still prevail because it had no

[26] One prominent commentary flatly states that the court should revisit and overrule *Patsy*, opining that it "is a badly reasoned anomaly in the law of exhaustion. The holding is not supported by a single word of statutory text. It is inconsistent with the many powerful policy considerations that have shaped the common law of exhaustion in all other contexts. . . . [J]udicial review of state agency action under § 1983 is, and should be, analogous to judicial review of federal agency actions under the [Administrative Procedures Act]." 2 R. Pierce, Administrative Law Treatise (5th Ed. 2010) § 15.9, p.1298. Regardless of the merits of such criticism, reconsideration of that precedent remains the prerogative of the United States Supreme Court.

[27] In so doing, our Supreme Court distinguished the procedural context of *Pasty*, noting that "it was a § 1983 action for damages in federal court that the plaintiff argued should not be dismissed for failure to exhaust his state remedies." *Pet* v. *Dept. of Health Services*, supra, 207 Conn. 369.

adequate administrative remedy. This court has rejected that claim in part II A of this opinion. The plaintiff, therefore, cannot "forestall an invocation of the exhaustion doctrine" due to the inclusion of a § 1983 count in its complaint. *Pet* v. *Dept. of Health Services*, supra, 207 Conn. 370.

IV

In sum, we conclude that the plaintiff had adequate administrative remedies that it failed to exhaust prior to commencing this independent civil action in the Superior Court, namely, recourse in the pending *Sotil*, *Cipes*, and *Wills* proceedings before the commission and the corresponding avenue of administrative appeal provided by § 4-183. Moreover, to the extent that any issues remain after those pending proceedings conclude, § 4-176 permits the plaintiff to petition the commission for a declaratory ruling, which ruling itself then would be appealable pursuant to § 4-183. It is undisputed that the plaintiff in this case did not exhaust those administrative remedies prior to commencing this independent civil action. The trial court therefore properly dismissed the plaintiff's complaint for lack of subject matter jurisdiction.

The judgment is affirmed.

In this opinion the other judges concurred.

MASON MCCARROLL ET AL. *v.* TOWN OF EAST HAVEN
(AC 39260)

Lavine, Keller and Pellegrino, Js.

Syllabus

The plaintiff parents, individually and on behalf of their minor son, who had sustained injuries to his left arm when he fell from the ladder of a

wooden playscape he was climbing on at an elementary school playground, sought to recover damages for negligence from the defendant town of East Haven. The plaintiffs alleged that the playscape was in a decrepit condition, that the ladder was in a similar decrepit condition in that the fifth metal rung on the ladder was missing a bolt, that school officials and employees were aware of the dilapidated condition of the playscape, and that school employees were present at all times while students were playing on the playscape. The trial court granted the defendant's motion for summary judgment on the ground of governmental immunity and rendered judgment thereon, from which the plaintiffs appealed to this court. *Held* that the trial court properly granted the defendant's motion for summary judgment; that court properly determined that although the defendant owed the plaintiffs a duty of care, the inspection and repair of the playscape was a discretionary act and, thus, governmental immunity applied, and it found that the identifiable person-imminent harm exception to discretionary act immunity did not apply to the facts of the present case because the plaintiffs failed to demonstrate that the harm alleged was imminent, as the plaintiffs failed to demonstrate that the condition of the missing or loose bolt on the fifth rung of the ladder was apparent to the defendant or its officials, and that the probability of the child being injured was so high that the defendant had a clear and unequivocal duty to act to prevent harm.

Argued November 27, 2017—officially released March 27, 2018

Procedural History

Action to recover damages for the defendant's alleged negligence, brought to the Superior Court in the judicial district of New Haven, where the court, *B. Fischer*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

David N. Rosen, with whom, on the brief, was *Alexander Taubes*, for the appellants (plaintiffs).

Rosalie D. Louis, with whom, on the brief, was *Hugh F. Keefe*, for the appellee (defendant).

Opinion

LAVINE, J. This personal injury action concerns the injuries the minor plaintiff, Mason McCarroll (child), sustained when he fell from a playscape he was climbing

on at an elementary school playground.[1] The plaintiffs appeal from the judgment of the trial court rendered when it granted the motion for summary judgment filed by the defendant, the town of East Haven.[2] On appeal, the plaintiffs claim that, in granting the defendant's motion for summary judgment, the court improperly concluded that their claims were barred by the doctrine of governmental immunity.[3] We affirm the judgment of the trial court.

The following facts are relevant to the plaintiffs' claim on appeal. On April 12, 2012, the child was a kindergarten student at D.C. Moore Elementary School (school), a public school in East Haven. There was a wooden playscape on the school's playground. During recess on the date in question, the child was attempting to climb the ladder of the playscape when he fell and sustained injuries to his left arm.

[1] The child commenced the present action by and through his mother, Nichole McCarroll. The child's parents, the plaintiffs Nichole McCarroll and Ryan McCarroll, alleged that they sustained damages as a result of the child's injuries.

[2] In its motion for summary judgment, the defendant made two arguments: (1) it did not owe the child a duty of care as that duty falls on the board of education and (2) it was not liable for the plaintiffs' injuries and loss on the ground of governmental immunity. The plaintiffs did not cite the board of education as a defendant in the present action. The court denied the defendant's motion for summary judgment with respect to its claim that it did not owe the child a duty of care. The court concluded that the defendant owed the child a duty of care on the basis of agency. The defendant did not file a cross appeal but argues in its brief on appeal that the court improperly concluded that it owed the child a duty of care on the basis of agency. Because we conclude that the court properly granted the defendant's motion for summary judgment on the ground of governmental immunity, we do not address the defendant's agency argument.

[3] On appeal, the plaintiffs argue that *Haynes* v. *Middletown*, 314 Conn. 303, 101 A.3d 249 (2014), is controlling of the present case. Although *Haynes* controls the legal issues, the facts of the present case are distinguishable from those in *Haynes* in which teachers and school employees were aware of ongoing student horseplay in the locker room where school officials knew there was a broken and rusty locker. Id., 308, 325. There is no evidence in the present case that the defendant was aware of the alleged dangerous and defective condition.

The plaintiffs commenced the present action on January 17, 2014. In their amended complaint of September 22, 2015, the plaintiffs alleged that the playscape consisted of a tower, several slides, a wooden ramp, and a five rung ladder,[4] and that it was intended for use by students at the school. They also alleged that the playscape was in a decrepit condition and that the protective mulch underneath the playscape had eroded, resulting in a hard and uneven dirt surface. The ladder was in a similar decrepit condition in that the first four metal rungs were bolted to three parallel wooden posts and were in the shape of a "W" but the fifth rung was missing a bolt and was in the shape of a "U." Moreover, they alleged that the wood at the base of the "U" had begun to wear away due to friction caused by the chain, that *school officials and employees* were aware of the playscape's dilapidated condition, and that *school employees* were present at all times while students were playing on the playscape.

The plaintiffs also alleged that when the child, who was climbing the ladder, reached the fifth rung, he slipped, fell to the ground, and sustained serious injuries to his left arm. The plaintiffs alleged that the defendant is liable for the child's injuries and damages pursuant to General Statutes § 52-557n[5] due to the negligence of

[4] The rungs consisted of a metal chain that was covered by rubber tubing.

[5] General Statutes § 52-557n provides in relevant part: "(a) (1) Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties; (B) negligence in the performance of functions from which the political subdivision derives a special corporate profit or pecuniary benefit . . . . (2) Except as otherwise provided by law, a political subdivision of the state shall not be liable for damages to person or property caused by . . . (B) negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law.

"(b) Notwithstanding the provisions of subsection (a) of this section, a political subdivision of the state or any employee, officer or agent acting within the scope of his employment or official duties *shall not be liable for damages* to person or property resulting from: (1) The condition of natural

the school officials.[6] In its memorandum of law in support of its motion for summary judgment, the defendant pointed out that the plaintiffs failed to allege that the acts and omissions of which they complained were ministerial in nature.

On September 11, 2014, the defendant filed an amended answer to the plaintiffs' January 27, 2014 complaint and four special defenses. The defendant alleged, among other special defenses, that it was "immune from suit" pursuant to the doctrine of governmental immunity.[7] The plaintiffs denied the defendant's special defenses. On March 17, 2015, the defendant filed a motion for summary judgment, along with supporting exhibits and affidavits, claiming that there were no genuine issues of material fact (1) that it owed no duty to the child to maintain the facilities at the school and, in the alternative, (2) that the plaintiffs' negligence claims were barred by the doctrine of governmental immunity pursuant to § 52-557n in that the acts complained of

land or unimproved property . . . (4) the condition of an unpaved road, trail or footpath, the purpose of which is to provide access to a recreational or scenic area, if the political subdivision has not received notice and has not had a reasonable opportunity to make the condition safe . . . (8) failure to make an inspection or making an inadequate or negligent inspection of any property, other than property owned or leased by or leased to such political subdivision, to determine whether the property complies with or violates any law or contains a hazard to health or safety, unless the political subdivision had notice of such a violation of law or such a hazard or unless such failure to inspect or such inadequate or negligent inspection constitutes a reckless disregard for health or safety under all the relevant circumstances . . . ." (Emphasis added.)

[6] On the basis of our plenary review of the plaintiffs' amended complaint, we note that they alleged several defects with respect to the playscape and the surrounding area, but failed to allege the proximate cause of the child's injuries. See *Miller* v. *Egan*, 265 Conn. 301, 308, 828 A.2d 549 (2003) (construction of pleadings question of law).

[7] Section 52-557n provides that political subdivisions "shall not be liable for damages," not that they shall be immune from suit. See *Edgerton* v. *Clinton*, 311 Conn. 217, 227 n.9, 86 A.3d 437 (2014) (distinguishing sovereign immunity from suit from governmental immunity from liability).

were discretionary in nature and that no exception to the immunity doctrine applied.[8] The plaintiffs filed an objection to the motion for summary judgment with a supporting memorandum of law and exhibits.

The trial court heard the motion at short calendar on February 15, 2016, and granted the motion for summary judgment in a memorandum of decision issued on May 9, 2016. The court found that the defendant owed the plaintiffs a duty of care because the board of education was the defendant's agent despite the fact that the plaintiffs had failed to cite the board of education as a defendant.[9] Nonetheless, the court concluded that the inspection and repair of the playscape was a discretionary act; see General Statutes § 10-220 (a); and that the defendant was not liable to the plaintiffs for the child's injuries because the identifiable victim-imminent harm exception to the doctrine of governmental immunity was inapplicable. The court, therefore, granted the motion for summary judgment in favor of the defendant. The plaintiffs appealed.

We first set forth the standard of review by which we consider appeals from summary judgments. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any

[8] In support of their motion for summary judgment, the defendant submitted an affidavit from Robert Parente, superintendent of operations for the defendant. Parente attested in part as follows:

"5. The Town of East Haven has no duty to inspect the playscape located at the D.C. Moore School.

"6. The East Haven Board of Education has the responsibility to inspect the facilities and playscape located at the D.C. Moore School.

"7. The Town of East Haven does not have a duty to maintain the facilities and playscape located at the D.C. Moore School.

"8. There are no rules, regulations, ordinances, or policies directing the Town of East Haven in how to maintain or inspect playscapes located at schools."

[9] We offer no opinion as to whether the court properly determined that the defendant owed the plaintiffs a duty of care to maintain the school facilities. See footnote 2 of this opinion.

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 moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law. . . . The test is whether the party moving for summary judgment would be entitled to a directed verdict on the same facts. . . . Our review of the trial court's decision to grant the [defendant's] motion for summary judgment is plenary. . . .

"The party opposing a motion for summary judgment must present evidence that demonstrates the existence of some disputed factual issue . . . . The movant has the burden of showing the nonexistence of such issues but the evidence thus presented, if otherwise sufficient, is not rebutted by the bald statement that an issue of fact does exist. . . . To oppose a motion for summary judgment successfully, the nonmovant must recite specific facts . . . which contradict those stated in the movant's affidavits and documents. . . . The opposing party to a motion for summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue. . . . The existence of the genuine issue of material fact must be demonstrated by counteraffidavits and concrete evidence." (Citation omitted; internal quotation marks omitted.) *DiPietro* v. *Farmington Sports Arena, LLC*, 123 Conn. App. 583, 598–99, 2 A.3d 963 (2010), rev'd on other grounds, 306 Conn. 107, 49 A.3d 951 (2012).

We now turn to the plaintiffs' claim that the court improperly concluded that their negligence claims were

barred by governmental immunity because the defective condition of the bolt was apparent and the danger to the child was imminent. "The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury. . . . If a plaintiff cannot prove all of those elements, the cause of action fails." (Internal quotation marks omitted.) *Angiolillo* v. *Buckmiller*, 102 Conn. App. 697, 711, 927 A.2d 312, cert. denied, 284 Conn. 927, 934 A.2d 243 (2007).

In the present case, after the court concluded that the defendant owed the plaintiffs a duty of care, it considered whether the plaintiffs' claims were barred by the doctrine of governmental immunity. The court found that the plaintiffs failed to identify a policy that required the defendant to inspect or maintain the playscape in a particular manner and, therefore, the alleged acts of negligence were discretionary in nature. The court concluded that no reasonable juror could find that the defendant was liable to the plaintiffs because their claims were barred by the doctrine of governmental immunity and that the identifiable person-imminent harm exception to governmental immunity did not apply because the harm to the child was not imminent.

Our Supreme Court recently reviewed the law concerning governmental immunity regarding the imminent harm to an identifiable person exception in *Martinez* v. *New Haven*, 328 Conn. 1, 176 A.3d 531 (2018). The court stated that "[§] 52-557n abandons the common-law principle of municipal sovereign immunity and establishes the circumstances in which a municipality may be liable for damages. . . . One such circumstance is a negligent act or omission of a municipal officer acting within the scope of his or her employment or official duties. . . . [Section] 52-557n (a) (2) (B), however, explicitly shields a municipality from liability

for damages to person or property caused by the negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law." (Internal quotation marks omitted.) Id., 8.

Our Supreme Court "has recognized an exception to discretionary act immunity that allows for liability when the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm . . . . This identifiable person-imminent harm exception has three requirements: (1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm. . . . All three must be proven in order for the exception to apply." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Edgerton* v. *Clinton*, 311 Conn. 217, 230–31, 86 A.3d 437 (2014). "[T]he ultimate determination of whether [governmental] immunity applies is ordinarily a question of law for the court . . . [unless] there are unresolved factual issues . . . properly left to the jury." *Strycharz* v. *Cady*, 323 Conn. 548, 574, 148 A.2d 1011 (2016).

Our Supreme Court "has held that public schoolchildren are an identifiable class of beneficiaries of a school system's duty of care for purposes of the imminent harm to identifiable persons exception. . . . Indeed, [t]he only identifiable class of foreseeable victims that [it has] recognized . . . is that of schoolchildren attending public schools during school hours . . . ." (Citation omitted; internal quotation marks omitted.) *Martinez* v. *New Haven*, supra, 328 Conn. 8–9. "[T]he proper standard for determining whether a harm was imminent is whether it was apparent to the municipal defendant that the dangerous condition was so likely to cause harm that the defendant had a clear and unequivocal duty to act immediately to prevent

the harm." (Internal quotation marks omitted.) Id., 9, quoting *Haynes* v. *Middletown*, 314 Conn. 303, 322–23, 101 A.3d 249 (2014).

"[I]n order to qualify under the imminent harm exception, a plaintiff must satisfy a four-pronged test. First, the dangerous condition alleged by the plaintiff must be apparent to the municipal defendant. . . . We interpret this to mean that the dangerous condition must not be latent or otherwise undiscoverable by a reasonably objective person in the position and with the knowledge of the defendant. Second, the alleged dangerous condition must be likely to have caused the harm suffered by the plaintiff. A dangerous condition that is unrelated to the cause of the harm is insufficient to satisfy the *Haynes* test. Third, the likelihood of the harm must be sufficient to place upon the municipal defendant a clear and unequivocal duty . . . to alleviate the dangerous condition. The court in *Haynes* tied the duty to prevent the harm to the likelihood that the dangerous condition would cause harm. . . . Thus, we consider a clear and unequivocal duty . . . to be one that arises when the probability that harm will occur from the dangerous condition is high enough to *necessitate* that the defendant act to alleviate the defect. Finally, the probability that harm will occur must be so high as to require the defendant to act *immediately* to prevent the harm." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *Williams* v. *Housing Authority*, 159 Conn. App. 679, 705–706, 124 A.3d 537 (2015), aff'd, 327 Conn. 338, 174 A.3d 137 (2017).

"[T]o meet the apparentness requirement, the plaintiff must show that the circumstances would have made the government agent aware that his or her acts or omissions would likely have subjected the victim to imminent harm. . . . This is an objective test pursuant to which we consider the information available to the

government agent at the time of [his or] her discretionary act or omission. . . . We do not consider what the government agent could have discovered after engaging in additional inquiry." (Citations omitted; footnote omitted.) *Edgerton* v. *Clinton*, supra, 311 Conn. 231.

In the present case, the court found that the child was within the class of victims who were identifiable but, when analyzing the facts of the present case under the *Williams* test, the court determined that the harm he suffered was not imminent. The court stated that the plaintiffs had failed to produce evidence that the condition of the bolt on the fifth rung of the ladder was apparent to the defendant. The court noted that, rather than submitting evidence that the defendant was aware of, or was put on notice of the missing or loose bolt, the plaintiffs argued that the entire playscape was in an apparent, decrepit condition. The court reasoned that the harm that befell the child was not caused by the overall decrepit condition of the playscape but by the bolt that was missing or loose. The plaintiffs presented no evidence that the condition of the bolt was evident to the defendant or its officials. The court also found that the plaintiffs failed to produce evidence of the third and fourth *Williams* prongs, that is, that the probability of injury to the child was so high that the defendant had a clear and unequivocal duty to act immediately to prevent harm. The court found that a reasonable juror could have found that thousands of schoolchildren had played on the decrepit playscape over the years and had not suffered an injury.[10] The harm, it therefore concluded, was not imminent.

[10] The plaintiffs take exception to the court's conclusion, noting that the standard of review is that a reasonable juror could reach no other conclusion. We acknowledge that the court's expression of the governing standard is unartful. On the basis of the evidence presented by the plaintiffs in opposition to the defendant's evidence that it had no duty to inspect, we conclude that the court's ultimate legal conclusion is not erroneous. See footnote 11 of this opinion.

On appeal, the plaintiffs argue that the court overlooked the evidence they presented in opposition to the motion for summary judgment or was mistaken that the condition of the bolt was not apparent to the defendant. They conceded, however, that their amended complaint that alleges that the bolt was missing is at odds with Nichole McCarroll's affidavit attesting that the bolt was loose.[11] They also acknowledge that photographs of the ladder were "inadvertently omitted" from the affidavit.

We have reviewed the entire record, the briefs and arguments of the parties and the court's thorough memorandum of decision. On the basis of our review, we conclude that the court properly determined that the defendant's duty with respect to the defendant's alleged conduct was discretionary and the harm suffered by the child was not imminent. Whether the bolt was missing or loose, the plaintiffs failed to demonstrate that the probability of the child being injured was so high that the defendant had a clear and unequivocal duty to act to prevent harm. We conclude, therefore, that the court properly granted the defendant's motion for summary judgment.

The judgment is affirmed.

In this opinion the other judges concurred.

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[11] In her affidavit, Nichole McCarroll attested in part: "We looked at the playscape shortly after [the child's] fall and could see that the rung [the child] referred to was obviously loose. It was held in place by a bolt that was very loose. If you removed the bolt from the hole, which was easy to do because it was so loose, it would fall down and strike the wooden post that the bolt was inserted into. The place where the bolt struck the wood was visibly worn and damaged, obviously from being struck repeatedly over time by the bolt falling out."

STATE OF CONNECTICUT *v.* LOUIS D.*
(AC 39335)

Lavine, Prescott and Bright, Js.

Syllabus

Convicted, under three informations, of the crime of criminal possession of a firearm and of three counts of the crime of criminal violation of a protective order, the defendant appealed to this court. On appeal, he claimed that the trial court improperly consolidated the three informations for trial and improperly denied his motion for a judgment of acquittal. The defendant claimed, inter alia, that the improper joinder instilled the presumption that he had a bad character and a propensity for criminal behavior, and that the prejudice could not be cured by the trial court's instructions. The defendant had been arrested and charged with violating a protective order that prohibited him from harassing the victim. Subsequently, he was arrested and charged with violating a protective order that prohibited him from having contact with the victim. Thereafter, he was arrested and charged with criminal possession of a firearm and violation a protective order that had required him to surrender all firearms and ammunition. Prior to the defendant's trial, the state filed a motion to consolidate the three informations, and the defendant filed a motion for severance, arguing that the joinder of the three cases would prejudice him severely. Following a hearing, the trial court granted the state's motion to consolidate. Subsequently, the state filed a consolidated long form information charging the defendant with one count of criminal possession of a firearm and three counts of criminal violation of a protective order. Following a jury trial, the defendant was convicted of the charges, and this appeal followed. Held:

1. The trial court's ruling granting the state's motion to consolidate the informations was not an abuse of discretion, the defendant having failed to demonstrate that the joinder of the informations caused him substantial or unfair prejudice; although all three charges for violation of a protective order alleged violations of increasingly restrictive protective orders with different conditions, the defendant's behavior underlying each violation was not so similar so as to substantially prejudice him, as the three informations involved discrete, factually distinguishable scenarios, the trial was not particularly lengthy or complex given that the presentation of evidence lasted four days and thirteen witnesses were called, there was little chance that the jury would have confused the evidence as to each charge given the drastically different factual

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

scenarios underlying the charges, and the court further reduced any possibility of confusion by instructing the jury that it had consolidated separate cases to be tried together and that the jury was to consider each separately, which minimized any risk of prejudice that might have resulted from the joinder of the three cases.

2. The defendant's claim that the trial court improperly denied his motion for a judgment of acquittal as to the count of criminal possession of a firearm was unavailing, there having been sufficient evidence to establish that the state had proven beyond a reasonable doubt that the defendant was afforded notice and an opportunity to be heard prior to the issuance of the subject protective order on December 26, 2014, as required by statute ([Supp. 2014] § 53a-217 [a]); the plain language of that statute, when read in conjunction with other statutes, demonstrated that the requirement of "notice and an opportunity to be heard" in the statute was satisfied by the defendant's arraignment on December 26, 2014, at which the court informed him that a protective order was being issued against him and that he was prohibited from possessing firearms, and the defendant indicated that he understood that he could not possess firearms, if the defendant desired an evidentiary hearing on the matter, he could have requested such a hearing at the arraignment, and if the legislature had intended to imposed the specific requirement of an evidentiary hearing prior to the issuance of the protective order, it could have expressly done so but failed to include such language in the subject statute.

Argued December 11, 2017—officially released March 27, 2018

Procedural History

Substitute information, in the first case, charging the defendant with the crime of criminal violation of a protective order, and substitute information, in the second case, charging the defendant with the crime of criminal violation of a protective order, and substitute information, in the third case, charging the defendant with the crimes of criminal possession of a firearm and of criminal violation of a protective order, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, where the cases were consolidated; thereafter, the matter was tried to tried to the jury before the court, *Holden, J.*; subsequently, the court denied the defendant's motion for a judgment of acquittal as to the count of criminal possession of a

firearm; verdicts and judgments of guilty, from which the defendant appealed to this court. *Affirmed.*

Guy P. Soares, with whom was *Justin P. Soares*, for the appellant (defendant).

Linda F. Currie-Zeffiro, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Kevin Dunn*, senior assistant state's attorney, for the appellee (state).

Opinion

LAVINE, J. The defendant, Louis D., appeals from the judgments of conviction, rendered after a jury trial, of three counts of criminal violation of a protective order in violation of General Statutes § 53a-223 (a) and one count of criminal possession of a firearm in violation of General Statutes (Supp. 2014) § 53a-217 (a) (4) (A) arising out of three separate informations.[1] On appeal, the defendant claims that the trial court improperly (1) consolidated the three informations for trial, and (2) denied his motion for a judgment of acquittal. We disagree and, accordingly, affirm the judgments of the trial court.

The following facts and procedural history are relevant. In 2013, the victim commenced an action against the defendant seeking a dissolution of their marriage. On December 25, 2014, a dispute between the victim and the defendant escalated to the point where the defendant pushed the victim to the ground. The victim contacted the police, and the defendant was arrested for disorderly conduct. At the defendant's December 26, 2014 arraignment, the court, *Devlin, J.*, issued a protective order as a condition of the defendant's release on bail. The protective order permitted the defendant to live in the family residence, but required

[1] All references to § 53a-217 are to the 2014 supplement to the General Statutes.

him to surrender all firearms and provided that he could not "assault, threaten, abuse, harass, follow, interfere with or stalk" the victim.

The defendant continued to reside in the family home with the victim and their son. On January 4, 2015, the defendant pushed the victim into a safe room in the basement and closed the vault door until she pleaded to be released. In February, 2015, the victim and the couple's son moved into the home of the victim's brother. On March 17, 2015, the court, *Doyle*, *J.*, issued a protective order that included the same terms as the December 26, 2014 protective order and permitted the defendant to return to the family residence one time with police to retrieve his belongings, but ordered him to otherwise stay away from that residence or wherever the victim lived.

On March 18, 2015, the victim and the couple's son moved back into the family residence. That night, the defendant telephoned the victim and threatened to take his own life and the life of the family dog if she did not cease all legal proceedings. The following day, the victim had a security company assess the family residence to install security cameras in the home. On March 19, 2015, the defendant telephoned the victim and threatened to break the security cameras. The victim informed the police, and a warrant was issued for the defendant's arrest. The defendant was arrested and charged in docket number CR-15-0283581-S with violating the March 17, 2015 protective order that prohibited him from harassing the victim. On March 30, 2015, the court, *Pavia*, *J.*, issued a third protective order that the defendant not contact the victim in any manner.

On April 5, 2015, the defendant had his sister, who lived in the same duplex as the victim and his son, deliver an Easter basket to his son. The defendant's sister placed the basket in the foyer of the duplex. The

victim noticed that the defendant had addressed an Easter card to her. The victim notified the police, and the defendant was arrested and charged in docket number CR-15-0284214-S with a violation of the March 30, 2015 protective order that prohibited him from having contact with the victim.

On July 23, 2015, the victim hired a locksmith to open the vault door of the safe room in the basement. Inside the safe room was a .22 caliber Ruger pistol along with rifle and pistol ammunition. The victim informed the police. The victim also found a .25 caliber Berretta handgun in the safe room and informed the police again. The Ruger and the Beretta were both registered to a friend of the defendant, to whom he had transferred registration of the Beretta and the Ruger years earlier when he was not permitted to possess firearms. The defendant was arrested on November 29, 2015, and was charged, by way of substitute long form information in docket number CR-15-0287545-S, with criminal possession of a firearm, and a violation of the December 26, 2014 protective order requiring him to surrender all firearms and ammunition.

Before trial commenced, the state moved for a consolidated trial on the charges in the three informations. The defendant filed a motion for severance arguing that the joinder of the three cases would prejudice him severely. Following a hearing, the court, *Holden*, *J.*, granted the state's motion to consolidate. The state then filed a consolidated long form information charging the defendant with one count of criminal possession of a firearm and three counts of criminal violation of a protective order.

Following a jury trial, the defendant was convicted of one count of criminal possession of a firearm and three counts of violation of a protective order. The defendant was sentenced to seven years incarceration,

execution suspended after three and one-half years, with five years probation. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the court improperly consolidated the three informations for trial. We disagree.

"[I]n deciding whether to [join informations] for trial, the trial court enjoys broad discretion, which, in the absence of manifest abuse, an appellate court may not disturb." (Internal quotation marks omitted.) *State* v. *LaFleur*, 307 Conn. 115, 158, 51 A.3d 1048 (2012). "At trial, the burden rests with the state to prove that joinder will not substantially prejudice a defendant. As our Supreme Court [has] clarified, when charges are set forth in separate informations, presumably because they are not of the same character, and the state has moved in the trial court to join the multiple informations for trial, the state bears the burden of proving that the defendant will not be substantially prejudiced by joinder pursuant to Practice Book § 41-19. The state may satisfy this burden by proving, by a preponderance of the evidence, *either* that the evidence in the cases is cross admissible *or* that the defendant will not be unfairly prejudiced pursuant to the *Boscarino* factors. . . . On appeal, the burden rests with the defendant to show that joinder was improper by proving substantial prejudice that could not be cured by the trial court's instructions to the jury." (Citation omitted; emphasis added; footnote omitted; internal quotation marks omitted.) *State* v. *Wilson*, 142 Conn. App. 793, 800–801, 64 A.3d 846, cert. denied, 309 Conn. 917, 70 A.3d 40 (2013).

In *State* v. *Payne*, 303 Conn. 538, 548, 34 A.3d 370 (2012), our Supreme Court overruled prior precedent and concluded "that the blanket presumption in favor of joinder . . . is inappropriate and should no longer

be employed. . . . In cases where the evidence cannot be used for cross admissible purposes . . . the blanket presumption in favor of joinder is inconsistent with the well established evidentiary principle restricting the admission of character evidence." (Citations omitted; internal quotation marks omitted.)

"The court's discretion regarding joinder, however, is not unlimited; rather, that discretion must be exercised in a manner consistent with the defendant's right to a fair trial. Consequently, [in *State* v. *Boscarino*, 204 Conn. 714, 722–24, 529 A.2d 1260 (1987), our Supreme Court] identified several factors that a trial court should consider in deciding whether a severance may be necessary to avoid undue prejudice resulting from consolidation of multiple charges for trial. These factors include: (1) whether the charges involve discrete, easily distinguishable factual scenarios; (2) whether the crimes were of a violent nature or concerned brutal or shocking conduct on the defendant's part; and (3) the duration and complexity of the trial. . . . If any or all of these factors are present, a reviewing court must decide whether the trial court's jury instructions cured any prejudice that might have occurred." (Citations omitted; internal quotation marks omitted.) *State* v. *Payne*, supra, 303 Conn. 545. The defendant argues that he was prejudiced by the court's joinder of the three informations on the basis of the first and third *Boscarino* factors only[2] and that the prejudice could not be cured by the trial court's instructions.[3] Specifically, the defendant

[2] Accordingly, we do not analyze the second *Boscarino* factor, i.e., whether the crimes were of a violent nature or concerned brutal or shocking conduct on the defendant's part. See, e.g., *State* v. *Ellis*, 270 Conn. 337, 376, 852 A.2d 676 (2004) (limiting analysis to *Boscarino* factor addressed by defendant).

[3] The defendant argues that the court improperly applied a blanket presumption in favor of joinder despite our Supreme Court's having abolished the previous blanket presumption in favor of joinder in *State* v. *Payne*, 303 Conn. 538, 548, 34 A.3d 370 (2012). The court did not express its reasons for granting the state's motion to consolidate, and the defendant did not move for an articulation. We do not infer error from a silent record. See *State* v. *Andriulaitis*, 169 Conn. App. 286, 295, 150 A.3d 720 (2016). Rather,

argues that "[g]iven the inflammatory nature of the three separate cases, both alleging [the defendant's] abuse as a husband and repeated violations of criminal protective orders, the improper joinder instilled the presumption that [the defendant] had a bad character and a propensity for criminal behavior. It increased the risk that the jury simply obtained the view that [the defendant] was just another abusive husband that this state is so accustomed to of late." We disagree.

As to the first *Boscarino* factor, the defendant's three informations involved discrete, factually distinguishable scenarios.[4] The defendant argues that his behavior in each case involved "several months of overlapping conduct" wherein the violation of a protective order "was at the core of each case." Although all three charges for violation of a protective order alleged violations of increasingly restrictive protective orders with different conditions, the defendant's behavior underlying each violation was not so similar so as to substantially prejudice him. One information alleged the

"[j]udges are presumed to know the law . . . and to apply it correctly." (Internal quotation marks omitted.) *State* v. *Stern*, 65 Conn. App. 634, 648, 782 A.2d 1275, cert. denied, 258 Conn. 935, 785 A.2d 232 (2001).

It also is unclear whether the court granted the state's motion to consolidate the informations on the basis that the evidence in the three cases was cross admissible, or, alternatively, that the evidence was not cross admissible, but the defendant was still, nonetheless, not prejudiced by joinder pursuant to the *Boscarino* factors. On appeal, the defendant does not discuss the question of cross admissibility except in his reply brief in response to the state's contention that the evidence was cross admissible. We do not address claims raised for the first time in a reply brief. See *State* v. *Toro*, 172 Conn. App. 810, 818, 162 A.3d 63, cert. denied, 327 Conn. 905, A.3d (2017). Consequently, we do not decide whether the evidence relating to the charges set forth in each information would have been cross admissible in separate trials. See *State* v. *Delgado*, 243 Conn. 523, 536 n.14, 707 A.2d 1 (1998) (when appellate court concludes that defendant has not met burden of showing joinder resulted in substantial injustice, it need not decide whether evidence of one charge would be cross admissible at separate trials).

[4] We note that the existence of discrete, easily distinguishable factual scenarios weighs in favor of joinder. See, e.g., *State* v. *Rodriguez*, 91 Conn. App. 112, 118–21, 881 A.2d 371 (2005).

defendant violated the March 17, 2015 protective order by making a telephone call to the victim on March 18, 2015, threatening the family dog, and making a telephone call on March 19, 2015, threatening to break security cameras at the family residence. Another information stemmed from the defendant's addressing an Easter card to the victim in violation of the no contact provision of the third protective order. A third information alleged that the defendant possessed firearms in violation of the December 26, 2014 protective order. Each information alleged easily distinguishable factual scenarios. In fact, the defendant acknowledges that "the factual scenarios for each separate offense were drastically different from one another."

With respect to the third *Boscarino* factor, the trial was not particularly lengthy or complex. "The factor, at its core, is a question of whether the jury will confuse the evidence as a result of a long, complicated trial." *State* v. *Perez*, 147 Conn. App. 53, 100, 80 A.3d 103 (2013), aff'd, 322 Conn. 118, 139 A.3d 654 (2016). The joinder of the three informations, which alleged three separate violations of protective order counts, did not result in a trial that was long; the presentation of evidence lasted four days and thirteen witnesses were called. See, e.g., *State* v. *David P.*, 70 Conn. App. 462, 469, 800 A.2d 541, 548 (2002) (concluding that six day trial, including argument and jury instruction, with thirteen witnesses not unduly long or complex), cert. denied, 262 Conn. 907, 810 A.2d 275 (2002). Furthermore, given the "drastically different" factual scenarios underlying the charges, there was little chance that the jury would confuse the evidence as to each charge.

The court further reduced any possibility of confusion by instructing the jury that it had consolidated separate cases to be tried together and that the jury was to consider each separately. This instruction minimized any risk of prejudice that might have resulted from the

joinder of the three cases. "[W]e presume, absent a fair indication to the contrary, that the jury followed the instruction of the court as to the law." *State* v. *Lasky*, 43 Conn. App. 619, 629, 685 A.2d 336 (1996), cert. denied, 239 Conn. 959, 688 A.2d 328 (1997). We conclude that the defendant has not demonstrated that the joinder of the informations caused him substantial or unfair prejudice. Accordingly, we conclude that the court's ruling on the state's motion to consolidate the informations was not an abuse of discretion.

II

The defendant also claims that the court improperly denied his motion for judgment of acquittal as to the count of criminal possession of a firearm. We disagree.

After the state rested, the defendant filed a motion for a judgment of acquittal as to the charge of criminal possession of a firearm on the ground that the state failed to prove that he was given notice and an opportunity to be heard, as required by § 53a-217 (a), prior to Judge Devlin issuing the December 26, 2014 protective order. Judge Holden denied the defendant's motion.

"The standard of appellate review of a denial of a motion for a judgment of acquittal has been settled by judicial decision. . . . The issue to be determined is whether the jury could have reasonably concluded, from the facts established and the reasonable inferences which could be drawn from those facts, that the cumulative effect was to establish guilt beyond a reasonable doubt. . . . The facts and the reasonable inferences stemming from the facts must be given a construction most favorable to sustaining the jury's verdict." (Internal quotation marks omitted.) *State* v. *Balbuena*, 168 Conn. App. 194, 199, 144 A.3d 540, cert. denied, 323 Conn. 936, 151 A.3d 384 (2016).

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent

of the legislature. . . . 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. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *State* v. *Agron*, 323 Conn. 629, 633–34, 148 A.3d 1052 (2016). "Issues of statutory construction raise questions of law, over which we exercise plenary review." (Internal quotation marks omitted.) *State* v. *Peters*, 287 Conn. 82, 87, 946 A.2d 1231 (2008).

We begin with the language of the pertinent statute. Section 53a-217 (a) provides in part: "A person is guilty of criminal possession of a firearm [or] ammunition . . . when such person possesses a firearm [or] ammunition . . . and . . . (4) knows that such person is subject to (A) a . . . protective order of a court of this state that has been issued against such person, after *notice and an opportunity to be heard* has been provided to such person in a case involving the use, attempted use or threatened use of physical force against another person. . . ."[5] (Emphasis added.)

The defendant argues that the state presented no evidence as to the element of "notice and an opportunity to be heard" on the charge of criminal possession of a firearm. He argues that § 53a-217 (a) (4) (A) required the court, prior to issuing the December 26, 2014 protective

[5] We note that § 53a-217 (a) (4) (A) was amended in 2016 by No. 16–34 of the Public Acts, which removed the words "and an opportunity to be heard." The 2014 supplement of the statute, which includes the phrase "opportunity to be heard," is at issue in this case. See footnote 1 of this opinion.

order, to hold a hearing at which the defendant could contest the necessity of a protective order. The defendant argues that, at the December 26, 2014 arraignment, the court did not even inform him that he had a right to such a hearing. The state contends that the arraignment itself provided the defendant with the required notice and opportunity to be heard. We agree with the state.

The text of § 53a-217 (a) (4) (A) provides that the defendant be given "notice and an opportunity to be heard. . . ." The meaning of this statutory phrase may be clarified by looking at the words with which it is associated in the statute. See *State* v. *Agron*, supra, 323 Conn. 636. The notice and opportunity to be heard is to be provided to the defendant prior to the issuance of a protective order. Although § 53a-217 is a firearms statute located in the "Miscellaneous Offenses" chapter of the Penal Code, subsection (a) (4) (A) clearly references protective orders. Section 1-2z directs us first to consider the text of the statute and its relationship to other statutes before consulting other sources. See *State* v. *Agron*, supra, 636.

The statutory scheme involving criminal protective orders informs our understanding of what is required by the phrase "notice and opportunity to be heard." Our Supreme Court in *State* v. *Fernando A.*, 294 Conn. 1, 981 A.2d 427 (2009), held that the statutory scheme concerning family violence protective orders "permit[s] the trial court to issue a criminal protective order at arraignment after consideration of oral argument and the family services report . . . [and] require[s] the trial court to hold, at the defendant's request made at the initial hearing, a subsequent hearing within a reasonable period of time wherein the state will be required to prove the continued necessity of that order by a fair preponderance of the evidence . . . ." Id., 13. The court emphasized that the family violence protective

order statutes[6] do not "entitle a defendant to an evidentiary hearing beyond consideration of the parties' arguments and the family services report prior to the initial issuance of a criminal protective order at arraignment, which may well occur within hours of the alleged incident of family violence." (Emphasis omitted.) Id., 23–24.

If the legislature had intended to impose the specific requirement of an evidentiary hearing prior to the issuance of the protective order, it could have expressly done so. See id., 11–13. For example, General Statutes § 54-82r (a), which concerns protective orders prohibiting the harassment of a witness, provides for a "hearing at which hearsay evidence shall be admissible" after which the court must find by a preponderance of the evidence the necessity of issuing such an order. The legislature did not include similar language in § 53a-217.

"It is axiomatic that, when interpreting the terms of one statute, we are guided by the principle that the legislature is always presumed to have created a harmonious and consistent body of law . . . . Legislation never is written on a clean slate, nor is it ever read in isolation or applied in a vacuum. Every new act takes its place as a component of an extensive and elaborate system of written laws. . . . Construing statutes by reference to others advances [the values of harmony and consistency within the law]. In fact, courts have been said to be under a duty to construe statutes harmoniously where that can reasonably be done. . . . Moreover, statutes must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant." (Internal quotation marks omitted.) *State* v. *Agron*, supra, 323 Conn. 638. Applying this principle to the terms of § 53a-217 (a) (4) (A), we conclude that the plain language of the statute, as read in connection with other statutes, demonstrates that an arraignment satisfies the requirement of "notice and an opportunity to be heard."

[6] See General Statutes §§ 54-63c (b) and 46b-38c.

At trial, the state admitted as a full exhibit the transcript of the defendant's December 26, 2014 arraignment. The transcript reveals that the court informed the defendant that a protective order was being issued against him and that he was prohibited from possessing firearms. The defendant indicated that he understood that he could not possess firearms, and he inquired as to whether he was allowed to go home, to which question the court responded affirmatively. Accordingly, this transcript reveals that defendant was provided with an opportunity to be heard prior to the issuance of the protective order. If the defendant desired an evidentiary hearing on the matter, he could have requested such a hearing at the arraignment. In reviewing the evidence in the light most favorable to sustaining the verdict, we conclude that there was sufficient evidence to establish that the state had proven beyond a reasonable doubt that the defendant was afforded notice and an opportunity to be heard prior to the issuance of the December 26, 2014 protective order. Accordingly, we conclude that the court did not err in denying the defendant's motion for judgment of acquittal.

The judgments are affirmed.

In this opinion the other judges occurred.

ANDREA MICEK-HOLT, EXECUTRIX (ESTATE OF EDWARD W. MICEK) *v.* MARY PAPAGEORGE ET AL.

MARY PAPAGEORGE *v.* ANDREA MICEK-HOLT ET AL.

(AC 39668)

Sheldon, Elgo and Eveleigh, Js.

Syllabus

The plaintiff in the first case, H, the executrix of the estate of her father, the decedent, sought to enforce a purchase and sale agreement for

certain real property that the decedent had entered into with M, a defendant in the first case. M had agreed to purchase the property after the expiration of a lease agreement entered into between the decedent and K Co., which was owned by M and her husband, G. G and M thereafter filed a separate action, alleging, inter alia, breach of contract and seeking damages. The trial court consolidated the matters and, following a trial to the court, rendered judgments in favor of H in both cases. On appeal, M and G challenged the trial court's decision on several grounds. *Held* that the trial court properly rendered judgments in favor of H in both cases, and that court having thoroughly addressed the arguments raised in this appeal, this court adopted the trial court's well reasoned memorandum of decision as a statement of the facts and the applicable law on the issues.

Argued January 16—officially released March 27, 2018

Procedural History

Action, in the first case, for, inter alia, breach of contract, and for other relief, and action, in the second case, for breach of contract, and for other relief, brought to the Superior Court in the judicial district of Windham at Putnam, where the named defendant et al. in the first case filed a counterclaim; thereafter, the court, *Calmar*, *J.*, granted the motion to consolidate filed by the defendants in the first case; subsequently, the matters were tried to the court, *Boland*, *J.*; thereafter, the complaint in the second case was withdrawn in part; subsequently, the court, *Boland*, *J.*, granted the motions to dismiss filed by the defendant Jamie Davis et al. in the second case; judgments for the plaintiff in the first case on the complaint and counterclaim, and for the named defendant in the second case, from which the named defendant et al. in the first case and the plaintiff in the second case appealed to this court; thereafter, the court, *Boland*, *J.*, issued an articulation of its decision. *Affirmed.*

Mathew Olkin, for the appellants (named defendant et al. in the first case, plaintiff in the second case).

Beth A. Steele, for the appellee (plaintiff in the first case, named defendant in the second case).

Opinion

PER CURIAM. This appeal arises from two cases, which were consolidated for trial, involving a contract for the purchase of certain real property located in Thompson. Mary Papageorge and George Papageorge appeal from the judgments of the trial court, rendered after a court trial, in favor of Andrea Micek-Holt, executrix of the estate of Edward W. Micek. We affirm the judgments of the trial court.

In 2010, the plaintiff's decedent entered into a lease agreement with Kalami Corporation, which was owned by the family of Mary and George Papageorge (Papageorges). Pursuant to the lease agreement, the Papageorges, along with their two children, were permitted to rent a home owned by the plaintiff's decedent. The term of the lease ran from August 1, 2010 to September 1, 2011. The plaintiff's decedent and Mary Papageorge also executed a purchase and sale agreement, pursuant to which Mary Papageorge agreed to purchase the home once the term of the lease had expired. A closing was scheduled for August 31, 2011. The closing never occurred, yet the Papageorges continued to reside in the subject property.

On October 28, 2014, Micek-Holt, as executrix of the estate of Edward W. Micek, commenced one of the two underlying actions.[1] See *Micek-Holt* v. *Papageorge*, Superior Court, judicial district of Windham at Putnam, Docket No. CV-14-6008881-S (September 26, 2016) (first action). Micek-Holt pleaded seven claims in her complaint sounding in breach of contract, unjust enrichment, declaratory judgment, quiet title, foreclosure of equitable title, enforcement of the purchase and sale agreement, and eviction. On December 18, 2014, the

[1] Kalami Corporation and Angelina Papageorge, one of the Papageorges' children, also were named as defendants in the action filed by Micek-Holt. Neither of those parties is participating in this appeal.

Papageorges, along with Angelina Papageorge, filed an answer, special defenses and a counterclaim directed to Micek-Holt, both individually and in her capacity as the executrix of her decedent's estate.

On August 25, 2015, Mary Papageorge commenced the second of the two underlying consolidated actions. See *Papageorge* v. *Micek-Holt*, Superior Court, judicial district of Windham at Putnam, Docket No. CV-15-5006173-S (September 26, 2016) (second action). Mary Papageorge raised six counts in her complaint sounding in breach of contract, fraud, unjust enrichment, abuse of process, intentional infliction of emotional distress and negligent infliction of emotional distress. The claims were directed to Micek-Holt in her individual capacity, in her capacity as executrix of her decedent's estate, and in her capacity as a beneficiary of her decedent's estate.[2] As relief, Mary Papageorge sought $5.5 million in damages, a determination that she was the equitable owner of the subject property, and an order requiring Micek-Holt to convey legal title to the subject property to her without contingencies and without a mortgage. On March 23, 2016, Micek-Holt, in all of her capacities, filed an answer and special defenses.

On August 1, 2016, the first action filed by Micek-Holt and the second action filed by Mary Papageorge were consolidated. Over the course of two days, the consolidated cases were tried to the court.

On September 26, 2016, the trial court issued a memorandum of decision rendering judgments in Micek-Holt's favor on all counts in her complaint and on all counts in the Papageorges' counterclaim in the first

[2] Mary Papageorge's complaint also named two attorneys, Jamie Davis and Daniel McGinn. Davis and McGinn filed separate motions to dismiss the counts directed to them, both of which the trial court granted. Mary Papageorge did not appeal from those decisions. Further, the complaint contained a seventh count sounding in "misconduct." She withdrew that claim prior to trial.

action, and in Micek-Holt's favor on all counts in Mary Papageorge's complaint in the second action. By way of relief, the court ordered the parties to meet for a closing on October 24, 2016, at which, inter alia: (1) Micek-Holt would convey to Mary Papageorge legal title to the property; (2) Mary Papageorge would convey a check to Micek-Holt in the amount of $78,336.40; and (3) Mary Papageorge would deliver to Micek-Holt a note secured by a mortgage. In addition, the court ordered Mary Papageorge to pay Micek-Holt the sum of $17,401.50, to reimburse her for taxes that Micek-Holt had paid for her on the subject property, plus attorney's fees. The court further ordered that, if the closing did not occur as ordered, then, inter alia: (1) the Papageorges would either have to vacate the property by October 26, 2016, or be required to pay $150 in daily use and occupancy payments and be subject to the execution of an eviction order; (2) Mary Papageorge's interest in the property would be extinguished; and (3) a judgment quieting title in favor of Micek-Holt would enter. On September 29, 2016, the Papageorges appealed.[3]

On appeal, the Papageorges challenge the trial court's decision on several grounds. After examination of the

[3] Extensive litigation ensued regarding the termination of the appellate stay and various efforts to have the Papageorges ejected from the subject property. This court already considered whether the trial court improperly granted the plaintiff's motion to terminate the stay when it considered the Papageorges' motion for review under Practice Book § 61-14. We granted the Papageorges' request for review, but denied the relief they requested. We thereafter denied their motion for reconsideration. See *Lawrence* v. *Cords*, 165 Conn. App. 473, 479, 139 A.3d 778 ("[I]ssues regarding a stay of execution cannot be raised on direct appeal. The sole remedy of any party desiring . . . [review of] . . . an order concerning a stay of execution shall be by motion for review . . . ." [Internal quotation marks omitted.]), cert. denied, 322 Conn. 907, 140 A.3d 221 (2016). Moreover, although the Papageorges have challenged several executions of ejectment served by Micek-Holt, they did not brief any claimed errors with respect to those challenges, and we thus deem them abandoned. See *Countrywide Home Loans Servicing, LP* v. *Creed*, 145 Conn. App. 38, 44 n.7, 75 A.3d 38, cert. denied, 310 Conn. 936, 79 A.3d 889 (2013).

record on appeal and the parties' briefs and arguments, we conclude that the judgments of the trial court should be affirmed. Because the trial court thoroughly addressed the arguments raised in this appeal, we adopt its well reasoned decision as a statement of the facts and the applicable law on the issues. See *Micek-Holt* v. *Papageorge*, Superior Court, judicial district of Windham at Putnam, Docket No. CV-14-6008881-S (September 26, 2016), and *Papageorge* v. *Micek-Holt*, Superior Court, judicial district of Windham at Putnam, Docket No. CV-15-5006173-S (September 26, 2016) (reprinted at 180 Conn. App. 545). Any further discussion by this court would serve no useful purpose. See, e.g., *Woodruff* v. *Hemingway*, 297 Conn. 317, 321, 2 A.3d 857 (2010); *Brander* v. *Stoddard*, 173 Conn. App. 730, 732, 164 A.3d 889, cert. denied, 327 Conn. 928, 171 A.3d 456 (2017).

The judgments are affirmed.

APPENDIX

ANDREA MICEK-HOLT, EXECUTRIX (ESTATE OF EDWARD F. MICEK) *v.* MARY PAPAGEORGE ET AL.*

MARY PAPAGEORGE *v.* ANDREA MICEK-HOLT ET AL.

Superior Court, Judicial District of Windham at Putnam
File Nos. CV-14-6008881-S and CV-15-5006173-S

Memorandum filed September 26, 2016

Proceedings

Memorandum of decision in actions for, inter alia, breach of contract. *Judgments for the plaintiff in the first case and for the named defendant et al. in the second case.*

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* Affirmed. *Micek-Holt* v. *Papageorge*, 180 Conn. App. 540, A.3d (2018).

Mathew Olkin, for the defendants in the first case, plaintiff in the second case.

Beth A. Steele, for the plaintiff in the first case, named defendant et al. in the second case.

Opinion

BOLAND, J. Over a period of two days, this court tried these two matters, which involve conflicting claims of the same parties. These pending suits are actually numbers three and four between them, having been preceded by a 2011 summary process action in the Superior Court, geographical area number eleven, captioned, "Edward Micek *v.* George Papageorge," Docket No. 11-8151. That case went to judgment, the terms of which have a bearing upon the matters before me, as will be discussed below. Edward Micek filed a later action of the same nature in the same venue, and with the same caption, bearing Docket No. 11-9324, but he died during its pendency and it was dismissed for inactivity. Given the lengthy and increasingly acrimonious tone of this dispute, it is the intent of this jurist that this decision resolve all the issues outstanding between these parties so as to obviate the need for any later lawsuits.

I

INTRODUCTION

At the heart of the parties' dispute is a single-family home located at 361 Thompson Road in the town of Thompson. The home was built almost two hundred years ago, but photographs submitted depict it as a stately residence in overall good condition. At all relevant times until his death in 2014, Edward Micek was the land-record owner of the home. Andrea Micek-Holt is his daughter and the executrix of his estate. The decedent resided at 366 Thompson Road, immediately across the street from number 361. His daughter resides there today.

At some point in 2010, the decedent decided to sell number 361. He was acquainted with Mary Papageorge and George Papageorge, a married couple, as they owned a business which supplied his premises with heating oil. The deal which ensued from their negotiations provided that the Papageorges would take occupancy under a lease from August of 2010 through August 31, 2011. At the same time, they entered into a contract of purchase and sale. Only Ms. Papageorge was named as a buyer. That contract provided for a closing at the end of the lease term. The lease specifically incorporates the provisions of that contract, even though, oddly, certain of their provisions are contradictory.

In addition to Mary and George, two of their children also occupied the home. One of them, Angelina, is now an adult and remains a resident. Named as a defendant in the 2014 case, she has appeared but has not asserted any separate defenses on her own behalf. She has joined her parents as a counterclaim plaintiff on two of their counts. She did not attend the trial. The orders which are set forth below are applicable to her to the same extent as to her parents.

Under the lease, the actual lessee was Kalami Corporation, an entity named as an additional defendant in the 2014 case. Ms. Papageorge testified that the corporation was owned by her family and engaged in real estate holdings. The corporation was a party only to the lease, and not to the sales agreement. Like Angelina, the corporation has appeared and has not asserted any separate defenses on its own behalf. Also, it has not asserted any additional claims on its behalf.

The difficulties outlined below commenced in mid-August of 2011, a few weeks preceding the anticipated closing date.

A

Micek-Holt Claims

Alleging that by means of a variety of ruses and subterfuges the Papageorges have frustrated every reasonable effort to complete the title conveyance and pay the agreed upon consideration, Ms. Micek-Holt sues on behalf of the estate in seven counts. These include claims for (1) breach of contract; (2) unjust enrichment; (4) to quiet title; (5) to foreclose defendants' equitable claims to the property; (6) to specifically enforce the terms of the 2010 contract; and (7) to evict them. Her third count seeks a declaratory judgment in terms generally tracking the material in the other six counts.

The Papageorges deny all material allegations of each count. They also plead seven separate special defenses. Two of these can be disposed of summarily. Number six asserts that the complaint should be dismissed in its entirety, as plaintiff has failed to allege any facts or assert any legal basis upon which relief can be granted. This is an improper special defense, and it is contradictory to the findings this court sets forth below. Number seven of the Papageorge special defenses asserts that Kalami Corporation was dissolved and therefore no legal claims may be asserted against it. Whether true or not, this pleading is one Ms. Papageorge, who is not an attorney, is not permitted to make on behalf of this corporation. As indicated above, the court views the corporation as playing no role in this trial. The remaining special defenses will be discussed more fully momentarily.

B

Papageorge Claims

In the 2014 action, Mary Papageorge filed on her own behalf claims for breach of contract, fraud, unjust

enrichment, and abuse of process against Ms. Micek-Holt both individually and as a representative of her father's estate. Both George and Angelina join her in asserting additional claims for intentional and negligent infliction of emotional distress. The relief she seeks is an order that the estate convey title to 361 Thompson Road to her without further payment by her, and damages of $2,500,000.

In the 2015 action, Ms. Papageorge is the sole plaintiff, in six counts which are essentially restatements of the material just described.[1] In each count she sues Ms. Micek-Holt in each of her two capacities. She seeks, again, a conveyance of clear title, but her demand for damages has risen to $5,500,000.

Ms. Micek-Holt, individually and in her representative capacity, denies all claims. In addition, she sets forth a series of special defenses, including unclean hands, fraud, waiver, reliance upon advice of counsel, failure to meet statutory limits for making these claims, a defense relating to her status as a defendant, and to any claims on the lease, as the lessee, Kalami Corporation, has been dissolved with no apparent successor to its interests.

II

STIPULATED FACTS

The parties stipulated to the following facts:

1. On August 15, 2010, Edward W. Micek was the owner of property known as 361 Thompson Road, Thompson, Connecticut.

2. On that date, he entered into a written lease with Kalami Corporation for the use and occupancy of 361 Thompson Road, Thompson, CT. The lease term was from August 1, 2010, to September 1, 2011. The lease

[1] Her complaint has a seventh count captioned, "Misconduct." At trial, her counsel withdrew this count.

provided that the Papageorges and their two children would occupy the property.

3. Simultaneously with that lease, he entered into a purchase and sale agreement for that property with Mary Papageorge. The agreement called for a closing on August 31, 2011.

4. Such closing never occurred.

5. Micek filed a summary process action, which resulted in an April 15, 2013 judgment by the Honorable Leeland J. Cole-Chu.

They stipulated also that they have been unable to agree upon the extent of the res judicata and, or, collateral estoppel effect of that decision.

III

ISSUES DECIDED IN FIRST SUMMARY PROCESS CASE

A

Findings and Orders of the Court

This court has carefully scrutinized Judge Cole-Chu's decision. It followed a trial of several days duration in January of 2013, and it makes apparent that the parties had the opportunity to air all of the grievances they held against each other at that time.

The court found that Kalami Corporation had fulfilled all of its obligations as tenant (or sublessor) under the one year lease. Also, it found that Mary Papageorge had been ready, able and willing to consummate the real estate closing on September 1, 2011.[2] What had impeded

[2] Testimony in this case indicates that Hurricane Irene had buffeted Connecticut on August 29, 2011, and that as of September 1 all of Thompson Road was without power and the site of numerous downed trees. Accordingly, a closing on the first would have likely been impossible. However, time was not of the essence of the agreement, and the marginal delay caused by this weather event was not the cause of the parties' dispute; the storm did, however, drop trees at 361 Thompson Road, and the cost of their removal did become a sticking point.

closing was an argument as to the amount of cash which the buyer would have to pay. The contract stated the purchase price to be $250,000, and provided that it would be paid in the form of three deposits totaling $20,000 plus a note from buyers to seller for $229,000, with the note to be secured by a mortgage upon the subject premises. The $1000 discrepancy between the express purchase price and the payment schedule is in the original. In the 2013 trial, the parties differed as to how much the deposits actually totaled, and what credits and offsets buyer was entitled to in consideration of work done upon the premises. Judge Cole-Chu resolved their disputes as well as the addition error by crediting buyer with effective down payments exceeding $21,000, thus recognizing $229,000 as the proper amount remaining to be paid by the note. Given that finding, he ruled that aside from normal and customary closing adjustments, the buyer had to bring no additional cash to the closing.

Additionally, he heard and adjudicated their claims as to the amount and value of the buyer's preclosing work. His decision refers specifically to her having remediated mold, replaced a water heater, sanded and varnished parts of the flooring, and removed approximately seven trees. He made no separate calculation of any offset attributable to this work. In that case, as in this one, she produced no evidence of the cost of any of that work. Also, the work could be viewed as an aspect of the purchase and sale agreement, which provided that the premises were to be conveyed as is, with any improvements the duty of the buyer.

Beyond calculating the appropriate remainder of the purchase price, the decision also resolves an issue relating to Ms. Papageorge's status with respect to the subject property. Edward Micek had described her and the rest of her family as tenants. Instead, the court held, Ms. Papageorge became the equitable owner of the property

when she entered into the purchase and sale agreement in August of 2010. This holding was consistent with precedent summarized just recently in *Southport Congregational Church-United Church of Christ* v. *Hadley*, 320 Conn. 103, 128 A.3d 478 (2016): "[e]quitable conversion is a settled principle under which a contract for the sale of land vests equitable title in the [buyer]. . . . Under the doctrine of equitable conversion . . . the purchaser of land under an executory contract is regarded as the owner, subject to the vendor's lien for the unpaid purchase price, and the vendor holds the legal title in trust for the purchaser. . . . The vendor's interest thereafter in equity is in the unpaid purchase price, and is treated as personalty . . . while the purchaser's interest is in the land and is treated as realty." (Citation omitted; internal quotation marks omitted.) Id., 111.

Neither party filed any appeal of that judgment.

B

Impact of that Decision upon Present Cases

Ms. Papageorge pleads res judicata as a special defense applicable to Ms. Micek-Holt's counts sounding in breach of contract and for possession of the property. Via a pretrial motion in limine as well as in a motion for summary judgment[3] filed two days before trial, she claimed that the 2013 decision served to collaterally estop the estate from raising these issues in the present cases.

[3] These filings came to the attention of this court at a trial management conference held just prior to the trial. The court denied the motion in limine as the full import of the 2013 decision was unclear in light of subsequent events. Ms. Papageorge accompanied her motion for summary judgment with a request for leave to file, which this court denied; proceedings on that motion likely would have delayed a resolution of the parties' claims for several additional months, an unacceptable delay in a case of this nature, which has already passed its fifth anniversary. However, the court indicated that it was not deciding the merits of either motion.

Collateral estoppel is the appropriate concept by which to measure the parties' present dispute over the construction of the lease and purchase and sale agreement, and the precise amount of the purchase price. "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, or issue preclusion, is that aspect of res judicata which prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties upon a different claim. . . . For an issue to be subject to collateral estoppel, it must have been fully and fairly litigated in the first action. It also must have been actually decided and the decision must have been necessary to the judgment." (Internal quotation marks omitted.) *Lighthouse Landings, Inc.* v. *Connecticut Light & Power Co.*, 300 Conn. 325, 343–44, 15 A.3d 601 (2011).

Res judicata, in contrast, precludes the litigation in later actions of claims which existed at the time of a prior action but which were not raised therein. "Generally, for res judicata to apply, four elements must be met: (1) the judgment must have been rendered on the merits by a court of competent jurisdiction; (2) the parties to the prior and subsequent actions must be the same or in privity; (3) there must have been an adequate opportunity to litigate the matter fully; and (4) the same underlying claim must be at issue. . . . Public policy supports the principle that a party should not be allowed to relitigate a matter which it already has had an opportunity to litigate." (Citations omitted; internal quotation marks omitted.) *Wheeler* v. *Beachcroft, LLC*, 320 Conn. 146, 156–57, 129 A.3d 677 (2016).

Applying those measures, this court determines that the 2013 judgment squarely answered all of the parties' questions on lease construction and the enforceability

of the purchase and sale agreement, and collateral estoppel thus precludes the parties from litigating those issues a second time in this case. Therefore, the court accepts that the equitable owner of the real estate is Ms. Papageorge, subject to her obligation to pay the remainder of the purchase price. Likewise, the court will give no weight to Ms. Papageorge's references (sketchy as they were) to the lease-term troubles she incurred with tree removal, or floor repair or replacement, or installing a new water heater, or mold remediation. Judge Cole-Chu decided them unambiguously.

The decision obviously contemplated further performance on the part of each side as to details which remained executory at that time; these included delivery of a deed transferring title and payment in the form of the note and mortgage. Judge Cole-Chu could not have anticipated whether the parties' performance of those details would provide any additional circumstances amounting to a breach subsequent to April 15, 2013, and so the third prong of the *Wheeler* test cannot be found to have been met as to events following his decision. In *Weiss* v. *Weiss*, 297 Conn. 446, 998 A.2d 766 (2010), the court indicated that whether an action involves the same claim as a prior action such that it triggers the doctrine of res judicata requires a transactional analysis. A court must determine pragmatically whether a connected series of transactions form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage. Events which occur after a decision is rendered cannot easily be immunized from scrutiny by a later court.

Thus, neither collateral estoppel nor res judicata bar Ms. Micek-Holt from seeking a ruling on the actions taken or avoided by Ms. Papageorge to complete the contract's provisions after April 15, 2013. In so ruling, the court is also rejecting the conclusory allegations of

the first special defense filed by Ms. Papageorge claiming res judicata, and the conclusory allegations of her fourth special defense alleging collateral estoppel, except to the limited extent set forth in this memorandum.

Ms. Papageorge's counterclaims in the present cases themselves raise a question of preclusion. Her breach of contract count, in particular, is heavily dependent upon proof of circumstances which took place in August and September of 2011 and their consequences to her. She frames that count so as to include both contract and tort elements. As to the tort elements, at least, they could not have been litigated in the summary process action. As stated in *Pollansky* v. *Pollansky*, 162 Conn. App. 635, 133 A.3d 167 (2016), "[s]ummary process proceedings are limited to a determination of who is entitled to possession of real property. . . . The plaintiff is correct that counterclaims for money damages are not permitted . . . ." (Citations omitted.) Id., 658.

Additionally, she charges Ms. Micek-Holt and the estate with fraud. "[F]raud is an exception to res judicata"; *Weiss* v. *Weiss*, supra, 297 Conn. 459; and thus her fraud count cannot be deemed precluded by the 2013 decision.

Finally, her counts alleging both intentional and negligent infliction of emotional distress arise from events which occurred after the decision. Like the postdecision breach of contract claims, they cannot be said to have been decided by Judge Cole-Chu.Accordingly, this court will evaluate her claims on these causes of action on their merits.

C

What Was Supposed to Happen After April 15, 2013?

The 2013 decision neither rewrote the parties' agreement nor directed how and when a closing should

take place, but it was issued with a clear implication that Edward Micek, then still living, had an obligation to convey title by deed to Ms. Papageorge. Reciprocally, it indicated she was obliged to sign a note in the amount of $229,000, secured by a mortgage in his favor. The court left it to the parties to work out the time and place of a closing and resolve what it viewed as the ministerial duties attendant upon transferring title to a parcel of real estate.

IV

WHAT ACTUALLY HAPPENED FOLLOWING APRIL 15, 2013

A

2013 Closing Preparation

On May 13, 2013, Attorney Nicholas Longo, representing Mr. Micek, wrote to Ms. Papageorge, inquiring who her attorney was and attempting to arrange a closing. On May 20, he transmitted a draft note to her attorney, and on May 23, sent to her a draft deed, mortgage, and note. The tenor of his letters was civil and professional.

Ms. Papageorge's first written reply is an e-mail dated May 29, in which she indicated that the documents appeared to be in order. She went on, however, to demand (1) a doctor's letter stating that Edward Micek was competent to close; (2) interest of almost a thousand dollars on the money paid as a deposit under the purchase and sale agreement; (3) damages for trees brought down by Hurricane Katrina (sic); (4) and unspecified compensation for landscaping and painting she claimed was owed to her as a result of undocumented verbal understandings reached with Mr. Micek or Ms. Micek-Holt.

On June 4, Attorney Longo communicated that the demands were unacceptable, but that his client was

still ready to close. He repeated that message on June 18, obviously not having heard from her in the interim. By e-mail on June 21 she stated that "I want everything" denoted in her earlier e-mail, and added new items to that list. First, she refused to be responsible for taxes on the grand list of October 1, 2012, as the documents specified, as she claimed that language exposed her to payment of "back taxes" owed by Mr. Micek. Secondly, she expanded upon the demand for the seller to complete landscaping work on the property. She concluded by saying that she would not hire an attorney[4] until her demands were met, that the seller was stalling and game-playing, and that she had no doubt that she would succeed if either party took this case back to court.

No closing occurred in 2013.

B

Second Summary Process Claim

In the middle of July of 2013, the parties' dispute escalated. Observing activity at 361, which he believed violated the spirit and terms of their agreement, Edward Micek demanded to be allowed to inspect the property. Almost simultaneously, the town of Thompson sent him a cease and desist order demanding that he put an end to allegedly illegal auto sales at 361 Thompson Road. While he was the addressee because title to that parcel remained in his name in the land records, he believed that any illegal activity was the doing of the Papageorges.

Ms. Papageorge's quick reply was to refuse him access and threaten that she would call the state police if he or anyone representing him set foot on her property.

[4] Note that on May 20 Attorney Longo had communicated with an attorney he believed was representing her; she appears, instead, to have continued to represent herself, at least in a cocounsel arrangement.

Edward Micek died on March 11, 2014. For reasons as to which one may only speculate, he had filed a second summary process action in geographical area number eleven of this court in December of 2013. That case was pending at the time of his death and was ultimately dismissed as dormant. The court held no meaningful proceedings in that case.

C

2014 Closing Preparation

Ms. Micek-Holt was appointed executrix of his estate shortly following her father's death.

On April 17, 2014, Attorney Harold Cummings wrote to Ms. Papageorge, identifying himself as the estate's attorney and proposing that a closing be held on May 15. On April 30, he wrote to her again, including copies of a proposed deed, note, and mortgage, and inquiring who her attorney would be. In these and in all other written communications with her, the tenor of his writings was civil and professional.

Ms. Papageorge rejected these documents, and indicated that she would not be hiring an attorney until the documents conformed to her demands, and until the estate had agreed to compensate her for the items listed in her earlier communications with Attorney Longo. She complained that the instruments submitted now recited that she would be responsible for taxes on the grand list of October 1, 2013, which, again, she rejected as being the responsibility of the estate. She quibbled about the credits she believed the Cole-Chu decision entitled her to. In a telephone conversation memorialized in his e-mail to her of April 30, it appears that she had also objected to the deed's recital of $250,000 as the purchase price, contending that she only owed at most $229,000, minus adjustments she believed she was entitled to.

Over the next several weeks, Attorney Cummings attempted to address her complaints about the documents and requested copies of invoices for any work she had commissioned on the property without conceding liability for those items. Ultimately, Attorney Cummings informed her that he and Ms. Micek-Holt would be present at the Thompson town hall on June 30, 2014, to complete the closing.

She did not attend. Shortly thereafter, Ms. Micek-Holt filed the 2014 case.

D

Conclusions as to Breach of Contract

After the 2011 breach of contract by Edward Micek, Ms. Papageorge has remained in possession of 361 Thompson Road. With the exception of some homeowner's insurance paid recently, she has paid nothing to Mr. Micek or his estate.

In her response both to Attorney Longo and to Attorney Cummings, she has overplayed the hand Judge Cole-Chu dealt her in his decision. His decision did not leave her the option of attaching a bill for additional claims relating to the physical condition of the property. His decision did not even by implication suggest that she was entitled to interest on the deposits paid to the seller. The decision indicated that she was obligated to sign a note for $229,000, without further discounts or further ado.

Nor did the decision empower her to ignore Connecticut law and local closing customs while serving as her own attorney in preparing for a closing. Our law, for instance in chapter 223 of the General Statutes, imposes a conveyance tax on the sale of real estate calculated on the full purchase price without regard to the timing of payments between the parties. Thus the deed's recital of a $250,000 price was entirely correct and proper.

Similarly, the closing customs of the Windham County Bar Association provide that real estate tax adjustments at closing operate on the premise that "taxes assessed upon the List of the preceding October 1st shall be considered to be applicable to the following fiscal year." It is the rule applicable to all real property in this state that a property owner pays taxes assessed on one year's grand list in two installments in the following fiscal year, one due in July nine months after the grand list is published, and the second in January of the succeeding year. The county customs[5] provide that closing attorneys adjust taxes to the date upon which the closing occurs. Thus, at a closing held on July 1, for instance, the seller would be liable for payment of all taxes up to June 30, all of which were assessed on the grand list published twenty-one months previously. The buyer would be liable for all taxes due as a result of the assessment made on October 1, of the year preceding the closing, as all of the latter are only prospectively due as of the beginning of the fiscal year. That allocation of the property tax burden is exactly what both Attorneys Longo and Cummings attempted to achieve by including in their draft instruments the reference to the last grand list, as opposed to the next one, as Ms. Papageorge insisted.

Ms. Papageorge's persistence in making demands not allowed by her earlier court victory, together with her stubborn refusal to retain an attorney who might help her overcome her ignorance of standard provisions as to the form of a deed and the propriety of closing adjustments, combine to qualify as objectively unreasonable her claim that it was the estate or Mr. Micek and not she herself who breached the purchase and sale

[5] This court is unaware of any local custom in any other region of the state which would direct a result different from that outlined herein.

agreement as it stood as of April 15, 2013. This is then the appropriate moment to reject her second and third special defenses, which, under the respective labels of "accord and satisfaction" and "payment," allege in identical terms that she has paid all sums due under the two 2010 agreements. Each is patently false.

Furthermore, these unsubstantiated claims of full payment, together with her resistance for over five years to complete the closing while all along enjoying the benefit of the bargain by remaining in undisturbed possession of the real estate, provide solid support for a finding that she has not shown good faith in this transaction. "Bad faith has been defined in our jurisprudence in various ways. Bad faith in general implies . . . a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. . . . [B]ad faith may be overt or may consist of inaction, and it may include evasion of the spirit of the bargain . . . ." (Internal quotation marks omitted.) *Brennan Associates* v. *OBGYN Specialty Group, P.C.*, 127 Conn. App. 746, 759–60, 15 A.3d 1094, cert. denied, 301 Conn. 917, 21 A.3d 463 (2011).

In light of these findings, the court finds for the plaintiff Micek-Holt on the first count of the 2014 complaint. Her remaining six counts are all derivatives of that count and depend upon the finding that I have reached. Each additional count essentially proposes a different remedy, and each will be examined, below, in the discussion of the equitable response to the present circumstances which this court should direct.

V

PAPAGEORGE TORT CLAIMS

As indicated, Ms. Papageorge and her family have asserted a present total of six claims against the estate and Ms. Micek-Holt, individually.

A

Breach of Contract

Ms. Papageorge has an expansive claim for damages flowing from what she believes to be the multiple contract breaches committed by the defendants. As to events occurring after April 15, 2013, this court finds that her own actions and omissions are the source of any distress she may have suffered.

Left to be resolved are her claims that the seller's 2011 breach caused her damages warranting compensation at this time. In her direct testimony, she stated that the earlier breach had ruined her life. What happened, in her words, was a cascading series of calamities, which led to her loss of her business, to adverse civil consequences in the state of Massachusetts, to Bankruptcy Court, and to untold pain and suffering.

Briefly summarized, she testified that she and her husband were in the home heating oil business as they negotiated with Mr. Micek. The business did between four and five million dollars a year in sales, and was subject to the vagaries of weather and international oil prices to an extent unusual for other industries but likely common in this one. Critical to the business' success, she maintained, was the ability to obtain a line of credit secured by the owners' home. By virtue of that, the business could borrow to cover today's purchases until customers sent in their payments. Mr. Micek's default made placement of such a lien upon 361 Thompson Road impossible. No line of credit meant no available cash, meant no ability to continue the oil business, meant bankruptcy and all of its ugly sequelae.

Credibility is always a critical concern in a trial, and unfortunately for Ms. Papageorge, her own husband's

testimony contradicted hers on this theory. He testified that the line of credit was only a marginal concern. Instead, he opined, their ability to describe themselves as homeowners would have been the sufficient remedy to their credit problems. As such, they would appear to their creditors to be people of substance who could be trusted for payments a day or a week later to their wholesale suppliers. Additionally, he conceded that the available equity in the property of about $20,000[6] was not adequate to the volume of their cash needs.

Even before her husband spoke, information elicited on cross-examination by Ms. Micek-Holt's counsel provided additional reason for doubting her direct testimony. In 2012, she was a party to at least three lawsuits brought by business creditors for amounts totaling in the six figures on debts that she had guaranteed for her business. More seriously, the state of Massachusetts had obtained a court order freezing assets belonging to both the Papageorges and their business in that state, and garnishing the business' bank accounts to the extent of some $200,000 for behavior constituting a retail variation on a Ponzi scheme. The company's practice was to accept prepayment from customers in the summer to be applied to deliveries in the fall and winter. When that time came, however, the Papageorges had used the cash to pay other bills. What oil they were able to obtain would be allocated first to new customers on a C.O.D. basis, and the summer customers given fifty or one hundred gallons to silence their complaints until the Papageorges raised enough cash to induce their trade creditors to supply them with more oil—or until the weather improved.

[6] I.e., sale price of $250,000 minus mortgage of $229,000, rounded down. It must be noted that whatever equity inhered in the property, there was no evidence that any bank's post–2008 loan standards would permit a loan to the Papageorges given the credit problems they obviously were afflicted by.

Eventually, enough of those customers complained to the Massachusetts Department of Consumer Affairs that it initiated the proceedings described—prior to August 31, 2011, when the Micek breach occurred. Borrowing against the Thompson property was thus not a component of a sound business plan frustrated by Mr. Micek, but a desperate attempt to borrow from Peter to pay Paul. The Massachusetts proceedings dwarf in magnitude those involved in this action and make absurd her claim that the fiscal house of cards she and her husband had erected before the Micek breach tumbled because they were not in a position to place a junior mortgage on 361 Thompson Road, or to hold themselves out as homeowners.[7]

Those details illustrate why this court is unpersuaded that the Miceks have any liability to Ms. Papageorge for the 2011 breach. That breach was not the cause of her business debacle. Her claim that bankruptcy and other negative consequences were caused by Mr. Micek has no basis in fact or logic. She was likely in deep financial trouble before she moved to Thompson Road and was certainly in such straits before the expected closing date. Moreover, she offered no evidence of damages such a breach might have occasioned, whether that be doctor bills, counseling costs, lost-income projections, or anything upon which to calculate a fair damage award.

On her breach of contract claim, the court finds that she has proven neither liability nor damages to her as a consequence of the 2011 breach, and thus has failed to prove that either Ms. Micek-Holt or the estate is liable to her as a result of that breach.

[7] Additionally, in approximately March of 2012, Mr. Papageorge lost title through a foreclosure proceeding to real estate in Massachusetts which he or his family had owned for half a century. Thus, he was, prior to that date, already a homeowner.

B

Fraud

After incorporating by reference the ninety-four[8] paragraphs of the breach of contract count, Ms. Papageorge adds that in concealing cash payments prior to August 31, 2011, Ms. Micek-Holt and her father created a false accounting. In what really amounts to a different theory for including this cause of action, she adds an additional charge relating to how they induced her to enter into the "Lease/Contract" in the first place, that is, behavior on their part in August of 2010. She labels all of these actions as fraudulent.

"The essential elements of an action in common law fraud . . . are that: (1) a false representation was made as a statement of fact; (2) it was untrue and known to be untrue by the party making it; (3) it was made to induce the other party to act upon it; and (4) the other party did so act upon that false representation to his injury. . . . [T]he party to whom the false representation was made [must claim] to have relied on that representation and to have suffered harm as a result of the reliance." (Internal quotation marks omitted.) *Simms* v. *Seaman*, 308 Conn. 523, 548, 69 A.3d 880 (2013). As to the accounting—and even assuming that Judge Cole-Chu's memorandum did not definitively resolve that issue—fraud cannot be found in the details of the Micek deposit reckoning. As soon as the number was presented to Ms. Papageorge she disputed it, and thus cannot establish the prong of this test requiring proof that she acted upon the false representation to her

[8] There are ninety-four paragraphs in the breach of contract count as Ms. Papageorge expressed the same in her counterclaim to Ms. Micek-Holt's 2014 action. By the time of her own 2015 complaint, her expression of that count had grown to one hundred and twenty-one paragraphs. The observations as to the substance of the fraud count are accurate as to both of these pleadings.

detriment. There's not a shred of evidence to suggest that she believed the Micek accounting for a minute.

With respect to the claim that fraud tainted the 2010 negotiations, it must be noted that her burden of proof is one of clear and convincing evidence. *Reville* v. *Reville*, 312 Conn. 428, 469, 93 A.3d 1076 (2014). Her claim of fraudulent inducement suffers from a distinct lack of pleading specificity; in fact, it is a bald conclusion divorced from any factual allegations which a trier of fact could look to in order to discern whether the elements of fraud had been proven. That pleading defect is perhaps not germane at this time, and potentially curable, but what is not curable is that Ms. Papageorge adduced no evidence indicating that when the parties entered into the various documents in August of 2010 either Mr. Micek or his daughter possessed any intent of doing anything but conveying the property to her in 2011. It's not that her evidence on this point is not clear and convincing, but that, concerning this claim, she has offered no evidence whatsoever.

As to the fraud count in the counterclaim, and its reiteration in the 2015 complaint, the court finds for Ms. Micek-Holt. The court further rejects the fifth Papageorge special defense alleging that the sellers engaged in fraud in their dealings with her.

C

Abuse of Process

The focus of this count is upon Mr. Micek's filing of the second summary process action in December of 2013.

In the recent case of *Rogan* v. *Rungee*, 165 Conn. App. 209, 140 A.3d 979 (2016), the court explained that "[a]n action for abuse of process lies against any person using a legal process against another in an improper manner or to accomplish a purpose for which it was

not designed. . . . Because the tort arises out of the accomplishment of a result that could not be achieved by the proper and successful use of process, the Restatement Second (1977) of Torts, § 682, emphasizes that the gravamen of the action for abuse of process is the use of a legal process . . . against another primarily to accomplish a purpose for which it is not designed . . . .'' (Internal quotation marks omitted.) Id., 220.

Ms. Papageorge claims there are three respects in which Mr. Micek committed this tort: (1) he filed an eviction knowing of an automatic stay under the Bankruptcy Code entered for her and her husband's benefit; (2) he filed two additional eviction proceedings after Judge Cole-Chu's decision in the 2011 case; and (3) he failed to attach the entire Lease/Contract to his pleadings.

If one, for the sake of argument, accepts all three of these premises as proven and true, one cannot then conclude that his actions amount to the abuse of process. If there was a bankruptcy stay in effect, the remedy would be sought in a contempt proceeding in the Bankruptcy Court. If he filed two additional actions aimed at getting back possession of 361 Thompson Road, he availed himself of a statutory proceeding ostensibly designed for that very purpose. Finally, his omission of the cited documents could easily be cured by a request to revise the complaint, or by the defendant therein producing them on her own behalf.

This imaginative exercise is unnecessary, however, because in spite of participating in a two day trial in which the court afforded her sufficient latitude to prove her case, she offered no evidence on the timing of her (apparently multiple) bankruptcy filings and whether any stay was in effect during the three month pendency of the second summary process case. Nor did she offer

any evidence of a third summary process case (which might explain her claim that Mr. Micek filed *two* cases after April 15, 2013); the only evidence presented is that he only brought one such action. Finally, the omission of the attachments to the complaint he filed is a defect of form only. His complaint, which she presented as an exhibit, makes frequent reference to the earlier lease and the purchase and sale agreement, as well as to Judge Cole-Chu's earlier decision. Its omissions, if any, do not transmute it into a means by which he sought to deceive the court or achieve any improper end.

On the counts claiming abuse of process, the court finds for Ms. Micek-Holt and the estate.

D

Unjust Enrichment

Ms. Papageorge claims that the Miceks' retention of deposit moneys and their acceptance of the substantial repairs and improvements made to 361 Thompson Road have unjustly enriched them.

"Plaintiffs seeking recovery for unjust enrichment must prove (1) that the defendants were benefited, (2) that the defendants unjustly did not pay the plaintiffs for the benefits, and (3) that the failure of payment was to the plaintiffs' detriment." (Internal quotation marks omitted.) *Vertex, Inc.* v. *Waterbury*, 278 Conn. 557, 573, 898 A.2d 178 (2006). That enumeration of the elements of this tort follows immediately upon the court's discussion of the nature of the doctrine and the criteria by which a court might determine if it has been correctly raised. "A right of recovery under the doctrine of unjust enrichment is essentially equitable, its basis being that in a given situation it is contrary to equity and good conscience for one to retain a benefit which has come to him at the expense of another. . . . With no other test than what, under a given set of circumstances, is

just or unjust, equitable or inequitable, conscionable or unconscionable, it becomes necessary in any case where the benefit of the doctrine is claimed, to examine the circumstances and the conduct of the parties and apply this standard. . . . Unjust enrichment is, consistent with the principles of equity, a broad and flexible remedy." (Internal quotation marks omitted.) Id., 573.

It is a remedy reserved for those who have acted with equity themselves.

At no time since April 15, 2013, have Ms. Micek-Holt or her father attempted to retain the moneys Ms. Papageorge tendered as deposit payments. Both in 2013 and in 2014, their efforts to comply with Judge Cole-Chu's expectations included giving her full credit for the total $21,000 he found that she had deposited.

How the repairs and improvements inure to the sellers' benefit is unclear. If Ms. Papageorge had completed her performance under the contract, those improvements would be a part of her own home. On the other hand, if by default she put herself in a position of being dispossessed of the property, she can have no expectation that she is entitled to compensation for work she did on the property in the more than five years of her posttenancy occupation.

It should be noted, moreover, that she offered no evidence as to what work was done, when and by whom, what it cost, etc. Thus, even if she had a valid claim against her defendants on this count, she has inadequately proven any damages flowing from their breach.

As to the counts alleging unjust enrichment, the court finds for Ms. Micek-Holt and the estate.

E

Infliction of Emotional Distress

To succeed in a claim for intentional infliction of emotional distress, "four elements must be established.

It must be shown: (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.) *Watts* v. *Chittenden*, 301 Conn. 575, 586, 22 A.3d 1214 (2011). 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 specific acts cited by Ms. Papageorge in support of these claims are that Ms. Micek-Holt on more than one occasion took photographs of 361 Thompson Road, from a vantage point on a neighbor's property; on another occasion, she told a Papageorge visitor that her hostess was paying no rent; and that at another time Ms. Micek-Holt had "given her the finger." Clearly, none of these acts alone or in tandem amount to extreme or outrageous conduct as our case law defines that term. In *Petyan* v. *Ellis*, 200 Conn. 243, 510 A.2d 1337 (1986), such conduct was described as "conduct exceeding all bounds usually tolerated by decent society, of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind." (Emphasis omitted; internal quotation marks omitted.) Id., 254 n.5. In *Appleton* v. *Board of Education*, 254 Conn. 205, 757 A.2d 1059 (2000), the court determined that "[c]onduct on the part of the defendant that is

merely insulting or displays bad manners or results in hurt feelings is insufficient to form the basis for an action based upon intentional infliction of emotional distress." (Internal quotation marks omitted.) Id., 211. On the intentional infliction count, the Papageorges' claim must fail.

While the articulation of the elements of an action for negligent infliction of emotional distress does not employ the adjectives "extreme" or "outrageous," the requirement that any emotional distress complained of must be "severe enough that it might result in illness or bodily harm" establishes a standard against which the scope of this tort might be measured. One is hard-pressed to conceive that people as sophisticated in the rough-and-tumble of the oil business as were the Papageorges would suffer illness or bodily harm as a result of Ms. Micek-Holt's minor incivilities. If their daughter, Angelina, who is reported to now be twenty-one years of age, has her own injuries resulting from these encounters, it was incumbent upon her to appear at the trial to supply some evidence upon which the court could evaluate her claims.

On the negligent infliction count, too, the Papageorges' claim must fail.

VI

CONTEMPT ISSUES

In the course of the progress of these cases before the Superior Court, orders have been entered, which, in turn, have prompted contempt proceedings. As trial commenced, the parties remain divided as to the resolution of these issues.

A

Rental Payment Order

At a short calendar on November 2, 2015, I heard a "motion for escrow" filed by Ms. Micek-Holt. The

motion claimed that the parties had previously agreed upon monthly rental of $1600, that Ms. Papageorge was not making those payments, and that the underlying suit involved their lease and ancillary matters. The motion sought an order that she make payments each month in that amount to be paid into court and held in escrow pending final judgment. I granted that motion.

B

Tax Payment Order

At a subsequent short calendar on June 27, 2016, Ms. Micek-Holt presented to the court a motion for an order that Ms. Papageorge make tax payments stemming from ownership of 361 Thompson Road. The court (*Calmar*, *J.*), granted that motion and ordered her to refund to Ms. Micek-Holt taxes which she had paid to the town of Thompson to forestall a foreclosure of tax liens upon the property.

C

Motion for Contempt

On the short calendar of July 18, the court (*Riley*, *J.*) heard Ms. Micek-Holt's motion seeking a finding that Ms. Papageorge was in contempt for failure to abide by the prior orders described above. Judge Riley granted that motion, found that the total of unpaid taxes was then $16,201.50, and ordered that Ms. Papageorge pay that amount within thirty days, plus attorney fees of $1200.

D

Papageorge Response

After counsel appeared herein for Ms. Papageorge on August 12, he moved to vacate the November 2 and June 27 orders, as well as Judge Riley's contempt finding of July 18, on due process grounds. Judge Calmar denied

that motion on September 14. Ms. Papageorge has not represented that she has paid the $17,401.50 ordered by Judge Riley.

E

Disposition

Ms. Micek-Holt requests that this court refer Ms. Papageorge to the state's attorney's office to be prosecuted for her continued contempt of court orders.

First, this court will vacate its own order of November 2. Part of the argument made at that time was that the monthly payment was needed to allow the estate to cover taxes on the property. The motion Judge Calmar granted on June 27 dealt with taxes, and there is therefore redundancy between the two orders in an unknown amount. The value of the use and occupancy of the premises throughout this litigation is something I have taken into account in the final orders entered today, and thus the earlier, interlocutory order is unnecessary as well as confusing.

The tax payment order, however, was authorized and equitable, and it remains ignored. The final orders entered today will direct that this be paid, an order that Ms. Papageorge may satisfy. If she fails to do so, Ms. Micek-Holt may pursue any remedies available to her. If that includes a civil sanction for contempt of the court's pendente lite orders, Ms. Papageorge will have to answer when she is summoned to court. The dispute, however, is civil, not criminal, and this court therefore declines to refer the matter to the state's attorney's office for prosecution as requested.

VII

CONCLUSION AND ORDERS

"[T]he determination of what equity requires in a particular case, the balancing of the equities, is a matter

for the discretion of the trial court." (Internal quotation marks omitted.) *Independence One Mortgage Corp.* v. *Katsaros*, 43 Conn. App. 71, 75–76, 681 A.2d 1005 (1996). In the exercise of that discretion, "[in] an equitable proceeding, the trial court may consider all relevant circumstances to ensure that complete justice is done." (Internal quotation marks omitted.) Id., 75. The court indicated in *Home Owners' Loan Corp.* v. *Sears, Roebuck & Co.*, 123 Conn. 232, 242, 193 A. 769 (1937), that an equitable result "depends to a large extent upon the circumstances of the particular case."

The particular circumstances of this case are sufficiently involved as to make the court's task somewhat more difficult than usual. Each side accuses the other of unclean hands. Each is correct. Mr. Micek's abrupt 2011 decision to declare the sales agreement in default needs no further discussion. Ms. Papageorge's prolonged refusal to compensate the estate for the real property she occupies, or to satisfy Ms. Micek-Holt's reasonable demand that she be repaid for the taxes she paid, eclipses the wrong done to her in 2011.

The court is mindful of the maxims "equity abhors a forfeiture," and "equity views as done that which ought to have been done." The first conduces toward an award leaving Ms. Papageorge in ownership of the real estate, as she had made deposit payments and done some work upon the property before becoming the initial victim in this long-running saga. In the orders entered below, functionally, the court is averting a forfeiture by granting the relief requested in the sixth count of the Micek-Holt complaint where she demands an order of specific performance of the original purchase and sale agreement.

At the same time, Ms. Papageorge's indifference to the obligations of that bargain over more than three years cannot go unrecognized and cannot be allowed

to persist. The second equitable maxim cited authorizes orders that require her to make good upon her multiple failures to hold up her end of that bargain dating back to June of 2013. Ms. Papageorge has shown this court no valid reason why the closing did not occur in that month, nor presented the court with any valid reason for discounting the payments she agreed to make and ought to have made since then. Without revising the terms upon which the parties agreed in 2010, the court will apply the provisions of that agreement with adjustments for the passage of time and the performance or lack thereof by the parties in the interim.

In calibrating the extent of the performance Ms. Papageorge must make up at this time, the court has utilized June 24, 2013, as the date upon which the closing ordered by Judge Cole-Chu ought to have taken place. The note upon whose terms the parties agreed provided that interest of 4.85 percent would be added to a principal of $229,000, and amortized via monthly payments of $1208.41, augmented by three annual principal reduction payments of $10,000 each. If the closing had occurred in June of 2013, and Ms. Papageorge complied with the contract terms, she would by October 24, 2016, have made forty monthly payments of $1208.41, plus $30,000 in the annual payments, for a total of $78,336.40. She must make that payment now to preserve the opportunity to retain ownership of the property.

The present payment of $78,336.40 would reduce the amount remaining to be paid in coming years, as it includes a substantial reduction of the principal amount of her debt to the estate. The note promising to pay the balance due will thus no longer be in the amount of $229,000, as it must be adjusted downward to account for the portion of that amount representing payment on the principal.[9]

[9] The court has not calculated the exact principal balance that would therefore be due. It is not so simple as subtracting $78,336.40 from $229,000, as the payments are a combination of both principal and interest and only

Additionally, with ownership came the responsibility to pay the taxes upon the tract. Ms. Micek-Holt's second count claims damages for unjust enrichment. She has proven that she incurred expenses amounting to $17,401.50 for tax payments required to save 361 Thompson Road from foreclosure, including attorney fees. Those tax payments were the legal liability of Ms. Papageorge. She cannot claim the benefits of that status unless she acknowledges the responsibilities that flow from it. The court finds for Ms. Micek-Holt, individually, on that count, and orders that Ms. Papageorge reimburse her without further delay.

This judgment disallows any further Papageorge demands for discounts relating to work she has done on the property. Those items were covered by Judge Cole-Chu's decision. Furthermore, she provided this court with no evidence upon which to determine the true value of her demands in that regard.

Because this court is concerned that Ms. Papageorge lacks either the will or the ability to complete this purchase, the court will also provisionally grant Ms. Micek-Holt the relief she requests in her fourth, fifth, and seventh counts. These demand the extinction of any equitable claims Ms. Papageorge may have to 361 Thompson Road, an order quieting title to that parcel in favor of the estate, and the eviction of the Papageorges from the property. In the event that Ms. Papageorge fails to complete the closing as hereafter ordered, this judgment contains orders responsive to that eventuality.

Lastly, the court considers that Ms. Papageorge does owe the estate use and occupancy payments if she fails

the amount of each payment attributable to principal reduces the note amount. The parties must prepare an amortization table to show the amount of the principal remaining due on October 24, 2016; that is the appropriate amount of the note that Ms. Papageorge must sign and deliver.

to pay the amounts owed on the note as indicated above. The original lease allocated one thousand dollars per month to the value of the property, and six hundred to tax and insurance costs. This decision has treated the tax issue separately, as indicated, and thus adopts one thousand as the reasonable value for use of the premises since June 24, 2013. Note, this element of the judgment is only reached in the event that Ms. Papageorge fails to pay the accrued principal and interest payments described.

Time is of the essence as to the performance of these orders.

In light of the foregoing it is, therefore, ORDERED:

1. Judgment on all counts of the complaint in CV-15-5006173-S shall enter in favor of Andrea Micek-Holt in her individual and representative capacities, and against Mary Papageorge.

2. On the counterclaim in CV-14-6008881-S, judgment on all counts shall enter in favor of Andrea Micek-Holt, and against Mary Papageorge.

3. On the complaint in CV-14-6008881-S, judgment on the first count shall enter in favor of the plaintiff.

4. At a time and place of the parties' choosing up to October 24, but, absent agreement, then at the Thompson Town Hall at 2 p.m. on October 24, 2016, the parties will meet for the following purposes:

(a) Andrea Micek-Holt will convey to Mary Papageorge all the right, title and interest held by the estate of Edward Micek (seller) in and to premises known as 361 Thompson Road in Thompson, more fully described in the Executor's Deed submitted to this court as plaintiff's exhibit 1, to which reference may be had. The deed shall be in the form prepared by Harold Cummings, Esq., and attached to plaintiff's exhibit 32. The date

of the grand list referred to therein shall be October 1, 2015.

(b) Seller shall be responsible for payment of its own attorney fees, and for the town and state conveyance taxes required by statute.

(c) In consideration therefor, Mary Papageorge (buyer) shall:

(i) Deliver to seller by bank or cashier's check the amount of $78,336.40;

(ii) Execute and deliver to seller a promissory note in the principal amount of $229,000, less that portion of the sum set forth in the preceding subparagraph, which represents payments of principal on the note between June 24, 2013, and October 24, 2016, had the note been signed on the 2013 date. Prospectively, interest on the note shall be paid at the rate of 4.85 percent per annum. Monthly payments on the note shall commence on November 24, 2016, in the amount of $1208.41 each, until the debt memorialized thereby has been fully amortized;

(iii) As security for that note, buyer shall execute and deliver to seller a first mortgage encumbering the 361 Thompson Road property, and shall provide a release for any encumbrances placed upon her interest in the property on or after August 1, 2010;

(iv) Buyer shall be liable for the cost of recording the deed and the mortgage, and for her own attorney's fees, including title insurance, if required;

(v) Buyer shall also provide the seller with proof of insurance upon the premises, naming the seller as an additional protected party, in an amount at least equal to the amount of the note, and such insurance shall be kept in effect until the note is paid in full.

(d) There will be no adjustments or demands for adjustments relating to the condition of the premises now or at any earlier time, nor for repairs done to it by either party.

(e) No tax adjustment shall be owed to buyer for any period following June 24, 2013.

(f) Not later than the conclusion of that closing, buyer shall reimburse Andrea Micek-Holt personally for taxes she paid to the town, and attorney fees previously ordered in this action, in the amount of $17,401.50.

(g) Pending that closing, plaintiff shall not go upon that property, except by invitation of defendant or in the event of true emergency.

(h) Under no circumstances shall buyer, or George Papageorge, or any agent of theirs, including, but not limited to, other family members, cause any damage to the premises by intent or negligence, including omission of necessary maintenance of the property, prior to the closing, or, if they fail to close, at any time following the entry of this judgment.

5. By 5 p.m. on October 26, 2016, counsel for the parties shall file affidavits with the clerk of this court attesting that the closing ordered by paragraph 4 has occurred, and all of the terms set forth in that paragraph have been fulfilled. Upon the receipt of those affidavits, the clerk shall indicate on the file that the judgment in this matter has been satisfied, and the orders numbered 6 and 7, below, shall be vacated.

6. In the absence of the filing of such affidavits:

(a) Mary Papageorge, George Papageorge, and Angelina Papageorge are ordered to vacate 361 Thompson Road not later than 5 p.m. on October 26, 2016, together with all their possessions, and along with any other persons whom they might have permitted to

occupy said premises. In the event that they hold over after that date, they shall make use and occupancy payments to the estate at the rate of $150 per day. The clerk of this court may issue an execution of eviction order if requested by plaintiff at any time after October 26;

(b) The interests of Mary Papageorge in the property located at 361 Thompson Road, Thompson, Connecticut, whether arising from lease, contract, or whatever source, are hereby extinguished;

(c) The clerk shall issue a judgment file quieting title to the premises in favor of the estate of Edward Micek;

(d) Judgment shall enter in favor of the estate against Mary Papageorge in the amount of $40,000, on the second count of the complaint.

7. Judgment enters in favor of Andrea Micek-Holt against Mary Papageorge in the amount of $17,401.50.

8. No costs are taxed to either party.

AMY BINKOWSKI *v.* BOARD OF EDUCATION OF THE CITY OF NEW HAVEN ET AL.
(AC 39298)

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

Syllabus

The plaintiff school teacher sought to recover damages from the defendants J and O, the principal and assistant principal of the school at which she taught, for intentional infliction of emotional distress in connection with a work related incident at the school. In her complaint, the plaintiff alleged, inter alia, that the defendants had instituted a policy of denying assistance to teachers confronted by violent and disruptive students in their classrooms, and had refused to assist her when she was assaulted and injured by two students. She further alleged that the defendants' conduct was wilful and malicious and carried out for the conscious purpose of causing physical and emotional injury to her and other teachers. The defendants filed a motion to strike the complaint on the ground

that the plaintiff's claims were barred by the exclusivity provision (§ 31-293a) of the Workers' Compensation Act (act) (§ 31-275 et seq.), which provides that the act is the exclusive remedy for employees injured by a coworker and that no civil action may be brought against a coworker unless the wrongful conduct was wilful or malicious. The trial court granted the defendants' motion to strike, concluding that the plaintiff's complaint did not state a legally sufficient cause of action that fell within intentional tort exception to the exclusivity provision of the act. Thereafter, the trial court granted the defendants' motion for judgment and rendered judgment in favor of the defendants. On the plaintiff's appeal to this court, *held* that the trial court properly granted the defendants' motion to strike, as the plaintiff's complaint failed to state a cause of action that fell within the intentional tort exception to the exclusivity provision of the act: the plaintiff's complaint failed to state a cause of action under the actual intent standard set forth in *Suarez* v. *Dickmont Plastics Corp.* (242 Conn. 255), the factual allegations in the complaint having been insufficient to demonstrate that the defendants actually intended to cause the plaintiff's injury, as the complaint was devoid of any factual allegations that supported the plaintiff's conclusory allegation that the defendants had the conscious purpose of causing the plaintiff physical or emotional injury, or that they directed or authorized the students to assault the plaintiff, the complaint, which alleged that O sent a nurse to assist the plaintiff, contained factual allegations that undermined the plaintiff's claim, and although the complaint alleged that J stood at the end of the hallway and did nothing during the incident, there was no allegation that J knew what had happened to the plaintiff; moreover, the plaintiff's complaint failed to state a cause of action under the substantial certainty standard set forth in *Suarez* because, although it alleged that the defendants implemented a policy denying assistance to teachers with the intent to cause her physical and emotional injury, it failed to allege sufficient facts that would establish that they intentionally created a situation that they believed was substantially certain to cause the plaintiff's injuries.

Submitted on briefs November 29, 2017—officially released March 27, 2018

Procedural History

Action to recover damages for intentional infliction of emotional distress, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the action was withdrawn as against the defendant Board of Education of the City of New Haven; thereafter, the court, *Nazzaro*, *J.*, granted the motion to strike filed by the defendant Yolanda Jones-Generette et al.; subsequently, the court, *Blue*, *J.*, granted the

motion for judgment filed by the defendant Yolanda Jones-Generette et al. and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

John R. Williams filed a brief for the appellant (plaintiff).

Audrey C. Kramer, assistant corporation counsel, filed a brief for the appellees (defendant Yolanda Jones-Generette et al.).

Opinion

BRIGHT, J. The plaintiff, Amy Binkowski, appeals from the judgment of the trial court rendered in favor of the defendants Yolanda Jones-Generette and Linda O'Brien[1] following the granting of their motion to strike her third revised complaint. On appeal, the plaintiff claims that the court improperly concluded that her complaint failed, as a matter of law, to allege facts that would bring it within the intentional tort exception to the exclusivity provision of the Workers' Compensation Act (act), General Statutes § 31-275 et seq., as set forth in General Statutes § 31-293a. We disagree and, accordingly, affirm the judgment of the trial court.

The plaintiff's third revised complaint[2] contains two counts, one against each defendant, alleging intentional infliction of emotional distress. Both counts allege identical facts. The plaintiff's claims arise out of a work

[1] The plaintiff initially filed her complaint against the Board of Education of the city of New Haven (board), Jones-Generette, and O'Brien. Following the trial court's granting of the defendants' first motion to strike, the plaintiff withdrew the action as to the board. All references to the defendants in this opinion are to Jones-Generette and O'Brien.

[2] The defendants filed a request to revise the original complaint on December 4, 2014, and the plaintiff then filed a revised complaint on December 5, 2014. Thereafter, the defendants filed a motion to strike the plaintiff's revised complaint on December 22, 2014, which the trial court granted on February 23, 2015. The plaintiff then filed the operative complaint on April 13, 2015.

related incident that occurred on February 26, 2014. At that time, the plaintiff was a tenured teacher in the New Haven public school system at Lincoln-Bassett Elementary School (school) in New Haven. Jones-Generette was the principal, and O'Brien was the assistant principal, for the school during the 2013–2014 school year.

In the summer of 2013, the defendants instituted a policy for the school regarding student discipline. The policy established that the administrators of the school would not be involved in any issues related to student discipline. In accordance with the policy, the defendants "refused to allow classroom teachers to send disruptive students out of the classroom to a different environment, refused to intervene in any disrupted classroom, refused to discipline disruptive or violent students or to permit classroom teachers to discipline disruptive or violent students, refused to allow help to be summoned from outside of the school under any circumstances, and refused to provide any protection whatsoever to teachers confronted with disruptive or violent students."

During the 2013–2014 school year, violence at the school escalated. On February 26, 2014, two students assaulted the plaintiff in her classroom, knocking her to the floor. As a result of the assault, the plaintiff severely sprained her left ankle and knee. The plaintiff was unable to stand, so she called out for help. Adrianna Petrucci, the teacher in the classroom across the hall, responded to the plaintiff's call for help. The plaintiff was in pain, lying on the floor, and Petrucci immediately called the school's main office for assistance. Petrucci "also sent a text message to . . . O'Brien, stating: '[The plaintiff] is on the floor in her room from being shoved out of the way.' " After receiving the text message, O'Brien told Petrucci to send a student to the office. Petrucci repeated that the plaintiff "is on the floor" in

her classroom, and O'Brien responded that she did not know what that meant.

Although O'Brien did not send security to assist the plaintiff or go to the classroom herself, she sent the school nurse to help the plaintiff. While the nurse and another teacher helped place the plaintiff in a wheelchair, some students began fighting in the classroom; the defendants still had not gone to the plaintiff's classroom. The plaintiff alleged that "Jones-Generette was standing down at the end of the hallway doing nothing. At no point was 911 called, and at no point was any outside assistance summoned."

The plaintiff alleged that the defendants' conduct was "wilful and malicious. It was carried out for the conscious purpose of causing physical and emotional injury to the plaintiff and other teachers and to cause conditions in the school to deteriorate so badly that the state of Connecticut would offer special financial assistance to the school, which otherwise would not have been available. The said conduct was carried out in conscious disregard of the injuries it would cause to the plaintiff, to other teachers, and to the students in the school." The plaintiff further alleged that the defendants' conduct "was extreme and outrageous and was carried out with the knowledge that it would cause the plaintiff to suffer severe emotional distress." The plaintiff sought compensatory and punitive damages, claiming that she suffered physical injuries and emotional distress as the result of the defendants' conduct.

The defendants filed a motion to strike the plaintiff's third revised complaint. They argued that the plaintiff's claims are barred by the exclusivity provision of the act because the complaint failed to allege sufficient facts to support the claim that the defendants' conduct was wilful or malicious. Following a hearing on June

22, 2015, the trial court, *Nazzaro*, *J.*, issued a memorandum of decision granting the defendants' motion to strike. The court concluded that there was "nothing in the complaint to suggest that there was intent on the part of the defendants to cause the plaintiff's particular injuries." Specifically, the court held that "the defendants' failure to take action does not demonstrate that they intended to cause the harmful situation under which the plaintiff suffered injury, and therefore their actions do not fall within an exception [to] the exclusivity provision of the [a]ct. Accordingly, the plaintiff has not set forth a legally sufficient cause of action." The plaintiff filed a notice of intent to appeal on October 9, 2015, and, thereafter, the trial court, *Blue*, *J.*, granted the defendants' motion for judgment and rendered judgment in favor of the defendants. This appeal followed.

We begin by setting forth the standard of review and legal principles that govern our resolution of this appeal. "The standard of review on an appeal challenging the granting of a motion to strike is well established. A motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court. As a result, our review of the court's ruling is plenary. . . . We take the facts to be those alleged in the complaint that has been stricken and we construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied. . . . [W]e assume the truth of both the specific factual allegations and any facts fairly provable thereunder. . . . A [motion to strike] admits all facts well pleaded; it does not admit legal conclusions or the truth or accuracy of opinions stated in the pleadings." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Mercer* v. *Champion*, 139 Conn. App. 216, 223, 55 A.3d 772 (2012).

Section 31-293a provides in relevant part that "[i]f an employee . . . has a right to benefits or compensation under [the act] on account of injury . . . caused by the negligence or wrong of a fellow employee, such right shall be the exclusive remedy of such injured employee . . . and no action may be brought against such fellow employee unless such wrong was wilful or malicious . . . ."

"In *Jett* v. *Dunlap*, 179 Conn. 215, 425 A.2d 1263 (1979), our Supreme Court recognized an exception to the exclusivity provision for intentional torts of an employer. . . . Subsequently, in *Suarez* v. *Dickmont Plastics Corp.*, 229 Conn. 99, 639 A.2d 507 (1994) (*Suarez I*), and *Suarez* v. *Dickmont Plastics Corp.*, 242 Conn. 255, 698 A.2d 838 (1997) (*Suarez II*), the court expanded the intentional tort exception to the exclusivity provision to include circumstances in which either . . . the employer actually intended to injure the plaintiff (actual intent standard) or . . . the employer intentionally created a dangerous condition that made the plaintiff's injuries substantially certain to occur (substantial certainty standard)." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Dinino* v. *Federal Express Corp.*, 176 Conn. App. 248, 255–56, 169 A.3d 303 (2017).

On appeal, the plaintiff argues that her complaint states a cause of action under both the actual intent standard and the substantial certainty standard. We disagree.

I

The plaintiff first claims that her complaint "clearly and explicitly alleged intentional conduct . . . with great factual detail." The plaintiff argues that the factual allegations in her complaint "would support a jury's finding that the defendants intentionally and maliciously took affirmative actions, and took some of those

actions with the intent that this specific plaintiff suffer the injuries which she did suffer." We are not persuaded.

The actual intent prong of *Suarez II* requires that "[b]oth the action producing the injury and the resulting injury must be intentional. . . . [The] characteristic element is the design to injure either actually entertained or to be implied from the conduct and circumstances." (Citation omitted; internal quotation marks omitted.) *Suarez II*, supra, 242 Conn. 279. "Without a showing that the employer's violations of safety regulations were committed with a conscious and deliberate intent directed to the purpose of inflicting an injury . . . [a] wrongful failure to act to prevent injury is not the equivalent of an intention to cause injury." (Citation omitted; internal quotation marks omitted.) *Ramos* v. *Branford*, 63 Conn. App. 671, 685, 778 A.2d 972 (2001). "A result is intended if the act is done *for the purpose of accomplishing such a result* . . . ." (Emphasis in original; internal quotation marks omitted.) *Suarez II*, supra, 279.

In her complaint, the plaintiff alleges that the defendants instituted a policy of denying assistance to teachers confronted by violent and disruptive students in their classrooms, and then refused to assist the plaintiff when she was assaulted in her classroom by two students. According to the plaintiff, this policy of inaction, and the defendants' failure to take action once the plaintiff had been injured, were "carried out for the conscious purpose of causing physical and emotional injury to the plaintiff and other teachers" in order to receive financial assistance from the state of Connecticut. Construing these facts in the manner most favorable to sustaining the legal sufficiency of the complaint, as we must, we, nevertheless, conclude that the plaintiff has failed to state a cause of action that falls within the intentional tort exception to the exclusivity provision of the act.

In order to satisfy the actual intent prong, there has to be factual allegations that establish that the employer's intentional conduct was designed to cause the employee's injury. In *McCoy* v. *New Haven*, 92 Conn. App. 558, 560, 886 A.2d 489 (2005), the plaintiff alleged that he was assaulted by a coemployee and that, "as the city affirmatively condoned and thereby positively fostered . . . assaultive conduct by [the coemployee] against his co-workers, the city either intended or was substantially certain that the plaintiff's injuries would occur." (Internal quotation marks omitted.) This court affirmed the trial court's granting of the city's motion to strike. Id. We reasoned that "[a]lthough [the plaintiff's complaint] alleges in conclusory fashion that the [*Suarez*] exception applies, the complaint contains no allegations that the city intended to injure the plaintiff or that the city directed or authorized [the coemployee] to injure the plaintiff." Id., 563. Relying on our Supreme Court's decision in *Jett* v. *Dunlap*, supra, 179 Conn. 215, this court explained that merely alleging that the employer condoned the acts that resulted in the plaintiff's injury is not enough. Id., 564. We concluded that "[a]bsent allegations that the city . . . directed or authorized the assault, the *Suarez* exception does not apply." Id.

In the present case, the plaintiff's complaint contains a conclusory allegation that the defendants undertook their actions for the "conscious purpose" of causing the plaintiff physical and emotional injury. As in *McCoy*, there is no allegation that the defendants directed or authorized the students to assault the plaintiff, and the plaintiff's factual allegations do not support the conclusory allegation that the defendants intended to cause the plaintiff's injuries. In fact, the complaint contains factual allegations that undermine the plaintiff's claim that the defendants intended to cause her to suffer physical and emotional injuries. For example, the complaint alleges that O'Brien sent a nurse to assist the

plaintiff, which is inconsistent with an intent to cause the plaintiff any type of harm. Additionally, the complaint alleges that Jones-Generette stood at the end of the hallway doing nothing during the incident, but there is no allegation that Jones-Generette even knew what had happened to the plaintiff. Accordingly, the plaintiff's complaint is devoid of any factual allegations that would support her conclusory allegation that the defendants actually intended to injure the plaintiff. At best, the plaintiff's complaint alleges that the defendants condoned violence in the school, which is insufficient to establish that the defendants actually intended to injure the plaintiff. See *McCoy* v. *New Haven*, supra, 92 Conn. App. 563–64.

Simply put, the factual allegations in the complaint, if proven, are insufficient to demonstrate that the defendants actually intended to injure the plaintiff. Accordingly, the plaintiff's complaint fails to state a cause of action under the actual intent prong of *Suarez II*.

II

The plaintiff also claims that she has sufficiently pleaded facts to sustain the legal sufficiency of her complaint under the substantial certainty standard. The plaintiff argues that the factual allegations establish that her "injuries were known to the defendants to be a substantially certain consequence of their actions." We disagree.

"Although it is less demanding than the actual intent standard, the substantial certainty standard is, nonetheless, an intentional tort claim requiring an appropriate showing of intent to injure on the part of the defendant. . . . Specifically, the substantial certainty standard requires that the plaintiff establish that the employer intentionally acted in such a way that the resulting injury to the employee was substantially certain to result from the employer's conduct. . . . To satisfy the

substantial certainty standard, a plaintiff must show more than that [a] defendant exhibited a lackadaisical or even cavalier attitude toward worker safety . . . . Rather, a plaintiff must demonstrate that [the] employer believed that its conduct was substantially certain to cause the employee harm." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Sullivan* v. *Lake Compounce Theme Park, Inc.*, 277 Conn. 113, 118, 889 A.2d 810 (2006). "Substantial certainty exists when the employer cannot be believed if it denies that it knew the consequences were certain to follow." *Sorban* v. *Sterling Engineering Corp.*, 79 Conn. App. 444, 455, 830 A.2d 372, cert. denied, 266 Conn. 925, 835 A.2d 473 (2003).

The trial court, relying on this court's decision in *Melanson* v. *West Hartford*, 61 Conn. App. 683, 767 A.2d 764, cert. denied, 256 Conn. 904, 772 A.2d 595 (2001), concluded that the plaintiff had failed to state a cause of action under the substantial certainty prong of *Suarez II*. In *Melanson*, the plaintiff was a police officer who had been shot accidentally by a fellow police officer while they were executing a search warrant. Id., 685–86. The plaintiff, relying on the substantial certainty standard, claimed that the town's failure to manage, train, and staff his team of police officers adequately permitted the inference that the town intentionally had created a situation that it knew was substantially certain to cause his injuries. Id., 686.

This court affirmed the trial court's granting of the defendants' motion to strike the plaintiff's complaint, concluding that the plaintiff had not alleged facts that would permit a finding that the town knew that the plaintiff's injury was substantially certain to occur. Id., 689–90. This court rejected the plaintiff's claim for two reasons. First, we reasoned that "the alleged town failings on which the plaintiff rests his case are allegations of misconduct that address negligence rather than

intentional misconduct. Failure to take affirmative remedial action, even if wrongful, does not demonstrate an affirmative intent to create a situation that causes personal injury." (Footnote omitted.) Id., 689. Second, the plaintiff's "complaint provide[d] no factual basis for a finding that the town was substantially certain that the specific injury that the plaintiff suffered would occur." Id.

The present case is controlled by this court's decision in *Melanson*. In *Melanson*, the plaintiff alleged that the town and the individual defendants had failed to take affirmative remedial action. On appeal, this court noted that such allegations "address negligence rather than intentional misconduct." Id., 689. In the present case, the plaintiff has alleged that the defendants affirmatively failed to take certain actions and that they knew the plaintiff's injuries would occur as the result of their policy of inaction. Although the plaintiff has framed the defendants' failure to take action as "intentional conduct," the plaintiff's claim is indistinguishable from the plaintiff's claim in *Melanson*. At best, the defendants' conduct, as alleged in the complaint, establishes a "lackadaisical or even cavalier attitude towards worker safety . . . ." (Internal quotation marks omitted.) *Sullivan* v. *Lake Compounce Theme Park, Inc.*, supra, 277 Conn. 119. The defendants' allegedly wrongful conduct "is not the equivalent of ordering [a] soldier to walk through a mine field all by himself just to see if it was working." (Internal quotation marks omitted.) *Melanson* v. *West Hartford*, supra, 61 Conn. App. 689 n.7.

Although the plaintiff has alleged that the defendants implemented a policy denying assistance to teachers with the intent to cause her physical and emotional injury, she has failed to allege sufficient facts that would establish that the defendants intentionally created a situation that they believed was substantially certain to cause the plaintiff's injuries. Accordingly, the plaintiff's

complaint fails to state a cause of action under the substantial certainty prong of *Suarez II*.

In sum, the plaintiff failed to allege facts that, if proven, would be sufficient to allow recovery under either the actual intent standard or the substantial certainty standard. Accordingly, the trial court properly granted the defendants' motion to strike the plaintiff's complaint.

The judgment is affirmed.

In this opinion the other judges concurred.

MARK SILVER *v.* COMMISSIONER OF CORRECTION (AC 39238)

Keller, Bright and Pellegrino, Js.

Syllabus

The petitioner, who had been convicted of the crimes of attempt to commit murder and assault in the first degree, sought a writ of habeas corpus, claiming that his trial counsel had provided ineffective assistance. The habeas court rendered judgment denying the habeas petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court did not abuse its discretion in denying the petition for certification to appeal, the petitioner having failed to establish that the issues he raised were debatable among jurists of reason, that a court could have resolved the issues in a different manner or that the questions raised were adequate to deserve encouragement to proceed further; although the petitioner alleged that his trial counsel had failed to adequately advise him regarding a possible plea agreement with the state, the habeas court credited the testimony of his trial counsel that there never was a formal plea offer from the state and that the state had agreed only to bring a proposal to the victim's family for consideration if the petitioner approached the state with a proposal that included a sentence of twenty years incarceration, and even if the state had made a formal offer of twenty years incarceration, the petitioner failed to sustain his burden of demonstrating that his counsel's performance was deficient, as the testimony of his counsel, which the court credited, demonstrated that counsel adequately apprised the petitioner of the advisability of a plea deal with the state, correctly informed the petitioner of his exposure on the charges he was facing and of his exposure if the victim died, fully discussed with him the

evidence that would be presented at trial and the strengths and weaknesses of the state's case, and urged the petitioner to authorize a request for a plea deal proposing a sentence of twenty years, but that the petitioner repeatedly refused to consider such a sentence and insisted on going to trial.

Argued January 2—officially released March 27, 2018

Procedural History

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

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

Margaret Gaffney Radionovas, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Emily Dewey Trudeau*, deputy assistant state's attorney, for the appellee (respondent).

Opinion

BRIGHT, J. The petitioner, Mark Silver, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his amended petition for a writ of habeas corpus, in which he alleged ineffective assistance on the part of his trial counsel in advising him concerning a possible plea deal. The dispositive issue is whether the habeas court abused its discretion in denying the petition for certification to appeal. We conclude that the habeas court properly denied certification, and we, therefore, dismiss the appeal.

The following facts inform our review. "In a two count substitute information filed August 8, 2008, the state charged the [petitioner] . . . with attempt to

commit murder in violation of General Statutes §§ 53a-49 and 53a-54a (a), and assault in the first degree in violation of General Statutes § [53a-59 (a) (1)]. After a jury trial, the [petitioner] was found guilty on both counts and sentenced by the court to a total effective term of forty years incarceration." (Footnote omitted.) *State* v. *Silver*, 126 Conn. App. 522, 525, 12 A.3d 1014, cert. denied, 300 Conn. 931, 17 A.3d 68 (2011). The judgment of conviction was affirmed by this court on direct appeal. Id., 539.

On December 21, 2015, the petitioner filed an amended petition for a writ of habeas corpus, alleging ineffective assistance of trial counsel, namely, Attorneys Barry Butler and William Schipul.[1] The petitioner alleged, in relevant part, that his trial counsel had "failed to adequately advise [him] regarding pursuing a plea agreement with the state . . . and . . . they failed to adequately pursue a plea bargain for [him]."[2] Following an April 26, 2016 trial on the merits of the petition, the habeas court denied the petition after concluding that the petitioner had failed to satisfy his burden of proof that counsel had provided ineffective assistance.

Specifically, the habeas court credited the testimony of Attorneys Butler and Schipul, and found that their testimony was more credible than that of the petitioner. The court also found that there never was a formal plea offer from the state, but that the state only had agreed to bring a proposal to the victim's family for consideration if the petitioner approached the state with a proposal of a sentence of twenty years incarceration; the

[1] Butler represented the defendant for only a few months before accepting a position in a different judicial district. Schipul was appointed to replace Butler as the defendant's attorney thereafter. The petitioner does not make separate claims of ineffective assistance against each attorney, but, rather, alleges that counsel's collective overall representation was ineffective.

[2] The petitioner had alleged a second count in his petition, which he withdrew with prejudice before the habeas hearing.

petitioner, however, refused to consider such a sentence. The court further found that even if it were to assume that the state had made a formal offer of twenty years incarceration, it was clear that Butler and Schipul had complied with their constitutional duties to advise and explain the offer to the petitioner and that the petitioner had made the decision not to entertain such an offer. The court, therefore, denied the petition for a writ of habeas corpus. Thereafter, the petitioner filed a petition for certification to appeal from the habeas court's judgment. The court denied the petition for certification to appeal on May 10, 2016. The petitioner now appeals from the judgment denying his petition for certification to appeal. Additional facts will be set forth as necessary.

"Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, [the petitioner] must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . . To prove that the denial of his petition for certification to appeal constituted an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for

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

The petitioner claims that the habeas court abused its discretion in denying his petition for certification to appeal because there is merit to his underlying claim that trial counsel provided ineffective assistance by failing to provide constitutionally adequate advice during plea negotiations. We are not persuaded.

We set forth the legal principles and the standard of review that guide our analysis. "The sixth amendment to the United States constitution, made applicable to the states through the due process clause of the fourteenth amendment, affords criminal defendants the right to effective assistance of counsel. . . . Although a challenge to the facts found by the habeas court is reviewed under the clearly erroneous standard, whether those facts constituted a violation of the petitioner's rights under the sixth amendment is a mixed determination of law and fact that requires the application of legal principles to the historical facts of this case. . . . As such, that question requires plenary review by this court unfettered by the clearly erroneous standard. . . .

"It is well established that the failure to adequately advise a client regarding a plea offer from the state can form the basis for a sixth amendment claim of

ineffective assistance of counsel." (Citations omitted; internal quotation marks omitted.) *Duncan* v. *Commissioner of Correction*, 171 Conn. App. 635, 646–47, 157 A.3d 1169, cert. denied, 325 Conn. 923, 159 A.3d 1172 (2017). "As enunciated in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] . . . [i]t is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law." (Internal quotation marks omitted.) *Thomas* v. *Commissioner of Correction*, 141 Conn. App. 465, 471, 62 A.3d 534, cert. denied, 308 Conn. 939, 66 A.3d 881 (2013).

"To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time. *Missouri* v. *Frye*, 566 U.S. 134, 147, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012); see also *Padilla* v. *Kentucky*, 559 U.S. 356, 364, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) . . . ." (Internal quotation marks omitted.) *Kellman* v. *Commissioner of Correction*, 178

Conn. App. 63, 71, 174 A.3d 206 (2017). The court, however, "can find against a petitioner . . . on either the performance prong or the prejudice prong, whichever is easier." *Thomas* v. *Commissioner of Correction*, supra, 141 Conn. App. 471. In the present case, the habeas court determined that the petitioner had failed to establish that counsel's performance was deficient; the court also determined that there had been no plea offer from the state.

The petitioner claims that the habeas court erred in determining that he had failed to establish that trial counsel had provided inadequate advice during plea negotiations. Specifically, the petitioner argues: "Attorney Schipul and Attorney [Butler] failed to adequately advise the petitioner such that he could make an informed choice regarding the state's offer of twenty years. Had they accurately informed the petitioner regarding the vast punishment he was exposed to by going to trial and the likelihood of a lengthy sentence being imposed, the petitioner would have accepted the state's offer and he would have received a sentence substantially less than the forty year sentence imposed after trial." Although the petitioner concedes that counsel's credited testimony "reflects that they informed the petitioner of the state's offer and recommended multiple times that he accept it," he argues that counsel, nevertheless, "did not adequately advise the petitioner regarding *why* the offer should be accepted." (Emphasis in original.)

The petitioner also specifically argues that "Butler failed to even review the state's evidence in conjunction with the elements of the charged crimes to explain why the state's case was strong[3] . . . ." (Footnote added.)

[3] The respondent, the Commissioner of Correction, contends that this claim was not specifically raised in the habeas petition, that Butler was not asked about this during the habeas trial, and that the habeas court, therefore, did not address it. We agree with the respondent. We also note that the petitioner failed to address this in his pretrial habeas brief. Furthermore,

He also contends that "both attorneys gave the petitioner affirmatively incorrect advice regarding his total exposure if he proceeded to trial. Attorney Schipul accurately informed the petitioner that he was exposed to five to forty years of incarceration under the . . . charges of attempted murder and assault in the first degree. However, he failed to adequately advise the petitioner that, if the victim died and he was charged with murder instead of attempted murder, that would increase his exposure to twenty-five to eighty years. Similarly, Attorney Butler's advice that the petitioner was exposed to twenty-five to sixty years if the victim passed away from his injuries was also affirmatively incorrect, as he apparently failed to account for the additional twenty years stemming from the assault in the first degree charge."[4]

The petitioner contends that counsel's overall advice was incorrect and incomplete, and that it fell short of objective standards for counseling regarding plea offers.[5] We are not persuaded. Indeed, even if we

the petitioner does not argue in his brief that Schipul failed to address the elements of the crime, and we conclude that such an argument would be inconsistent with Schipul's testimony that he discussed with the petitioner the evidence and the strength and weaknesses of the state's case. The petitioner also specifically testified during the habeas trial that he had looked at the statutes addressing the crimes he was alleged to have committed and that Schipul had to explain them to him, particularly "that attempted murder was a compound statute that is combined with murder and attempt together." Accordingly, this belies any claim that counsel had not addressed the elements of the crime with the petitioner.

[4] The petitioner incorrectly alleged that, if the victim had died, his total exposure would have been eighty years. He is correct that his maximum exposure for intentional murder, pursuant to § 53a-54a, would have been sixty years, but he fails to recognize that he could not have been exposed to a separate sentence of twenty years for intentional assault in the first degree, pursuant to § 53a-59 (a) (1), involving the same victim and the same conduct.

[5] The petitioner also argues that counsel never counseled him on all the additional charges that the state *might have* been able to bring against him via an amended information. When asked during oral argument before this court for any case law that would support his contention that counsel has a responsibility to advise a client regarding every possible charge that *could*

assume, as did the habeas court, that the state made a plea offer when it indicated to the petitioner that it would bring a plea proposal to the victim's family for consideration only if the petitioner approached the state and agreed to serve a twenty year term of incarceration, we, nevertheless, agree with the habeas court's conclusion that the petitioner has failed to establish that counsel's performance was deficient.

"Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered. Determining whether an accused is guilty or innocent of the charges in a complex legal indictment is seldom a simple and easy task for a layman, even though acutely intelligent. . . . A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable. . . .

"On the one hand, defense counsel must give the client the benefit of counsel's professional advice on this crucial decision of whether to plead guilty. . . . As part of this advice, counsel must communicate to the defendant the terms of the plea offer . . . and should usually inform the defendant of the strengths and weaknesses of the case against him, as well as the alternative sentences to which he will most likely be exposed. . . . On the other hand, the ultimate decision whether to plead guilty must be made by the defendant.

be brought via a hypothetical amendment to an information, when the state never indicated that it was considering additional charges, the petitioner admitted that he was aware of none. We are not inclined to impose a new onerous requirement on counsel on the basis of an unsupported argument for which the petitioner provides no analysis or legal basis to do so, particularly when the petitioner submitted no evidence whatsoever that the state ever communicated an intent to charge the petitioner with the additional hypothetical crimes.

. . . And a lawyer must take care not to coerce a client into either accepting or rejecting a plea offer. . . . Counsel's conclusion as to how best to advise a client in order to avoid, on the one hand, failing to give advice and, on the other, coercing a plea enjoys a wide range of reasonableness because [r]epresentation is an art . . . and [t]here are countless ways to provide effective assistance in any given case . . . . Counsel rendering advice in this critical area may take into account, among other factors, the defendant's chances of prevailing at trial, the likely disparity in sentencing after a full trial as compared to a guilty plea (whether or not accompanied by an agreement with the government), whether defendant has maintained his innocence, and the defendant's comprehension of the various factors that will inform his plea decision." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Vazquez* v. *Commissioner of Correction*, 123 Conn. App. 424, 437–38, 1 A.3d 1242 (2010), cert. denied, 302 Conn. 901, 23 A.3d 1241 (2011); see also *Sanders* v. *Commissioner of Correction*, supra, 169 Conn. App. 830–31.

In the present case, after listening to and viewing the evidence presented at the habeas trial, the habeas court credited the testimony of both Butler and Schipul, and it found that they had provided constitutionally adequate advice regarding the state's indication that it would bring to the victim's family and consider a twenty year term of incarceration if the petitioner made such a proposal.

The record reveals that Butler testified in relevant part that he thought the case against the petitioner was fairly strong and that the petitioner likely would not prevail. He testified that the state initially was reluctant to engage in plea negotiations because the victim's injuries were so severe and life threatening that it thought a murder charge might be brought against the petitioner. Butler stated that he persisted in trying to resolve the

case, and that he succeeded in getting the state to agree to consider a resolution, but that the state was firm in its position that it would talk to the victim's family only if the petitioner would approach the state about a deal that included at least a twenty year term of incarceration. Butler stated that he repeatedly broached this with the petitioner, but that the petitioner "was not interested in any twenty year sentence" or even in a fifteen year sentence. Butler testified that "[o]ne of the things that [the petitioner] said to me was the most he had ever done was eighteen months, and he sure as hell wasn't going to be taking any twenty years." Butler testified that he advised the petitioner that "the state had a strong case, that we were exposed to fifty to sixty years with the victim's injuries if he did die and we faced [a] murder [charge]" and that the petitioner should "settle the case." Butler always recommended that the petitioner "tak[e] the twenty as opposed to a trial."

Schipul testified that he reviewed Butler's notes, the state's evidence, the disclosures, and the investigators' reports after he took over the petitioner's defense. After such review, Schipul thought the case against the petitioner was strong. He learned from Butler's notes that the state might be willing to present a twenty year deal to the victim's family if the petitioner first agreed to it, but that no formal offer had been made or would be made by the state unless the petitioner brought an offer to the state that included a twenty year term of incarceration. Schipul also testified that the possibility of a deal was discussed in court chambers, and, after such discussion, Schipul believed that the state was "solid . . . like [a] wall" that would not budge about the petitioner serving at least twenty years. He also testified that the state was not willing to make an offer to the petitioner, and that he had to be the one to bring any offer to the state, but that he could do so only if the

petitioner first were to agree to a twenty year term of incarceration; the state was not willing to bring any potential offer to the very involved family of the victim unless the petitioner were to approach the state with an offer that he would serve twenty years. Schipul "understood . . . that it wasn't ever going to get any better than twenty years."

When Schipul brought this possibility to the petitioner on several occasions, the petitioner was not interested and "thought twenty years was way too much." Schipul stated: "It got repetitive after a while, and I [knew] the [petitioner] wasn't happy about me bringing it up every time I saw him, so basically, it was—I'd bring it up occasionally after it was clear to me that [the petitioner] had no intention of taking twenty years."

Schipul also testified that he went over the evidence with the petitioner, including the vehicle, the description of the perpetrator, and the petitioner's confession. He also stated that the petitioner had copies of the discovery and the police reports. Schipul discussed the strengths and weaknesses of the case, and he told the petitioner that the case was not worth taking to trial, and that the petitioner should enter into a plea agreement. He testified that he explained to the petitioner "the advantages of taking a plea bargain versus going to trial and being exposed to forty years incarceration, and a possible murder prosecution in the future." Schipul stated that the petitioner told him that a twenty year sentence was not an option, even if the state would agree not to prosecute him for murder in the event the victim died. Schipul repeatedly told the petitioner, even during the trial, that he believed the petitioner should accept the twenty year proposal, but the petitioner wanted to continue with the trial. The petitioner argues that Schipul's strong recommendations were insufficient in light of the fact that he gave the petitioner false hope of an acquittal by telling the petitioner that he

might have a defense based on the fact that no witness had identified the petitioner as the driver of the vehicle that ran over the victim. Schipul's discussion with the petitioner of this theory of defense, however, hardly can be seen as encouragement to the petitioner that he try the case given the repeated advice to the petitioner that the state had a strong case, he should accept a plea bargain, and he should not go to trial.

We conclude that the testimony of counsel, which the habeas court credited, demonstrates that counsel adequately apprised the petitioner of the advisability of a plea deal with the state. Schipul correctly informed the petitioner of his exposure on the charges he was facing. Butler correctly informed him of his exposure if the victim died. Schipul fully discussed with the petitioner the evidence that would be presented at trial and the strengths and weaknesses of the case. He also reviewed with the petitioner the applicable statutes. Both Butler and Schipul told the petitioner that the state had a very strong case and urged him to authorize them to inform the state that the petitioner would accept a sentence of twenty years. Despite all of counsel's efforts and advice, the petitioner simply was not interested in a deal that required a long prison sentence; he was informed and chose to go to trial.

Accordingly, after a thorough review of the record, we conclude that the habeas court properly concluded that the petitioner failed to sustain his burden of demonstrating that his trial counsel rendered ineffective assistance. The petitioner failed to establish that the issues he raised are debatable among jurists of reason, that a court could resolve them in a different manner or that the questions he raised are adequate to deserve encouragement to proceed further. See *Sanders* v. *Commissioner of Correction*, supra, 169 Conn. App. 821. We conclude, therefore, that the habeas court did not abuse its discretion in denying the petition for certification

to appeal from the judgment denying his amended petition for a writ of habeas corpus.

The appeal is dismissed.

In this opinion the other judges concurred.