MICHAEL A. FIANO *v.* OLD SAYBROOK FIRE COMPANY NO. 1, INC., ET AL.
(AC 39321)

Keller, Bright and Mihalakos, Js.

Syllabus

The plaintiff sought to recover damages from the defendants, S, F Co. and the town of Old Saybrook, for negligence in connection with personal injuries he sustained when a motor vehicle operated by S struck the motor vehicle operated by the plaintiff. The plaintiff alleged that the accident occurred when S, who worked as a volunteer firefighter for F Co., moved from a stopped position on the property of F Co. onto a public road. F Co. and the town filed a motion for summary judgment as to the claims raised against them on the ground that they could not be held vicariously liable because S was not acting within the scope of his employment or official duties at the time of the accident. After the trial court denied the motion for summary judgment, it granted F Co.'s motion to reargue or reconsider the motion for summary judgment and, without holding a hearing, granted the motion for summary judgment. On appeal, the plaintiff claimed, inter alia, that it was procedurally improper for the trial court to grant F Co.'s motion to reargue or reconsider the motion for summary judgment because the motion was untimely and did not present new arguments, and that once the trial court decided to permit reargument, it should have held a hearing prior to reconsidering its earlier ruling and granting the motion for summary judgment. *Held*:

1. Although the trial court abused its discretion by granting F Co.'s untimely motion to reargue or reconsider without holding a hearing before granting the motion for summary judgement, the plaintiff failed to demonstrate that the error was harmful: because F Co.'s motion to reargue or

reconsider did not present any new facts or legal arguments that had not already been raised in support of the motion for summary judgment, the plaintiff had been provided ample opportunity to respond to the arguments and documentation on which the court relied in granting the motion for summary judgment in his memorandum of law in support of the objection to the motion for summary judgment, in his response to the reply memorandum filed by F Co. and the town, and at oral argument on the motion for summary judgment, and the plaintiff failed to suggest anything, by way of argument, documentation or otherwise, that he would or could have adduced in response to the motion for summary judgment to undermine the propriety of the court's rulings on it; furthermore, the trial court had the inherent authority to grant the motion for summary judgment sua sponte, as courts can reconsider a past decision in order to correct mistakes in prior judgments, the court had jurisdiction when it ruled on the motion to reargue or reconsider and did not grant the motion for summary judgment on grounds that F Co. and the town previously had never presented, and reversing the trial court's judgment would have hindered the interests of judicial economy.

2. The plaintiff could not prevail on his claim that the trial court erred by rendering summary judgment in favor of F Co. and the town on the plaintiff's vicarious liability claims because there was a genuine issue of material fact as to whether S was acting in the course of his employment or official duties at the time of the accident: S was in the process of leaving to attend to his personal affairs at the time of the accident, it was inconsequential that he was still on F Co.'s property because he was no longer furthering the interests of F Co. or the town at that time, and although the plaintiff provided grounds to conclude that F Co. and the town may have benefitted from S's presence at F Co.'s property, the plaintiff did not show how that provided a basis to determine that F Co. and the town benefitted from S's departure from F Co.'s property, which was when S's allegedly negligent conduct occurred; moreover, although control was an essential element in determining whether an agency relationship existed, the plaintiff did not provide any authority that F Co., as a fire company, exercised control over S, a volunteer member, when S used his personal vehicle for a personal matter because he used that same vehicle at other times, under the supervision of F Co., in his capacity as a volunteer firefighter, and this court declined to adopt such a rule; furthermore, although, pursuant to statute (§ 31-275), professional firefighters are considered to be in the course of their employment for workers' compensation purposes while going to or coming from work, volunteer firefighters, such as S, are entitled to workers' compensation only for injuries incurred while in training or engaged in volunteer fire duty, S's conduct in departing the firehouse to go home to attend to a personal matter did not encompass such fire duties, and even if S's activities were deemed to be fire duties, the plaintiff provided no authority that the workers' compensation statutes provide guidance for determining when volunteer firefighters are acting

within the scope of their employment for the purpose of vicarious liability.

Argued November 14, 2017—officially released April 10, 2018

Procedural History

Action to recover damages for the defendants' negligence brought to the Superior Court in the judicial district of Middlesex, where the court, *Aurigemma, J.*, denied the motion for partial summary judgment filed by the named defendant et al.; thereafter, the court granted the named defendant's motion to reargue and for reconsideration; subsequently, the court granted the motion for partial summary judgment filed by the named defendant et al. and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

James J. Healy, with whom was *Douglas P. Mahoney*, for the appellant (plaintiff).

Michael O'Connor, for the appellees (named defendant et al.).

Opinion

KELLER, J. In this negligence action arising from a motor vehicle accident between the plaintiff, Michael A. Fiano, and the defendant James M. Smith, the plaintiff appeals from the summary judgment rendered by the trial court in favor of the defendants Old Saybrook Fire Company No. 1, Inc. (fire company), and the town of Old Saybrook (town).[1] The plaintiff first claims that the court erred by granting the fire company's motion to reargue/reconsider its denial of a motion for summary judgment filed by the defendants. Second, the plaintiff

[1] Smith is also a defendant in the present action. For the purpose of this opinion, our references to the defendants are to the fire company and the town only.

claims that the court erred by rendering summary judgment for the defendants on the plaintiff's vicarious liability claims. We affirm the judgment of the trial court.

The alleged facts and procedural history, viewed in the light most favorable to the nonmoving plaintiff, reveal the following. The plaintiff alleged that on October 26, 2013, he operated a motorcycle, travelling south on Main Street in Old Saybrook, Connecticut. Concurrently, "Smith was the operator of a motor vehicle which was stopped on private property owned by the [fire company] . . . facing in a westerly direction on a driveway on the aforementioned property. . . . As the plaintiff's motorcycle . . . [approached] the intersection of Main Street and Old Boston Post . . . Smith, while stopped on the property of . . . [the fire company], negligently made a decision to move his vehicle from a stopped position onto the Old Boston Post Road, striking the motorcycle being operated by the plaintiff . . . ." The plaintiff, as a result of the accident, "suffered injuries of a serious, painful and permanent nature in that he sustained a head wound; a left acetabular fracture; a left femoral head dislocation; open left distal femur and tibia fractures with open bone loss; an injury to his left leg, which has required multiple surgeries and skin grafting procedures; rib fractures; and a general shock to his nervous system, all of which have permanently reduced his ability to pursue and enjoy life's activities."

On July 22, 2014, the plaintiff brought this negligence action against Smith and the defendants. The complaint included three counts. Count one asserted that Smith was negligent by failing "to keep a proper lookout . . . [failing] to keep his vehicle under proper control . . . [and failing] to properly brake his vehicle . . . ." He was also allegedly negligent because, while stopped on the fire company's property, he decided "to move his vehicle and not yield the right-of-way to vehicles

approaching on Main Street in violation of . . . General Statutes § 14-247[2] . . . he negligently made a decision to start his vehicle when it could not be done so with reasonable safety without interfering with traffic, in violation of . . . General Statutes § 14-243[3] . . . and . . . he . . . failed to yield the right of way to vehicles approaching from his right at an intersection in violation of . . . General Statutes § 14-245."[4] (Footnotes added.)

Counts two and three asserted, in a conclusory manner, that the defendants were liable for Smith's negligence. In count two, the plaintiff alleged that the defendants were liable for his injuries pursuant to General Statutes § 7-308,[5] which governs a municipality's

[2] General Statutes § 14-247 provides: "The driver of a vehicle about to enter or cross a highway from a private road or driveway shall yield the right-of-way to all vehicles approaching on such highway. Failure to grant the right-of-way as provided by this section shall be an infraction."

[3] General Statutes § 14-243 provides in relevant part: "(a) No person shall move a vehicle which is stopped, standing or parked unless such movement can be made with reasonable safety and without interfering with other traffic, nor without signalling as provided by section 14-244. . . .

"(c) Violation of any of the provisions of this section shall be an infraction."

[4] General Statutes § 14-245 provides: "As used in this section and subsection (e) of section 14-242, 'intersection' means the area common to two or more highways which cross each other. Each driver of a vehicle approaching an intersection shall grant the right-of-way at such intersection to any vehicle approaching from his right when such vehicles are arriving at such intersection at approximately the same time, unless otherwise directed by a traffic officer. Failure to grant the right-of-way as provided in this section shall be an infraction."

[5] General Statutes § 7-308 provides in relevant part: "(a) As used in this section, 'municipality' has the same meaning as provided in section 7-314; 'fire duties' has the same meaning as provided in section 7-314; 'ambulance service' means 'ambulance service' as defined in section 7-314b . . . .

"(b) Each municipality of this state, notwithstanding any inconsistent provision of law, general, special or local, or any limitation contained in the provisions of any charter, shall protect and save harmless any volunteer firefighter . . . of such municipality from financial loss and expense, including legal fees and costs, if any, arising out of (1) any claim, demand, suit or judgment by reason of alleged negligence on the part of such volunteer firefighter . . . *while performing fire, volunteer ambulance or fire police*

liability for a volunteer firefighter's negligence, and General Statutes § 7-465,[6] which addresses the liability of a municipality for damages caused by an employee, other than a firefighter covered under the provisions of § 7-308, acting in the course of duty. In count three,

duties, and (2) any claim, demand or suit instituted against such volunteer firefighter . . . by reason of alleged malicious, wanton or wilful act on the part of such volunteer firefighter . . . *while performing fire, volunteer ambulance or fire police duties*. In the event that a court of law enters a judgment against such volunteer firefighter . . . for a malicious, wanton or wilful act, such volunteer firefighter . . . shall reimburse such municipality for any expenses that the municipality incurred in providing such defense, and such municipality shall be exempt from any liability to such volunteer firefighter . . . for any financial loss resulting from such act. . . . Such municipality may arrange for and maintain appropriate insurance or may elect to act as a self-insurer to maintain such protection. No action or proceeding instituted pursuant to the provisions of this section shall be prosecuted or maintained against the municipality or firefighter . . . unless at least thirty days have elapsed since the demand, claim or claims upon which such action or special proceeding is founded were presented to the clerk or corresponding officer of such municipality. No action for personal injuries or damages to real or personal property shall be maintained against such municipality and firefighter . . . unless such action is commenced within one year after the cause of action therefor arose and notice of the intention to commence such action and of the time when and the place where the damages were incurred or sustained has been filed with the clerk or corresponding officer of such municipality and with the firefighter, volunteer ambulance member or volunteer fire police officer not later than six months after such cause of action has accrued. . . . Governmental immunity shall not be a defense in any action brought under this section. . . ." (Emphasis added.)

[6] General Statutes § 7-465 provides in relevant part: "(a) Any town, city or borough, notwithstanding any inconsistent provision of law, general, special or local, shall pay on behalf of any employee of such municipality, *except firemen covered under the provisions of section 7-308* . . . all sums which such employee becomes obligated to pay by reason of the liability imposed upon such employee by law for damages awarded for infringement of any person's civil rights or for physical damages to person or property, except as set forth in this section, if the employee, at the time of the occurrence, accident, physical injury or damages complained of, was *acting in the performance of his duties and within the scope of his employment*, and if such occurrence, accident, physical injury or damage was not the result of any wilful or wanton act of such employee in the discharge of such duty. . . ." (Emphasis added.)

the plaintiff alleged that the defendants were liable pursuant to General Statutes § 52-557n,[7] which governs when a political subdivision is liable for the negligence of its agents.

On July 14, 2015, the defendants filed a motion for summary judgment as to counts two and three of the plaintiff's complaint. In their memorandum of law in support of this motion, the defendants argued that, on the basis of the plaintiff's alleged facts, they could not be held vicariously liable. The defendants contended that "Smith was [seventeen] years old and a senior in high school. . . . He was a junior member of the [fire company]. . . . However, on the day of . . . [the] accident, [Smith] was not requested to come to the firehouse. . . . Nor was he at the firehouse that day for fire [company] affairs. . . . Upon leaving the firehouse, his intention was to go home and get changed to have his picture taken for the senior yearbook. . . . He makes no claim that in leaving to make his preparation for having his picture taken that he was providing a benefit to the [defendants]. . . . Importantly, [Smith stated] that as he was leaving that day he was not acting

[7] 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* . . . . (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: (A) Acts or omissions of any employee, officer or agent which constitute criminal conduct, fraud, actual malice or wilful misconduct; or (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 . . . (6) the act or omission of someone other than an employee, officer or agent of the political subdivision . . . ." (Emphasis added.)

in furtherance of the [defendants'] affairs."[8] (Citations omitted; emphasis omitted.) As a result, when the accident occurred, Smith was "not acting within the scope of his employment or performing any service to the [defendants] at the time of the accident. Accordingly, there is no basis for vicarious liability as against the moving defendants."

The plaintiff filed an objection to the defendants' motion for summary judgment on January 21, 2016. In support of his objection to the defendants' motion for summary judgment, the plaintiff asserted that there was a genuine issue of material fact as to whether Smith was acting as the defendants' "agent" and "in the scope of his employment" at the time of the accident and, thus, the defendants could be found vicariously liable. The plaintiff focused on three factual allegations: first, that Smith was at the firehouse on the day of the accident to monitor for emergency calls on the radio; second, that he used his personal vehicle, which was involved in the accident, to carry out his duties as a junior firefighter; and third, that Smith admitted to being the defendants' agent. In support, the plaintiff cited cases discussing the principles of vicarious liability, especially highlighting that whether an agency relationship exists is generally a question of fact, and referred to portions of Smith's deposition that purportedly raised a genuine issue of material fact as to whether Smith was acting within the scope of his employment at the time of the accident. The plaintiff also argued that pursuant to General Statutes § 31-275,[9] a provision of the

[8] The defendants appended an excerpt from Smith's March 27, 2015 deposition to their motion for summary judgment. During this deposition, Smith stated the following about the day of the accident: he was not requested to be at the firehouse; his girlfriend was also present at the firehouse; he left the firehouse in his personal vehicle; and he left the firehouse in order to change his clothes to have his picture taken for his senior yearbook.

[9] General Statutes § 31-275 provides in relevant part: "For a . . . firefighter, 'in the course of his employment' encompasses such individual's departure from such individual's place of abode to duty, such individual's duty, and the return to such individual's place of abode after duty . . . ."

Workers' Compensation Act, a firefighter is considered on duty for the purpose of workers' compensation claims while traveling to and from work and, therefore, Smith was acting within the scope of his employment as a volunteer firefighter at the time of the accident.

The defendants filed a reply to the plaintiff's objection to the motion for summary judgment on February 5, 2016. In that reply, the defendants reiterated that Smith left the firehouse on the day of the accident for "exclusively personal" reasons. (Emphasis omitted.) The defendants also argued that § 31-275 applies to paid firefighters, not volunteers. The defendants also asserted that the plaintiff mischaracterized the legal relevance of some of the statements Smith and others made during their deposition. In addition, the defendants argued that Smith admitting that he was an agent for the defendants at the time of the accident cannot establish a genuine issue of material fact as to whether, as a matter of law, an agency relationship existed at the time of the accident.

On February 9, 2016, the plaintiff filed a response to the defendants' reply memorandum. In this filing, the plaintiff reasserted that, pursuant to § 31-275, a firefighter is considered to be acting in the course of employment while travelling home and that the purpose of General Statutes § 7-314a is to ensure that the Workers' Compensation Act covers volunteer firefighters. The defendants filed a response to the plaintiff's surreply on February 10, 2016. In this response, the defendants again argued that the plaintiff's arguments on the basis of § 31-275 were meritless.

On February 8, 2016, the court, *Aurigemma, J.*, heard oral argument on the defendants' motion for summary judgment. The court summarily denied the defendants' motion on February 18, 2016, merely stating that "[m]aterial issues of fact exist." In response, on March 4, 2016, the defendants filed a timely motion to reargue/ for articulation on the motion for summary judgment

pursuant to Practice Book § 11-12,[10] which the court summarily denied on March 7, 2016.[11] The case was scheduled to begin jury selection on June 1, 2016. On May 31, 2016, the fire company filed an untimely motion to reargue/reconsider the defendants' motion for summary judgment. The plaintiff received notice of the fire company's motion and quickly filed an objection, but the court already had granted the fire company's motion, reconsidered, and granted the defendants' motion for summary judgment within two hours of the time of the filing of the motion to reargue/reconsider. On June 1, 2016,[12] the court apologized for its quick ruling in granting the motion for summary judgment for both defendants without hearing further arguments on the merits of the defendants' motion for summary judgment.

Subsequently, on June 1, 2016, the court issued the following written decision granting the defendants' motion for summary judgment: "There is no evidence that . . . [Smith] was acting for the benefit of the [defendants] at the time of the accident. The only evidence is that he was going home to get changed to have his picture taken for the yearbook at the time of the accident and was providing no benefit to the . . .

[10] Practice Book § 11-12 provides in relevant part: "(a) A party who wishes to reargue a decision or order rendered by the court shall, within twenty days from the issuance of notice of the rendition of the decision or order, file a motion to reargue setting forth the decision or order which is the subject of the motion, the name of the judge who rendered it, and the specific grounds for reargument upon which the party relies. . . .

"(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. If the judge grants the motion, the judge shall schedule the matter for hearing on the relief requested. . . ."

[11] The plaintiff did not file an objection to the defendants' March 4, 2016 motion to reargue/for articulation.

[12] The court rendered summary judgment on June 1, 2016. According to the plaintiff's counsel, however, at 3 p.m. on May 31, 2016, he received notice from the caseflow office that the court had already decided to reverse its original decision and grant the motion for summary judgment.

[defendants]. The case is analogous to *Levitz* v. *Jewish Home for the Aged, Inc.*, 156 Conn. 193, [239 A.2d 490] (1968). A reasonable jury could not find that . . . [Smith] was acting within the scope of his employment at the time of the accident. Whether he was acting [within] the scope of his employment for the purpose of the workers' compensation statutes, i.e., under *Labadie* v. *Norwalk Rehabilitation Services*, [*Inc.*], 274 Conn. 219, [875 A.2d 485] (2005), cited by the plaintiff, is not relevant to the determination at issue in [the present] case." This appeal followed.

I

The plaintiff claims the court erred by granting the fire company's motion to reargue/reconsider the defendants' motion for summary judgment. The plaintiff argues that granting this motion was procedurally improper because it was untimely and did not present new arguments. Moreover, the plaintiff emphasizes that once the court decided to permit reargument, it should have held a hearing pursuant to Practice Book § 11-12 prior to reconsidering its earlier ruling and granting the defendants' motion for summary judgment. The defendants argue, in part, that the court's decision should not be overturned because the court already had held argument on the merits of summary judgment and, further, the court possessed the authority to reconsider its decision on summary judgment on its own accord. Although the plaintiff raises valid concerns, in the circumstances presented in the present case, we agree with the defendants.

We begin by summarizing the parties' arguments that were presented to the court both in support of and in objection to the motions to reargue. Following discovery, the defendants moved for summary judgment on the basis that they could not be vicariously liable because Smith was not acting within the scope of his employment or official duties at the time of the accident.

The court denied the motion on February 18, 2016. In response, on March 4, 2016, the defendants timely filed a motion to reargue/for articulation concerning the denial of the motion for summary judgment pursuant to Practice Book § 11-12. In support of their motion to reargue/for articulation, the defendants reiterated the same arguments presented in their motion for summary judgment. The defendants did not raise new factual allegations or legal arguments in this motion that they had not already presented to the court. The defendants stated that Smith was not "on duty or otherwise acting in his capacity as a junior member of the [fire company] when he was present at the [firehouse] on the day [of the accident]. . . . Smith . . . was not requested to come to the firehouse, and, furthermore, was not at the firehouse that day for [the defendants'] affairs. . . . Accordingly, the defendants respectfully submit [that] there is no basis for a determination that [Smith] was acting as an agent of the [fire company] . . . on the [day] of the accident . . . ." (Citation omitted; emphasis omitted.) The defendants also pointed out that the plaintiff's arguments pertaining to § 31-275 were misguided because § 31-275 applies only when a firefighter is returning home "after duty, which . . . Smith was not," and applies to professional, not volunteer, firefighters. (Emphasis omitted; internal quotation marks omitted.) The defendants argued that, instead, General Statutes § 7-314b applies to volunteer firefighters. Section 7-314b (a) provides that volunteer firefighters may be eligible for workers' compensation if they are injured while performing "fire duties," as defined by § 7-314b (b). The defendants contended that the term "fire duties" does not include the plaintiff's actions at the time of the accident. The defendants also requested that the court articulate its reasons for denying their motion for summary judgment if the court would not grant reargument. The court denied this motion.[13]

[13] The plaintiff did not file a motion in objection to the defendants' motion for reargument.

Just before jury selection was scheduled to begin, the fire company filed a motion to reargue/reconsider on May 31, 2016. In this motion, the fire company maintained the position that the defendants could not be held vicariously liable as a matter of law. The fire company emphasized that Smith was "(1) a junior volunteer firefighter; (2) visiting his then girlfriend at the [firehouse]; (3) leaving the [firehouse] for the purpose of taking prom photographs; (4) operating a private, family owned vehicle that did not have its emergency lights on; and (5) not driving to or from an emergency call when the subject collision occurred on a public roadway." The fire company did not raise factual allegations or legal arguments in this motion to reargue/reconsider that were not previously presented in support of the defendants' motion for summary judgment. In response, the plaintiff objected on the grounds that this motion was untimely, the court already had denied the defendants' motion to reargue/for articulation, and the fire company filed the motion as a dilatory tactic on the day before jury selection was to begin.[14] The court granted the fire company's motion for reargument within two hours of its filing and then, without holding a hearing, granted the defendants' July 14, 2015 motion for summary judgment.

We review a trial court's decision to grant a motion to reargue pursuant to the abuse of discretion standard. *Weiss* v. *Smulders*, 313 Conn. 227, 261, 96 A.3d 1175 (2014). "In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only [when] an abuse of discretion is manifest or [when] injustice appears to have been done." (Internal quotation marks omitted.) *Patino* v. *Birken Mfg. Co.*, 304 Conn. 679, 698, 41 A.3d 1013 (2012). "As with any discretionary action of the

[14] The plaintiff did not have the opportunity to file this objection until after the court granted the fire company's motion to reargue/reconsider.

trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue . . . is whether the trial court could have reasonably concluded as it did." *Biro* v. *Hill*, 231 Conn. 462, 465, 650 A.2d 541 (1994).

The court's decision to grant the fire company's motion to reargue/reconsider without holding a hearing before granting the defendants' motion for summary judgement amounted to an abuse of discretion. The fire company's untimely motion merely reiterated arguments that were already presented to the court numerous times, which is improper because "[a] motion to reargue . . . is not to be used as an opportunity to have a second bite of the apple or to present additional cases or briefs which could have been presented at the time of the original argument." (Internal quotation marks omitted.) *Opoku* v. *Grant*, 63 Conn. App. 686, 692–93, 778 A.2d 981 (2001). Although, in its discretion, the court may have granted the fire company's motion to reargue/reconsider despite these shortcomings, even without giving the plaintiff a reasonable amount of time to object, once it decided to grant reargument, the court should have held a hearing prior to granting the motion for summary judgment, as required by Practice Book § 11-12.

Despite the fact that the court abused its decision in granting the motion for summary judgment as a result of the fire company's motion to reargue/reconsider without holding a hearing, we decline to reverse the judgment because: first, the plaintiff was not harmed by the court's failure to hold a hearing; second, the court had the inherent authority to grant the motion for summary judgment sua sponte; and third, reversing the court's judgment would hinder the interests of judicial economy.[15]

[15] We are not condoning the defendants' use of a motion to reargue to rehash arguments already presented and the court, in accordance with Practice Book 11-12, should have held a hearing prior to granting the defen-

With respect to the court's failure to hold a hearing after granting the fire company's motion to reargue/reconsider, we conclude that the plaintiff was not prejudiced. In reaching this determination, we are guided by the principle that "[w]hen reviewing claims of error, we examine first whether the trial court abused its discretion, and, if so, we next inquire whether the error was harmless." *State* v. *Payne*, 303 Conn. 538, 552–53, 34 A.3d 370 (2012). The fire company did not present any new facts or legal arguments in its motion to reargue/reconsider that had not already been raised in support of the defendants' motion for summary judgment. Therefore, in connection with the prior motions, the plaintiff already had been provided ample opportunity to respond to the arguments and documentation upon which the court relied in rendering summary judgment in his memorandum of law in support of the objection to the motion for summary judgment, his response to the defendants' reply memorandum, and at oral argument, on February 8, 2016. Despite the plaintiff's claimed harm as a result of the court's failure to hold a hearing prior to granting the motion for summary judgment, the plaintiff has failed to demonstrate what else he might have presented that would have swayed the court's decision. At no time during the entire process of this appeal has the plaintiff suggested anything, by way of argument, documentation, or otherwise, that he would or could have adduced in response to the motion for summary judgment to undermine the propriety of the court's rulings on it. See *McNamara* v. *Tournament Players Club of Connecticut, Inc.*, 270 Conn. 179, 194, 851 A.2d 1154 (2004). As a result, the plaintiff was not prejudiced by the absence of a hearing.[16] Additionally, in this appeal, in which we review the plaintiff's

dants' motion for summary judgment. In affirming the trial court on the plaintiff's first claim, we are limiting our holding to the specific circumstances of the present case.

[16] At oral argument, the plaintiff conceded that he was not prejudiced by the court's decision to not hold a hearing prior to granting the motion for summary judgment.

second claim pursuant to a plenary standard; *DiPietro* v. *Farmington Sports Arena, LLC*, 306 Conn. 107, 116, 49 A.3d 951 (2012); the plaintiff has been afforded an opportunity to offer any additional arguments that he could have raised before the trial court if the court had held the hearing required by Practice Book § 11-12.

The court's ability to reconsider prior decisions on its own accord also supports our conclusion not to reverse the court's decision to grant the fire company's motion to reargue. Courts can reconsider a past decision in order to correct mistakes in prior judgments. *United States* v. *Morgan*, 307 U.S. 183, 197, 59 S. Ct. 795, 83 L. Ed. 1211 (1939). "It is a power inherent in every court of justice . . . to correct that which has been wrongfully done by virtue of its process." (Internal quotation marks omitted.) Id. This inherent power includes the authority to revisit prior decisions pertaining to summary judgment. See *McNamara* v. *Tournament Players Club of Connecticut, Inc.*, supra, 270 Conn. 193 ("the trial court, in the exercise of its case management authority, has the discretion, as a trial is about to begin, to decide a dispositive question of law . . . that had been presented in writing previously to the court but had not been ruled on because of untimeliness" [emphasis omitted; footnote omitted; internal quotation marks omitted]). The court's power to reconsider a prior decision on summary judgment is not unbounded. The court must still have jurisdiction over the matter; *Steele* v. *Stonington*, 225 Conn. 217, 219 n.4, 622 A.2d 551 (1993); and the court cannot sua sponte render summary judgment on grounds never raised by the moving party. *Greene* v. *Keating*, 156 Conn. App. 854, 861, 115 A.3d 512 (2015). In the present case, the court still had jurisdiction and did not render summary judgment on grounds that the defendants previously had never presented. Thus, the court had the authority to reconsider its prior decision on summary judgment

even if the fire company had not filed a motion to reargue. This authority to reconsider the prior decision on summary judgment even if a motion to reargue had not been filed reduces the decision to grant the fire company's motion to reargue/reconsider to a mere formality.

For the reasons discussed in part II of this opinion, we are persuaded that the court's rendering of summary judgment should not be reversed because the defendants are not vicariously liable for Smith's negligence as a matter of law. Consequently, the court's decision to revisit the defendants' motion for summary judgment, being correct, prevented unnecessary proceedings in the present case. The court's decision served the principle that "[t]he policy of the law is always to prevent unnecessary litigation . . . ." *Avery* v. *Brown*, 31 Conn. 398, 401 (1863); see also *Rode* v. *Adley Express Co.*, 130 Conn. 274, 277, 33 A.2d 329 (1943) ("the public has an interest in the prevention of unnecessary litigation, both because of the burden it places on the State and the resulting crowding of the dockets of the courts" [internal quotation marks omitted]). In accordance of this principle, trial courts are given broad "case management authority," which includes the power to decide "dispositive questions of law." *McNamara* v. *Tournament Players Club*, *Inc.*, supra, 270 Conn. 193. The court in the present case exercised its case management authority to prevent unnecessary litigation by ruling on a dispositive question of law. If we were to reverse the court because it used procedurally improper means to reach the correct decision, we would mandate that a meritless case proceed to trial. This would be a waste of judicial resources and detrimental to the public's interest in judicial economy.

II

The plaintiff claims that the court erred by rendering summary judgment for the defendants on the plaintiff's

vicarious liability claims. The plaintiff argues that there is a genuine issue of material fact as to whether Smith was acting in the course of employment or official duties at the time of the accident. The defendants argue that because Smith was tending to personal affairs at the time of the accident, they cannot be vicariously liable for his alleged negligence. We agree with the defendants.

We begin our analysis of this claim by setting forth the relevant alleged facts, viewed in the light most favorable to the nonmoving plaintiff, pertaining to Smith's service as a junior firefighter generally and his actions on the day of the accident. Smith became a junior member of the fire company in 2012. As a junior member, he was authorized to fight exterior fires and respond to other emergency calls. Smith possessed an electronic key fob that enabled him to enter the firehouse during the day. Smith, along with the other members of the fire company, was encouraged to spend time at the firehouse monitoring the radio for emergency calls in order to quicken response times, perform training exercises, and to build comradery with one another. In order to entice members to spend time at the firehouse, the fire company provided televisions, computers, a weight room, laundry facilities, and showers.

The fire company utilized a "points system" in order to track a firefighter's participation and the firefighters were required to obtain a minimum number of points in order to maintain active membership. Firefighters earned points by responding to emergency calls, staffing the firehouse during emergencies, and, at the fire company's discretion, spending time at the firehouse waiting for a call. Additionally, although the fire company is a volunteer department, the town's firefighters received monetary compensation for their duties.

Full members of the fire company are eligible for pensions and receive tax abatements from the town. Members are also paid in the event they respond to a brush fire. Prior to the accident, Smith personally received payment for his time spent staffing the firehouse during emergencies.

As a junior member, Smith was not allowed to drive any of the fire company's vehicles. Thus, Smith used his personal vehicle to respond to emergency calls, travel to and from the firehouse, and to attend training. Using this vehicle, Smith also would transport other members of the company to emergencies and other fire company related events. The fire company instructed how its members were to use their personal vehicles when responding to emergencies, such as how to properly park at the scene. In his personal vehicle, Smith kept his company issued firefighting equipment, which included a helmet, coat, bunker pants, and fire boots. His vehicle was adorned with a special license plate that identified him as a member of the fire company, which grants him access to closed roads during emergencies.

On the day of the accident, Smith went to the firehouse because he had a "couple [of] extra hours to spare." Smith's girlfriend at the time, who also was a junior member of the fire company, and two other members of the fire company, were also present at the firehouse that day. Smith spent his time at the firehouse monitoring the radio for emergency calls. After spending approximately three and one-half hours at the firehouse, Smith left with the intention to go home to change his clothing in order to have his picture taken for his senior yearbook. Smith departed the firehouse in his personal vehicle, and, as Smith pulled out of the firehouse driveway onto Main Street, his vehicle and the plaintiff's vehicle collided.

We observe the following principles relating to motions for summary judgment. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing . . . that the party is . . . entitled to judgment as a matter of law." (Internal quotation marks omitted.) *Powell* v. *Infinity Ins. Co.*, 282 Conn. 594, 599–600, 922 A.2d 1073 (2007).

"On appeal, [w]e must decide whether the trial court erred in determining that there was no genuine issue as to any material fact and that the nonmoving party is entitled to judgment as a matter of law. . . . Because the trial court rendered judgment for the [defendants] as a matter of law, our review is plenary and we must decide whether [the trial court's] conclusions are legally and logically correct and find support in the facts that appear in the record." (Citation omitted; internal quotation marks omitted.) *Davies* v. *General Tours, Inc.*, 63 Conn. App. 17, 21, 774 A.2d 1063, cert. granted on other grounds, 256 Conn. 926, 776 A.2d 1143 (2001) (appeal withdrawn October 18, 2001), overruled on other grounds by *Cefaratti* v. *Aranow*, 321 Conn. 593, 141 A.3d 752 (2016).

Pursuant to the principles of vicarious liability, "every man who prefers to manage his affairs through others, remains bound to so manage them that third persons are not injured by any breach of legal duty on the part of such others while they are engaged upon his business and within the scope of their authority. . . . But it must be the affairs of the principal, and not solely the affairs of the agent, which are being furthered in order for the

doctrine to apply." (Citations omitted; internal quotation marks omitted.) *Mitchell* v. *Resto*, 157 Conn. 258, 262, 253 A.2d 25 (1968). "Before vicarious liability can be imposed, however, there must be sufficient evidence produced to warrant a finding of agency between the parties. If there is a finding that the allegedly negligent actor is not an . . . agent, then the claim of vicarious liability must fail." *Cefaratti* v. *Aranow*, 154 Conn. App. 1, 29, 105 A.3d 265 (2014), rev'd on other grounds, 321 Conn. 593, 141 A.3d 752 (plaintiffs' petition for certification), aff'd, 321 Conn. 637, 138 A.3d 837 (defendants' petition for certification) (2016). "Agency is defined as the fiduciary relationship which results from manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act . . . ." (Internal quotation marks omitted.) *Beckenstein* v. *Potter & Carrier, Inc.*, 191 Conn. 120, 132, 464 A.2d 6 (1983). Although whether an agent is serving the benefit of his employer is generally a question of fact, there are instances, such as the present case, where the question is so obvious that it becomes one of law. *Brown* v. *Housing Authority*, 23 Conn. App. 624, 628, 583 A.2d 643 (1990), cert. denied, 217 Conn. 808, 585 A.2d 1233 (1991).

We now address the plaintiff's first assertion that there are numerous alleged facts which establish that Smith was acting within the course of his employment or official duties at the time of the accident. In order to prevail on appeal, the plaintiff must establish that there is a genuine issue of material fact as to whether Smith served within the scope of his employment to further the defendants' interest at the time of the accident because the defendants are liable only for those torts of Smith that "are done with a view of furthering [the defendants'] business within the field of this employment—for those which have for their purpose the execution of the [defendants'] orders or the doing

of the work assigned to him to do." (Internal quotation marks omitted.) Id. The plaintiff argues that Smith provided a benefit to the defendants because he went to the firehouse on the day of the accident in order to respond to emergency calls, and that the fire company, generally, encouraged this activity because it quickened response times. Specifically, the plaintiff asserts that by utilizing a points system that encouraged spending time at the firehouse and fitting the firehouse with attractive amenities, such as exercise equipment and televisions, the fire company benefitted from having Smith and the other firefighters spending time at the firehouse. Although the plaintiff provides grounds to conclude that the defendants may have benefitted from Smith's presence, or otherwise enticed Smith to be at the firehouse, the plaintiff does not connect how this provides a basis to determine that the defendants benefitted from Smith's departure from the firehouse, which was when Smith's allegedly tortious conduct occurred. In fact, if the defendants benefited from Smith's presence at the firehouse, then Smith's departure would be to their detriment.

The plaintiff next states that the defendants can be held vicariously liable because Smith's alleged negligence occurred on the fire company's property. In support of this contention, the plaintiff reiterates that the fire company had encouraged Smith to be at the firehouse, and without this encouragement, Smith would not have been at the firehouse on the day of the accident. The plaintiff also argues that "an off duty employee's negligence at the employer's place of business can raise a prima facie case for respondeat superior liability," relying on *Glucksman* v. *Walters*, 38 Conn. App. 140, 659 A.2d 1217, cert. denied, 235 Conn. 914, 665 A.2d 608 (1995). In *Glucksman*, the appellate tribunal concluded that a reasonable jury could find that an employee's alleged negligence could still fall within the

course of her employment despite being off duty. Id., 141–43, 148. Instead of supporting the plaintiff's assertion that an employer is liable for an off duty employee's negligence because it occurred on the employer's premises, *Glucksman* adheres to the rule that whether an employer can be liable for an employee's negligence hinges on whether the employee was furthering the employer's interests when the negligent act occurred. Smith was in the process of leaving to attend to his personal affairs, which the plaintiff does not dispute. It is inconsequential that he was still on the fire company's property when "he negligently accelerated his vehicle into the roadway" because he was no longer furthering the defendants' interests at that time.

The plaintiff also asserts that because Smith's negligence occurred while he was operating his personal vehicle, which the plaintiff describes as "an authorized emergency vehicle that was regulated by the [fire company]," there is a genuine issue of material fact as to whether the plaintiff was subject to the fire company's control at the time of the accident. The plaintiff argues that this is relevant because in determining whether an agency relationship exists, courts look to whether the principal "has the right to direct and control the work of the agent . . . ." *Beckenstein* v. *Potter & Carrier, Inc.*, supra, 191 Conn. 133. The plaintiff asserts that the fire company had control over Smith because the fire company set policies directing how personal vehicles were to be used to respond to emergencies. The plaintiff points out that, prior to the accident, Smith used his personal vehicle in order to respond to emergencies, travel to and from the firehouse, and attend off-site trainings. In addition, the plaintiff contends that Smith kept his fire company issued gear in his personal vehicle and the fire company allowed Smith to outfit his vehicle with a license plate that identified Smith as a volunteer firefighter. Although the plaintiff is correct that control

is an essential element in determining whether an agency relationship exists, the plaintiff does not provide any authority that a fire company exercises control over volunteer members when they use their personal vehicles for personal matters because they use the same vehicles at other times, under the supervision of the fire company they serve, in their capacity as volunteer firefighters. Essentially, the plaintiff is requesting that a volunteer fire company and the town which it serves be held liable whenever a volunteer firefighter is negligently responsible for an accident in their personal vehicle. We decline to adopt such a rule.

The plaintiff's last argument is that Smith's intended destination upon leaving the firehouse does not preclude us from determining that the defendants are vicariously liable because, pursuant to the workers' compensation statutes, firefighters are considered on "duty" going to and from work,[17] and the plaintiff asserts that *Leary* v. *Johnson*, 159 Conn. 101, 267 A.2d 658 (1970), should guide us to the conclusion that a genuine issue of material fact remains and that *Levitz* v. *Jewish Home for the Aged, Inc.*, supra, 156 Conn. 193, which the court cited, is distinguishable.

The plaintiff asserts, albeit not clearly, that Smith's intended destination upon leaving the firehouse does not preclude finding that the defendants are vicariously liable because, pursuant to § 31-275, "firefighters are considered to be in the course of their employment for workers' compensation purposes while going to or coming from work." (Emphasis omitted.)

[17] The plaintiff also makes an unpersuasive argument that the coming and going rule, which is used to determine whether an employee is eligible for workers' compensation; see *Balloli* v. *New Haven Police Dept.*, 324 Conn. 14, 25, 151 A.3d 367 (2016); "does not preclude a vicarious liability finding in [the present] case." As no appellate court has ever applied this rule in analyzing whether an employer is liable for an employee's negligence, we determine that, contrary to the plaintiff's assertions, this rule is not pertinent to the present case.

First, the plaintiff's argument fails to acknowledge that volunteer firefighters are treated differently from professional firefighters for the purpose of workers' compensation, and the provisions in § 31-275 do not apply to volunteer firefighters. *Evanuska* v. *Danbury*, 285 Conn. 348, 357–58, 939 A.2d 1174 (2008) ("§§ 7-314a and 7-314b are the only procedural vehicles available for volunteer firefighters to obtain workers' compensation benefits for injuries sustained while performing fire duties, even when such injuries prevent them from performing at their regular, paid employment" [footnote omitted]). Although for the purpose of workers' compensation, the definition of "in the course of his employment" for professional firefighters includes "such individual's departure from such individual's place of abode to duty, such individual's duty, and the return to such individual's place of abode after duty"; General Statutes § 31-275 (1) (A) (i); volunteer firefighters are only entitled to workers' compensation for injuries incurred "while in training or engaged in volunteer fire duty"; General Statutes § 7-314a (a); or when "engaged in volunteer fire duties"; General Statutes § 7-314b (a).

Second, even if the plaintiff's arguments relied on the appropriate statutes, we fail to see how §§ 7-314a or 7-314b preclude us from concluding that the defendants cannot be held vicariously liable because Smith left the firehouse to attend to his personal affairs. As used in § 7-314a, "fire duties" include, inter alia, duties performed while at fires, answering alarms of fire and while directly returning from fires. See General Statutes § 7-314. As used in § 7-314b, the term "fire duties" includes "duties performed while at fires, answering alarms of fire, answering calls for mutual aid assistance, returning from calls for mutual aid assistance, at fire drills or training exercises, and directly returning from fires . . . ." General Statutes § 7-314b (b). Nothing in either definition persuades us that the term "fire duties"

encompasses Smith's conduct in departing the firehouse to go home to change his clothing to have his picture taken for his high school yearbook. Moreover, even if Smith's activities were deemed to be fire duties, the plaintiff provides no authority that the workers' compensation statutes provide guidance for determining when volunteer firefighters are acting within the scope of their employment for the purpose of vicarious liability. Nothing in the text of §§ 7-314a or 7-314b sheds light on whether an employer can be held vicariously liable for its employee's negligence and no appellate court has relied on either statute in making such a determination. Instead, the limited purpose of § 7-314a is that it "allows volunteer [firefighters] to receive workers' compensation benefits as if they were employees of the municipality that benefited from their services." *Thomas* v. *Lisbon*, 209 Conn. 268, 272, 550 A.2d 894 (1988).

We now turn to the plaintiff's argument that the present case is more akin to *Leary* than *Levitz*. In *Leary*, the plaintiff, who had a financial interest in the sale of a home, contacted a cleaning service to clean the floors before the defendant purchasers moved into the home. *Leary* v. *Johnson*, supra, 159 Conn. 103. The plaintiff directed which portions of the house were to be cleaned and the defendants reimbursed the cost of the cleaning service. Id. While walking through the home, the plaintiff slipped on a puddle left by the cleaning service and brought a negligence action against the defendants, alleging that they were vicariously liable for the cleaning service's alleged negligence. Id., 103–104. On appeal from a directed verdict rendered in favor of the defendants, our Supreme Court reversed the trial court because a jury could have found that the cleaning service "was furthering the purposes and interests of the defendants" and "had been obtained by the plaintiff as

the defendants' agent" due to the "several legal relationships that lurked in the evidence offered." Id., 106.

In *Levitz*, the defendant employee of the defendant home for the aged left his place of employment to tend to personal errands. *Levitz* v. *Jewish Home for the Aged, Inc.*, supra, 156 Conn. 196. In the process of leaving his place of employment, the employee lost control of his vehicle in the employer's parking lot and struck the plaintiff. Id. The plaintiff brought a negligence action against the employee and the home for the aged, alleging that the home for the aged was vicariously liable for its employee's conduct. Id., 194. The trial court set aside a jury verdict for the plaintiff and rendered judgment notwithstanding the verdict for the home for the aged because the employee was not acting in the course of his employment at the time of the accident. Id., 198. On appeal, our Supreme Court affirmed the judgment of the court because, "[b]efore responsibility can attach to the [employer], the relationship of master and servant must have existed at the time the injury was done to the plaintiff and [the employee] must have been acting in the course of his employment. 'In the course of his employment' means while engaged in the service of the master, and it is not synonymous with the phrase 'during the period covered by his employment.' " Id.

Contrary to what the plaintiff asserts, we do not conclude that the factual situation presented in *Leary* is more analogous to the present case than the situation in *Levitz*. In *Leary*, the central issue was whether the cleaning service could be an agent for the defendants despite being hired and supervised by the plaintiff. This dissimilar fact pattern provides little guidance, if any, to the present case. *Levitz*, however, is useful in our analysis of whether the defendants are vicariously liable for Smith's alleged negligence because it addresses whether an employer can be vicariously liable for its

employee's negligence when the employee negligently caused an accident on the employer's premises while tending to personal matters. *Levitz* remains good law and is consistent with the well established principle that a defendant cannot be held liable pursuant to respondeat superior when its agent is "going on a frolic of his own." (Internal quotation marks omitted.) W. Keeton et al., Prosser and Keeton on the Law of Torts (5th Ed. 1984) § 70, p. 503. If Smith was not acting in the course of his employment or official duties as a junior firefighter, then the defendants have no more liability for what Smith did than they would for the acts of a stranger. Id. Therefore, based on *Levitz* and the well established principles of agency law, we conclude that Smith's purpose for leaving the firehouse is dispositive of whether the defendants can be held vicariously liable for his negligence.

The judgment is affirmed.

In this opinion the other judges concurred.

DEREK J. DELEO *v.* EQUALE AND CIRONE, LLP, ET AL.
(AC 38527)

Lavine, Prescott and Bright, Js.

Syllabus

The plaintiff sought to recover damages from the defendants for, inter alia, breach of fiduciary duty and conversion. The plaintiff, a certified public accountant, was a partner at the defendant accounting firm, where the defendant C was managing partner. In April 2013, C decided to terminate his partnership with the plaintiff after it became known that the plaintiff had engaged in a relationship with a staff accountant. The plaintiff retained his 38 percent partnership interest through June 30, 2018, and, after his departure, continued to provide accounting services in New Milford. The plaintiff thereafter brought the present action, alleging, inter alia, that he still held a 38 percent interest in the partnership, that C had excluded him from the daily operations of the partnership, and that C's conduct frustrated the economic purpose of the partnership

such that it was no longer reasonable to continue the partnership's business in accordance with the partnership agreement. The plaintiff sought, inter alia, a dissolution and winding up of the partnership and restoration of his partnership rights. The defendants filed a counterclaim, special defenses and a claim of setoff. Following a trial to the court, the trial court rendered judgment in favor of the defendants on the complaint and on their special defenses, finding, inter alia, that the plaintiff voluntarily withdrew as partner of the partnership, that C did not waive the partnership's right to enforce a noncompete provision in the partnership agreement, and that the plaintiff had agreed to terminate his partnership interest as of June 30, 2013. On the plaintiff's appeal to this court, *held*:

1. The plaintiff could not prevail on his claim that the trial court committed plain error by not ordering the dissolution of the partnership, which was based on his claim that the partnership could not continue to exist as a single partner partnership; the record was factually inadequate to permit this court to find an error so obvious that reversal was required, the plaintiff's claim that the partnership was a single partner partnership that could not exist pursuant to statute (§ 34-301 [12]) was not raised at trial and to allow him to raise the claim for the first time on appeal would permit trial by ambuscade, and even if the trial court committed error, no manifest injustice resulted from this court's refusal to entertain the claim newly raised on appeal, which contradicted the plaintiff's position in the trial court.
2. The plaintiff's claim that the trial court improperly estopped him from contesting the enforceability of a noncompete provision in the partnership agreement was unavailing; although that court stated that the plaintiff was estopped from asserting that the noncompete provision was unenforceable, it did not apply the doctrine of estoppel to preclude the plaintiff from asserting his claim, as the court set forth the legal principles that governed the plaintiff's claim but did not set forth any legal principles regarding estoppel, it addressed six reasons for its conclusion that the noncompete provision was enforceable, if the court had applied the doctrine of estoppel to bar the claim there would have been no need for it to have addressed the merits of the claim, and it was reasonable to interpret the court's discussion of estoppel as a comment on the plaintiff's credibility rather than an application of the doctrine.
3. The trial court's finding that C had not waived enforcement of the noncompete provision in the partnership agreement was not clearly erroneous; the record supported the trial court's findings that C, as managing partner of the partnership, repeatedly asserted that the partnership agreement controlled the plaintiff's departure, despite statements that expressed his desire to avoid hurting the plaintiff, all of C's representations were consistent with the terms of the noncompete provision in the partnership agreement, which did not prohibit a departing partner from continuing to practice accounting or from servicing former clients

of the partnership but required that the former partner compensate the partnership for any clients taken from the partnership.

4. The trial court incorrectly treated the noncompete provision as a liquidated damages clause and improperly failed to consider the reasonableness of the restraint imposed by the noncompete provision; because the plaintiff's actions did not constitute a breach of contract and the noncompete provision did not require that the plaintiff breach the partnership agreement before the partnership was entitled to compensation for work that the plaintiff performed for the partnership's former clients, the noncompete provision could not be viewed as a liquidated damages clause designed to fix compensation for a breach of contract, and given that the noncompete provision did not differ meaningfully from a prohibitive covenant not to compete, the enforceability of the noncompete provision had to be judged by the same standard used for covenants not to compete.

Argued December 11, 2017—officially released April 10, 2018

Procedural History

Action to recover damages for, inter alia, alleged breach of fiduciary duty, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the defendants filed a counterclaim; thereafter, the matter was tried to the court, *Truglia, J.*; judgment in favor of the defendants on the complaint and in part on the counterclaim, from which the plaintiff appealed to this court. *Reversed in part; further proceedings.*

Brendon P. Levesque, with whom were *Karen L. Dowd* and, on the brief, *Scott T. Garosshen*, for the plaintiff (appellant).

Daniel J. Krisch, with whom was *Kevin J. Greene*, for the defendants (appellees).

Opinion

BRIGHT, J. The plaintiff, Derek J. DeLeo, appeals from the judgment of the trial court rendered in favor of the defendants, Equale & Cirone, LLP (partnership), and Anthony W. Cirone, Jr., on the plaintiff's complaint and the defendants' special defenses, claim of setoff, and counterclaim. Specifically, the plaintiff claims that

the trial court (1) committed plain error when it failed to order the dissolution of the partnership; (2) improperly estopped him from challenging the noncompete provision in the partnership agreement; (3) improperly found that the defendants did not waive the enforcement of the noncompete provision; and (4) improperly concluded that the noncompete clause in the partnership agreement was enforceable. We agree with the plaintiff's final claim, and we, therefore, affirm in part and reverse in part the judgment of the trial court.

The following facts and procedural history, as found by the trial court or as undisputed in the record, are relevant to our review. The partnership, an accounting firm, is a limited liability partnership located in Bethel. Joseph A. Equale, Jr., and Cirone formed the partnership in 1999. In 2005, the plaintiff, a certified public accountant, joined the partnership as an equity partner. The partnership operated under an oral partnership agreement until January, 2009, when Equale, Cirone, and the plaintiff executed a written partnership agreement (partnership agreement). Pursuant to the partnership agreement, Cirone held a 40 percent interest, Equale held a 35 percent interest, and the plaintiff held a 25 percent interest. The partnership agreement was intended to govern all aspects of the partnership.

In January, 2012, the partnership purchased the assets of Allen & Tyransky, an accounting firm located in Danbury. As a result of the acquisition, Jack Tyransky became a nonequity "contract" partner of the partnership. Shortly after the acquisition of Allen & Tyransky, several of the partnership's employees began to suspect that the plaintiff was involved in a romantic relationship with a female staff accountant at the partnership. In October, 2012, Cirone learned about the suspicions regarding the plaintiff's relationship with the staff accountant. Thereafter, Cirone confronted the plaintiff about the alleged relationship, but the plaintiff denied

any such relationship. Later, Cirone approached Equale, who was preparing to retire from the partnership at the end of 2012, to discuss the plaintiff's alleged relationship. Both Equale and Cirone decided to believe the plaintiff's denial, and they did not take any further action at that time.

Equale retired, effective January 1, 2013, but he continued to work for the partnership through the end of the 2013 tax season. Pursuant to the partnership agreement, Equale's shares were acquired by the partnership upon his retirement. Cirone and the plaintiff agreed that following Equale's retirement Cirone would own 62 percent of the partnership and the plaintiff would own the remaining 38 percent.

On April 26, 2013, after the completion of the 2013 tax season, Cirone, Tyranksy, and the plaintiff met at a diner to discuss the future of the partnership in light of the plaintiff's suspected relationship with the staff accountant. At this meeting,[1] Cirone told the plaintiff that they needed to fire the staff accountant and terminate their partnership. The court credited Cirone's testimony regarding this meeting, finding that "given [Cirone's] position as managing partner of the firm and also given the risks that [the plaintiff's] actions posed to the firm, [Cirone] had no choice but to separate [the plaintiff] from the partnership." The plaintiff and Cirone agreed that their business relationship had to end, and they acknowledged that any plan for the plaintiff's departure would begin with the partnership agreement.

Following their meeting, Cirone and the plaintiff exchanged several e-mails during May and June, 2013, regarding the plaintiff's departure from the partnership. In these e-mails, the plaintiff did not deny that he was leaving the partnership, and there was no indication that

[1] The plaintiff secretly recorded this meeting on his cell phone and the parties agreed to enter a transcript of the recording into evidence.

he believed that the partnership was being dissolved. Following these exchanges, Cirone sent an e-mail to the partnership's employees informing them that the plaintiff would be "transitioning out of the firm" beginning on June 17, 2013. The plaintiff retained his 38 percent partnership interest through June 30, 2013, and, after leaving the partnership, he continued to provide accounting services in New Milford. Following the plaintiff's departure, Cirone first transferred the plaintiff's interest in the partnership to himself, and then he transferred a 1 percent interest to Tyransky.

In September, 2013, approximately two months after leaving the partnership, the plaintiff commenced the present action against the defendants. The operative amended complaint was filed on September 29, 2014, and contained seven counts alleging, inter alia, that the plaintiff held a 38 percent interest in the partnership, and that Cirone had excluded him from the daily operations of the partnership. He further alleged that Cirone's conduct had frustrated the economic purpose of the partnership such that it was no longer reasonably practicable to continue the partnership's business in accordance with the partnership agreement. Additionally, the plaintiff alleged claims of breach of fiduciary duty and conversion. The plaintiff sought, inter alia, a dissolution and winding up of the partnership pursuant to General Statutes §§ 34-339 (b) (2) (C) and 34-372 (5); restoration of his partnership rights pursuant to § 34-339 (b) (1); an accounting and access to the partnership's books and records pursuant to General Statutes §§ 34-337 and 34-338; appointment of a receiver pursuant to General Statutes § 52-509; and money damages.

On January 6, 2015, the defendants filed an answer denying the plaintiff's allegations or leaving him to his proof, asserted various special defenses and a claim for setoff. The defendants alleged the following special defenses: the plaintiff's complaint failed to state a claim

upon which relief could be granted; the plaintiff's claims were barred by his own conduct and breach of fiduciary duties; the plaintiff's claims were barred by the doctrine of unclean hands; and the plaintiff had waived any claim against the defendants because he had terminated his partnership interest voluntarily. In their claim for setoff, the defendants alleged, inter alia, that the plaintiff was liable to the partnership for damages as a result of: self-dealing, violations of his fiduciary duties, and amounts due pursuant to the noncompete provision in the partnership agreement.

The defendants also filed a four count counterclaim against the plaintiff, claiming that the partnership had terminated the plaintiff's partnership interest for cause, or, in the alternative, that the plaintiff had terminated his partnership interest voluntarily. In both counts the defendants claimed that the value of the plaintiff's partnership interest was limited to the accrual basis capital value,[2] as defined in the partnership agreement. Additionally, the defendants claimed that the plaintiff is subject to the noncompete provision in the partnership agreement, requiring him to compensate the partnership for any former clients of the partnership for whom the plaintiff had provided accounting services following his departure. In counts three and four, the defendants alleged that the plaintiff breached his fiduciary duty pursuant to the partnership agreement and/or pursuant to §§ 34-338 and 34-339.

The plaintiff denied all the allegations as set forth in the defendants' special defenses and claim for setoff.

[2] Section II E of the partnership agreement defines accrual basis capital value as "the cash basis financial statement prepared by the [partnership] on a monthly basis modified for inclusion of accounts receivable as defined in [Item F] and work in process in [Item G] with the appropriate adjustments for liabilities and expense accruals including but not limited to payroll accruals, malpractice accruals, and other operating expenses." (Emphasis omitted.)

He also denied the allegations in the defendants' counterclaim and, by way of special defense, asserted that the defendants had waived the enforcement of the noncompete provision.

The case was tried to the court over the course of six days in September, 2015. In its memorandum of decision dated October 22, 2015, the court rendered judgment in favor of the defendants on the plaintiff's complaint and the defendants' special defenses. The court did not credit the plaintiff's testimony, finding that the plaintiff, "through his words and actions, starting with the April 26 meeting through July of 2013, voluntarily withdrew as a partner of [the partnership]." The court credited Cirone's testimony, finding that Cirone did not waive the partnership's right to enforce the noncompete provision in the partnership agreement, and that the plaintiff had agreed to terminate his partnership interest as of June 30, 2013. The court further found that the voluntary termination provision[3] in the partnership agreement determined the amount due to the plaintiff. Accordingly, the court rendered judgment in favor of the defendants on their counterclaim and on the plaintiff's special defense. The court awarded the defendants $740,783. The court credited the testimony of the defendants' expert witness with respect to the calculation of the plaintiff's accrual basis capital as of June 30, 2013, and the amount owed by the plaintiff to the partnership, pursuant to the noncompete provision in the partnership agreement. The court found that

[3] Section III D 1 of the partnership agreement provides in relevant part: "Any Partner may terminate his interest in the [partnership] at any time provided that the Partner gives the partnership at least one hundred eighty (180) days prior notice in writing of his intention to terminate his interest . . . . The only amounts that will be due to such Partner will be his [accrual basis capital], unless, at the discretion of the remaining Partners, they choose to provide any additional payments. . . . As noted in part F3 of Section III of this Agreement, the withdrawing partner is subject to the [noncompete provision] of that section." (Emphasis omitted.)

the plaintiff was overdrawn in his partnership income account by $143,496 as of June 30, 2013, and that his accrual basis capital as of June 30, 2013, was $165,079. The court also found that the plaintiff owed $762,366 to the partnership pursuant to the noncompete provision. This appeal followed.

I

The plaintiff does not challenge on appeal the court's finding that he voluntarily withdrew from the partnership. Instead, he argues that the court committed plain error by not ordering the dissolution of the partnership because a single partner partnership cannot exist. At oral argument, the plaintiff conceded that this claim was not preserved pursuant to our rules of practice. Nevertheless, he contends that reversal is appropriate pursuant to the plain error doctrine. The defendants argue that this court should not review the plaintiff's claim because it contradicts the plaintiff's pleadings and arguments in the trial court. We agree with the defendants.

The following legal principles inform our review. "[T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . .

"[Our Supreme Court] recently clarified the [two-pronged] framework under which we review claims of plain error. [Under the] [f]irst [prong], we must determine whether the trial court in fact committed an error

and, if it did, whether that error was indeed plain in the sense that it is patent [or] readily discernable on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . [T]his inquiry entails a relatively high standard, under which it is not enough for the defendant simply to demonstrate that his position is correct. Rather, the party seeking plain error review must demonstrate that the claimed impropriety was so clear, obvious and indisputable as to warrant the extraordinary remedy of reversal. . . .

"[U]nder the second prong of the analysis we must determine whether the consequences of the error are so grievous as to be fundamentally unfair or manifestly unjust. . . . Only if both prongs of the analysis are satisfied can the appealing party obtain relief." (Emphasis omitted; internal quotation marks omitted.) *Healey* v. *Haymond Law Firm, P.C.*, 174 Conn. App. 230, 245, 166 A.3d 10 (2017).

After filing the present appeal, the plaintiff filed a motion for articulation on September 19, 2016, requesting that the trial court state "the factual and legal basis for [its] finding that [the partnership] continued as a single partner partnership after the plaintiff's" voluntary departure on June 30, 2013. The court denied the motion for articulation, however, the court stated that "[t]he evidence at trial showed (and the court found) that [the partnership] (1) existed as a for profit venture between Cirone, [the plaintiff] and Tyransk[y] prior to [the plaintiff's] departure from the firm; and (2) continued after [the plaintiff's] departure between Cirone and Tyransk[y], with Cirone as an equity partner and Tyransk[y] as a nonequity contract partner."

Relying on the court's statement in its order denying his motion for articulation, the plaintiff contends that because the court found that Tyransky was not an equity partner of the partnership after the plaintiff's departure,

the partnership could not have continued to exist. Therefore, according to the plaintiff, the court should have ordered the dissolution of the partnership. The plaintiff also argues that had the trial court properly ordered the dissolution of the partnership, the noncompete provision would have been inapplicable because the plaintiff could not have been in competition with a partnership that no longer existed. We cannot conclude under the facts and circumstances of this case that reversal for plain error is warranted.

First, there is not a factually adequate record. Although the plaintiff claims that "the trial court expressly found that the partnership continued . . . with . . . Tyransk[y] as a nonequity contract partner" after he withdrew from the partnership, he also acknowledges that "[t]he testimony at trial . . . conflicted as to when, if ever, Tyransky actually received the [1] percent equity interest." Indeed, the court's order denying the plaintiff's motion for articulation does not make any finding as to the duration of Tyransky's status as a "nonequity contract partner." Accordingly, this court cannot find an error so obvious that reversal is required on the basis of this record.

Second, it is axiomatic that this court "should not consider different theories or new questions if proof might have been offered to refute or overcome them had they been presented at trial. . . . Our rules of procedure do not allow a [party] to pursue one course of action at trial and later, on appeal, argue that a path he rejected should now be open to him. . . . To rule otherwise would permit trial by ambuscade." (Citation omitted; internal quotation marks omitted.) *Nweeia* v. *Nweeia*, 142 Conn. App. 613, 620, 64 A.3d 1251 (2013). At trial, the plaintiff did not claim that the partnership was a single partner partnership that could not exist

pursuant to General Statutes §§ 34-301 (12).[4] In fact, the plaintiff argued the opposite position, claiming that he continued to hold a 38 percent interest in the partnership. He further alleged that Cirone unlawfully converted his 38 percent interest in the partnership and transferred 1 percent of that interest to Tyransky. In light of the plaintiff's pleadings and arguments at trial, the defendants had no reason to offer evidence regarding when Tyransky became a partner. To allow the plaintiff to raise this claim for the first time on appeal would permit trial by ambuscade. See id.

Finally, even if we assume that the trial court committed error in the present case, "no manifest injustice results from our refusal to entertain an argument fashioned anew for appellate purposes, particularly where the freshly minted argument contradicts the position that the plaintiff advanced in the trial court." *Gladstein* v. *Goldfield*, 163 Conn. App. 579, 586-87, 137 A.3d 60 (2016), appeal dismissed, 325 Conn. 418, 159 A.3d 661 (2017). Accordingly, we decline to apply the extraordinary remedy of plain error to rescue the plaintiff from his failed trial strategy.

II

The plaintiff next claims that the court improperly estopped him from contesting the enforceability of the noncompete provision in the partnership agreement. The plaintiff argues that his inclusion of a payment pursuant to the noncompete provision as a line item in a submission for his divorce mediation "do[es] not satisfy the legal standard for any kind of estoppel." Although we agree with the plaintiff that estoppel does not apply under these circumstances, we conclude that the court did not apply any form of estoppel.

[4] General Statutes § 34-301 (12) defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit . . . ."

It is well established that "an opinion must be read as a whole, without particular portions read in isolation, to discern the parameters of its holding. . . . Furthermore, we read an ambiguous trial court record so as to support, rather than contradict, its judgment." *In re Nevaeh W.*, 317 Conn. 723, 733, 120 A.3d 1177 (2015). "Additionally, our appellate courts do not presume error on the part of the trial court. . . . Rather, we presume that the trial court, in rendering its judgment . . . undertook the proper analysis of the law and the facts." (Citations omitted; internal quotation marks omitted.) *Rogan* v. *Rungee*, 165 Conn. App. 209, 223, 140 A.3d 979 (2016).

The trial court addressed the plaintiff's claim that the noncompete provision was unenforceable because it was a penalty. After setting forth the legal standard for determining whether a particular provision in a contract is for liquidated damages or is an unenforceable penalty, the court then proceeded to evaluate the noncompete provision, listing six reasons supporting its conclusion that the amount due pursuant to the noncompete provision is for liquidated damages. In the final two sentences of its analysis, the court stated that "[the plaintiff] included the noncompete payment as a line item in his calculation of the value of his partnership in his divorce mediation submission. . . . He is, therefore, *estopped* from asserting that the noncompete provision is unenforceable." (Emphasis added.)

Although the court stated that the plaintiff is estopped from asserting that the noncompete provision is unenforceable, our review of the court's decision convinces us that the court did not apply the doctrine of estoppel to bar the plaintiff's claim. First, the court correctly set forth the legal principles governing the plaintiff's claim,[5]

[5] Although the court applied the correct test for determining whether a contractual provision for payment of money arising out of a breach of contract is a liquidated damages clause or an unenforceable penalty, for the reasons set forth in part IV of this opinion, that was not the correct

but did not set forth any legal principles regarding estoppel. Second, the court addressed *six reasons* for its conclusion that the noncompete provision was enforceable, before stating that the plaintiff was "estopped" from challenging it. Thus, the plaintiff's interpretation of the court's decision is in tension with the court's entire discussion of his claim. Indeed, if the court had applied the doctrine of estoppel to bar the claim, there would have been no need for it to have addressed the merits of the plaintiff's claim. See *State* v. *Jones*, 98 Conn. App. 695, 696, 911 A.2d 353 (2006) ("[b]ecause we conclude that the defendant's claim is barred by the doctrine of res judicata, we do not review the merits of his claim"), cert. denied, 281 Conn. 916, 917 A.2d 1000 (2007). Furthermore, in the context of the whole opinion, it is reasonable to interpret the court's discussion of estoppel as a comment on the plaintiff's credibility rather than an application of the judicial doctrine of estoppel. In fact, the court acknowledged that it considered the plaintiff's conflicting position in his divorce case when it assessed his credibility.[6] Accordingly, after reviewing the court's memorandum of decision in its entirety, we conclude that the court did not apply any form of estoppel to preclude the plaintiff from asserting that the noncompete provision was unenforceable. For that reason, we find no error.

III

The plaintiff also claims that the court improperly found that Cirone had not waived enforcement of the

legal test to apply to the noncompete provision at issue in the present case, which cannot properly be considered either a liquidated damages clause or an unenforceable penalty.

[6] The court stated: "Although it is not necessary to the court's final determination in this case, when evaluating [the plaintiff's] credibility, the court also takes into consideration [his] calculation of the value of his partnership interest in the divorce case. The court finds it highly suspect that [he] would value his partnership interest in the dissolution of marriage action in 2013 or 2014 as $354,000, and then attempt to value it at $1,300,000 in this case less than a year later."

noncompete provision in the partnership agreement. We disagree.

"Waiver is the intentional relinquishment of a known right. . . . Intention to relinquish [must] appear, but acts and conduct inconsistent with intention [to assert a right] are sufficient. . . . Thus, [w]aiver does not have to be express, but may consist of acts or conduct from which waiver may be implied. . . . In other words, waiver may be inferred from the circumstances if it is reasonable to do so. . . . Whether conduct constitutes a waiver is a question of fact. . . . Our review therefore is limited to whether the judgment is clearly erroneous or contrary to law." (Internal quotation marks omitted.) *R.S. Silver Enterprises, Inc.* v. *Pascarella*, 163 Conn. App. 1, 32, 134 A.3d 662, cert. denied, 320 Conn. 929, 133 A.3d 460 (2016). "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." (Internal quotation marks omitted.) *Coppola Construction Co.* v. *Hoffman Enterprises Ltd. Partnership*, 157 Conn. App. 139, 181, 117 A.3d 876, certs. denied, 318 Conn. 902, 122 A.3d 631, 123 A.3d 882 (2015).

The plaintiff has failed to establish that the court's factual finding was clearly erroneous. The plaintiff directs this court to portions of the April 26, 2013 conversation that he believes support his position that Cirone waived the noncompete provision. The plaintiff contends that Cirone expressed his desire not to hurt him, and Cirone acknowledged that the clients would decide to go with whomever they wanted. He further contends that Cirone encouraged him to take his clients, and that Cirone never expressed an intention to enforce the noncompete provision until the plaintiff commenced this action. According to the plaintiff, Cirone's

conduct and representations caused him to believe that he "could rest assured that his book of business would be permitted to leave with him, unassailed by [the partnership's] enforcement of the noncompete [provision]."

The court, however, found that Cirone, as managing partner of the partnership, did not "waive the firm's rights to receive amounts due pursuant to the noncompete provision." Additionally, the court found that "[a]t no point during the April 26 meeting or later in their e-mail correspondence did [the plaintiff] deny the existence or enforceability of the partnership agreement." Our review of the record supports the court's findings. Specifically, during the recorded conversation on April 26, 2013, Cirone asked the plaintiff if he had a copy of the partnership agreement. The plaintiff replied: "I have it. I know it in and out." Cirone confirmed: "[T]hat's what we're gonna follow." Then, again, at the end of that conversation, Cirone stated: "[W]e are not gonna try to stop any client of the firm from leaving with you. We've only gotta discuss how it's gonna work in [the] confines [of] the partnership agreement."

Despite Cirone's statements expressing his desire to avoid hurting the plaintiff, Cirone repeatedly asserted that the partnership agreement controlled the plaintiff's departure. Moreover, all of Cirone's representations are consistent with the terms of the noncompete provision in the partnership agreement.[7] The noncompete provision does not prohibit a departing partner from continuing to practice accounting or from servicing former

[7] The noncompete provision is contained in Section III F 3 of the partnership agreement. It provides in relevant part: "If during the (5) five year period after any retirement/withdrawal/termination [of a partner] he provides any accounting, auditing, tax or consulting services for a client that was represented by the [partnership] during the two (2) year period prior to his termination, he will pay to [the partnership] as compensation for the goodwill and know-how of [the partnership] relating to such client an amount equal to 150% of the total average annual fees billed to such client or to any related persons or entities by the [partnership] during the two (2) year period prior

clients of the partnership. The provision requires that a former partner compensate the partnership for any clients that he or she takes from the partnership. Thus, the evidence adduced at trial supports the court's finding that Cirone did not waive the partnership's rights pursuant to the partnership agreement. Because there is evidence in the record to support the court's finding, we conclude that the court's finding was not clearly erroneous.[8]

IV

The plaintiff's final claim is that the trial court improperly concluded that the noncompete provision was enforceable. Specifically, he argues that the noncompete provision is a restraint of trade and, accordingly, the court improperly failed to evaluate the reasonableness of the restraint. The defendants argue that the noncompete provision is not a restraint of trade and thus not subject to a reasonableness analysis. Instead, the defendants claim that the noncompete provision is, in reality, an inaptly titled liquidated damages clause. We agree with the plaintiff.[9]

to such termination. Such amount shall be payable to the partnership in equal monthly installments over the 36 month period commencing with the date of termination. At the option of [the partnership], such installments may be recovered by the [partnership] by set-off against any payments that may be due to such [p]artner by the [partnership]. . . . Any [p]artner who violates the noncompete provisions of this section is not entitled to any [Deferred Income Amount] payments. . . ." (Emphasis omitted.)

[8] The plaintiff also argues that Cirone's "representation that the noncompete [provision] would be waived induced substantial reliance by the plaintiff that would result in severe detriment if the noncompete's enforcement is not estopped." As noted previously, the trial court found that Cirone made no such representation. Consequently, there was no representation of waiver on which the plaintiff could rely. Accordingly, we reject the plaintiff's equitable estoppel argument.

[9] Because we agree with the plaintiff that the trial court erred in failing to evaluate the reasonableness of the noncompete provision, we do not address his argument that the noncompete provision is an unenforceable penalty.

Our review of the plaintiff's claim requires us to construe the contract. "[W]ith any issue of contract interpretation, we begin with the language of the contract. . . . Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact . . . [w]here there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law." (Citation omitted; internal quotation marks omitted.) *Financial Freedom Acquisition, LLC* v. *Griffin*, 176 Conn. App. 314, 338–39, 170 A.3d 41, cert. denied, 327 Conn. 931, 171 A.3d 454 (2017). The relevant language in the partnership agreement is plain and unambiguous and, therefore, our review is plenary.

The language of the noncompete provision cannot be read as a liquidated damages clause. "A provision for liquidated damages . . . is one the real purpose of which is to fix fair compensation to the injured party for a breach of contract." (Internal quotation marks omitted.) *Tsiropoulos* v. *Radigan*, 163 Conn. App. 122, 127-28, 133 A.3d 898 (2016). In the present case, the noncompete provision does not require that the plaintiff breach the partnership agreement before the partnership is entitled to compensation for work that the plaintiff performs for the partnership's former clients. In fact, under the terms of the partnership agreement, the plaintiff had every right to provide services to former clients of the partnership; he just had to compensate the partnership if he did so. Because the plaintiff's actions do not constitute a breach of contract, the noncompete provision cannot be viewed as a liquidated damages clause designed to fix compensation for a breach of contract.

Instead, under controlling law, the noncompete provision is exactly that because it imposes a financial disincentive on the plaintiff to deter competition with the

partnership. In the present case, the noncompete provision[10] in the partnership agreement requires a former partner to forfeit his Deferred Income Amount[11] if the partner provides any accounting, auditing, tax or consulting services for one of the partnership's former clients during the first five years following his departure from the partnership. Additionally, the former partner is required to pay 150 percent of the average annual fees that the partnership billed to the former client during the previous two years prior to the partner's departure. The provision does not prohibit a former partner from providing accounting services to former clients of the partnership; rather, it requires that the former partner compensate the partnership. Simply put, a partner may leave the partnership and engage in the business of accounting subject to certain economic disincentives.

Our interpretation of the noncompete provision at issue in this case is controlled by our Supreme Court's decision in *Deming* v. *Nationwide Mutual Ins. Co.*, 279 Conn. 745, 761, 905 A.2d 623 (2006). In *Deming*, the court considered whether a forfeiture provision in an employment contract was, in effect, a covenant not to compete. Id., 760–68. The provision provided that if an employee engaged in certain competitive conduct, following the cancellation of the contract, the employee would forfeit any deferred compensation that had been earned during the employee's employment. Id., 750. The court recognized that "the contract does not require an employee's express promise not to compete after

[10] See footnote 7 of this opinion for the relevant portion of the noncompete provision.

[11] Section III F 2 (b) of the partnership agreement provides that Deferred Income Amount "will equal the Goodwill value for the most recently completed fiscal year computed by taking two (2) times the average of the partner's past three years' total annual compensation (per IRS form K1)." (Emphasis omitted.)

termination of employment; instead, it requires a forfeiture of the employee's benefits if he or she engages in competition after termination of employment." Id., 761. Nevertheless, the court concluded that the provision needed to be analyzed under the reasonableness test for covenants not to compete. Id., 767. The court reasoned that "[p]ermitting a forfeiture clause that is not subject to a reasonableness assessment is essentially no different than enforcing a covenant not to compete, which, not properly circumscribed, is the classic example of a direct restraint." Id., 768.

The facts of this case are also remarkably similar to those in *Holloway* v. *Faw, Casson & Co.*, 319 Md. 324, 572 A.2d 510 (1990), which our Supreme Court cited with approval in *Deming*. See *Deming* v. *Nationwide Mutual Ins. Co.*, supra, 279 Conn. 767. In *Holloway*, the plaintiff, a former partner of an accounting firm, challenged provisions in the partnership agreement that required him to forfeit certain deferred income payments and pay the partnership "100% of the prior year's fees for any clients" for whom the departing partner continued to provide accounting services. *Holloway* v. *Faw Casson & Co.*, supra, 319 Md. 328. The Maryland Supreme Court held that "[t]he covenants in [the partnership agreement] are sufficiently similar to covenants not to compete to invoke, in general, the analysis applied under the law bearing on covenants not to compete." Id., 333.

In the present case, the noncompete provision does not differ meaningfully from a prohibitive covenant not to compete. Just as in *Deming* and *Holloway*, the partnership agreement imposes financial disincentives, including a forfeiture of the former partner's deferred income amount, instead of requiring a partner's express promise not to compete. The financial disincentives for competition discourage a former partner from continuing to provide accounting services to the partnership's

clients. Thus, although the provision at issue is an indirect restraint on competition, much like the forfeiture provision at issue in *Deming*, it accomplishes the same result as a covenant not to compete: a restraint of trade. *Deming* v. *Nationwide Mutual Ins. Co.*, supra, 279 Conn. 767. "[A] covenant not to compete and a forfeiture upon competing are but alternative approaches to accomplish the same practical result. . . . When pruned to their quintessence, they tend to accomplish the same results and should be treated accordingly." (Internal quotation marks omitted.) Id., 768–69. Consequently, the enforceability of the noncompete provision must be judged by the same standard used for covenants not to compete.

"A covenant that restricts the activities of an employee following the termination of his employment is valid and enforceable if the restraint is reasonable." *New Haven Tobacco Co.* v. *Perrelli*, 18 Conn. App. 531, 533, 559 A.2d 715, cert. denied, 212 Conn. 809, 564 A.2d 1071 (1989). Whether a restraint is reasonable "depends upon the competing needs of the parties as well as the needs of the public. These needs include: (1) the employer's need to protect legitimate business interests, such as trade secrets and customer lists; (2) the employee's need to earn a living; and (3) the public's need to secure the employee's presence in the labor pool." *Deming* v. *Nationwide Mutual Ins. Co.*, supra, 279 Conn. 761.

In his posttrial brief, the plaintiff argued that the noncompete provision is unenforceable because it is unreasonable as a matter of law. He claimed that enforcement would "eliminate [his] ability to pursue his occupation in an economically tenable way." The court, however, did not consider the reasonableness of the restraint imposed by the noncompete provision.

Instead, the court concluded that the noncompete provision was enforceable as a liquidated damages provision. For the reasons set forth previously in this opinion, we conclude that the court incorrectly treated the noncompete provision as a liquidated damages clause and improperly failed to consider the reasonableness of the restraint imposed by the noncompete provision.

The judgment is reversed only as to the award of damages pursuant to count two of the defendants' counterclaim and the case is remanded for further proceedings limited to determining whether the noncompete provision in the partnership agreement is reasonable under applicable law; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

BAYVIEW LOAN SERVICING, LLC *v.* PARK CITY SPORTS, LLC, ET AL.
(AC 38654)

Lavine, Bright and Pellegrino, Js.

Syllabus

The plaintiff loan servicing company sought to foreclose a mortgage on certain real property owned by the defendant P Co., which, through its manager, the defendant C, had executed a promissory note payable to I Co. The note was secured by a mortgage on the subject property, and C, in his individual capacity, executed a guarantee agreement for the note in favor of I Co. Thereafter, I Co. assigned the mortgage to the plaintiff, and, when P Co. failed to make its monthly payments pursuant to the note, the plaintiff commenced this foreclosure action. After the defendants filed an answer, the plaintiff filed a motion for summary judgment as to liability and an affidavit in support thereof. In response, the defendants filed an amended answer and special defenses and an objection to the plaintiff's motion. In their supporting memorandum of law, the defendants challenged the plaintiff's standing to bring the action on the ground that it had failed to establish the chain of endorsements of the original note payable to I Co. The defendants also submitted an affidavit from C but did not submit any documentary evidence to support

C's statements therein. Following a hearing, the plaintiff filed a supplemental affidavit and accompanying exhibits establishing the chain of endorsements of the note. The defendants, in turn, filed a supplemental memorandum of law in opposition to the motion for summary judgment but did not submit any counteraffidavits or accompanying documentation. The trial court granted the motion for summary judgment, concluding that the plaintiff had established a prima facie case for its foreclosure action and that the defendants had failed to establish that there were any issues of material fact concerning their special defenses. The court also determined that there was an issue of fact as to the accuracy of the plaintiff's federal loss affidavit but that the plaintiff could correct the error prior to obtaining a judgment of strict foreclosure. The plaintiff then filed a new federal loss affidavit that specifically asserted that the loan was ineligible for any loss mitigation programs. Thereafter, the plaintiff filed a motion for a judgment of strict foreclosure. The court granted the motion and rendered a judgment of strict foreclosure, from which the defendants appealed to this court. *Held*:

1. The defendants' claim that the trial court lacked subject matter jurisdiction over the foreclosure action because the plaintiff's federal loss affidavit failed to comply with a certain standing order of the Superior Court was unavailing; even if the federal loss affidavit did not comply with the subject standing order, the trial court did not lack subject matter jurisdiction over the action, as standing orders are not constitutionally or legislatively created, and, therefore, a failure to comply with them does not implicate the court's subject matter jurisdiction.
2. The defendants could not prevail on their claim that the trial court erred in granting the plaintiff's motion for summary judgment, as they failed to meet their burden of presenting evidence that demonstrated the existence of a genuine issue of material fact: the defendants failed to recite specific facts or submit documentary evidence as to their claims that there were issues of fact regarding the plaintiff's alleged misapplication or miscalculation of certain payments related to the loan, when P Co. defaulted on the loan, the propriety of the default notice and whether the note was properly endorsed and assigned to the plaintiff, and any issue of fact regarding the validity of the original federal loss affidavit was immaterial because prior to filing its motion for a judgment of strict foreclosure, the plaintiff filed a new federal loss affidavit asserting that the loan was ineligible for any loss mitigation programs, and the court accepted the new affidavit prior to rendering its judgment.
3. The trial court properly concluded that the defendants' special defenses that the loan was not in default and that the plaintiff's conduct violated the Connecticut Unfair Trade Practices Act (§ 42-110a et seq.) were legally insufficient; the special defenses were dependent on the defendants' claim that the plaintiff had incorrectly applied certain escrow payments or miscalculated the payments that were due pursuant to the

note, and the defendants failed to provide the trial court with any evidence related to the plaintiff's alleged misapplication or miscalculation of their payments.

4. The record was inadequate to review the defendants' claim that the trial court abused its discretion in denying C's petition to participate in the foreclosure mediation program; the trial court summarily denied C's petition, and the defendants did not file a motion for articulation to ascertain the basis of the court's decision and failed to request a transcript of the hearing on the petition, and, therefore, any decision made by this court concerning the claim would be entirely speculative.

Submitted on briefs January 9—officially released April 10, 2018

Procedural History

Action to foreclose a mortgage on certain of the named defendant's real property, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the defendant William McCarthy et al. were defaulted for failure to appear and the defendant Fairfield County Bank was defaulted for failure to plead; thereafter, the court, *Bellis, J.*, denied the petition to participate in the foreclosure mediation program filed by the defendant Robert P. Carter; subsequently, the court, *Hon. Alfred J. Jennings, Jr.*, judge trial referee, granted the plaintiff's motion for summary judgment as to liability; thereafter, the court, *Hon. Richard P. Gilardi*, judge trial referee, granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon, from which the named defendant et al. appealed to this court. *Affirmed.*

Charles C. Hallas, for the appellants (named defendant et al.).

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

Opinion

BRIGHT, J. The defendants, Park City Sports, LLC (Park City) and Robert P. Carter,[1] appeal from the trial

[1] The complaint also named as defendants The Lamar Companies, successor in interest to Murphy, Inc., Fairfield County Bank, Stuart Rosenberg, William McCarthy, and Interbay Funding, LLC. In June, 2014, the trial court clerk granted the plaintiff's motion for default as to McCarthy and Interbay Funding, LLC, for their failure to file an appearance and as to Fairfield

court's judgment of strict foreclosure rendered in favor of the plaintiff, Bayview Loan Servicing, LLC. On appeal, the defendants claim that the trial court (1) lacked subject matter jurisdiction over the foreclosure action due to the plaintiff's failure to comply with a standing order of the Superior Court, (2) improperly granted the plaintiff's motion for summary judgment as to liability, (3) improperly determined that the defendants' special defenses were legally insufficient, and (4) improperly denied Carter's petition to participate in the foreclosure mediation program. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. On August 13, 2004, Park City, through its manager, Carter, executed a promissory note, pursuant to which it promised to pay to the order of InterBay Funding, LLC (InterBay), the principal sum of $390,000. The note was secured by a mortgage on 1382-1386 Park Avenue in Bridgeport in favor of InterBay. There are four units in the building located on the property: a four bedroom residential apartment and three commercial storefronts. Carter, in his individual capacity, executed a guarantee agreement for the note in favor of InterBay. Thereafter, InterBay assigned the mortgage on the subject property, and endorsed the note, to the plaintiff.

Beginning on December 1, 2012, and every month thereafter, Park City failed to make monthly payments due pursuant to the note. As a result, the plaintiff commenced this foreclosure action in November, 2013. The defendants filed an answer in April, 2014. On January 21, 2015, the plaintiff filed the operative revised complaint seeking foreclosure of the mortgage on the property.

County Bank for its failure to plead. The Lamar Companies and Rosenberg filed answers to the complaint but did not contest the plaintiff's motions for summary judgment and for a judgment of strict foreclosure. Any reference to the defendants in this opinion is solely to Park City and Carter.

On March 24, 2015, the plaintiff moved for summary judgment as to liability only. Subsequently, on April 15, 2015, the defendants filed an amended answer and special defenses, alleging, inter alia, that the plaintiff had (1) failed to credit the defendants' payments properly, (2) submitted an inaccurate affidavit regarding the defendants' eligibility for federal loss mitigation programs (federal loss affidavit), and (3) violated the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.[2] On that same day, the defendants filed an objection to the motion for summary judgment and an accompanying memorandum of law.

In their memorandum of law in opposition to summary judgment, the defendants challenged whether the plaintiff had standing to bring this action. The defendants claimed that the plaintiff had failed to establish the chain of endorsements of the note that was made payable to the original lender, InterBay. In support of their opposition, the defendants submitted Carter's affidavit that essentially recited the allegations in their special defenses, but they did not submit any documentary evidence to support the conclusory statements in Carter's affidavit. The affidavit also stated that the subject property is Carter's principal residence, which the plaintiff, in its federal loss affidavit, had denied. Following a hearing on April 20, 2015, the plaintiff filed a supplemental affidavit and accompanying exhibits establishing the chain of endorsements for the note. In their supplemental memorandum of law in opposition to summary judgment, the defendants asserted various

[2] Additionally, the defendants alleged that the plaintiff had "failed to mitigate the damages of the defendants in connection with this action. . . . Such damages have increased tremendously due to the negligent actions of the plaintiff in not properly crediting all amounts paid by [the] defendants." Although the defendants listed this allegation as a second special defense, it appears to allege, for a second time, that the plaintiff failed to credit the defendants' payments properly.

issues with regard to the plaintiff's supplemental affidavit and accompanying exhibits, but they did not submit any counteraffidavits or accompanying documentation in support of their claims.

On September 23, 2015, the trial court, *Hon. Alfred J. Jennings, Jr.*, judge trial referee, granted the motion for summary judgment. In its order, the court concluded that the plaintiff had established a prima facie case for its foreclosure action. Specifically, the court found that the plaintiff's affidavit and accompanying exhibits established that the plaintiff was the owner of the note and mortgage at the time that the action was commenced, that Park City had defaulted on the note beginning on December 1, 2012, and that the plaintiff had sent the required notice of default before commencing the foreclosure action. The court further concluded that the defendants failed to establish that there were any issues of material fact concerning their special defenses. Although the court determined that there was an issue of fact as to the accuracy of the plaintiff's federal loss affidavit because the affidavit provided that the subject property is not "owner-occupied," the court concluded that the plaintiff could correct this error prior to obtaining a judgment of strict foreclosure.

Following the court's order granting the motion for summary judgment, the plaintiff filed a new federal loss affidavit on September 30, 2015. On October 28, 2015, the plaintiff filed a motion for a judgment of strict foreclosure, which the court, *Hon. Richard P. Gilardi*, judge trial referee, granted on November 16, 2015. The court rendered a judgment of strict foreclosure with the law days commencing on March 15, 2016. This appeal followed.[3]

[3] On December 15, 2015, the plaintiff filed a motion to terminate the appellate stay, which the trial court granted on May 23, 2016. The defendants filed a motion for review of the trial court's order terminating the appellate stay, which this court granted but denied the relief requested therein. Approximately one year later, the plaintiff filed a motion to open and reset the law

I

The defendants claim that the court lacked subject matter jurisdiction over the plaintiff's foreclosure action due to the plaintiff's alleged failure to comply with the standing order of the Superior Court that required that the plaintiff file a fully executed copy of the Judicial Branch form entitled "AFFIDAVIT Federal Loss Mitigation Programs," form JD-CL-114, with its foreclosure complaint.[4] See Mortgage Foreclosure Standing Order Federal Loss Mitigation Programs, form JD-CV-117. We disagree.

"Although the term is sometimes loosely used, 'jurisdiction' in proper usage is the power in a court to hear

day on August 18, 2017, which the trial court granted on September 25, 2017, and it reset the law day to November 28, 2017, with all prior orders regarding the judgment remaining in effect. On October 12, 2017, after briefs had been submitted to this court, the defendants filed an amended appeal to challenge the trial court's September 25, 2017 order resetting the law day. Neither the plaintiff nor the defendants filed a request for supplemental briefing. Accordingly, the defendants' claims related to the judgment rendered on September 25, 2017, are deemed abandoned.

On October 13, 2017, the plaintiff filed a motion to dismiss the amended appeal and a motion to terminate the appellate stay and any future appellate stays. The trial court granted the plaintiff's motion to terminate the stay on November 7, 2017, thereby eliminating any future appellate stays, and the defendants filed a motion for review of that decision on November 24, 2017. On November 15, 2017, this court denied the plaintiff's motion to dismiss the amended appeal. On December 6, 2017, this court granted review, but denied the relief requested in the defendants' November 24, 2017 motion for review. Accordingly, there is currently no appellate stay in effect, and, therefore, there is no need for the resetting of the law day upon our resolution of this appeal. As of April 4, 2018, the law day is set for April 24, 2018.

[4] Judicial Branch form entitled Mortgage Foreclosure Standing Order Federal Loss Mitigation Programs, form JD-CV-117, provides in relevant part: "3. All mortgage foreclosure complaints filed in the Superior Court on and after September 1, 2010, shall be accompanied by a fully executed AFFIDAVIT Federal Loss Mitigation Programs, form JD-CL-114. . . . 5. If the plaintiff does not comply with the requirement to file a fully executed AFFIDAVIT Federal Loss Mitigation Programs . . . under this order, a motion for default or motion for judgment filed by the plaintiff may not be granted until the affidavit is filed or upon order of the court." (Emphasis omitted.)

and determine the cause of action presented to it. . . . It is axiomatic that [a court's] jurisdiction is derived from the constitutional or statutory provisions by which it is created, and can be acquired and exercised only in the manner prescribed. *Thus, the determination of the existence and extent of* [*a court's*] *jurisdiction depends upon the terms of the statutory or constitutional provisions in which it has its source*." (Citation omitted; emphasis altered; internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Cornelius*, 170 Conn. App. 104, 115, 154 A.3d 79, cert. denied, 325 Conn. 922, 159 A.3d 1171 (2017). "[B]ecause [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary." (Internal quotation marks omitted.) *Housing Authority* v. *Rodriguez*, 178 Conn. App. 120, 126, 174 A.3d 844 (2017).

"The last page of the Practice Book pertaining to Superior Court Standing Orders explains: 'Standing Orders are provided on the Judicial Branch website for the convenience of the bench and bar. They are not adopted by the Superior Court judges and are not Practice Book rules.' Additionally, at the top of the form that sets forth the uniform standing orders, it is stated in bold type: 'Unless otherwise ordered by the Court, these are the Standing Orders for Foreclosures by Sale.' . . . One can infer from these published caveats that the uniform standing orders do not carry the weight of statutes or rules of practice, but, rather, that the court may exercise discretion in applying them." (Emphasis omitted; internal quotation marks omitted.) *Norwich* v. *Norwich Harborview Corp.*, 156 Conn. App. 45, 52, 111 A.3d 956 (2015).

The defendants claim that the plaintiff incorrectly indicated on the federal loss affidavit that the loan is ineligible for review under the federal programs because "[t]he property is not owner-occupied, is

vacant, is condemned, and/or has more than four units." The plaintiff maintains that the owner of the subject property is Park City, and, therefore, the fact that Carter resides at the property does not mean that it is "owner-occupied." The plaintiff further argues that even if the original federal loss affidavit was incorrect, a new affidavit was filed on September 30, 2015, prior to the rendering of the judgment of strict foreclosure on October 28, 2015. Our resolution of the defendants' claim does not require us to consider whether the plaintiff's federal loss affidavit was accurate because, even assuming that the plaintiff's federal loss affidavit did not comply with the standing order of the Superior Court, the defendants' jurisdictional claim fails.

First, the standing order specifically provides that if the plaintiff fails to comply with the order, "a motion for default or motion for judgment filed by the plaintiff *may* not be granted until the affidavit is filed *or upon order of the court*." (Emphasis added.) As was noted in *Norwich* v. *Norwich Harborview Corp.*, supra, 156 Conn. App. 52, one can infer from the "caveats that the uniform standing orders do not carry the weight of statutes or rules of practice . . . ."

Second, standing orders are not rules of practice, and, even if they were, they would not create a condition precedent to jurisdiction. See, e.g., *Novak* v. *Levin*, 287 Conn. 71, 79, 951 A.2d 514 (2008) ("[w]e repeatedly have held . . . that time periods prescribed by the rules of practice are fixed by a rule of this court . . . [and are] not a constitutionally or legislatively created condition precedent to the jurisdiction of this court" [internal quotation marks omitted]). Likewise, standing orders are not constitutionally or legislatively created, and, therefore, a failure to comply with them does not implicate the court's subject matter jurisdiction. See *Deutsche Bank National Trust Co.* v. *Cornelius*, supra, 170 Conn. App. 115 ("the determination of the existence

and extent of [a court's] jurisdiction depends upon the terms of the statutory or constitutional provisions in which it has its source" [emphasis omitted; internal quotation marks omitted]).

Accordingly, even if we assume that the plaintiff's federal loss affidavit did not comply with the standing order of the Superior Court, the trial court did not lack subject matter jurisdiction over this foreclosure action.

II

The defendants next claim that the trial court erred in granting the plaintiff's motion for summary judgment because there were genuine issues of material fact concerning: (1) payments sent to the plaintiff that were not applied properly; (2) when Park City defaulted on the loan and whether the plaintiff's notice of default was proper; (3) whether the note properly was assigned to the plaintiff; and (4) the validity of the plaintiff's federal loss affidavit. We are not persuaded.

We begin by setting forth the applicable standard of review and legal principles. "Appellate review of the trial court's decision to grant summary judgment is plenary. . . . [W]e must [therefore] decide whether [the trial court's] conclusions are legally and logically correct and find support in the facts that appear in the record." (Citation omitted; internal quotation marks omitted.) *McFarline* v. *Mickens*, 177 Conn. App. 83, 90, 173 A.3d 417 (2017), cert. denied, 327 Conn. 997, A.3d (2018).

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

result of the case. . . . The test is whether a party would be entitled to a directed verdict on the same facts. . . . Once the moving party has presented evidence in support of the motion for summary judgment, the opposing party must present evidence that demonstrates the existence of some disputed factual issue . . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]. . . . 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." (Internal quotation marks omitted.) *Diamond 67, LLC* v. *Oatis*, 167 Conn. App. 659, 675, 144 A.3d 1055, cert. denied, 323 Conn. 927, 150 A.3d 228 (2016).

"In order to establish a prima facie case in a mortgage foreclosure action, the plaintiff must prove by a preponderance of the evidence that it is the owner of the note and mortgage, that the defendant mortgagor has defaulted on the note and that any conditions precedent to foreclosure, as established by the note and mortgage, have been satisfied. . . . Thus, a court may properly grant summary judgment as to liability in a foreclosure action if the complaint and supporting affidavits establish an undisputed prima facie case and the defendant fails to assert any legally sufficient special defense." (Internal quotation marks omitted.) *21st Mortgage Corp.* v. *Schumacher*, 171 Conn. App. 470, 484, 157 A.3d 714, cert. denied, 325 Conn. 923, 159 A.3d 1171 (2017).

In the present case, the plaintiff, through the submission of affidavits and supporting documentary evidence, established that it is the holder of the note upon which Park City defaulted and the plaintiff foreclosed, and it submitted to the court an affidavit that included, and incorporated by reference, copies of the note, mortgage and assignment of the mortgage. The plaintiff, therefore, established its prima facie case. Accordingly, the defendants then were required to present evidence that demonstrated the existence of some disputed factual issue. We conclude, as did the trial court, that the defendants failed to meet their burden. We address each of the defendants' claims seriatim.

A

First, the defendants' claim that there are factual issues concerning the plaintiff's misapplication of payments is unsupported by the record. The defendants failed to produce competent evidence that would support their vague allegation in Carter's affidavit that "the plaintiff has miscalculated and overcharged me escrow amounts which were too high and which were paid by the defendant borrowers thereby preventing them from making the proper lower payments under this loan which would have prevented default on the part of the defendants . . . ." In particular, the defendants did not submit documentary evidence of *any* payments, nor did they specify how the "proper lower payments" should have been calculated. As a result, the defendants failed to demonstrate the existence of any genuine issue of material fact with regard to the miscalculation and/or misapplication of payments by the plaintiff.

B

Second, the defendants' claim that there are factual issues concerning when Park City defaulted on the loan and whether the plaintiff's notice of default was proper is also unsupported by the record. The defendants claim

that there are "issues concerning the precise date of the alleged default by the defendants and whether the plaintiff issued a proper notice of the default setting forth the specific date of default and the amount of default . . . ." Nevertheless, the defendants did not address the propriety of the notice of default or the accuracy of the specific date of default. In addition, aside from the vague allegation in Carter's affidavit regarding the miscalculation of escrow payments, the defendants did not address the accuracy of the amount that was claimed to be in default in the default notice. Simply put, there is nothing in the defendants' memorandum of law in opposition to summary judgment to demonstrate an issue of fact with regard to the propriety of the plaintiff's default notice.

C

Third, the defendants claim that there are "issues concerning the limited power of attorney used to endorse the mortgage note and assignment of the mortgage" to the plaintiff. Again, the defendants failed to recite specific facts, or submit documentary evidence, to demonstrate that there is an issue of fact with regard to the endorsements of the note or the assignment of the mortgage. Although the defendants made claims regarding the limited power of attorney in their supplemental memorandum of law in opposition to summary judgment, they did not attach any accompanying counteraffidavits that recited specific facts to rebut the plaintiff's affidavit and documentary evidence regarding the assignment of the note and mortgage. See *GMAC Mortgage, LLC* v. *Ford*, 144 Conn. App. 165, 178, 73 A.3d 742 (2013) ("[i]t is axiomatic that in order to successfully oppose a motion for summary judgment by raising a genuine issue of material fact, the opposing party cannot rely solely on allegations that contradict those offered by the moving party, whether raised at oral argument or in written pleadings; such allegations must

be supported by counteraffidavits or other documentary submissions that controvert the evidence offered in support of summary judgment"). After concluding that the plaintiff had "supplied evidence of the authority for the signature in the form of a copy of the Limited Power of Attorney and a Supporting Affidavit," the court stated that the defendants had "submitted no contrary evidence." Accordingly, the trial court properly concluded that there was no genuine issue of material fact regarding the endorsement of the note or assignment of the mortgage.

D

Finally, the defendants' claim that there are "issues concerning the validity of the [federal loss affidavit] filed at the commencement of this action" is without merit. The court concluded that any issue of fact with regard to the plaintiff's federal loss affidavit did not need to be resolved prior to the granting of the motion for summary judgment as to liability. We similarly conclude that any issue regarding the validity of that affidavit is not an issue of material fact. Prior to filing the motion for a judgment of strict foreclosure, the plaintiff filed a new federal loss affidavit asserting that the loan was ineligible for any loss mitigation programs. The court accepted the new federal loss affidavit prior to rendering judgment. Therefore, whether the original federal loss affidavit was deficient is immaterial.

For those reasons, we conclude that the court did not err in granting the plaintiff's motion for summary judgment, after concluding that there was no genuine issue of material fact.

III

The defendants next claim that the trial court erred in determining that their special defenses were legally insufficient. Specifically, the defendants claim that they

raised two legally sufficient special defenses: (1) that the loan was not in default because of "the plaintiff's misapplication of escrow and other payments made by [the defendants] in connection with this mortgage," and (2) that the plaintiff's conduct violated CUTPA. We disagree.

The defendants' special defenses are dependent upon their claim that the plaintiff incorrectly applied escrow payments or miscalculated the payments that were due pursuant to the note. The court concluded that the defendants failed to establish that the plaintiff misapplied or miscalculated payments due under the loan, and, therefore, their special defense related to a violation of CUTPA failed. Although we agree with the defendants that a claim that the loan is not in default is a valid special defense, we conclude that the court properly found that the defendants failed to establish a genuine issue of material fact as to their special defenses. As previously discussed in this opinion, the defendants failed to provide the court with any evidence related to the plaintiff's alleged misapplication or miscalculation of their payments. The court, therefore, properly concluded that the defendants had failed to establish a genuine issue of material fact as to their special defenses. Accordingly, the court properly rejected the defendants' special defenses.[5]

[5] Additionally, subsequent to the trial court's judgment in the present case, this court held that a CUTPA violation may not be asserted as a special defense in a foreclosure action. See *Bank of America, N.A.* v. *Aubut*, 167 Conn. App. 347, 374, 143 A.3d 638 (2016) ("[A] special defense operates as a shield, to defeat a cause of action, and not as a sword, to seek a judicial remedy for a wrong. Against this backdrop, we readily conclude that a CUTPA violation may not be asserted as a special defense. In reaching this conclusion, we are mindful that, by its express terms, CUTPA provides a cause of action for its violation, but it does not expressly provide a defense by invalidating, or otherwise rendering unenforceable, agreements that are the product of unfair trade practices.").

IV

The defendants' final claim is that the court improperly denied Carter's petition to participate in the foreclosure mediation program as an aggrieved person. We conclude that the defendants' claim is unreviewable.[6]

"This court reviews mortgage foreclosure appeals under the abuse of discretion standard. . . . A foreclosure action is an equitable proceeding. . . . The determination of what equity requires is a matter for the discretion of the trial court. . . . In determining whether the trial court has abused its discretion, we must make every reasonable presumption in favor of the correctness of its action. . . . Our review of a trial court's exercise of the legal discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did." (Internal quotation marks omitted.) *U.S. Bank, N.A.* v. *Morawska*, 165 Conn. App. 421, 425, 139 A.3d 747 (2016).

[6] In the final paragraph of their appellate brief, the defendants argue that Carter was "denied his due process rights to a hearing under the constitutions of the United States and state of Connecticut, and that he should be granted at the minimum a new trial on all aspects of this case, and a hearing on his right to federal loss mitigation options." To the extent that the defendants have framed this claim as a constitutional claim, we conclude that it is inadequately briefed.

"It is well established that we are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [When] a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned." (Internal quotation marks omitted.) *Darin* v. *Cais*, 161 Conn. App. 475, 483, 129 A.3d 716 (2015).

The defendants have failed to address why this *commercial* loan would qualify for a federal loss mitigation program, let alone why Carter, who is neither the mortgagor nor the owner of the property, has a "right" to federal loss mitigation programs. In fact, the defendants failed to cite even to the state or federal constitution. Accordingly, we decline to review the defendants' due process claim.

"It is well established that the appellant bears the burden of providing an appellate court with an adequate record for review. . . . It is, therefore, the responsibility of the appellant to move for an articulation or rectification of the record where the trial court has failed to state the basis of a decision . . . . Without an adequate record, [w]e . . . are left to surmise or speculate as to the existence of a factual predicate for the trial court's rulings. Our role is not to guess at possibilities, but to review claims based on a complete factual record developed by the trial court. . . . Without the necessary factual and legal conclusions furnished by the trial court, either on its own or in response to a proper motion for articulation, any decision made by us . . . would be entirely speculative." (Internal quotation marks omitted.) *Jezierny* v. *Jezierny*, 99 Conn. App. 158, 160–61, 912 A.2d 1127 (2007).

In the present case, the defendants argue that Carter "met all of the requirements set forth for mediation qualification" and that he "could have explored several loss mitigation programs" in mediation. Carter, who is not the mortgagor or the borrower, filed his petition to participate in mediation on April 15, 2014, approximately four months after the return date for the foreclosure action, November 26, 2013. See General Statutes § 49-31*l* (b) (2) ("a *mortgagor* may request foreclosure mediation by submitting the foreclosure mediation request form to the court and filing an appearance *not more than fifteen days after the return date for the foreclosure action*" [emphasis added]). The court, *Bellis, J.*, heard oral argument on May 13, 2014. The court denied the petition, and the defendants did not move to reargue that decision. The defendants also did not file a motion for articulation to ascertain the basis of the court's decision, and they failed to request a transcript of that hearing. Accordingly, the record is inadequate for review and "any decision made by us

. . . would be entirely speculative.'' (Internal quotation marks omitted.) *Jezierny* v. *Jezierny*, supra, 99 Conn. App. 160–61. Therefore, we decline to review the defendants' claim that the court abused its discretion when it denied Carter's petition for inclusion in the foreclosure mediation program.

The judgment is affirmed.

In this opinion the other judges concurred.

NATIONSTAR MORTGAGE, LLC *v.* CLIFFORD W. MOLLO (AC 39320)

Lavine, Keller and Harper, Js.

Syllabus

The plaintiff, which had been assigned a note secured by a mortgage on certain real property owned by the defendant, commenced this action to foreclose that mortgage. The plaintiff filed a motion for summary judgment claiming that there were no genuine issues as to any material fact alleged in its complaint, and appended documentation that purported to set forth a prima facie case for foreclosure. Three days prior to oral argument on the motion for summary judgment, the defendant filed an answer, special defenses and a counterclaim, as well as an objection to the motion for summary judgment, which was supported by documentation and affidavits attesting to certain alleged fraudulent misrepresentations. The trial court overruled the defendant's objection and granted the plaintiff's motion for summary judgment as to liability only. Thereafter, the trial court rendered judgment of strict foreclosure, from which the defendant appealed to this court. *Held* that the trial court lacked authority to render summary judgment as to liability in favor of the plaintiff with respect to the factual or legal viability of the defendant's special defenses, as the issues relating to the special defenses remained outside the scope of the plaintiff's motion for summary judgment: the plaintiff's motion for summary judgment, which had been filed before the defendant filed his answer, special defenses and counterclaim, did not address the factual or legal issues raised therein, the only ground the plaintiff had raised in favor of summary judgment was limited to the facts alleged in its foreclosure complaint, its memorandum of law in support of summary judgment and the documentation appended to it shed no light on the validity of the defendant's special

defenses of fraud, unclean hands and equitable estoppel, and no argument or evidence had been presented refuting the factual allegations raised by the defendant's objection and supporting documentation, and for the plaintiff to have invoked the trial court's authority to render summary judgment as to liability in light of the special defenses raised by the defendant, it should have marked off the argument on the motion for summary judgment to enable it to file a new pleading that addressed the special defenses with an accompanying brief and competent evidence to establish their legal insufficiency or that no genuine issue of material fact existed; accordingly, the trial court acted in excess of its authority when it raised and considered, sua sponte, grounds for summary judgment not raised or briefed by the plaintiff, and because the trial court did not render a final judgment with respect to the defendant's counterclaim, this court lacked subject matter jurisdiction over and dismissed the portion of the appeal challenging the purported judgment on the counterclaim.

Argued January 11—officially released April 10, 2018

Procedural History

Action to foreclose a mortgage on certain of the defendant's real property, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the defendant filed a counterclaim; thereafter, the court, *Dunnell*, *J.*, granted the plaintiff's motion for summary judgment as to liability only; subsequently, the court, *Abrams*, *J.*, granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon, from which the defendant appealed to this court. *Reversed in part; appeal dismissed in part; further proceedings.*

Ridgely W. Brown, with whom, on the brief, was *Benjamin Gershberg*, for the appellant (defendant).

Shawn M. Masterson, for the appellee (plaintiff).

Opinion

KELLER, J. The defendant, Clifford W. Mollo, appeals from the judgment of strict foreclosure rendered by the trial court in favor of the plaintiff, Nationstar Mortgage, LLC. The defendant sets forth five claims that may be

distilled as follows: (1) the judgment of strict foreclosure was improper because the court lacked authority to render summary judgment as to liability on the note and mortgage, and (2) the trial court erroneously determined that his special defenses and counterclaim were legally insufficient and/or failed to establish any genuine issue of material fact. Specifically, the defendant's first claim is that procedurally, the court lacked authority to grant summary judgment because the plaintiff failed to file any motion or memorandum of law attacking the legal sufficiency of his special defenses or counterclaim and failed to submit any competent evidence to establish that there was no genuine issue of material fact with respect to the issues raised in them. With respect to the second claim, the defendant argues that the court's decision granting summary judgment as to liability in favor of the plaintiff was clearly erroneous in that he presented uncontroverted evidence that demonstrated that genuine issues of material fact exist with respect to his special defenses of unclean hands, fraudulent inducement and equitable estoppel, and his counterclaim under the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. In addition, the defendant claims that the plaintiff failed to demonstrate that any defect in pleading his unclean hands defense and the CUTPA counterclaim could not be cured by repleading. We agree with the defendant that the court lacked authority to grant the motion for summary judgment as to liability because the plaintiff failed to file any motion or memorandum of law attacking the legal sufficiency of the special defenses and failed to submit any competent evidence to establish that there was no genuine issue of material fact with respect to the issues raised in them. Accordingly, we reverse the judgment rendered by the trial court on the plaintiff's complaint.[1] In light of our conclusion that the court

[1] Because our resolution of the defendant's first claim is dispositive, we do not reach the merits of his other claims.

did not render a final judgment with respect to the defendant's counterclaim, we dismiss the portion of the appeal challenging the purported judgment on the counterclaim for lack of subject matter jurisdiction.[2] See General Statutes § 52-263; Practice Book § 61-4; *State* v. *Curcio*, 191 Conn. 27, 30, 463 A.2d 566 (1983).

The following facts and procedural history are relevant to our analysis. On June 26, 2007, the defendant executed a promissory note, entitled "Adjustable Rate Note," in favor of First National Bank of Arizona (FNB Arizona) in the original principal amount of $261,000. To secure his obligations under the note, the defendant granted a mortgage to Mortgage Electronic Registration Systems, Inc., as nominee for FNB Arizona in his real property known as 109 Lyon Road in Burlington. The mortgage was assigned by an assignment of mortgage to the plaintiff on February 15, 2013. This assignment of the mortgage was recorded on March 11, 2013, in Volume 321 at page 656 of the town of Burlington land records. The plaintiff claims that, on or about October 1, 2012, the defendant defaulted on his payment obligations under the note. On April 22, 2013, the plaintiff initiated the present action to foreclose its mortgage and alleged that it was the owner of the note and mortgage executed by the defendant on June 26, 2007, in

[2] Both parties on appeal argue whether the court erred in rendering summary judgment on the defendant's counterclaim. Our review of the record, however, reveals that no judgment was entered on the defendant's counterclaim. Accordingly, we only address the propriety of the court's granting summary judgment as to liability on the complaint and special defenses. We note that if the court had rendered summary judgment on the counterclaim, we would conclude it lacked authority to do so as no motion for summary judgment on the counterclaim had been filed by either party. See *Miller* v. *Bourgoin*, 28 Conn. App. 491, 499–500, 613 A.2d 292, cert. denied, 223 Conn. 927, 614 A.2d 825 (1992); *Cummings & Lockwood* v. *Gray*, 26 Conn. App. 293, 299–300, 600 A.2d 1040 (1991). "The lack of final judgment is a threshold question that implicates the subject matter jurisdiction of this court. . . . If there is no final judgment, we cannot reach the merits of an appeal." (Internal quotation marks omitted.) *Heyward* v. *Judicial Dept.*, 159 Conn. App. 794, 799, 124 A.3d 920 (2015).

favor of FNB Arizona.[3] The defendant filed a disclosure of defense on May 8, 2014, and a motion to strike on July 16, 2014.[4] In response to the motion to strike, on February 6, 2015, the plaintiff filed a request for leave to file an amended complaint and an amended complaint, to which the defendant did not object. See Practice Book § 10-60 (a) (3). On March 25, 2015, prior to the defendant's filing an answer to the amended complaint, the plaintiff filed its first motion for summary judgment, to which the defendant did not respond. On December 16, 2015, the plaintiff filed a second motion for summary judgment. On December 21, 2015, the defendant filed a request for an extension of time in which to respond to this motion.

In the operative motion for summary judgment and memorandum of law in support thereof, the plaintiff alleged that there were no genuine issues as to any material fact set forth in the *complaint*, as it is the current holder of the note and mortgage and the defendant is in default under the terms of the note and mortgage. Attached to the plaintiff's motion was the following documentation, which purported to set forth a prima facie case for foreclosure against the defendant:

[3] This appeal raises no challenges as to the plaintiff's standing to bring the foreclosure action. Although the defendant, in his counterclaim, alleged that the assignment of the mortgage to the plaintiff was fraudulent, during the hearing on the plaintiff's motion for summary judgment and his objection thereto, at the suggestion of the court, he agreed to narrow his objection to defenses involving the making, validity and enforcement of the note and mortgage.

[4] In his disclosure of defense, the defendant indicated that defenses would be made, "on the basis of the plaintiff's lack of standing and the lender being involved in equity skimming and predatory lending." The defendant also reserved the right to present additional defenses should such defenses be discovered at a future date. Subsequent to the plaintiff's filing of its amended complaint in February 2015, at no time prior to the filing of the defendant's answer, special defenses and counterclaim on March 11, 2016, did the plaintiff move for default against the defendant for failure to plead in response to its amended complaint. See Practice Book § 17-32.

copies of the note, the mortgage and its adjustable rate rider, the assignment of the mortgage to the plaintiff, and an affidavit from Tina Marie Braune, a document execution specialist employed by the plaintiff who averred that the defendant remains in default of the terms and obligations of the mortgage.

On March 14, 2016, the plaintiff's motion for summary judgment appeared on the short calendar for argument. Three days prior to this short calendar, on March 11, 2016, the defendant filed an answer, special defenses and counterclaim and at the same time, an objection to the motion for summary judgment. The objection was untimely, as Practice Book (2016) § 17-45 then required that "[a]ny adverse party shall at least five days before the date the motion is to be considered on the short calendar file opposing affidavits and other available documentary evidence. Affidavits, and other documentary proof not already a part of the file, shall be filed and served as are pleadings."[5]

In his answer, the defendant denied that the plaintiff was entitled to any relief and further denied that the plaintiff could satisfy its burden of proving that it was entitled to the equitable remedy of foreclosure. He also brought a counterclaim that alleged violations of CUTPA as a result of the use of a "bait and switch teaser note and option [adjustable rate mortgage] negative amortization loan designed to fail," a fraudulent assignment of the mortgage, "part of an ongoing fraudulent scheme of the plaintiff to 'robo-sign' mortgage loan documents," and illegal attempts by the plaintiff to

[5] Under the current rule of practice, the moving party shall not claim a motion for summary judgment to the short calendar fewer than forty-five days after the filing of the motion and the adverse party has forty-five days to file and serve a response. See Practice Book § 17-45 (b) and (c), amended June 24, 2016, to take effect January 1, 2017. Effectively, a nonmovant is now permitted to file an objection on the day before the short calendar argument, if argument is claimed for the forty-fifth day.

exclude the defendant from possession of the premises by use of force. He claimed an entitlement to a set off against any debt that is claimed to be due by the plaintiff in the amount of any damages arising from his CUTPA counterclaim. In addition, the defendant pleaded three special defenses: unclean hands, fraudulent inducement and equitable estoppel.

In objecting to the motion for summary judgment, the defendant filed a comprehensive "memorandum of law in support of objection to motion for summary judgment" in which he argued that his special defenses and counterclaim were legally sufficient and that there remained genuine issues of material fact with respect to his claims. Attached to his memorandum, and relevant to this appeal, are the defendant's own affidavit attesting to misleading and fraudulent misrepresentations on the part of FNB Arizona at the time he signed the note and mortgage, a truth-in-lending disclosure statement that the defendant alleges failed to disclose the alternative payment schedules provided in the adjustable rate mortgage,[6] and the detailed affidavit of a purported expert, Randall Huinker, who opined that "[t]he facts and circumstances regarding this loan indicate that it meets the criteria for predatory lending outlined in an [Office of the Comptroller of the Currency] Advisory Letter."

When the short calendar hearing concerning the motion for summary judgment commenced, counsel for the defendant was not present. Counsel for the plaintiff objected to the court entertaining the defendant's objection to summary judgment because his written objec-

[6] Before this court, the defendant asserts that this document is the truth in lending disclosure statement provided to him at the time of the closing in issue, and that it shows the monthly payments over the life of the mortgage to be $1190 each, with no indication of variation. Before this court, the plaintiff asserts that this disclosure statement is unrelated to the note and mortgage at issue in the present case.

tion was not timely filed and he only had been able to glance at it before he left his office to come to court. In the alternative, the plaintiff argued that if the court were to consider the defendant's objection, the plaintiff should be allowed sufficient time to amend its motion for summary judgment accordingly. The court, despite noting that the terms of the mortgage were "ridiculous" and "harsh," and further indicating it did not know whether the mortgage, alleged by the defendant to be predatory in nature, was illegal as a matter of law, overruled the objection and granted the motion for summary judgment as to liability only.

Later that day, while counsel for the plaintiff was still present, counsel for the defendant arrived and the court indicated that it would rehear argument. After hearing further argument, mostly from the defendant, the court again overruled the defendant's objection and permitted its decision granting summary judgment in favor of the plaintiff to stand.[7] The court made only passing references to the defendant's special defenses and at no time during the hearing did it make any reference to the defendant's counterclaim. The court indicated

[7] The court never issued a written memorandum of decision further articulating its reasons for granting summary judgment and neither party has provided us with a signed transcript of the court's oral decision, upon which they both rely, as required by Practice Book § 64-1 (a). The defendant did not file a motion pursuant to Practice Book § 64-1 (b) providing notice that the court had not filed a signed transcript of its oral decision. Nor did the defendant take any additional steps to obtain a decision in compliance with Practice Book § 64-1 (a). In some cases in which the requirements of Practice Book § 64-1 (a) have not been followed, this court has declined to review the claims raised on appeal due to the lack of an adequate record. Our review of the dispositive issue in the present appeal is plenary. Moreover, despite the absence of a signed transcript of the court's oral decision or a written memorandum of decision, our ability to review the claims raised on appeal is not hampered because we are able to readily identify a sufficiently detailed and concise statement of the court's findings in the transcript of the proceedings. See *Medeiros* v. *Medeiros*, 175 Conn. App. 174, 177, n.1, 167 A.3d 967 (2017).

that it did not "see anything wrong in the making of this note except that [the defendant] made a bad bargain."[8]

On June 6, 2016, the court, *Abrams*, *J.*, granted the plaintiff's motion for judgment of foreclosure and rendered a judgment of strict foreclosure. This appeal followed.[9]

We now address the defendant's claim that the court lacked authority to grant summary judgment[10] in light of the fact that, in its motion, the plaintiff did not argue that the defendant's special defenses were legally insufficient and/or argue that no genuine issues of material fact existed with respect to the special defenses,[11] such

[8] This statement by the court appears to be an improper finding of fact, suggesting that, in the court's opinion, the defendant knew what he was doing when he signed the note and mortgage, rather than the more proper finding that no genuine issue of material fact exists as to the validity, making or enforcement of the note. Viewed in the light most favorable to the defendant, his affidavit raised several areas in which factual determinations may control the outcome. "[S]ummary judgment procedure is particularly inappropriate where the inferences which the parties seek to have drawn deal with questions of motive, intent and subjective feelings and reactions. . . . It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given to their testimony can be appraised." (Citations omitted; internal quotation marks omitted.) *United Oil Co.* v. *Urban Redevelopment Commission*, 158 Conn. 364, 376, 260 A.2d 596 (1969).

[9] As we noted previously, the judgment of strict foreclosure makes no reference to any judgment on the defendant's counterclaim.

[10] "[A] court may properly grant summary judgment as to liability in a foreclosure action if the complaint and supporting affidavits establish an undisputed prima facie case and the defendant fails to assert any legally sufficient special defense." (Internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Tarzia*, 150 Conn. App. 660, 667, 92 A.3d 983, cert. denied, 314 Conn. 905, 99 A.3d 635 (2014). The plaintiff can then proceed to judgment of foreclosure, which is a separate proceeding after liability has been determined on the note and mortgage. Id., 663–64.

[11] We disagree with the plaintiff's position that, despite the fact that its motion for motion for summary judgment did not address the defendant's special defenses, the court had the authority "to [decide] whether the defendant sufficiently [pleaded] his special defenses . . . and whether any deficiency could not be cured by repleading." See *GMAC Mortgage, LLC* v. *Ford*, 144 Conn. App. 165, 179–80, 73 A.3d 742 (2013), which we will discuss later in this opinion.

that the plaintiff was entitled to judgment as a matter of law as to liability.

As a preliminary matter, we set forth our standard of review and other relevant legal principles. Practice Book § 17-49 provides that summary judgment "shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." As an appellate court, "[w]e must decide whether the trial court erred in determining that there was 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 test is whether a party would be entitled to a directed verdict on the same facts. . . . A material fact is a fact which will make a difference in the result of the case. . . . [I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist." (Internal quotation marks omitted.) *Lathrop* v. *Malcolm Pirnie, Inc.*, 131 Conn. App. 204, 208, 25 A.3d 740 (2011).

"In any action . . . any party may move for a summary judgment as to any claim *or defense* as a matter of right at any time if no scheduling order exists and the case has not been assigned for trial." (Emphasis added.) Practice Book § 17-44.[12] "A memorandum of law briefly outlining the claims of law and authority

[12] Practice Book (2014) § 17-44 was amended in 2013 to provide that summary judgment is available for defenses, which rendered prior decisional law to the contrary moot. W. Horton et al., 1 Connecticut Practice Series: Connecticut Superior Court Civil Rules (2017–2018 Ed.) § 17-44, authors' comments, p. 829.

pertinent thereto shall be filed and served by the movant with . . . motions for summary judgment." Practice Book § 11-10.

"The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *Mott* v. *Wal-Mart Stores East, LP*, 139 Conn. App. 618, 624–25, 57 A.3d 391 (2012).

"It is not enough for the moving party merely to assert the absence of any disputed factual issue; the moving party is required to bring forward . . . evidentiary facts, or substantial evidence outside the pleadings to show the absence of any material dispute. . . . The party opposing summary judgment must present a factual predicate for his argument to raise a genuine issue of fact. . . . Once raised, if it is not conclusively refuted by the moving party, a genuine issue of fact exists, and summary judgment is inappropriate." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Barasso* v. *Rear Still Hill Road, LLC*, 81 Conn. App. 798, 803, 842 A.2d 1134 (2004).

In an appropriate case, a party also may properly use a motion for summary judgment to challenge the legal sufficiency of a pleading if its legal insufficiency is clear on the face of the pleading and the adverse party is unable to cure the defect by repleading. See *Larobina* v. *McDonald*, 274 Conn. 394, 400–402, 876 A.2d 522 (2005). Seeking such a ruling by means of a motion for

summary judgment is the equivalent of filing a motion to strike and assumes the truth of both the specific factual allegations and any facts fairly provable thereunder. Id., 401. The movant must establish that the defect cannot be cured by repleading, and it must be clear that the motion is being used to challenge the legal sufficiency of the pleading. See *American Progressive Life & Health Ins. Co. of New York* v. *Better Benefits, LLC*, 292 Conn. 111, 121, 971 A.2d 17 (2009). This court has concluded that *Larobina* and *American Progressive Life & Health Ins. Co. of New York* apply "when the motion for summary judgment challenges the sufficiency of a special defense." *GMAC Mortgage, LLC* v. *Ford*, 144 Conn. App. 165, 180, 73 A.3d 742 (2013).

In order to establish a prima facie case in a mortgage foreclosure action based on the allegations in the complaint in this case, the plaintiff must prove by a preponderance of the evidence that it is the owner of the note and mortgage, that the defendant has defaulted on the note and that any conditions precedent to foreclosure, as established by the note and mortgage, have been satisfied. See *Franklin Credit Management Corp.* v. *Nicholas*, 73 Conn. App. 830, 838, 812 A.2d 51 (2002), cert. denied, 262 Conn. 937, 815 A.2d 136 (2003). Thus, the court may properly have granted summary judgment as to liability in this foreclosure action if the complaint and supporting affidavits had established an undisputed prima facie case and the defendant had failed to assert any legally sufficient special defense.

"Historically, defenses to a foreclosure action have been limited to payment, discharge, release or satisfaction . . . or, if there had never been a valid lien. . . . The purpose of a special defense is to plead facts that are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action. . . . A valid special defense at law to a foreclosure proceeding must be legally sufficient and

address the making, validity or enforcement of the mortgage, the note or both. . . . Where the plaintiff's conduct is inequitable, a court may withhold foreclosure on equitable consideration and principles. . . . [O]ur courts have permitted several equitable defenses to a foreclosure action. [I]f the mortgagor is prevented by accident, mistake or fraud, from fulfilling a condition of the mortgage, foreclosure cannot be had . . . . Other equitable defenses that our Supreme Court has recognized in foreclosure actions include unconscionability . . . abandonment of security . . . and usury." (Internal quotation marks omitted.) *Fidelity Bank* v. *Krenisky*, 72 Conn. App. 700, 705–706, 807 A.2d 968, cert. denied, 262 Conn. 915, 811 A.2d 1291 (2002). Recently, in *Bank of America, N.A.* v. *Aubut*, 167 Conn. App. 347, 143 A.3d 638 (2016), this court concluded that although the defendants had entitled their special defense "predatory lending," they did not merely rely on a bald assertion that the original plaintiff had engaged in predatory lending practices, but had set forth their special defense allegations in sufficient detail as to legally invoke other, well recognized special defenses to a foreclosure action, including fraud, unconscionability, equitable estoppel and unclean hands.[13] Id., 378–81. In the present case, the defendant has pleaded recognized special defenses: fraud and misrepresentation, unclean hands and equitable estoppel.

"Whether a court has the power to exercise discretion at all is governed by the statutes and rules of practice. Because we are concerned with the interpretation of the rules of practice, which interpretation is controlled

[13] The plaintiff, as an assignee of the mortgage who received "the full benefit of all the powers and of all the covenants and provisions contained in the mortgage," takes it subject to all defenses which might have been asserted against the assignor that go to the making, enforcement or validity of the note and mortgage. See *Bank of America, N.A.* v. *Aubut*, supra, 167 Conn. App. 370; see also *Hartford* v. *McKeever*, 139 Conn. App. 277, 286, 55 A.3d 787 (2012), aff'd, 314 Conn. 255, 101 A.3d 229 (2014).

by the same rules of construction as statutes . . . we are dealing with a question of law rather than a question of the discretion of the court . . . . Accordingly, our review is plenary." (Citation omitted; internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Treglia*, 156 Conn. App. 1, 9, 111 A.3d 524 (2015).

The defendant argues that the trial court lacked authority to grant summary judgment as to liability because the plaintiff's motion did not address his special defenses. As a result, the defendant argues, the plaintiff failed to meet its initial burden of submitting competent evidence to establish that there is not a genuine issue of material fact with respect to the issues raised in his special defenses, and further, failed to meet its burden of demonstrating that each of his special defenses does not state a legally cognizable defense that cannot be cured by repleading.

The plaintiff's motion for summary judgment addressed only the issues raised in its foreclosure complaint. Counsel for the plaintiff understood that the plaintiff needed to file a pleading in response to the defendant's objection if the court was going to entertain it, such as an amendment to its motion for summary judgment or other pleading to address the merits or legal sufficiency of the defendant's newly-posed special defenses. In the absence of counsel for the defendant, however, when the court appeared disinclined to continue the matter[14] and indicated it preferred to consider the motion and the defendant's untimely objection to it, the plaintiff acquiesced and made no further effort

[14] We by no means countenance the fact that the defendant, in derogation of the rules of practice, unfairly surprised the plaintiff by the late filing of his objection to summary judgment, but such conduct on the part of the defendant does not justify the court's consideration of the plaintiff's motion as having adequately raised and refuted the special defenses so as to justify granting summary judgment.

to make the court aware of the risk of proceeding in the face of such procedural irregularity.[15]

In the present case, the court lacked authority to render summary judgment as to liability in favor of the plaintiff with respect to the factual or legal viability of the defendant's special defenses because the issues relating to the special defenses remained outside the scope of the plaintiff's motion for summary judgment. The plaintiff's motion had been filed before the defendant filed his answer, special defenses and counterclaim and therefore, it did not address the factual or legal issues raised therein. The only ground the plaintiff had raised in favor of summary judgment was limited to the facts alleged in its foreclosure complaint. As our Supreme Court has explained: "[T]he court's function is generally limited to adjudicating the issues *raised by the parties* on the proof they have presented and applying appropriate procedural sanctions on motion of a party. . . . F. James, G. Hazard & J. Leubsdorf, Civil Procedure (5th Ed. 2001) § 1.2, p. 4. The parties may, under our rules of practice, challenge the legal sufficiency of a claim at two points prior to the commencement of trial. First, a party may challenge the legal sufficiency of an adverse party's claim by filing a motion to strike. Practice Book § 10-39. Second, a party may move for summary judgment and request the trial court to render judgment in its favor if there is no genuine issue of fact and the moving party is entitled

[15] The defendant, however, inartfully attempted to alert the court that there might be "technical pleading reasons" for denying summary judgment, citing to a case in which counsel for the defendant had prevailed for another client on appeal, *Wells Fargo Bank, N.A.* v. *Treglia*, supra, 156 Conn. App. 1. In that case, the defendant had prevailed by asserting the court's lack of authority to consider and grant a motion for summary judgment when the nonmoving party had moved to set aside a default. Id., 9. This court held that the trial court had improperly conflated a motion for summary judgment with a motion for judgment for the purposes of Practice Book (2014) § 17-32 (b). Id., 13.

to judgment as a matter of law. Practice Book §§ 17-44 [and] 17-49. In both instances, the rules of practice require a party to file a written motion to trigger the trial court's determination of a dispositive question of law. The rules of practice do not provide the trial court with authority to determine dispositive questions of law in the absence of such a motion." (Emphasis in original; internal quotation marks omitted.) *Vertex, Inc.* v. *Waterbury*, 278 Conn. 557, 564–65, 898 A.2d 178 (2006); see also *Greene* v. *Keating*, 156 Conn. App. 854, 860–61, 115 A.3d 512 (2015) (court erred in rendering summary judgment on ground not claimed or briefed by parties' cross motions for summary judgment). We will not countenance a summary judgment procedure that only requires a party in its written pleading to address some, but not all, of the issues whose resolution is necessary to resolve a particular claim. Such a practice is a disservice to all parties and the court. When a rule of practice requires a written motion, a memorandum of law and supporting documentation, it is because the issue to be decided is of considerable importance. In the case of summary judgment, which results in a swift, concise end to often complex litigation without benefit of a full trial, the parties and the court need to be as well informed as possible on the applicable law and facts.

In the present case, as a result of the defendant's last minute filing, the plaintiff understandably had not yet raised any grounds for summary judgment related to the defendant's special defenses. Its memorandum of law in support of summary judgment and the documentation appended to it shed no light on their validity, as no argument or even a scintilla of evidence had been presented refuting the factual allegations raised by the defendant's objection and supporting documentation.[16]

[16] Faced with the lack of any opportunity to factually refute the defendant's allegations below with any competent evidence, plaintiff's counsel made unsubstantiated factual representations to the court, stating: "The only thing I would add is that the borrower is a savvy borrower. He is a CPA. He understood what he was getting into."

"A court may not grant summary judgment sua sponte. . . . The issue first must be raised by the motion of a party and supported by affidavits, documents or other forms of proof." (Citations omitted.) *Cummings & Lockwood* v. *Gray*, 26 Conn. App. 293, 299, 600 A.2d 1040 (1991); see also *Booth* v. *Flanagan*, 19 Conn. App. 413, 415, 562 A.2d 592 (1989). The only way for the plaintiff to properly have invoked the court's authority to render a summary judgment as to liability in light of the special defenses raised by the defendant was to proceed in the manner it first suggested to the court: to mark off the argument on the motion for summary judgment to enable it to file a new pleading addressing the special defenses with an accompanying brief and/or competent evidence sufficient to establish their legal insufficiency or that no genuine issue of material fact exists.

Accordingly, we conclude, on the basis of the facts of this case, that the court acted in excess of its authority when it raised and considered, sua sponte, grounds for summary judgment not raised or briefed by the plaintiff. Moreover, as set forth previously, the trial court did not render judgment with respect to the defendant's counterclaim and this court does not have subject matter jurisdiction over that portion of his appeal. See footnote 2 of this opinion.

The portion of the appeal in which the defendant challenges the court's granting of the motion for summary judgment as to his counterclaim is dismissed; the judgment of strict foreclosure is reversed and the case is remanded for further proceedings according to law.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JARAH MICAH DAVIS (AC 40232)

Alvord, Prescott and Beach, Js.

Syllabus

Convicted of the crimes of sexual assault in the second degree and delivery of alcohol to a minor, the defendant appealed to this court. The defendant's conviction stemmed from his alleged sexual assault of the sixteen year old victim, M, while she was heavily intoxicated. At trial, the defendant admitted that he had sexual intercourse with M but maintained she had consented to the encounter. Five days before jury selection began, the state, which initially had charged the defendant with sexual assault in the first degree and delivery of alcohol to a minor, filed a substitute information adding an additional count of sexual assault in the second degree. The defendant filed a motion to dismiss the count of sexual assault in the second degree, which the court denied. On appeal, the defendant claimed, inter alia, that the evidence was insufficient to prove beyond a reasonable doubt that M was physically helpless as defined by statute (§ 53a-65 [6]) for a conviction of sexual assault in the second degree (§ 53a-71 [a] [3]). Held:

1. The evidence admitted at trial was sufficient to prove beyond a reasonable doubt that the defendant committed sexual assault in the second degree, as it was sufficient to prove beyond a reasonable doubt that M was rendered physically helpless by way of intoxication: M's testimony that she could not physically or verbally communicate her lack of consent during the sexual intercourse due to her intoxication was sufficient to prove that she was physically helpless, and the defendant's assertion that M's ability to communicate her lack of consent at one point during the sexual assault precluded the possibility that she later became physically helpless was unpersuasive, as § 53a-71 (a) (3) does not impose the requirement that the victim be physically helpless during the entirety of the sexual assault and sexual assault in the second degree occurs when an individual who was able to communicate her consent or lack thereof at the beginning of the sexual encounter later becomes unable to do so and the defendant continues to engage that person in sexual activity; moreover, even though the defendant attempted to portray his conduct with respect to M as one continuous alleged assault, case law instructs that his various conduct may properly be treated as distinct acts and punished as separate crimes.
2. The trial court did not abuse its discretion in denying the defendant's motion to dismiss the count of the substitute information charging him with sexual assault in the second degree:

   a. The state's decision to charge the defendant with sexual assault in the first and second degree did not prevent the defendant from presenting

a defense; the defendant's claim that an information which charges two or more separate offenses in the alternative is fatally defective because of its failure adequately to apprise the defendant of the specific charge against him was unavailing, as the state did not charge the defendant with two or more offenses in the alternative, the substitute information charged each offense in a separate count and made clear that the state intended to pursue a conviction for both, and the state's method of charging did not force the defendant to take alternative factual positions at trial or prevent him from presenting a defense.

b. The defendant could not prevail on his claim that the timing of the state's filing of the substitute information violated his substantive rights; the state properly relied on the applicable rule of practice (§ 36-17) to file a substitute information prior to trial, to the extent that the defendant claimed that he was prejudiced by the state's filing of the substitute information because he did not have time to hire an expert, he should have requested a continuance, and the state, by adding the charge of sexual assault in the second degree, did not substitute a theory of liability but, rather, added one based on facts that were contained in the defendant's arrest warrant and known to him throughout the entirety of the proceedings.

Argued January 16—officially released April 10, 2018

Procedural History

Substitute information, charging the defendant with the crimes of sexual assault in the first degree, sexual assault in the second degree, and of delivery of alcohol to a minor, brought to the Superior Court in the judicial district of New London and tried to a jury before the court, *Jongbloed, J.*; verdict of guilty of sexual assault in the second degree and delivery of alcohol to a minor; thereafter, the court denied the defendant's motion for a judgment of acquittal and rendered judgment in accordance with the verdict, from which the defendant appealed to this court. *Affirmed.*

Bryan P. Fiengo, for the appellant (defendant).

Theresa Anne Ferryman, senior assistant state's attorney, with whom was *Michael Regan*, state's attorney, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, Jarah Micah Davis, appeals from the judgment of conviction, rendered after a jury trial, of one count of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (3) and one count of delivery of alcohol to a minor in violation of General Statutes § 30-86 (b) (2).[1] On appeal, the defendant claims that (1) the evidence admitted at trial was not sufficient to prove beyond a reasonable doubt that the alleged victim was physically helpless within the meaning of General Statutes § 53a-65 (6) as required for a conviction of sexual assault in the second degree, and (2) the trial court improperly denied his pretrial motion to dismiss the second count of the state's substitute information charging him with sexual assault in the second degree. We disagree and, accordingly, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On May 22, 2015, the victim, M,[2] attended a graduation ceremony for her cousin. M was sixteen years old at the time. Her cousin's adult sister, K, and her husband, the defendant, were also in attendance. Both K and the defendant are approximately ten years older than M.

After the ceremony, K's parents hosted a graduation party for friends and family at their home. M consumed two beers at the party. At some point, K invited M to stay the night at her house. M had never been to K's house before and thought it would be fun.

With her parents' permission, M left the party with K and the defendant around 11 p.m. After arriving at

[1] The defendant does not challenge on appeal his conviction of delivery of alcohol to a minor.

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

the defendant's house, K gave M some comfortable clothes in which to change. K then opened a bottle of wine and she and M both drank a glass.

Soon after, K showed M the finished basement. She had converted it into a "man cave" for the defendant, who was in the military, while he was deployed. The room featured a bar stocked with various types of hard alcohol.

For a few hours, M, K, and the defendant sat at the bar in the finished basement talking and drinking. During this time, the defendant poured M multiple shots of hard liquor, as well as a small glass of Dewars and vodka. M soon became heavily intoxicated, which resulted in her stumbling, slurring her words, and having blurred vision.

At some point, K went upstairs to check on her young son, leaving M and the defendant alone. When K did not return, the defendant went upstairs and found her sleeping in their bedroom.

After seeing that K was asleep, the defendant went back downstairs, took M's hands, and began dancing with her. The two then began kissing. The defendant then pushed M against the couch, put his hands down her pants, and began digitally penetrating her vagina. M repeatedly told the defendant to stop and attempted to push him off of her. She had difficultly physically resisting him, however, given her level of intoxication.

Shortly thereafter, M found herself lying on her back on the floor of the basement.[3] The defendant then lifted M's legs, took off her pants and underwear, and began penetrating her vagina with his penis. At that point, M was so intoxicated that she was unable to move or speak.

[3] M testified that she does not remember how she went from standing to lying on the floor.

After the assault, the next thing M recalled was that she was on the couch in the defendant's basement and was vomiting on herself. The defendant took M upstairs, undressed her, and put her in the shower. After showering, M went to sleep in a spare bedroom.

The next morning, M was awakened by K, who had laundered her dirty clothes. M did not tell K about the assault because she was "still processing it and was terrified."

Later that afternoon, while M and her mother were driving home, M started crying and told her mother that the defendant assaulted her. Her mother decided to take M to the hospital, where she was evaluated for a sexual assault and evidence was collected. DNA testing of biological samples obtained from M confirmed that the defendant had sexual intercourse with her.

Soon after, M reported the assault to the police. The defendant subsequently was arrested and initially charged with sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1) and delivery of alcohol to a minor in violation of § 30-86 (b) (2). Five days before jury selection was scheduled to begin, the state filed a substitute information in which it additionally charged the defendant, in a separate count, with sexual assault in the second degree in violation of § 53a-71 (a) (3).

The defendant was subsequently tried before a jury. At trial, the defendant elected to testify and admitted that he had sexual intercourse with M but maintained that she had consented to it.

The jury acquitted the defendant of sexual assault in the first degree but convicted him of sexual assault in the second degree and delivery of alcohol to a minor. He was sentenced to nine years' incarceration, execution suspended after fifty months, followed by ten years of

probation. Additional facts will be set forth as necessary.

I

The defendant first claims that the evidence admitted at trial was not sufficient to prove beyond a reasonable doubt that M was physically helpless within the meaning of § 53a-65 (6), as required to obtain a conviction of sexual assault in the second degree. Specifically, the defendant argues that M's testimony that she repeatedly had told the defendant that she did not consent to the sexual conduct negates a conclusion that she was physically helpless. We disagree.

The following additional facts and procedural history are relevant to the resolution of the defendant's claim. At trial, M testified that she voluntarily danced with and kissed the defendant. She further testified that, after a few minutes of dancing and kissing, the defendant forced his hands down her pants and began digitally penetrating her. M resisted the defendant's advances by telling him "no" several times and attempting to push him away.

After the defendant forced his hands down her pants, M testified: "I remember being between the wall and the couch. I was on my back laying down on the floor on a rug and he was standing over me and I remember him taking my pants and underwear off." M did not, however, remember how she went from standing to lying on her back. Thereafter, M testified that the defendant penetrated her vagina with his penis.

The following exchange then occurred between the prosecutor and M:

"Q. What happened after his penis entered your vagina?

"A. I was on the ground and I couldn't move.

"Q. Okay. When you say you couldn't move, describe what you mean.

"A. It was the weirdest feeling. I was—I could not move. I was so incapacitated. I was—I just remember staring at the ceiling and I felt him doing that to me but I—I could not fight back

"Q. Were you able to speak?

"A. No."

M further testified that she was not sure how long the assault lasted, and that the next thing she remembered was vomiting on the couch in the defendant's basement.

After the state rested, the defendant filed a motion for a judgment of acquittal as to all counts of the substitute information. The defendant argued, inter alia, that the state had failed to present sufficient evidence to prove beyond a reasonable doubt that he committed sexual assault in the second degree because M was not physically helpless during the sexual encounter. The court denied the defendant's motion and concluded that the jury reasonably could find that M was physically helpless based on her testimony that she was unable to speak or move during the penile-vaginal intercourse.

"The appellate standard of review of sufficiency of the evidence claims is well established. 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. . . .

"Our review is a fact based inquiry limited to determining whether the inferences drawn by the [fact finder] are so unreasonable as to be unjustifiable. . . . [T]he inquiry into whether the record evidence would support a finding of guilt beyond a reasonable doubt does not require a court to ask itself whether it believes that the evidence . . . established guilt beyond a reasonable doubt. . . . Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . . .

"We do not sit as a [seventh] juror who may cast a vote against the verdict based upon our feeling that some doubt of guilt is shown by the cold printed record. We have not had the [fact finder's] opportunity to observe the conduct, demeanor, and attitude of the witnesses and to gauge their credibility. . . ." (Internal quotation marks omitted.) *State* v. *Whitnum-Baker*, 169 Conn. App. 523, 526, 150 A.3d 1174 (2016), cert. denied, 324 Conn. 923, 155 A.3d 753 (2017).

"A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and . . . such other person is physically helpless . . . ." General Statutes § 53a-71 (a) (3). " 'Physically helpless' means that a person is (A) unconscious,[4] or (B) for any other reason, is physically unable to resist an act of sexual intercourse or sexual contact or to communicate unwillingness to an act of sexual intercourse or sexual contact." (Footnote added.) General Statutes § 53a-65 (6).

Recently, our Supreme Court concluded that the statutory term "physically helpless" has "a highly particularized meaning . . . ." *State* v. *Fourtin*, 307 Conn. 186,

[4] The state does not contend that M was unconscious at any time during the assault.

198, 52 A.3d 674 (2012). Specifically, in order to be rendered physically helpless, the complainant must have been either (1) unconscious, or (2) unable to communicate—both verbally and physically—her lack of consent to the sexual act. Id., 199–200. The latter scenario commonly involves sexual assault that occurs while the victim is sleeping or heavily intoxicated. See *State* v. *Fourtin*, supra, 307 Conn. 202 ("it is the rare case that does *not* involve a victim who was physically helpless due to unconsciousness, sleep or intoxication" [emphasis in original]).

At trial, the state argued that M was unable to communicate her lack of consent to the penile-vaginal intercourse because she was heavily intoxicated. M testified that she consumed at least one glass of wine, multiple shots of hard liquor, a small glass of Dewars, and a small glass of vodka after arriving at the defendant's home. She described her condition after consuming the alcohol as "not well," and testified that she was stumbling, had blurred vision, and was slurring her words. Critically, M further testified that she was "so incapacitated" during the penile-vaginal intercourse and could not move or speak. Moreover, she could not recall the events that occurred immediately before or after the assault. Based on this testimony, the jury reasonably could have found that M was unable to communicate her lack of consent to the defendant's conduct. Thus, the evidence admitted at trial was sufficient to prove beyond a reasonable doubt that M was rendered physically helpless by way of intoxication.

The defendant argues, however, that M's ability to communicate her lack of consent to the defendant's digital penetration of her vagina earlier during the assault "foreclosed any possibility of [M] being considered physically helpless under our law." We are not persuaded by the defendant's assertion that M's ability to communicate her lack of consent at one point during

the sexual assault precluded the possibility that she later became physically helpless.

First, in a closely related context, this court has concluded that sexual assault in the first degree occurs when a person who initially consents to sexual activity later withdraws that consent, and the defendant forces the victim to continue to engage in that activity. See *State* v. *Siering*, 35 Conn. App. 173, 179, 185 (trial court correctly instructed jury that "if there exists consensual intercourse and the alleged victim changes her mind and communicates the revocation or change of mind of consent and the other person continues the sexual intercourse . . . then it would be sexual assault." [internal quotation marks omitted]), cert. denied, 231 Conn. 914, 648 A.2d 158 (1994). Thus, it logically follows that sexual assault in the second degree occurs when, like in the present case, an individual who was able to communicate her consent or lack thereof at the beginning of the sexual encounter later becomes unable to do so and the defendant continues to engage that person in sexual activity.

Second, we find it significant that § 53a-71 (a) (3) does not impose the requirement that the victim be physically helpless during the entirety of the sexual assault. Although there is no Connecticut case law addressing this issue, Pennsylvania appellate courts have interpreted a similar, albeit not identical, statute and concluded that a victim need not be unconscious or physically helpless during the entire encounter for the conduct to constitute a sexual assault.[5] See *Com.*

[5] We recognize that these cases, unlike the present case, involve a claim that the victim was unconscious for at least part of the sexual conduct. This distinction, however, does not undermine our reliance on them because we cite them for a broader principle. That is, a defendant may be convicted of a sexual offense if he has sexual contact with a person who, although she is able to express consent or lack thereof at some point during a sexual encounter, becomes unable to do so subsequently because she either has become unconscious or is so intoxicated that she is unable to communicate at all.

v. *Erney*, 548 Pa. 467, 473–74, 698 A.2d 56 (1997) (concluding that "[b]ecause the evidence supports the finding that the victim was intermittently unconscious throughout the assault and was at all relevant times in such impaired physical and mental condition so as to be unable to knowingly consent . . . [t]hat intercourse . . . is sufficient to constitute rape of an unconscious individual" [footnote omitted]); see also *Com.* v. *Diaz*, 152 A.3d 1040, 1045 (Pa. Super. 2016) (upholding conviction for rape of unconscious individual because there was evidence from which jury could have reasonably concluded that victim was unconscious for at least portions of assault).

Third, although the defendant attempts to portray his conduct with respect to M as one continuous alleged assault, our case law instructs that his various conduct may properly be treated as distinct acts and punished as separate crimes. This court has held that "distinct repetitions of a prohibited act, *however closely they may follow each other* . . . may be punished as separate crimes . . . . The same transaction, in other words, may constitute separate and distinct crimes where it is susceptible of separation into parts, each of which in itself constitutes a completed offense." (Emphasis in original; internal quotation marks omitted.) *State* v. *Howard F.*, 86 Conn. App. 702, 713, 862 A.2d 331 (2004) (upholding defendant's conviction for two separate counts of risk of injury to child arising out of one course of conduct; defendant was convicted for both fondling victim's genitals and breasts as well as engaging victim in penile-vaginal intercourse), cert. denied, 273 Conn. 924, 871 A.2d 1032 (2005).

Thus, because M's testimony that she could not physically or verbally communicate her lack of consent during the penile-vaginal intercourse is sufficient to prove that she was physically helpless, the fact that she was able to communicate during the earlier stages of the

assault does not negate our ultimate conclusion. We therefore determine that the evidence admitted at trial was sufficient to prove beyond a reasonable doubt that the defendant committed sexual assault in the second degree.

II

The defendant next claims that the trial court improperly denied his motion to dismiss the second count of the state's substitute information charging him with sexual assault in the second degree. We disagree.

The following additional facts are relevant to the resolution of the defendant's claim. On September 14, 2015, the defendant was charged in the original information with one count of sexual assault in the first degree in violation of § 53a-70 (a) (1) and one count of delivery of alcohol to a minor in violation of § 30-86 (b) (2). On December 29, 2016, five days before jury selection was scheduled to begin, the state filed a substitute information charging the defendant, in an additional count, with sexual assault in the second degree in violation of § 53a-71 (a) (3).

On December 30, 2016, the defendant filed a motion to dismiss the second count of the substitute information charging sexual assault in the second degree. Therein, the defendant argued that the second count was insufficient as a matter of law.

On January 6, 2017, the court heard oral argument on the defendant's motion to dismiss. The defendant argued that the additional count alleging sexual assault in the second degree was legally insufficient because "[M's] statements to the police indicate[d] . . . a physical struggle." The defendant further argued that the state's late filing of the substitute information prejudiced him because, had he known that the state was going to pursue the additional charge of sexual assault

in the second degree, he would have hired an expert to "undermine that type of theory from the state." The defendant, however, did not request a continuance so that he could retain an expert.

The court then made an oral ruling from the bench denying the defendant's motion to dismiss, concluding that the warrant alleged facts sufficient to support the charge of sexual assault in the second degree in violation of § 53a-71 (a) (3).[6] The court further concluded that the defendant was not prejudiced by the state adding that charge so close to trial because the facts supporting it were contained in the arrest warrant and had been known to the defendant throughout the entirety of the proceeding.

On January 9, 2017, the court allowed the defendant to reargue his motion to dismiss. At that time, the defendant raised an additional ground for dismissal, arguing that the state improperly charged two substantively different crimes based on the same set of facts. In so arguing, the defendant relied exclusively on *State* v. *Hufford*, 205 Conn. 386, 533 A.2d 866 (1987), for the proposition that the state could not charge sexual assault in the first degree, which requires the use of force, and sexual assault in the second degree, which requires the state to prove that the victim was physically helpless, when both charges arose out of one alleged assault.

The state countered that the defendant's characterization of *Hufford* was incorrect and that it was proper for a defendant to be charged with multiple offenses depending on the facts of the particular assault. The court then once again denied the defendant's motion

[6] On appeal, the defendant does not challenge the court's conclusion that the warrant alleged sufficient facts to support the charge of sexual assault in the second degree.

to dismiss, without prejudice, concluding that his alternative ground for dismissal was premature because it concerned "a factual issue with regard to what the evidence in the case [was] going to show."

A

The defendant first argues that the trial court improperly denied his motion to dismiss the second count of the substitute information charging him with sexual assault in the second degree because the state's method of charging violated his sixth amendment right to present a defense. We disagree.

Whether the state's method of charging violated the defendant's sixth amendment right to present a defense constitutes a question of law subject to plenary review. See *State* v. *Dixon*, 318 Conn. 495, 511, 122 A.3d 542 (2015). The defendant first argues that our Supreme Court's decision in *Hufford* prohibits the method of charging employed by the state in the present case. In *Hufford*, the defendant was charged in multiple counts with various sexual offenses. *State* v. *Hufford*, supra, 205 Conn. 388. In one count, however, the state charged the defendant with sexual assault in the fourth degree by alleging alternate theories of liability—i.e., that the defendant had sexual contact with the complainant either while she was physically helpless and/or without her consent. Id., 395.

In that case, the state did not introduce any evidence at trial regarding whether the complainant was physically helpless during the alleged assault. Nevertheless, the court instructed the jury that it could convict the defendant on that count if it found that the complainant was physically helpless or had not consented to the sexual contact. Id., 399. The defendant was subsequently convicted of sexual assault in the fourth degree. Id.

On appeal, the defendant in *Hufford* claimed that the information was legally improper because the count charging him with sexual assault in the fourth degree alleged two alternative theories of liability. The defendant argued that this method of charging, coupled with the court's erroneous instruction to the jury, violated his sixth amendment right to present a defense and to a unanimous verdict. Id., 395. The defendant also claimed that the evidence was insufficient to support his conviction for that offense because the state had not presented any evidence that showed that the complainant was physically helpless during the alleged assault. Id., 395–96.

Our Supreme Court disagreed with the defendant in *Hufford* that the state's method of charging in that case was improper. Id., 397. The court ultimately set aside the defendant's conviction for sexual assault in the fourth degree, however, because "[a] verdict rendered on a single count charging alternative methods of committing the same crime may be upheld only if there is sufficient evidence to support the verdict as to each alternative charged," and the state had not presented any evidence that the complainant was physically helpless. Id., 399. Thus, the state's method of charging the defendant and failure to offer evidence at trial that proved that the alleged victim was physically helpless ran the risk that jurors convicted the defendant on a theory of liability for which there was no evidence and/or sanctioned a nonunanimous verdict.

Even though the manner in which the defendant was charged in the present case is different from how the defendant was charged in *Hufford*, the defendant, in support of his claim, nevertheless relies on the following language in *Hufford*: "[A]n information which charges two or more separate offenses in the alternative is fatally defective because of its failure adequately to

apprise the defendant of the specific charge against him" *State* v. *Hufford*, supra, 205 Conn. 397.

The defendant's reliance on this language from *Hufford* is misplaced for at least two reasons. First, in the present case, the state did not charge the defendant with two or more offenses in the alternative. The substitute information charged each offense in a separate count and made clear that the state intended to pursue a conviction for both. See *State* v. *Rios*, 171 Conn. App. 1, 23, 156 A.3d 18 (amended information clearly charged defendant with multiple counts of intentional assault and reckless endangerment because "[the amended information] did not in any way suggest that [the separate offenses] represented alternative theories of liability"), cert. denied, 325 Conn. 914, 159 A.3d 232 (2017).

Second, the language in *Hufford* relied on by the defendant must be read in context as to refer only to an information that charges two or more offenses in the alternative *within a single count*.[7] In the present case, the state charged the defendant with sexual assault in the first and second degree in separate counts. Thus, because the substitute information did not charge

[7] The court in *Hufford* did not describe with any detail the way in which the state pleaded the particular counts at issue. This lack of detail creates potential ambiguity regarding whether the state pleaded alternative theories of liability in one count or separate counts. Our review of *Hufford*, however, leads us to conclude that the court was discussing a scenario in which alternative methods of committing the same offense were pleaded in a single count. First, in describing the manner in which the trial court's instruction to the jury was improper, it stated as follows: "A verdict rendered on a *single count* charging alternative methods of committing the same crime may be upheld only if there is sufficient evidence to support the verdict as to each alternative charged." (Emphasis added.) *State* v. *Hufford*, supra, 205 Conn. 399. Second, our review of the substitute information and bill of particulars in *Hufford* confirms that the state pleaded alternative methods of committing sexual assault in the fourth degree in a single count. Thus, any language in *Hufford* regarding limitations on the state's ability to charge alternative methods of committing the same offense must be limited to instances in which the state has done so in a single count.

the defendant with the two offenses either (1) in the alternative, or (2) within a single count, it does not run afoul of *Hufford*.

The defendant further argues that the substitute information, in which the state alleged that he had committed both sexual assault in the first degree as well as sexual assault in the second degree during a single encounter, forced him to take alternative factual positions at trial thereby undermining his defense that M consented to the sexual activity. Specifically, the defendant argues that the inclusion of the charge of sexual assault in the second degree put him in the untenable position of arguing that M was not physically helpless because she was able to communicate her *lack* of consent, while at the same time asserting that she had consented to the sexual acts. We disagree.

The state's method of charging did not force the defendant to take alternative factual positions. Rather, the defendant's assertion that M consented to the entire sexual encounter, if credited by the jury, would have provided a complete defense to both sexual assault in the first and second degree. With respect to sexual assault in the first degree, the defendant's testimony that M consented to sexual contact and intercourse with him, if credited by the jury, would have negated a conclusion that he used force to carry out those acts. Likewise, his testimony that M communicated her consent to the sexual activity would have precluded the possibility that she was physically helpless as required for a conviction of sexual assault in the second degree. Thus, the state's decision to charge the defendant with sexual assault in both the first and second degree did not prevent him from presenting a defense.

B

Finally, the defendant argues that the court abused its discretion by denying his motion to dismiss the second

count of the substitute information charging him with sexual assault in the second degree because the timing of the state's filing of that information violated his substantive rights. We disagree.

"On appeal, our [standard of] review . . . of the court's decision to permit an amendment to the information is one of abuse of discretion." (Internal quotation marks omitted.) *State* v. *Grant*, 83 Conn. App. 90, 96–97, 848 A.2d 549, cert. denied, 270 Conn. 913, 853 A.2d 529 (2004). "Before a trial begins, the state has broad authority to amend an information pursuant to Practice Book § 36-17;" id., 97; which provides, "[i]f the trial has not commenced, the prosecuting authority may amend the information, or add additional counts, or file a substitute information. Upon motion of the defendant, the judicial authority, in its discretion, may strike the amendment or added counts or substitute information, if the trial or the cause would be unduly delayed or the substantive rights of the defendant would be prejudiced." Practice Book § 36-17. For purposes of Practice Book § 36-17, a criminal trial begins with the voir dire of the prospective jurors. *State* v. *Tanzella*, 226 Conn. 601, 608, 628 A.2d 973 (1993).

"In determining whether the defendant's rights were prejudiced, this court considers the totality of the circumstances in deciding whether the defendant was surprised by the changes and whether the defense was hampered. . . . A bare assertion of prejudice is not sufficient . . . . The defendant must provide a specific showing of prejudice in order to establish that he was denied the right of due process of law . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Marsala*, 44 Conn. App. 84, 89, 688 A.2d 336, cert. denied, 240 Conn. 912, 690 A.2d 400 (1997).

In the present case, the state properly relied on Practice Book § 36-17 to file a substitute information prior to trial. The defendant asserts, however, that he was

prejudiced because, at trial, he "lamented the fact that he was not able to retain an expert to refute [the state's allegation that M was physically helpless]." To the extent that the defendant is arguing that he was prejudiced by the state's filing of the substitute information because he did not have time to hire an expert, he should have requested a continuance. See *State* v. *Marsala*, supra, 44 Conn. App. 88–90 (court did not abuse discretion in allowing state to file amended information alleging five additional charges on day that trial began; defendant did not request continuance to allow time to investigate additional charges).

Furthermore, as the court properly noted at oral argument on the defendant's motion to dismiss, in adding the charge of sexual assault in the second degree the state was not substituting a theory of liability, but rather adding one based on facts that were contained in the defendant's arrest warrant and known to him throughout the entirety of the proceedings. See *State* v. *Marsala*, supra, 44 Conn. App. 90 (defendant was not prejudiced by state's late filing of amended information in part because "the state turned over the police reports detailing the five additional charges early in the prosecution"). Thus, under all of these circumstances, we conclude that the court properly denied the defendant's motion to dismiss.[8]

The judgment is affirmed.

In this opinion the other judges concurred.

[8] The defendant also argues that *State* v. *Secore*, 194 Conn. 692, 485 A.2d 1280 (1984), prohibits the state from adding a charge on the eve of trial that is substantively different than the one for which the defendant was arrested. The defendant's characterization of our Supreme Court's holding in *Secore* is incorrect. The issue in that case was whether, under the old indictment system, the defendant was improperly sentenced as a persistent felony offender because the substantive offense of which he was convicted was charged in a different indictment than the persistent felony offender violation. Id., 694. *Secore* did not concern issues relating to the timing of the state's filing of the substitute information and thus has no bearing on the present case. See id., 701 (defendant made no claim that he was prejudiced or unfairly surprised by the substitute information).

ADRIANA RUIZ ET AL. *v.* VICTORY PROPERTIES, LLC (AC 39381)

Prescott, Elgo and Beach, Js.

Syllabus

The plaintiffs, O and her minor daughter, A, sought to recover damages from the defendant, V Co., the owner of an apartment building where the plaintiffs resided, for personal injuries sustained by A as a result of V Co.'s alleged negligence. Following the commencement of the action, the court granted the plaintiffs' motion to cite in as a defendant K, the managing member of V Co., and I Co., a company for which K was the president and a director. The plaintiffs then filed an amended complaint alleging negligence against V Co. in the first two counts and fraudulent transfer against V Co. and I Co. in the third count, and, in the fourth count, they sought to pierce the corporate veil to hold K personally liable for any wrongful conduct alleged in count three against V Co. and I Co. Thereafter, V Co. filed a motion for summary judgment, and I Co. and K filed a separate motion for summary judgment as to counts three and four. The trial court granted V Co.'s motion and rendered summary judgment in its favor. The next day, the trial court granted the motion for summary judgment filed by I Co. and K and rendered judgment thereon, concluding that the counts against them were derivative of the counts against V Co. The plaintiffs thereafter appealed to this court challenging only the summary judgment rendered in favor of V Co. This court reversed the summary judgment and, on the granting of certification, V Co. appealed to our Supreme Court, which affirmed this court's judgment. Subsequently, the plaintiffs filed a motion to open the summary judgment rendered in favor of I Co. and K pursuant to the applicable statute (§ 52-212a). The trial court denied the plaintiffs' motion to open on the ground that it was untimely because it was not filed within four months following the date on which the judgment was rendered as required by § 52-212a. On appeal to this court, the plaintiffs claimed that the trial court abused its discretion in denying their motion to open the summary judgment because the four month limitation period contained in § 52-212a had been tolled by the filing of their first appeal. *Held* that the trial court properly denied the plaintiffs' motion to open: the plaintiffs' claim that the automatic stay provision in the relevant rule of practice (§ 61-11 [a]) operated to preserve the entire procedural posture of the case during the pendency of the prior appeal was not supported by established case law or the plain language of § 61-11 (a), as our Supreme Court has clarified that trial courts in this state have the power to conduct proceedings and to act on motions filed during the pendency of an appeal provided they take no action to enforce or carry out a judgment while an appellate stay is in effect, the plain

language of the automatic stay provision in § 61-11 (a) creates only a stay of execution regarding the judgment from which the appeal was filed and because the plaintiffs did not appeal from the summary judgment rendered in favor of I Co. and K, any protection afforded by the automatic stay related to the prior appeal did not extend to that judgment; moreover, although our Supreme Court has indicated that the four month limitation period in § 52-212a may be tolled on equitable grounds in certain circumstances, the plaintiffs did not argue on appeal that the limitation period should be tolled on equity grounds nor did they identify any particular equitable principles or cite to relevant case law regarding the doctrine of equitable tolling, and given that the plaintiffs provided no justification for their failure to challenge directly the summary judgment rendered in favor of I Co. and K as part of their prior appeal, it was not clear that they could prevail in a balancing of the equities involved.

Argued December 6, 2017—officially released April 10, 2018

Procedural History

Action to recover damages for, inter alia, personal injuries sustain by the named plaintiff as a result of the defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the court, *Vacchelli, J.*, granted the plaintiffs' application for a prejudgment remedy; thereafter, the court, *Swienton, J.*, granted the plaintiffs' motion to join John R. Kovalcik and Interpros, Inc., as defendants; subsequently, the defendant John R. Kovalcik et al. filed an apportionment complaint against Saribel Cruz et al.; subsequently, the court, *Pittman, J.*, granted the defendants' motions for summary judgment and rendered judgment thereon, from which the plaintiffs appealed to this court, which reversed the trial court's judgment as to the named defendant and remanded the case to the trial court with direction to deny the motion for summary judgment filed by the named defendant and for further proceedings; thereafter, the named defendant, on the granting of certification, appealed to our Supreme Court, which affirmed this court's judgment; subsequently, the court, *Swienton, J.*, denied the plaintiffs' motion to open the

judgment as to the defendant John R. Kovalcik et al., and the plaintiffs appealed to this court. *Affirmed.*

Matthew D. Paradisi, for the appellants (plaintiffs).

Lorinda S. Coon, with whom, on the brief, were *John M. O'Donnell* and *Herbert J. Shepardson*, for the appellees (defendant John Kovalcik et al.).

Opinion

PRESCOTT, J. In this appeal from the judgment of the trial court denying a motion to open a summary judgment, we consider the interplay between (1) General Statutes § 52-212a,[1] which places a four month limit on the trial court's inherent authority to open or set aside a judgment; (2) the doctrine of finality of judgments; and (3) the automatic stay provision of Practice Book § 61-11 (a),[2] which, in applicable civil cases, prohibits any proceeding to enforce or carry out a final judgment or order during the appeal period and, if an appeal is filed, until a final determination of that appeal.

The plaintiffs, Adriana Ruiz and Olga Rivera,[3] claim on appeal that the trial court improperly declined to open a summary judgment on counts three and four of their complaint that had been rendered years earlier in favor of the defendants, Victory Properties, LLC (Victory), John R. Kovalcik, and Intepros, Inc. (Intepros). In the plaintiffs' view, the fourth month limitation period

[1] General Statutes § 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. . . ."

[2] Practice Book § 61-11 (a) provides in relevant part: "Except where otherwise provided by statute or other law, proceedings to enforce or carry out the judgment or order shall be automatically stayed until the time to file an appeal has expired. If an appeal is filed, such proceedings shall be stayed until the final determination of the cause. . . ."

[3] Rivera is Ruiz' mother, and she brought the action both individually and as Ruiz' next friend and parent.

contained in § 52-212a had been stayed by the filing of an earlier appeal by them challenging a summary judgment rendered in favor of Victory on counts one and two of their complaint. We affirm the judgment of the trial court denying the plaintiffs' motion to open.

The following procedural history is relevant to this appeal. The plaintiffs initiated this personal injury action in January, 2009, against Victory, their landlord, to recover money damages arising from injuries that Ruiz sustained while playing in the rubble strewn backyard of the apartment building where she lived. Specifically, the plaintiffs alleged in counts one and two of their complaint[4] that Ruiz, who was seven years old at the time, suffered serious head injuries when her ten year old neighbor took a piece of a cinder block from the backyard, "carried it up to his family's third floor apartment and dropped it onto [her] head from a window or the balcony of that apartment." See *Ruiz* v. *Victory Properties, LLC*, 315 Conn. 320, 323, 107 A.3d 381 (2015). The plaintiffs asserted that Victory was negligent because it had failed to remove loose concrete and other debris from the apartment building's backyard where it knew or should have known that children were likely to play, and that Victory's negligence was the proximate cause of Ruiz' injuries.

In May, 2009, the plaintiffs filed an application for a prejudgment remedy of attachment with respect to five buildings owned by Victory. According to the plaintiffs, Victory had informed them that it did not have liability insurance. Furthermore, the plaintiffs believed that Victory was in the process of selling one or more of its properties. On August 14, 2009, the court granted a

[4] Count one was brought by Rivera on behalf of Ruiz and sought compensatory damages for Ruiz' injuries. Count two was brought by Rivera in her individual capacity and sought compensation for expenses that she incurred in obtaining treatments for Ruiz' injuries.

prejudgment remedy in the amount of $100,000 against Victory.[5]

On November 30, 2009, the plaintiffs filed a motion to cite in as additional defendants in the action Kovalcik, who was the managing member of Victory, and Intepros, a company for which Kovalcik was the president and a director. According to the plaintiff, Kovalcik, acting on behalf of Victory, granted a $500,000 mortgage to Intepros with respect to the attached real properties, presumably with the goal of shielding those assets in the event Victory was found liable on the negligence counts. The court granted the motion on December 23, 2009, and the plaintiffs filed and served an amended complaint that included two additional counts. Counts one and two of the amended complaint continued to sound in negligence against Victory. Count three alleged violations of the Uniform Fraudulent Transfer Act, General Statutes § 52-552a et seq., against Victory and Intepros, and in count four the plaintiffs sought to pierce the corporate veil and to hold Kovalcik personally liable for any wrongful conduct alleged in count three against Victory or Intepros.[6]

On April 23, 2010, Victory filed a motion for summary judgment, arguing that it had no legal duty to protect a tenant from injuries caused by the intentional act of

[5] In their application for a prejudgment remedy, the plaintiffs had sought to secure an order allowing them to attach property of Victory up to a sum of $1,000,000. Although the court found that there was probable cause that the plaintiffs would prevail on their negligence claim against Victory, the court believed that because of the availability of apportionment of liability, Victory ultimately would be found to be only 10 percent responsible, and, accordingly, it granted the application allowing attachment only up to the amount of $100,000.

[6] Prior to the court's rendering summary judgment, Kovalcik and Intepros filed an apportionment complaint against two individuals, Delis Cabrera and Saribel Cruz, who allegedly were responsible for supervising Ruiz and the child that injured her. Cabrera and Cruz did not appear before the trial court and have not participated in the present appeal.

another tenant. That same day, Kovalcik and Intepros filed a motion seeking summary judgment with respect to the fraudulent transfer counts. They argued that those counts were derivative of the negligence counts in that the plaintiffs would be precluded from recovering against Kovalcik and Intepros if the court rendered summary judgment in favor of Victory on the negligence counts. The plaintiffs filed an objection directed at both motions for summary judgment, arguing that the defendants had "failed to show that they were entitled to judgment as a matter of law on any of the counts or on any legal theory." They also filed a memorandum of law in support of their objection that focused entirely on the negligence counts, failing to address in any way the argument that if the court rendered summary judgment on the negligence counts it also should render summary judgment on the fraudulent transfer counts.

The court, *Pittman, J.*, issued a memorandum of decision on October 5, 2010, granting Victory's motion for summary judgment. The court concluded that the material facts were not in dispute and that there was no evidence from which a reasonable trier of fact could conclude that the type of incident that led to Ruiz' injuries was reasonably foreseeable by Victory, nor was there a compelling public policy reason to impose a duty on the landlord in this case.[7]

[7] As previously indicated, Victory was a named defendant with respect to the first three counts of the operative complaint. Victory, however, did not specifically indicate in its motion for summary judgment whether it sought summary judgment only with respect to the two negligence counts of the operative complaint or, conversely, all counts in which it was named. The trial court's decision granting Victory's motion for summary judgment also did not state explicitly on which counts the court had rendered judgment. We raise this ambiguity for two reasons. First, if the October 5, 2010 summary judgment did not resolve count three as to Victory, this would raise a significant question regarding whether the prior appeal was taken from a final judgment. Because such a judgment would not have disposed of all counts brought against Victory, the appeal from that judgment would have been jurisdictionally defective. See *Mazurek* v. *Great American Ins. Co.*, 284 Conn. 16, 33, 930 A.2d 682 (2007). Second, if the October 5, 2010 summary

The next day, on October 6, 2010, Judge Pittman issued a separate memorandum of decision granting the motion for summary judgment filed by Kovalcik and Intepros. According to the court, "[b]ecause the issue of liability has been resolved against the plaintiffs and in favor of the primary defendant Victory, and because the claims of the remaining defendants Kovalcik and Intepros are derivative only, the claims as to these latter defendants cannot survive."

The plaintiffs, on October 21, 2010, filed a motion seeking reconsideration and an opportunity to reargue both summary judgment decisions. Although the discussion in the motion was limited to the court's analysis regarding the negligence counts, the request for relief asked the court to reconsider its decisions on both motions for summary judgment. The court denied the motion the same day without discussion.

The plaintiffs filed an appeal with this court on November 2, 2010. The corresponding appeal form indicates that the plaintiffs sought to challenge only the summary judgment rendered on October 5, 2010, which was the summary judgment granted in favor of Victory.

judgment encompassed count three, then the decision by our Supreme Court to reverse the summary judgment also encompassed count three.

We construe the court's summary judgment in favor of Victory to encompass all claims brought against it because neither the parties, this court nor our Supreme Court ever questioned the jurisdictional footing of the prior appeal. In other words, it appears that this court and our Supreme Court construed the summary judgment as having disposed of all three counts brought against Victory because they could not have decided the merits of the prior appeal if all counts had not been disposed of by the trial court. There is also nothing in the underlying pleadings or in the trial court's October 5, 2010 memorandum of decision that directly contradicts this construction of the judgment. See *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 91–92, 952 A.2d 1 (2008) (construction of judgments is question of law for reviewing court and effect must be given not only to that which is expressed but to that which is clearly implied as well). Accordingly, on remand, count three of the complaint against Victory remains pending before the trial court in addition to the two negligence counts.

On November 12, 2010, however, Kovalcik and Intepros filed a motion asking this court to dismiss the appeal as to them. This court denied that motion on February 9, 2011, issuing an order to all parties clarifying that it was unnecessary to dismiss the appeal as to Kovalcik and Intepros because the plaintiffs' appeal was filed only from the summary judgment rendered in favor of Victory and the plaintiffs had not sought permission to amend the appeal to include the summary judgment rendered on October 6, 2010.

Despite notice that the Appellate Court did not consider the October 6, 2010 summary judgment rendered in favor of Kovalcik and Intepros to be part of the judgment challenged on appeal, the plaintiffs never sought permission to file a late amended appeal or to indicate otherwise their intent to challenge the October 6, 2010 judgment. In other words, the plaintiffs failed to indicate in any manner that in the event that they were successful in overturning the summary judgment on the negligence counts, they also sought to overturn the summary judgment rendered on the fraudulent transfer counts in favor of Kovalcik and Intepros, a judgment that was predicated on the disposition of the negligence counts.

On May 1, 2012, this court issued its decision reversing the trial court's summary judgment in favor of Victory. *Ruiz* v. *Victory Properties, LLC*, 135 Conn. App. 119, 43 A.3d 186 (2012), aff'd, 315 Conn. 320, 107 A.3d 381 (2015). This court agreed with the plaintiffs that the trial court improperly had concluded on the evidence submitted that Victory owed them no duty of care as a matter of law. Our Supreme Court subsequently granted Victory's petition for certification to challenge the judgment of this court. On January 20, 2015, our Supreme Court issued its decision affirming our reversal of the trial court's summary judgment in favor of Victory, concluding that there were genuine

issues of material fact that must be left for the trier of fact. *Ruiz* v. *Victory Properties, LLC*, supra, 315 Conn. 347. Victory filed a motion for reconsideration en banc, which our Supreme Court denied on March 4, 2015.

On April 24, 2015, the plaintiffs filed a motion pursuant to Practice Book § 17-4[8] and General Statutes § 52-212a, asking the trial court to open the October 6, 2010 summary judgment rendered in favor of Kovalcik and Intepros. The plaintiffs argued that the trial court had rendered that judgment solely on the basis that the plaintiffs' claims against Kovalcik and Intepros were derivative of the claims against Victory, and that because our Supreme Court had upheld this court's judgment reversing the summary judgment rendered in favor of Victory, "there now exists good cause" for the trial court to open the judgment disposing of the claims against Kovalcik and Intepros.

Kovalcik and Intepros filed a joint objection to the motion to open. They argued that although our Supreme Court had ruled in favor of the plaintiffs, the case was remanded for a trial only as to the counts against Victory, that the plaintiffs had chosen not to appeal from the October 6, 2010 judgment in favor of Kovalcik and Intepros, and that "four and one-half years postdecision, the plaintiffs have long waived any claim or motion to reopen the [judgment]." Both sides filed memoranda of law in support of their respective positions.

On June 7, 2016, the court, *Swienton, J.*, heard oral argument on the motion to open. On June 17, 2016, it denied the motion. After briefly setting forth the relevant facts and applicable law, the court concluded as

[8] Practice Book § 17-4 (a), which largely mirrors the language of § 52-212a, provides in relevant part: "Unless otherwise provided by law and except in such cases in which the court has continuing jurisdiction, any 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 succeeding the date on which notice was sent. . . ."

follows: "Although the plaintiff[s] argue that 'good cause' exists for the judgment to be opened, good cause is not the proper standard for the court to consider in opening the judgment. The defendants argue that the proper procedure for challenging the judgment would have been to file an appeal. The plaintiffs make the argument that the matter was stayed due to the filing of the appeal [against Victory] and, therefore, time somehow stood still while the appeal was pending. However, the judgment entered against [Kovalcik and Intepros] was a final judgment from which the only remedy would have been to file an appeal." This appeal followed.

The plaintiffs' sole claim on appeal is that the court abused its discretion by denying their motion to open as untimely. The plaintiffs argue, as they did before the trial court, that the automatic stay provision of Practice Book § 61-11 (a) operates "to preserve the entire procedural posture of a case" during the pendency of an appeal. They conclude, therefore, that the four month period for filing a motion to open pursuant to § 52-212a was tolled by the filing of their prior appeal and, contrary to the assertion of the trial court, had not yet run when the plaintiffs filed the motion to open. We disagree.

We begin with our standard of review and applicable legal principles. Ordinarily, our review of a court's decision to deny a motion to open is limited to whether the court abused its discretion. See *Flater* v. *Grace*, 291 Conn. 410, 419, 969 A.2d 157 (2009) ("We do not undertake a plenary review of the merits of a decision of the trial court to grant or to deny a motion to open a judgment. The only issue on appeal is whether the trial court has acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action." [Internal

quotation marks omitted.]). Nevertheless, to the extent that our consideration of the court's exercise of its discretion in this case turns on the proper application of statutory provisions or our rules of practice, this involves a question of law over which we exercise plenary review. See *Wiseman* v. *Armstrong*, 295 Conn. 94, 99, 989 A.2d 1027 (2010).

Turning to the applicable law, we begin by discussing the doctrine of finality of judgments, which is implicated in the present appeal. Generally, courts recognize "a compelling interest in the finality of judgments which should not lightly be disregarded. Finality of litigation is essential so that parties may rely on judgments in ordering their private affairs and so that the moral force of court judgments will not be undermined. The law favors finality of judgments . . . ." 46 Am. Jur. 2d 543–44, Judgments § 164 (2017). This court has emphasized that due consideration of the finality of judgments is important and that judgments should only be set aside or opened for a strong and compelling reason. See *Lewis* v. *Bowden*, 166 Conn. App. 400, 403, 141 A.3d 998 (2016); see also *Brody* v. *Brody*, 153 Conn. App. 625, 631–32, 103 A.3d 981, cert. denied, 315 Conn. 910 (2014), and cases cited therein. It is in the "interest of the public as well as that of the parties [that] there must be fixed a time after the expiration of which the controversy is to be regarded as settled and the parties freed of obligation to act further in the matter by virtue of having been summoned into or having appeared in the case. . . . Without such a rule, no judgment could be relied on." (Citation omitted; internal quotation marks omitted.) *Bruno* v. *Bruno*, 146 Conn. App. 214, 229, 76 A.3d 725 (2013). "[T]he modern law of civil procedure suggests that even litigation about subject matter jurisdiction should take into account the importance of the principle of the finality of judgments . . . ." *Urban Redevelopment Commission* v. *Katsetos*,

86 Conn. App. 236, 241, 860 A.2d 1233 (2004), cert. denied, 272 Conn. 919, 866 A.3d 1289 (2005).

Protecting the finality of judgments is the primary purpose behind the legislature's enactment of § 52-212a. See *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 276 Conn. 168, 222 n.60, 884 A.2d 981 (2005); *Kim* v. *Magnotta*, 249 Conn. 94, 102, 733 A.2d 809 (1999). Although it is undisputed that courts of general jurisdiction have the inherent power to open, correct, or modify their own judgments, "the duration of this power is restricted by statute and rule of practice." *Batory* v. *Bajor*, 22 Conn. App. 4, 8, 575 A.2d 1042, cert. denied, 215 Conn. 812, 576 A.2d 541 (1990). In particular, § 52-212a constrains the trial court's general authority to grant relief from a final judgment, providing in relevant part that "[u]nless 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*. . . ." (Emphasis added.)[9]

Our Supreme Court has instructed courts to look to the date when the judgment the party seeks to open or set aside became final in calculating the start of the four month limitation period in § 52-212a. See *Nelson* v. *Dettmer*, 305 Conn. 654, 674, 46 A.3d 916 (2012) (indicating that plain meaning of "rendered and passed" as used in § 52-212a "contemplates finality" of judgment). The court in *Nelson* concluded that for the purpose of determining finality with respect to § 52-212a and, thus, the commencement of the four month limitation period in which to file a motion to open, a judgment granting a motion for summary judgment did not become final

[9] The plaintiffs do not argue that any exception to the four month limitation period contained in § 52-212a is applicable in the present case.

until the trial court denied a motion to reargue that was filed within the applicable appeal period.[10] *Nelson* thus stands for the proposition that, under limited circumstances, the date a judgment is deemed final shifts from the date the judgment was rendered by the court until such time as that court disposes of any postjudgment motions that, if granted, would affect the substantive rights of the parties. In *Kim* v. *Magnotta*, supra, 249 Conn. 109, our Supreme Court also recognized that, "in some situations, the principle of protection of the finality of judgments must give way to the principle of fairness and equity." Neither *Nelson* nor *Kim*, however, concludes, or can be read to imply, that the filing of an appeal from a related judgment suspends the finality of a judgment for purposes of complying with the four month limitation period in § 52-212a.[11]

[10] In so holding, our Supreme Court in *Nelson* relied on language from its decision in *Weinstein* v. *Weinstein*, 275 Conn. 671, 698–99, 882 A.2d 53 (2005), in which it indicated that the filing of a motion to reargue or for reconsideration of a judgment within the applicable appeal period "should be treated as suspending the finality of judgment" and "suspends the appeal period." *Nelson* v. *Dettmer*, supra, 305 Conn. 677. It is axiomatic that we are bound by the decisions of our Supreme Court. See *Stuart* v. *Stuart*, 297 Conn. 26, 45–46, 996 A.2d 259 (2010). We nevertheless take this opportunity to note an apparent tension between our Supreme Court's reasoning and our rules of practice. Our Supreme Court suggests by its language in *Weinstein* that the filing of a motion to reargue "suspends" finality and, thus, the time to file an appeal. The plain language of Practice Book § 63-1 (a) and (c) (1), however, provides that the filing of such a postjudgment motion creates a *new* appeal period in which to challenge the original judgment, but that the *original* appeal period, which runs from the time the judgment was initially rendered continues to run, and that a *proper appeal from the initial judgment may be filed in either the original or newly created appeal period*. If the finality of a judgment truly is suspended by the filing of a motion to reargue, a party could not file such a motion and also file an appeal in the original appeal period because that appeal arguably would not be taken from a final judgment—a jurisdictional defect. See, e.g., *Stroiney* v. *Crescent Lake Tax District*, 197 Conn. 82, 86, 495 A.2d 1063 (1985).

[11] Support for a rule that the filing of an appeal does not toll the time period in which to seek relief from a judgment from the trial court is found in our federal courts' treatment of this issue. The analogous federal rule authorizing motions to open judgments is found in Rule 60 (b) of the Federal

Turning to the present case, the court rendered summary judgment in favor of Kovalcik and Intepros on October 6, 2010. The stated ground for the court's decision was that the claims against them were "derivative" of the plaintiffs' negligence claims against Victory and, because the court had granted Victory's motion for summary judgment in a separate decision dated October 5, 2010, the claims against these latter defendants "cannot survive."[12] Irrespective of the reasons for granting the motion for summary judgment, the court's judgment disposed of all counts of the complaint brought against Kovalcik and Intepros. Thus, it constituted a final judgment with respect to those parties. See Practice Book § 61-3. A motion to reargue, however, was filed on October 21, 2010, and denied that same day. Accordingly, pursuant to our Supreme Court's decision in *Nelson* v. *Dettmer*, supra, 305 Conn. 654, the four month period to file a motion seeking relief from that judgment under § 52-212a began to run on October 21, 2010, and expired in February, 2011.

Rules of Civil Procedure, and requires that parties move for relief from a final judgment "within a reasonable time," although motions based on mistake, excusable neglect, previously undiscovered evidence, or fraud must be filed "no more than a year after the entry of the judgment or order . . . ." Federal courts have held that "[b]y its terms, the one-year time limit in Rule 60 (b) runs from the date the judgment was 'entered' in the district court; it does not run from the date of an appellate decision reviewing that judgment, *nor does the pendency of an appeal toll the one-year period*." (Emphasis added.) *Tool Box, Inc.* v. *Ogden City Corp.*, 419 F.3d 1084, 1088–89 (10th Cir. 2005).

[12] The plaintiffs place great weight on the fact that the court referred to the counts against Kovalcik and Intepros as having been "derivative" of the negligence counts. We are unpersuaded that this designation has any meaningful significance in our consideration of the issue before us. It may be accurate that the plaintiffs' sole motivation for bringing the fraudulent transfer counts was to aid their ability to secure any judgment that they might obtain as a result of their negligence action against Victory and, thus, absent the negligence counts, neither they nor the court had any incentive to pursue those counts. The causes of action, however, are legally distinct and require proof of different facts, and, therefore, the court's judgments on those counts were separate and distinct for purposes of an appeal.

Our Supreme Court has indicated that the four month limitation period in § 52-212a may be tolled on equitable grounds in certain circumstances. See *Kim* v. *Magnotta*, supra, 249 Conn. 109. Nevertheless, the plaintiffs have not argued on appeal that the four month limitation period in § 52-212a should give way in the present case on account of principles of equity nor have they identified any particular equitable principles or cited to relevant case law regarding the doctrine of equitable tolling. Moreover, given that the plaintiffs have provided no justification for their failure to challenge directly the summary judgment on the fraudulent transfer counts as part of their prior appeal, which would have eliminated the need for a late motion to open, it is not clear that they could prevail in a balancing of the equities involved.

Finally, we turn to the plaintiffs' primary argument on appeal, namely, that the running of the four month limitation period was tolled in this case because, for all intents and purposes, the underlying action was "proverbially preserved in amber upon the filing of [the prior] appeal." That argument is not supported either by the plain language of Practice Book § 61-11 (a) or existing case law.

First, construing the automatic appellate stay provision in the expansive manner suggested by the plaintiffs would be in direct conflict with existing case law. In this state, the filing of an appeal does not divest the trial court of jurisdiction or authority to continue to act in the matter on appeal.[13] To the contrary, our Supreme Court has clarified on numerous occasions that trial

[13] Although a majority of states hold that an appeal divests the trial court of jurisdiction to act in the matter on appeal, Connecticut is among the substantial minority of jurisdictions that recognize a trial court's continuing jurisdiction. See 46 Am. Jur. 2d 30–31, Judgments § 647 (2017), and cases cited therein.

courts in this state continue to have the power to conduct proceedings and to act on motions filed during the pendency of an appeal provided they take no action to enforce or carry out a judgment while an appellate stay is in effect. See *RAL Management, Inc.* v. *Valley View Associates*, 278 Conn. 672, 682, 691–92, 899 A.2d 586 (2006) (trial court properly may open judgment despite pending appeal and may even reverse itself rendering appeal moot); *Ahneman* v. *Ahneman*, 243 Conn. 471, 482, 706 A.2d 960 (1998) ("[i]t is well established that a trial court maintains jurisdiction over an action subsequent to the filing of an appeal"), and cases cited therein. The automatic stay prohibits only those actions that would execute, effectuate, or give legal effect to all or part of a judgment challenged on appeal. See *Caruso* v. *Bridgeport*, 284 Conn. 793, 803, 937 A.2d. 1 (2007); *Cunniffe* v. *Cunniffe*, 150 Conn. App. 419, 435 n.12, 91 A.3d 497 (2014).

Second, the plaintiffs appear to misconstrue the scope and purpose of the automatic stay provision of Practice Book § 61-11 (a). As previously noted, Practice Book § 61-11 (a) provides that, with limited exceptions not relevant here, "proceedings to enforce or carry out the judgment or order shall be automatically stayed until the time to file an appeal has expired. If an appeal is filed, such proceedings shall be stayed until the final determination of the cause." Accordingly, by its plain language, the automatic stay provision creates only a stay of *execution* regarding the judgment from which the appeal was filed. In other words, the automatic appellate stay, "merely denies [the successful litigant] the immediate fruits of his or her victory . . . in order to protect the full and unhampered exercise of the right to appellate review." (Citation omitted; internal quotation marks omitted.) *Preisner* v. *Aetna Casualty & Surety Co.*, 203 Conn. 407, 414, 525 A.2d 83 (1987). As the plaintiffs conceded at oral argument, there is no

express language in that provision that gives rise to any blanket prohibition against all further proceedings in the trial court upon the filing of an appeal.[14]

Lastly, the plaintiffs did not appeal from the judgment rendered in favor of Kovalcik and Intepros, and, therefore, any protection afforded by the automatic appellate stay did not extend to that judgment. We have recently held that if the trial court renders multiple but separate judgments in the same case, this results in distinct and separate appeal periods, and "any automatic stay that is extended as the result of filing an appeal from [one judgment] will not stay proceedings to enforce or carry out the judgment on the [other]." *Sovereign Bank* v. *Licata*, 178 Conn. App. 82, 99, 172 A.3d 1263 (2017) (holding automatic stay arising as result of appeal taken from judgment on counterclaims in foreclosure action did not stay proceedings to enforce or carry out judgment of strict foreclosure rendered on complaint). Even after this court notified the parties in response to the motion to dismiss filed by Kovalcik and Intepros that we construed the plaintiffs' prior appeal as challenging only the judgment rendered in favor of Victory, the plaintiffs took no action to amend the prior appeal.

We recognize that our jurisprudence regarding the finality of judgments, preservation of appellate issues, and limitations on a party's right to seek collateral relief from a judgment is, at times, somewhat opaque and

[14] In support of their assertion that an appeal effectively preserves "in amber" the procedural posture of a case on appeal, the plaintiffs cite language from our decision in *Pavliscak* v. *Bridgeport Hospital*, 48 Conn. App. 580, 589, 711 A.2d 747, cert. denied, 245 Conn 911, 718 A.2d 17 (1998), in which we reversed a trial court order that significantly altered the judgment being considered on appeal. Our Supreme Court, however, impliedly overruled *Pavliscak* when it reaffirmed in *RAL Management, Inc.* v. *Valley View Associates*, supra, 278 Conn. 691–92, that a trial court properly may alter a judgment that is the subject of a pending appeal even if by doing so the trial court rendered the appeal moot. Any reliance upon this court's discussion in *Pavliscak* is, therefore, misplaced.

fraught with potential pitfalls for attorneys and self-represented litigants. The plaintiffs in the present case appear to have misapprehended these rules, as is apparent from their failure to appeal from the October 6, 2010 judgment on the mistaken belief that the unchallenged judgment could later be opened and set aside by the trial court if they were successful in overturning the summary judgment in favor of Victory. Nevertheless, Kovalcik and Intepros were entitled to rely upon the finality of the decision rendered in their favor once the applicable appeal period had passed. The plaintiffs' attempt to revive the claims against them by filing a motion to open well outside the statutorily prescribed time period was not, as the trial court indicated, a proper substitute for an appeal.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MARY E. BAGNASCHI
(AC 39072)

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

Syllabus

Convicted of the crime of breach of the peace in the second degree, the defendant appealed to this court. The defendant, who previously had been employed by the same entity that employed S, was involved in an incident at a frozen yogurt shop with S, who was accompanied by R and his grandchildren. Specifically, S had extended his hand to greet the defendant, who grasped S's hand and, in a raised voice, used obscenities in accusing him of having ruined her life. R became alarmed and one of the children began to cry. The defendant then went to the passenger side window of the car, made an obscene gesture at R and yelled obscenities at her before S was able to drive to his home. After S had driven into the driveway of his home, the defendant, who had driven her vehicle to the bottom of the driveway, lowered her window and yelled obscenities at S before she drove away. The trial court denied the defendant's motion to dismiss, in which she alleged that only evidence of the events at S's home could be considered at trial because the state's operative information did not include the events at the frozen yogurt

shop, and that her use of profanity toward S from the bottom of the driveway did not constitute breach of the peace in the second degree. On appeal, the defendant claimed, inter alia, that the evidence was insufficient to support her conviction because the state's information and bill of particulars charged her with breach of the peace only as to the events at S's residence, and her conduct in shouting profanities from a distance amounted to constitutionally protected speech. *Held*:

1. The evidence was sufficient to support the defendant's conviction of breach of the peace in the second degree:

   a. The defendant could not prevail on her claim that the information and bill of particulars limited the scope of the prosecution to the events in front of S's house and that the use of the events at the frozen yogurt shop constituted a material variance from the allegations in the operative information and bill of particulars, she having failed to sustain her burden of establishing prejudicial surprise as a result of the information and bill of particulars; the defendant's lack of notice claim regarding the events at the frozen yogurt shop failed, as the defendant's motion to dismiss the charges specifically referred to her conduct at the frozen yogurt shop, the prosecutor, during oral argument on the motion to dismiss, emphasized the events at the frozen yogurt shop, including the physical contact between the defendant and S, as did defense counsel, the defendant failed to object to or to claim that the evidence presented by the state regarding her actions at the frozen yogurt shop was outside the scope of the state's pleadings, and the defendant did not demonstrate that she was prejudiced as a result of the alleged material variance between the state's pleadings and the proof at trial.

   b. The evidence concerning the defendant's actions outside the frozen yogurt shop and at S's house was sufficient to support her conviction of breach of the peace in the second degree; the trial court properly considered the defendant's conduct in determining whether the evidence supported her conviction of breach of the peace in the second degree, as the events at the frozen yogurt shop, coupled with the defendant's later appearance and actions outside S's residence, constituted a continuing course of conduct from which the jury reasonably could have found that the defendant, with the intent to cause inconvenience, annoyance or alarm, or having recklessly created a risk thereof, engaged in threatening behavior in a public place.

2. The defendant's claim that the trial court improperly denied her motion for a probable cause hearing was unavailing; that claim was not made before the trial court and was unsupported by any discussion of or citation to persuasive legal authority, and the defendant conceded that there was no statutory right to a probable cause hearing for a misdemeanor such as breach of the peace in the second degree.

3. The defendant could not prevail on her claim that her warrantless arrest in her home was unlawful and, thus, that the subsequent prosecution and her conviction violated her constitutional rights, as an illegal arrest,

under controlling legal precedent, does not bar a subsequent prosecution or void a resulting conviction.

4. The trial court did not violate the defendant's constitutional right to present a defense when it ruled that evidence pertaining to complaints that she had filed against her former employer and grievances filed against S were irrelevant and, thus, inadmissible; the defendant failed to proffer evidence that connected S to the alleged acts by the employer that she claimed were in retaliation for her whistle-blowing activities, and there was no evidence that the employer had directed S to pursue his criminal complaint against the defendant as retaliation for her complaints against the employer.
5. The defendant could not prevail on her unpreserved claim that the trial court committed plain error when it failed to recuse itself, which was based on her assertion that the court's preclusion of certain witnesses and evidence demonstrated bias against her that amounted to structural error and necessitated a new trial; the defendant's claims of judicial bias did not constitute plain error, as they amounted to disagreements with the court's rulings, which are not evidence of bias.

Argued November 15, 2017—officially released April 10, 2018

Procedural History

Substitute information charging the defendant with the crimes of breach of the peace in the second degree and interfering with an officer, brought to the Superior Court in the judicial district of Waterbury, geographical area number four, where the court, *K. Murphy, J.*, denied the defendant's motion to dismiss; thereafter, the matter was tried to the jury; subsequently, the court denied the defendant's motion to dismiss or for a judgment of acquittal; verdict and judgment of guilty of breach of the peace in the second degree; thereafter, the court dismissed the charge of interfering with an officer, and the defendant appealed to this court. *Affirmed.*

Deborah G. Stevenson, assigned counsel, for the appellant (defendant).

Timothy F. Costello assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *John J. Davenport*, senior assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, C. J. The defendant, Mary E. Bagnaschi, appeals from the judgment of conviction, rendered after a jury trial, of breach of the peace in the second degree in violation of General Statutes § 53a-181 (a) (1). On appeal, the defendant claims that (1) there was insufficient evidence to support her conviction, (2) the trial court improperly denied her request for a probable cause hearing, (3) the court improperly denied her motion to dismiss, which was based on her assertion that she was unlawfully arrested in her home without a warrant, (4) the court improperly violated her constitutional right to present a defense and (5) the court improperly failed to recuse itself. We disagree and, accordingly, affirm the judgment.

The jury reasonably could have found the following facts. On May 16, 2013, John Silano took Jessica Rich, whom he considered to be his "daughter," and Rich's children, whom he considered to be his "grandchildren," to a frozen yogurt shop in Torrington.[1] As Silano, a longtime employee of the Torrington Housing Authority (authority), assisted the older grandchild into the car, he observed the defendant standing approximately twelve to fifteen feet away. Silano knew the defendant because she was a former employee of the authority.

Silano stopped buckling his grandchild into her car seat as the defendant approached. Silano extended his hand to greet the defendant, who inquired as to Silano's well-being. Silano responded that he was "doing fine" and asked how the defendant was. She responded, "I'm not doing well at all, the [authority] ruined my life, you ruined my life." At this point, the defendant, still

[1] At the time of trial, Silano had been in a long-term relationship and resided with Paula Dante. Silano and Dante were not married, but he considered Rich, Dante's daughter, and Rich's two children to be his "daughter" and "grandchildren," respectively.

grasping Silano's hand, stated with a raised voice: "[W]ell, fuck you, John, you ruined my fucking life, fuck you." Rich was "extremely alarmed" by the defendant's actions.

Rich loudly instructed Silano to get into the car as he attempted to extricate himself from the defendant's grasp. The volume of the defendant's voice caused the older grandchild to become upset and to cry. Silano freed himself from the defendant's grip. The defendant then proceeded to the passenger's side window, held up both middle fingers and yelled, "fuck you, fuck you," at Rich. Silano then entered the car and drove away as the defendant continued yelling.

Silano travelled to his home and, after pulling into the driveway, the two adults began taking the grandchildren out of the car. The defendant drove her vehicle to the bottom of the driveway, lowered her window and again yelled at Silano. Specifically, she shouted: "[F]uck you, John, fuck you, look at me, call the police. I want a complete investigation of this." Silano and Rich took the grandchildren into the home and locked the door. The defendant remained for fifteen to thirty seconds before driving away.

Silano called the police, and James Delay, a Torrington police officer, responded to Silano's home. After speaking to Delay about the incidents at the yogurt shop and his home, Silano indicated that he wanted to file a criminal complaint. Delay obtained a sworn, written statement from Silano. Delay then went to the defendant's residence to "get her side of the story" and to arrest her, having determined that there was probable cause to do so.

The defendant subsequently was charged with breach of the peace in the second degree and interfering with a police officer. Following a trial, the jury found the defendant guilty of breach of the peace in the second

degree but not guilty of interfering with a police officer. The court rendered judgment in accordance with the jury's verdict and sentenced the defendant to six months incarceration, execution suspended, and two years of probation.[2] This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that there was insufficient evidence to support her conviction.[3] This claim includes two distinct, yet related components. First, the defendant argues that state's information and bill of particulars charged her with breach of the peace only as to the events at Silano's residence, where there was no physical contact between her and Silano. She further contends that shouting profanities from a distance amounted to constitutionally protected speech and did not rise to the level of "fighting words,"[4] and therefore that the evidence was insufficient to convict her of breach of the peace in the second degree. Second, the defendant argues that even if the state's charging documents included the events at the frozen yogurt shop, the evidence was insufficient to support her conviction. We disagree.

As a preliminary matter, we set forth our well established standard of review. "In reviewing the sufficiency

[2] The terms of probation included an order that the defendant initiate no contact with Silano or Rich.

[3] "We begin with this issue because if the defendant prevails on the sufficiency claim, she is entitled to a directed judgment of acquittal rather than to a new trial." *State* v. *Moore*, 100 Conn. App. 122, 126 n.2, 917 A.2d 564 (2007).

[4] "Fighting words consist of speech that has a direct tendency to cause imminent acts of violence or an immediate breach of the peace. Such speech must be of such a nature that it is likely to provoke the average person to retaliation." (Internal quotation marks omitted.) *State* v. *Buhl*, 321 Conn. 688, 717 n.23, 138 A.3d 868 (2016); see also *State* v. *Parnoff*, 160 Conn. App. 270, 278, 125 A.3d 573 (2015), cert. granted on other grounds, 320 Conn. 901, 127 A.3d 185 (2015).

of the evidence to support a criminal conviction 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 [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"We note that the 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 [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . .

"Finally, [a]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable

doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Crespo*, 317 Conn. 1, 16–17, 115 A.3d 447 (2015); *State* v. *Gill*, 178 Conn. App. 43, 47–48, 173 A.3d 998, cert. denied, 327 Conn. 987, 175 A.3d 44 (2017).

Next, we identify the elements the state must prove beyond a reasonable doubt to convict an individual of breach of the peace in the second degree. Section 53a-181 (a) provides in relevant part: "A person is guilty of breach of the peace in the second degree when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person . . . (1) Engages in fighting or in violent, tumultuous or threatening behavior in a public place . . . . For purposes of this section, 'public place' means any area that is used or held out for use by the public whether owned or operated by public or private interests."

A

We first consider the defendant's contention that the state's information and bill of particulars limited the scope of the prosecution to the events in front of Silano's home. Put another way, the defendant argues that the use of the events at the frozen yogurt shop constituted a material variance from the allegations in the operative information and bill of particulars. See, e.g., *State* v. *Pettway*, 39 Conn. App. 63, 80, 664 A.2d 1125, cert. denied, 235 Conn. 921, 665 A.2d 908 (1995). We conclude that the defendant failed to sustain her

burden of establishing prejudicial surprise as a result of the state's information and bill of particulars.

The following additional facts are necessary for our discussion. In its initial short form information, the state charged the defendant with committing the offenses of breach of the peace in the second degree in violation of § 53a-181 and interfering with a police officer in violation of General Statutes § 53a-167a on or about May 16, 2013. On February 11, 2015, the defendant filed a motion for a bill of particulars.[5]

Nearly one year later, on January 7, 2016, the state filed its bill of particulars. It provides in relevant part: "1. The defendant is charged with one count each of Breach of Peace in the Second Degree [in] violation of . . . § 53a-181 (a) (1) and one count of Interfering with an Officer in violation of . . . § 53a-167a. 2. The two charges occurred at or about May 16, 2013, at or about 8:15 p.m. The Breach of Peace Second Degree occurred at or near 260 Crestwood Road, Torrington, Connecticut . . . . 3. As it relates to the Breach of Peace in the Second Degree count; the defendant recklessly created a risk of inconvenience, annoyance or alarm towards John Silano in a public place. . . . 4. See #3 above. 5. See #2 above. 6. The names and addresses of all potential witnesses [have] been disclosed to the defendant in a separate pleading." On the same day, the state filed a long form substitute information essentially tracking the language set forth in its bill of particulars.

[5] Specifically, the defendant's motion requested that the state set forth: "1. The specific nature of the offense or offenses which the Defendant is charged with. 2. The time, place and manner in which this offense was committed. 3. The specific acts performed by the Defendant which constitutes all necessary elements of the crime charged. 4. The general circumstances surrounding the alleged crime. 5. State with particularity, the date, and time of said alleged violations and the section of the Connecticut General Statutes violated. 6. State with particularity, the name or names, including addresses, of all persons the State alleges were involved in said violations."

The state subsequently filed an amended substitute information and a second amended substitute information on January 11, 2016, and January 12, 2016, respectively. The second amended substitute information charged the defendant, in relevant part, as follows: "That the said [defendant] did commit the crime of Breach of Peace in the Second Degree in violation of . . . § 53a-181 (a) (1), in that on or about May 16, 2013, at or about 8:15 p.m., at or near 260 Crestwood Road, Torrington, Connecticut, the said [defendant], recklessly created a risk of inconvenience, annoyance and alarm towards John Silano by engaging in violent, tumultuous and threatening behavior in a public place."

Contemporaneous with the state's filings, the defendant moved to dismiss the charges on January 11, 2016. Specifically, she asserted that there was insufficient evidence "to justify the bringing or continuing of such information or the placing of the defendant on trial." In the fact section of her supporting memorandum of law, the defendant recited the events of May 16, 2013, beginning at the frozen yogurt shop.

Prior to the start of jury selection, the court, *K. Murphy, J.*, heard argument on the defendant's motion to dismiss. At the outset of his presentation, defense counsel stated: "With regard to the breach of the peace charge, the allegation is that [the defendant] shook hands with the alleged victim, Mr. Silano, and stated that he had ruined her life. And then she used some language, that I care not to repeat on the record, but it was obscene language to Mr. Silano. And the allegation is, according to the police record, and according to Mr. Silano's statement, that she used that same phrase multiple times. . . . *So, the evidence at a trial before a jury would fairly be the same; it would be that she shook hands with Mr. Silano, that she used foul language to Mr. Silano . . . . [T]hat, in and of itself, I would submit to the court, does not amount to a breach*

of the peace under the statute." (Emphasis added.) Defense counsel also argued that the words used by the defendant on May 16, 2013, did not qualify as "inconvenience, annoyance or alarm with respect to the breach of the peace."

In response, the prosecutor explained that the language used by the defendant constituted fighting words. Additionally the prosecutor argued: "But also if you look at the case law . . . *it's not only the fighting words, but it's the physical contact, the refusal to let go of the handshake*, and the other facts that arise around it between—by the fact that the family members, including young children, were present and the frightening behavior that caused annoyance and alarm to the people who were responsible for the care of those children." (Emphasis added.) The prosecutor subsequently emphasized the significance of the physical contact, which occurred only at the frozen yogurt shop. The court heard a brief response from the defendant's attorney and summarily denied the motion to dismiss.[6]

Evidence commenced on January 14, 2016. The state presented Silano and Rich as witnesses. Both testified regarding the defendant's conduct outside of the frozen yogurt shop without objection from the defendant's counsel. Following their testimony, and that of the police officers, the state rested.

Defense counsel orally moved to dismiss both counts of the information, claiming insufficient evidence.[7] Then, for the first time, defense counsel argued that

[6] Specifically, the court stated: "All right. Well, I'm going to deny the motion at this time. I will [say] this, that's why we have jury trials. I will also indicate that based on—assuming the facts as presented in the motion, which, I understand, is based on the police report and may not be accurate, but based on what the police have indicated, and what counsel has put in their motion, I believe there is sufficient evidence to go forward, and I deny the defense's motion to dismiss."

[7] See Practice Book § 41-8 (5).

the operative information did not include the events at the frozen yogurt shop, and therefore that only evidence of the events at Silano's home could be considered.[8] Defense counsel further contended that the defendant's use of profanity toward Silano from the bottom of the driveway did not constitute the crime of breach of the peace in the second degree.

In response, the prosecutor countered that the date and time set forth in the operative information did not constitute elements of the crime of breach of the peace in the second degree; instead, it provided notice to the defendant. The prosecutor continued: "[T]he defendant was well on notice. And we know that, if you look at his pleadings, because in his motion to dismiss he lays out the entire factual basis of the entire state's case. The defense was entirely aware [of] this conduct while the police took the statement, and that some of the incidents happened at Mr. Silano's house, that the conduct alleged in this was the continued course of conduct from outside of the yogurt shop all the way up to Mr. Silano's house. And that testimony here was entirely consistent with the entire course of conduct from outside the yogurt store all the way up to the house that was occupied by Mr. Silano."

The prosecutor also emphasized that the present case was about the defendant's conduct and that it was "not a first amendment case." Returning to the issue of

[8] Specifically, defense counsel argued: "Your Honor, first of all, I believe that—and I submit to the court that the evidence that is pertinent to this charge is solely the evidence involving the events that took place at or near 260 Crestwood Road in Torrington, and that is the residence of Mr. Silano. So that any conduct that took place elsewhere is not being charged in this count one. And so what happened, according to the evidence that we have from State, is that at or near 260 Crestwood Road in Torrington, [the defendant] allegedly stopped her car in the middle of the street at the drive, or near the driveway of 260 Crestwood Road, and yelled profanities at Mr. Silano, and demanded an investigation and told him to call the cops. And that's basically all that [the defendant] is alleged to have done."

notice, the prosecutor argued that "the conduct here alleged is the conduct that began outside the yogurt shop and ended at the house. The defense knew that. They had that in the bill of particulars. They had that in their information. They had that in their police reports. They put in their pleadings. They were not surprised or disadvantaged. And it is not an element of the crime."

The court denied the defendant's motion to dismiss. In rejecting the defendant's claim of protected speech, the court observed: "I will indicate that both sides focus on these—both sides refer to as fighting words. I don't think this is a case about fighting words at all. This is a case about conduct. This is a case about grabbing hold of an individual and holding them and not letting go, and then chasing them around the car, then thrusting both hands with the F-you sign in an extremely violent fashion. . . . The words are certainly important, because they show [the defendant's] actions here, but according to the evidence—but the words are—the case is about words, this case is about actions. So, I think the focus on the fighting words language, I really don't think it appropriate in this case."

The court then addressed the scope of the operative information. It reasoned that the information used the phrase, "at or near," and that there was evidence that Silano's home was within "a couple of miles" of the frozen yogurt shop. The court also noted that the defendant had failed to object to the evidence regarding the events at the frozen yogurt shop. The court further stated: "And it appears that it always was anticipated that that was going to be evidence in this case. And I did note the same thing, that in the defense's motion to dismiss, the facts that occurred in front of the yogurt store there, the location of the yogurt store is there . . . ."

Having set forth the facts relevant to this issue, we next identify the applicable legal principles. "The function of an accusatory pleading such as an information is to inform a defendant of the nature and cause of the accusation as required by our federal and state constitutions." (Internal quotation marks omitted.) *State* v. *David N.J.*, 301 Conn. 122, 158, 19 A.3d 646 (2011). "The sixth amendment to the United States constitution and article first, § 8, of the Connecticut constitution guarantee a criminal defendant the right to be informed of the nature and cause of the charges against him with sufficient precision to enable him to meet them at trial. . . . [That] the offense should be described with sufficient definiteness and particularity to apprise the accused of the nature of the charge so he can prepare to meet it at his trial . . . are principles of constitutional law [that] are inveterate and sacrosanct." (Internal quotation marks omitted.) *State* v. *Caballero*, 172 Conn. App. 556, 564, 160 A.3d 1103, cert. denied, 326 Conn. 903, 162 A.3d 725 (2017); see also *State* v. *Bergin*, 214 Conn. 657, 674, 574 A.2d 164 (1990).

A bill of particulars, which is to be read not in isolation but rather with the information, provides the defendant with additional information regarding the state's accusations. *State* v. *Roque*, 190 Conn. 143, 154, 460 A.2d 26 (1983). Our Supreme Court has instructed that "[i]f we consider the bill of particulars in conjunction with the information, the test to be applied is as follows: [If] the state's pleadings . . . informed the defendant of the charge against him with sufficient precision to enable him to prepare his defense and to avoid prejudicial surprise, and were definite enough to enable him to plead his acquittal or conviction in bar of any future prosecution for the same offense, they have performed their constitutional duty." (Internal quotation marks omitted.) Id.; *State* v. *Morrill*, 197 Conn. 507, 551, 498 A.2d 76 (1985); *State* v. *Killenger*, 193 Conn. 48, 55, 475

A.2d 276 (1984); see also *State* v. *Steve*, 208 Conn. 38, 44, 544 A.2d 1179 (1988) (purpose of bill of particulars is to inform defendant, with sufficient precision, of charges against him to prepare defense and avoid prejudicial surprise).

In the present case, the defendant's lack of notice claim regarding the events at the frozen yogurt shop fails in light of defense counsel's arguments in the pretrial motion to dismiss. That motion specifically referred to the defendant's conduct at the frozen yogurt shop as part of the factual basis of the breach of the peace charge. Furthermore, at oral argument on this motion, the prosecutor emphasized the events at the frozen yogurt shop, including the physical contact between the defendant and Silano, as did defense counsel. These facts undermine any claim of surprise.

Additionally, we note that the defendant failed to object to the evidence presented by the state regarding her actions at the frozen yogurt shop. The defendant did not claim that such evidence was outside the scope of the state's pleadings, which also undercuts her appellate claim. See *State* v. *Roque*, supra, 190 Conn. 155–56; *State* v. *Trujillo*, 12 Conn. App. 320, 326, 531 A.2d 142, cert. denied, 205 Conn. 812, 532 A.2d 588 (1987).

Finally, we note that the defendant's appellate brief fails to analyze the issue of prejudice. "[A] defendant can gain nothing from [the claim that the state's charging documents are insufficient] without showing that he was in fact prejudiced in his defense on the merits and that substantial injustice was done to him because of the language of the information. . . . To establish prejudice, the defendant must show that the information was *necessary* to his defense, and not merely that the preparation of his defense was made more burdensome or difficult by the failure to provide the information." (Emphasis added; internal quotation marks

omitted.) *State* v. *Caballero*, supra, 172 Conn. App. 566; *State* v. *Shenkman*, 154 Conn. App. 45, 65, 104 A.3d 780 (2014), cert. denied, 315 Conn. 921, 107 A.3d 959 (2015); see also *State* v. *Vumback*, 263 Conn. 215, 227–28, 819 A.2d 250 (2003).

In her brief, the defendant argues that the trial court, "without authority and in abuse of its discretion, improperly expanded the information, without amendment by the state, to include the alleged conduct of the defendant at both locations." She further contends that in doing so, the court employed an incorrect standard of review with respect to its consideration of the January 14, 2016 motion to dismiss and/or for a judgment of acquittal. This argument, however, ignores the well established obligation for the defendant to show prejudice. The defendant bears the burden on appeal of demonstrating prejudice as a result of a material variance between the state's pleadings and the proof at trial. *State* v. *Stephen G.*, 113 Conn. App. 682, 694–95, 967 A.2d 586 (2009). The defendant has failed to do so and, thus, her claim must fail.

B

We next consider the defendant's claim that the evidence concerning her actions outside of the frozen yogurt shop and outside of Silano's home was insufficient to prove that she violated § 53a-181 (a) (1). Specifically, the defendant argues that the court improperly considered this to be a prosecution based on conduct, rather than on her speech, and that the evidence was insufficient to prove beyond a reasonable doubt that she acted in a violent, tumultuous or threatening manner outside the frozen yogurt shop. The state counters that "physical conduct augmented by speech does not implicate the first amendment . . . [and that] the defendant's physical conduct here—gripping Silano's hand while spewing vulgarities at him—constituted violent,

tumultuous, or threatening behavior." We agree with the state.[9]

As we have noted previously, a valid conviction for breach of the peace in the second degree requires the state to "prove that (1) the defendant engaged in fighting or in violent, tumultuous or threatening behavior, (2) this conduct occurred in a public place and (3) the defendant acted with the intent to cause inconvenience, annoyance or alarm, or that he recklessly created a risk thereof." *State* v. *Ragin*, 106 Conn. App. 445, 451, 942 A.2d 489, cert. denied, 287 Conn. 905, 950 A.2d 1282 (2008). "[T]he predominant intent [in a breach of the peace charge] is to cause what a reasonable person operating under contemporary community standards would consider a disturbance to or impediment of a lawful activity, a deep feeling of vexation or provocation, or a feeling of anxiety prompted by threatened danger or harm." *State* v. *Wolff*, 237 Conn. 633, 670, 678 A.2d 1369 (1996).

We first consider whether the court properly concluded that this prosecution was based on the defendant's physical conduct and, thus, outside of the shield of constitutional protections afforded to protected speech. See, e.g., *State* v. *Weber*, 6 Conn. App. 407, 414, 505 A.2d 1266, cert. denied, 199 Conn. 810, 508 A.2d 771 (1986). The defendant argues that the court improperly failed to consider the "fighting words" doctrine in deciding her motion to dismiss and for a judgment of acquittal filed after the state had rested. We disagree. In *State* v. *Andriulaitis*, 169 Conn. App. 286, 288, 150 A.3d 720 (2016), the defendant argued that the evidence was

[9] As a result of this conclusion, we need not consider the defendant's request to incorporate the arguments set forth in *State* v. *Parnoff*, supra, 160 Conn. App. 270. In *Parnoff*, the dispositive issue was whether the defendant's statements to a summer intern and an employee of a water utility company who had entered his property rose to the level "fighting words." Id., 272–74. Unlike the present case, *Parnoff* concerned speech and not physical conduct.

insufficient to sustain his conviction of disorderly conduct in violation of General Statutes § 53a-182.[10] We noted there that the fighting words doctrine applies when a statute proscribes only speech. Id., 299. For that reason, we determined that "we need not decide whether the defendant's language portended physical violence or amounted to fighting words because the defendant's conduct consisted of more than mere speech. In addition to shouting profanities and that he did not want [his daughter] to enter the residence, the defendant stood in the entrance hallway near the door, and, through that conduct, prevented [her] from engaging in the admittedly lawful activity of entering [the residence] to retrieve her personal possessions. The fighting words limitation, therefore, is not implicated here." (Footnote omitted.) Id., 299–300; see also *State* v. *Simmons*, 86 Conn. App. 381, 389, 861 A.2d 537 (2004) (conviction based on defendant's conduct and not his speech), cert. denied, 273 Conn. 923, 871 A.2d 1033, cert. denied, 546 U.S. 822, 126 S. Ct. 356, 163 L. Ed. 2d 64 (2005); see generally *State* v. *DeLoreto*, 265 Conn. 145, 170–71, 827 A.2d 671 (2003) (*Katz, J.*, concurring and dissenting) (majority's analysis should have focused on defendant's conduct, not "true threats" exception to speech protected under first amendment and noting that nonverbal expressive activity can be banned because of action it entails but not because of ideas it expresses); *State* v. *Szymkiewicz*, 237 Conn. 613, 620, 678 A.2d 473 (1996) (speech may be proscribed under disorderly conduct statute [1] when accompanied

[10] In *State* v. *Simmons*, 86 Conn. App. 381, 391, 861 A.2d 537 (2004), cert. denied, 273 Conn. 923, 871 A.2d 1033, cert. denied, 546 U.S. 822, 126 S. Ct. 356, 163 L. Ed. 2d 64 (2005), we stated: "It is clear that the only difference between [breach of the peace and disorderly conduct] is that the breach of the peace statute requires that the proscribed conduct occur in a public place. The disorderly conduct statute does not require proof of any fact not also required for conviction under the breach of the peace statute." See also *State* v. *Szymkiewicz*, 237 Conn. 613, 618, 678 A.2d 473 (1996).

by actual physical conduct or [2] when identified as fighting words that portend imminent physical violence). In accordance with the foregoing precedent, we conclude that the trial court properly considered the defendant's conduct in determining whether the evidence supported her conviction of breach of the peace in the second degree.

The state presented evidence that Silano encountered the defendant as he left the frozen yogurt shop with Rich and his grandchildren. After exchanging an initial pleasantry and a handshake, the defendant's demeanor changed. She stated that both the authority and Silano had ruined her life and then directed a profanity at Silano. The defendant grabbed his hand tightly and would not let go of it. Silano became alarmed by the defendant's "intensity" as she held onto his hand. After Silano freed himself from the defendant's grasp, she went over to the passenger's side of the vehicle where Rich was located, and continued to use profanity. Silano was "very alarmed" for both himself and his family by the defendant's conduct, demeanor and language at the yogurt shop.[11] These events, coupled with the defendant's later appearance and actions outside of Silano's residence, constituted a continuing course of conduct according to the state's theory of the case.[12] The jury reasonably could have found that the defendant, with the intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, engaged in threatening behavior in a public place. See, e.g., *State* v. *Lo Sacco*, 12 Conn. App. 481, 489, 531 A.2d 184 (sufficient

[11] Silano's written statement to the police regarding the incident, which was admitted into evidence, indicated that he was "extremely alarmed for me, my family, and other housing authority employees' safety."

[12] In addition to the evidence presented during the trial, the prosecutor, in his closing argument, addressed the defendant's conduct toward Silano at the frozen yogurt shop and described the events of May 16, 2013, as a "continuing course of conduct that starts at the yogurt store and goes all the way [through the events at the Silano residence]."

evidence to convict defendant of creating public disturbance, which is similar to breach of peace, where defendant, who had been drinking alcohol heavily and was excitable, angry and upset, went to car, put hands on window, leaned head into car, and yelled at victim for approximately two minutes despite requests to stop), cert. denied, 205 Conn. 814, 533 A.2d 568 (1987). We conclude, therefore, that the state satisfied its burden of proving that the defendant committed breach of the peace in the second degree, and thus that her claim of insufficient evidence must fail.

II

The defendant next claims that the court improperly denied her motion for a probable cause hearing. Specifically, she argues that she was subjected to a warrantless arrest in her home and that a subsequent determination of probable cause never was made by a judge of the Superior Court. She further contends that it was improper for the court to deny her a probable cause hearing. We disagree with the defendant.

On August 24, 2014, at a pretrial proceeding before the court, *Fasano, J.*, the defendant orally requested a probable cause hearing. The court responded that the existence of probable cause had been determined at a prior proceeding. The defendant countered that she had "never had a probable cause hearing." The court then stated: "Well, here's the problem. There's a statutory right to a probable cause hearing for homicides because there's an exposure to life in prison . . . . They have a right to a probable cause hearing. There's no separate right to a probable cause hearing, particularly on misdemeanors." After the prosecutor voiced his objection, the court denied the defendant's motion, stating, "[i]t's not the practice in Connecticut."

On appeal, the defendant concedes that there is no statutory right to a probable cause hearing for a misdemeanor such as breach of the peace in the second

degree.[13] See, e.g., *Edwards* v. *Commissioner of Correction*, 105 Conn. App. 124, 130, 936 A.2d 716 (2008) (where state filed substitute information charging defendant with class D felony, and thus he no longer faced life sentence, he was no longer entitled to probable cause hearing); cf. Conn. Const., art. I, § 8, as amended by articles seventeen and twenty-nine of the amendments ("[n]o person shall be held to answer for any crime, punishable by death or life imprisonment, unless upon probable cause shown at a hearing"); General Statutes § 54-46a (probable cause hearing required for crimes punishable by death, life imprisonment without the possibility of release or life imprisonment). She argues, nonetheless, that the court improperly rejected her request for such a hearing on the ground that "[i]t's not the practice in Connecticut" and erred in assuming that a determination of probable cause had been made by another judge in the present case.

We note that the claims raised on appeal were not made before the trial court. Additionally, the defendant's appellate brief fails to point us to any precedent supporting her claim that the trial court should have afforded her a probable cause hearing. The bald assertion that the court's ruling constituted an abuse of discretion or violated her right to due process is unsupported by any discussion of or citation to persuasive legal authority. See *State* v. *Riggsbee*, 112 Conn. App. 787, 793, 963 A.2d 1122 (2009). Put differently, "[i]t

[13] As noted in the state's brief, the defendant did not specifically argue that she was entitled to a hearing pursuant to Practice Book § 37-12. Section 37-12 (a) provides in relevant part that "[i]f a defendant has been arrested without a warrant and has not been released from custody by the time of the arraignment or is not released at the arraignment . . . the judicial authority shall . . . make an independent determination as to whether there is probable cause for believing that the offense charged has been committed by the defendant." The state further properly notes that the defendant had been released from custody prior to her first court appearance, and therefore that rule of practice did not apply in this case.

is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones." (Internal quotation marks omitted.) *State* v. *Prosper*, 160 Conn. App. 61, 74–75, 125 A.3d 219 (2015). For these reasons, we conclude that the defendant's claim that the court should have held a probable cause hearing is without merit.[14]

III

The defendant next claims that she was arrested in her home without a warrant and as a result of this illegal arrest, her subsequent prosecution for and conviction of breach of the peace in the second degree violated various provisions of the federal and state constitutions.[15] The state counters that, under the facts and circumstances of this case, even if her arrest was illegal, such illegality does not serve as the basis for the dismissal of the information. We agree with the state.

The defendant raised the issue of the illegality of her arrest at a pretrial proceeding on June 11, 2014, in her oral motion to dismiss on January 11, 2016, and in her motion to dismiss and for a judgment of acquittal on January 14, 2016. On appeal she contends that the planned and warrantless arrest in her home, absent exigent circumstances, was illegal and unconstitutional. See, e.g., *State* v. *Santiago*, 224 Conn. 494, 498–99, 619 A.2d 1132 (1993) ("[e]ven where there is probable cause

[14] We further note our Supreme Court "has required the automatic reversal of a conviction due to error at the probable cause hearing only when the error was a lack of sufficient evidence to justify the finding of probable cause." *State* v. *Brown*, 279 Conn. 493, 508, 903 A.2d 169 (2006). Otherwise, errors at the probable cause stage are subject to the harmless error analysis on appeal. Id., 509.

[15] Specifically, she argues that her prosecution and conviction following the illegal arrest violated her rights to due process and a fair trial in violation of the fourth, fifth and fourteen amendments to the United States constitution, as well as article first of the Connecticut constitution.

to arrest a suspect on the speedy information of others, however, the fourth amendment prohibits the police from making a warrantless . . . entry into a suspect's home in order to make a routine . . . misdemeanor arrest" [internal quotation marks omitted]).

Our Supreme Court has recognized that "[t]he relationship between an illegal arrest and a subsequent prosecution under federal constitutional law is well settled. In an unbroken line of cases dating back to 1886, the federal rule has been that an illegal arrest will not bar a subsequent prosecution or void a resulting conviction." *State* v. *Fleming*, 198 Conn. 255, 259, 502 A.2d 886, cert. denied, 475 U.S. 1143, 106 S. Ct. 1797, 90 L. Ed. 2d 342 (1986); see also *State* v. *Heinz*, 193 Conn. 612, 629, 480 A.2d 452 (1984) (under federal law, fact that person has been illegally arrested or detained does not void subsequent conviction); *State* v. *Haskins*, 188 Conn. 432, 442–43, 450 A.2d 828 (1982) (fact that person was subject to illegal arrest or detention will not void subsequent conviction); *State* v. *Silano*, 96 Conn. App. 341, 344, 900 A.2d 540 (conviction not void if no evidence obtained as result of illegal arrest), cert. denied, 280 Conn. 911, 908 A.2d 542 (2006). Mindful of this controlling precedent, we conclude that the defendant's claim of an illegal arrest warrants neither a dismissal of the information nor a voiding of her conviction.

IV

The defendant next claims that the court deprived her of the right to present a defense, as well as her rights to due process and a fair trial, by preventing her from calling certain witnesses and presenting evidence regarding her dismissal from the authority. Specifically, the defendant argues that the court precluded the examination of Claudia Sweeney, the executive director of the authority, and prohibited, inter alia, the admission

into evidence of complaints that the defendant had filed against the authority and grievances filed against Silano. The state counters that the court properly determined that the evidence sought by the defendant either was irrelevant or constituted inadmissible hearsay. We agree with the state.

The following additional facts are necessary for our discussion. The defendant's revised witness list, dated January 11, 2016, contained twenty-seven persons, including Senator Richard Blumenthal, Senator Christopher S. Murphy, Governor Dannel P. Malloy, Attorney General George Jepsen, three mayors of Torrington, and Sweeney. Prior to the start of the trial, the court expressed its concern that many of the individuals on the revised witness list would not be able to provide testimony relevant to the criminal case. Following the conclusion of the state's case, the court addressed the defendant's revised witness list, stating: "I don't see how anything from the [authority] is relevant here. This is not about the [authority] at all. . . . I know at one time you indicated that there was going to be some type of connection between this arrest and her previous experience with the [authority]. I did not hear anything that connected it to this arrest. To me, this was an incident that was initiated completely on the part of [the defendant] toward Mr. Silano. And it may be that in her mind Mr. Silano was related, but there was nothing that connected him and his actions that day to the [authority]. Again, the only thing that connected him is that's how he knew—so, the records of the [authority], anything involving [the defendant's] termination from that job, I do not see how that's relevant at all here." After hearing further argument from both the defendant and defense counsel, the court iterated that the defendant's prior termination and actions of the authority "have absolutely nothing to do with this incident, and so that is the reason why I've limited what we're doing

here . . . that this case isn't about your experience with the [authority].''

The court permitted the defendant to call Sweeney as a witness.[16] Sweeney, in her position as the executive director of the authority, terminated the defendant's employment in 2006. Sweeney admitted that in 2012, approximately six years after terminating the defendant's employment, she sent the defendant a letter, warning her that if she continued engaging in certain behavior, she could be arrested. She also testified that she had learned of the defendant's arrest from Silano the day after it had occurred. Sweeney denied, however, telling Silano that she wanted the defendant arrested.[17]

On appeal, the defendant argues that the court improperly precluded most of her witnesses from testifying[18] and prohibited her from presenting evidence in support of her contention that the authority had terminated her employment and threatened her with arrest because she had alleged corruption in the authority. Put differently, the court erred, according to the defendant, by refusing ''to allow testimony or evidence about her whistle-blowing complaints to be admitted, saying it was not going to 'relitigate' the defendant's firing.''

[16] The court also permitted the defendant to call Michael Maniago, the Torrington chief of police, as a witness.

[17] During cross-examination, Sweeney expressly stated that she did not speak with Silano on May 16, 2013, regarding the defendant and never told Silano that he had to file a ''complaint'' against the defendant.

[18] The state correctly contends that the defendant inadequately briefed the issue of whether the court improperly had precluded the majority of the witnesses listed on her revised witness list from testifying. As succinctly noted in its brief, the state asserts that the defendant ''has failed to specify which of the numerous witnesses proffered to the court were improperly excluded. . . . Here, the only one of the proffered witnesses mentioned in the defendant's brief is . . . Sweeney, whom the trial court permitted to testify. . . . The defendant appears to claim that the trial court improperly limited the scope of Sweeney's testimony. . . . The defendant does not address any of these proffered witnesses with any particularity . . . .'' (Citations omitted.)

The defendant maintains that such evidence would have undermined the credibility of the state's witnesses and proved retaliation, motivation, bias, prior misconduct and political motivation for her arrest.

"It is well established that [t]he federal constitution require[s] that criminal defendants be afforded a meaningful opportunity to present a complete defense. . . . The sixth amendment . . . [guarantees] the right to offer the testimony of witnesses, and to compel their attendance, if necessary, [and] is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. . . . When defense evidence is excluded, such exclusion may give rise to a claim of denial of the right to present a defense. . . .

"The sixth amendment to the [United States] constitution guarantees the right of an accused in a criminal prosecution to confront the witnesses against him. . . . The primary interest secured by confrontation is the right to cross-examination . . . and an important function of cross-examination is the exposure of a witness' motivation in testifying. . . . Cross-examination to elicit facts tending to show motive, interest, bias and prejudice is a matter of right and may not be unduly restricted. . . .

"Impeachment of a witness for motive, bias and interest may also be accomplished by the introduction of extrinsic evidence. . . . The same rule that applies to the right to cross-examine applies with respect to extrinsic evidence to show motive, bias and interest; proof of the main facts is a matter of right, but the extent of the proof of details lies in the court's discretion. . . . The right of confrontation is preserved if defense counsel is permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility,

could appropriately draw inferences relating to the reliability of the witness. . . .

"Although it is within the trial court's discretion to determine the extent of cross-examination and the admissibility of evidence, the preclusion of sufficient inquiry into a particular matter tending to show motive, bias and interest may result in a violation of the constitutional requirements [of the confrontation clause] of the sixth amendment. . . . Further, the exclusion of defense evidence may deprive the defendant of his constitutional right to present a defense. . . .

"[*T*]*he confrontation clause does not* [*however*] *suspend the rules of evidence to give the defendant the right to engage in unrestricted cross-examination. . . . Rather*, [*a*] *defendant is . . . bound by the rules of evidence in presenting a defense*. . . . Although exclusionary rules of evidence cannot be applied mechanistically to deprive a defendant of his rights, the [federal] constitution does not require that a defendant be permitted to present every piece of evidence he wishes. . . . To the contrary, [t]he [c]onfrontation [c]lause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. . . . *Thus*, [*i*]*f the proffered evidence is not relevant* [*or constitutes inadmissible hearsay*], *the defendant's right to confrontation is not affected, and the evidence was properly excluded*." (Citation omitted; emphasis added; internal quotation marks omitted.) *State* v. *Baltas*, 311 Conn. 786, 798–99, 91 A.3d 384 (2014); see also *State* v. *Bennett*, 324 Conn. 744, 760, 155 A.3d 188 (2017).

Distilled to its essence, the defendant's argument appears to be that she made complaints regarding the authority, which then retaliated against her by terminating her employment. The authority allegedly responded

to the defendant's continuing crusade with threats of arrest, which eventually were acted on following her incident with Silano. The trial court, however, declined to allow such evidence on the ground that it would not "relitigate" the termination of the defendant's employment with the authority.[19]

"Relevant evidence means evidence having any tendency to make the existence of the fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence. Conn. Code Evid. § 4-1. Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . One fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable. . . . *Evidence is irrelevant or too remote if there is such a want of open and visible connection between the evidentiary and principal facts that, all things considered, the former is not worthy or safe to be admitted in the proof of the latter*. . . . The trial court has wide discretion to determine the relevancy of evidence and [e]very reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion. . . . [A]buse

[19] For example, the defendant points us to the following statement from the trial court: "All right. Here's my ruling in regard to this. And we talked about this at the beginning of this trial, and I'm going to say it again . . . . But we are not relitigating a proper or improper firing of [the defendant]. As I indicated before, there are avenues available to [the defendant] to challenge an illegal firing, improper firing, a firing that she alleges is based upon her being a 'whistle-blower.' There is a legal forum for airing those kinds of issues. This case is not that forum.

"So, the fact that [the defendant] had made numerous, or the nature of those complaints against the [authority] are not relevant in this case. The—so, the fact that . . . Sweeney fired [the defendant], that fact, that [the defendant] complained of corruption, the fact that [the defendant] filed a complaint resulting in a settlement, those are just—they're not relevant to this case."

of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors." (Emphasis added; internal quotation marks omitted.) *State* v. *Halili*, 175 Conn. App. 838, 862–63, 168 A.3d 565, cert. denied, 327 Conn. 961, 172 A.3d 1261 (2017); see also *State* v. *Lewis*, 146 Conn. App. 589, 602, 79 A.3d 102 (2013), cert. denied, 311 Conn. 904, 83 A.3d 605 (2014).

The defendant failed to proffer evidence connecting Silano to the alleged retaliatory acts of the authority. There was no evidence presented that Silano had been directed by Sweeney, or anyone else associated with the authority, to pursue his criminal complaint against the defendant. Silano testified that the decision to call the police following his interactions with the defendant of May 16, 2013, was based on his concern for his family, particularly his grandchildren. Additionally, there was no evidence that Silano had been directed by his employer to speak with the police as retaliation for the defendant's complaints against the authority. Absent such a connection, the court did not abuse its discretion in ruling that the evidence offered by the defendant was irrelevant, and thus inadmissible. See *Spearman* v. *Commissioner of Correction*, 164 Conn. App. 530, 577, 138 A.3d 378, cert. denied, 321 Conn. 923, 138 A.3d 284 (2016). As a result, we also conclude that the defendant's constitutional right to present a defense was not violated.

V

The defendant finally claims that the court improperly failed to recuse itself for bias. Specifically, she argues that, over the course of the proceedings, the court's preclusion of witnesses and evidence demonstrated a bias against the defendant that amounted to

structural error, necessitating the reversal of her conviction and the granting of a new trial. Acknowledging that she failed to move to disqualify the trial judge or to seek a mistrial, the defendant now attempts to prevail on this claim pursuant to the plain error doctrine.[20] The state counters that the claim of bias in this case constitutes nothing more than disagreement with the court's adverse rulings, and therefore fails to constitute judicial bias or plain error. We agree with the state.

During the proceedings, the court concluded that evidence of the defendant's termination by the authority was irrelevant to the proceedings. The defendant now argues that these rulings demonstrated judicial bias. As a result, she contends that such rulings "[give] rise to a reasonable appearance of impropriety such that the judge's failure to recuse himself amounted to structural error . . . ."

We recently have stated that "[o]ur Supreme Court has criticized the practice whereby an attorney, cognizant of circumstances giving rise to an objection before or during trial, waits until after an unfavorable judgment to raise the issue. We have made it clear that we will not permit parties to anticipate a favorable decision, reserving a right to impeach it or set it aside if it happens to be against them, for a cause which was well known to them before or during the trial. . . . Nevertheless, [b]ecause an accusation of judicial bias or prejudice strikes at the very core of judicial integrity and tends to undermine public confidence in the established judiciary, this court has reviewed unpreserved judicial bias claims under the plain error doctrine. . . . Plain error exists only in truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the

[20] See Practice Book § 60-5.

judicial proceedings." (Citations omitted; internal quotation marks omitted.) *Baronio* v. *Stubbs*, 178 Conn. App. 769, 778–79, A.3d (2017); see also *State* v. *James R.*, 138 Conn. App. 181, 202, 50 A.3d 936 (same), cert. denied, 307 Conn. 940, 56 A.3d 949 (2012); *State* v. *McDuffie*, 51 Conn. App. 210, 216, 721 A.2d 142 (1998) (absent plain error, claim of judicial bias must be preserved for appellate review through motion for disqualification or motion for mistrial), cert. denied, 247 Conn. 958, 723 A.2d 814 (1999).

"In reviewing a claim of judicial bias, this court employs a plain error standard of review. . . . The standard to be employed is an objective one, not the judge's subjective view as to whether he or she can be fair and impartial in hearing the case. . . . Any conduct that would lead a reasonable [person] knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned is a basis for the judge's disqualification." (Internal quotation marks omitted.) *State* v. *Carlos C.*, 165 Conn. App. 195, 207, 138 A.3d 1090, cert. denied, 322 Conn. 906, 140 A.3d 977 (2016); *State* v. *Crespo*, 145 Conn. App. 547, 577, 76 A.3d 664 (2013), aff'd, 317 Conn. 1, 115 A.3d 447 (2015). After reviewing the record and arguments set forth in the defendant's appellate brief, we conclude that her claims of judicial bias do not constitute plain error. Her claims amount to disagreements with the court's rulings. Adverse rulings, however, are not evidence of bias. *Emerick* v. *Glastonbury*, 177 Conn. App. 701, 739, 173 A.3d 28 (2017), cert. denied, 327 Conn. 994, 175 A.3d 1245 (2018). Accordingly, we reject the defendant's claim of plain error in this case.

The judgment is affirmed.

In this opinion the other judges concurred.