STATE OF CONNECTICUT *v.* DAVID G. LIEBENGUTH
(AC 39506)

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

Syllabus

Convicted, following a trial to the court, of the crimes of breach of the peace in the second degree and tampering with a witness, the defendant appealed to this court. His conviction stemmed from an incident in which he allegedly confronted and made racial slurs toward a parking authority officer, M, over a parking ticket, and subsequently e-mailed M's supervisor suggesting why M should not appear in court to testify.

On appeal, the defendant claimed that the evidence adduced at trial was insufficient to support his conviction of either charge. *Held*:

1. The trial court incorrectly concluded that the evidence adduced at trial was sufficient to support the defendant's conviction of breach of the peace in the second degree: that court's finding that the defendant twice directed a racial slur at M in a belligerent tone, with an aggressive stance and while walking toward him was clearly erroneous, as the defendant was inside his car on both occasions when he made the racial slur, and although the defendant used extremely vulgar and offensive language that was meant to personally demean M, under the circumstances in which he uttered that language it was not likely to tend to provoke a reasonable person in M's position immediately to retaliate with violence, and, therefore, because M was unlikely to have retaliated with immediate violence to the conduct for which the defendant was charged, the defendant's words were not fighting words on which he might appropriately be convicted of breach of the peace; accordingly, his conviction of breach of the peace in the second degree could not stand.
2. The evidence adduced at trial was sufficient to support the defendant's conviction of tampering with a witness in violation of statute (§ 53a-151), there having been ample evidence demonstrating that the defendant intended to induce M to absent himself from a court proceeding; the state presented evidence that the defendant sent an e-mail to M's supervisor implying that he would press felony charges against M and cause M to lose his job if he appeared in court to testify, but that he would let the matter drop if M did not appear in court to testify, and the defendant's claim that the e-mail did not constitute a true threat against M was unavailing, as the state did not claim that the defendant tampered with a witness by threatening him and, thus, was not required to prove, nor was the trial court required to find, that the defendant threatened M in order to establish that he sought to induce him not to testify for purposes of § 53a-151, under which a defendant need not contact a witness directly to be convicted.

(*One judge concurring in part and dissenting in part*)

Argued November 15, 2017—officially released April 17, 2018

Procedural History

Substitute information charging the defendant with the crimes of breach of the peace in the second degree and tampering with a witness, brought to the Superior Court in the judicial district of Norwalk, geographical area number twenty, and tried to the court, *Hernandez, J.*; judgment of guilty, from which the defendant appealed to this court. *Reversed in part*; *judgment directed.*

Joseph M. Merly, with whom, on the brief, was *John R. Williams*, for the appellant (defendant).

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo, Jr.*, state's attorney, and *Nadia C. Prinz*, deputy assistant state's attorney, for the appellee (state).

Opinion

SHELDON, J. The defendant, David G. Liebenguth, was convicted, following a bench trial, of breach of the peace in the second degree in violation of General Statutes § 53a-181 (a) (5) and tampering with a witness in violation of General Statutes § 53a-151. The charges were filed in connection with an angry confrontation between the defendant and a parking authority officer who had issued him a parking ticket, and a subsequent e-mail from the defendant to the officer's supervisor, suggesting why the officer should not appear in court to testify against him. The defendant now appeals, claiming that the evidence adduced at trial was insufficient to support his conviction of either charge. We affirm in part and reverse in part the judgment of the trial court.

The following evidence was presented at trial. Michael McCargo, a parking enforcement officer for the town of New Canaan, testified that he was patrolling the Morris Court parking lot on the morning of August 28, 2014, when he noticed that the defendant's vehicle was parked in a metered space for which no payment had been made. He first issued a ticket for the defendant's vehicle, then walked to another vehicle to issue a ticket, while his vehicle remained idling behind the defendant's vehicle. As McCargo was returning to his vehicle, he was approached by the defendant, whom he had never before seen or interacted with. The defendant said to McCargo, "not only did you give me a ticket, but you blocked me in." Initially believing that the

defendant was calm, McCargo jokingly responded that he didn't want the defendant getting away. When the defendant then attempted to explain why he had parked in the lot, McCargo responded that his vehicle was in a metered space for which payment was required, not in one of the lot's free parking spaces. McCargo testified that the defendant's demeanor then "escalated," with the defendant saying that the parking authority was "unfucking believable" and telling McCargo that he had given him a parking ticket "because my car is white. . . . [N]o, [you gave] me a ticket because I'm white." As the defendant, who is white, spoke with McCargo, who is African-American, he "flared" his hands and added special emphasis to the profanity he uttered. Even so, according to McCargo, the defendant always remained a "respectable" distance from him. Finally, as the defendant was walking away from McCargo toward his own vehicle, he spoke the words, "remember Ferguson."

After both men had returned to and reentered their vehicles, McCargo, whose window was rolled down, testified that he thought he heard the defendant say the words, "fucking niggers." This caused him to believe that the defendant's prior comment about Ferguson had been made in reference to the then recent shooting of an African-American man by a white police officer in Ferguson, Missouri. He thus believed that the defendant meant to imply that what had happened in Ferguson "was going to happen" to him. McCargo also believed that by uttering the racial slur and making reference to Ferguson, the defendant was trying to rile him up and escalate the situation. That, however, did not happen, for although McCargo found the remark offensive, and he had never before been the target of such language while performing his duties, he remained calm at all times and simply drove away to resume his patrol. Shortly thereafter, however, as he was driving away,

the defendant drove past him. As he did so, McCargo testified that the defendant turned toward him, looked directly at him with an angry expression on his face, and repeated the slur, "fucking niggers." McCargo noted in his testimony that the defendant said the slur louder the second time than he had the first time.

After the defendant drove out of the parking lot, McCargo called his supervisor, who instructed him to report the incident to the New Canaan police. In his report, McCargo noted that there might have been a witness to the interaction, whom he described as a young white female. The defendant later was arrested in connection with the incident on the charge of breach of the peace in the second degree.

Next to testify was Mallory Frangione, the young white female witness to the incident whom McCargo had mentioned in his report. She testified that she parked in the Morris Court parking lot around 9:45 a.m. on the morning of August 28, 2014, and as soon as she opened her car door, she heard yelling. She then saw two men, McCargo and the defendant, who were standing outside of their vehicles about seventy feet away from her. She observed that the defendant was moving his hands all around, that his body movements were aggressive and irate, and that his voice was loud. She heard him say something about Ferguson, then say that something was "f'ing unbelievable." She further testified that she saw the defendant take steps toward McCargo while acting in an aggressive manner. She described McCargo, by contrast, as calm, noting that he never raised his voice, moved his arms or gesticulated in any way. McCargo ultimately backed away from the defendant and got into his vehicle. The defendant, she recalled, drove in two circles around the parking lot before leaving. Frangione testified that witnessing the interaction made her feel nervous and upset.

Karen Miller, McCargo's supervisor at the New Canaan Parking Department, also testified. Miller received an e-mail from the defendant at work on March 6, 2015. The e-mail, which was admitted into evidence, read as follows: "Please be advised that on March 12th at 2 p.m.[1] in a court of law in Norwalk, CT., I will prove beyond any reasonable doubt that your meter maid did in fact commit multiple crimes against me, including at least one FELONY, as well as breaking CT vehicular/traffic laws in the operation of his vehicle and New Canaan town ordinances while on the job PRIOR to any false allegations of breach of peace in the second degree on my part. Additionally, as such, I also intend to subsequently invoke and pursue New Canaan town ordinances that would effectively require this meter maid to resign, or be terminated, from his position.

"Although it is not my desire to escalate this situation to the point a mans job, career, and lively hood is on the line, I must do what is necessary to prove my innocence. And in that course it will be proven your mater maid did in fact commit multiple crimes, including at least one FELONY, and infractions against me on that day BEFORE I was forced to react to his criminal actions against me.

"Of course if this is what you want to see happen I look forward to you and your meter maids presence in court next week. It goes without mention that if your meter maid does not show up in court this case will be over and everyone can go peacefully on their own way, no harm, no foul, no fallout.

"It's your choice now to make whatever recommendation you wish to your selectman. It will be MY CHOICE to defend myself from these false charges next

[1] The court took judicial notice that there was a scheduled court date related to the breach of peace charge on March 12, 2015.

week in court by proving (at minimum showing probable cause for an arrest!) your meter maid a criminal at best.a FELON at worst. Perhaps the judge will remand him to custody right then and there from his witness chair?

"Obviously not if he is not there."[2] (Footnote added.) Miller understood the e-mail to mean that McCargo should absent himself from court proceedings. McCargo also read the e-mail, the sending of which he described as a "scare tactic." He believed the defendant sent the e-mail in order to persuade him not to go to court and testify, and that if he did appear in court, the defendant would pursue negative repercussions as outlined in his e-mail.

After the state rested, the defendant moved for a judgment of acquittal on both counts, which the court denied. The defendant elected not to testify. The court, ruling from the bench, found the defendant guilty on both counts. It reasoned as follows: "In finding that the defendant's language and behavior is not protected speech, the court considers the words themselves, in other words, the content of the speech, the context in which it was uttered, and all of the circumstances surrounding the defendant's speech and behavior.

"The court finds that the defendant's language, fucking niggers directed at Mr. McCargo twice . . . is not protected speech. . . . The defendant's use of the particular racial epithet is in the American lexicon, there is no other racial epithet more loaded with racial animus, no other epithet more degrading, demeaning or dehumanizing. It is a word which is probably the most [vile] racial epithet a non-African-American can direct towards an African-American. [The defendant] is white. Mr. McCargo is African-American.

[2] The spelling and capitalization in the e-mail as quoted are per the original.

"In light of this country's long and shameful history of state sanctioned slavery, Jim Crow segregation, state sanctioned racial terrorism, financial and housing discrimination, the word simply has . . . no understanding under these circumstances other than as a word directed to incite violence. The word itself is a word likely to provoke a violent response.

"The defendant is not however being prosecuted solely for use of this word. All language must be considered in light of its context.

"The court finds that considering . . . the content of the defendant's speech taken in context and in light of his belligerent tone, his aggressive stance, the fact that he was walking towards Mr. McCargo and moving his hands in an aggressive manner, there's no other interpretation other than these are fighting words. And he uttered the phrase not once but twice. It was directed—the court finds that it was directed directly at Mr. McCargo. There were no other African-Americans present . . . in the parking lot when it happened, and indeed Mr. McCargo's unease and apprehension at hearing those words was corroborated by Mallory Frangione who . . . said that she felt disconcerted by the defendant's tone of voice and his aggressive stance and actions.

"With respect to count two, the court has . . . similarly considered the words that were used in the e-mail, the subject e-mail. It finds that there is nothing in the evidence which suggests that in sending the e-mail, the defendant intended to comment or bring attention to a matter of public concern in a public forum.[3] . . .

"[T]he content . . . of the communication . . . itself was of an entirely personal nature. [The defendant] stated that he was willing to withdraw his claim

[3] On appeal, the defendant did not pursue his claim that his e-mail was protected speech as a matter of public concern.

which he now suggests was a matter of public interest, in exchange for a purely personal benefit, namely the withdrawal of criminal charges which were then pending against [him].

"So for those reasons, the court rejects the defendant's claim that either or both of these statements were protected first amendment speech." (Footnote added.) The court later sentenced the defendant as follows: on the charge of breach of the peace in the second degree, to a term of six months, execution suspended, followed by two years of probation on several special conditions, plus a $1000 fine; and on the charge of tampering with a witness, a consecutive term of four years incarceration, execution suspended, followed by four years of probation on the same special conditions and a $3000 fine. This appeal followed.

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

"[T]he [fact finder] 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 [fact finder] to conclude that a basic fact or an inferred fact is true, the [fact finder] 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 [fact finder] is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [fact finder] may draw whatever inferences from the evidence or facts established by the evidence [that] it deems to be reasonable and logical. . . .

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

I

The defendant first claims that the evidence was insufficient to support his conviction for breach of the peace in the second degree because the words he uttered to McCargo were protected speech under the first amendment to the United States constitution[4] and thus did not violate § 53a-181 (a) (5).

"Ordinarily, a jury or trial court's findings of fact are not to be overturned on appeal unless they are clearly erroneous. . . . Thus, we [generally] review the findings of fact . . . for clear error.

"In certain first amendment contexts, however, appellate courts are bound to apply a de novo standard of review. . . . [In such cases], the inquiry into the protected status of . . . speech is one of law, not fact. . . . As such, an appellate court is compelled to examine for [itself] the . . . statements [at] issue and the circumstances under which they [were] made to [determine] whether . . . they . . . are of a character [that] the principles of the [f]irst [a]mendment . . . protect. . . . [I]n cases raising [f]irst [a]mendment issues [the United States Supreme Court has] repeatedly held that an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion [into] the field of free expression. . . . This rule of independent review was forged in recognition that a [reviewing] [c]ourt's duty is not limited to the elaboration of constitutional principles . . . . [Rather, an appellate court] must also in proper cases review the evidence to make certain that those principles have

[4] The defendant also claims his conduct was protected by article first, §§ 3, 4 and 14, of the Connecticut constitution. Because this claim is not independently briefed, we do not reach the defendant's claim pursuant to the Connecticut constitution. See, e.g., *State* v. *Outlaw*, 216 Conn. 492, 501 n.6, 582 A.2d 751 (1990).

been constitutionally applied. . . . Therefore, even though, ordinarily . . . [f]indings of fact . . . shall not be set aside unless clearly erroneous, [appellate courts] are obliged to [perform] a fresh examination of crucial facts under the rule of independent review." (Citation omitted; internal quotation marks omitted.) *State* v. *Krijger*, 313 Conn. 434, 446–47, 97 A.3d 946 (2014). The court in *Krijger* also noted, however, that although an appellate court "review[s] de novo the trier of fact's ultimate determination that the statements at issue constituted a [breach of the peace], [the court] accept[s] all subsidiary credibility determinations and findings that are not clearly erroneous." Id., 447.

The defendant argues that the trial court's findings that he directed the phrase "fucking niggers" at McCargo "in context and in light of his belligerent tone, his aggressive stance, [and] the fact that he was walking toward Mr. McCargo and moving his hands in an aggressive manner" have no support in the evidence and, in fact, are contradicted by the evidence. Pursuant to *Krijger*, we must examine the statements at issue to determine whether they are of such a character as to be protected under the first amendment. See *State* v. *Krijger*, supra, 313 Conn. 446. Upon conducting such an examination, we agree with the defendant that the court's findings are clearly erroneous.

"The starting point for our analysis is an examination of the statements at issue." Id., 452. The defendant does not contest the finding that he twice used the words "fucking niggers," or the finding that he directed those words at McCargo. Frangione, however, who was the only person to testify that the defendant ever walked toward McCargo while speaking to him, did not testify that she ever heard the defendant say the words "fucking niggers." McCargo, who did testify to hearing the defendant say those words, testified that the defendant "[stood] his ground" during the incident, staying at a

"respectable" distance from him throughout. According to McCargo, the defendant was inside his car on both occasions when he said the words "fucking niggers." The trial court's finding that the defendant twice directed the phrase "fucking niggers" at McCargo, in a belligerent tone, with an aggressive stance and while walking toward him, is therefore clearly erroneous.

We continue our analysis to determine whether the defendant's speech, as supported by the evidence adduced at trial, could lawfully constitute a breach of the peace under the fighting words exception to the first amendment. Our Supreme Court recently discussed the type of speech that constitutes "fighting words," and thus is not protected by the first amendment, in *State* v. *Baccala*, 326 Conn. 232, 163 A.3d 1, cert. denied, U.S. , 138 S. Ct. 510, 199 L. Ed. 2d 408 (2017). In *Baccala*, the defendant was convicted of breach of the peace in the second degree after a customer service dispute in a supermarket. Id., 233–34. The defendant customer called the supermarket to request that the store keep the customer service desk open until she arrived so that she could pick up a Western Union money transfer. Id., 235. The manager who answered her telephone call informed her that the desk was already closed and the services she sought were currently unavailable. Id. "The defendant became belligerent, responded that she 'really didn't give a shit,' and called [the manager] '[p]retty much every swear word you can think of' before the call was terminated." Id. A few minutes after the telephone call, the defendant arrived at the store, went inside, and proceeded directly to the closed customer service desk, where she attempted to fill out a money transfer form. Id. After the manager with whom she had spoken on the telephone told her once again that the customer service desk was closed for the day, the defendant "proceeded to loudly call [the manager] a 'fat ugly bitch' and a 'cunt'

and said 'fuck you, you're not a manager,' all while gesticulating with her cane." (Footnote omitted.) Id., 236. The manager remained calm during this outburst and responded to the defendant by telling her to have a good night, at which point the defendant left the store. Id. On appeal, our Supreme Court held that the foregoing evidence was insufficient to support the defendant's breach of peace conviction under settled first amendment principles; id., 237; "[b]ecause the words spoken by the defendant were not likely to provoke a violent response under the circumstances in which they were uttered." Id., 234.

"[A] proper contextual analysis," the court in *Baccala* wrote, "requires consideration of the actual circumstances, as perceived by both a reasonable speaker and addressee, to determine whether there was a likelihood of violent retaliation. This necessarily includes the manner in which the words were uttered, by whom and to whom the words were uttered, and any other attendant circumstances that were objectively apparent and bear on the question of whether a violent response was likely."[5] Id., 250.

"[I]t is precisely this consideration of the specific context in which the words were uttered and the likelihood of *actual* violence, not an undifferentiated fear or apprehension of disturbance, that is required by the United States Supreme Court's decisions following *Chaplinsky* [v. *New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942)]. . . . Because the fighting words exception is concerned only with preventing the likelihood of actual violence, an approach ignoring the

[5] Our Supreme Court also noted that "[a] proper examination of the context also considers those personal attributes of the speaker and the addressee that are reasonably apparent because they are necessarily a part of the objective situation in which the speech was made. . . . Courts have, for example, considered the age, gender, race, and status of the speaker." (Citations omitted.) Id., 241–42.

circumstances of the addressee is antithetical and simply unworkable." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 248. "[T]he fighting words exception is not concerned with creating symmetrical free speech rights by way of establishing a uniform set of words that are constitutionally proscribed. . . . Rather, because the fighting words exception is intended only to prevent the likelihood of an actual violent response, it is an unfortunate but necessary consequence that we are required to differentiate between addressees who are more or less likely to respond violently and speakers who are more or less likely to elicit such a response." (Citation omitted.) Id., 249.

The court applied a two part test "[i]n considering the defendant's challenge to the sufficiency of the evidence to support her conviction of breach of the peace in the second degree in accordance with her first amendment rights . . . . First, as reflected in the previous recitation of facts, we construe the evidence in the light most favorable to sustaining the verdict. . . . Second, we determine whether the trier of fact could have concluded from those facts and reasonable inferences drawn therefrom that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . Accordingly, to establish the defendant's violation of § 53a-181 (a) (5) . . . in light of its constitutional gloss, the state was required to prove beyond a reasonable doubt that the defendant's words were likely to provoke an imminent violent response from an average store manager in [that woman's] position." (Citations omitted.) Id., 250–51.

The court continued: "At the outset of [our] examination, we must acknowledge that the words and phrases used by the defendant—'fat ugly bitch,' 'cunt,' and 'fuck you, you're not a manager'—were extremely offensive and meant to personally demean [the manager]. The

defendant invoked one or more of the most vulgar terms known in our lexicon to refer to [the manager's] gender. Nevertheless, '[t]he question in this case is not whether the defendant's words were reprehensible, which they clearly were; or cruel, which they just as assuredly were; or whether they were calculated to cause psychic harm, which they unquestionably were; but whether they were *criminal*.' . . . Uttering a cruel or offensive word is not a crime unless it would tend to provoke a reasonable person in the addressee's position to immediately retaliate with violence under the circumstances." (Citation omitted; emphasis in original.) Id., 251–52.

In determining that the defendant's conduct in *Baccala* did not support a conviction for breach of the peace because the state did not prove beyond a reasonable doubt that the manager was likely to retaliate with violence, the court considered several factors. Id., 252. First, the court discussed the telephone call that preceded the in-person interaction: Because the defendant had already been belligerent to and directed swear words at the manager over the telephone, the manager "reasonably would have been aware of the possibility that a similar barrage of insults . . . would be directed at her." Id. Second, the court noted that store managers are routinely confronted by frustrated customers, who often express themselves in angry terms, and are expected in such situations to model appropriate behavior and deescalate the situation. Id., 253. Additionally, the manager had a significant degree of control over the premises where the confrontation took place and could have resorted to lawful self-help tools if the defendant became abusive, rather than responding with violence herself. Id. The court concluded that "[g]iven the totality of the circumstances in the present case . . . it would be unlikely for an on duty store manager in [her] position to respond in kind to the defendant's

angry diatribe with similar expletives." Id. Finally, the court noted that the manager did not respond with profanity or violence, observing that "[a]lthough the reaction of the addressee is not dispositive . . . it is probative of the likelihood of a violent reaction." (Citation omitted.) Id., 254.

In this case, as in *Baccala*, the defendant used extremely vulgar and offensive language, meant to personally demean McCargo.[6] Under the circumstances in which he uttered this language, however, it was not likely to tend to provoke a reasonable person in McCargo's position immediately to retaliate with violence. Although the evidence unequivocally supports a finding that the defendant at one point walked toward McCargo while yelling and moving his hands, there is no evidence that the defendant simultaneously used the racial slurs. The evidence unequivocally shows, instead, that the defendant was in his car both times that he directed the racial slurs toward McCargo.[7] McCargo did

[6] Our dissenting colleague notes, as did the trial court, that the word "nigger" is vile and offensive, and that its use perpetuates historically discriminatory attitudes about race that regrettably persist in modern society. We agree entirely with those observations. We reiterate, however, that, under our law, it is the context in which such slurs are uttered that determines whether or not their utterance is so likely to provoke a violent response as to constitute fighting words, for which criminal sanctions may constitutionally be imposed.

[7] The dissent also points to two cases cited in *Baccala*, in which it contends that the word "nigger" was held to constitute a constitutionally unprotected fighting word. The *Baccala* court cited the two cases, *In re Spivey*, 345 N.C. 404, 480 S.E.2d 693 (1997), and *In re John M.*, 201 Ariz. 424, 36 P.3d 772 (App. 2001), for the related propositions that a proper contextual evaluation of speech as alleged fighting words involves consideration of: the personal characteristics of the speaker and the person to whom his words are addressed, such as their ages, genders, races and respective statuses; *State* v. *Baccala*, supra, 326 Conn. 241–43; and the likelihood that the average listener with those personal characteristics would respond with violence to such speech if it were addressed to him in the circumstances of the case before the court. Id., 243. We respectfully submit that in those two cases, it was the particular circumstances in which the word "nigger" was uttered that made its use unprotected by the first amendment, and that nothing in those cases suggests that that word is always an unprotected fighting word.

testify that the defendant's use of the slurs shocked and appalled him, and that he found the remarks offensive. He also testified, however, that he remained calm throughout the encounter and felt no need to raise his voice to the defendant. A reasonable person acting in the capacity of a parking official would be aware that some level of frustration might be expressed by some members of the public who are unhappy with receiving tickets and would therefore not be likely to retaliate with immediate violence during such an interaction. In reviewing the entire context of the interaction, we therefore find that because McCargo was unlikely to retaliate with immediate violence to the conduct for which the defendant was charged, the defendant's words were not "fighting words," upon which he might appropriately be convicted of breach of the peace. The defendant's conviction of breach of the peace in the second degree must therefore be reversed.

II

The defendant next claims that the evidence was insufficient to prove him guilty of tampering with a witness in violation of § 53a-151. That statute provides: "A person is guilty of tampering with a witness if, believing that an official proceeding is pending or about to be instituted, he induces or attempts to induce a witness to testify falsely, withhold testimony, elude legal process summoning him to testify or absent himself from any official proceeding." General Statutes § 53a-151. "[T]he witness tampering statute has two requirements: (1) the defendant believes that an official proceeding is pending or about to be instituted; and (2) the defendant induces or attempts to induce a witness to engage in the proscribed conduct." (Internal quotation marks omitted.) *State* v. *O'Donnell*, 174 Conn. App. 675, 690, 166 A.3d 646, cert. denied, 327 Conn. 956, 172 A.3d 205 (2017).

The defendant, however, has construed the state's charge as one of tampering with a witness by way of threatening conduct. He argues that his e-mail to McCargo's supervisor did not constitute a "true threat," and thus is entitled to first amendment protection, citing *State* v. *Sabato*, 321 Conn. 729, 742, 138 A.3d 895 (2016), for the proposition that "a defendant whose alleged threats form the basis of a prosecution under any provision of our Penal Code . . . could be convicted as charged only if his statements . . . constituted a true threat, that is, a threat that would be viewed by a reasonable person as one that would be understood by the person against whom it was directed as a serious expression of an intent to harm or assault, and not as mere puffery, bluster, jest or hyperbole." (Internal quotation marks omitted.) Because the state did not claim that the defendant tampered with a witness by threatening him, his argument that his words did not constitute a "true threat" is unavailing.

"The language of § 53a-151 plainly warns potential perpetrators that the statute applies to any conduct that is intended to prompt a witness . . . to refrain from testifying in an official proceeding that the perpetrator believes to be pending or imminent. The legislature's unqualified use of the word 'induce' clearly informs persons of ordinary intelligence that *any conduct, whether it be physical or verbal, can potentially give rise to criminal liability.* Although the statute does not expressly mandate that the perpetrator intend to cause the witness to . . . withhold his testimony, the implicit requirement is apparent when the statute is read as a whole. . . . The legislature's choice of the verb 'induce' connotes a volitional component of the crime of tampering that would have been absent had it employed a more neutral verb such as 'cause.' Furthermore, the statute's application to unsuccessful, as

well as successful, attempts to induce a witness to render false testimony [or refrain from testifying] supports our conclusion that the statute focuses on the mental state of the perpetrator to distinguish culpable conduct from innocent conduct." (Citations omitted; emphasis added.) *State* v. *Cavallo*, 200 Conn. 664, 668–69, 513 A.2d 646 (1986). "Although *Cavallo* discusses § 53a-151 in the context of inducing someone to testify falsely or to refrain from testifying, we conclude that its holding that the language of § 53a-151 plainly warns potential perpetrators applies equally to situations in which a defendant attempts to induce someone to absent himself or herself from a proceeding." *State* v. *Bennett-Gibson*, 84 Conn. App. 48, 57–58 n.9, 851 A.2d 1214, cert. denied, 271 Conn. 916, 859 A.2d 570 (2004). "[A] defendant is guilty of tampering with a witness only if he intends that his conduct directly cause a particular witness to testify falsely or to refrain from testifying at all." *State* v. *Cavallo*, supra, 672.

In *State* v. *Bennett-Gibson*, this court stated that "[t]o prove inducement or an attempt thereof, the evidence before the jury must be sufficient to conclude that the defendant's conduct was intended to prompt [the complainant] to absent herself from the proceeding. . . . Intent may be, and usually is, inferred from the defendant's verbal or physical conduct. . . . Intent may also be inferred from the surrounding circumstances. . . . The use of inferences based on circumstantial evidence is necessary because direct evidence of the accused's state of mind is rarely available. . . . Furthermore, it is a permissible, albeit not a necessary or mandatory, inference that a defendant intended the natural consequences of his voluntary conduct." (Citation omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Bennett-Gibson*, supra, 84 Conn. App. 53.

A defendant need not contact a witness directly to be convicted under § 53a-151. In *State* v. *Carolina*, 143 Conn. App. 438, 69 A.3d 341, cert. denied, 310 Conn. 904, 75 A.3d 31 (2013), this court upheld the conviction of a defendant who had written a letter to his cousin in which he asked his cousin to pass along scripted false testimony to a potential witness against him. Id., 440–42. The letter was intercepted by a correction officer and did not reach the cousin; therefore, the witness did not become aware of the defendant's scripted testimony. Id., 444. The defendant claimed that "[t]he letter was an attempt to induce [his] cousin to induce [the witness] to testify falsely," but since the letter never reached the witness, the witness "was never aware of the defendant's attempts to induce her to testify falsely." (Internal quotation marks omitted.) Id., 442. This court upheld the defendant's conviction under § 53a-151, noting that "[t]he purpose of the statute would be thwarted if a defendant could avoid liability by inducing false testimony indirectly through an intermediary instead of communicating directly with the witness himself." Id., 445.

In this case, the trial court had ample evidence that the defendant intended to induce McCargo to absent himself from the court proceeding. The state presented evidence that the defendant sent an e-mail to McCargo's supervisor implying that he would press felony charges against McCargo and cause McCargo to lose his job if he appeared in court to testify, but that he would let the matter drop if McCargo did not appear in court to testify. The defendant's claim that his e-mail did not constitute a "true threat" against McCargo is unavailing. The state was not required to prove, nor was the trial court required to find, that the defendant threatened McCargo in order to establish that he sought to induce him not to testify. The language of the defendant's e-mail clearly indicates that the defendant intended to induce

McCargo not to appear in court, insofar as it stated: "It goes without mention that if your meter maid does not show up in court this case will be over and everyone can go peacefully on their own way, no harm, no foul, no fallout" and "[p]erhaps the judge will remand him to custody right then and there from his witness chair? Obviously not if he is not there." That is all that is required for a conviction on this charge. We therefore affirm the defendant's conviction of tampering with a witness.

The judgment is reversed only as to the defendant's conviction of breach of the peace in the second degree and the case is remanded with direction to render a judgment of acquittal on that charge and to resentence the defendant on the charge of tampering with a witness; the judgment is affirmed in all other respects.

In this opinion, DiPENTIMA, C. J., concurred.

DEVLIN, J., concurring in part and dissenting in part. I agree with the majority that the evidence was sufficient to support the trial court's verdict of guilty on the charge of tampering with a witness in violation of General Statutes § 53a-151. I write separately because I also believe that the evidence was sufficient to support the guilty verdict on the charge of breach of the peace in the second degree in violation of General Statutes § 53a-181 (a) (5). Contrary to the majority, I do not believe that *State* v. *Baccala*, 326 Conn. 232, 163 A.3d 1, cert. denied, U.S. , 138 S. Ct. 510, 199 L. Ed. 2d 408 (2017) requires a different result.

As related to the breach of the peace charge, the trial court reasonably could have found the following facts. On August 28, 2014, between 9 a.m. and 9:30 a.m., New Canaan Parking Enforcement Officer Michael McCargo was patrolling a municipal parking lot in the town's commercial district. Although there were a few parking

spaces that permitted up to fifteen minutes of free parking, the majority of parking spaces required that the motorist pay a fee to park. McCargo observed the defendant's car in space number two, which required payment of a parking fee that had not been paid by the defendant. Accordingly, McCargo stopped his parking enforcement vehicle in the parking lot's travel lane near the defendant's car and issued a parking ticket. McCargo noted a second unpaid vehicle parked in a space near the center of the parking lot. He left his vehicle, still parked near the defendant's car, and walked to the car at the center of the lot. McCargo was in the process of issuing a ticket for the second vehicle when the driver of that vehicle showed up. The driver said that she did not know that she had to pay to park there. The driver just left it at that.

McCargo then walked back to his parking enforcement vehicle. The defendant approached him stating: "[N]ot only did you give me a ticket, but you blocked me in." McCargo responded jokingly: "[T]hat's because I didn't want you to get away." The defendant explained why he was parked in the lot and McCargo stated why he had issued the ticket. McCargo noted the free fifteen minute parking spaces nearby. Unhappy with the explanation, the defendant said that the New Canaan Parking Department was "unfucking believable." As the defendant said this, his demeanor changed as he emphasized the profanities. At one point, McCargo advised the defendant to watch what he said, to which the defendant responded: "It's freedom of speech."

The encounter then escalated and the defendant said: "I know why you gave me a ticket. . . . [Y]ou gave me a ticket because my car is white." McCargo looked at the defendant. The defendant continued: "[N]o, you're giving me a ticket because I'm white."[1] The defendant

[1] The defendant is a white male and McCargo is an African-American male.

then turned and walked back to his parked vehicle. As he walked, the defendant said "remember Ferguson."

McCargo understood "Ferguson" to reference the then recent incident in Ferguson, Missouri in which a police officer had shot a black male. McCargo believed the events in Ferguson had been quite recent—within a few days of the encounter with the defendant. McCargo considered the defendant's comment to be a threat and believed that the defendant was implying that what happened at Ferguson was going to happen to him. He felt that the defendant was trying to "rile [him] up" and "just take it to a whole other level."

Mallory Frangione, who was in the parking lot, witnessed the confrontation between the defendant and McCargo. She saw the defendant yelling and motioning with his hands back and forth and up and down in an aggressive manner and taking steps toward McCargo. She also overheard the defendant reference Ferguson and say "f'ing unbelievable." Even though she was approximately seventy feet away, witnessing the incident made her feel nervous and upset.

After the "Ferguson" comment, the defendant and McCargo returned to their respective vehicles. As they were getting inside their vehicles, McCargo testified that he heard the defendant say "fucking niggers." McCargo pulled away and the defendant backed out of his space and drove behind McCargo. The defendant drove his vehicle around McCargo's vehicle and, as he passed, he looked at McCargo and again said: "[F]ucking niggers." This was said louder than the first time. While saying this, the defendant had an angry expression on his face and spoke in a loud and angry tone.

McCargo was shocked and appalled by the remarks. When McCargo advised his supervisor of the incident, he was clearly upset. His supervisor encouraged him to make a report to the New Canaan Police Department, and he did so.

In considering the defendant's challenge to his conviction for breach of the peace in the second degree, 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." (Internal quotation marks omitted.) *State* v. *Cook*, 287 Conn. 237, 254, 947 A.2d 307, cert. denied, 555 U.S. 970, 129 S. Ct. 464, 172 L. Ed. 2d 328 (2008). More specifically, as to the present case, to establish the defendant's violation of § 53a-181 (a) (5), the state was required to prove beyond a reasonable doubt that the defendant's words were "fighting words" that were likely to "induce immediate violence by the person or persons to whom [they were] uttered because of their raw effect." *State* v. *Caracoglia*, 78 Conn. App. 98, 110, 826 A.2d 192, cert. denied, 266 Conn. 903, 832 A.2d 65 (2003).

"In cases where [the line between speech unconditionally guaranteed and speech which may be legitimately regulated] must be drawn, the rule is that we examine for ourselves the statements in issue and the circumstances under which they were made to see if they are consistent with the first amendment. . . . We undertake an independent examination of the record as a whole to ensure that the judgment does not constitute a forbidden intrusion on the field of free expression." (Citations omitted; internal quotation marks omitted.) *State* v. *Baccala*, supra, 326 Conn. 251.

The majority is correct that, in announcing its verdict, the trial court conflated the physically aggressive aspects of the encounter with the racial epithets that came later. The record is clear that the two aspects of the incident were separate. Notwithstanding the trial court's remarks, in my view, the evidence supports the

defendant's conviction of breach of the peace in the second degree.

The first amendment constitutional right to freedom of speech, while generally prohibiting the government from proscribing speech based on disapproval of its content, does not protect "fighting words" that tend to incite a breach of the peace. (Internal quotation marks omitted.) *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571–72, 62 S. Ct. 766, 86 L. Ed. 1031 (1942). "[F]ighting words" are "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." (Internal quotation marks omitted.) *Cohen* v. *California*, 403 U.S. 15, 20, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971).

In *State* v. *Baccala*, supra, 326 Conn. 232, our Supreme Court considered whether the angry outbursts of a dissatisfied customer directed at a manager of a supermarket were sufficient to support her conviction for breach of the peace in the second degree. This was no ordinary dispute. The defendant became very angry when she became aware that she would not be able to pick up a Western Union money transfer. Id., 235–36. The defendant, in a loud voice, called the store manager a "fat ugly bitch" and a "cunt" and said "fuck you, you're not a manager" all the while gesticulating with a cane. (Internal quotation marks omitted.) Id., 236.

In concluding that the defendant's words were protected by the first amendment, our Supreme Court noted several concepts pertinent to the fighting words exception. First, the court noted that there are no per se fighting words but, rather, words may or may not be fighting words depending upon the circumstances of their use. Id., 238–39. Second, "[a] proper contextual analysis requires consideration of the actual circumstances as perceived by a reasonable speaker and

addressee to determine whether there was a likelihood of violent retaliation. . . . A proper examination of context also considers those personal attributes of the speaker and the addressee that are reasonably apparent because they are necessarily a part of the objective situation in which the speech was made." (Citations omitted.) Id., 240–41. Finally, the court's task is to "determine on a case-by-case basis all of the circumstances relevant to whether a reasonable person in the position of the actual addressee would have been likely to respond with violence." Id., 245. It is the "tendency or likelihood of the words to provoke violent reaction that is the touchstone of the *Chaplinsky* test . . . ." (Internal quotation marks omitted.) Id., 247.

Given the *Baccala* decision, one may fairly pose the following question: If angrily calling a store manager a "fat ugly bitch" and a "cunt" is not breach of the peace, how can the words used in the present case be considered fighting words that would support a conviction for breach of the peace? This is essentially the position of the majority. The majority rests its reversal of the breach of the peace in the second degree conviction on two grounds. First, that, under the circumstances in which the defendant used the language, it was not likely to provoke a reasonable person in McCargo's position to immediately retaliate with violence. Second, that a parking official should expect frustration from persons who receive parking tickets and therefore not be likely to retaliate with immediate violence.

As to the second ground, there is nothing in the record to support the assertion that a "parking official" is less likely to respond to a provocative racial insult than any other person. In McCargo's experience, there were people who were not happy about receiving a parking ticket. He testified, however, that no one had ever used the level of language employed by the defendant.

Turning to the first ground, that the language was not likely to provoke a reasonable person to retaliate with violence, I believe that this does not account for the truly inflammatory and provocative language used. The word "nigger" is commonly used and understood as an offensive and inflammatory racial slur. See Merriam-Webster's Collegiate Dictionary (11th Ed. 2011) One commentator describes its effect this way: "American society remains deeply afflicted by racism. Long before slavery became the mainstay of the plantation society of the antebellum South, Anglo-Saxon attitudes of racial superiority left their stamp on the developing culture of colonial America. Today, over a century after the abolition of slavery, many citizens suffer from discriminatory attitudes and practices, infecting our economic system, our cultural and political institutions, and the daily interactions of individuals. The idea that color is a badge of inferiority and a justification for the denial of opportunity and equal treatment is deeply ingrained. *The racial insult remains one of the most pervasive channels through which discriminatory attitudes are imparted.* Such language injures the dignity and self-regard of the person to whom it is addressed, communicating the message that distinctions of race are distinctions of merit, dignity, status, and personhood. Not only does the listener learn and internalize the messages contained in racial insults, these messages color our society's institutions and are transmitted to succeeding generations." (Emphasis added; footnotes omitted.) R. Delgado, "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling," 17 Harv. Civil Rights-Civil Liberties L. Rev. 133, 135–136 (1982).

In *Baccala*, the court recognized the particularly heinous nature of racial epithets in citing to *In re Spivey*, 345 N.C. 404, 480 S.E.2d 693 (1997) and *In re John M.*, 201 Ariz. 424, 36 P.3d 772 (App. 2001). *State* v. *Baccala*,

supra, 326 Conn. 242–43. *In re Spivey*, supra, 408, concerned a removal proceeding for a district attorney who repeatedly called a black bar patron "nigger." In denying the respondent's claim that his use of the word was protected by the first amendment, the Supreme Court of North Carolina took judicial notice of the following: "No fact is more generally known than that a white man who calls a black man 'a nigger' within his hearing will hurt and anger the black man and often provoke him to confront the white man and retaliate." Id., 414. The court went on to describe the respondent's repeated references to the bar patron as a "nigger" as a "classic case of the use of fighting words tending to incite an immediate breach of the peace . . . ." (Internal quotation marks omitted.) Id., 415.

In *In re John M.*, supra, 201 Ariz. 424, a juvenile leaned out a car window and yelled "fuck you, you god damn nigger" to an African-American woman walking to a bus stop. Id., 425. In concluding that these words were not protected speech, the Court of Appeals of Arizona observed: "We agree with the [s]tate that few words convey such an inflammatory message of racial hatred and bigotry as the term nigger. According to Webster's New World Dictionary, the term is generally regarded as virtually taboo because of the legacy of racial hatred that underlies the history of its use among whites, and its continuing use among a minority as a viciously hostile epithet." (Internal quotation marks omitted.) Id., 428.

In re Spivey and *In re John M.* are by no means the only cases that have categorized the word "nigger" as a fighting word. See, e.g., *In re H.K.*, 778 N.W.2d 764, 767, 770 (N.D. 2010) (following a teenage girl of African-American ancestry into a bathroom during a dance, yelling at her and calling her a "nigger" and then "telling [her she doesn't] own this town, that they own this town, and they don't want niggers in their town and

that [she needed] to watch out" were fighting words likely to incite a breach of the peace); *Lee* v. *Superior Court*, 9 Cal. App. 4th 510, 518, 11 Cal. Rptr. 2d 763 (1992) (denying request of African-American applicant to legally change his name to "Misteri Nigger" and stating: "We opine that men and women . . . of common intelligence would understand . . . [the word, nigger] likely to cause an average addressee to fight" [internal quotation marks omitted]).

The present case falls within the "fighting words" exception to first amendment protection for several reasons. First, the words used by the defendant were personally provocative. This was not a situation like *Cohen* v. *California*, supra, 403 U.S. 20, in which the defendant's jacket bore the words "Fuck the Draft" directed at no one in particular. (Internal quotation marks omitted.) Here, the defendant was directing personally provocative insults at McCargo. Second, the racial animus expressed by the defendant was not restricted to the "fucking niggers" comments. The encounter between the defendant and McCargo almost immediately took on a racial tone when the defendant commented: "You're giving me a ticket because I'm white." The defendant's inflammatory reference to the highly controversial shooting of an African-American man by a white police officer—"remember Ferguson"—only raised the tension more. Third, a witness approximately seventy feet away saw the defendant motion with his hands back and forth, up and down in an aggressive manner. Although she could not hear everything, she heard the defendant reference Ferguson and say "f'ing unbelievable." She could tell that the defendant was yelling and it upset her. Finally, the defendant angrily and twice hurled the worst racial epithet in the English language at McCargo with the "fucking niggers" comment.[2]

[2] "The experience of being called 'nigger' . . . is like receiving a slap in the face. The injury is instantaneous." (Internal quotation marks omitted.) *Taylor* v. *Metzger*, 152 N.J. 490, 503, 706 A.2d 685 (1998).

These were scathing insults that in many situations would provoke a reflexive visceral response. The fact that no such response occurred is not dispositive of whether words are fighting words. See *State* v. *Hoshijo ex rel. White*, 102 Haw. 307, 322, 76 P.3d 550 (2003) (fact that violence was not precipitated is of no consequence, as "proper standard is whether the words were *likely to provoke a violent response*, not whether violence occurred" [emphasis in original]). Also, the fact that the defendant was in his car at the moment that he yelled his "fucking niggers" epithets does not eviscerate their "fighting words" quality. Other cases have upheld breach of the peace convictions on similar facts. See *In re John M.*, supra, 201 Ariz. 428–29 (the words "fuck you, you god damn nigger" yelled at an African-American woman from a car as it pulled away were unprotected fighting words). Moreover, the cumulative effect of the entire incident constituted a breach of the peace.

I recognize that there are those who advocate that no speech, however vile and provocative, should be subject to criminal sanction. See Note, "The Demise of the *Chaplinsky* Fighting Words Doctrine: An Argument for its Internment," 106 Harv. L. Rev. 1129, 1140 (1993) (recommending that *Chaplinsky* be overruled because "it is a hopeless anachronism that mimics the macho code of barroom brawls" [internal quotation marks omitted]); see also *State* v. *Tracy*, 200 Vt. 216, 237, 130 A.3d 196 (2015) ("[i]n this day and age, the notion that *any* set of words are so provocative that they can reasonably be expected to lead an average listener to immediately respond with physical violence is highly problematic" [emphasis in original]).

Steven Pinker, a psychology professor at Harvard University, reflected on this change in attitude and behavior when he wrote: "Centuries ago our ancestors may have had to squelch all signs of spontaneity and individuality in order to civilize themselves, but now

that norms of nonviolence are entrenched, we can let up on particular inhibitions that may be obsolete. In this way of thinking, the fact that . . . men curse in public is not a sign of cultural decay. On the contrary, it's a sign that they live in a society that is so civilized that they don't have to fear being harassed or assaulted in response. As the novelist Robert Howard put it, '[c]ivilized men are more discourteous than savages because they know they can be impolite without having their skulls split.' " S. Pinker, The Better Angels of Our Nature (Penguin Books 2011) p. 128.

In *Baccala*, our Supreme Court left for another day "the continued vitality of the fighting words exception . . . ." *State* v. *Baccala*, supra, 326 Conn. 240. In my view, if angrily calling an African-American man a "fucking [nigger]" after taunting him with references to a recent police shooting of a young African-American man by a white police officer is not breach of the peace, then that day has come.

Because I believe that the evidence was sufficient to support the defendant's conviction of breach of the peace in the second degree, I would affirm the judgment of the trial court on that count.

PATRICK T. MCMAHON *v.* CITY OF MIDDLETOWN ET AL.
(AC 38678)

DiPentima, C. J., and Elgo and Bear, Js.

Syllabus

The plaintiff sought to recover damages from the defendant city of Middletown for breach of an employment contract and breach of the implied covenant of good faith and fair dealing in connection with the allegedly wrongful termination of his employment as the defendant's deputy chief of police without just cause. During the plaintiff's direct examination of four witnesses at trial, the plaintiff's counsel requested the court's permission to ask leading questions, which the court denied as to three

of the witnesses. Thereafter, the trial court rendered judgment for the city, from which the plaintiff appealed to this court. *Held* that this court declined to review the plaintiff's claim that the trial court violated statute (§ 52-178) when it denied his counsel permission to ask leading questions of the three allegedly adverse parties on direct examination, the plaintiff having failed to preserve the claim by raising it at trial; the plaintiff conceded that he did not specifically direct the trial court to § 52-178 but claimed that his requests to ask leading questions "functionally raised" the issue, and although our appellate courts occasionally have reviewed a claim that a party did not explicitly raise to the trial court if it was clear from the record that the substance of the claim was raised, the record here clearly indicated that the plaintiff did not raise, functionally or otherwise, the substance of the claim made on appeal, as the plaintiff's counsel did not argue at trial, as on appeal, that § 52-178 mandated that the court permit leading questions during the direct examination of an adverse witness in every instance and, instead, requested the court's permission to ask leading questions of the three witnesses, and when such permission was not forthcoming, the plaintiff's counsel mounted no challenge to the court's rulings and made no proffer as to the testimony that the leading questions might have elicited.

Argued November 27, 2017—officially released April 17, 2018

Procedural History

Action to recover damages for, inter alia, breach of an employment contract, and for other relief, brought to the Superior Court in the judicial district of New London at Norwich and transferred to the Superior Court in the judicial district of New London, where the action was withdrawn as against the defendant Eric P. Daigle; thereafter, the matter was tried to the court, *Hon. Joseph Q. Koletsky*, judge trial referee; judgment for the defendant city of Middletown, from which the plaintiff appealed to this court. *Affirmed.*

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

Michael J. Rose, with whom was *Cindy M. Cieslak*, for the appellee (named defendant).

Opinion

DiPENTIMA, C. J. The plaintiff, Patrick T. McMahon, appeals from the judgment of the trial court rendered

in favor of the defendant city of Middletown (city).[1] On appeal, the plaintiff claims that the court contravened General Statutes § 52-178[2] by denying his counsel's[3] requests to ask leading questions during the direct examination of the city's mayor, former mayor, and former acting deputy police chief. We decline to review this unpreserved claim and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant. In October, 2007, the plaintiff was hired by the city to be its deputy chief of police. That position was classified in the personnel rules as a "Defined, Non-Bargaining Position," meaning that the city must have "just cause" to terminate employment.

In July, 2009, the city's chief of police retired, and then mayor, Sebastian Giuliano, appointed the plaintiff to the position of acting chief. In October, 2010, Giuliano nominated the plaintiff for permanent appointment as chief of police but the city's common council voted against the nomination. Giuliano nevertheless continued to support the plaintiff's nomination, which the council again rejected in January, 2011. Thereafter, a

[1] The plaintiff also named Attorney Eric P. Daigle as a defendant, alleging tortious interference with a contract and civil conspiracy. The claims against Daigle were withdrawn; he is not party to this appeal.

[2] General Statutes § 52-178 provides: "A party to a civil action or probate proceeding: (1) May compel any adverse party, any person for whose benefit the action or proceeding is instituted, prosecuted or defended, or any officer, director, managing agent, or other agent or employee having knowledge of facts relevant to the action or proceeding, of a public or private corporation, partnership or association which is an adverse party or for whose benefit the action or proceeding is instituted, prosecuted or defended, to testify as a witness in his behalf, in the same manner and subject to the same rules as other witnesses; (2) may take the deposition of such party or person in the same manner and subject to the same rules as those pertaining to the taking of other depositions; and, (3) in either case, may examine such party to the same extent as an adverse witness."

[3] At trial, two attorneys appeared on behalf of the plaintiff. For the sake of convenience, we refer to both of them as "the plaintiff's counsel."

group of citizens successfully petitioned to put the plaintiff's nomination on the November, 2011 ballot. Giuliano maintained his support for the plaintiff, who remained acting chief.

In early October, 2011, an anonymous comment on the website of a local newspaper, the Middletown Press, stated that on Thursday, September 29, 2011, the plaintiff was seen consuming alcoholic beverages in public while armed and in uniform. Shortly after this comment appeared, a reporter from the Middletown Press called the police department concerning the comment. After the ensuing holiday weekend, on Tuesday, October 11, 2011, the acting deputy chief, William McKenna, told the plaintiff of both the comment and the reporter's most recent phone call. The plaintiff was "aggravated" to learn of "these rumors," and immediately called the Middletown Press from McKenna's office while McKenna was present and listening. The plaintiff spoke first to the reporter who had called the police station, and then to the editor, Viktoria Sundqvist. The plaintiff told Sundqvist that the allegation was not true; he was not in uniform at the time and he had consumed "a club soda and lime, but [he's] sure [he] wasn't drinking [alcohol]."

After speaking with Sundqvist, the plaintiff, while still in McKenna's office, called Giuliano. Giuliano's administrative assistant, William Pillarella, listened to the call on speakerphone. At trial, the plaintiff testified that the conversation proceeded as follows: "Just directly, I said, Mayor I'm giving you a call because I just spoke to the editor of the Middletown Press. There were some blogs about me drinking [alcohol] on duty in uniform . . . at a party at Mezzo Grille. I said I spoke to her and I wanted to give you the heads up in case you hadn't heard anything about that. He said no, I hadn't heard anything. . . . Mayor, it wasn't a party I was at Mezzo [Grille]. I was off duty, I was in civilian clothes,

I had a badge and gun on, it was a gathering of sorts for firefighters because—he knew that a firefighter had lost his girlfriend. I said I bought a round of drinks, and I probably had a club soda and lime. I remember saying that I probably had a club soda and lime because his aide, whose voice I recognized on his phone, said wine? I said no; la-la-la-lime, accentuating the word lime because he thought I said wine." Giuliano testified that he believed the plaintiff was telling the truth during their phone call.

McKenna, however, was concerned that the plaintiff's statements to Sundqvist and Giuliano were not true. After listening to the call to Giuliano, McKenna stated to the plaintiff that he had seen him drinking at the Mezzo Grille and that while McKenna could not be certain whether the plaintiff had been "in uniform," the plaintiff nevertheless may have violated a police department rule.[4] On October 14, 2011, McKenna contacted Giuliano and Pillarella to inform them of his concerns about the veracity of the plaintiff's statements. Later that same day, two representatives from the police union met with Giuliano and the city's personnel director, Debra Milardo, to express their own concerns about statements the plaintiff had made to union members at a recent meeting to which he had been invited. Eventually, Giuliano came to believe that the plaintiff had demonstrated a serious lapse in judgment by failing to provide Giuliano with all of the relevant information. After consulting further with Milardo and others, Giuliano informed the plaintiff that he would be withdrawing his support for his nomination, returning him to the position of deputy chief, placing him on administrative leave, and opening an investigation into his conduct.

At McKenna's suggestion, the city ultimately hired Attorney Eric P. Daigle to conduct the investigation.

[4] McKenna later testified that he had personally seen the plaintiff order "a Jack Daniels on the rocks" while wearing a badge and sidearm.

While the investigation was ongoing, in November, 2011, Daniel Drew defeated Giuliano in the city's mayoral election. During his campaign, Drew had made a political issue of the plaintiff's appointment.

On February 17, 2012, Daigle submitted his report. He had interviewed thirty witnesses, half of whom reported seeing the plaintiff drinking alcohol in public while wearing his badge and sidearm on various occasions, including at the Mezzo Grille on September 29, 2011. Daigle concluded that the plaintiff had indeed consumed alcohol at the Mezzo Grille while wearing a badge and a sidearm. While it was unclear whether this in and of itself violated any of the relevant police department rules, Daigle concluded that the plaintiff nevertheless had given false and misleading statements and had committed conduct unbecoming a police officer.

On the same day that the report was released, Drew sent the plaintiff a letter notifying him that the city would hold a hearing pursuant to *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532, 538–46, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985) (*Loudermill*), to determine whether just cause existed to terminate the plaintiff's employment. In addition to the violations Daigle had reported, Drew charged the plaintiff with threatening city employees during a press conference, misleading the press by claiming not to have been drinking alcohol and being insubordinate because he attended a training session while on administrative leave.

At the *Loudermill* hearing, when given the opportunity to present mitigating evidence, the plaintiff read a lengthy statement in his defense, after which Drew immediately terminated the plaintiff's employment. The plaintiff's attorney objected to the alacrity with which Drew acted, claiming that it was evidence of a predetermined outcome. Drew did not reconsider, and the plaintiff's employment was terminated.

On December 6, 2012, the plaintiff brought an action against the city for (1) breach of contract on the ground that he had been terminated without just cause and (2) breach of the covenant of good faith and fair dealing. The bench trial commenced on November 12, 2015, and after the plaintiff testified, he called Milardo, Giuliano, Drew and McKenna as witnesses. During the direct examination of each of those witnesses, counsel for the plaintiff requested the court's permission to ask leading questions as if on cross-examination. The court granted this request with respect to Milardo[5] but denied subsequent requests as to Giuliano, Drew and McKenna.[6] The court ultimately rendered judgment for the city, finding that the plaintiff had consumed alcohol

[5] "[The Plaintiff's Counsel]: Your Honor, at this time I'd like permission to lead the witness given that she was the Personnel Director at the time.

"The Court: Objection?

"[The City's Counsel]: There is; I don't believe it's a hostile witness, I don't believe there's any indication she needs to be led.

"The Court: Granted.

"[The Plaintiff's Counsel]: Thank you."

[6] With respect to Giuliano, the following exchange occurred:

"[The Plaintiff's Counsel]: Your Honor, I request permission to lead the witness.

"The Court: Denied.

"[The Plaintiff's Counsel]: Excuse me?

"The Court: Denied.

"[The Plaintiff's Counsel]: Thank you.

"The Court: That hardly is a foundation; I see nothing but openness and lack of hostility. I'm aware of Mayor Giuliano's role in this; I have been paying a moderate amount of attention during the trial. So, let's proceed.

"[The Plaintiff's Counsel]: Very good, Your Honor."

The court also denied the request of the plaintiff's counsel to ask leading questions of Drew:

"[The Plaintiff's Counsel]: Your Honor, at this time I'd like permission to treat the witness as a party opponent, an adverse witness, and lead?

"The Court: No, it helps me as the trier of fact not to hear leading questions. If you're having difficulty, then I'll grant you the permission; I don't see any indication that the witness is not going to respond fully and fairly to your nonleading questions, and it is an aid to me as the fact finder. So, for the moment the motion is denied with leave to renew if you're perceiving that the only way you can perform your task is with leading.

"[The Plaintiff's Counsel]: Understood, Your Honor. Thank you."

at the Mezzo Grille while wearing a badge and sidearm and that the plaintiff deliberately had lied about doing so to Giuliano and others.[7] The court concluded that this was just cause for the termination of the plaintiff's employment. The plaintiff appealed.

The plaintiff's sole claim on appeal is that the trial court violated § 52-178 by denying his counsel permission to ask leading questions of Giuliano, Drew and McKenna on direct examination. Specifically, the plaintiff argues that § 52-178 requires a trial court to permit leading questions during the direct examination of a party opponent and its agents and employees; see footnote 2 of this opinion; and that the court's refusal to do so was harmful to his case. The city argues, inter alia, that the plaintiff failed to preserve this claim. We agree with the city.

"Our rules of practice require that a party 'intending to raise any question of law which may be the subject of an appeal must either state the question distinctly to the judicial authority in a written trial brief . . . or state the question distinctly to the judicial authority on the record before such party's closing argument and within sufficient time to give the opposing counsel an

Finally, the court denied the plaintiff's request to ask leading questions of McKenna:

"[The Plaintiff's Counsel]: Your Honor, I would request permission to use leading questions—

"The Court: Let's see how it goes, denied; let's see how it goes.

"[The Plaintiff's Counsel]: All right, okay.

"The Court: If you're getting what appear to me to be open and complete answers without leading questions, as I told your co-counsel, I vastly prefer it as the trier of fact because it helps me to assess credibility much better.

"[The Plaintiff's Counsel]: Okay.

"The Court: If, however, you perceive, and I agree, that the witness is indeed hostile, I will be happy to reconsider my denial of your request for leading questions.

"[The Plaintiff's Counsel]: Okay."

[7] The court expressly declined to decide whether the plaintiff had been "in uniform."

opportunity to discuss the question. . . .' Practice Book § 5-2." *Adamo* v. *Adamo*, 123 Conn. App. 38, 45–46, 1 A.3d 221, cert. denied, 298 Conn. 916, 4 A.3d 830 (2010). "It is well established that an appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. See Practice Book § 60-5 . . . . The requirement that [a] claim be raised distinctly means that it must be so stated as to bring to the attention of the court the *precise* matter on which its decision is being asked. . . . We repeatedly have held that [a] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . . We will not promote a Kafkaesque academic test by which [a trial judge] may be determined on appeal to have failed because of questions never asked of [him] or issues never clearly presented to [him]." (Citations omitted; emphasis in original; internal quotation marks omitted.) *DiGiuseppe* v. *DiGiuseppe*, 174 Conn. App. 855, 864, 167 A.3d 411 (2017); see also *Burnham* v. *Karl & Gelb, P.C.*, 252 Conn. 153, 170–71, 745 A.2d 178 (2000). "These requirements are not simply formalities." (Internal quotation marks omitted.) *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 620, 99 A.3d 1079 (2014). "The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." (Internal quotation marks omitted.) *Chief Disciplinary Counsel* v. *Rozbicki*, 326 Conn. 686, 695, 167 A.3d 351 (2017).

The plaintiff concedes that he did not specifically direct the trial court to § 52-178 but argues that his requests to ask leading questions "functionally raised" the issue.[8] It is true that our appellate courts occasionally have "expressed a willingness to review claims that

[8] In his reply brief, the plaintiff also suggests, for the first time, two alternative grounds for review of this nonconstitutional claim. First, he

a party did not explicitly raise to the trial court if it is clear from the record that the substance of the claim

contends that this court may consider an unpreserved claim where it is "in the interest of public welfare or of justice between the parties." (Emphasis omitted.) See *Perez-Dickson* v. *Bridgeport*, 304 Conn. 483, 500, 43 A.3d 69 (2012). We conclude that this claim is inadequately briefed and, thus, abandoned. See *Electrical Contractors, Inc.* v. *Dept. of Education*, 303 Conn. 402, 444 n.40, 35 A.3d 188 (2012) ("Claims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion. . . . Claims are also inadequately briefed when they are raised for the first time in a reply brief . . . or consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record . . . ." [Citations omitted; internal quotation marks omitted.]).

Second, in a footnote, the plaintiff argues that plain error review may be appropriate—a claim repeated at oral argument before this court. See Practice Book § 60-5. "It is well established that the plain error doctrine . . . is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved [and nonconstitutional in nature], are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. [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 . . . requires reversal of the trial court's judgment . . . for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly. . . . Implicit in this very demanding standard is the notion . . . that invocation of the plain error doctrine is reserved for occasions requiring the reversal of the judgment under review. . . .

"An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily [discernible] on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . .

"[An appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest injustice." (Emphasis in original; internal quotation marks omitted.) *Estela* v. *Bristol Hospital, Inc.*, 179 Conn. App. 196, 199–200 n.2, A.3d (2018). After a careful reading of the record, we are not convinced that the claimed error is so clear that it is "[discernible] on the face of a factually adequate record" or "obvious in the sense of not debatable." (Internal quotation marks omitted.) Id., 200 n.2. Moreover, because the plaintiff's counsel made no showing that the preclusion of leading questions harmed the plaintiff in any way, we are not convinced that the claimed error was "so harmful that a failure to reverse the judgment would result in manifest injustice." (Internal quotation marks omitted.) Id. Accordingly, we decline to reverse the judgment under the plain error doctrine.

was raised." *State* v. *Santana*, 313 Conn. 461, 467, 97 A.3d 963 (2014); see also *Fadner* v. *Commissioner of Revenue Services*, 281 Conn. 719, 729 n.12, 917 A.2d 540 (2007); *Salmon* v. *Dept. of Public Health & Addiction Services*, 259 Conn. 288, 305, 788 A.2d 1199 (2002); *State* v. *Munoz*, 233 Conn. 106, 119 n.7, 659 A.2d 683 (1995); *State* v. *Dabkowski*, 199 Conn. 193, 198, 506 A.2d 118 (1986). We sometimes review such claims because, "although a party need not use the term of art applicable to the claim, or cite to a particular statutory provision or rule of practice to functionally preserve a claim, he or she must have argued the underlying principles or rules at the trial court level in order to obtain appellate review." *State* v. *Santana*, supra, 468. Ordinarily, our appellate courts review claims that are functionally raised "only when a similar claim was raised in the trial court and the record was adequate to review the claim." *State* v. *Misenti*, 112 Conn. App. 562, 567, 963 A.2d 696, cert. denied, 291 Conn. 904, 967 A.2d 1220 (2009).

In the present case, the record clearly indicates that the plaintiff did not raise, functionally or otherwise, the substance of the claim he now makes on appeal. Four times over the span of a six day trial, the plaintiff's counsel requested the court's permission to ask leading questions. The court denied those requests with respect to Giuliano, Drew and McKenna.[9] At each denial, the plaintiff's counsel merely accepted the court's rulings and proceeded with direct examination. See footnote 7 of this opinion. The plaintiff's counsel did not argue, as on appeal, that there was an absolute right to ask leading questions pursuant to § 52-178. Instead, at trial, the plaintiff's counsel requested the court's permission to ask leading questions of three different witnesses, in addition to Milardo, and when such permission was

[9] Conversely, in addition to permitting the plaintiff's counsel to ask leading questions of Milardo; see footnote 6 of this opinion; the court at least twice overruled objections from the city's counsel to leading questions.

not forthcoming as to those three witnesses, the plaintiff's counsel mounted no challenge to the rulings and made no proffer as to the testimony that leading questions might elicit. Although the trial court twice offered to reconsider its ruling if the plaintiff's counsel experienced difficulties examining the witnesses, no such request for reconsideration was made.[10] See *White* v. *Mazda Motors of America, Inc.*, supra, 313 Conn. 631 ("an issue must be distinctly raised before the trial court, not just briefly suggested" [internal quotation marks omitted]). In the present case, the plaintiff did not reach the threshold of briefly suggesting, let alone actually arguing, that he had a right to ask leading questions pursuant to § 52-178; neither the claimed right nor the statute itself were mentioned at any time during the trial.

On appeal, however, the plaintiff contends that § 52-178 mandates that the trial court permit leading questions during the direct examination of an adverse witness in every instance. Indeed, the plaintiff does not argue that the court abused its discretion by making an erroneous evidentiary ruling, but rather that the court had no discretion to make such a ruling. The plaintiff frames this as a question of statutory interpretation, relying in part on the legislative history of § 52-178 and on the commentary to the Connecticut Code of Evidence § 6-8, as well as related case law. To claim now, for the first time on appeal, that the trial court "contravened" § 52-178 amounts to an ambuscade of that court. There was neither occasion nor opportunity for the court to consider the statute upon which the plaintiff now relies because the plaintiff did not mention it at any time during the trial. See Practice Book § 60-5; see also *White* v. *Mazda Motors of America, Inc.*,

[10] Additionally, the record reveals that, on at least one occasion, the court contemplated whether to reassess its ruling sua sponte, noting that it was "inclined to start permitting [leading questions]" during the examination of Drew.

supra, 313 Conn. 639 (*Eveleigh*, *J.*, dissenting) ("the essence of the preservation requirement is that fair notice be given to the trial court of the party's view of the governing law" [emphasis omitted; internal quotation marks omitted]). For these reasons, we conclude that the plaintiff's claim was not preserved and decline to review it.

The judgment is affirmed.

In this opinion the other judges concurred.

MARY RANDAZZO *v.* JOHN ALAN SAKON
(AC 39197)

Alvord, Bright and Lavery, Js.

Syllabus

The plaintiff landowner sought to recover damages arising out of the defendant's breach of an agreement to pay the property taxes on a portion of the plaintiff's property that allowed road access to the defendant's commercial property development and over which the defendant held an easement. The matter was tried before an attorney fact finder, who recommended that judgment be rendered in favor of the plaintiff, including an award of statutory interest (§ 37-3a). The trial court rendered judgment in the plaintiff's favor, from which the defendant appealed to this court. Thereafter, the trial court sought clarification from the fact finder regarding his recommended award of interest and rendered judgment in accordance with the fact finder's clarification, and the defendant filed an amended appeal. *Held*:

1. The trial court properly applied the six year statute of limitations (§ 52-576 [a]) for breach of contract actions, rather than the three year statute of limitations (§ 52-598a) for indemnification actions: in his report, the fact finder determined that the plaintiff sent the defendant annual bills for the amount of taxes related to the easement portion of her property, but that the defendant refused to pay, and that she commenced this action to enforce her rights under a certain global settlement agreement between the parties, seeking reimbursement for money that the defendant had agreed to pay the plaintiff as set forth in the easement deed, and not to recover damages for which she was found to be liable to a third party; moreover, to the extent that the defendant claimed that because he did not sign the easement before it was recorded on the land records, he could not be held to the terms of the global agreement, that claim was unavailing, as the defendant, by accepting the easement,

became contractually bound by its terms, including the payment of the taxes on the easement.

2. The defendant could not prevail on his claim that the trial court erred in concluding that the statute of frauds did not bar the plaintiff's action, the defendant having been bound by the provisions in the deed of conveyance once he accepted the conveyance; the defendant had reviewed the easement, rendered payment for the easement, and signed an escrow process letter that provided that the easement would be binding on the parties if the defendant received zoning approval for his development, which he did, and, therefore, it was clear that a contract existed between the parties and that the statute of frauds did not bar the action.

3. The finding that the town imposed taxes on the plaintiff's property, including the portion over which the defendant held an easement, and did not value and tax the easement separately from the remaineder of the plaintiff's land was supported by the record: although easements generally cannot be assessed and taxed separately, the present case did not involve a tax imposed by a town on an easement but, rather, concerned whether the defendant had breached his agreement with the plaintiff by failing to reimburse the plaintiff for a portion of the property tax assessed on the plaintiff's property, there was nothing in the law that prohibited the dominant and servient owners of an easement from entering into a contract setting forth responsibility for the property taxes on the land on which the easement was located, and there was ample evidence to support the fact finder's finding that the town had taxed the plaintiff's property and had not separately taxed the easement, and that pursuant to the parties' agreement, the defendant was obligated to reimburse the plaintiff for the taxes on the land under the easement; moreover, the defendant's claims that he did not need to reimburse the plaintiff because the municipality taxed him directly for the easement and that his commercial tenant, V Co., should share in the tax reimbursement to the plaintiff were unavailing, as the defendant voluntarily had agreed to reimburse the plaintiff for the taxes assessed on the portion of the plaintiff's property over which he held the easement and was not assessed a tax by the town, and nothing in the parties' agreement imposed an obligation on V Co.

Argued January 3—officially released April 17, 2018

Procedural History

Action to recover damages for breach of contract, brought to the Superior Court in the judicial district of Hartford, where the matter was referred to *James J. Gadarowski*, attorney fact finder, who filed a report recommending judgment for the plaintiff; thereafter,

the court, *Dubay, J.*, granted the plaintiff's motion for judgment and rendered partial judgment for the plaintiff in accordance with the report, from which the defendant appealed to this court; subsequently, the attorney fact finder filed a report concerning prejudgment interest; thereafter, the court, *Wahla, J.*, rendered judgment for the plaintiff in accordance with the report, and the defendant filed an amended appeal. *Appeal dismissed in part; affirmed.*

John A. Sakon, self-represented, the appellant (defendant).

Thomas P. Moriarty, for the appellee (plaintiff).

Opinion

BRIGHT, J. In this amended appeal, the defendant, John Alan Sakon, appeals from the judgment of the trial court, rendered in favor of the plaintiff, Mary Randazzo, acting as trustee for A&F Foods, a general partnership.[1] On appeal, the defendant claims that the trial court erred in accepting the findings and recommendations of the attorney fact finder, James J. Gadarowski (fact finder), and in rendering judgment in accordance with

[1] The complaint in this matter very clearly sets forth that this case is brought by Mary Randazzo in her capacity as trustee for A&F Foods. The summons, however, erroneously lists the plaintiff only as Mary Randazzo. The case caption in the Superior Court followed the summons. Because there is no question that Randazzo is acting only in her capacity as trustee, we conclude that this merely is a scrivener's error. See *Birkhamshaw* v. *Socha*, 156 Conn. App 453, 465, 115 A.3d 1 ("[a]lthough the writ of summons need not be technically perfect . . . the plaintiff's complaint must contain the basic information and direction normally included in a writ of summons" [internal quotation marks omitted]), cert. denied, 317 Conn. 913, 116 A.3d 812 (2015); General Statutes § 52-123 ("[n]o writ, pleading, judgment or any kind of proceeding in court or course of justice shall be abated, suspended, set aside or reversed for any kind of circumstantial errors, mistakes or defects, if the person and the cause may be rightly understood and intended by the court"). Accordingly, all references to the plaintiff in this opinion are to Randazzo, acting as trustee for A&F Foods, and references to the plaintiff's property are to the property of the trust.

his recommendations. More specifically, the defendant claims that the court improperly: (1) concluded that the plaintiff's cause of action sounds in contract, rather than indemnification, and, therefore, applied the incorrect statute of limitations; (2) concluded that the statute of frauds, General Statutes § 52-550, was inapplicable to this case; and (3) accepted the finding that the town of Glastonbury (town) had imposed real estate taxes on the easement area. We dismiss the defendant's original appeal and, with respect to his amended appeal, we disagree with each of the defendant's claims and, therefore, affirm the judgment of the trial court.

In his findings of fact and recommended award of damages, the fact finder set forth the following relevant background: "A long trek would best describe the trip undertaken to develop a large shopping center in Glastonbury . . . by the defendant. The center is to utilize approximately 13.5 acres of land. The process for the new center began in the 1980s when [the] defendant began to acquire properties and easements. In the 1990s a number of lawsuits concerning various issues related to the area to be developed were filed both in Connecticut and federal courts by [the] defendant. Finally, an agreement was reached in February, 1999, called the 'global settlement' by the parties. The actual settlement document was signed on February 5, 1999, by various parties but was not submitted as evidence at the hearing. Based upon other correspondence and the documents prepared, signed, and recorded, the settlement, in general, provided for a ground lease from [the] plaintiff to [the] defendant for a parcel of land in the area to be developed; an easement . . . from [the] plaintiff to [the] defendant that would allow access from . . . Main [Street] over [the] plaintiff's property to [the] defendant's development;[2] payment of $100,000 by [the]

[2] The easement provides in relevant part: "KNOW ALL MEN BY THESE PRESENTS That MARY RANDAZZO, Trustee . . . ('Grantor'), for the consideration of One Dollar ($1.00) and other valuable considerations received

defendant . . . and the filing of withdrawals by [the] defendant of four . . . state lawsuits, a federal district court action, and an appeal to the [United States Court of Appeals for the Second Circuit].'' (Footnote added.)

The parties also drafted an escrow process letter, dated February 9, 1999, signed by the plaintiff's attorney and by the defendant, which listed all documents necessary to consummate the global settlement agreement.[3] The letter indicated that the defendant would be submitting an application to the town's Plan and Zoning Commission (commission) for modification of an existing

to its full satisfaction of JOHN ALAN SAKON . . . ('Grantee'), does give, grant, bargain, sell and confirm unto said Grantee, his heirs, successors and assigns forever, WITH WARRANTY COVENANTS, the following easements:

"(a) a permanent easement and right of way, in common with others, to lay, maintain, operate, construct, use, alter, repair and replace an access road and electrical lines and other utilities and appurtenances thereto, in, through, on and over a certain piece or parcel of land . . . more particularly described in Schedule A attached hereto ('Easement Area') . . . .

"Within the easement area, and subject to the terms of this Easement, the Grantee shall have the right to construct maintain, inspect, use, operate, repair and replace an access road for vehicular and pedestrian traffic to and from the Benefited Property and electrical lines, lighting facilities, drainage, storm and sanitary sewer lines and other utilities and appurtenances necessary or convenient for development and use of the Benefited Property, and to enter in and upon said Easement Area and to pass over the same and excavate therein for said purposes . . . .

"Grantee shall construct and, for long as Grantee is making use of the Easement Area, shall maintain and repair the access road and appurtenances with the Easement Area in good condition and repair . . . at Grantee's sole costs and expense. Grantee hereby agrees to indemnify and hold harmless Grantor from any claims, judgments, suits, obligations, costs and expenses (a) arising out of Grantee's failure to pay, when due, any and all costs relating to the Grantee's construction and maintenance of said access road or appurtenances . . . and (b) in any way arising out of the use, construction or maintenance of said access road or appurtenances . . . and (c) any and all real estate taxes imposed upon the Easement Area, provided that Grantee is not separately taxed therefor. . . ."

[3] The letter provided that all parties would sign the "documents necessary to consummate settlement of all appeals and withdrawal of all actions and releases of all parties, to be held in escrow . . . including . . . the ground lease . . . the easement agreement . . . the mortgage . . . the promissory note . . . the release agreements . . . withdrawal of the deferral

application involving the plaintiff's tenant, Valvoline, and giving the commission information on the easement, and it provided that if this application was not approved by the commission at its February 16, 1999 meeting, then the entire global settlement agreement was null and void, and all documents, including the easement agreement, would be destroyed and would not be binding on any party. The letter further provided that if the commission approved the application at its February 16, 1999 meeting, then all of the documents would become "immediately legally binding and effective upon the parties . . . [and] the mortgage, easement agreement and subordination agreement" would be recorded. The fact finder found that the defendant and his attorney reviewed all of the documents, including the easement. Upon receiving the easement, the defendant submitted the modified application to the commission, and the commission approved the modified application at its February 16, 1999 meeting. Thereafter, the recordable documents were filed, funds were disbursed, and the settlement became final in accordance with the parties' agreement.

Regarding the taxes due to the town for the land over which the defendant had obtained the easement from the plaintiff, the defendant, in a letter dated February 6, 2000, wrote to the plaintiff: "I agree that Randazzo is not responsible for any of the taxes. Since Valvoline and I share the easement, we each should be responsible for [half] its assessment where the easement is in common. Since Valvoline gains no benefit, I would be happy to pay the portion in full. I would also pay for any assessment of the sign easement area." When the defendant failed to reimburse the plaintiff for the taxes paid, the plaintiff refused to provide requested documentation to the defendant in connection with some

appeal . . . stipulation and withdrawal of the two state court appeals . . . [and the] subordination agreement."

financing he was seeking. The plaintiff demanded $4439.76 from the defendant to cover taxes for the grand list years of 1998-2001 assessed against the easement area. The defendant made the payment and sent a letter, dated May 3, 2001, to the plaintiff providing in relevant part: "*I honestly believe that I have already paid all taxes that are my responsibility under the documents.* Accordingly, this payment is made under protest and, inter alia, I reserve the right to contest the amount or validity of the imposition by appropriate proceedings . . . . I offered to assume the payment of taxes for the easement area solely in exchange for good relations between the parties. Given our history, I wish only to deal with the town in regard to property taxes." (Emphasis in original.) The town assessor at that time, Leon Jendrzejczyk, was asked by the plaintiff to calculate the taxes on the land underlying the easement separately, and he agreed to do so, showing his method of calculation.[4] The plaintiff, thereafter, utilized this method of calculation and sent yearly billings to the defendant seeking reimbursement of the amount due for taxes each year for the easement area. The defendant, however, did not pay these amounts.

In 2010, the plaintiff commenced this breach of contract action against the defendant. In her revised complaint, the plaintiff alleged that the defendant failed to comply with the parties' agreement that he would reimburse her for the real estate taxes assessed on that portion of the plaintiff's land encumbered by the easement. The plaintiff sought reimbursement for the grand list years 2002 through 2010. The court referred the case to the fact finder, who recommended that

[4] The fact finder stated that Jendrzejczyk testified before him and opined that these types of requests were not unusual. We note that the defendant has not furnished a transcript of Jendrzejczyk's testimony. In fact, although the hearing before the fact finder was conducted over seven separates dates, with several witnesses, the defendant has provided us with *excerpts* of transcripts from only three of those dates. Nevertheless, we conclude that these transcripts are sufficient for us to address the defendant's claims on appeal.

judgment be rendered in favor of the plaintiff in the amount of $15,529.45 plus "statutory interest."[5] The trial court rendered judgment in accordance with this recommendation, and the defendant appealed. The plaintiff then filed a motion for clarification regarding the applicable rate of interest awarded and the date on which interest began to accrue. The trial court referred the motion to the fact finder, who clarified that the plaintiff was entitled to prejudgment interest under General Statutes § 37-3a at a rate of 10 percent per annum from the date each payment accrued to the date judgment was rendered.[6] The court, thereafter, rendered judgment in accordance with this clarification, and the defendant amended his appeal to include the new judgment.[7] Additional facts will be included as necessary.

[5] At the hearing before the fact finder, the plaintiff also introduced evidence that the defendant owed moneys for grand list years 2011 through 2013. The plaintiff, thereafter, filed a revised complaint to include these years, and the defendant filed an objection, which the court sustained.

[6] Pursuant to General Statutes § 37-3a (a), "interest at the rate of ten per cent a year, and no more, may be recovered and allowed in civil actions . . . as damages for the detention of money after it becomes payable."

[7] Because the defendant's original appeal was taken before the rate of statutory prejudgment interest was determined, the appeal is subject to dismissal pursuant to *Gianetti* v. *Meszoros*, 268 Conn. 424, 426, 844 A.2d 851 (2004), for lack of a final judgment. In *Gianetti*, our Supreme Court explained that, because the 10 percent interest rate set forth in § 37-3a is not a fixed rate of interest but, rather, is the maximum rate of interest that may be awarded under its provisions, a judgment awarding prejudgment interest under the statute must set forth the rate awarded in order to be a final judgment. Id.; see also *Morgan* v. *Morgan*, 136 Conn. App. 371, 372, 46 A.3d 255 (2012) (no appealable final judgment if court renders judgment awarding prejudgment interest pursuant to § 37-3a but does not determine rate of such interest).

Although we conclude, sua sponte, that the defendant's original appeal was not taken from a final judgment and, therefore, must be dismissed, his amended appeal is jurisdictionally proper. See Practice Book § 61-9 ("[i]f the original appeal is dismissed for lack of jurisdiction, the amended appeal shall remain pending if it was filed from a judgment or order from which an original appeal properly could have been filed"). Accordingly, this court has jurisdiction to consider the defendant's claims in the context of his amended appeal, which was taken from a final judgment, despite the jurisdictional defect in his original appeal. See, e.g., *Rosa* v. *Lawrence & Memorial*

On appeal, the defendant challenges the factual conclusions reached by the fact finder, as well as the legal conclusions reached by the trial court. Our standard of review, therefore, is as follows. "Attorney fact finders are empowered to hear and decide issues of fact on contract actions pending in the Superior Court . . . . On appeal, [o]ur function . . . is not to examine the record to see if the trier of fact could have reached a contrary conclusion. . . . Rather, it is the function of this court to determine whether the decision of the trial court is clearly erroneous. . . . This involves a two part function: where the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision; where the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . .

"Finally, we note that, because the attorney [fact finder] does not have the powers of a court and is simply a fact finder, [a]ny legal conclusions reached by an attorney [fact finder] have no conclusive effect. . . . The reviewing court is the effective arbiter of the law and the legal opinions of [a fact finder], like those of the parties, though they may be helpful, carry no weight not justified by their soundness as viewed by the court

Hospital, 145 Conn. App. 275, 282 n.9, 74 A.3d 534 (2013) (dismissing original appeal for lack of final judgment but reviewing claims under amended appeal pursuant to § 61-9); *Midland Funding, LLC* v. *Tripp*, 134 Conn. App. 195, 196 n.1, 38 A.3d 221 (2012) (dismissing original appeal sua sponte but reviewing claims under amended appeal pursuant to § 61-9).

that renders judgment." (Citation omitted; internal quotation marks omitted.) *Walpole Woodworkers, Inc.* v. *Manning*, 126 Conn. App. 94, 98–99, 11 A.3d 165 (2011), aff'd, 307 Conn. 582, 57 A.3d 730 (2012). With this standard of review in mind, we now consider the defendant's claims.

I

The defendant claims that the court erred when it concluded that the plaintiff's cause of action sounds in contract, rather than indemnification, and that the court, therefore, applied the incorrect statute of limitations. The defendant argues that the court should have applied the three year statute of limitations set forth in General Statutes § 52-598a,[8] concerning actions for indemnification, rather than the six year statute of limitations set forth in General Statutes § 52-576 (a),[9] concerning actions on simple or implied contracts.[10] We disagree.

"The determination of which statute of limitations applies to a given action is a question of law over which our review is plenary." *Vaccaro* v. *Shell Beach Condo., Inc.*, 169 Conn. App. 21, 29, 148 A.3d 1123 (2016), cert. denied, 324 Conn. 917, 154 A.3d 1008 (2017).

[8] General Statutes § 52-598a provides: "Notwithstanding any provision of this chapter, an action for indemnification may be brought within three years from the date of the determination of the action against the party which is seeking indemnification by either judgment or settlement."

[9] General Statutes § 52-576 (a) provides: "No action for an account, or on any simple or implied contract, or on any contract in writing, shall be brought but within six years after the right of action accrues, except as provided in subsection (b) of this section."

[10] A review of the record in this case reveals that the defendant specially pleaded in his first special defense that the plaintiff's action was "barred by the applicable statute of limitations . . . § 52-576 (a)." The defendant did not specially plead the applicability of § 52-598a in his special defenses, although he did raise this statute in his posttrial brief to the fact finder, attempting to change his original position.

In his decision, the fact finder found that the plaintiff sent the defendant yearly bills for the amount of taxes related to the easement portion of her property, but the defendant refused to pay. In his supplemental decision, the fact finder stated that "it is clear that upon the facts, including that the plaintiff has not sought . . . indemnification by either judgment or settlement . . . § 52-598a would not apply to this situation. This, instead, is a claim under a contractual obligation and is governed by the six (6) year limit under the terms of . . . § 52-576 (a)." The defendant objected to this finding, and the trial court overruled the objection.

On appeal, the defendant first contends that there is no enforceable contract between the parties. This claim is without merit. The fact finder specifically found that there was a global agreement between the parties that involved many documents, including the easement agreement. He further found that the defendant and his attorney reviewed these documents, including the easement agreement. Furthermore, the fact finder found that there was no evidence that the defendant had disputed the wording of the easement, had sought the return of the $100,000 that he had paid for the easement, or ever offered to return the easement to the plaintiff. The fact finder also specifically credited the testimony of the defendant that the easement was of great value to him. The defendant challenges none of these findings on appeal.

Furthermore, the defendant does not contest the validity of the easement agreement. Rather, his claim, although not developed, appears to include the contention that because he did not sign the easement before it was recorded on the land records, he cannot be held to the terms of the global agreement on a contract theory. For over 100 years, however, the law has been to the contrary.

For example, in *Elting* v. *Clinton Mills Co.*, 36 Conn. 296, 299 (1869), the plaintiff's predecessor in title, Amasa L. Hyde, conveyed by deed an easement to the defendants, which contained a clause requiring the defendants to remove a river wall from the easement area and to rebuild it at their own cost. Id., 301. The deed was executed by Hyde only. Id., 297. The defendants accepted the deed and recorded it. Id., 301. Following Hyde's sale of his property, he executed and delivered to the plaintiff, the new owner, a written assignment of all his interest in the agreement with the defendants regarding the river wall. Id., 302. The plaintiff then demanded that the defendants remove the existing wall and rebuild it in a different location. Id., 301–302. When the defendants refused, the plaintiff commenced suit. Id., 302. The Superior Court reserved for the advice of the Supreme Court the question of whether the plaintiff was entitled to judgment. Id., 304.

Our Supreme Court explained that it was "unquestionable" that there had been a valid and binding contract between the defendants and the original grantor, Hyde, because the defendants had accepted the deeded easement. Id. The question with which the court grappled was whether the conveyance by Hyde to another, without reference to the provision contained in the easement to the defendants, discharged the defendants from their obligations. Id. Although the court declined to determine whether the contract ran with the land or was personal in nature, it held that the contract was binding on the defendants because they had accepted the deeded easement, and, therefore, they were not relieved of their obligation regarding the river wall. Id.

Additionally, in *Foster* v. *Atwater*, 42 Conn. 244, 250 (1875), our Supreme Court explained: "The principle is well settled, that where one by deed poll[11] grants land,

[11] "In bi-partite conveyances an acceptance is shown by the grantees' signature to it. In deeds poll his acceptance will ordinarily be presumed, if he has knowledge of the deed and expresses no dissent." *Greene* v. *A. &*

and conveys any right, title or interest in real estate to another, and where there is any money to be paid by the grantee to the grantor, or any other debt or duty to be performed by the grantee to the grantor, or for his use and benefit, and the grantee accepts the deed and enters on the estate, the grantee becomes bound to make such payment or perform such duty, and not having sealed the instrument he is not bound by it as a deed; but it being a duty, *the law implies a promise to perform it*, upon which promise, in case of failure, assumpsit will lie."[12] (Emphasis added; footnote added; internal quotation marks omitted.) In this case, the defendant, by accepting the easement, became contractually bound by its terms, including the payment of taxes.

Alternatively, the defendant argues that, even if there is an enforceable contract, "the language in the agreement demonstrates that it is an indemnification." Accordingly, he argues, "the Superior Court ought to have found that the statute of limitations applicable is three (3) year[s] as [the parties'] contract language states that it is an indemnification agreement." The plaintiff argues that "the plaintiff is not seeking indemnification for losses it has incurred pursuant to either a judgment or settlement in a third party action. Rather,

W. Sprague Mfg. Co., 52 Conn. 330, 372 (1885). According to Black's Law Dictionary (7th Ed. 1999), "deed poll" is defined as: "A deed made by and binding on only one party, or on two or more parties having similar interests."

[12] According to Black's Law Dictionary (7th Ed. 1999), "assumpsit" is defined as: "An express or implied promise, not under seal, by which one person undertakes to do some act or pay something to another . . . . A common-law action for breach of such a promise or for breach of a contract." "[I]t is elementary law that where a sum certain is due on a simple contract, indebitatus assumpsit will lie to recover it." *Packer* v. *Benton*, 35 Conn. 343, 348 (1868). Furthermore, "[a]n action on an 'implied contract' still includes actions which at common law would have taken the form of assumpsit upon such a contract." *Anderson* v. *Bridgeport*, 134 Conn. 260, 266, 56 A.2d 650 (1947).

the plaintiff is seeking its right to indemnification or reimbursement in accordance with its easement agreement with the defendant. Thus . . . § 52-576 (a) is the correct statute of limitations . . . .'' We agree with the plaintiff.

Our Supreme Court addressed this issue in *Amoco Oil Co.* v. *Liberty Auto & Electric Co.*, 262 Conn. 142, 810 A.2d 259 (2002). In *Amoco Oil Co.*, the plaintiff oil company commenced an action against the defendant contractor claiming, in part, that it was entitled to indemnification because the defendant was negligent when it installed underground tanks on the plaintiff's property. Id., 145–46. On appeal, our Supreme Court agreed, in relevant part, with the trial court's holding that the plaintiff's claim sounded in breach of contract, rather than indemnification. Id., 148.

Our Supreme Court explained: ''Our analysis begins with the contract provision on which [the plaintiff] relies in asserting its claim in count one of its complaint. Among other things, that provision purports to require [the defendant] to reimburse [the plaintiff] for and indemnify [the plaintiff] against loss, costs, damage, expense, claims and liability arising out of work performed by [the defendant] under the contract. Count one of [the plaintiff's] complaint is based solely on damage to [the plaintiff's] property allegedly caused by [the defendant's] negligent and improper installation of the tank, not from losses that arise from [the defendant's] liability to a third party. . . . Count one, therefore, is improperly characterized as a claim for indemnification; it is, rather, a claim for damages for [the plaintiff's] own losses. Although [the plaintiff] maintains that its claim arises under a provision of its contract with [the defendant] entitled 'Liability and Indemnity,' a claim for indemnity and a claim for one's first party losses are not one and the same.'' (Citation omitted.) Id., 148.

"Notwithstanding our conclusion that [the plaintiff's] claim is not an indemnification claim, there is another reason why [the plaintiff's] reliance on § 52-598a is misplaced. [Section] 52-598a provides that a party seeking indemnification may bring an indemnification action within three years from the date an action against it, *by a third party, has been determined 'by either judgment or settlement.*' . . . [The plaintiff] did not allege in count one of its complaint that it sought indemnification for losses it had incurred pursuant to either a judgment or settlement in a third party action. Rather, [it] alleged that it had 'a right to indemnification in accordance with the terms and provisions of its contract with [the defendant] for all damages . . . incurred as a result of [the leaking tank]. Thus, we agree with the trial court that § 52-576 (a) rather than § 52-598a applies to [the plaintiff's] claim." (Emphasis in original; footnote omitted.) Id., 152.

Similarly, "the common-law doctrine of indemnification permits a tortfeasor to assert a claim *only* against another *liable* tortfeasor." (Emphasis in original.) *Crotta* v. *Home Depot, Inc.*, 249 Conn. 634, 642, 732 A.2d 767 (1999). "In an action for indemnity . . . one tortfeasor seeks to impose total liability upon another [tortfeasor]." (Internal quotation marks omitted.) *Bristol* v. *Dickau Bus Co.*, 63 Conn. App. 770, 773, 779 A.2d 152 (2001).

In the present case, the easement provision specifically provides in relevant part that the defendant "agrees to indemnify . . . [the plaintiff] from . . . any and all real estate taxes imposed upon the Easement Area, provided that [the defendant] is not separately taxed therefor." The defendant paid for the easement, reviewed the terms of the easement deed, and signed a document that provided that the "easement agreement" would be binding at the moment the commission approved the revised application. The fact finder found

that the plaintiff sent the defendant yearly bills for the amount of taxes related to the easement portion of her property, but he refused to pay. The reimbursement sought by the plaintiff in this case is not for damages for which the plaintiff was found liable to a third party; rather, this reimbursement is for money that the plaintiff and the defendant agreed would be an ongoing obligation of the defendant as set forth in the easement deed itself. The plaintiff is not seeking indemnity from the defendant for a third party tort action for which the plaintiff owed damages as a result of a judgment or a settlement. See General Statutes § 52-598a. The plaintiff is seeking to enforce an ongoing financial obligation for which the defendant had contracted when he accepted the deeded easement. See *Elting* v. *Clinton Mills Co.*, supra, 36 Conn. 304; *Foster* v. *Atwater*, supra, 42 Conn. 250.

Accordingly, the trial court properly applied the six year statute of limitations for breach of contract actions, rather than the three year statute of limitations for indemnification actions.

II

The defendant next claims that the court erred in concluding that the statute of frauds did not bar the plaintiff's cause of action. The defendant contends, in relevant part, that because he did not sign the easement, it does not comply with the statute of frauds, and, therefore, the provision in the easement requiring him to pay the taxes is not binding on him. He also argues that there was no evidence of part performance that would support a finding that he agreed to the payment of taxes, and that there is nothing to support an application of equitable estoppel. The plaintiff argues that, "in light of the settlement agreement [that the defendant] signed, in which he acknowledged the easement would be binding on him, his argument is without merit." The plaintiff

further argues that "it is settled law that if a grantee accepts a deed of conveyance, he is bound by its covenants even though the grantee did not sign the document." Furthermore, the plaintiff argues, "equitable estoppel removed the easement agreement from the operation of the statute of frauds." We conclude that a grantee is bound by the provisions in a deed of conveyance once he accepts the conveyance. Accordingly, we conclude that the court properly determined that the statute of frauds did not bar the plaintiff's cause of action.[13]

Whether the statute of frauds applies in any given case involves an issue of statutory interpretation, which is a question of law, and therefore appellate review of the issue is plenary. See *Kalas* v. *Cook*, 70 Conn. App. 477, 482–83, 800 A.2d 553 (2002).

As we set forth in part I of this opinion, "[t]he principle is well settled, that where one by deed poll grants land, and conveys any right, title or interest in real estate to another, and where there is any money to be paid by the grantee to the grantor, or any other debt or duty to be performed by the grantee to the grantor, or for his use and benefit, *and the grantee accepts the deed and enters on the estate*, the grantee becomes bound to make such payment or perform such duty, and not having sealed the instrument he is not bound by it as a deed; but it being a duty, the law implies a promise to perform it, upon which promise, in case of failure, assumpsit will lie." (Emphasis added; internal quotation marks omitted.) *Foster* v. *Atwater*, supra, 42 Conn. 250.

In *Foster*, the defendant had assumed and promised the grantor, via language contained in a deed, to pay

[13] Because we conclude that the defendant was bound by the agreement to pay the taxes by his acceptance of the deed of conveyance, we need not address the other arguments regarding the statute of frauds.

the mortgages on the property. Id., 251. He asserted several defenses in the action, including the statute of frauds on the ground that he had not signed the deed. Id. As to the statute of frauds defense, our Supreme Court explained: "[T]he contract in this case was in writing, although it was not formally signed by the defendant. It has all the certainty of being his contract that it would have had if it had been so signed. The terms of the contract are in writing, and the defendant's acceptance of the deed, in which the contract exists, and of which it forms a part of the consideration, is equivalent to the signature of the defendant to the contract, for it can as easily, and with equal certainty, be shown to be his contract. A contract of this character is obviously not within the object of the statute. That statute was intended to do away with the temptation to commit fraud and perjury in attempting to make one party answer for the debt, default or miscarriage of another. In cases of this character no such temptation can by possibility exist, for the case is as much beyond the reach of fraud as it would be if the contract was formally executed by the defendant. Furthermore, all the cases hold that the contract stated in a deed poll is binding between the parties. The statute of frauds makes void all contracts within its provisions; hence, contracts stated in deed polls cannot be within the statute." Id., 254; see also *Elting* v. *Clinton Mills Co.*, supra, 36 Conn. 304 (holding it was "unquestionable" that there had been valid and binding contract between defendants and grantor because defendants had accepted deeded easement).

In the present case, the defendant reviewed the easement, rendered payment for the easement, and signed an escrow process letter that provided that the easement would be binding on the parties if the commission approved the revised application, which the defendant himself submitted; the defendant does not question that

the commission approved the revised application. Considering these facts, it is clear that a contract existed between the parties and that the statute of frauds does not bar the plaintiff's cause of action.

III

The defendant also claims that the court erred in accepting the finding that the town had imposed real estate taxes on the easement area, without recognizing that the state does not allow taxes to be assessed on easements. Specifically, he argues: "No tax can be imposed upon the easement area as easements are not separately assessed for taxation. Any tax imposed upon the easement area arises out of Valvoline's [the other user of the easement] use of the easement area for its driveways and [the] plaintiff's remaining property rights in the servient estate. The defendant has already [borne] his burden for taxes by paying the increased assessment of the lands . . . serviced by the easement. To allocate additional tax burden on [the] defendant for lands in the easement area would result in double taxation. . . . That is why long held Connecticut law holds easements are not taxable." The defendant also argues that the fact finder "has ignored the fact that the easement area is shared by other tenant(s) of the plaintiff, and the plaintiff reserved the easement area for future use to [herself] not inconsistent with the grant of the easement." We conclude that the defendant's claim is without merit.

"[W]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts . . . . [W]here the factual basis of the court's decision is challenged we must determine whether the facts . . . are supported by the evidence or whether, in light of the evidence and the pleadings in the whole

record, those facts are clearly erroneous." (Internal quotation marks omitted.) *Walpole Woodworkers, Inc.* v. *Manning*, supra, 126 Conn. App. 99.

We address first the defendant's claim that the fact finder's award amounted to an impermissible tax on an easement. The defendant relies principally on *Breezy Knoll Assn., Inc.* v. *Morris*, 286 Conn. 766, 946 A.2d 215 (2008), and General Statutes § 12-64 (a) for the proposition that "[a]s easements are incapable of existence separate and apart from the particular land, they are not assessed separately for the real estate taxation."[14] We agree that easements generally cannot be assessed and taxed separately; this case, however, does not involve a tax imposed by a town on an easement. The issue in this case is whether the defendant has breached his agreement with the plaintiff by failing to reimburse the plaintiff for a portion of the property tax on the plaintiff's property. We are aware of nothing in the law that prohibits the dominant and servient owners of an easement from entering into a contract setting forth responsibility for the property taxes on the land upon which the easement lies, and the defendant has not provided a citation to any authority that would support such a prohibition. The fact finder resolved the parties' dispute over this issue by finding that the town had taxed the plaintiff's property and had not separately taxed the easement. Consequently, the defendant, pursuant to the parties' agreement, was obligated to reimburse the plaintiff for the taxes on the land under the easement. This finding was supported by ample evidence.

[14] Although not cited in his appellate brief, during oral argument, the defendant argued that *Hartford Electric Light Co.* v. *Wethersfield*, 165 Conn. 211, 332 A.2d 83 (1973), concluded, as a matter of law, that easements could not be taxed. We disagree with the defendant's reading of this case. In *Hartford Electric Light Co.*, our Supreme Court held that public utility easements are not taxable *separately* to the public utility, but generally are taxable to the record owner of the freehold estate. Id., 219.

In particular, the testimony of Nicole Lintereur, the town assessor, provided a sufficient factual basis for the fact finder to conclude that the town did not value and tax the easement separately from the remainder of the plaintiff's land. There also was considerable testimony from Lintereur that supports the finding that the town assessed taxes on *the plaintiff's property*, upon a portion of which the defendant holds an easement. Specifically, Lintereur testified that the plaintiff's property was .79 acres, and that the town billed the plaintiff directly for taxes on that property. She testified that the easement runs through the .79 acres of land, and it measures .32 acres in size. When asked whether that .32 acres of land is assessed by the town *to the plaintiff*, Lintereur affirmed that it is assessed to the plaintiff. When specifically asked if the town ever assessed the defendant for taxes on the easement area, Lintereur said no. Lintereur also responded affirmatively when asked whether the plaintiff is "assessed for the .79 acres, which includes the easement area . . . ." Additionally, when asked, "[w]hen an easement is recorded on the land records, how do you deal with that from an assessment standpoint; do you tax the easement?" Lintereur responded, "[n]o . . . . It's not its own separate parcel." Accordingly, the finding that the town imposed taxes on the plaintiff's property, including the portion over which the defendant held an easement, and did not separately tax the defendant for the easement, is supported by the record.

We find similarly unpersuasive the defendant's argument that he was taxed directly by the town for the increase in value of his property by virtue of having the easement, and, therefore, any payment to the plaintiff for her taxes for that area amounts to double taxation. The facts of this case demonstrate that the defendant contracted to reimburse the plaintiff for the taxes assessed on the portion of the plaintiff's property over

which the defendant held the easement. This was a voluntary agreement that the defendant made with the plaintiff and was not a tax assessed to the defendant by the town. Accordingly, it does not amount to double taxation but, rather, is part of a contractual agreement between two private parties.

As to the defendant's claim that Valvoline should share in the tax reimbursement to the plaintiff for the easement area because it also makes use of the easement, we are not persuaded. The defendant voluntarily assumed the responsibility to reimburse the plaintiff for the taxes assessed. He agreed to be bound by the provisions in the easement, one of which included the obligation to reimburse the plaintiff for the taxes paid on that portion of her property. There is nothing in the agreement that imposes an obligation on Valvoline. Accordingly, the contention that Valvoline should be held responsible for a portion of the burden that the defendant voluntarily assumed is without merit.[15]

The defendant's original appeal is dismissed; the judgment is affirmed with respect to the defendant's amended appeal.

In this opinion the other judges concurred.

GMAC MORTGAGE, LLC *v.* DANIEL DEMELIS ET AL.
(AC 39836)

Sheldon, Bright and Flynn, Js.

Syllabus

The plaintiff, G Co., sought to foreclose a mortgage on certain real property owned by the defendant C. After the trial court rendered a judgment of foreclosure by sale and just prior to the sale date, C filed a petition

[15] Any claim that the plaintiff has some responsibility for the taxes on the land covered by the easement because she reserved the right to use the easement in the future is rejected for the same reasons.

for bankruptcy, which was eventually dismissed in March, 2014. Subsequently, in April, 2014, G Co. filed a motion to open the judgment, in which it informed the court that C's bankruptcy petition had been dismissed. That motion was not heard by the court for more than two years. In July, 2015, the court, instead, sua sponte issued an order requiring G Co. to file an affidavit stating the status of C's bankruptcy petition and whether a motion for relief from stay had been filed, which G Co. did not do. Thereafter, G Co. filed a motion to substitute D Co. as the plaintiff, which the trial court granted. C subsequently filed a motion to dismiss the action on two grounds, claiming that the case should be dismissed due to G Co.'s lack of diligence in prosecuting the action and because G Co. never complied with the court's July, 2015 order. The trial court denied C's motion to dismiss and considered, for the first time, G Co.'s April, 2014 motion to open the judgment, which it granted, and rendered a judgment of strict foreclosure. Subsequently, the court denied C's motion for articulation, reconsideration and/or reargument, and C appealed to this court. *Held*:

1. The trial court did not abuse its discretion in denying C's motion to dismiss based on G Co.'s failure to comply with a court order: the subject order, which stated that a failure to comply would result in dismissal, was not self-executing, as it merely set forth the court's then-present intention to dismiss the case if G Co. did not comply, and in the event of noncompliance, further action of the court was still required to render a judgment of dismissal and the trial court retained the jurisdiction and discretion to decide not to impose the sanction of dismissal; moreover, the court's decision to deny the motion to dismiss was consistent with the policy preference to bring about a trial on the merits of a dispute whenever possible and was supported by the facts that G Co. actually had informed the court of the status of the defendant's bankruptcy in its April, 2014 motion to open the judgment, and that C had waited more than one year from G Co.'s failure to comply with the order before filing her motion to dismiss.

2. C could not prevail on her claim that the trial court abused its discretion in not dismissing the action due to G Co.'s failure to prosecute the case with reasonable diligence; the court exercised its discretion in favor of resolving the case on its merits, and the delay in the resolution of the case was not attributed solely to G Co. given that, after the judgment of foreclosure by sale was first rendered, C moved to open the judgment three times and, on the eve of the sale date, filed for bankruptcy, which stayed the foreclosure by sale, and that when the court issued its July, 2015 order requiring G Co. to provide an affidavit regarding C's bankruptcy petition, C remained silent even though she knew her bankruptcy petition had been dismissed more than one year prior and that G Co. had already brought that fact to the court's attention.

C's claim that the trial court abused its discretion by denying her motion for articulation, reconsideration and/or reargument was not reviewable,

C having failed to file a motion for review pursuant to the applicable rule of practice (§ 66-7) following the trial court's denial of her motion.

Argued on February 1—officially released April 17, 2018

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the court, *Aurigemma*, *J.*, rendered a judgment of foreclosure by sale; thereafter, the court granted the defendant Courtney Demelis' motion to open the judgment; subsequently, the court granted the plaintiff's motion to substitute Ditech Financial, LLC, as the plaintiff; thereafter, the court denied the defendant Courtney Demelis' motion to dismiss; subsequently, the court granted the substitute plaintiff's motion to open the judgment and rendered a judgment of strict foreclosure; thereafter, the court denied the defendant Courtney Demelis' motion for articulation, and the defendant Courtney Demelis appealed to this court. *Affirmed.*

C. Michael Budlong, with whom was *Emily C. Thaller*, for the appellant (defendant Courtney Demelis).

S. Bruce Fair, with whom, on the brief, was *Victoria L. Forcella*, for the appellee (substitute plaintiff).

Opinion

BRIGHT, J. The defendant Courtney Demelis[1] appeals from the judgment of strict foreclosure rendered by the trial court in favor of the substitute plaintiff, Ditech Financial, LLC (Ditech).[2] The defendant claims that the

[1] Daniel Demelis is not participating in this appeal. Accordingly, any reference to the defendant is to Courtney Demelis only.

[2] On April 18, 2016, prior to rendering the judgment of strict foreclosure, the trial court granted the motion filed by the original plaintiff, GMAC Mortgage, LLC, to substitute Ditech as the party plaintiff.

court abused its discretion by: (1) denying her motion to dismiss for the original plaintiff's failure to comply with an order of the court; (2) denying her motion to dismiss based on the original plaintiff's failure to prosecute the case with reasonable diligence; and (3) denying her postjudgment motion for articulation, reconsideration and/or reargument. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. In January, 2011, the original plaintiff commenced this foreclosure action by writ, summons and complaint with a return date of February 8, 2011. The defendant appeared and requested participation in the court's foreclosure mediation program. The parties engaged in mediation until July 1, 2011, when the mediation was terminated as unsuccessful. Thereafter, the parties engaged in discovery, after which the original plaintiff moved for a judgment of strict foreclosure on March 12, 2012. The court held a hearing on the motion and, on April 2, 2012, rendered a judgment of foreclosure by sale. The defendant then filed three motions to open the judgment and extend the sale date, all of which were granted. Following the granting of the defendant's last motion to open, the court set the sale date for September 14, 2013.

Just prior to the sale date, on September 13, 2013, the defendant filed a petition for bankruptcy pursuant to title 11, chapter 13, of the United States Code, which caused the sale of the foreclosed property to be stayed. On March 10, 2014, the Bankruptcy Court dismissed the defendant's bankruptcy petition. Consequently, on April 4, 2014, the original plaintiff filed a motion requesting that the trial court open the judgment and reset the sale date for the foreclosed property. In its motion to open the judgment and set a new sale date, the original plaintiff informed the court that the defendant's bankruptcy petition had been dismissed on March 10,

2014. That motion was not heard by the court for more than two years.

Instead, on July 6, 2015, the court, sua sponte, issued an order pursuant to Practice Book § 14-3 requiring the original plaintiff to file an affidavit by August 6, 2015, stating the status of the defendant's bankruptcy petition and whether a motion for relief from stay had been filed. The court's order stated that "[c]ounsel for the plaintiff must file an affidavit by [August 6, 2015] . . . . Failure to comply with the above order within thirty (30) days hereof will result in dismissal pursuant to [Practice Book §] 14-3." The original plaintiff did not comply with the court's order. Neither the court nor the parties took any further action in the case until March 31, 2016, when the original plaintiff filed a motion to substitute Ditech as the party plaintiff, following the assignment of the subject note and mortgage to Ditech. The motion was unopposed, and the court granted it on April 18, 2016.

Thereafter, on September 22, 2016, the defendant filed a motion to dismiss the case on two grounds. First, the defendant claimed that the case should be dismissed pursuant to Practice Book § 14-3 due to the original plaintiff's lack of diligence in prosecuting the action. Second, she claimed that the case should be dismissed because the original plaintiff never complied with the court's July 6, 2015 order. According to the defendant, because that order stated that the case *will* be dismissed if the original plaintiff did not comply, the order was self-executing and dismissal was required. The court considered the defendant's motion to dismiss on October 17, 2016. At the same time, the court also considered, for the first time, the original plaintiff's April 4, 2014 motion to open judgment. The court denied the defendant's motion to dismiss, granted the original plaintiff's motion to open, and rendered a judgment of strict foreclosure. On November 7, 2016, the defendant

filed a motion for articulation, reconsideration and/or reargument. The court denied the motion on November 8, 2016. This appeal followed.

Because the defendant, in each of her three claims, argues that the court abused its discretion, we begin by setting forth the standard of review. "In reviewing a claim that [the] discretion [of the trial court] has been abused, the unquestioned rule is that great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness. . . . [T]he ultimate issue is whether the court could reasonably conclude as it did." (Internal quotation marks omitted.) *Faile* v. *Stratford*, 177 Conn. App. 183, 201, 172 A.3d 206 (2017).

I

The defendant claims that the trial court abused its discretion when it denied her motion to dismiss based on the original plaintiff's failure to comply with the court's July 6, 2015 order, which required the original plaintiff to provide an affidavit regarding the defendant's bankruptcy petition by August 6, 2015. The defendant argues that because the order stated that a failure to comply with the order "will result in dismissal pursuant to [Practice Book §] 14-3," the order was self-executing, and the court's refusal to implement the order and dismiss the action was an abuse of discretion. We disagree.

First, the premise of the defendant's argument, that the court's order was self-executing, is incorrect. The July 6, 2015 order did not dismiss the case. It merely set forth the court's then-present intention to dismiss the case if the original plaintiff did not comply with its order. In the event of noncompliance, further action of the court was still required to render a judgment of dismissal.

The cases upon which the defendant relies are inapposite. In *Mihalyak* v. *Mihalyak*, 30 Conn. App. 516, 518, 620 A.2d 1327 (1993), the *judgment of dissolution* provided that "alimony will terminate upon the death of either party or upon the wife's remarriage or cohabitation." (Internal quotation marks omitted.) This court concluded that "[t]he alimony termination provision was automatic and self-executing" because it took effect upon the occurrence of a certain event, without further action of the court. Id., 518, 522. Accordingly, the court already had rendered *a judgment*, which this court determined was clear and unambiguous. Id., 522.

In *Johnson* v. *Atlantic Health Services, P.C.*, Superior Court, judicial district of New Haven, Docket No. CV-99-0430613-S (April 30, 2002), the trial court, *Blue, J.*, issued a contingent order granting the defendants' motion for judgment on the plaintiffs' stricken complaint, stating that the motion was "granted unless an amended complaint [was] filed by" a particular date.[3] (Internal quotation marks omitted.) Id. After the deadline had passed, and with judgment never having entered in the case, the plaintiffs filed an amended complaint and the defendants objected. Approximately one year later, the trial court, *Booth, J.*, held that Judge Blue's order was self-executing, and, therefore, judgment had already entered in the defendants' favor. Id.

[3] In *Johnson* v. *Atlantic Health Services, P.C.*, 83 Conn. App. 268, 849 A.2d 853 (2004), the defendants appealed from the granting of the plaintiffs' motion to open the judgment of dismissal, claiming that the court improperly determined that the motion to open was timely pursuant to Practice Book § 17-4 (a). Id., 269. This court affirmed the order granting the motion to open, holding that "[n]otice is necessary to make a determination of the date that commences the four month period within which a party may file a motion to open a judgment. Noncompliance with a contingent order, by itself, cannot serve as notice of the resultant judgment." Id., 276. In the present case, notice of a judgment of dismissal was not sent to the parties. Consequently, even if the court's order was self-executing, a notice of the judgment still would have had to be sent in order to commence the four month period in which the original plaintiff could file a motion to open.

Then, for the first time, a judgment actually was entered in the case by the court clerk. Consequently, until Judge Booth's order sustaining the defendants' objection, Judge Blue's contingent order did not result in a final judgment rendered by the court or entered by the court clerk. Further action of the court, i.e., Judge Booth's order, was required in order for a final judgment to enter pursuant to Judge Blue's contingent order.

In the present case, as in *Johnson*, judgment was not entered by the court clerk after the original plaintiff failed to comply with the court's July 6, 2015 order. Further action of the court was required. Unlike in *Johnson* though, the court never rendered a judgment. Rather, it merely stated its intention to do so if the original plaintiff did not comply with its order. Actual dismissal of the case required the additional step of the court following through on its stated intention and rendering a judgment of dismissal. Contrary to the defendant's argument, the court was not required to follow through on its stated intention in its July 6, 2015 order. It retained the jurisdiction and discretion to decide not to impose the sanction of dismissal.

Second, the court's decision not to dismiss the case due to the original plaintiff's failure to comply with the court's July 6, 2015 order was not an abuse of discretion. Denying the defendant's motion to dismiss based on noncompliance with the court's July 6, 2015 order is consistent with the direction by our Supreme Court that the court's discretion should be exercised mindful of the policy preference "to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court." *Snow* v. *Calise*, 174 Conn. 567, 574, 392 A.2d 440 (1978). In addition, the court's decision not to render a judgment of dismissal is supported by the facts that the original plaintiff actually had informed the court of the status of the defendant's bankruptcy in its April 4, 2014 motion to open,

and that the defendant waited more than one year from the original plaintiff's failure to comply with July 6, 2015 order before filing her motion to dismiss.

Accordingly, the trial court did not abuse its discretion in denying the defendant's motion to dismiss on this ground.

II

The defendant next claims that the trial court abused its discretion by not dismissing the case due to the original plaintiff's failure to prosecute the case with reasonable diligence. We are not persuaded.

"Practice Book § 14-3 (a) permits a trial court to dismiss an action with costs if a party fails to prosecute the action with reasonable diligence. The ultimate determination regarding a motion to dismiss for lack of diligence is within the sound discretion of the court. . . . Under [§ 14-3], the trial court is confronted with endless gradations of diligence, and in its sound discretion, the court must determine whether the party's diligence falls within the reasonable section of the diligence spectrum. . . . Courts must remain mindful, however, that [i]t is the policy of the law to bring about a trial on the merits of a dispute whenever possible . . . and that [o]ur practice does not favor the termination of proceedings without a determination of the merits of the controversy where that can be brought about with due regard to necessary rules of procedure." (Citations omitted; internal quotation marks omitted.) *Bobbin* v. *Sail the Sounds, LLC*, 153 Conn. App. 716, 726–27, 107 A.3d 414 (2014), cert. denied, 315 Conn. 918, 107 A.3d 961 (2015).

As previously noted, courts typically should exercise their discretion in favor of resolving a case on its merits. That is exactly what the court did here. Furthermore, the delay in the resolution of this case can hardly be

attributed solely to the original plaintiff. Judgment was first rendered in this case on April 2, 2012. Thereafter, the defendant three times moved to open the judgment, extending the sale date until September 14, 2013. Then, on the eve of the sale date, the defendant filed for bankruptcy, staying the foreclosure by sale. When the court issued its order on July 6, 2015, requiring the original plaintiff to provide an affidavit regarding the defendant's bankruptcy petition, the defendant remained silent even though she knew that her bankruptcy petition had been dismissed more than one year earlier and that the original plaintiff had brought that fact to the court's attention in its April 4, 2014 motion to open. On the basis of these facts, the court's denial of the defendant's motion to dismiss in no way constituted an abuse of discretion.

III

Finally, the defendant claims that the court abused its discretion by denying her November 7, 2016 motion for articulation, reconsideration and/or reargument. We decline to review this claim.

The defendant's entire argument is as follows: "Without reasoning behind the court's denial of her motion to dismiss and subsequent motion for reargument, [the defendant] was left to speculate as to the court's reasoning for each, thereby leaving her without the proper information to seek relief on appeal. In her motion for reargument, [the defendant] requested at a minimum, an articulation of the court's denial of her motion to dismiss and also sought reargument on the issues set forth above. Due to the blanket denial of this motion, [the defendant] could not adequately challenge the orders of the court and was improperly left to guess at the court's reasoning."

The defendant's argument improperly attempts to obtain review of the court's denial of her request for

articulation. See Practice Book § 66-5 ("[t]he sole remedy of any party desiring [appellate review of] the trial court's decision on the motion [for articulation] filed pursuant to this section . . . shall be by motion for review under [§] 66-7"). The defendant could have filed a motion for review pursuant to Practice Book § 66-7. In fact, the defendant's counsel admitted at oral argument that he did not do so because he has been dissatisfied with this court's rulings on such motions in other cases. Counsel's past disappointments notwithstanding, we will not condone the defendant's attempted end run around our rules of practice by considering her claim. See *Havis-Carbone* v. *Carbone*, 155 Conn. App. 848, 851 n.3, 112 A.3d 779 (2015) (declining to review defendant's claim that court improperly denied motion for articulation because defendant "failed to file a motion for review, which is the remedy for the denial of a motion for articulation").

The judgment is affirmed.

In this opinion the other judges concurred.

MARK P. CHIOFFI *v.* CHRISTOPHER G. MARTIN ET AL.
(AC 38443)

Lavine, Elgo and Beach, Js.

Syllabus

The plaintiff sought to recover damages from his law partner, the defendant M, for, inter alia, breach of fiduciary duty and breach of a partnership agreement arising out of the dissolution of the limited liability partnership they had formed for the practice of law. The plaintiff claimed, inter alia, that M, as part of the winding up of the partnership, had improperly distributed certain assets to himself in violation of the partnership agreement. M filed a counterclaim, seeking damages and attorney's fees. At the time of the dissolution of the partnership, M had a 57 percent interest in the partnership, and the plaintiff had a 43 percent interest in the partnership. Under the partnership agreement, revenue was to be allocated between three capital accounts, namely, a corporate

account for which M was responsible, a trusts and estates account for which the plaintiff was responsible, and a "remaining" account into which all other revenues were allocated. The distribution of funds to the plaintiff and M was governed by § 3.02 of the partnership agreement, which required that, following any distribution, the balances in the plaintiff's and M's capital accounts be directly proportionate to their ownership percentages. The partnership agreement also contained restrictions in § 4.03 on certain actions that the plaintiff and M could take. Any losses or expenses, including attorney's fees, arising from a partner's actions were to be allocated exclusively to that partner's capital account. After a trial to the court, the court rendered judgment for the plaintiff on his claim for breach of contract. The trial court found that M had breached the partnership agreement and awarded the plaintiff, inter alia, damages and attorney's fees. On M's appeal and the plaintiff's cross appeal to this court, *held*:

1. The trial court properly found that M breached § 3.02 of the partnership agreement when he distributed revenues from the corporate account to himself without regard for the required ratio of partnership assets in his and the plaintiff's capital accounts; the clear language of the partnership agreement provided that the allocation of partnership revenues and expenses was to continue through the time of the final distributions, and that distributions were to be made such that the plaintiff's and M's capital account balances were to be in proportion to their ownership interests in the partnership, and there was nothing in that portion of the partnership agreement to suggest that the specifically designed balancing of accounts was to be abandoned when one partner gave notice of his intention to withdraw from the partnership.
2. The trial court improperly concluded that M breached § 4.03 of the partnership agreement when he assigned corporate accounts receivable and works in progress to a new law firm that he had formed; the restrictions listed in § 4.03 pertained to the partnership's dealings with third parties, there was no actionable breach on the basis of § 4.03, as M's assignment of corporate assets did not create additional partnership losses or expenses, and even if M could be deemed to have breached § 4.03 (b), the sole remedy was the assignment of that expense to his capital account.
3. The trial court did not abuse its discretion when it ordered a direct payment from M to the plaintiff rather than a reduction in M's capital account; because M breached the agreement by distributing partnership assets to himself without observing the balance of the corporate accounts, a reduction in his capital account would have been pointless, as it would have permitted him to distribute assets to himself without regard to the relative states of the accounts, and the partnership agreement provided an exception to the limited liability of a partner where, as here, M violated an express term of the partnership agreement, which subjected him to personal liability for his breach of the partnership agreement.

4. The trial court's award of attorney's fees to the plaintiff pursuant to § 4.03 of the partnership agreement was improper and could not stand, as that court erred in finding that M had breached § 4.03, and because the court found no other basis for its award of attorney's fees, that award was vacated.
5. The trial court improperly failed to conclude that M breached his fiduciary duty to the plaintiff; M took partnership assets over the objection of the plaintiff, who received no benefit or consideration for the self-dealing distributions made by M, the partnership agreement did not compromise or expressly limit the parties' duty of loyalty, and because the plaintiff's complaint had requested attorney's fees for M's breach of fiduciary duty, the case had to be remanded for a determination of whether the plaintiff was entitled to such fees and, if so, in what amount.
6. The trial court did not abuse its discretion in its method of calculating damages; that court properly calculated the amount that would have been distributed by the partnership to the plaintiff if M had adhered to the requirements of the partnership agreement and the partnership's liabilities had not been satisfied predominantly by the plaintiff's share, and any additional funds placed in M's capital account would have been profits of the corporate department, to which the plaintiff was not entitled.
7. The trial court did not commit clear error or abuse its discretion in finding that the plaintiff waived his claim for an accounting; the partnership agreement contained no absolute requirement for an accounting, which is discretionary pursuant to statute (§ 34-339 [b]), the plaintiff litigated his claims at trial and did not mention the request in his complaint for an accounting until posttrial reargument, and even if there was no waiver, the trial court's decision denying an accounting was not an abuse of discretion, as the trial and discovery constituted a remedy at law that was available to the plaintiff, and the expense of an accounting and the resulting delay outweighed whatever benefit would have been gained by ordering an accounting.

Argued October 12, 2017—officially released April 17, 2018

Procedural History

Action to recover damages for, inter alia the named defendant's alleged breach of contract, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the named defendant filed a counterclaim; thereafter, the matter was transferred to the Complex Litigation Docket and tried to the court, *Genuario*, *J.*; judgment for the plaintiff on the complaint in part and on the counterclaim; subsequently, the court granted the plaintiff's motions for

reargument and attorney's fees, and amended its judgment; thereafter, the court denied the named defendant's motion for reargument, and the named defendant appealed and the plaintiff cross appealed to this court; subsequently, the court, *Genuario*, *J.*, issued an articulation of its decision. *Reversed in part; further proceedings.*

William H. Champlin III, with whom, on the brief, was *Mark S. Gregory*, for the appellant-appellee (named defendant).

Timothy G. Ronan, with whom, on the brief, was *Assaf Z. Ben-Atar*, for the appellee-appellant (plaintiff).

Opinion

BEACH, J. This action arises out of the dissolution of a registered limited liability partnership. The defendant Christopher G. Martin[1] appeals, following a trial to the court, from the judgment rendered in favor of the plaintiff, Mark P. Chioffi, on the count of the plaintiff's complaint which alleged breach of contract. The trial court awarded Chioffi $34,120 in compensatory damages, $103,000 in attorney's fees, and $6226.73 in costs. The defendant claims on appeal that the court erred in (1) finding a breach of § 3.02 of the parties' partnership agreement; (2) finding a breach of § 4.03 of the partnership agreement; (3) ordering the defendant to pay damages directly to the plaintiff rather than ordering a reduction in the defendant's capital account in the partnership; and (4) awarding attorney's fees to the plaintiff. The plaintiff cross appealed, claiming that the court (1) erred in not finding a breach of fiduciary duty, as alleged in count one of his complaint; (2) erred in its calculation of damages; and (3) abused its discretion in holding

[1] The partnership itself, Martin Chioffi LLP (alternatively Martin & Chioffi LLP), was also named as a defendant, but is unrepresented and has not participated in the proceedings as a separate entity. All references to the defendant in this opinion are to Martin alone.

that the plaintiff waived his claim for an accounting. We agree with the defendant's second and fourth claims and the plaintiff's first claim. Accordingly, we reverse in part the judgment of the court and remand the case for a hearing on attorney's fees. We otherwise affirm the court's judgment.

The parties, partners in Martin Chioffi LLP, a law firm, entered into a partnership agreement in 2012; the agreement by its terms was to be effective retroactively to January 1, 2010. The agreement comprehensively described and prescribed the operations of the partnership; a copy of the partnership agreement was an exhibit before the court.

The agreement contemplated that revenue was to be allocated between three capital accounts: the corporate account, for which Martin was responsible; the trusts and estates account, for which Chioffi was responsible; and the "remaining" account, into which all other revenues were allocated. See § 3.01 (c). The balance of each account was to be adjusted periodically by adding to it the appropriately allocated share of partnership revenue, and subtracting from it the allocable share of expenses and distributions to partners. See § 2.02.

The process used to determine the "calculation and allocation of net profits and losses" was set forth in article III of the agreement. As previously mentioned, there were three capital accounts corresponding to the three departments: corporate, trusts and estates, and everything else. Section 3.02 (b). Revenues were initially allocated to the appropriate account. Section 3.02 (c). Expenses were also allocated among the three departments. "Direct expenses" of each department were to be allocated accordingly; "indirect expenses," such as rent, utilities, and costs of administrative personnel, were allocated among the departments "in proportion to the number of billing professionals" in each

department. Section 3.01 (d) (ii). The net profits or losses for each department were determined by subtracting the direct and indirect expenses attributed to each department from the revenue so attributed. The net profits for the corporate account were then allocated to Martin's capital account, those of the trusts and estates department to Chioffi's capital account, and net profits for the "remaining," or other, department were divided between Martin's capital account and Chioffi's capital account in proportion to the ownership percentage of each partner. Section 3.01 (e) and (f). Martin's ownership interest was 57 percent and Chioffi's 43 was percent. Schedule 1 of the partnership agreement.

The allocation process did not in itself cause the actual, physical transfer of funds; rather, the process simply sorted revenues and expenses into separate capital accounts. Distribution of funds to partners was governed by § 3.02 of the agreement: "Distributions shall be made monthly and at such other times as the partners agree such that, following any such distribution, the capital account balances of the partners shall be directly proportionate to the ownership percentages of such partners. Monthly distributions for determining net income shall include cash paid to each partner, 401 (k) contributions, all related expense for business, automobile, and certain entertainment for certain clients not considered joint as it relates to the firm consistent with past practices of the partnership."

The management of the partnership was consistent with the allocation of revenues. Martin was the managing partner. Section 4.01. Article IV, entitled "Management; Restrictions," indicated that the partnership was to be "managed and the conduct of its business . . . controlled (except as otherwise specifically provided herein) by the partners" such that "any decisions pertaining to the provision of corporate services [were to]

be made by Martin in his sole discretion," and Chioffi enjoyed identical authority as to the trusts and estates department. Section 4.02. Other decisions were to be made by mutual consent.

Article IV also listed, in § 4.03, seven specific actions which a partner was prohibited from performing except with the consent of the other partner. These "restrictions" included, in part, compromising partnership claims, committing the partnership to financial obligations, and selling or assigning an interest in the partnership. Any losses or expenses, including attorney's fees, arising from such transgressions were to be "allocated exclusively to such partner's capital account." Section 4.03.

Further sections governed a partner's withdrawal from the partnership and its dissolution. Section 7.01 provided that a partner could withdraw at any time, provided that the withdrawing partner was to give at least ninety days notice before the effective date of the withdrawal. Section 7.02 provided that upon the withdrawal of a partner, "the partners shall dissolve and liquidate the partnership pursuant to [article VIII]."

Article VIII, in turn, set forth the procedures for dissolution and liquidation. The partners were to "work together in good faith" to "immediately" wind up the affairs and to "minimize to the greatest extent possible the costs incurred" by the partnership or any partner. Section 8.01. The costs which were incurred were to be "allocated and apportioned to the partners in accordance with the departmental profit calculation."[2] Id.

[2] The term "departmental profit calculation" appears in the agreement several times. According to the agreement, the "calculation" was attached to the agreement as an exhibit. The page so designated was blank. The parties appear to agree, however, that article III, described at some length previously, functioned as the "departmental profit calculation," as it indeed sets forth the method for determining and allocating department profit or loss.

Section 8.02 provided for liquidation. If the partnership were dissolved, the partners were to be the "liquidating trustees" and were to take appropriate actions, including making "final distributions" pursuant to § 8.03 and the Connecticut Uniform Partnership Act (act), General Statutes § 34-300 et seq. The costs of dissolution and liquidation were to be expenses of the partnership, and were "to be allocated and apportioned between Martin and Chioffi in accordance with their ownership percentages . . . ." Section 8.02. The partners were to continue to operate the affairs of the partnership "until final distributions have been made . . . ." Section 8.02.

According to § 8.03, the assets of the partnership, "net of partnership liabilities," were to be distributed "upon liquidation . . . ." The net assets to be distributed at that time included "all accounts receivable, works in progress and contingent fees with respect to any partner [which were to] be allocated in accordance with the departmental profit calculation,"[3] and any "special allocations" were to be determined in accordance with the respective ownership percentages of the partners, unless otherwise agreed by the parties. Any other assets were also to be distributed in accordance with the ownership percentages. Id.

The following facts, as found by the trial court, and procedural history are relevant to our resolution of the claims on appeal. As the court stated in its memorandum of decision: "This action arises out of the dissolution of a limited liability partnership formed for the practice of law. The dissolution was occasioned by the voluntary withdrawal from the partnership of the defendant Martin, who owned a 57 percent interest in the partnership. The plaintiff was the only other [equity] partner. He owned a 43 percent interest. . . .

[3] See footnote 2 of this opinion.

"This dissolution did not occur under the best of circumstances. Besides . . . deficient communication between the partners and . . . different points of view, the dissolution was plagued by two particularly troublesome and substantial issues. The first dealt with the lease, to which the partnership was a party, and the second dealt with the disproportionate balances reflected in the partners' capital accounts." (Footnotes omitted.)

In its memorandum of decision, the court described the partnership's lease and its ramifications for the dissolution as follows: "In June, 2012, the partnership entered into a lease that did not expire until December 31, 2017. The base monthly rent of the lease was $24,916.67. Both parties described the lease as both a liability and an asset. The lease required substantial payments and was a substantial liability to the partnership. The rent payable was viewed by the parties to be below fair market value and therefore was considered a significant asset. Moreover, the partnership as a tenant had various subtenants whose rent covered $11,961.67 of this partnership's monthly rental obligation. Because each party intended to form [his] own firm upon dissolution of the partnership, each partner initially had a desire to remain in the premises or, at least, in a portion of the premises. The plaintiff and the defendant, however, could not reach an agreement as to an allocation of the space contained in the premises. Notably, neither partner personally guaranteed or signed the lease in [his] individual capacity, and the only obligor under the lease was the limited liability partnership. Both the plaintiff's new firm . . . and the defendant's new firm . . . continued to occupy the space subsequent to the dissolution of the partnership on November 15, 2013, until such time as the defendant's new firm vacated the premises in June, 2014. From November 15, 2013, the

parties practiced law and operated their new firms independently of one another, communicating only when necessary regarding their shared space and the winding up process. The defendant's new firm did not pay any rent for its occupancy of this space to the partnership or the lessor during the period between dissolution of the partnership and its vacating of the premises in June or, for that matter, thereafter. During the postdissolution period, the plaintiff contributed $12,600 to assist the partnership in meeting its rental obligations. The rent that was due the lessor was fully paid by September 1, 2014, by virtue of certain assets of the partnership (cash remaining in the partnership accounts, accounts receivable of the remaining departments, rent from the subtenants, the plaintiff's contribution as indicated and finally by allocation of $35,000 of the partnership's $74,750 security deposit). Both [the] plaintiff and the defendant individually entered into discussions with the lessor concerning a new lease or leases, but no agreement was reached until after the defendant's firm had vacated the premises. In August, 2014, the plaintiff's new firm and the lessor entered into a new lease, effective September 1, for the same space previously occupied by the partnership and at the same rental price. The agreement between the plaintiff's new firm and the lessor also eliminated liability of the partnership for the balance of the partnership's leasehold obligations and allowed the plaintiff's new firm to continue to receive the benefit of the rents payable by the subtenants. The partnership's security deposit of $74,750 was allocated as follows: $35,000 for the payment of the partnership rental obligations up and through August 31, 2014, and $39,750 as a portion of the plaintiff's new firm's security deposit."

The court found the following facts regarding the state of the capital accounts and the liquidation of the partnership: "[Although] all three departments of the

partnership were financially healthy, the corporate department generated far more net income and, because it had more billing professionals, was responsible for a larger share of the indirect costs of the partnership. During the last two years of the partnership's existence, the defendant took distributions from his capital account [in] excess of the net income that was allocable to his capital account on a cash basis. In other words, he took more money than he made during that time period and, in fact, on the date he gave notice of his intent to withdraw, his capital account was negative in excess of $150,000. This excessive distribution was, at least in part, financed by increases in the partnership credit line and increases in draws against that credit line. These excessive distributions were done with the knowledge and consent of the plaintiff, as was the activity regarding the partnership credit line. The defendant's rationale for taking these distributions, as expressed to the plaintiff, was based upon the fact that the corporate department had very substantial accounts receivable that eventually would more than offset the distributions he was taking. In fact, the corporate department did have substantial accounts receivable.

"[Although] the plaintiff consented to these distributions, that consent was based upon the [defendant's] representations that draw[s] from the credit line which financed the distributions would be repaid through the collection of the corporate department accounts receivable in approximately six months. The credit line was eventually, though well past the represented time frame, paid in full through these corporate department assets shortly before the dissolution of the firm. However, the practice left the partners' capital accounts in a relationship that was directly in contradiction to the express provisions of the partnership agreement. The partnership agreement states that 'distributions shall be made monthly and at such other times as the partners agree

such that, following any such distribution, the capital account balances of the partners shall be directly proportionate to the ownership percentage of such partners.' In other words, at any given point in time, the defendant's capital account balance should be 57 percent of the total capital account balance of the two partners, and the plaintiff's capital account balance should be 43 percent of that total. [Although] the plaintiff may have consented to distributions that were temporarily in excess of the amount [that] the defendant was entitled to receive under the [partnership agreement], there was no evidence that such consent was intended to be a permanent amendment to the partnership agreement. Nor is there any evidence that such accommodation was intended to alter the financial relationship between the partners or between the partners and the firm. Nor is there any evidence to suggest that, upon dissolution and liquidation of the firm, the plaintiff would not be entitled to be paid 100 percent of his capital account or, at least, an amount equal to 43 percent of the firm's capital after payment of the firm's liabilities.

"Both partners had firm credit cards and both partners were allowed to use those credit cards for personal expenses . . . . To the extent they did so, such personal expenses were treated as distributions to the respective partner with a corresponding reduction in the partner's capital account. The defendant engaged in this practice to a greater extent than the plaintiff, particularly subsequent to June, 2013, when, as a result of disagreements between the partners, the firm suspended monthly cash distributions. [Although] the personal expenses were properly accounted for, those expenditures further reduced the defendant's capital account in relation to that of the plaintiff.

"The result of all of this was that, on November 15, 2013, the date of the dissolution of the partnership, the

plaintiff's capital account was $178,436 and the defendant's capital account was $46,191. Moreover, the defendant, acting in his capacity as liquidating trustee of the partnership, assigned to himself all of the accounts receivable and work[s] in progress of the corporate department in a document dated November 16, 2013. The defendant, by document also dated November 16, 2013, offered to assign to the plaintiff all of the accounts receivable of the trust and estate departments. The assignment of the corporate department work[s] in progress and accounts receivable as of November 16, 2013 . . . had the effect of diverting from the partnership cash that would have brought the partners' capital accounts back to the proportional relationship required by the partnership agreement. Moreover, the balance sheet of the partnership indicates that, as of November 15, 2013, there were insufficient assets, and particularly liquid assets, remaining in the partnership from which the plaintiff could be paid the amount due him based upon his capital account and its relationship to the defendant's capital account.

"The plaintiff did not accept distribution of the trust and [estate department's] accounts receivable on or about November 16, 2013. During the weeks following November 16, 2013, up until at least December 31, 2013, he continued to deposit the funds generated by those receivables into the partnership account. This caused his capital account balance to increase even further. Accordingly, on December 31, 2013, the capital account balance of the plaintiff was $279,856 and the capital account balance of the defendant was $36,734. The plaintiff did accept assignment of the accounts receivable of the trust and [estate department] on January 15, 2014, and, at that time, he withdrew $113,363 from the partnership accounts with the consent of the defendant as a distribution of capital.

"The difference in the approach[es] that the parties took to the accounts receivable between November 15, 2013, and December 31, 2013, is reflective of the difference in the parties' approach[es] toward the winding up of the partnership business. [The defendant] believed that, upon dissolution, the parties should distribute the assets as quickly as possible, leaving in the firm accounts only [those] which [were] necessary to pay the final expenses of the partnership and, to the extent there were assets available beyond what was necessary to pay the remaining obligations of the firm, they should be distributed immediately to accommodate the ongoing business of the successor firms. [The plaintiff] believed all assets of the firm, including accounts receivable, should continue to be collected until such time as all firm obligations had been paid or otherwise dealt with, until the lease liability was resolved and until an agreement on capital account adjustments had been reached. Distribution should occur subsequently. Whether because of a change in viewpoint or as a practical necessity, [the plaintiff] in January, 2014, took a cash distribution of $113,363 with the defendant's consent. In the spring of 2014, [the plaintiff] also took a $64,000 cash distribution without the defendant's consent." (Footnotes omitted.)

After the date of the defendant's withdrawal letter, but prior to the partnership's date of dissolution, the plaintiff brought this action seeking, among other things, an injunction to prevent the defendant from winding up the affairs or liquidating and distributing the assets of the partnership. The injunction was denied. In the five count operative complaint, the plaintiff alleged that the defendant breached his fiduciary duty, breached the partnership agreement and converted partnership property. He also sought an order for judicial oversight and an accounting. The defendant filed a counterclaim alleging breach of contract and statutory

theft, and seeking damages and attorney's fees. After a trial to the court, the court found that the defendant breached the partnership agreement and awarded damages of $30,384 to the plaintiff, which the court later amended to $34,120. The court also awarded $103,000 in attorney's fees and $6226.73 in costs to the plaintiff. The defendant's claim for attorney's fees was denied. The defendant appealed and the plaintiff cross appealed. We will set forth additional facts as necessary.

I

DEFENDANT'S APPEAL

The defendant claims on appeal that the court erred in (1) finding a breach of § 3.02 of the partnership agreement; (2) finding a breach of § 4.03 of the partnership agreement; (3) ordering the defendant to pay damages directly to the plaintiff rather than reducing the defendant's capital account; and (4) awarding attorney's fees and costs to the plaintiff.

A

The defendant first claims that the trial court erred in finding a breach of § 3.02 of the partnership agreement.[4] We disagree.

"Except as otherwise provided [in this section], relations among the partners and between the partners and the partnership are governed by the partnership agreement. . . ." General Statutes § 34-303 (a). "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 communications is a question of law . . . subject to plenary review by this court.

[4] The defendant's argument is premised on the contention that the court's analysis of the contractual obligations was erroneous; he does not claim, for the purpose of this argument, that the court's fact-finding was deficient.

. . . In giving meaning to the terms of a contract, the court should construe the agreement as a whole, and its relevant provisions are to be considered together. . . . The contract must be construed to give effect to the intent of the contracting parties. . . . This intent must be determined from the language of the instrument and not from any intention either of the parties may have secretly entertained. . . . [I]ntent . . . is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . [Where] . . . there is clear and definitive contract language, the scope and meaning of that language is not a question of fact but a question of law. . . . In such a situation our scope of review is plenary, and is not limited by the clearly erroneous standard. . . . Whether a contract is ambiguous is a question of law subject to plenary review." (Citations omitted; internal quotation marks omitted.) *Schwartz* v. *Family Dental Group, P.C.*, 106 Conn. App. 765, 771, 943 A.2d 1122, cert. denied, 288 Conn. 911, 954 A.2d 184 (2008).

There is an animating difference between the parties' interpretations of the partnership agreement. The defendant's position is that once the date of dissolution arrived, in this case November 15, 2013, he was entitled to withdraw for his sole benefit all of the assets of the corporate department without regard to the provisions of article III of the agreement. The plaintiff, on the other hand, maintains that distributions throughout the liquidation process were subject to article III, and that, in general, partnership expenses were to be subtracted from revenues prior to distribution and that distributions were to be made such that the 57 to 43 ratio of partnership assets was to be maintained. We agree with the plaintiff.

There is no merit to the defendant's contention that he was free, during the liquidation process, to assign all corporate revenue to himself without regard to expenses and the maintenance of the ratio of partnership assets in the partners' capital accounts. The agreement unambiguously required the prescribed distribution procedures to continue through the period of liquidation. First, § 8.01, entitled "Dissolution of Partnership," provided that the costs "in respect of such dissolution" were to be allocated in accordance with the departmental profit calculation, which, as we have seen, allocated revenues to the several departments, then assigned expenses to each department, and finally provided that the required ratio between the capital accounts was to be realized immediately following any distribution (except perhaps the final distribution). Second, in § 8.02, the agreement provided that upon dissolution, the partners became liquidating trustees and that the expenses were to be apportioned; the business of the partnership could be continued until the final distributions were made. Third, as spelled out in § 8.03, upon liquidation, all assets of the partnership *net of partnership liabilities* were to be distributed according to the departmental profit calculation. The agreement, then, expressly contemplated that the allocation process was to continue from the date of dissolution—here, November 15, 2013—through the period of liquidation until and including, at least with respect to the "remaining" capital account, the final distribution. There is nothing in the agreement indicating that the allocation process was to cease at the date of dissolution, such that either partner was free to appropriate partnership assets.[5]

[5] We note that, pursuant to article III, revenues were partnership assets, subject to allocation to different accounts. Once the accounting was accomplished, and expenses allocated as well, distributions could be made, either monthly or as otherwise agreed, and the capital accounts following each distribution were to be in the proper ratio. Revenues, then, initially were the property of the partnership rather than of the individual partner responsible for an account.

As previously cited, the specific provisions of article VIII, pertaining to dissolution and liquidation, refer to the distribution of *net* assets and adherence to the departmental profit calculation. The final distribution was to be made "in accordance with the departmental profit calculation." Section 8.01. Similarly, there is nothing in article III, which details the calculation and balancing of accounts, to suggest that the specifically designed balancing of accounts was to be abandoned when one partner gave notice of his intention to withdraw. In sum, the clear language of the agreement provided that the allocation of partnership revenues and expenses was to continue through the time of the final distributions, and § 3.02 provided that distributions were to be made such that, after each distribution, the capital account balances were to be in proportion to the partners' ownership interests. By distributing revenues from the corporate account to himself without regard to the required ratio of partnership assets in the partners' capital accounts, the defendant breached § 3.02 of the agreement, as the court correctly determined.

The trial court noted that "[t]he defendant's assignment to himself of the accounts receivable and work[s] in progress of the corporate department upon dissolution, *under some circumstances*, would be harmless to the plaintiff" because the defendant would have been entitled ultimately to the net profits under the partnership agreement's terms. (Emphasis in original.) This is entirely correct; however, with the capital accounts out of balance, the plaintiff was left bearing a disproportionate share of the remaining liabilities postdissolution. Thus, we agree with the trial court that the defendant's assignment of the corporate department's accounts receivable and works in progress without regard to the ratio of partnership assets in the partners' capital accounts, as reconciled pursuant to the departmental

profit calculation, breached § 3.02 of the partnership agreement.

B

The defendant also challenges the court's conclusion that he breached § 4.03 of the partnership agreement. Section 4.03, as previously discussed, concerned restrictions on the partners' conduct. The defendant claims that because he had sole discretion regarding the provision of corporate services pursuant to § 4.02 (a), and that § 4.03 is subject to § 4.02, he did not breach § 4.03 by assigning the corporate accounts receivable and works in progress to his new firm. We conclude that there was no breach of § 4.03.

"The elements of a breach of contract action are the formation of an agreement, performance by one party, breach of the agreement by the other party and damages." (Internal quotation marks omitted.) *Chiulli* v. *Zola*, 97 Conn. App. 699, 706–707, 905 A.2d 1236 (2006). If the plaintiff suffers no actual damage, there can be no recovery. See *Waicunas* v. *Macari*, 151 Conn. 134, 139, 193 A.2d 709 (1963).

Article IV of the partnership agreement, entitled "Management; Restrictions," pertained to governance of the partnership. Section 4.01 named the defendant as managing partner, except in cases where he is unable to act. Section 4.02 provided for decision-making power pertaining to the provision of services within the three departments. Section 4.03 was a list of restrictions on the partners' activities. The section concluded: "If a partner commits any breach of the [restrictions], any losses or other expenses (including but not limited to reasonable [attorney's] and [accountant's] fees) on account thereof shall be allocated exclusively to such partner's capital account."

At trial, the court found that the defendant breached § 4.03 (b) by assigning corporate accounts receivable

and works in progress to his new firm. Section 4.03 (b) provided that a partner shall not "assign, transfer, pledge, compromise or release any of the partnership's claims, or debts, except upon payment in full, or arbitrate, or consent to the arbitration of any of its disputes or controversies . . . ."

Each of the restrictions listed in § 4.03 pertained to the partnership's dealings with third parties, and the final paragraph of § 4.03 provided that the remedy for a partner's breach of a restriction was the allocation of a resulting loss or expense to that partner's capital account. Section 4.03 created an accounting method for penalizing breaching partners for liabilities they might incur for the partnership that may not otherwise be assessed under either General Statutes § 34-327 (c) or § 2.04 of the partnership agreement. See footnotes 6 and 7 of this opinion. Principles of limited liability shield the partners from indemnification for debts and expenses of the partnership, with some exceptions, but the list of restrictions in § 4.03 provided specific exceptions to immunity, such that only the breaching partner's account was to be affected, and, when the time came for distributions, the amount of the breaching partner's distribution would be decreased accordingly. The function of § 4.03, then, was to allocate partnership losses or obligations to a single partner if that partner had violated a restriction listed in that section.

When the defendant assigned corporate assets to himself or to his new firm, however, he did not create additional liabilities for the partnership. He instead altered the balance of corporate accounts and prevented orderly payment of existing liabilities. Thus, there were no partnership losses or expenses "on account" of the defendant's breach, as required in the partnership agreement. Without partnership losses or expenses, there was no actionable breach of contract on the basis of § 4.03. Therefore, the trial court erred in

finding a breach of § 4.03 of the partnership agreement, which, in itself, caused damages.

Even if the defendant's assignment of assets to himself could be deemed to be a breach of § 4.03 (b), as found by the court, the sole remedy for the breach was to be the assignment of that expense to the breaching partner's capital account. In the circumstances of this case, the breach occurred, as we previously held in part I A of this opinion, when the *distributions* were made to the defendant without regard for the balance of accounts in violation of § 3.02. The breach causing harm, then, was the breach of § 3.02, and the damages are the same under either theory of recovery.

C

The defendant also claims that the trial court erred in ordering the defendant to pay damages to the plaintiff directly rather than ordering only a reduction in the defendant's capital account, contrary to provisions of both the partnership agreement and the act. We are not persuaded.

As noted in part I A of this opinion, our review of unambiguous contract provisions is plenary. *Schwartz* v. *Family Dental Group, P.C.*, supra, 106 Conn. App. 771. The interpretation and construction of statutes are also subject to plenary review. See *Magee* v. *Commissioner of Correction*, 105 Conn. App. 210, 214, 937 A.2d 72, cert. denied, 286 Conn. 901, 943 A.2d 1102 (2008).

"Our standard of review of an award of damages . . . is well settled. [T]he trial court has broad discretion in determining whether damages are appropriate. . . . Its decision will not be disturbed on appeal absent a clear abuse of discretion." (Internal quotation marks omitted.) *Aurora Loan Services, LLC* v. *Hirsch*, 170 Conn. App. 439, 447, 154 A.3d 1009 (2017). "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.) *Weiss* v. *Smulders*, 313 Conn. 227, 261, 96 A.3d 1175 (2014).

The defendant contends that § 2.04 of the partnership agreement, particularly subsections (a) and (b), prevented his being found liable directly to the plaintiff.[6] He adds that the language of § 2.04 largely tracked the language of § 34-327 (c),[7] and that these provisions are both unambiguous.

[6] Section 2.04 of the partnership agreement provided in pertinent part:

"(a) No Personal Obligation.

"(i) To the fullest extent permitted by the act and by other applicable law, no partner shall be personally liable for the return or repayment of all or any portion of the contributions to capital of any partner; any such return or repayment shall be made solely from the assets of the partnership.

"(ii) To the fullest extent permitted by the act and by other applicable law, no partner shall be liable, responsible, or accountable in damages or otherwise to the partnership or to any other partner . . . for any losses, claims, damages, or liabilities arising from (i) any act performed, or any omission to perform any act, by such partner in [his] capacity as a partner, *except by reason of acts or omissions in violation of the express terms of this agreement*; or (ii) the acts or omissions of any person other than such partner. No partner, in [his] capacity as a partner, has any fiduciary obligation or other duties to the partnership or any other partner, except as may be provided under this agreement, the act and by other applicable law.

"(b) Limitation of Liability. To the fullest extent permitted by the Act and by other applicable law, no partner of the partnership shall be liable or accountable, directly or indirectly (including by way of indemnification, contribution or otherwise), for any debts, obligations or liabilities of, or chargeable to, the partnership or each other, whether arising in tort, contract or otherwise, which are incurred, created or assumed by the partnership while the partnership is a registered limited liability partnership, solely by reason of being such a partner or acting (or omitting to act) in such capacity or rendering professional services or otherwise participating . . . in the conduct of the other business or activities of the partnership." (Emphasis added.)

[7] General Statutes § 34-327 (c) provides: "Subject to subsection (d) of this section, a partner in a registered limited liability partnership is not liable directly or indirectly, including by way of indemnification, contribution or otherwise, for any debts, obligations and liabilities of or chargeable to the

The defendant quite correctly contends that pursuant to both the partnership agreement and the statutory provision, a partner is not personally liable for the debts of the partnership or another partner. The defendant also acknowledges that, pursuant to § 34-327 (d), "[t]he provisions of subsection (c) of this section shall not affect the liability of a partner in a registered limited liability partnership for his own negligence, wrongful acts or misconduct . . . ." The defendant asserts that in this case the court found no negligence, wrongful acts, or misconduct. In the context of deciding whether the defendant was entitled to attorney's fees, however, the court found that "[w]hen the defendant assigned to himself the corporate accounts receivable, to the extent that it exceeded the ability of the firm to obtain receipts necessary to bring the capital accounts back to their appropriate proportions, he did this over the objection of the plaintiff and this constituted wilful misconduct." This finding of the court, although enunciated in a separate memorandum of decision regarding, among other issues, attorney's fees, is clear and relevant, and negates the defendant's argument that § 34-327 bars a determination of liability.[8]

Similarly, the partnership agreement itself expressly sets forth an exception to otherwise limited liability: "[N]o partner shall be liable, responsible, or accountable in damages or otherwise to the partnership or to any other partner . . . for any losses, claims, damages, or liabilities arising from . . . any act performed, or any omission to perform any act, by such partner in [his] capacity as a partner, *except by reason of acts or*

Partnership or another partner or partners, whether arising in contract, tort or otherwise, arising in the course of partnership business while the Partnership is a registered limited liability partnership."

[8] The defendant claims that the plaintiff limited his claim to §§ 4.03 and 3.02, eliminating a claim under § 34-327 (d); however, the partnership agreement limits its provisions to what is allowed under § 34-327. Thus, we find no merit to the claim that § 34-327 (d) is inapplicable.

omissions in violation of the express terms of this agreement . . . ." (Emphasis added.) Section 2.04 (a) (ii). The defendant violated § 3.02, an express term of the partnership agreement. Thus, pursuant to the terms of the agreement, the defendant may be personally liable for his breach of the partnership agreement.

The defendant additionally claims that the only remedy for a breach is a reduction in his capital account; he points to several sections of the agreement for support. He urges that § 4.03 provided that the only remedy for violating that section is a corresponding reduction of that partner's capital account, but, as we decided in part I B of this opinion, there was no actionable breach of article IV in any event. The defendant also points out that § 3.03 of the partnership agreement required that all expenses and losses *of the partnership* resulting from a partner's wrongful act are to be charged to the partner's capital account.[9] The defendant's actions, however, caused an internal maladjustment of accounts rather than a loss to the partnership.

More to the point, and undermining the defendant's claims regarding damages, is the simple proposition that the defendant breached the agreement *because* he distributed partnership assets to himself without observing the balance of corporate accounts. If the sole remedy for the breach of a duty to a partner was to reduce the breaching partner's capital account, but then the breaching partner could nonetheless blithely distribute assets to himself without regard to the relative states of the accounts, then that remedy would be rendered utterly meaningless. The remedy for most

[9] Section 3.03 of the partnership agreement provided in relevant part: "[N]et losses of the partnership shall be allocated and apportioned in the same manner as set forth in section 3.01 . . . provided, however, that all expenses and losses resulting from the wrongful act or gross negligence of a partner (to the extent not covered by insurance) shall be charged to such partner in full."

breaches, to be sure, was reduction of the particular capital account; when the time came for *distribution*, the remedy would functionally be realized. When the breach *is* the distribution, however, the situation is intrinsically different, and the parties' agreement did not require merely a further pointless reduction in a capital account—especially after liquidation. The court did not abuse its discretion in ordering a direct payment from the defendant to the plaintiff.

D

The defendant finally claims that the trial court erred in awarding attorney's fees to the plaintiff. The court awarded attorney's fees pursuant to § 4.03 of the partnership agreement and then concluded that Chioffi should be indemnified for this expense pursuant to § 2.04 (c). As we have determined in part I B, however, the court erred in finding an actionable breach of contract pursuant to § 4.03. The provision in § 4.03 allowing for attorney's fees was expressly limited to breaches of the "restrictions" of that section. Because no other basis for attorney's fees was found by the court,[10] we vacate the award of attorney's fees under § 4.03.

II

PLAINTIFF'S CROSS APPEAL

The plaintiff claims on cross appeal that the court (1) erred in not finding a breach of fiduciary duty; (2) erred in its calculation of damages; and (3) abused its discretion in finding that the plaintiff waived his claim for an accounting.

A

The plaintiff first claims that the trial court erred in declining to conclude that the defendant breached a fiduciary duty. We agree.

[10] The court enunciated and refined its award of attorney's fees in its third memorandum of decision, dated September 10, 2015.

"[T]he determination of whether a duty exists between individuals is a question of law. . . . Only if a duty is found to exist does the trier of fact go on to determine whether the defendant has violated that duty. . . . When the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Biller Associates* v. *Peterken*, 269 Conn. 716, 721–22, 849 A.2d 847 (2004). Alternatively, our Supreme Court has upheld jury instructions that state that it is a question of law as to what constitutes a breach of a duty, but a question of fact as to whether such a breach occurred. *Dunbar* v. *Jones*, 87 Conn. 253, 258–59, 87 A. 787 (1913); see also *Stevens* v. *Pierpont*, 42 Conn. 360, 361–62 (1875) ("[w]hether certain facts do or do not constitute a breach may, in some circumstances, be a question of law; or at least, a mixed question of law and fact"). Appellate review of facts on which a claim of breach of fiduciary duty is based is subject to the clearly erroneous standard. See *Spector* v. *Konover*, 57 Conn. App. 121, 126, 747 A.2d 39, cert. denied, 254 Conn. 913, 759 A.2d 507 (2000).

"It is a thoroughly well-settled equitable rule that any one acting in a fiduciary relation shall not be permitted to make use of that relation to benefit his own personal interest. This rule is strict in its requirements and in its operation. It extends to all transactions where the individual's personal interests may be brought into conflict with his acts in the fiduciary capacity, *and it works independently of the question whether there was fraud or whether there was good intention.* Where the possibility of such a conflict exists there is the danger intended to be guarded against by the absoluteness of the rule. The underlying thought is that an agent or other fiduciary should not unite his personal and his representative characters in the same transaction; and

equity will not permit him to be exposed to the temptation, or be brought into a situation where his own personal interests conflict with the interests of his principal and with the duties he owes to his principal. The rule applies [to] partners . . . .'' (Emphasis added.) *Mallory* v. *Mallory Wheeler Co.*, 61 Conn. 131, 137–38, 23 A. 708 (1891); *Spector* v. *Konover*, supra, 57 Conn. App. 128.

''[P]roof of a fiduciary relationship imposes a twofold burden on the fiduciary. First, the burden of proof shifts to the fiduciary; and second, the standard of proof is clear and convincing evidence. Once a fiduciary relationship is found to exist, the burden of proving fair dealing properly shifts to the fiduciary. . . . Furthermore, the standard of proof for establishing fair dealing is not the ordinary standard of proof of fair preponderance of the evidence, but requires proof . . . by clear and convincing evidence . . . . We have recognized that, generally, partners are bound in a fiduciary relationship and act as trustees toward each other and toward the partnership.'' (Citation omitted; internal quotation marks omitted.) *Oakhill Associates* v. *D'Amato*, 228 Conn. 723, 726–27, 638 A.2d 31 (1994). ''The fiduciary duty of loyalty is breached when the fiduciary engages in self-dealing by using the fiduciary relationship to benefit [his or] her personal interest.'' *Mangiante* v. *Niemiec*, 82 Conn. App. 277, 284, 843 A.2d 656 (2004).

The first count of the operative complaint alleged that the defendant breached his fiduciary duty. The count included detailed factual allegations. Included were allegations that (1) the defendant and the plaintiff were partners in a limited liability partnership; (2) § 3.02 required any distributions to be made such that, following any distribution, the capital accounts balances of the partners were to be proportionate to their ownership interests; (3) Martin was the ''managing partner''; (4)

on dissolution, the partners became liquidating trustees; (5) the defendant caused distributions such that balances remained disproportionate, thus violating § 3.02 of the agreement; and (6) the defendant breached his fiduciary duties as a partner and as a liquidating trustee.[11]

As we stated at some length previously in this opinion, the court found the relevant factual allegations to be true. In its memorandum of decision, however, the court rendered judgment in favor of the plaintiff only as to count four, which alleged breach of contract. With no explanation, the court rendered judgment in favor of the defendant "on the remaining counts of the complaint." In the unusual circumstances presented, we hold that the court erred in not concluding that the defendant breached his fiduciary duty, in light of the facts which the court found.[12]

The elements which must be proved to support a conclusion of breach of fiduciary duty are: "[1] [t]hat a fiduciary relationship existed which gave rise to . . . a duty of loyalty . . . an obligation . . . to act in the best interests of the plaintiff, and . . . an obligation . . . to act in good faith in any matter relating to the plaintiff; [2] [t]hat the defendant advanced his or her own interests to the detriment of the plaintiff; [3] [t]hat the plaintiff sustained damages; [and] [4] [t]hat the damages were proximately caused by the fiduciary's breach of his or her fiduciary duty." (Emphasis omitted; internal quotation marks omitted.) *Rendahl* v. *Peluso*, 173 Conn. App. 66, 100, 162 A.3d 1 (2017). As a partner and liquidating trustee, the defendant was in a fiduciary relationship with the plaintiff. See *Oakhill Associates* v. *D'Amato*, supra, 228 Conn. 727. Further, the court

[11] The complaint contained many other allegations; for the purpose of this opinion we select those most relevant to the issues presented on appeal.

[12] This court similarly directed a judgment on a count alleging breach of fiduciary duty in *Spector* v. *Konover*, supra, 57 Conn. App. 134.

found, on voluminous facts, a breach of § 3.02, from which it could only be concluded that the defendant advanced his interests to the detriment of the plaintiff's interests.

Where a fiduciary relationship exists, the burden shifts to the fiduciary to show fair dealing by clear and convincing evidence. Id., 726–27. On the facts found, however, the court could not logically have concluded that the defendant sustained his burden to show fair dealing by clear and convincing evidence.

"Important factors in determining whether a particular [self-dealing] transaction is fair include a showing by the fiduciary: (1) that he made a free and frank disclosure of all the relevant information he had; (2) that the consideration was adequate . . . (3) that the principal had competent and independent advice before completing that transaction . . . [and] (4) the relative sophistication and bargaining power among the parties."[13] (Citation omitted; internal quotation marks omitted.) *Konover Development Corp.* v. *Zeller*, 228 Conn. 206, 228, 635 A.2d 798 (1994). This standard was later invoked in *Spector* v. *Konover*, supra, 57 Conn. App. 121. In *Spector*, the plaintiff general partner claimed that his partners, the defendants, had breached their fiduciary duties by diverting funds from the partnership to other properties owned by one of the codefendants. Id., 122–26. The trial court concluded that, although the defendants owed the plaintiff a fiduciary duty, "they proved by clear and convincing evidence that they dealt with the plaintiff fairly and that they breached no fiduciary duty." Id., 126. This court reversed the trial court's judgment in favor of the defendants, holding that "[t]he defendants' practice of diverting [partnership] funds to other entities and retaining interest earned on [those]

[13] The defendant, in his brief, alludes to, but does not explicitly cite, the *Zeller* factors.

partnership funds constitute[d] a breach of fiduciary duty." Id., 127–28. Further, this court concluded that the misuse of partnership property for personal gain was "a clear case of self-dealing and a violation of [the defendants'] fiduciary duty to the plaintiff." Id., 128. This court then considered the aforementioned *Zeller* factors, and held that the defendants' failure to make free and frank disclosure thwarted any attempt to claim fair dealing. See id., 128–30.

Here, the defendant took partnership assets, at least some of which could have been used to pay partnership liabilities, and left Chioffi "holding the bag" while the defendant's capital account was negative. Although the defendant did inform the plaintiff of his intentions and the parties were both sophisticated lawyers, in this case the defendant proceeded over the objection of the plaintiff, who received no benefit or consideration for the self-dealing distributions made by the defendant.[14]

The defendant contends that he nonetheless violated no fiduciary duty. He urges in his brief that the language of the partnership agreement provided that the parties have no fiduciary obligations "except as may be provided under this Agreement and by other applicable law." The defendant has omitted a term: § 2.04 (a) (ii) provided that "no partner . . . has any fiduciary obligation . . . except as may be provided under this agreement, *the act* and by other applicable law." (Emphasis added.)

The act expressly provides that "[a] partner's duty of loyalty to the partnership and other partners is limited to the following: (1) To account to the partnership and hold as trustee for it any property, profit or benefit derived by the partner in the conduct and winding up

[14] The record does not reflect whether the defendant received any independent advice from counsel prior to distributing the corporate assets. Because the defendant had the burden to prove that fact, the absence of any evidence in that regard works against him in proving fair dealing.

of the partnership business . . . ."; General Statutes § 34-338 (b); and General Statutes § 34-303 (b) (3) provides in relevant part that a partnership agreement may not "[e]liminate the duty of loyalty . . . ." The duty of loyalty may also be found in "other applicable law"; this court held in *Springfield Oil Services, Inc.* v. *Conlon*, 77 Conn. App. 289, 302, 823 A.2d 345 (2003), that "[t]he terms of a limited partnership agreement cannot negate the fiduciary duty of the general partner even where the relationship and terms of a contract between the fiduciary and its affiliate are disclosed and even where the partnership involves sophisticated parties." The partnership agreement, then, did not compromise or expressly limit the duty of loyalty as prescribed by law.

On the facts found by the court, we hold that the court erred in not concluding that the defendant breached his fiduciary duty to the plaintiff. The compensatory damages, however, remain those found by the court for the breach of contract. Both breaches caused the same harm, the disproportionate corporate accounts after distribution. The court awarded compensatory damages for breach of contract, and courts ought not countenance duplicative damages.

Breach of fiduciary duty, however, is a tort; *Ahern* v. *Kappalumakkel*, 97 Conn. App. 189, 192 n.3, 903 A.2d 266 (2006); and punitive damages may result from a breach of fiduciary duty. See *Rendahl* v. *Deluso*, supra, 173 Conn. App. 100–101. The complaint requested attorney's fees for the breach of fiduciary duty, and attorney's fees may, where found to be appropriate, be allowed as damages for breach of fiduciary duty. Punitive damages in this context generally are limited to attorney's fees and costs. *Hylton* v. *Gunter*, 313 Conn. 472, 474, 97 A.3d 970 (2014).[15]

[15] Because punitive damages may include attorney's fees, we treat this claim for attorney's fees as a request for punitive damages. Although the plaintiff did not claim attorney's fees in the form of punitive damages but instead merely as "attorney's fees," the defendant "necessarily [was] on

The court awarded attorney's fees, but its award was premised on a breach of § 4.03 of the partnership agreement and was limited to work performed on that particular issue. Because any award of punitive damages would instead arise from a breach of fiduciary duty, the analysis may differ. Also, "[a]n award of attorney's fees is not a matter of right. Whether any award is to be made and the amount thereof lie within the discretion of the trial court, which is in the best position to evaluate the particular circumstances of a case." (Internal quotation marks omitted.) *LaMontagne* v. *Musano, Inc.*, 61 Conn. App. 60, 63–64, 762 A.2d 508 (2000). Finally, in order for a court to award punitive damages, "the pleadings must allege and the evidence must be sufficient to allow the trier of fact to find that the defendant exhibited a reckless indifference to the rights of others or an intentional and wanton violation of those rights." (Internal quotation marks omitted.) *Landmark Investment Group, LLC* v. *CALCO Construction & Development Co.*, 318 Conn. 847, 878, 124 A.3d 847 (2015). On remand, the trial court is to determine whether the plaintiff is entitled to attorney's fees because of the defendant's breach of fiduciary duty, and, if so, in what amount.

B

The plaintiff next claims that the trial court erred in failing to render judgment against the defendant for the full amount of damages resulting from the defendant's conduct. The plaintiff claims that the defendant should be ordered to return to the partnership all funds diverted by him so that the plaintiff in turn can receive the full amount of his corrected capital account. We

notice that punitive damages were being claimed because of the type of conduct pleaded and the fact that attorney's fees, [for this claim], could be obtained only through the awarding of punitive damages." *Stohlts* v. *Gilkinson*, 87 Conn. App. 634, 647, 867 A.2d 860, cert. denied, 273 Conn. 930, 873 A.2d 1000 (2005).

are not persuaded that there was reversible error in this regard.

The plaintiff cites no authority for this claim other than a general rule of damages. It appears that the plaintiff claims that he would be able to obtain more of the partnership assets if the defendant were required to return the value of all of the diverted corporate assets to the partnership. We disagree with his claim.

"The assessment of damages is peculiarly within the province of the trier and the award will be sustained so long as it does not shock the sense of justice. The test is whether the amount of damages awarded falls within the necessarily uncertain limits of fair and just damages. . . . There are no unbending rules as to the evidence by which [damages for breach of contract] are to be determined. . . . In making its assessment of damages for breach of [any] contract the trier must determine the existence and extent of any deficiency and then calculate its loss to the injured party. The determination of both of these issues involves a question of fact which will not be overturned unless the determination is clearly erroneous." (Citation omitted; internal quotation marks omitted.) *Chila* v. *Stuart*, 81 Conn. App. 458, 466–67, 840 A.2d 1176, cert. denied, 268 Conn. 917, 847 A.2d 311 (2004).

The court's theory in awarding damages was to calculate the amount that would have been distributed by the partnership to the plaintiff if the defendant had adhered to the requirements of the partnership agreement, and the liabilities had not been satisfied predominantly by the plaintiff's share. The court engaged in a detailed analysis, which included a consideration of the plaintiff's benefiting from a transfer of the security deposit and credit for rent to the plaintiff's new firm. Any additional funds placed in the defendant's capital account *necessarily* would have been profits of

the corporate department, to which the plaintiff was not entitled once the departmental profit calculation was performed. The trial court did not abuse its discretion in its method of calculating damages.[16]

C

The plaintiff finally claims that the trial court abused its discretion by holding that the plaintiff waived his claim for an accounting. We disagree.

"Waiver is the intentional relinquishment or abandonment of a known right or privilege. . . . Waiver does not have to be express, but may consist of acts or conduct from which waiver may be implied." (Internal quotation marks omitted.) *MSO, LLC* v. *DeSimone*, 313 Conn. 54, 64, 94 A.3d 1189 (2014). "Waiver is a question of fact. . . . [W]here the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous. . . . [T]he trial court's conclusions must stand unless they are legally or logically inconsistent with the facts found or unless they involve the application of some erroneous rule of law material to the case. . . . [V]arious statutory and contract rights may be waived." (Citations omitted; internal quotation marks omitted.) *AFSCME, Council 4, Local 704* v. *Dept. of Public Health*, 272 Conn. 617, 622–23, 866 A.2d 582 (2005).

[16] The court's reasoning is further supported by its finding that the defendant's distribution of corporate assets to his new firm would in some circumstances be harmless. In other words, any distribution of assets of the corporate department beyond what was needed to meet existing liabilities were profits which ultimately would have been distributed to the defendant in any event in the final distribution, had the liquidation proceeded according to the agreement.

i

We consider (1) whether an accounting can be waived and (2) whether the court clearly erred in finding a waiver. We hold that an accounting can be waived and that the court did not abuse its discretion in finding that the plaintiff waived his claim.

a

"As a general rule, both statutory and constitutional rights and privileges may be waived." (Internal quotation marks omitted.) *Dinan* v. *Patten*, 317 Conn. 185, 195, 116 A.3d 275 (2015). The remedy of an accounting is codified in General Statutes § 52-401, which provides: "In any judgment or decree for an accounting, the court shall determine the terms and principles upon which such accounting shall be had." Thus, the remedy is statutory.

In years past, the common law of our state mandated an accounting if certain criteria were met, including the existence of a fiduciary relationship. See, e.g., *Zuch* v. *Connecticut Bank & Trust Co.*, 5 Conn. App. 457, 460, 500 A.2d 565 (1985) ("[t]he fiduciary relationship is in and of itself sufficient to form the basis for [an accounting]"). In fact, an accounting was a prerequisite to any action at law upon the termination of a partnership. See *Weidlich* v. *Weidlich*, 147 Conn. 160, 163–64, 157 A.2d 910 (1960). "A final account is the one great occasion for a comprehensive and effective settlement of all partnership affairs. All the claims and demands arising between the partners should be settled upon such an accounting." Id., 165.

Over the years, the need for a formal judicial accounting has evolved, such that courts of other jurisdictions have held that "an action can be maintained by one partner against another, even where the partnership transaction is the basis of the suit, if the facts are such

that no complex accounting involving a variety of partnership transactions is necessary." *Hanes* v. *Giambrone*, 14 Ohio App. 3d 400, 404, 471 N.E.2d 801 (1984); see also *Moody* v. *Headrick*, 247 Ala. 455, 457, 25 So. 2d 137 (1946); *Lau* v. *Valu-Bilt Homes, Ltd.*, 59 Haw. 283, 290, 582 P.2d 195 (1978); *Balcor Income Properties, Ltd.* v. *Arlen Realty, Inc.*, 95 Ill. App. 3d 700, 702, 420 N.E.2d 612 (1981); *Clarke* v. *Mills*, 36 Kan. 393, 397, 13 P. 569 (1887); *Kolb* v. *Dietz*, 454 S.W.2d 632, 636 (Mo. App. 1970); *Auld* v. *Estridge*, 86 Misc. 2d 895, 900–901, 382 N.Y.S.2d 897 (1976), aff'd, 58 App. Div. 2d 636, 395 N.Y.S.2d 969, leave to appeal denied, 43 N.Y.2d 641, 371 N.E.2d 830, 401 N.Y.S.2d 1025 (1977); *Zimmerman* v. *Lehr*, 176 N.W. 837, 837 (N.D. 1920); *Doyle* v. *Polle*, 121 Vt. 335, 338, 157 A.2d 226 (1960). Our Superior Court, in *Canton West Associates* v. *Miller*, 44 Conn. Supp. 321, 325–27, 688 A.2d 1360 (1995), adopted this more flexible standard in reaching its decision.

The more flexible approach finds some support in our appellate precedent. See *Mankert* v. *Elmatco Products, Inc.*, 84 Conn. App. 456, 460, 854 A.2d 766 ("[a]n accounting is not available in an action where the amount due is readily ascertainable" [internal quotation marks omitted]), cert. denied, 271 Conn. 925, 859 A.2d 580 (2004). Likewise, after *Canton West Associates*, the General Assembly revised the act to allow a partner to "maintain an action against . . . another partner for legal or equitable relief, *with or without an accounting as to partnership business* . . . ." (Emphasis added.) General Statutes § 34-339 (b).

Under current law, an accounting is not mandatory merely because it is requested: many situations may require a formal judicial accounting; in others, discovery may suffice. In the absence of an absolute requirement in the partnership agreement, § 34-339 (b) provides that an accounting is discretionary, and the statutory provision in this regard supersedes vestigial

common law to the contrary. See *Brennan* v. *Brennan Associates*, 293 Conn. 60, 92, 977 A.2d 107 (2009) ("[w]hen the . . . [statute] articulating a public policy also includes certain substantive limitations in scope or remedy, these limitations also circumscribe the common law" [internal quotation marks omitted]). The statutory provision echoes a general principle of equity. See *Papallo* v. *Lefebvre*, 172 Conn. App. 746, 763, 161 A.3d 603 (2017) ("[t]he determination of what equity requires in a particular case [is] a matter for the discretion of the trial court" [internal quotation marks omitted]). An accounting, then, is waivable.

b

We turn to the issue of whether the plaintiff waived any ability to require an accounting. In *MSO, LLC* v. *DeSimone*, supra, 313 Conn. 64, our Supreme Court reaffirmed the principle that waiver may be found "when a party engages in substantial litigation without asserting its right to arbitrate." Analogously, the court here found that the plaintiff, having requested an accounting in his complaint, nonetheless proceeded to trial, in which the finances of the partnership were litigated at length. The plaintiff later reasserted the accounting claim after a decision had been issued.

The trial court, in its articulation, clarified and stated: "[T]he plaintiff included a . . . count for breach of contract . . . specifically breach of the [partnership agreement]. Consistent with [that] count . . . during seven days of trial, the plaintiff and the defendant introduced detailed evidence concerning the obligations and rights of the parties pursuant to the [partnership agreement], [and] the financial transactions that had occurred consistent with and inconsistent with the terms of the [partnership agreement]. . . . Additionally, both the plaintiff and [the] defendant testified at length concerning these documents and the various

transactions that preceded the dissolution of the partnership, as well as transactions that occurred subsequent to the dissolution of the partnership.

"The plaintiff chose a particular approach during the trial. Rather than merely establish the relationship between the plaintiff, the defendant, and the partnership, as well as a demand for an accounting . . . the plaintiff, consistent with [his] breach of contract count, elected to introduce the detailed evidence [that he] claimed substantiated his position and damages for breach of contract. . . .

"Once the introduction of evidence had begun, the plaintiff never asserted that [he] had insufficient evidence to pursue [his] breach of contract claims to the fullest. . . . Nowhere in [his] posttrial memorandum of law does the plaintiff request, expressly or impliedly, that the court order an accounting. . . .

"Indeed, in the section of [his] posttrial memorandum of law entitled 'Governing Legal Standards,' the plaintiff sets forth three sections [for breach of fiduciary duty, breach of contract, and conversion]. Nowhere in his posttrial memorandum of law does the plaintiff argue or set forth any legal standards, consistent with the evidence in the case, pursuant to which he would be entitled to an accounting. Moreover, subsequent to the section on governing legal standards, the plaintiff sets forth in the discussion and damages sections of the brief the detailed nature of the transactions of which the plaintiff complains, and seeks damages and a detailed analysis of the damages suffered by the plaintiff. . . .

"In the case at bar, not only did the court find that the plaintiff had an adequate remedy [at] law, but the plaintiff, based upon his posttrial briefs, also believed that [he] had an adequate remedy at law, and seemingly abandoned [his] request for an accounting. Under the

circumstances of this case, it would have been inequitable to order an accounting subsequent to the plaintiff's attempt to persuade the court, in its role as trier of fact, that the evidence was sufficient to sustain [his] claim for damages for breach of contract.

"The plaintiff simply did not try or brief his case as though he was seeking the remedy of an accounting. Rather, the plaintiff clearly and unequivocally sought an award of damages from the court consistent with the evidence he had introduced and he thought was persuasive."

Thus, the court found that the plaintiff pleaded a count requesting an accounting, but did not mention that claim again until posttrial reargument. The plaintiff proceeded to litigate his claims and was successful on one of them. He claims, however, that he never actually abandoned his claim for an accounting and that the claim was extant until the court declined to order such, as requested during reargument. After reviewing the entire record, we do not conclude that the court committed clear error in its fact-finding or abused its discretion in reaching its conclusion of waiver.

ii

We hold alternatively that even if there was no waiver, the court did not abuse its discretion in denying an accounting.

As noted previously, "[a]n accounting is not available in an action where the amount due is readily ascertainable." (Internal quotation marks omitted.) *Mankert* v. *Elmatco Products, Inc.*, supra, 84 Conn. App. 460. "Courts of equity have original jurisdiction to state and settle accounts, or to compel an accounting, where a fiduciary relationship exists between the parties and the defendant has a duty to render an account. . . . In an equitable proceeding, the trial court may examine

all relevant factors to ensure that complete justice is done . . . .'' (Internal quotation marks omitted.) *Papallo* v. *Lefebvre*, supra, 172 Conn. App. 763.

Here, the trial court considered detailed evidence of the partnership assets and accounts such that it was able to ascertain damages.[17] It was not until posttrial reargument that the plaintiff tried to reignite his accounting claim. The court noted in its November 28, 2016 articulation that because it determined that the trial, with available discovery, constituted an adequate remedy at law and that the plaintiff had apparently concurred, it chose not to exercise its equitable powers to order an accounting. We observe that the expense of an accounting and the resulting delay almost certainly outweigh whatever benefit would have been gained by ordering an accounting. We do not find an abuse of discretion in the trial court's decision denying an accounting.[18]

III

SUMMARY

In sum, the court's conclusion that the defendant breached § 3.02 of the partnership agreement is affirmed. The court erred in finding a breach of § 4.03

[17] Although absolute precision is ideal, ''a plaintiff is not required to prove actual damages of a specific dollar amount.'' (Internal quotation marks omitted.) *Landmark Investment Group, LLC* v. *CALCO Construction & Development Co.*, supra, 318 Conn. 882.

[18] We note that this result is not inconsistent with *August* v. *Moran*, 50 Conn. App. 202, 717 A.2d 807 (1998). In *August*, an action for an accounting, the only issue was whether the trial court had properly rendered summary judgment in favor of the defendant on the ground that the plaintiff was collaterally estopped from litigating the amount of his overall partnership interest, where a prior case had determined the value of his capital account. Id., 203. This court held that a partnership interest was not necessarily identical to a capital account, and that the trial court erred in applying the doctrine of collateral estoppel. Id., 208. *August* did not address the question of whether an accounting was required or appropriate in the circumstances of that case.

and in awarding attorney's fees on that basis. The court did not abuse its discretion in ordering a direct payment from the defendant to the plaintiff. The court erred in finding no breach of fiduciary duty. The court did not clearly err in its calculation of compensatory damages. The court did not err in finding a waiver of an accounting, nor, in the alternative, did it abuse its discretion in declining to order an accounting.

The judgment is reversed only as to the findings that the defendant breached his fiduciary duty and § 4.03 of the partnership agreement, and as to the award of attorney's fees, and the case is remanded for further proceedings on the issue of attorney's fees; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

ALTAMA, LLC *v.* NAPOLI MOTORS, INC., ET AL.
(AC 39978)

Sheldon, Prescott and Elgo, Js.

Syllabus

The plaintiff landlord sought, by way of summary process, to regain possession of certain premises leased to the defendant tenant. The lease agreement provided that the defendant would lease the premises for a five year term commencing on June 1, 2011, and it included an option to renew the lease for an additional five year term. To exercise the option, the defendant was required to notify the plaintiff of its intent to do so, in writing, 180 days prior to the expiration of the initial term of the lease. When the defendant did not provide the plaintiff with written notice of its intent to renew the lease by the applicable deadline, the plaintiff served the defendant with a notice to quit possession of the premises for lapse of time. The day after the lease expired, the plaintiff initiated this summary process action against the defendant. After a trial, the trial court rendered judgment in favor of the plaintiff, concluding that the plaintiff had met its burden of proving that the lease had terminated by lapse of time and that the defendant had failed to notify the plaintiff, in accordance with the terms of the lease, of its intent to exercise its option to renew the lease for an additional five years. On the defendant's appeal to this court, *held*:

1. The defendant could not prevail on its claim that the trial court improperly rendered judgment against it on a theory of liability that was not alleged in the revised complaint, as the complaint sufficiently alleged that the plaintiff had initiated the summary process action for lapse of time: paragraph 5 of the revised complaint specifically referenced the notice to quit possession, which had cited lapse of time under the lease agreement as the sole basis for the plaintiff's alleged right to recover possession of the subject premises, and because the notice to quit possession was attached to the revised complaint as an exhibit, the court properly considered it in rendering its judgment; moreover, in its answer, the defendant admitted the allegations contained in paragraph 5, thereby acknowledging that it had received the notice to quit possession and, thus, had been notified sufficiently of the legal and factual basis for which the plaintiff had initiated the summary process action.
2. The trial court's finding that the term of the lease had expired was supported by evidence in the record and was not clearly erroneous; the lease, which was admitted into evidence at trial, stated that the term of the lease would commence on June 1, 2011, and end on June 1, 2016, and, therefore, when the plaintiff initiated the summary process action, the lease had expired by its terms, and insofar as the defendant claimed that the lease had not expired because the defendant had exercised its option to renew it, the trial court expressly rejected that claim and specifically found that the defendant had failed to provide written notice to the plaintiff, in accordance with the terms of the lease, of its intent to exercise its option to renew the lease.

Argued January 23—officially released April 17, 2018

Procedural History

Summary process action brought to the Superior Court in the judicial district of New Haven, Housing Session, where the defendant John Doe et al. were defaulted for failure to appear; thereafter, the matter was tried to the court, *Avallone*, *J.*; judgment for the plaintiff, from which the named defendant appealed to this court. *Affirmed.*

Michael J. Ajello, for the appellant (named defendant).

John-Henry M. Steele, for the appellee (plaintiff).

Opinion

PRESCOTT, J. In this commercial summary process action, the defendant Napoli Motors, Inc., appeals from

the judgment of possession, rendered after a trial to the court, in favor of the plaintiff, Altama, LLC.[1] On appeal, the defendant claims that the court improperly (1) rendered judgment against it on a theory of liability that was not alleged in the complaint, and (2) concluded that the lease had terminated for lapse of time. We disagree with the defendant and, accordingly, affirm the judgment of the trial court.

The following procedural history and facts, as found by the trial court in its memorandum of decision, are relevant to the resolution of this appeal. The defendant operates a car dealership. On or about June 1, 2011, the defendant executed a written agreement to lease the premises located at 50 South Washington Street in Milford from Leonard Wisniewski G.R.A.T., which is a trust, for a term of five years, until June 1, 2016. The plaintiff is the successor in interest to that trust, and became the owner of the property subject to the lease on December 3, 2014.

Paragraph 21 of the lease included an option to renew the lease for an additional five year period. The same paragraph provided that, in order to exercise its option to renew, the defendant needed to notify the plaintiff of its intent to do so, in writing, 180 days prior to the expiration of the initial term of the lease. The defendant did not provide any written notice of its intent to renew the lease by the applicable deadline.

On May 26, 2016, the plaintiff served the defendant with a notice to quit possession of the premises for lapse of time. On June 2, 2016, the plaintiff initiated this summary process action against the defendant. In its revised complaint dated June 28, 2016, the plaintiff

[1] The plaintiff also named as defendants John Doe, Jane Doe, and "[a]ny other company doing business out of this location." These parties did not appear before the trial court and have not participated in this appeal. We therefore refer in this opinion to Napoli Motors, Inc., as the defendant.

alleged that the defendant had been served with a notice to quit possession but still remained on the premises. The notice to quit and the lease were referenced in paragraphs 3 and 5 of the revised complaint and were attached thereto.

In its answer to the plaintiff's revised complaint, the defendant admitted the allegations contained in paragraphs 5 and 6. Those paragraphs alleged that the defendant had received the notice to quit on May 26, 2016, that the time given in the notice had expired, and that the defendant had not vacated the premises.[2] The defendant also pleaded two special defenses. Specifically, the defendant claimed that it had properly executed its option to renew the lease and that forfeiture of the right to occupy the premises would cause it disproportionate injury.

On August 18, 2016, the matter was tried to the court. At trial, the plaintiff submitted a stipulation of facts establishing that (1) the plaintiff is a limited liability company organized and existing under the laws of Connecticut, (2) the plaintiff became the owner in fee simple of the subject property on December 3, 2014, and took title subject to the terms of the lease, and (3) since that time, all dealings regarding the lease had been between the plaintiff and the defendant. The lease also was admitted into evidence. In addition, the plaintiff

[2] Paragraph 4 of the revised complaint states that "[t]he defendant agreed to pay $6500.00 monthly on the first day of each month."

Paragraph 5 of the revised complaint states that "[o]n May 26, 2016, the plaintiff had a notice to quit possession served on the defendant and all other occupants, if any, which required that the defendant and all of said other occupants, if any, move out of the premises on or before June 1, 2016. A copy of the notice to quit possession and the marshal's return of the same is appended hereto as exhibit B."

Paragraph 6 of the revised complaint states that "[t]he time given in the notice to quit possession for the defendant and all other occupants, if any, to move out of the premises has ended, but the defendant and all other occupants, if any, have not moved out."

asked the court to take notice of the defendant's judicial admissions in its answer to the allegations in the revised complaint, where it pleaded that it had served the defendant with a notice to quit possession demanding that it vacate the subject premises on or before June 1, 2016, and that the defendant had failed to do so. The plaintiff then rested its case.

After the plaintiff rested, the defendant moved for a directed verdict on the ground that the revised complaint failed to state a claim upon which relief could be granted. The defendant argued to the court that the complaint did not state that the lease was terminated for lapse of time. The court denied the defendant's motion.

Thereafter, the defendant called three witnesses. The first, Deborah Soares, testified that she worked for the defendant and that on December 18, 2015, she verbally notified the plaintiff of the defendant's intent to exercise its option to renew the lease. Soares further testified that on March 23, 2016, she again communicated to the plaintiff, this time via e-mail, that the defendant intended to exercise its option to renew the lease. The defendant's second witness, Scott Haverl, testified that eviction would cause the defendant hardship. Finally, the defendant's third witness, Joseph Napoli, testified that he and Haverl had a meeting with one of the plaintiff's employees in November, 2015, at which time both men told that employee that the defendant intended to renew the lease.

The court issued its memorandum of decision on December 28, 2016. Therein, the court rendered judgment in favor of the plaintiff on the complaint and rejected the defendant's special defenses. The court concluded that the plaintiff had met its burden of proving that the lease had terminated by lapse of time and that the defendant had failed to notify the plaintiff, in accordance with the terms of the lease, of its intent to

exercise its option to renew the lease for an additional five years. The court further concluded that the defendant had failed to prove that rendering judgment in favor of the plaintiff would be inequitable. This appeal followed.

I

The defendant first claims that the trial court improperly rendered judgment against it on a theory of liability that was not alleged in the revised complaint. We disagree.

"[T]he interpretation of pleadings is always a question of law for the court . . . . Our review of the trial court's interpretation of the pleadings therefore is plenary. . . . [T]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and *realistically*, rather than narrowly and technically. . . . [T]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . . As long as the pleadings provide sufficient notice of the facts claimed and the issues to be tried and do not surprise or prejudice the opposing party, we will not conclude that the complaint is insufficient to allow recovery." (Citations omitted, emphasis in original, internal quotation marks omitted.) *Boone* v. *William W. Backus Hospital*, 272 Conn. 551, 559–60, 864 A.2d 1 (2005).

Furthermore, "[a] complaint includes all exhibits attached thereto." (Internal quotation marks omitted.) *Tracy* v. *New Milford Public Schools*, 101 Conn. App. 560, 566, 922 A.2d 280, cert. denied, 284 Conn. 910, 931 A.2d 935 (2007). "Exhibits attached to a complaint can be considered by the factfinder if the defendant, through his answer or other responsive pleading, admits to the factual allegations contained therein so that the pleading constitutes a judicial admission." (Internal quotation marks omitted.) *Wilson* v. *Hryniewicz*, 51

Conn. App. 627, 632, 724 A.2d 531, cert. denied, 248 Conn. 904, 731 A.2d 310 (1999).

Construing the revised complaint broadly, we conclude that it sufficiently alleged that the plaintiff had initiated the summary process action for lapse of time. Although the plaintiff did not clearly articulate this theory of liability on the face of the revised complaint, paragraph 5 referenced the notice to quit possession, which cited "lapse of time, as set forth in the lease between the parties" as the sole basis for its alleged right to recover possession of the premises. Because the notice to quit was attached to the revised complaint as an exhibit, it properly was considered by the court in rendering judgment. Furthermore, the defendant admitted in its answer to the revised complaint the allegations contained in paragraph 5, thereby acknowledging that it had received the notice to quit and, thus, had been notified sufficiently of the legal and factual basis for which the plaintiff had initiated the summary process action. Accordingly, there was no surprise or prejudice to the defendant resulting from the manner in which the plaintiff pleaded this claim.[3] The defendant's claim therefore fails.

II

The defendant next claims that the court improperly concluded that the lease had terminated for lapse of time because the plaintiff failed to prove that the lease had expired.[4] We disagree.

[3] To the extent that there was any confusion about the theory upon which the plaintiff asserted that it was entitled to possession, the defendant could have filed a request to revise. See Practice Book § 10-35 ("[w]henever any party desires to obtain (1) a more complete or particular statement of the allegations of an adverse party's pleading . . . the party desiring any such amendment in an adverse party's pleading may file a timely request to revise that pleading").

[4] The defendant additionally claims that, because the plaintiff failed to prove that the lease had expired, the court improperly denied its motion for a directed judgment and motion to dismiss. Because both this claim and the defendant's claim that the court improperly rendered judgment in favor

"[T]he scope of our appellate review depends upon the proper characterization of the rulings made by the trial court. To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous." (Internal quotation marks omitted.) *New Haven* v. *G. L. Capasso, Inc.*, 151 Conn. App. 368, 370–71, 96 A.3d 563 (2014). "Summary process is a statutory remedy that enables a landlord to recover possession from a tenant upon the termination of a lease. . . . The purpose of summary process proceedings is to permit the landlord to recover possession of the premises upon termination of a lease without experiencing the delay, loss, and expense to which he might be subjected under a common law cause of action. The process is intended to be summary and is designed to provide an expeditious remedy to a landlord seeking possession. . . . We have recognized the principle that, because of the summary nature of its remedy, the summary process statute must be narrowly construed and strictly followed." (Citation omitted, internal quotation marks omitted.) *Federal Home Loan Mortgage Corp.* v. *Van Sickle*, 52 Conn. App. 37, 43, 726 A.2d 600 (1999).

Summary process actions are governed by General Statutes § 47a-23, which "allows an owner or lessor to issue a notice to quit only under certain conditions, including: (1) when the lease terminates . . . by lapse of time . . . ." Id., 43–44. In a summary process action for lapse of time, the plaintiff landlord must prove, as part of its prima facie case, that the term of the lease has expired.

The defendant argues that the plaintiff failed to prove that the term of the lease had expired, and, therefore, the court improperly rendered judgment in its favor. Because the defendant's claim challenges a factual finding made by the court, our review is limited to a determi-

of the plaintiff involve a determination of whether the plaintiff proved that the term of the lease had expired, we consider them as one claim.

nation of whether the court's finding was clearly erroneous. See *New Haven* v. *G. L. Capasso, Inc.*, supra, 151 Conn. App. 371.

Our review of the evidence leads us to conclude that the court's finding that the term of the lease had expired was not clearly erroneous. The lease, which was admitted into evidence at trial, states that the term of the lease would commence on June 1, 2011, and end on June 1, 2016. Thus, by the time the plaintiff initiated the summary process action on June 2, 2016, the lease had expired by its terms.

Moreover, to the extent that the defendant argues that the lease had not expired because the defendant had exercised its option to renew it, the court expressly rejected this claim. Specifically, the court found that "[n]o written notice was provided [to the plaintiff] in the time set forth in paragraph 21" of the lease, namely, 180 days before the expiration of the lease. Thus, because the court's finding that the term of the lease had expired was supported by evidence in the record, it was not clearly erroneous. We conclude, therefore, that the court properly rendered judgment in favor of the plaintiff.

The judgment is affirmed.

In this opinion the other judges concurred.

GEORGE BERKA *v.* CITY OF MIDDLETOWN
(AC 39579)

Lavine, Sheldon and Harper, Js.

Syllabus

The plaintiff appealed to this court from the judgment of the trial court dismissing his administrative appeal from the decision by the state Department of Health (department) finding in favor of the defendant city of Middletown concerning two municipal health orders that had been issued against the plaintiff, which related to violations of various

statutes and city ordinances at the plaintiff's property. In his administrative citation, the plaintiff had named only the city as the sole defendant and the state marshal's return of service indicated that he served the city only. The city filed a motion to dismiss the plaintiff's administrative appeal for the plaintiff's failure to name the department as a party. In response, the plaintiff filed an opposition and a motion to cite in the department as a party to his administrative appeal. The trial court, in granting the city's motion to dismiss, concluded that it lacked subject matter jurisdiction solely due to the plaintiff's failure to name the department as a party, noting that it was required to rule on the jurisdictional issue raised by the city's motion to dismiss before allowing the plaintiff to amend his complaint. On appeal, the plaintiff claimed that the department acted improperly by not informing him that it needed to be named as a party and that the trial court's dismissal of his administrative action deprived him of due process. *Held* that the trial court properly granted the city's motion to dismiss the plaintiff's administrative appeal due to the plaintiff's failure to timely serve the department pursuant to statute (§ 4-183 [d]); although it was improper for the trial court to dismiss the plaintiff's appeal simply because he failed to name the department in his citation, as an arguable defect in process no longer implicates the trial court's subject matter jurisdiction, because the department was the agency that rendered the final decision challenged by the plaintiff, the plaintiff was required pursuant to § 4-183 (d) to timely serve his administrative appeal on the department and his failure to do so deprived the trial court of subject matter jurisdiction.

Argued November 13, 2017—officially released April 17, 2018

Procedural History

Appeal from a decision issued by the Department of Public Health, brought to the Superior Court in the judicial district of Middlesex, where the court, *Vitale, J.*, granted the defendant's motion to dismiss and rendered judgment dismissing the appeal, from which the plaintiff appealed to this court. *Affirmed.*

George Berka, self-represented, the appellant (plaintiff).

Brig Smith, for the appellee (defendant).

Opinion

PER CURIAM. The principal issue in this appeal is whether the trial court properly dismissed the self-represented plaintiff's administrative appeal on the ground

that it lacked subject matter jurisdiction due to the plaintiff's failure to name the state of Connecticut Department of Public Health (department) as a party in his administrative citation. On appeal, the self-represented plaintiff, George Berka, claims first that the department acted improperly by not informing him that it needed to be named as a party and, second, that the trial court's dismissal of his appeal deprived him of due process. We disagree with the trial court's conclusion that the plaintiff's failure to *name* the department deprived it of subject matter jurisdiction. We conclude, however, that the trial court lacked subject matter jurisdiction due to the plaintiff's failure to *serve* his administrative appeal on the department. Accordingly, we affirm the judgment of the trial court.[1]

The record reveals the following facts and procedural history that are relevant. This appeal stems from two municipal health orders—one dated October 30, 2014, and the other dated November 21, 2014—issued by the defendant, the city of Middletown, acting through its municipal department of public health, regarding violations of various statutes and city ordinances at the plaintiff's property. The plaintiff challenged the orders by filing an appeal with the department. See General Statutes § 19a-229. A consolidated administrative appeal hearing relating to both orders took place on February 20, 2015.

The department issued a final memorandum of decision finding in favor of the defendant on January 26, 2016. See General Statutes §§ 4-179 and 4-180. The plaintiff subsequently appealed from that decision to the

[1] Because we conclude that the trial court properly dismissed the plaintiff's appeal due to a lack of subject matter jurisdiction, we do not reach the plaintiff's first claim. We also decline to address the plaintiff's second claim because it is inadequately briefed. See, e.g., *Darin* v. *Cais*, 161 Conn. App. 475, 483, 129 A.3d 716 (2015).

Superior Court. In his administrative citation, the plaintiff indicated that there was only one defendant and named the "city of Middletown" as that defendant.[2] The state marshal's return of service indicated that, on February 4, 2016, he served only the "city of Middletown."[3]

On May 26, 2016, the defendant filed a motion to dismiss the plaintiff's administrative appeal due, in part, to the plaintiff's failure to name the department as a party. The plaintiff filed his opposition on May 27, 2016, noting that "the department of public health shall be added as a party to this action, as requested." He then filed a motion to cite in the department as a party to his administrative appeal in the Superior Court on June 24, 2016, which the defendant opposed.

In its July 15, 2016 memorandum of decision, the court concluded that it lacked subject matter jurisdiction solely due to the plaintiff's failure to name the department as a party and, therefore, granted the defendant's motion to dismiss. The court also noted that it was required to rule on the jurisdictional issue raised by the defendant's motion to dismiss before allowing the plaintiff to amend his complaint. The plaintiff now appeals. Additional facts will be set forth as necessary.

[2] "In administrative appeals, the citation is the writ of summons that directs the sheriff or some other proper officer to seek out the defendant agency and to summon it to a particular sitting of a particular court on a specified day. . . . The citation, signed by competent authority, is the warrant which bestows upon the officer to whom it is given for service the power and authority to execute its command." (Citation omitted; internal quotation marks omitted.) *Tolly* v. *Dept. of Human Resources*, 225 Conn. 13, 18, 621 A.2d 719 (1993). "The citation that is used to commence an administrative appeal is analogous to the writ used to commence a civil action." (Internal quotation marks omitted.) Id., 20.

[3] The plaintiff filed a Form JD–CV–1 summons in the Superior Court directing the state marshal to serve his administrative appeal. See, e.g., *State* v. *Dyous*, 153 Conn. App. 266, 279–80, 100 A.3d 1004 (appellate court may take judicial notice of Superior Court filings), appeal dismissed, 320 Conn. 176, 128 A.3d 505 (2016) (certification improvidently granted).

"In an appeal from the granting of a motion to dismiss on the ground of subject matter jurisdiction, this court's review is plenary. A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record. . . . It is a familiar principle that a court which exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation." (Citations omitted; internal quotation marks omitted.) *Searles* v. *Dept. of Social Services*, 96 Conn. App. 511, 513, 900 A.2d 598 (2006); see also *Kindl* v. *Dept. of Social Services*, 69 Conn. App. 563, 566, 795 A.2d 622 (2002) (plenary review applies to court's construction of statute). "[W]e are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Footnote omitted; internal quotation marks omitted.) *Cuozzo* v. *Orange*, 315 Conn. 606, 614, 109 A.3d 903 (2015).

We also acknowledge that the plaintiff is a self-represented litigant. "[I]t is the established policy of the Connecticut courts to be solicitous of [self-represented] litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the [self-represented] party . . . we are also aware that [a]lthough we allow [self-represented] litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law." (Internal quotation marks omitted.) *Darin* v. *Cais*, 161 Conn. App. 475, 481, 129 A.3d 716 (2015).

The defendant argues that we should affirm the dismissal of the plaintiff's administrative appeal due to the plaintiff's failure to cite the department as a party. As it did before the trial court, the defendant relies on this court's decision in *Nanavati* v. *Dept. of Health Services*, 6 Conn. App. 473, 474–76, 506 A.2d 152 (1986) (failure to cite proper agency as defendant to administrative appeal deprived court of subject matter jurisdiction). *Nanavati* and the cases that cite it, however, either precede or fail to consider the extensive legislative revisions and judicial gloss given to General Statutes § 4-183 over the past thirty-two years. On the basis of those developments, we conclude that the trial court improperly dismissed the plaintiff's appeal simply because he failed to name the department in his citation.

Due to the strict nature of administrative appeals, both our Supreme Court and this court previously have held that a court lacks subject matter jurisdiction over an administrative appeal when a plaintiff fails properly to name a necessary party in a citation. See *Donis* v. *Board of Examiners in Podiatry*, 207 Conn. 674, 682–83, 542 A.2d 726 (1988); *Village Creek Homeowners Assn.* v. *Public Utilities Commission*, 148 Conn. 336, 338–39, 170 A.2d 732 (1961); *Shapiro* v. *Carothers*, 23 Conn. App. 188, 191, 579 A.2d 583 (1990); *Nanavati* v. *Dept. of Health Services*, supra, 6 Conn. App. 474–76.

In *Tolly* v. *Dept. of Human Resources*, 225 Conn. 13, 621 A.2d 719 (1993), however, our Supreme Court signaled a departure from the once ironclad rule that *any* deviation from § 4-183 deprives the court of subject matter jurisdiction.[4] See, e.g., *Kindl* v. *Dept. of Social*

[4] We note that legislative revisions to the Uniform Administrative Procedures Act (UAPA); General Statutes § 4-166 et seq.; and subsequent appellate decisions demonstrate a trend to construe the UAPA liberally in favor of the court's jurisdiction. See, e.g., *Bittle* v. *Commissioner of Social Services*, 249 Conn. 503, 509–15, 734 A.2d 551 (1999); *Tolly* v. *Dept. of Human Resources*, supra, 225 Conn. 19, 28–29; *Kindl* v. *Dept. of Social Services*, supra, 69 Conn. App. 575.

Services, supra, 69 Conn. App. 574. *Tolly* held that untimely service of an administrative appeal on an agency deprives the court of subject matter jurisdiction, but "arguable defects" in process render the appeal "dismissable only upon a finding of prejudice to the agency."[5] *Tolly* v. *Dept. of Human Resources*, supra, 28–29; see also *Yellow Cab Co. of New London & Groton, Inc.* v. *Dept. of Transportation*, 127 Conn. App. 170, 177, 13 A.3d 690 ("[a]bsent a complete failure to serve a party, *defective service* in an administrative appeal is *dismissable only upon a finding of prejudice* to the party" [emphasis altered]), cert. denied, 301 Conn. 908, 19 A.3d 178 (2011); 1 R. Bollier et al., Stephenson's Connecticut Civil Procedure (3d Ed. 2014 Supp.) § 62, p. S-114 ("the defect in service should be shown to somehow prejudice that party in some way"). In reaching this conclusion, the court in *Tolly* harmonized the conflicting subsections of § 4-183 (c) and (d).[6] See *Bittle*

[5] After oral argument, this court, sua sponte, ordered the parties to file simultaneous briefs analyzing *Tolly* v. *Dept. of Human Resources*, supra, 225 Conn. 13, and its progeny. Neither party discussed that decision in its initial brief, and instead principally relied on appellate authority that predated *Tolly*. As we explain in this opinion, the plaintiff's administrative appeal was properly dismissed in accordance with *Tolly*. In fact, both parties acknowledge in their supplemental briefs that *Tolly* requires dismissal.

[6] General Statutes § 4-183 (c) provides in relevant part: "[A] person appealing as provided in this section shall serve a copy of the appeal on the agency that rendered the final decision at its office or at the office of the Attorney General in Hartford . . . . [T]he person appealing shall also serve a copy of the appeal on each party listed in the final decision . . . provided failure to make such service within forty-five days *on parties other than the agency that rendered the final decision shall not deprive the court of jurisdiction over the appeal.* Service of an appeal shall be made by United States mail, certified or registered, postage prepaid, return receipt requested, without the use of a state marshal or other officer, or by personal service by a proper officer or indifferent person making service in the same manner as complaints are served in ordinary civil actions." (Emphasis added.)

General Statutes § 4-183 (d) provides in relevant part: "The person appealing . . . shall filed or cause to be filed with the clerk of the court an affidavit, or the state marshal's return, stating the date and manner in which a copy of the appeal was served on each party and on the agency that rendered the final decision, and, if service was not made on a party, the reason for

v. *Commissioner of Social Services*, 249 Conn. 503, 522 n.14, 734 A.2d 551 (1999). As the court in *Bittle* noted, "[§] 4-183 (d) provides a standard for dismissing appeals when parties *other than agencies* are not served, *or are served with defective papers*. This statutory standard is met upon a showing of actual prejudicial consequences stemming from a failure of service . . . ." (Emphasis added.) Id., 521–22.

The trial court concluded that the plaintiff's failure to name the department in his administrative citation—an arguable defect in the process—deprived it of subject matter jurisdiction. In light of *Tolly*, that conclusion was incorrect; arguable defects in process no longer implicate the subject matter jurisdiction of the court. Nonetheless, *Tolly* also made clear that, "[i]f there is no service at all on the agency within the forty-five day period, the court lacks subject matter jurisdiction over the appeal by virtue of the clear implication of the language in § 4-183 (c), read against the background of the preexisting law." *Tolly* v. *Dept. of Human Resources*, supra, 225 Conn. 28.

It is undisputed that the department was the "agency" that rendered the final decision challenged by the plaintiff. See General Statutes § 4-166 (1). The plaintiff was therefore required to timely serve his administrative appeal on the department. See, e.g., *Tolly* v. *Dept. of Human Resources*, supra, 225 Conn. 28. There is nothing in the record to suggest that he did so. Section 4-183 (d) requires that the plaintiff file an affidavit or a return from the marshal "stating the date and manner in which a copy of the appeal was served . . . *on the agency* that rendered the final decision, and, if service was not made on a party, the reason for failure to make

failure to make service. *If the failure to make service causes prejudice to any party to the appeal or the agency, the court, after hearing, may dismiss the appeal.*" (Emphasis added.)

service." (Emphasis added.) The plaintiff did not file an affidavit indicating that he served the department, and the marshal's return indicates that the administrative appeal was served only on the defendant. In fact, the plaintiff concedes in his supplemental brief; see footnote 5 of this opinion; that he did not serve the department at any point in time. Accordingly, the trial court properly granted the defendant's motion to dismiss the plaintiff's administrative appeal due to the plaintiff's failure to timely serve the department. See, e.g., *Geremia* v. *Geremia*, 159 Conn. App. 751, 779, 125 A.3d 549 (2015) (appellate court "may affirm a trial court's proper decision, although it may have been founded on a wrong reason"); see also Practice Book § 10-33.[7]

The judgment is affirmed.

FRANTZ CATOR *v.* COMMISSIONER OF CORRECTION (AC 39795)

Alvord, Prescott and Pellegrino, Js.

Syllabus

The petitioner, who previously had been convicted of, inter alia, felony murder in connection with a shooting incident and had filed three petitions for a writ of habeas corpus, filed a fourth petition for a writ of habeas corpus, claiming, inter alia, that his appellate counsel had rendered ineffective assistance on direct appeal from his conviction. The petitioner had picked up the shooter in his vehicle and driven to the victim's residence, where the victim was forced into the vehicle and later fatally shot with a gun that belonged to the petitioner. In his fourth habeas petition, the petitioner claimed, inter alia, that his appellate counsel improperly failed to raise a claim that the trial court improperly instructed the jury on intent, and that the evidence was insufficient to sustain the petitioner's convictions of murder, conspiracy to commit

[7] The defendant asks us to "reach the question of whether [the plaintiff] can refile an action if the dismissal of this action is affirmed." We decline to do so.

murder and felony murder. The habeas court rendered judgment denying the habeas petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The habeas court did not abuse its discretion in denying the petition for certification to appeal, as the petitioner's claims did not involve issues that were debatable among jurists of reason, that could have been resolved by a court in a different manner or that deserved encouragement to proceed further.

2. The habeas court properly determined that the petitioner failed to demonstrate that his appellate counsel provided ineffective assistance:

a. The petitioner could not prevail on his unpreserved claim that his appellate counsel should have raised a claim that the trial court improperly read to the jury the entire statutory (§ 53a-3 [11]) definition of intent when the crimes with which the petitioner was charged required instructions only as to specific intent; the record supported the habeas court's conclusion that appellate counsel made a reasonable strategic decision to forgo a weak claim of instructional error, as the record indicated that the trial court read the improper instruction only as a general definition of intent, and that it repeatedly gave a proper instruction as to each offense and provided the jury with a handout that listed the essential elements of each charged offense, and, under the facts of the present case, because an appellate court may have rejected a claim that there was a reasonable possibility that the trial court's instructions misled the jury, the petitioner's claim would have failed to satisfy the requirement of *State* v. *Golding* (213 Conn. 233) that a constitutional violation existed and deprived him of a fair trial.

b. The petitioner's appellate counsel was not ineffective and acted reasonably by not raising a claim that the evidence was insufficient to prove that the petitioner was guilty of murder as an accessory and conspiracy to commit murder, there having been sufficient evidence adduced at trial to prove that the petitioner was guilty of those crimes; the jury reasonably could have found, inter alia, that the petitioner had been angered by the disappearance of a certain gun, that the petitioner drove away from the victim's residence after the victim had been forced into the petitioner's vehicle, that the victim was shot after he and the alleged shooter had gotten out of the vehicle, that the petitioner drove back to the victim's residence after the shooting, and that the victim was fatally shot with a gun that belonged to the petitioner.

c. The petitioner could not prevail on his claim that his appellate counsel was ineffective in failing to raise a claim that the evidence was insufficient with respect to the charge of felony murder; the habeas court properly concluded that the jury logically and reasonably could have inferred that, during the victim's abduction by the petitioner, the petitioner supplied the shooter with the firearm that was used to kill the victim.

3. The petitioner's claim that his due process rights were violated when the trial court erroneously instructed the jury as to intent was unavailing; the habeas court properly determined that the petitioner's due process claim was subject to procedural default and that the petitioner failed to demonstrate good cause and actual prejudice to excuse the procedural default of his claim, which was not raised on direct appeal pursuant to a reasonable strategy.

Argued November 14, 2017—officially released April 17, 2018

Procedural History

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

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

Linda F. Currie-Zeffiro, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Emily D. Trudeau*, deputy assistant state's attorney, for the appellee (respondent).

Opinion

PELLEGRINO, J. The petitioner, Frantz Cator, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his fourth petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court (1) abused its discretion in denying his petition for certification to appeal from the denial of his amended petition, (2) improperly concluded that he failed to establish that his appellate counsel in his direct criminal appeal rendered deficient performance, and (3) improperly concluded that his stand-alone due process claim was procedurally defaulted. We conclude that the habeas court did not abuse its discretion in denying the

petition for certification to appeal and, accordingly, dismiss the petitioner's appeal.

The following facts and procedural history are relevant to our disposition of the petitioner's appeal. In connection with the murder of the victim, Nathaniel Morris, the state charged the petitioner with capital felony in violation of General Statutes § 53a-54b (5); felony murder in violation of General Statutes § 53a-54c; murder as an accessory in violation of General Statutes §§ 53a-54a (a) and 53a-8 (a); conspiracy to commit murder in violation of General Statutes §§ 53a-48 and 53a-54a (a); kidnapping in the second degree in violation of General Statutes § 53a-94 (a); conspiracy to commit kidnapping in the second degree in violation of §§ 53a-48 and 53a-94 (a); and commission of a Class A, B or C felony with a firearm in violation of General Statutes § 53-202k.

A five day jury trial began on October 14, 1997. At the close of the state's evidence, the petitioner's trial counsel, Kevin Randolph, moved for a judgment of acquittal with respect to the charges of capital felony murder, felony murder, murder, conspiracy to commit murder and conspiracy to commit kidnapping in the second degree on the basis of insufficient evidence. The court granted the petitioner's motion only as to the capital felony murder charge. The petitioner was subsequently convicted on all remaining charges and sentenced to a total effective term of fifty-five years incarceration, execution suspended after fifty years, followed by five years of probation. See *State* v. *Cator*, 256 Conn. 785, 787–88, 781 A.2d 285 (2001).

The petitioner appealed from the trial court's judgment to this court, and our Supreme Court transferred the appeal to itself pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. Id., 788. Attorney Suzanne Zitser, the petitioner's appellate counsel,

raised seven issues on his behalf, specifically claiming that the trial court improperly "(1) failed to determine whether there was a conflict in dual representation at the probable cause hearing; (2) admitted evidence of the [petitioner's] prior, uncharged drug dealing; (3) failed to instruct the jury regarding the [petitioner's] prior drug dealing; (4) modified the judgment of conviction after the [petitioner] had begun serving his imposed prison term; (5) charged the jury that § 53-202k is a separate offense and encompasses accessory liability; (6) sentenced him to concurrent terms for two conspiracies and thereby violated the ban on double jeopardy; and (7) failed to provide him with formal notice that he had violated his probation stemming from a previous conviction." *State* v. *Cator*, supra, 256 Conn. 789. Our Supreme Court subsequently reversed the trial court's judgment in part and remanded the case with direction (1) to vacate the petitioner's conviction under § 53-202k and to conduct a new trial on the issue of whether the petitioner "used a proscribed firearm in the commission of the underlying offense"; id., 812; and (2) to merge the petitioner's convictions of the conspiracy offenses and to impose one sentence for that conviction. See id., 813. The judgment was affirmed in all other aspects. See id. On April 22, 2003, the trial court modified the petitioner's sentence to a total effective sentence of forty-five years.

The petitioner has brought five habeas petitions since he was convicted.[1] On December 4, 2013, the self-represented petitioner filed his fourth petition for a writ of

[1] On August 22, 2001, the petitioner filed his first petition for a writ of habeas corpus, thereafter amended on November 23, 2003, in which he alleged the ineffective assistance of his trial counsel and actual innocence. See *Cator* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-01-0810396-S, 2004 WL 503831 (February 25, 2004). After a trial, the habeas court denied the petitioner's amended petition for a writ of habeas corpus in a written memorandum of decision and denied his petition for certification to appeal. See id. This court subsequently dismissed the petitioner's appeal. See *Cator* v. *Commissioner of Correction*, 92 Conn. App. 241, 884 A.2d 447 (2005), cert. denied, 276 Conn. 936, 891 A.2d 1 (2006).

habeas corpus. On June 7, 2016, the petitioner, represented by appointed counsel, filed the amended three count operative petition. The petitioner alleged: (1) the ineffective assistance of his trial counsel; (2) the ineffective assistance of his appellate counsel in his direct criminal appeal, on the basis of her failure to raise claims of instructional error and insufficient evidence to sustain his convictions of murder, conspiracy to commit murder, and felony murder; and (3) a violation of his due process rights at his underlying criminal trial on the basis of the aforementioned instructional impropriety. On July 12, 2016, the respondent, the Commissioner of Correction, moved to dismiss the petitioner's amended petition in its entirety. On July 21, 2016, the petitioner filed an objection to the respondent's motion to dismiss.

The habeas trial was held on July 25, 2016. The habeas court granted the respondent's motion to dismiss with respect to the petitioner's claim against his trial counsel. The habeas court heard testimony from Randolph, Zitser, and Assistant State's Attorney C. Robert Satti, Jr., the prosecutor in the petitioner's criminal trial. The

On October 30, 2006, the petitioner filed a second petition for a writ of habeas corpus in which he requested that his right to petition for a new trial be restored. Specifically, the petitioner sought a new trial in light of the acquittal of Peter Johnson, who was charged with murder as principal in connection with the victim's death. See *Cator* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-06-4001410-S, 2009 WL 765395 (February 19, 2009). After a trial, the habeas court denied the petitioner's petition for a writ of habeas corpus and petition for certification to appeal.

On November 2, 2010, the petitioner filed his third petition for a writ of habeas corpus, thereafter amended on November 13, 2012, in which he alleged the ineffective assistance of his second habeas counsel. See *Cator* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-10-4003845-S. That petition was withdrawn on March 21, 2013. See id.

The petitioner filed his fifth petition for a writ of habeas corpus on June 12, 2017. See *Cator* v. *Commissioner of Correction*, Superior Court, judicial district of Tolland, Docket No. CV-17-4008872-S (June 12, 2017). That action remains pending before the habeas court.

petitioner also presented expert testimony from Attorney Norman A. Pattis, an expert in criminal defense matters in state court, and Attorney Michael Taylor, an expert in appellate law, both of whom rendered opinions as to the effectiveness of Zitser. On October 11, 2016, the habeas court issued a written decision denying the petitioner's amended petition. The habeas court concluded that the petitioner failed to establish that Zitser had rendered deficient performance and that the petitioner's due process claim was procedurally defaulted. Thereafter, on October 19, 2016, the habeas court denied the petition for certification to appeal, and this appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The petitioner claims that the habeas court abused its discretion in denying his petition for certification to appeal from the denial of his amended petition for a writ of habeas corpus. We disagree.

Preliminarily, we set forth the standard of review that governs our disposition of the petitioner's appeal. "Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, [the petitioner] must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . . To prove that the denial of his petition for certification to appeal constituted an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are

debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification." (Internal quotation marks omitted.) *Salmon* v. *Commissioner of Correction*, 178 Conn. App. 695, 700–701, 177 A.3d 566 (2017).

As discussed subsequently in parts II and III of this opinion, we conclude that the petitioner's underlying claims do not involve issues that are debatable among jurists of reason, could not have been resolved by a court in a different manner or that the questions raised deserve encouragement to proceed further. Accordingly, the habeas court did not abuse its discretion in denying the petition for certification to appeal from the denial of the amended petition for a writ of habeas corpus.

II

We now turn to the petitioner's substantive claims that the habeas court improperly concluded that the petitioner failed to establish ineffective assistance of his appellate counsel. The petitioner claims that his appellate counsel rendered ineffective assistance by failing to raise the following claims on direct appeal: (1) instructional error with respect to intent, and (2)

insufficient evidence adduced at trial to sustain his convictions of murder as an accessory, conspiracy to commit murder, and felony murder. We disagree.

We begin by setting forth the applicable standard of review and legal principles governing claims of ineffective assistance of appellate counsel. "The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . Historical facts constitute a recital of external events and the credibility of their narrators. . . . Accordingly, the habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Internal quotation marks omitted.) Id., 703.

"[I]t is well established that [a] criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. *Strickland* v. *Washington*, [466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution." (Internal quotation marks omitted.) *Salmon* v. *Commissioner of Correction*, supra, 178 Conn. App. 702. "Our Supreme Court has adopted [the] two part analysis [set forth in *Strickland* v. *Washington*, supra, 687] in reviewing claims of ineffective assistance of appellate counsel. . . . To prevail on a claim of ineffective assistance of counsel, a petitioner must show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Because the petitioner must satisfy both prongs of the *Strickland* test to prevail on

a habeas corpus petition, this court may dispose of the petitioner's claim if he fails to meet either prong. . . .

"Under the performance prong, [a] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . . [Although] an appellate advocate must provide effective assistance, [she] is not under an obligation to raise every conceivable issue. A brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions. . . . [I]f the issues not raised by his appellate counsel lack merit, [the petitioner] cannot sustain even the first part of this dual burden since *the failure to pursue unmeritorious claims cannot be considered conduct falling below the level of reasonably competent representation*." (Emphasis in original; internal quotation marks omitted.) *Toccaline* v. *Commissioner of Correction*, 177 Conn. App. 480, 496, 172 A.3d 821, cert. denied, 327 Conn. 986, 175 A.3d 45 (2017).

A

With that legal framework in mind, we first address the petitioner's claim that the habeas court improperly concluded that his appellate counsel did not render deficient performance by failing to raise an instructional claim on direct appeal. More specifically, the petitioner challenges the habeas court's conclusion that appellate counsel made a "strategic decision" not to pursue this claim on appeal given the "preexisting judicial recognition of the instructional impropriety." We disagree with the petitioner.

In order to determine whether appellate counsel made a reasonable strategic decision not to raise the claim of instructional error in the petitioner's direct criminal appeal, we must evaluate the merits of the claim itself. Although the petitioner's instructional error

claim was not preserved before the criminal trial court, had the claim been raised on direct appeal, review may have been available at that time pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015),[2] or alternatively, the plain error doctrine.[3]

"[The *Golding* doctrine] permits a [petitioner] to prevail on [an unpreserved] claim of constitutional error . . . only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the [petitioner] of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. . . . [T]he first two [prongs of *Golding*] involve a determination of whether

[2] We note that the petitioner's direct appeal occurred prior to our Supreme Court's decision in *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011), in which it held that "when the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal." Id., 482–83; see also *State* v. *Bellamy*, 323 Conn. 400, 147 A.3d 655 (2016).

[3] "The plain error doctrine is based on Practice Book § 60-5, which provides in relevant part: The court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. The court may in the interests of justice notice plain error not brought to the attention of the trial court. . . . The plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . A party cannot prevail under [the] plain error [doctrine] unless [he] has demonstrated that the failure to grant relief will result in manifest injustice." (Internal quotation marks omitted.) *State* v. *Vega*, 128 Conn. App. 20, 29 n.3, 17 A.3d 1060, cert. denied, 301 Conn. 919, 21 A.3d 463 (2011).

the claim is reviewable; the second two . . . involve a determination of whether the [petitioner] may prevail." (Citations omitted; internal quotation marks omitted.) *State* v. *Montanez*, 277 Conn. 735, 743–44, 894 A.2d 928 (2006). The record in the present case is adequate for our review because it contains the full transcript of the underlying criminal proceedings. Moreover, "when intent is an element of a crime, a trial court's failure to instruct the jury properly with respect to intent implicates the due process rights of the [petitioner]." Id., 744. We therefore turn to *Golding*'s third prong, which is dispositive of the petitioner's instructional claim. See, e.g., *State* v. *Aviles*, 107 Conn. App. 209, 230, 944 A.2d 994 ("as to unpreserved claims of constitutional error in jury instructions, we have stated that under the third prong of *Golding*, [a] defendant may prevail . . . only if . . . it is reasonably possible that the jury was misled" [internal quotation marks omitted]), cert. denied, 287 Conn. 922, 951 A.2d 570 (2008).

The issue in the present matter is whether the petitioner's appellate counsel should have raised a claim that the trial court improperly instructed the jury on intent when it read the entire definitional language of General Statutes § 53a-3 (11). Section 53a-3 (11) provides that "[a] person acts 'intentionally' with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct . . . ."

The petitioner argues that it was improper for the trial court to instruct the jury regarding general intent, the intent to engage in conduct, and specific intent, the intent to cause such result, because the crimes he was charged with required instructions only as to specific intent.[4] The petitioner further argues that "[a]s a result

[4] See *State* v. *Pond*, 315 Conn. 451, 467–68, 108 A.3d 1083 (2015) ("[c]onspiracy . . . is a specific intent crime, with the intent divided into two elements: [1] the intent to agree or conspire and [2] the intent to commit the offense which is the object of the conspiracy" [internal quotation marks omitted]);

of this instructional impropriety, the jury was misled as to the state's burden of proof on the essential element of intent," and the error allowed the jury to find him guilty of specific intent crimes while employing the lower standard of general intent. In response, the respondent argues that, viewing the charge in its entirety, there is no reasonable possibility that the jury was misled because the "trial court repeatedly instructed the jury regarding the specific intent necessary to commit murder, second degree kidnapping, and conspiracy to commit those crimes." We agree with the respondent.

We next set forth the legal principles applicable to our analysis of the petitioner's instructional claim. "[I]ndividual jury instructions should not be judged in artificial isolation, but must be viewed in the context of the overall charge. . . . The pertinent test is whether the charge, read in its entirety, fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . Thus, [t]he whole charge must be considered from the standpoint of its effect on the [jurors] in guiding them to the proper verdict . . . and not critically dissected in a microscopic search for possible error. . . . Accordingly, [i]n reviewing a constitutional challenge to the trial court's instruction, we must consider the jury charge as a whole to determine whether it is reasonably possible that the instruction misled the jury. . . . In other words, we must consider whether the instructions [in totality] are sufficiently correct in law, adapted to the issues and ample for the guidance of the jury." (Internal quotation marks omitted.) *Salters* v. *Commissioner of Correction*, 175 Conn. App. 807, 818–19, 170

State v. *Franko*, 142 Conn. App. 451, 460, 64 A.3d 807 (2005) ("kidnapping in the second degree . . . is a specific intent crime"), cert. denied, 310 Conn. 901, 75 A.3d 30 (2013); *State* v. *Rivet*, 99 Conn. App. 230, 231 n.1, 912 A.2d 1103 ("[m]urder is a specific intent crime"), cert. denied, 281 Conn. 923, 918 A.2d 274 (2007).

A.3d 25, cert. denied, 327 Conn. 969, 173 A.3d 954 (2017); see also *State* v. *Revels*, 313 Conn. 762, 784, 99 A.3d 1130 (2014), cert. denied, U.S. , 135 S. Ct. 1451, 191 L. Ed. 2d 404 (2015).

"Although [our appellate courts] have stated that [i]t is improper for the trial court to read an entire statute to a jury when the pleadings or the evidence support a violation of only a portion of the statute . . . that is not dispositive. We must determine whether it is reasonably possible that the jury was misled by the trial court's instructions." (Internal quotation marks omitted.) *Salters* v. *Commissioner of Correction*, supra, 175 Conn. App. 819. "[I]n cases in which the entire definition of intent was improperly read to the jury, the conviction of the crime requiring specific intent almost always has been upheld because a proper intent instruction was also given. [In those cases] [t]he erroneous instruction, therefore, was not harmful beyond a reasonable doubt."[5] (Internal quotation marks omitted.) *State* v. *Rivet*, 99 Conn. App. 230, 232–33, 912 A.2d 1103, cert. denied, 281 Conn. 923, 918 A.2d 274 (2007). Beginning with *State* v. *DeBarros*, 58 Conn. App. 673, 755 A.2d 303, cert. denied, 254 Conn. 931, 761 A.2d 756 (2000), however, this court has recognized a limited number of cases in which it was reasonably possible that the jury was misled when the trial court included the complete statutory definition of intent to the jury for crimes requiring specific intent.[6]

[5] See, e.g., *State* v. *Montanez*, supra, 277 Conn. 745–47; *State* v. *Austin*, 244 Conn. 226, 710 A.2d 732 (1998); *State* v. *Prioleau*, 235 Conn. 274, 322, 664 A.2d 743 (1995); *Salters* v. *Commissioner of Correction*, supra, 175 Conn. App. 821–22; *Barlow* v. *Commissioner of Correction*, 131 Conn. App. 90, 26 A.3d 123, cert. denied, 302 Conn. 937, 28 A.3d 989 (2011); *Moody* v. *Commissioner of Correction*, 127 Conn. App. 293, 14 A.3d 408, cert. denied, 300 Conn. 943, 17 A.3d 478 (2011); *State* v. *Young*, 68 Conn. App. 10, 791 A.2d 581, cert. denied, 260 Conn. 909, 795 A.2d 547 (2002).

[6] See also *State* v. *Sivak*, 84 Conn. App. 105, 112–13, 852 A.2d 812 (reasonably possible jury was misled by improper intent instruction that included full statutory definition of "intentionally" and focused on intended conduct rather than intended result of causing serious physical harm), cert. denied,

With those legal principles in mind, we turn to the trial court's jury instructions as set forth in the transcripts of the petitioner's underlying criminal proceeding. On Friday October 17, 1997, during its preliminary instructions, the court explained the following to the jury: "[The] offenses [to be defined] [on] Monday [are] all specific intent crimes. That means that the person charged has to have a specific intent to commit a particular crime." The trial court defined intent as follows: "[I]ntent is the status in a person's mind. It is the act of an intellect. . . . [I]ntent is required for the commission of the crime. Intent is defined in the statutes. It binds you and me. And [General Statutes § 53a-3 (11)] states that a person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause a result or to engage in such conduct. Murder is the unlawful taking of the life of another with an intent to take that life. The person charged with that offense must act intentionally, the intent to take a life at the time the life is taken, and it must be by the act of the person charged. Intentional conduct is purposeful conduct, rather than conduct that is accidental or inadvertent or unintentional conduct." The court further stated: "[A] person's intention may be inferred from their conduct or his conduct. You may infer from the fact that an accused engaged in conduct that he intended to engage in that conduct. . . . You may not presume the existence of intent. You may not presume that a person intended the consequences of their act, but you may draw reasonable and logical inferences

271 Conn. 916, 859 A.2d 573 (2004); *State* v. *Lopes*, 78 Conn. App. 264, 270–72, 826 A.2d 1238 (reasonably possible jury was misled where "improper instruction was given in regard to the definition of murder and not solely in the instruction dealing with the general definition of intent," and this court "[did] not observe numerous proper instructions that would overshadow the improper 'engaging in conduct' language"), cert. denied, 266 Conn. 902, 832 A.2d 66 (2003).

that a person's intention is exhibited by the total circumstances demonstrating the . . . conduct of the people involved in this case."

The following Monday, the court repeated its preliminary instructions and, for a second time, read the full statutory definition of intent under § 53a-3 (11).[7] Throughout the remainder of its instructions, the court referred the jury to this definition of intent on seven occasions, but did not repeat the definition itself. The court explained the principle of accessorial liability under § 53a-8, noting that "[i]n order to be an accessory to a crime, the [petitioner] must have the same criminal intent required for the crime to which he is an accessory, as I've explained intent to you and will explain it again."[8]

Thereafter, when instructing the jury on the specific elements of kidnapping in the second degree, the court

[7] The court instructed in relevant part: "Now, I defined intent [on Friday], I will do it today because it has—it has to be present in your mind and understanding. I want it fresh. . . .

"A person acts intentionally with respect to—to a result or to conduct described by the statute defining an offense when his conscious objective is to cause such a result or to engage in such conduct. Intentional conduct is purposeful conduct rather than conduct that is accidental or inadvertent. . . .

"[A] person's intention may be inferred from his conduct. You may infer from the fact that an accused engaged in conduct that he intended to engage in that conduct. An intent to cause death may be inferred from circumstantial evidence, such as the type of weapon used, the manner in which it is used, the type of wounds inflicted, the events leading to it, immediately following the death."

[8] The court further charged the jury: "[A]n accused person, acting with the mental state required for the commission of an offense, who solicits, requests, commands, importunes, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct, and may be prosecuted and punished as if he were the principal offender. If a person did any of these things specified in the statute, he is in the eyes of the law just as guilty of the crime charged as though he had directly committed it or directly participated in its commission; that is, solicits, requests, commands, importunes, or intentionally aids another person to engage in conduct which constitutes an offense."

read the statutory definition set forth in § 53a-94.[9] The court further instructed that, in order to find the petitioner guilty of that offense, the jury must find that he intended to abduct and restrain the victim. The court's instruction provided in relevant part: "A person is guilty of kidnapping in the second degree when he abducts another person. The first term is abduct. Abduct means to restrain a person with intent to prevent his liberation either by secreting or hiding him in a place where he is not likely to be found or by using or threatening to use physical force or intimidation. . . .

"The next term to be defined is to restrain. Restrain means to restrict a person's moving intentionally and unlawfully in such a manner as to interfere substantially with his liberty by moving him from one place to another or by confining him either in the place where the restriction first begins or in a place to which he has been moved to without consent. Without consent includes, but is not limited to, deception.

"As you can see, abduction and restraining must be intentional. There must be an intent to interfere intentionally with the victim's liberty and an intent to prevent the victim's liberation by, one, secreting or hiding him in a place where he is not likely to be found; two, by using or threatening to use physical force or intimidation. Remember my earlier instruction in regard to intentional conduct." The court repeated this proper instruction at least two more times during its charge.

With respect to murder,[10] the trial court instructed that in order to find the petitioner guilty of that offense,

[9] General Statutes § 53a-94 (a) provides: "A person is guilty of kidnapping in the second degree when he abducts another person."

[10] General Statutes § 53a-54a (a) provides in relevant part: "A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person . . . ."

"[T]he specific intent to kill is an essential element of the crime of murder. To act intentionally, the defendant must have had the conscious objective to cause the death of the victim. . . . Because direct evidence of the accused's state of mind is rarely available . . . intent is often inferred from

the jury must find that he specifically intended to cause the death of the victim. The court's instruction provided in relevant part: "Now . . . take into account the same instructions I have given you Friday and today on intentional conduct and accessorial liability as it applies. . . . A person is guilty of murder when, with the intent to cause the death of another person, he causes the death of such person." The court subsequently discussed each element of the offense, stating in relevant part: "There are two elements, each of which the state must prove beyond a reasonable doubt in order to sustain a conviction. . . . First is that the [petitioner] had the intent to cause the death of another person. Please bring into play my instructions in regard to the definition of intentional conduct. The second element is that the [petitioner] or [a coconspirator] acting with that intent to cause the death of [the victim], did shoot with a firearm and cause the death of [the victim]." The court repeated this proper instruction at least six more times during its charge.

The court then instructed the jury on the elements of conspiracy to commit kidnapping in the second degree and conspiracy to commit murder, stating that "[a] person is guilty of conspiracy when, with the intent to [engage in] conduct constituting a crime . . . he agrees with one or more persons to engage in or cause the performance of such conduct and any one of them commits an overt act in pursuance of such conspiracy."

conduct . . . and from the cumulative effect of the circumstantial evidence and the rational inferences drawn therefrom. . . . Intent to cause death may be inferred from the type of weapon used, the manner in which it was used, the type of wound inflicted and the events leading to and immediately following the death. . . . Furthermore, it is a permissible, albeit not a necessary or mandatory, inference that a defendant intended the natural consequences of his voluntary conduct." (Internal quotation marks omitted.) *State* v. *Gill*, 178 Conn. App. 43, 48–49, 173 A.3d 998, cert. denied, 327 Conn. 987, 175 A.3d 44 (2017); see also *State* v. *Otto*, 305 Conn. 51, 66–67, 43 A.3d 629 (2012).

The court repeated this proper instruction at least six more times during its charge.

In addition to its oral charge, the court provided the jury with a "schematic," which "list[ed] . . . the essential elements" and "what [was] required to be proven beyond a reasonable doubt" for each charged offense. The jury began its deliberations and, thereafter, sent the following note to the court: "Your Honor, if possible we would like the *written* definitions of the following terms: [1] reasonable doubt; [2] intent; and [3] conspiracy." (Emphasis in original.) In response to that note, the court provided the jury with written instructions regarding conspiracy, intent[11] and reasonable doubt.

We now turn to the testimony elicited at the petitioner's habeas trial. The petitioner's appellate counsel explained that as an appellate attorney, she reviewed jury instructions in their entirety, and not in isolated portions. She also testified that she was aware that the court improperly instructed the jury by including the full statutory definition of intent, but believed that the court had provided accurate instructions of the crimes charged, specifically testifying: "When you look at . . . the charge as a whole and specifically when the judge charged on the specific crimes . . . he gave the intent to cause the result. . . . He . . . referred only to that

[11] The court's supplemental intent instruction provided in relevant part: "Intent relates to the condition of mind of the person who commits the act; his purpose in doing it. As defined by our statute, a person acts 'intentionally' with respect to a result or to conduct when his conscious objective is to cause such result or to engage in such conduct.

"What a person's purpose, intention or knowledge has been is usually a matter to be determined by inference. No person is able to testify that he looked into another's mind and saw therein a certain purpose or intention or a certain knowledge to do harm to another. The only way in which a jury can ordinarily determine what a person's purpose, intention, or knowledge was, at any given time, aside from that person's own statements or testimony, is by determining what that person's conduct was and what the circumstances were surrounding that conduct, and from that infer what his purpose, intention, or knowledge was."

portion of the intent instruction." Appellate counsel further testified that, although she was aware of the *DeBarros* case, which was issued in 2000, three years after the petitioner's criminal trial, she did not raise an instructional claim because she "felt that it would be harmless error." Similarly, the petitioner's trial counsel testified that he did not take exception to the court's instructions on intent because he did not think "they were . . . an incorrect statement of the law," and that "focus[ing] on the tenor and timbre of the entire instruction . . . [it] left no doubt as to the intent necessary . . . ."

The petitioner's experts, Pattis and Taylor, both provided opinions with respect to this issue. Pattis would not concede that "the court gave what would have been apparent to a lawyer of ordinary skill and training at that time an incorrect instruction," but explained that, given *DeBarros*, he "would have liked it as a potential appellate issue . . . ." Although Pattis opined that there was a "substantial likelihood" that the jury was misled regarding the state's burden of proof, he classified the petitioner's case as "somewhere between *DeBarros* . . . and the cases where the court held it was not pervasive."

Taylor testified that in a murder case his practice was to raise any good faith issue because the stakes are so high. Taylor testified that "the trial court very clearly at one point gave the wrong instruction on intent, including a broader intent aspect than is permissible with respect to these specific intent crimes, but the court repeatedly gave a specific intent charge as well, and when you take the charge as a whole, [he thought] it would be very unlikely that you would convince an appellate court that the jury was misled by the charge."[12] Taylor nevertheless opined that appellate

[12] The habeas court subsequently requested Taylor to clarify this testimony, specifically asking: "On the question of . . . the overly broad intent instruction, I want to make sure I understood what you said, that the judge

counsel's failure to raise this claim constituted ineffective assistance.

The habeas court, in its memorandum of decision, stated that: "[Appellate counsel] had considered and declined to press this issue in the petitioner's appeal. She recognized that the trial judge lacked the benefit of [this court's] wisdom because [*State* v. *DeBarros*, supra, 58 Conn. App. 673] arose three years posttrial. [Appellate counsel] was also aware that our appellate tribunals have seldom reversed convictions based on this particular error since that case was decided. . . .

"In the petitioner's case, the trial judge correctly informed the jurors of the specific intent that the prosecution need[ed] to prove, beyond a reasonable doubt, when he instructed on each crime individually. [Appellate counsel] reasonably opined that this claim was unlikely to succeed, and she devoted her limited brief pages and argument to more meritorious issues. The court finds that this professional decision came within the wide boundaries of acceptable legal representation. Therefore, the petitioner has failed to satisfy his burden of proving, by a preponderance of the evidence, that his appellate lawyer rendered ineffective assistance as to this specification of deficient performance." (Citation omitted.)

With the foregoing facts in mind, we now address the habeas court's conclusion that appellate counsel did not render deficient performance by failing to raise this instructional claim on appeal. The petitioner contends that his case "presents a greater danger of a misled jury than . . . *DeBarros*." In *DeBarros*, the trial court, during its initial instructions, charged the jury

clearly gave . . . an intent definition that didn't apply in the case, but you also said that on the specific [charges] he gave the specific intent, which was restricted to the proper scope. Am I getting what you said correctly?" Taylor replied: "Yes, Your Honor."

on the elements of murder as follows: "There are two elements that the state has to prove . . . beyond a reasonable doubt. . . . The first element is that the defendant had the intent to cause the death of another person. Our statutes and law [are] that a person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct." (Internal quotation marks omitted.) *State* v. *DeBarros*, supra, 58 Conn. App. 683–84. Additionally, the court, while instructing the jury on other crimes, referred to this definition of intent on seven occasions. See id., 678, 683. Thereafter, during its deliberations, the jury requested clarification regarding intent and attempt to commit murder. Id., 678–79. In response, the court twice repeated the definition of intent. Id., 679. On appeal, this court reversed the defendant's murder conviction, holding that it was reasonably possible that the jury was misled because: (1) "the trial court's improper instructions were too numerous to be rectified by [its] proper instructions," and (2) "the court read the instruction as a specific definition of the intent required for [murder] . . . [which] likely misled the jury to believe that to intend to cause the death of another person means either to intend to cause the death of that person or to intend to engage in conduct that causes the death of that person." Id., 683–84. The court in *DeBarros* also noted that the trial court "did not provide instructional handouts to the jury that would have properly explained the element of intent." Id., 684 n.15.

We are not persuaded that the petitioner's case presents a situation analogous to that of *DeBarros* or those cases in which it was reasonably possible that the jury was misled by the trial court's instructions. Although similar to *DeBarros* in that the court in this case read, provided, or referred to the improper instruction a total

of ten times, "[a] quantitative 'litmus test' measuring how frequently a trial court gives an irrelevant instruction is . . . insufficient to establish an instruction's tendency to mislead the jury." *State* v. *Montanez*, supra, 277 Conn. 746; see also *State* v. *Santiago*, 87 Conn. App. 754, 764, 867 A.2d 138, cert. denied, 273 Conn. 938, 875 A.2d 45 (2005). In the present case, unlike *DeBarros*, the record indicates that the trial court read the improper instruction only as a general definition of intent. The record further indicates that the court repeatedly gave a proper instruction as to each specific offense. Moreover, the court provided the jury with a handout that listed the essential elements of each charged offense, reminding them that the petitioner must have the specific intent to cause the result referred to in the statute.

After a careful review of the entire jury charge, we cannot conclude that appellate counsel's strategic decision not to raise the instructional error claim was unreasonable. Under the facts of this case, an appellate court may have rejected a claim that there was a reasonable possibility that the jury was misled by the trial court's instructions. Accordingly, the petitioner's claim would have failed to satisfy *Golding*'s third prong because he is unable to demonstrate that a constitutional violation exists and deprived him of a fair trial.[13] See *State* v. *Aviles*, supra, 107 Conn. App. 229–30. The law and record, therefore, support the habeas court's conclusion that appellate counsel made a reasonable strategic decision in choosing to forgo a weak claim of instructional error, especially in view of other stronger claims, including two on which the petitioner prevailed. We conclude that the habeas court properly determined

[13] Likewise, because the trial court *repeatedly* instructed the jury as to the intent required under the charged offenses, there is no manifest injustice that warrants reversal pursuant to the plain error doctrine. See *State* v. *Jaynes*, 36 Conn. App. 417, 430, 650 A.2d 1261 (1994), cert. denied, 233 Conn. 908, 658 A.2d 980 (1995).

that the petitioner failed to demonstrate that appellate counsel rendered deficient performance with respect to this claim.

B

We now address the petitioner's claim that appellate counsel provided ineffective assistance by failing to raise claims on direct appeal that the evidence was insufficient to prove his convictions of (1) murder as an accessory and conspiracy to commit murder, and (2) felony murder.

The two part test this court applies in reviewing the sufficiency of the evidence supporting a criminal conviction is well established. "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." (Internal quotation marks omitted.) *State* v. *Lewis*, 303 Conn. 760, 767, 36 A.3d 670 (2012).

"In evaluating evidence, the trier of fact is not required to accept as dispositive those inferences that are consistent with the [petitioner's] innocence." *State* v. *Delgado*, 247 Conn. 616, 620, 725 A.2d 306 (1999). "[I]n viewing evidence which could yield contrary inferences, the jury is not barred from drawing those inferences consistent with guilt and is not required to draw only those inferences consistent with innocence. The rule is that the jury's function is to draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Internal quotation marks omitted.) *State* v. *Grant*, 219 Conn. 596, 604, 594 A.2d 459 (1991). As our Supreme Court has 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 [petitioner] that, had it been found credible by the trier, 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 jury's verdict of guilty." (Internal quotation marks omitted.) *State* v. *Aloi*, 280 Conn. 824, 842, 911 A.2d 1086 (2007).

With that legal framework in mind, we turn to the facts that our Supreme Court, in its prior decision on the petitioner's direct appeal, determined that the jury reasonably could have found. "Desmond Hamilton, the [petitioner] and the victim . . . all knew each other and had participated in the sale of drugs together. On May 10, 1996, on Laurel Court, a dead-end street in Bridgeport, the [petitioner] and Hamilton had a discussion concerning both money that Hamilton owed the [petitioner] and a gun of the [petitioner's] that he had given to Hamilton approximately two weeks earlier. Also present during the conversation were the victim, and McWarren St. Julien. The [petitioner] also questioned the victim about the whereabouts of the gun. During the conversation, the [petitioner] became upset, began yelling and pulled out a Glock .40 handgun. Police officers subsequently came to the location of the conversation, but when they arrived the [petitioner] was no longer there. Later that night, Hamilton called the [petitioner] to attempt to explain that he did not know where the gun was located, and that he would never steal from the [petitioner]. The [petitioner] told Hamilton that he wanted him 'to get everything straight.'

"On the following day, May 11, 1996, Hamilton again called the [petitioner], who told Hamilton that he was going to meet Hamilton . . . and that the two men

would go together to find the victim to learn what had happened to the gun. Later that evening, the [petitioner] picked up Hamilton and they proceeded to 244 Olive Street in Bridgeport, where Hamilton [and] the victim . . . lived. At 244 Olive Street, the [petitioner], the victim, St. Julien [and] Hamilton . . . were on the front porch of the house. There the [petitioner] asked the victim about the whereabouts of his gun that had been the topic of the May 10 discussion. At or about the same time, Rodolphe St. Victor arrived at the house. The [petitioner] and St. Julien then left the porch as St. Victor forcibly pulled the victim off the porch. As the [petitioner] and St. Julien proceeded to enter a blue Oldsmobile parked in the driveway of the house, St. Victor grabbed the victim by the sleeve and said 'Come on. [The petitioner] wants to talk to you.' St. Victor then forced the victim into the Oldsmobile, which the [petitioner] then drove away. . . .[14]

"Later that evening, the [petitioner], St. Julien and St. Victor returned to 244 Olive Street in the blue Oldsmobile. The police arrived shortly thereafter and arrested the three occupants of the vehicle and recovered a gun from it.[15] The [petitioner], St. Julien and St. Victor then were taken to the Bridgeport police station. . . . St. Victor directed the police to Suggetts Lane, Bridgeport, where the victim was found, conscious but unable to speak, with a gunshot wound to the back of his neck. The police summoned medical personnel, who took the victim to Bridgeport Hospital, where he died.

[14] After leaving 244 Olive Street, the petitioner picked up Johnson at [Waldbaum's] Market by James Street and "went for a ride by Stratford Avenue . . . ." At some point, the petitioner stopped the vehicle and the victim and Johnson exited and "talk[ed] for a while . . . ." A single gunshot rang out and Johnson reentered the vehicle holding a "little mini uzzi."

[15] When the blue Oldsmobile returned to 244 Olive Street, Johnson immediately "jumped out of the car and went into the house." Johnson subsequently exited the house through the back door and was not apprehended by Bridgeport police at that time.

Tests conducted on the gun recovered from the car revealed that the bullet that killed the victim had been fired from it. The murder weapon was a Mac-10 automatic pistol modified with a shell catcher to retain spent bullet casings and a handle to prevent shaking when the gun was fired rapidly. This weapon belonged to the [petitioner], and he often carried it with him." (Footnotes added.) *State* v. *Cator*, supra, 256 Conn. 789–91. With the foregoing facts and legal principles in mind, we now turn to the merits of the petitioner's claims.

1

We first address the petitioner's claim that "appellate counsel [rendered deficient performance] when she failed to appeal the murder and conspiracy to commit murder charges being submitted to the jury and the insufficient evidence to sustain [those convictions]." Specifically, he contends that the state failed to prove the element of intent required for those convictions. The crux of the petitioner's argument is that his convictions for murder as an accessory and conspiracy to commit murder cannot stand because they are logically inconsistent with the trial court's granting his motion for a judgment of acquittal with respect to the capital felony charge.[16] The petitioner further argues that

[16] As the habeas court correctly stated in its memorandum of decision: "[T]he critical issue was not whether [the court's] denial of the motion [for a judgment of acquittal] as to most counts was inconsistent with [the court's] granting of the motion as to capital felony murder, but rather whether [the court] correctly determined that there existed sufficient evidence to support the other charges, despite the fact that the petitioner was not the shooter himself." (Emphasis omitted.)

The trial court's granting of the petitioner's motion for a judgment of acquittal with respect to the capital felony charge does not implicate our analysis as to the sufficiency of the evidence underlying the petitioner's convictions for murder and conspiracy to commit murder.

"Practice Book §§ 42-40, 42-41 and 42-42 . . . govern motions for judgments of acquittal. Those provisions provide, among other things, that, '[a]fter the close of the prosecution's case in chief or at the close of all the evidence, upon motion of the defendant or upon its own motion, the judicial authority shall order the entry of a judgment of acquittal as to any principal

"[a]ppellate counsel's failure to pursue this claim on appeal was not based on reasonable strategy, but on an ignorance of the applicable principles of law and a misreading [of] the trial court's decision." In response, the respondent contends that despite appellate counsel's "misperception of the law regarding capital felony, she did not perform deficiently on this ground given its underlying lack of merit." We agree with the respondent and, accordingly, conclude that because there was sufficient evidence adduced at trial to prove that the petitioner was guilty of murder as an accessory and conspiracy to commit murder, appellate counsel acted reasonably by not raising an insufficiency claim in the petitioner's direct criminal appeal.

The following legal principles are necessary to our resolution of these claims. To establish the petitioner's guilt with respect to the offense of murder as an accessory under §§ 53a-54a and 53a-8 (a), the state was required to prove that: (1) a murder was committed; see footnote 11 of this opinion; (2) the petitioner had the intent to cause the death of the victim; see, e.g., *State* v. *Otto*, 305 Conn. 51, 66–67, 43 A.3d 629 (2012); and (3) the petitioner "solicit[ed], request[ed], command[ed], importune[ed] or intentionally aid[ed]" in the

offense charged . . . for which the evidence would not reasonably permit a finding of guilty.' . . . Practice Book § 42-40. Although . . . that language means that the trial court is obliged to grant a motion for a judgment of acquittal should a proper circumstance present itself, the rule sheds no light on how this court is required to review the sufficiency of the evidence following the trial court's denial of such a motion and a jury's verdict of guilty. There undoubtedly will be situations in which reasonable minds could differ regarding whether the particular facts at the close of the state's case could support a verdict of guilty, but once a case is submitted to a jury, however erroneously, and the jury returns a verdict of guilty, review of the evidence ought to be on the basis of that evidence that was before the jury. . . . After all, on an appeal claiming insufficiency of the evidence following a jury's verdict of guilty, *it is the propriety of the jury's verdict that we are reviewing, not the propriety of the trial court's submission of the case to the jury*." (Citation omitted; emphasis added and omitted; footnotes omitted.) *State* v. *Perkins*, 271 Conn. 218, 239–41, 856 A.2d 917 (2004).

commission of the murder. General Statutes § 53a-8 (a). "[A] conviction under § 53a-8 requires [the state to prove the petitioner's] dual intent, [first], that the accessory have the intent to aid the principal and [second] that in so aiding he intend to commit the offense with which he is charged." (Internal quotation marks omitted.) *State* v. *Danforth*, 315 Conn. 518, 529, 108 A.3d 1060 (2015).

The crime of conspiracy is codified at § 53a-48.[17] To establish the petitioner's guilt with respect to this offense, "the state must show that there was an agreement between two or more persons to engage in conduct constituting a crime and that the agreement was followed by an overt act in furtherance of the conspiracy . . . . The state must also show intent on the part of the [petitioner] that conduct constituting a crime be performed. . . . The existence of a formal agreement between the parties need not be proved; it is sufficient to show that they are knowingly engaged in a mutual plan to do a forbidden act. . . .

"Because of the secret nature of conspiracies, a conviction usually is based on circumstantial evidence. . . . Consequently, it is not necessary to establish that the [petitioner] and his coconspirators signed papers, shook hands, or uttered the words we have an agreement. . . . [T]he requisite agreement or confederation may be inferred from proof of the separate acts of the individuals accused as coconspirators and from the circumstances surrounding the commission of these acts." (Citations omitted; internal quotation marks omitted.) *State* v. *Taft*, 306 Conn. 749, 756–57, 51 A.3d 988 (2012); see also *State* v. *Taylor*, 177 Conn. App. 18,

[17] General Statutes § 53a-48 provides in relevant part: "(a) A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy. . . ."

31–32, 171 A.3d 1061 (2017), cert. denied, 327 Conn. 998, 176 A.3d 555 (2018).

The record indicates that the jury reasonably could have found that: (1) The petitioner was angered by the disappearance of a gun that he had lent to Hamilton; (2) St. Victor forced the victim into the petitioner's vehicle, which the petitioner then drove away; (3) in a sworn statement to Bridgeport police, the petitioner admitted to picking up Johnson after leaving the victim's residence; (4) the petitioner further stated that "[they] went for a ride . . . and [they] got to some street and someone said stop. When [he] stopped . . . [the victim and Johnson] got out"; (5) the petitioner heard one gunshot and Johnson got back into the vehicle holding a "little mini uzzi"; (6) the petitioner then returned to the victim's residence where he, St. Julien and St. Victor were apprehended by police; (7) Johnson exited the petitioner's vehicle and entered the residence; and (8) ballistics testing revealed that the victim was fatally shot in the back of the neck with the petitioner's Mac-10, which was recovered from the vehicle.

Viewing the evidence in the light most favorable to sustaining the verdict, we conclude that there was sufficient evidence to prove that the petitioner was guilty of murder as an accessory and conspiracy to commit murder. Accordingly, the habeas court properly denied this claim because the petitioner failed to demonstrate that his appellate counsel rendered deficient performance by failing to challenge the sufficiency of the evidence supporting these convictions.

2

We next address the petitioner's claim that appellate counsel rendered deficient performance by failing to raise a claim of insufficient evidence with respect to the charge of felony murder. Specifically, the petitioner

argues that the evidence adduced at trial failed to establish that Johnson, the victim's alleged shooter, was a participant in the kidnapping of the victim, or shot the victim in furtherance of the kidnapping. The respondent, in turn, argues that, "[v]iewing the evidence in the manner most supportive of the jury's verdict . . . the jury may reasonably have found a relationship between the ongoing abduction of the victim and the ultimate homicide beyond that of mere causation." We agree with the respondent.

The crime of felony murder is codified at § 53a-54c.[18] "In order to obtain a conviction for felony murder the state must prove, beyond a reasonable doubt, all the elements of the statutorily designated underlying felony [in this case, kidnapping in the second degree] and in addition, that a death was caused in the course of and in furtherance of that felony. . . . There is no requirement that the state prove an intent to cause death." (Internal quotation marks omitted.) *Ramos* v. *Commissioner of Correction*, 172 Conn. App. 282, 318, 159 A.3d 1174, cert. denied, 327 Conn. 904, 170 A.3d 1 (2017). "Kidnapping is a continuing crime. . . . Because kidnapping involves interfering with the victim's liberty, it continues until that liberty is restored." (Citations omitted.) *State* v. *Gomez*, 225 Conn. 347, 351, 622 A.2d 1014 (1993); see also *State* v. *Crenshaw*, 313 Conn. 69, 93, 95 A.3d 1113 (2014).

At the habeas trial, appellate counsel testified that she did not raise this issue on appeal because there was sufficient evidence to prove the petitioner's guilt with respect to felony murder. The petitioner's experts

[18] General Statutes § 53a-54c provides in relevant part: "A person is guilty of murder, when acting either alone or with one or more persons, such person commits or attempts to commit . . . kidnapping . . . and, in the course of and in furtherance of such crime or of flight therefrom, such person, or another participant, if any, causes the death of a person other than one of the participants . . . ."

agreed with that position. Pattis opined that "[he did] not see the significance of the Johnson issue because . . . the [victim] together with the [petitioner] and some colleagues got in a car. At some point that . . . car picked up [Johnson]. If [Johnson] wasn't present when the kidnapping began, [it was] not at all apparent to [him] that [Johnson] wasn't recruited or didn't come on the scene as that continuing course of conduct evolved and from the standpoint of [the petitioner, he did not] see the benefit to him of Johnson being a late arrival in an ongoing course of conduct." Similarly, Taylor opined that "[he] did not believe that . . . a reasonable appellate attorney would be required to raise [this] issue or risk being found to have provided ineffective assistance."

Viewing the evidence in the light most favorable to sustaining the verdict, we agree with the habeas court's conclusion that "[t]he jury could logically and reasonably infer that, during the victim's abduction by the petitioner, the petitioner picked up [Johnson] and supplied him with the firearm used to kill the victim." We therefore conclude that the habeas court properly denied this claim because the petitioner failed to demonstrate that his appellate counsel rendered deficient performance.

III

Last, we address the petitioner's claim that his due process rights were violated when the trial court erroneously instructed the jury with respect to intent. Specifically, the petitioner claims that the habeas court improperly concluded that this claim was procedurally defaulted. In response, the respondent argues that the petitioner "failed to bear his burden of proving both good cause and actual prejudice to excuse his procedural default of this claim." We agree with the respondent.

The following legal principles are necessary to our resolution of this claim. "Our review of a determination of the application of [the procedural default doctrine] involves a question of law over which our review is plenary. . . . Under the procedural default doctrine, a claimant may not raise, in a collateral proceeding, claims that he could have made at trial or on direct appeal in the original proceeding, unless he can prove that his default by failure to do so should be excused. . . .

"The cause and prejudice standard [of reviewability] is designed to prevent full review of issues in habeas corpus proceedings that counsel did not raise at trial or on appeal for reasons of tactics, [inadvertence] or ignorance . . . . In order to satisfy this standard, the [habeas] petitioner must demonstrate *both* good cause for failing to raise a claim at trial or on direct appeal and actual prejudice from the underlying impropriety. . . . [T]he existence of cause for a procedural default must ordinarily turn on whether the [petitioner] can show that some objective factor external to the defense impeded counsel's efforts to comply with the [s]tate's procedural rule. . . .

"With respect to the actual prejudice prong, [t]he habeas petitioner must show not merely that the errors at . . . trial created the possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions. . . . Such a showing of pervasive actual prejudice can hardly be thought to constitute anything other than a showing that the prisoner was denied fundamental fairness at trial. . . . [A] habeas petitioner's showing of ineffective assistance of counsel demonstrates such actual prejudice." (Citations omitted; emphasis added and omitted; internal quotation marks omitted.) *Arroyo* v. *Commissioner of Correction*, 172 Conn. App. 442, 461–62, 160 A.3d 425, cert. denied, 326

Conn. 921, 169 A.3d 235 (2017); see generally *Jackson* v. *Commissioner of Correction*, 227 Conn. 124, 629 A.2d 413 (1993). "Cause and prejudice must be established conjunctively. . . . If the petitioner fails to demonstrate either one, a trial court will not review the merits of his habeas claim." (Internal quotation marks omitted.) *Sinchak* v. *Commissioner of Correction*, 173 Conn. App. 352, 366, 163 A.3d 1208, cert. denied, 327 Conn. 901, 169 A.3d 796 (2017).

As we previously concluded in part II A of this opinion, the habeas court properly determined that the petitioner failed to establish that his appellate counsel rendered ineffective assistance by not raising the instructional impropriety claim on direct appeal. The petitioner, accordingly, has failed to satisfy the good cause prong under the curative standard because, as we have determined, the claim was not raised pursuant to a reasonable strategy. We therefore conclude that the habeas court properly determined that the petitioner's due process claim was subject to procedural default and that the petitioner failed to demonstrate both good cause and actual prejudice to excuse his procedural default of this claim.

For the reasons set forth previously, we conclude that the petitioner failed to establish that the issues raised on appeal are debatable among jurists of reason, that a court could resolve the issues in a different manner or that the questions raised deserve encouragement to proceed further. Accordingly, the habeas court did not abuse its discretion in denying the petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

SANDHYA DESMOND *v.* YALE-NEW HAVEN HOSPITAL, INC., ET AL.
(AC 39157)

Sheldon, Keller and Bright, Js.

Syllabus

The plaintiff sought to recover damages from her former employer for, inter alia, statutory theft in connection with the defendants' actions during proceedings before the Workers' Compensation Commissioner concerning a work related injury sustained by the plaintiff. The trial court granted the defendant's motion to strike the plaintiff's amended complaint and determined that it lacked jurisdiction over her claim due to the exclusivity provision of the Workers' Compensation Act (§ 31-275 et seq.). Thereafter, the plaintiff filed a substitute complaint, and the defendants filed a request to revise the substitute complaint, claiming that the allegations therein were substantially similar to those contained in the plaintiff's previously stricken complaint and that the allegations added to the substitute complaint failed to cure the deficiencies in the previous complaint. The trial court overruled the plaintiff's objections to the defendants' request to revise and rendered judgment dismissing the substitute complaint. The trial court also denied the plaintiff's request for leave to amend her substitute complaint to add a claim of retaliatory discrimination pursuant to statute (§ 31-290a). On the plaintiff's appeal to this court, *held*:

1. This court declined to review the plaintiff's claim that the trial court erred in determining that the counts alleged in her substitute complaint were barred by the exclusivity provision of the act, the plaintiff having failed to brief the claim adequately; because the plaintiff did not appeal from the trial court's determination, made when it struck her amended complaint, that the plaintiff's claims were barred by the exclusivity provision of the act, for the plaintiff to avoid waiving her right to appeal from that determination, she was first required to establish that the trial court improperly determined that her substitute complaint was not materially different from the stricken complaint and that she had failed to cure the deficiencies found by the trial court in striking the amended complaint, which she failed to do, as the plaintiff's brief to this court failed to address those findings of the trial court and was devoid of any specific discussion or legal analysis as to which allegations set forth in the forty-one additional pages filed as part of the substitute complaint cured the deficiencies that led the trial court to strike her amended complaint.
2. The trial court having improperly considered the wrong complaint when it denied the plaintiff's request for leave to amend her substitute complaint, further proceedings on the plaintiff's request for leave to amend were required; it was apparent from the trial court's decision denying the

plaintiff's motion to reargue that, when denying the request for leave to amend, the court considered the plaintiff's ten count substitute complaint and not the eleven count proposed amended complaint that accompanied her request for leave to amend, and, thus, the court failed to consider the additional count that purported to plead a cause of action for retaliatory discrimination pursuant to § 31-290a when ruling on that request.

Argued January 30—officially released April 17, 2018

Procedural History

Action to recover damages for, inter alia, statutory theft, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Nazzaro*, *J.*, granted the defendants' motion to strike; thereafter, the court denied the plaintiff's request for leave to amend her substitute complaint; subsequently, the court denied the plaintiff's motion for reargument and reconsideration; thereafter, the court, *Ecker*, *J.*, overruled the plaintiff's objections to the defendants' request to revise her substitute complaint, granted the defendants' motion for judgment, and rendered judgment of dismissal, from which the plaintiff appealed to this court. *Reversed in part; further proceedings.*

Eric M. Desmond, for the appellant (plaintiff).

Phyllis M. Pari, with whom was *Angelica L. Mack*, for the appellees (defendants).

Opinion

SHELDON, J. The plaintiff, Sandhya Desmond, appeals from the judgment of the trial court dismissing her complaint against the defendants, Yale-New Haven Hospital, Inc. (hospital), and Yale-New Haven Health Services, Inc., alleging statutory theft, common-law fraud, violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., breach of contract, and statutory negligence. The plaintiff claims that the court improperly (1) determined that it lacked jurisdiction over her claim for statutory theft

because the exclusivity provision of the Workers' Compensation Act (act), General Statutes § 31-275 et seq., barred her from bringing such a claim in the Superior Court, and (2) denied her request for leave to amend her complaint to add a claim for retaliatory discrimination pursuant to General Statutes § 31-290a. We affirm in part and reverse in part the judgment of the trial court.[1]

This court set forth the following undisputed factual and procedural history in an earlier appeal brought by this plaintiff, *Desmond* v. *Yale-New Haven Hospital, Inc.*, 138 Conn. App. 93, 50 A.3d 910 (*Desmond I*), cert. denied, 307 Conn. 942, 58 A.3d 258 (2012). "At all times relevant to this appeal, the plaintiff was an employee of the hospital. On December 30, 2004, she was injured in the course of her employment. According to the plaintiff, she suffered a spill-related fall while at work and subsequently was diagnosed with bilateral, acute post-traumatic carpal tunnel injuries. Her physicians have advised her that, absent medical treatment, she permanently will be unable to use her hands.

"Subsequently, she filed a workers' compensation claim with regard to her injury, and the defendants accepted the claim. On March 6, 2008, she filed a federal action in United States District Court for the District of Connecticut, in which she alleged various claims under state law and the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. On March 23, 2009, the District Court granted the defendants' motion to dismiss as to the plaintiff's state law claims, allowing the action to proceed only on her claim under the Americans with Disabilities Act.

[1] The plaintiff also claims that the trial court violated her right to equal protection when it ruled adversely to her and ignored binding precedent in so doing. Accepting the plaintiff's rationale, every claim that a trial court misapplied the law would be transformed into an equal protection claim. That clearly is not the law.

"On May 20, 2010, the plaintiff filed in the Superior Court the operative complaint in th[is] . . . case. The complaint contained ten counts, alleging against each of the defendants workers' compensation fraud, statutory negligence, breach of contract, unfair and deceptive acts and practices in violation of CUTPA and delay in the delivery of benefits under the act in violation of the plaintiff's state constitutional right to due process. The complaint alleged that the defendants had made various filings with the [W]orkers' [C]ompensation [C]ommission (commission) in a bad faith and fraudulent attempt to delay treatment. The complaint alleged that these bad faith attempts to delay treatment caused the plaintiff's condition to worsen, as she did not receive necessary treatment.

"On June 7, 2010, the defendants filed a motion to dismiss, alleging that the exclusivity provision of the act barred the action and that the plaintiff had failed to exhaust her administrative remedies under the act. The court granted the defendants' motion to dismiss on December 16, 2010. Relying on our Supreme Court's decision in *DeOliveira* v. *Liberty Mutual Ins. Co.*, 273 Conn. 487, 870 A.2d 1066 (2005), the court held that the plaintiff's claims did not allege conduct that was sufficiently egregious to remove the claims from the exclusive jurisdiction of the commission. The plaintiff filed . . . [an] appeal on January 20, 2011." *Desmond I*, supra, 138 Conn. App. 95–96.

On appeal in *Desmond I*, "the plaintiff claim[ed] that the court improperly held that it lacked jurisdiction over her claims because the exclusivity provision of the act barred her from bringing an action in the Superior Court. The plaintiff argue[d] that the court erroneously determined that its analysis was controlled by *DeOliveira* . . . and, instead, maintain[ed] that General Statutes § 31-290c establishes a civil cause of action over which the commission lacks jurisdiction. In the

alternative, the plaintiff argue[d] that, if *DeOliveira* d[id] apply and actions under § 31-290c ordinarily must be brought before the commission, the [trial] court improperly held that the present case did not involve egregious conduct that warranted an exception from the general rule of exclusivity." Id., 96–97.

This court rejected both of the plaintiff's arguments, holding that it was "clear that the plaintiff's claimed injuries allegedly caused by the defendants' bad faith delays in medical treatment, arose out of and in the course of the workers' compensation claims process" and thus that those injuries "fall within the jurisdiction of the commission." Id., 102. This court further held that even if the plaintiff's allegations were afforded "their most damaging interpretation, the defendants' conduct was not on the level of egregious behavior that . . . could provide an exception to the exclusivity provision." Id., 103. Accordingly, this court affirmed the judgment of the trial court dismissing the plaintiff's action in *Desmond I*.

On October 3, 2013, the plaintiff filed her amended complaint in the present action, wherein she again set forth ten counts against the defendants, claiming statutory theft, common-law fraud, violation of CUTPA, breach of contract and statutory negligence. The defendants moved to strike all of the plaintiff's claims on the ground, inter alia, that they are barred by the exclusivity provision of the act, and thus that the trial court had no jurisdiction over them. The plaintiff filed an objection, arguing, inter alia, that her claims were not barred by the exclusivity of the act.[2]

[2] The defendants also argued that the plaintiff's claims should be stricken because the accidental failure of suit statute, General Statutes § 52-592, did not apply to them and they were barred by the doctrine of res judicata. The plaintiff responded to all of the defendants' arguments in her objection to the motion to strike. Because the court determined that the plaintiff's claims were barred by the exclusivity of the act, the court did not reach the parties' additional arguments.

On August 25, 2014, the court, *Nazzaro*, *J.*, heard oral argument on the defendants' motion and the plaintiff's objection thereto. By way of memorandum of decision filed on November 26, 2014, the court granted the defendants' motion to strike the plaintiff's entire complaint on the ground that all of the plaintiff's claims fell within the exclusive jurisdiction of the commission. The court reasoned that the alleged misconduct of the defendants, which the court found to be "identical to that alleged in *Desmond* [*I*] . . . but for the addition of some conduct by the defendants postdating the prior suit," was not so egregious to invoke the exception to exclusivity.

The plaintiff did not appeal from the trial court's ruling striking her complaint. Rather, on December 11, 2014, pursuant to Practice Book § 10-44, the plaintiff, in her view, as advanced before this court, filed a substitute complaint "in an effort to plead additional facts and to amplify the allegations such that viability of the . . . [General Statutes] § 52-564 [statutory theft] claim (and associated claims) would be sufficient to allow the claim to proceed to the merits."

On February 5, 2015, the plaintiff filed a request for leave to amend her substitute complaint, pursuant to Practice Book § 10-60, to incorporate a claim for retaliatory discrimination pursuant to General Statutes § 31-290a. The defendants filed an objection to the plaintiff's request for leave to amend on two grounds. First, the defendants argued that the proposed addition of a § 31-290a claim was untimely and prejudicial. Second, the defendants argued that the proposed addition of a § 31-290a claim was futile because she already had asserted such a claim to the commission, and thus she was barred from bringing it again in an action before the court. On April 23, 2015, the court, *Nazzaro*, *J.*, denied the plaintiff's request for leave to amend, and sustained the defendants' objection thereto, stating: "The amendment

is improper. See court's previous ruling on [the defendants'] motion to strike."

On May 4, 2015, the plaintiff filed a motion for reargument and reconsideration.[3] The court heard reargument on June 22, 2015, and issued a memorandum of decision on October 7, 2015, denying reconsideration of its denial of the plaintiff's request for leave to amend.

On May 7, 2015, the defendants filed a request to revise the plaintiff's substitute complaint, which she had filed on December 11, 2014. The defendants sought to have the plaintiff's entire substitute complaint deleted because the allegations of the substitute complaint were substantially similar to those contained in the plaintiff's previously stricken complaint and the allegations added to the substitute complaint failed to cure the deficiencies of the earlier complaint.

On June 8, 2015, the plaintiff filed two separate objections to the defendants' request to revise. In one of her objections, she argued that the court "simply lacked the authority" to strike her § 52-564 claim on the basis of exclusivity because the allegations set forth in her December 11, 2014 complaint were sufficiently egregious that the defendant's alleged conduct that "bears no rational relation to a legitimate challenge to the plaintiff's workers' compensation claim; is not activity intrinsic to the workers' compensation claims process; and is conduct that is separate and apart from nonpayment of benefits." The plaintiff further argued: "[B]y the factual allegations pled, it should be understood, to the extent exclusivity might apply to certain conduct, that the defendants either (a) intended both the acts alleged and the injurious consequences of those acts or (b) intended the acts alleged and knew that the injury/injuries sustained was/were substantially certain to

[3] The plaintiff also filed a request for articulation, which the court denied as improperly filed.

occur. The defendants' conduct that falls into either of these categories means that the plaintiff has escaped the exclusivity of the act." (Emphasis omitted; footnote omitted; internal quotation marks omitted.) The plaintiff also argued that the defendants were not entitled to exclusivity because they failed to comply with "the self-insurance requirements upon their application for self-insured status."

In her other objection to the defendants' request to revise, the plaintiff argued that all of her claims arose from statutory theft under § 52-564, and, on that basis, they were not subject to exclusivity. The plaintiff also argued that she had added factual allegations to her complaint to cure the deficiencies relied upon by the trial court in previously striking her complaint. The plaintiff argued that the conduct that she alleged was not "intrinsic to the claims process," as found by the court when striking her complaint. In so doing, she set forth several instances of said conduct, featuring additional allegations against the defendants that she claims to have been so egregious as to remove her claims from exclusivity. As examples of such allegations, the plaintiff cited to allegations that the defendants had: aggressively surveilled upon her and members of her family; fabricated various allegations to the commission in an attempt to have her medical treatment terminated; fabricated information to her various medical providers; and revoked authorization for medical treatment and medication based upon false pretenses. In sum, the plaintiff argued: "As to allegations made pursuant to . . . § 52-564, exclusivity is inapplicable. As to allegations premised upon conduct that is violative of . . . § 52-564, they are beyond the protection of exclusivity. As to allegations that may be within the exclusivity provision of the act, the conduct alleged in the December 11, 2014 complaint—both new

and prior allegations and rationale—is beyond the exclusivity of the . . . act."

On March 4, 2016, the court, *Ecker*, *J.*, issued an order overruling the plaintiff's objections to the defendants' request to revise and rendered judgment dismissing her complaint. In so doing, the court held, inter alia: "[I]t is the court's opinion that the substitute complaint is not, in substance, materially different from the . . . stricken . . . complaint. In other words, the new allegations in the substitute complaint do not cure the legal deficiencies that caused Judge Nazzaro to strike the [amended] complaint. The substitute complaint contains many more pages of allegations, but those allegations, in this court's view, do not change the nature or character of the underlying claims in a manner that would alter the outcome of Judge Nazzaro's memorandum of decision striking the [amended] complaint." The court also explained that it was disinclined to revisit Judge Nazzaro's decision striking the plaintiff's complaint, but that, even if it did so, it would agree that the plaintiff's allegations could not overcome the exclusivity of the act. The plaintiff subsequently sought reargument, which the court denied. This appeal followed.

On appeal, the plaintiff claims that the trial court erred in determining that her claims were barred by the exclusivity of the act. She also claims that the trial court erred in denying her request for leave to amend her complaint to add a retaliation claim pursuant to § 31-290a. We address each of the plaintiff's claims in turn.

I

The plaintiff first claims that the court erred in determining that her claims were barred by the exclusivity of the act. "[A]fter a court has granted a motion to strike, [a party] may either amend his pleading [pursuant to Practice Book § 10-44] or, on the rendering of

judgment, file an appeal. . . . The choices are mutually exclusive [as the] filing of an amended pleading operates as a waiver of the right to claim that there was error in the [granting] of the [motion to strike] the original pleading. . . . Stated another way: When an amended pleading is filed, it operates as a waiver of the original pleading. The original pleading drops out of the case and although it remains in the file, it cannot serve as the basis for any future judgment, and previous rulings on the original pleading cannot be made the subject of appeal. . . .

"If the plaintiff elects to replead following the granting of a motion to strike, the defendant may take advantage of this waiver rule by challenging the amended complaint as not materially different than the [stricken] . . . pleading that the court had determined to be legally insufficient. That is, the issue [on appeal becomes] whether the court properly determined that the [plaintiff] had failed to remedy the pleading deficiencies that gave rise to the granting of the [motion] to strike or, in the alternative, set forth an entirely new cause of action. It is proper for a court to dispose of the substance of a complaint merely repetitive of one to which a demurrer had earlier been sustained. . . . Furthermore, if the allegations in a complaint filed subsequent to one that has been stricken are not materially different than those in the earlier, stricken complaint, the party bringing the subsequent complaint cannot be heard to appeal from the action of the trial court striking the subsequent complaint. . . . The law in this area requires the court to compare the two complaints to determine whether the amended complaint advanced the pleadings by remedying the defects identified by the trial court in granting the earlier motion to strike." (Citations omitted; internal quotation marks omitted.) *Lund* v. *Milford Hospital, Inc.*, 326 Conn. 846, 850–52, 168 A.3d 479 (2017). "Factual revisions or additions are

necessary; mere rewording that basically restate[s] the prior allegations is insufficient to render a complaint new following the granting of a previous motion to strike." (Internal quotation marks omitted.) Id., 852–53. "[A]ppellate review of this comparative process is plenary because it considers the trial court's interpretation of the pleadings." Id., 851 n.5.

The plaintiff argues that the trial court erred in determining that her claims were barred by the exclusivity of the workers' compensation act because claims brought pursuant to § 52-564 are not within the exclusive jurisdiction of the commission. The determination that her claims were so barred was made by the court when it struck her amended complaint. The plaintiff did not file an appeal from that determination, but, instead, filed a substitute complaint pursuant to Practice Book § 10-44 in an attempt to cure the deficiencies found by the trial court in striking her amended complaint. The trial court determined, however, that her substitute complaint did not set forth allegations that cured those deficiencies, and that it was not materially different from her previously stricken amended complaint. Thus, before we can consider the plaintiff's claim that the court erred in determining that her claims were barred by the exclusivity of the act, the plaintiff must establish that the trial court erred in concluding that her substitute complaint was not materially different from her amended complaint, and thus that she had failed to cure the deficiencies found by the trial court in striking the amended complaint and, as a result, had waived her right to appeal from the determination that her claims were barred by the exclusivity of the act.

The plaintiff's brief to this court fails to address the trial court's determination that her substitute complaint was not materially different from her previously stricken amended complaint, and thus that the allegations set forth in the substitute complaint did not cure

the legal deficiencies that led to the previous striking of her amended complaint. In her reply brief, she argues that this court must undertake a de novo review of the two complaints to determine whether the "trier of fact . . . could interpret the additional [thirty-five] pages as including allegations sufficient to establish egregiousness and intent." Those additional pages, actually forty-one in total, contain numerous legal citations, legal arguments and legal conclusions, plus several factual allegations that are merely duplicative of the allegations set forth in her amended complaint. The plaintiff's argument concerning the additional pages added to her substitute complaint is devoid of any specific discussion as to which allegations set forth in those pages cured the deficiencies that led the trial court to strike her amended complaint. Similarly, the plaintiff has provided no legal authority or analysis in support of such an argument. The plaintiff nevertheless argues that this court will find that the defendants' argument that her substitute complaint is not materially different from her previously stricken amended complaint is without merit based upon our own de novo comparison of the two pleadings.

"We repeatedly have stated that [w]e 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. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited." (Citations omitted; internal quotation marks omitted.) *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016). "Writing a compelling legal argument is a

painstaking, time-consuming task. Good legal analysis is premised on knowing the controlling rules of law. An effective appellate advocate must apply the rules of law to the facts at hand by applying or distinguishing existing legal precedent. . . . To write a good brief and to comply with the rules of practice, counsel must state the rules of law, [and] provide citations to legal authority that support the claims made . . . .'' (Internal quotation marks omitted.) Id., 729.

Because the plaintiff failed to argue in her initial brief to this court—and only did so cursorily in her reply brief—that the trial court erred in concluding that she failed, in her substitute complaint, to cure the deficiencies found by the court in her previously stricken amended complaint, we conclude that the plaintiff's claim is inadequately briefed, and thus we decline to review that claim.

II

The plaintiff also claims that the trial court erred in denying her request for leave to amend her substitute complaint, pursuant to Practice Book § 10-60, in order to add a claim for retaliatory discrimination under § 31-290a. We agree.[4]

''Whether to allow a party to amend the pleadings under Practice Book § 10-60 (a) rests within the discretion of the trial court. . . . Factors to be considered in passing on a motion to amend are the length of the delay, fairness to the opposing parties and the negligence, if any, of the party offering the amendment. . . .

[4] The defendants argue that the plaintiff's claim is moot because she has filed two other § 31-290a actions in the Superior Court. Specifically, the defendants argue that those other actions ''provide the plaintiff with an opportunity to obtain the same legal redress that would be obtained in this case if the [trial] court's ruling denying the motion to amend were overturned here.'' That is not the test for mootness. Because we can afford the plaintiff relief, as set forth herein, we disagree with the defendants.

Whether to allow an amendment is a matter left to the sound discretion of the trial court. This court will not disturb a trial court's ruling on a proposed amendment unless there has been a clear abuse of that discretion." (Citations omitted; internal quotation marks omitted.) *Martinez* v. *New Haven*, 328 Conn. 1, 15 n.13, A.3d (2018).

The plaintiff filed a request for leave to amend her substitute complaint on February 5, 2015, to which the defendants filed an objection. The trial court, *Nazzaro*, *J.*, denied the plaintiff's request and sustained the defendants' objection thereto. In so ruling, the court stated: "The amendment is improper. See court's previous ruling on [the defendants'] motion to strike." The plaintiff thereafter filed a motion to reargue and for reconsideration, which the court also denied. In the latter ruling, the trial court explained its earlier ruling as follows: "The [proposed] amended complaint contains the same ten counts [as the substitute complaint]. The [proposed] amended complaint also contains identical allegations concerning the plaintiff's retaliation complaint under § 31-290a. . . . The [proposed] amended complaint does not specifically raise a retaliation claim, but rather adds a forty-one page 'Preliminary Statement,' which contains numerous statements of law, discussions of legislative history, and a handful of factual allegations. The 'Preliminary Statement' was incorporated into each existing count." The court concluded that the proposed amended complaint did not address "substantive matters brought out in the court's earlier memorandum of decision granting the defendants' motion to strike" and the additional allegations set forth by the plaintiff, and its memorandum in support of the proposed amended complaint, "added nothing to the plaintiff's cause."

On appeal, the plaintiff claims, inter alia, that the trial court erred in denying her request for leave to amend because it considered the wrong proposed amended complaint in so ruling. We agree. The plaintiff's Febru-

ary 5, 2015, proposed amended complaint contained eleven counts, not ten counts, as recited by the trial court. The additional count, which was added as count one of the proposed amended complaint, purported[5] to plead a cause of action for retaliatory discrimination pursuant to § 31-290a. The proposed amended complaint also sought relief pursuant to § 31-290a, unlike the previously filed substitute complaint. It is apparent from the trial court's decision denying the plaintiff's motion to reargue, as set forth above, that the court considered the plaintiff's ten count substitute complaint, not the eleven count proposed amended complaint that accompanied her request for leave to amend, when ruling on that request. Because the trial court considered the wrong complaint when it denied the plaintiff's request for leave to amend, we cannot conclude that the court properly exercised its discretion in so ruling.

The judgment is reversed only as to the plaintiff's request for leave to amend her complaint to add a § 31-290a claim, and the case is remanded for further proceedings on that request and the defendants' objection thereto. The judgment is affirmed in all other respects.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ANGEL RIVERA
(AC 40233)

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

Syllabus

Convicted, after a jury trial, of capital felony and conspiracy to commit murder arising out of the shooting deaths of two victims, the defendant appealed. At trial, the trial court declined to admit into evidence certain statements that the defendant's coconspirator, M, had made in a telephone conversation with his girlfriend in the presence of police officers

[5] We make no judgment as to the legal sufficiency of that count.

following M's arrest on unrelated charges, during which M stated that he had shot both victims. Because M did not testify at trial, the defense sought to offer his statements through a police report. The trial court determined that the portion of a police report containing M's statements was not admissible. *Held* that the trial court did not abuse its discretion in declining to admit M's statements under the residual exception to the hearsay rule and concluding that the statements lacked the trustworthiness and reliability that are required for admission under that exception: that court properly noted that multiple levels of hearsay involved in M's statements undermined their reliability, as defense counsel sought to admit the statements through the testimony of one officer concerning what another officer wrote in a report about what he had overheard M say to his girlfriend during the phone call, and there was nothing in the record about the circumstances under which the police officers overheard the phone call; moreover, even if the exclusion of M's statements was improper, the defendant failed to demonstrate that any error was harmful, as M's statements, which were offered to demonstrate that the defendant did not commit the crime, did not expressly exclude the defendant as either an additional shooter or nonshooting participant in the crime, the evidence at trial strongly implicated the defendant as a participant and included eyewitness accounts and physical evidence, and, thus, the exclusion of M's statements did not substantially affect the verdict.

Argued January 8—officially released April 17, 2018

Procedural History

Substitute information charging the defendant with two counts of the crime of murder, and with the crimes of capital felony and conspiracy to commit murder, brought to the Superior Court in the judicial district of Hartford and tried to the jury before the court, *Dewey*, *J.*; verdict of guilty; thereafter, the court vacated and dismissed the murder counts; judgment of guilty of capital felony and conspiracy to commit murder, from which the defendant appealed. *Affirmed.*

Jennifer B. Smith, for the appellant (defendant).

Nancy L. Walker, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *John F. Fahey*, senior assistant state's attorney, for the appellee (state).

Opinion

DEVLIN, J. The defendant, Angel Rivera, appeals[1] from the judgment of conviction, rendered following a jury trial, of capital felony, in violation of General Statutes (Rev. to 2011) §§ 53a-54b (7) and 53a-8 (a), and conspiracy to commit murder, in violation of General Statutes (Rev. to 2011) §§ 53a-54a (a) and 53a-48 (a).[2] On appeal, the defendant claims that the trial court abused its discretion by declining to admit certain oral statements under the residual exception to the hearsay rule. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. At approximately 3 a.m. on January 1, 2011, Yolanda Diaz was out with some friends in Hartford. As she emerged from a limousine near Park Street, another car pulled up and the defendant and his friend, Jose Medina, also known as "Fat Boy," got out. The defendant asked Diaz if she knew where he could find Lionel Roldan, her former boyfriend. The defendant then slapped Diaz. Diaz noticed that the defendant's face was red, bloody and scratched, as if he had been in a fight. After the defendant slapped her, Diaz ran back to the limousine and called Roldan's mother because she was concerned that Roldan was in danger. Diaz knew that, during the previous two months, Roldan had been getting threatening phone calls from the defendant and "Fat Boy." She also knew that Roldan had a gun like a "cowboy's gun."

At some point between 3:30 and 4 a.m., Roldan and his cousin, Luis Rivera,[3] picked up Luis' wife, Carmen

[1] The defendant originally appealed to our Supreme Court pursuant to General Statutes § 51-199 (b) (3). Thereafter, our Supreme Court transferred the appeal to this court pursuant to § 51-199 (c) and Practice Book § 65-1.

[2] Hereinafter, all references to §§ 53a-54b and 53a-54a are to the 2011 revision of the statutes.

[3] Luis Rivera is not related to the defendant. To avoid confusion, we will refer to Luis Rivera as "Luis" in this opinion.

Pena, and her fourteen year old daughter, Irasema Sanchez, from the home of Pena's sister on Babcock Street in Hartford. Luis was driving his red Ford Expedition and Roldan was sitting in the front passenger seat. As Pena and Sanchez got into the Expedition, Sanchez noticed that Luis' hand was swollen. Luis explained that "he had a problem with the [defendant]."

Upon arrival at Pena's home on New Park Avenue in Hartford, a black Lexus automobile pulled up behind the Expedition. David Pabon previously had loaned his black Lexus automobile to the defendant. The defendant got out of the Lexus and walked toward the Expedition with a gun in his hand. When Sanchez alerted Luis that the defendant was approaching, Luis told Sanchez not to get out of the car. Pena told Luis to drive away. Luis then drove away with Roldan, Pena and Sanchez still in the Expedition. The defendant, driving the Lexus, followed the Expedition as it drove away. When they got to Francis Avenue, the defendant passed the Expedition and stopped. Luis then stopped as well. The defendant and Medina exited the Lexus and ran toward the Expedition, shooting at that vehicle.[4] Luis tried to move the Expedition but it became stuck in the snow. According to Pena, Luis had been hit at this point.

As the defendant and Medina approached the Expedition, Pena and Sanchez exited the Expedition and hid behind the driver's side back tire. When the defendant and Medina reached the passenger side of the Expedition, the defendant began beating Roldan and Medina

[4] Sanchez testified that she was not sure if the defendant had a gun at this time. In her statement to the police made on January 1, 2011, however, she stated that the defendant and Medina both had guns out and both started shooting right away, shooting six or seven times. Pena testified that the defendant was holding a gun when he approached the Expedition on New Park Avenue. The state stipulated, however, that Pena gave written statements to the police on January 1, 2011, and January 25, 2011, and said nothing in either statement about the defendant having a gun.

took Roldan's gun. Luis got out of the Expedition, walked a few steps and collapsed. Pena grabbed the defendant by the shoulders and asked him "why [he was] doing that." Medina pointed a gun at Pena's forehead and told Sanchez that if she "didn't take [her] mom to the other side of the truck he was going to shoot her right there." Pena then released the defendant and she and Sanchez ran to Luis.

The defendant and Medina left the scene of the shooting in the Lexus, but returned shortly thereafter and parked near the Expedition. They both pulled Roldan, who was almost dead, out of the Expedition and left him in the street. Medina then drove away in the Expedition and the defendant drove away in the Lexus.

At approximately 4:15 a.m. on January 1, 2011, Steven Barone, a Hartford police officer, responded to a report of a shooting on Francis Avenue. Upon arrival, he observed "two victims in the street, both suffering from apparent gunshot wounds." Barone called for medical personnel, who determined that Luis was dead. Roldan was transported to Hartford Hospital, where he died. The police recovered four nine millimeter shell casings and one fired bullet on Francis Avenue. No firearms were located at the scene. Once at the police station, Pena and Sanchez each gave statements. They also independently viewed photographic arrays and identified the defendant and Medina as the men who had attacked them on Francis Avenue. Prior to the night in question, Sanchez had known the defendant "in passing" for two and one-half years.

Later on January 1, 2011, Andrew Jacobson, a detective with the Major Crimes Division of the Hartford Police Department, learned that the Ford Expedition had been located in New Britain. He went to see the vehicle and observed that "[t]he front passenger window was damaged. It was pretty much missing. It looked

like it had been shattered. And there was a defect on the . . . outside of the front passenger door that is consistent with maybe a gunshot." Jacobson also saw some blood inside the vehicle and noticed a strong odor of gasoline. He arranged to have the vehicle towed to the police station while he secured a warrant to search the vehicle. The police recovered another nine millimeter shell casing on the floor of the Expedition below the driver's seat.

A few days later, police found the Lexus at the home of Alejandro Falcon, the defendant's friend. Falcon had found a bullet fragment in the rear passenger door, which he gave to Jacobson. The Lexus was swabbed for DNA. The results of subsequent DNA testing were consistent with the defendant's being the source of the DNA found on the steering wheel. The defendant also could not be eliminated as a contributor to the DNA mixtures found on both the driver's interior door handle and the gearshift of the Lexus.[5]

Medina was arrested later on January 1, 2011, on unrelated charges following a car chase. By January 17, 2011, the police had secured an arrest warrant for the defendant, who turned himself in to the police. He gave a statement to Jacobson in which he denied involvement in the shooting. According to the statement, the defendant went to a club in Hartford at approximately 1 a.m. on January 1, 2011. At approximately 3 to 3:30 a.m., after he had left the club and was outside, he got into a fight with "a guy I know as Luis or Tiko." The defendant stated that, after the fight, he returned to his mother's house, where he stayed until 7 or 8 a.m. He stated that he "first heard about Tiko and another guy

[5] Luis, Roldan and Medina were eliminated as contributors to the DNA mixture collected from the driver's interior door handle. Luis and Medina were eliminated as contributors to the DNA mixture found on the gearshift. The defendant and Roldan could not be eliminated as contributors to the DNA mixture collected from the gearshift.

being shot and killed on the news" and that "a guy I know as Fat Boy got in a car chase and was later arrested for . . . Tiko's murder." The defendant also stated that he used to own a black Lexus but previously had sold it to a man named "G."

Following a jury trial, the defendant was convicted of capital felony, in violation of §§ 53a-54b (7) and 53a-8 (a), two counts of murder, in violation of §§ 53a-54a (a) and 53a-8 (a), and conspiracy to commit murder, in violation of §§ 53a-48 (a) and 53a-54a (a). The court vacated and dismissed the two counts of murder and sentenced the defendant to life in prison without parole on the charge of capital felony, followed by an additional ten years on the charge of conspiracy to commit murder. The defendant then filed the present appeal. Additional facts will be set forth as necessary.

The defendant argues that the trial court abused its discretion in declining to admit Medina's oral statements under the residual exception to the hearsay rule. The state counters that the court properly exercised its discretion in declining to admit the statements under the residual exception to the hearsay rule. The state further argues that, even if the statements were admissible, the defendant failed to prove harm. We agree with the state.

The following additional facts are necessary for the resolution of this claim. At trial, the state called Jacobson as a witness. During cross-examination, defense counsel inquired whether Jacobson had used statements given by both the defendant and Medina in the application for the defendant's arrest warrant. As to any statements from Medina, the state objected on hearsay grounds. Defense counsel argued that the statements were admissible under the coconspirator exception to the hearsay rule. Outside the presence of the jury,

defense counsel read into the record the proffered statements that were contained in a police report authored by Officer R. Kevin Salkeld dated January 1, 2011. As read into the record, the report stated: "Later in the evening of January 1st of 2011, I was in Hartford Police Major Crimes and spoke to Jose Medina. . . . Medina repeatedly stated he just wanted to speak to his girlfriend. If he spoke to his girlfriend, he would tell us everything that happened that night. At approximately 21:01 hours, Detective Poma got in touch with Medina's girlfriend and asked if she would talk to him. I observed Medina pick up the phone with a big smile on his face. He told his girlfriend he was about to do twenty years in prison. He told [her] to watch the news he had gotten in a high speed chase with the police. He was smiling and told her it was the most fun he had ever had and he . . . again told her he was going to do twenty years. . . .

"He stated, 'Because I fucking killed Paulo and Lionel. He paused to state that, 'They deserved it for punching me in the face. See babe, that is what he gets for punching me and trying to rob me. I am going to do twenty years for shooting those two fuckers. Wait for me baby. I'll be out in twenty years. . . . I love you babe and I am going to do fifteen to twenty years and those fuckers deserved it. No one punches me. I shot those motherfuckers.' "

The trial court ruled that this portion of Salkeld's report containing Medina's statements was not admissible under the coconspirator exception because it was not made in furtherance of the conspiracy and was offered in a form involving multiple levels of hearsay.[6] Later that day, the court sua sponte raised the question of whether Medina's statements were admissible under

[6] The defendant does not challenge the ruling that the statements were inadmissible under the coconspirator exception.

the residual exception to the hearsay rule. In rejecting its admissibility under the residual exception, the court stated: "The trouble is reliability. It is so far removed. It's basically, the def—not even the defendant, 'A' told an unknown in this, was overheard by 'B,' was relayed by 'C' to 'D,' who told this witness. More than multiple levels of hearsay, it's the reliability of the original; Medina told someone on the phone. There's no indication that the circumstances of the statement were reliable."

We initially set forth the applicable standard of review. "A court's conclusion as to whether certain hearsay statements bear the requisite indicia of trustworthiness and reliability necessary for admission under the residual exception to the hearsay rule is reviewed for an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Myers*, 126 Conn. App. 239, 247, 11 A.3d 1100, cert. denied, 300 Conn. 923, 14 A.3d 1006 (2011). In reviewing for an abuse of discretion, we make "every reasonable presumption in favor of upholding the trial court's ruling." *State* v. *Bennett*, 324 Conn. 744, 761–62, 155 A.3d 188 (2017); accord *State* v. *Heredia* 139 Conn. App. 319, 331, 55 A.3d 598 (2012), cert. denied, 307 Conn. 952, 58 A.3d 975 (2013).

"The legal principles guiding the exercise of the trial court's discretion regarding the admission of hearsay evidence under the residual exception are well established. An [out-of-court] statement is hearsay when it is offered to establish the truth of the matters contained therein. . . . As a general rule, hearsay evidence is not admissible unless it falls under one of several well established exceptions. . . . The purpose behind the hearsay rule is to effectuate the policy of requiring that testimony be given in open court, under oath, and subject to cross-examination. . . . The residual, or catchall, exception to the hearsay rule allows a trial court to admit hearsay evidence not admissible under any of

the established exceptions if: (1) there is a reasonable necessity for the admission of the statement, and (2) the statement is supported by the equivalent guarantees of reliability and trustworthiness essential to other evidence admitted under the traditional hearsay exceptions. . . . We have recognized that [t]he residual hearsay exceptions [should be] applied in the rarest of cases . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Bennett*, supra, 324 Conn. 762.

According to the defendant, there was a reasonable necessity for the admission of Medina's statements because Medina had a fifth and fourteenth amendment privilege against self-incrimination, rendering him unavailable to testify.[7] The defendant also contends that Medina's statements were reliable and trustworthy. Specifically, he argues that Medina's statements were made in the presence of several police officers and were recorded by a police officer in an official report. He points out that the statements were made to his girlfriend, a person with whom he purportedly had a close relationship, just hours after the shooting at a time when he was not under arrest for the murders of Luis and Roldan. The defendant also argues that the statements were highly inculpatory, in that Medina admitted to killing both victims. We disagree.

Jacobson testified that when he went to talk to Medina at the Hartford Police Department about the murders, "he acted very erratically" and "his demeanor and his reactions to different questions varied wildly from crying to laughing to being serious." When Jacobson talked to him about two people dying, Medina removed his shoes and socks and started to pick lint out

[7] In holding that Medina's statements were unreliable, the trial court did not consider whether there was a reasonable necessity for the admission of the statements. It is undisputed, however, that Medina, whose case was pending on appeal, was not available to testify because he had asserted a fifth amendment privilege.

of his toes. On the basis of his training and experience, Jacobson concluded that Medina was under the influence of some type of drug and decided not to take a statement from him. Further, these statements do not exclude the defendant as being a participant in the incident.

The court properly noted that the multiple levels of hearsay involved in the statements undermined its reliability.[8] Specifically, defense counsel sought to question Jacobson regarding a police report authored by Salkeld about what Salkeld overheard Medina tell his girlfriend.[9] See *State* v. *Heredia*, supra, 139 Conn. App. 331 (no abuse of discretion in excluding offered testimony that "constituted hearsay within hearsay and was corroborated only by other hearsay statements rather than established facts"). More significantly, however, there is nothing in the record about the circumstances under which the police officers overheard the phone call.

The residual hearsay exception is designed to permit the admission of hearsay evidence that is supported by "equivalent guarantees of trustworthiness and reliability that are essential to other evidence admitted under traditional exceptions to the hearsay rule." Conn. Code Evid. § 8-9 (2). On the basis of our review of the record, we cannot say that the trial court abused its discretion in concluding that Medina's statements lacked the trustworthiness and reliability that are required for admission under the residual hearsay exception.[10]

[8] "Hearsay within hearsay is admissible only if each part of the combined statements is independently admissible under a hearsay exception." Conn. Code Evid. § 8-7.

[9] The defendant urges this court to take judicial notice of Jacobson's testimony from Medina's trial, in which Jacobson testified that he was present when Medina called his girlfriend. According to the defendant, this testimony would establish that there was only one level of hearsay, as Jacobson overheard Medina's phone call with his girlfriend. The defendant, however, has cited no authority indicating why judicial notice is appropriate under these circumstances.

[10] We note that, in response to a question raised at oral argument, the defendant filed a letter, pursuant to Practice Book § 67-10, indicating that

Finally, even if the exclusion of Medina's statements was improper, such error would be harmless. "When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [A] nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict. . . . [Our] determination [of whether] the defendant was harmed by the trial court's . . . [evidentiary ruling] is guided by the various factors that we have articulated as relevant [to] the inquiry of evidentiary harmlessness . . . such as the importance of the . . . testimony in [to the defense], whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony . . . on material points . . . and, of course, the overall strength of the state's case. . . . Most importantly, we must examine the impact of the evidence on the trier of fact and the result of the trial." (Internal quotation marks omitted.) *State* v. *Rodriguez*, 311 Conn. 80, 89, 83 A.3d 595 (2014).

In the present case, the purpose of the offered statements was not to show that Medina committed the crime, but rather that the defendant did not commit the crime. In that regard, the statements do not expressly

this court can consider, sua sponte, whether Medina's statements were admissible under the business record exception or the statement against penal interest exception to the hearsay rule. We decline to consider whether Medina's statements were admissible under these exceptions as these grounds were not raised in the trial court. Review of the admissibility of the statements on these grounds would be contrary to the established standard of review of evidentiary claims. See *State* v. *Miranda*, 327 Conn. 451, 464–65, 174 A.3d 770 (2018) ("This court is not bound to consider claims of law not made at the trial. . . . Once counsel states the authority and ground of [the] objection, any appeal will be limited to the ground asserted. . . . For this court to . . . consider [a] claim on the basis of a specific legal ground not raised during trial would amount to trial by ambuscade, unfair both to the [court] and to the opposing party." [Citations omitted; emphasis omitted; internal quotation marks omitted.]).

exclude the defendant as a participant. Medina's statements are consistent with the defendant being an additional shooter along with Medina as well as being a nonshooting accessory. Moreover, the evidence at trial strongly implicated the defendant. Approximately thirty minutes before the shootings, the defendant and Medina approached Diaz looking for Roldan. The defendant's face was red, bloody and scratched. Diaz knew that, during the previous two months, Roldan had received threatening phone calls from the defendant and Medina. Upon entering the Expedition, Sanchez noticed that Luis' hand was swollen and he explained that he had had a problem with the defendant. When Luis, Roldan, Sanchez and Pena reached Pena's home, Pena saw a black Lexus pull up behind them. The defendant then got out of the Lexus holding a gun. After Luis drove away a chase ensued. On Francis Avenue, after the Expedition became stuck in the snow, Sanchez and Pena both testified that they saw the defendant and Medina run to the Expedition.

In her statement to the police, Sanchez stated that the defendant and Medina both had guns out and started shooting six or seven times.[11] Pena and Sanchez independently viewed photographic arrays and identified the defendant and Medina as the men who attacked them. Sanchez had known the defendant in passing for two and one-half years. A few days after the crime, the police found the Lexus. It had a bullet fragment in the rear passenger door. The owner of the Lexus testified that he had loaned the car to the defendant a week earlier. DNA results were consistent with the defendant being the source of the DNA on the steering wheel and he could not be eliminated as a contributor to the DNA

[11] A redacted portion of this statement was admitted into evidence pursuant to *State* v. *Whelan*, 200 Conn. 743, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986).

mixtures from the driver's interior door handle and gearshift of the Lexus.

On the basis of our review of this record, we have a fair assurance that the exclusion of Medina's statements did not substantially affect the verdict. The defendant, therefore, has failed to demonstrate that any error was harmful.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* DAVE ANDAZ
(AC 38888)

Keller, Bright and Pellegrino, Js.

Syllabus

The defendant, who had been on probation in connection with his conviction of the crime of possession of a weapon or dangerous instrument in a correctional institution, appealed to this court from the judgment of the trial court finding him in violation of his probation. As a standard condition of his probation, the defendant was required and agreed not to violate any state or federal criminal law. During his probation, the defendant was arrested in connection with his assault of a college student, and he was thereafter arrested a second time and charged with burglary in the third degree, criminal trespass in the third degree and larceny in the sixth degree after being found by the police in an abandoned building. The defendant then was arrested pursuant to a warrant for violation of his probation. As the basis for his violation of probation, the arrest warrant application cited the second arrest as a violation of the general condition of his probation that he not violate any state or federal criminal law. Six days before the scheduled violation of probation hearing, the state filed a long form information substituting the defendant's first arrest as the underlying basis for the violation of his probation, and the defendant and his counsel were informed of this change on that same day. The defendant's counsel did not object to the change or seek a continuance of the hearing. Following the hearing, the trial court found by a preponderance of the evidence that the defendant, by assaulting the victim, had violated a criminal law, thereby violating a general condition of his probation. The court revoked the defendant's probation, and the defendant appealed to this court. On appeal, he claimed, for the first time, that his due process right to fair notice of the charges against

him was violated by the state's filing of a substitute information changing the underlying basis for his violation of probation six days prior to his violation of probation hearing because the late notice caused him unfair surprise and prejudice in preparing his defense. *Held* that the defendant's unpreserved due process claim failed under the third prong of the test set forth in *State* v. *Golding* (213 Conn. 233), as the defendant received adequate notice of the ground on which he ultimately was found to have violated his probation: it was undisputed that the substitute information was filed six days before the start of the defendant's probation hearing and the record revealed that the defendant's counsel acknowledged that he and the defendant had received the substitute information that same day, that counsel voiced no objection and did not seek a continuance at that time and that counsel had reviewed the substitute information with the defendant prior to the hearing, and the defendant provided no case law to support the proposition that six days did not constitute fair notice; moreover, from the arrest warrant and the substitute information, the defendant was aware that he was accused of having violated the criminal laws of this state because of his recent arrests, as the defendant was charged with having violated the general condition of his probation that he would not violate any criminal law, the arrest warrant application specified that condition as the basis of his violation and the state did not alter the underlying condition that it alleged the defendant had violated when it filed the substitute information.

Argued January 2—officially released April 17, 2018

Procedural History

Substitute information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of New Haven and tried to the court, *O'Keefe*, *J.*; judgment revoking the defendant's probation, from which the defendant appealed to this court. *Affirmed.*

Peter Tsimbidaros, assigned counsel, with whom, on the brief, were *Christopher Duby*, assigned counsel, and *Robert O'Brien*, assigned counsel, for the appellant (defendant).

Linda Currie-Zeffiro, assistant state's attorney, with whom, on the brief, were *Michael Dearington*, former state's attorney, and *Sean McGuinness*, assistant state's attorney, for the appellee (state).

Opinion

PELLEGRINO, J. The defendant, Dave Andaz, also known as David Polek,[1] appeals from the judgment of the trial court finding him in violation of his probation pursuant to General Statutes § 53a-32.[2] On appeal, the defendant claims that his due process right to fair notice of the charges against him was violated by the state's filing of a substitute information changing the underlying basis for his violation of probation six days prior to his probation revocation hearing. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of the issue on appeal. On April 29, 2014, the defendant was convicted of possession of a weapon or dangerous instrument in a correctional institution in violation of General Statutes § 53a-174a and sentenced to six years incarceration, execution suspended after thirteen months, followed by three years of probation. The court imposed and the defendant agreed to the standard conditions of probation, which included, inter alia, that he not violate any state or federal criminal law. The period of probation began on February 27, 2015. Thereafter, on May 5, 2015, the defendant was arrested following an incident on the New Haven green when he and two other individuals were seen assaulting a student from Yale University.

[1] Although the various informations and warrants occasionally refer to the defendant by the last name "Polek," his legal name is Andaz, and the trial court granted his motion to correct the record to reflect that his legal name is Andaz on September 29, 2015.

[2] General Statutes § 53a-32 (a) provides in relevant part: "Whenever a probation officer has probable cause to believe that a person has violated a condition of such person's probation, such probation officer may notify any police officer that such person has, in such officer's judgment, violated the conditions of such person's probation and such notice shall be sufficient warrant for the police officer to arrest such person and return such person to the custody of the court or to any suitable detention facility designated by the court. . . ."

On July 29, 2015, the defendant was arrested when he was found in an abandoned building at 301 George Street in New Haven and charged with burglary in the third degree in violation of General Statutes § 53a-103, criminal trespass in the third degree in violation of General Statutes § 53a-109, and larceny in the sixth degree in violation of General Statutes § 53a-125b.

On July 30, 2015, the defendant was arrested on a warrant for a violation of his probation pursuant to § 53a-32. As the basis for his violation, the warrant cited the July 29, 2015 arrest as a violation of the general condition of probation that the defendant not violate any state or federal criminal law. An attorney was appointed to represent the defendant. On December 2, 2015, six days before the date of the violation of probation hearing, the state filed a long form information substituting the May 5, 2015 arrest, rather than the July 29, 2015 arrest cited in the original warrant, as the underlying basis for the violation of his probation. The defendant and his attorney were informed of this change on December 2, 2015. The defendant's attorney did not object to the change or seek a continuance of the hearing. Following the violation of probation hearing on December 8, 2015, the court found by a preponderance of the evidence that the defendant, by assaulting the victim, violated a criminal law, thereby violating a general condition of his probation. As a result of this violation, the court revoked the defendant's probation and sentenced him to thirty months of incarceration. This appeal followed. Additional facts will be set forth as necessary.

The defendant's sole claim on appeal is that he was deprived of his due process right to fair notice of the charges against him when the state filed a substitute information six days prior to his probation revocation hearing. The defendant argues that the late notice caused him unfair surprise and prejudice in preparing

his defense.[3] The defendant concedes that his due process claim is unpreserved and seeks review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).

Pursuant to *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; internal quotation marks omitted.) *State* v. *Tucker*, 179 Conn. App. 270, 279, A.3d (2018). "In the absence of any one of these conditions, the defendant's claim will fail. The appellate tribunal is free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances." (Internal quotation marks omitted.) *State* v. *Santana*, 313 Conn. 461, 469–70, 97 A.3d 963 (2014). Upon review of the record, we conclude that the defendant has failed to satisfy the third prong of *Golding*.

We begin by setting forth the relevant legal principles. It is well established that the defendant is entitled to due process rights in a probation violation proceeding. "Probation revocation proceedings fall within the protections guaranteed by the due process clause of the

[3] See *State* v. *Carter*, 84 Conn. App. 263, 273, 853 A.2d 565 ("[w]here the defendant can demonstrate neither unfair surprise nor prejudice, he cannot claim an infringement of his constitutional right to fair notice of the crimes with which he is charged" [internal quotation marks omitted]), cert. denied, 271 Conn. 932, 859 A.2d 931 (2004), cert. denied, 544 U.S. 1066, 125 S. Ct. 2529, 161 L. Ed. 2d 1120 (2005).

fourteenth amendment to the federal constitution. . . . Probation itself is a conditional liberty and a privilege that, once granted, is a constitutionally protected interest. . . . The revocation proceeding must comport with the basic requirements of due process because termination of that privilege results in a loss of liberty." (Citation omitted; internal quotation marks omitted.) *State* v. *Barnes*, 116 Conn. App. 76, 79, 974 A.2d 815, cert. denied, 293 Conn. 925, 980 A.2d 913 (2009). "Although the due process requirements in a probation revocation hearing are less demanding than those in a full criminal proceeding,[4] they include the provision of written notice of the claimed violations to the defendant." (Footnotes added and omitted.) *State* v. *Repetti*, 60 Conn. App. 614, 617, 760 A.2d 964, cert. denied, 255 Conn. 923, 763 A.2d 1043 (2000).

The defendant argues that the state did not provide him with adequate notice of the basis of his violation of probation when it filed a substitute information six days prior to the violation of probation hearing. This court has held, however, that "[i]t is beyond question that in a criminal proceeding, the state may change the factual basis supporting a criminal count prior to trial. See Practice Book § 36-17.[5] If substantive amendments

[4] This court has recently discussed the due process requirements for a probation hearing in *State* v. *Tucker*, supra, 179 Conn. App. 280, stating: "[T]he minimum due process requirements for revocation of [probation] include written notice of the claimed [probation] violation, disclosure to the [probationer] of the evidence against him, the opportunity to be heard in person and to present witnesses and documentary evidence, the right to confront and cross-examine adverse witnesses in most instances, a neutral hearing body, and a written statement as to the evidence for and reasons for [probation] violation. . . . Despite that panoply of requirements, a probation revocation hearing does not require all of the procedural components associated with an adversarial criminal proceeding." (Internal quotation marks omitted.)

[5] "Practice Book § 36-17 provides: " 'If 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

are permissible prior to trial in a criminal proceeding, then surely our legislature did not intend to prohibit them prior to a hearing in a probation revocation proceeding." (Footnote in original.) *State* v. *Outlaw*, 60 Conn. App. 515, 526, 760 A.2d 140 (2000), aff'd, 256 Conn. 408, 772 A.2d 1122 (2001). The language of Practice Book § 36-17 requires only that the substitute information be filed before the trial or hearing commences, which this court interprets broadly. See *State* v. *Iovanna*, 80 Conn. App. 220, 223, 834 A.2d 742 (2003) (defendant received adequate notice of grounds on which he was found to have violated probation where state filed substitute information with additional charge at beginning of probation hearing); *State* v. *Repetti*, supra, 60 Conn. App. 617 (no due process violation in probation hearing where state filed substitute information before start of probation hearing and defendant did not object to substituted charges); see generally *State* v. *Marsala*, 44 Conn. App. 84, 89–90, 688 A.2d 336 (finding no abuse of discretion where court allowed prosecutor to amend information on day that trial began), cert. denied, 240 Conn. 912, 690 A.2d 400 (1997).

The record reveals that on December 2, 2015, the state filed a substitute information charging the defendant with violation of probation on the basis of his May 5, 2015 arrest. On that date, the defendant's counsel acknowledged that he and the defendant had received the substituted information. The defendant's counsel voiced no objection and did not seek a continuance at that time. The defendant's probation revocation hearing was held on December 8, 2015, six days later. Prior to the start of the hearing, the defendant's counsel stated that he had reviewed the substituted information with the defendant. It is undisputed that the substitute information was filed prior to the start of the defendant's probation hearing, and the defendant provides no case

the substantive rights of the defendant would be prejudiced.' " *State* v. *Outlaw*, supra, 60 Conn. App. 526 n.14.

law, nor do we find any such authority, to support the proposition that six days does not constitute fair notice.

Furthermore, the condition of the defendant's probation that he was charged with violating was that he would not violate any criminal law, and the arrest warrant application, dated July 30, 2015, specified that condition as the basis of the violation. The state did not alter the underlying condition that it alleged the defendant had violated, that he not violate any criminal law, when it filed the substitute information on December 2, 2015. From the warrant and the substitute information, the defendant was aware that he was accused of violating the criminal laws of this state because of his recent arrests. This court has stated that "[w]here criminal activity forms the basis for the revocation of probation, the law imputes to the probationer the knowledge that further criminal transgressions will result in a condition violation and the due process notice requirement is similarly met." (Internal quotation marks omitted.) *State* v. *Hooks*, 80 Conn. App. 75, 80, 832 A.2d 690, cert. denied, 267 Conn. 908, 840 A.2d 1171 (2003). At the conclusion of the violation of probation hearing, the court found that the state had satisfied its burden of proving that the defendant violated this general condition: "I find . . . by a fair preponderance of the evidence that [the defendant] engaged in criminal behavior while he was on probation. So, he's in violation of his probation."

After a careful review of the record, we conclude that the defendant received adequate notice of the ground on which he ultimately was found to have violated his probation. See *State* v. *Iovanna*, supra, 80 Conn. App. 223. Accordingly, the defendant's claim fails *Golding*'s third prong because he has failed to demonstrate that a constitutional violation exists and deprived him of due process during his probation revocation hearing.

The judgment is affirmed.

In this opinion the other judges concurred.

MOMODOU LAMIN JOBE *v.* COMMISSIONER OF CORRECTION
(AC 39760)

Lavine, Bright and Pellegrino, Js.

Syllabus

The petitioner, who had been convicted on a guilty plea of illegal possession of less than four ounces of marijuana and illegal sale of a record or tape, sought a writ of habeas corpus. The habeas court rendered judgment dismissing the habeas petition, concluding that it lacked jurisdiction to consider the merits of the petition pursuant to *Padilla* v. *Kentucky* (559 U.S. 356). Thereafter, the petitioner, on the granting of certification, appealed to this court. The respondent Commissioner of Correction conceded that the habeas court improperly dismissed the petition pursuant to *Padilla* but claimed that the judgment of dismissal could be affirmed on the alternate ground that the petitioner had failed to allege that he was in custody at the time he filed his petition. *Held* that the habeas court properly dismissed the habeas petition for lack of jurisdiction; the petitioner was no longer in custody at the time the petition was filed, and there was no evidence that a warrant had been issued for violation of his conditional discharge, which would have been the only way that the petitioner could have been in custody at the time he filed his petition.

Argued February 15—officially released April 17, 2018

Procedural History

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

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

Matthew A. Weiner, assistant state's attorney, with whom, on the brief, was *Matthew C. Gedansky*, state's attorney, for the appellee (respondent).

Opinion

PER CURIAM. General Statutes § 52-466 (a) (1) provides in relevant part that "[a]n application for a writ

of habeas corpus, other than an application pursuant to subdivision (2) of this subsection, shall be made to the superior court, or to a judge thereof, for the judicial district in which the person whose custody is in question *is claimed to be illegally confined or deprived of such person's liberty*."[1] (Emphasis added.) Our Supreme Court has concluded "that the custody requirement of § 52-466 is jurisdictional because the history and purpose of the writ of habeas corpus establish that the habeas court lacks the power to act on a habeas petition absent the petitioner's allegedly unlawful custody." (Internal quotation marks omitted.) *Richardson* v. *Commissioner of Correction*, 298 Conn. 690, 697, 6 A.3d 52 (2010).

The petitioner, Momodou Lamin Jobe, appeals from the judgment of the habeas court dismissing his petition for a writ of habeas corpus,[2] following the court's granting his petition for certification to appeal. On appeal, the petitioner claims that the habeas court improperly determined that it lacked jurisdiction to consider the merits of his claim under *Padilla* v. *Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010). The respondent, the Commissioner of Correction, concedes that the habeas court improperly dismissed the petition for a writ of habeas corpus pursuant to *Padilla*, but contends that the judgment of dismissal may be affirmed on the alternate ground that the petitioner failed to allege that he was in custody at the time he filed his petition. We affirm the judgment of dismissal on the basis of the respondent's alternate ground.[3]

[1] General Statutes § 52-466 (a) (2) pertains to an application for a writ of habeas corpus "made by or on behalf of an inmate or prisoner confined in a correctional facility as a result of a conviction of a crime . . . ."

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

[3] An appellate court may affirm the judgment of the trial court although it may have been grounded on a wrong reason. See *Geremia* v. *Geremia*,

"[A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Internal quotation marks omitted.) *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 533, 911 A.2d 712 (2006). The determination of whether the habeas court had subject matter jurisdiction is a question of law and this court's review is plenary. *Richardson* v. *Commissioner of Correction*, supra, 298 Conn. 696.

In his petition for a writ of habeas corpus, the petitioner alleged that he was arrested on September 10, 2009, and that he pleaded guilty to the crimes charged on January 5, 2010.[4] He also alleged that on January 5, 2010, he received a total effective sentence of eleven months incarceration, execution suspended, and two years of conditional discharge. The petitioner filed a petition for a writ of habeas corpus on August 12, 2016. The petition, therefore, was filed more than two years after he was sentenced and was not in custody at that time.

During oral argument, counsel for the petitioner acknowledged that the only way the petitioner could have been in custody at the time that he filed his petition was if a warrant had been issued for violation of his conditional discharge. Counsel conceded that absent such a warrant, the habeas court would not have subject matter jurisdiction over his petition. We asked counsel

159 Conn. App. 751, 779, 125 A.3d 549 (2015); see also Practice Book § 10-33. Because we conclude that the habeas court lacked subject matter jurisdiction, we need not reach the merits of the petitioner's claim on appeal.

[4] The record discloses that the petitioner pleaded guilty to one count of illegal possession of less than four ounces of marijuana in violation of General Statutes (Rev. to 2009) § 21a-279 (c) and one count of illegal sale of a record or tape in violation of General Statutes § 53-142c.

for the parties if they knew whether a warrant had been issued for the petitioner for violation of his conditional discharge. Following oral argument, counsel for the parties signed and submitted a letter to the court stating that they had searched relevant bases of information and found no evidence that a warrant had been issued for the petitioner for violation of his conditional discharge. The petitioner, as his counsel conceded, was not in custody pursuant to § 52-466 (a) (1) at the time he filed his petition for a writ of habeas corpus. The habeas court, therefore, lacked jurisdiction to adjudicate the merits of the petition for a writ of habeas corpus.[5]

The judgment is affirmed.

TATAYANA OSBORN ET AL. *v.* CITY OF WATERBURY ET AL.
(AC 39574)

Lavine, Prescott and Harper, Js.

Syllabus

The plaintiff mother brought this action on her own behalf and on behalf of her minor child, T, to recover damages for personal injuries that T sustained when she was assaulted by other students during a lunchtime recess at her elementary school. The matter was tried to the court, which rendered judgment in favor of the plaintiffs. The defendants, the city of Waterbury and the Waterbury Board of Education, appealed to this court, claiming, inter alia, that the trial court improperly determined, in the absence of expert testimony, that one student intern and three or four staff members were insufficient to control as many as four hundred students on the playground. *Held* that the trial court improperly rendered judgment in favor of the defendants, as the plaintiffs were required to present expert testimony as to the standard of care applicable to the defendants under the circumstances; because the policies and procedures of our public school system are highly regulated by governing

[5] In his reply brief, the petitioner asks us to adopt an expansive definition of the word *custody*. We decline to review claims raised for the first time in a reply brief. See *State* v. *Myers*, 178 Conn. App. 102, 107, 174 A.3d 197 (2017).

bodies and accreditation organizations, and the standards are set by professionals, the standard of care regarding the number of supervisors needed to ensure the safety of elementary school students on a playground was not a matter of common knowledge and, thus, under those circumstances, the plaintiffs were required to produce expert testimony on the standard of care and to show how the defendants breached that standard, which the plaintiffs failed to do.

Argued February 5—officially released April 17, 2018

Procedural History

Action to recover damages for personal injuries sustained by the named plaintiff as a result of the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the action as withdrawn as to the defendants Charles Stango et al.; thereafter, the matter was tried to the court, *Hon. Barbara J. Sheedy*, judge trial referee; judgment for the plaintiffs, from which the named defendant et al. appealed to this court; subsequently, the court, *Hon. Barbara J. Sheedy*, judge trial referee, issued an articulation of its decision, and the defendant Danielle Avalos et al. withdrew their appeal. *Reversed; judgment directed.*

Daniel J. Foster, corporation counsel, for the appellants (named defendant et al.)

Richard M. Franchi, for the appellees (plaintiffs).

Opinion

LAVINE, J. This personal injury action concerns the injuries the minor plaintiff, Tatayana Osborn (child),[1] sustained during a lunchtime recess at her elementary school. The defendants, the city of Waterbury (city) and the Waterbury Board of Education (board), appeal from the judgment of the trial court rendered in favor

[1] The child commenced the present action by and through her mother Tacarra Smith. Smith also alleged that she sustained damages as a result of the child's injuries. We refer to Smith and Osborn as the plaintiffs.

of the plaintiffs.[2] On appeal, the defendants claim that the trial court improperly (1) rejected their special defense of governmental immunity for discretionary acts, (2) concluded that the plaintiffs' injuries were caused when an inadequate number of adults were assigned to supervise up to 400 students when there was evidence that there were no more than fifty students on the playground, (3) found in the absence of expert testimony that one student intern and three or four staff members were insufficient to control as many as 400 students on the playground, and (4) awarded damages intended to encourage continued therapy and occupational training for the child in the absence of evidence that she would need such services in the future. We agree with the defendants' third claim and conclude, as a matter of law, that without expert testimony, the court could not properly have found that the defendants breached their duty of care to the child because there was an inadequate number of adults on the playground to supervise the students at the time the child was injured. We, therefore, reverse the judgment of the trial court.[3]

The following facts are relevant to our resolution of the defendants' appeal. On April 25, 2012, the child was an elementary school student when she was assaulted by other students while they were on the playground during the lunchtime recess. As a result of the assault,

[2] The plaintiffs also brought this action against Stephanie Pascale, a fifth grade teacher; Charles Stango, the president of the board; Danielle Avalos, a paraprofessional at the school; and Donna Perrealt, the school principal. They withdrew the action against Pascale and Stango in the trial court. In its articulation, the court clarified that it did not find that Avalos and Perrealt were liable for the plaintiffs' injuries. Avalos and Perrealt, therefore, withdrew from the present appeal. In this opinion, we refer to the city and board as the defendants.

[3] Because we resolve the appeal on the ground that the court improperly concluded that there was an insufficient number of staff on the playground to ensure the safety of students, we need not address the remainder of the defendants' claims.

the child sustained a cut to her face that required sutures to repair and resulted in scarring. The plaintiffs commenced the present action against the city, the board, the president of the board, and several members of the school staff. See footnote 2 of this opinion. The plaintiffs alleged, among other things, that certain members of the school staff were careless and negligent in failing to supervise the students on the playground and protect the child from injury. As to the city, the plaintiffs alleged, in part, that the child was an identifiable victim and that the city owed her a duty to protect her safety on school premises. As to the board, the plaintiffs alleged, in part, that the board was responsible for establishing and enforcing policies regarding the education and safety of students such as the child by hiring and training school staff to protect the students' safety. As a result of the defendants' claimed breach of duty, the child suffered lacerations to her nose and cheek, which resulted in scarring, among other things. The defendants denied the allegations of negligence and asserted three special defenses.[4]

The parties tried the case to the court. Following the presentation of evidence, the court issued a memorandum of decision in which it found that the child was a fifth grade student at Sprague Elementary School in Waterbury when she was assaulted by two or more students on the playground. The playground was surrounded by brick walls and fencing, and following lunch, students occupied the area for play and exercise. More specifically, the child was surrounded by a circle of students who physically assaulted her and pushed

[4] The special defenses were as follows: (1) municipal employees of the state are entitled to qualified immunity for the performance of discretionary duties; (2) the city is entitled to governmental immunity pursuant to General Statutes § 52-557n (a) (2) (B); and (3) members of municipal boards who are not compensated for such membership are entitled to immunity for any error or omission made in the exercise of such person's policy or decision-making responsibilities pursuant to § 52-557n (c).

her into a stone wall, causing injuries to her nose and cheek with resulting facial scarring. The child experienced post-traumatic headaches for a sustained period of time, but the most serious effect of this schoolyard assault was its lingering effect on the child's emerging personality and self-image.

The court also found that Danielle Avalos, a school paraprofessional, was assigned to monitor the students on the playground during recess. She was not provided with written documents that listed her duties during the lunchtime recess. Her two day professional development training occurred prior to the first day of school and focused on the forms of student bullying and the need to distinguish between bullying and students merely "picking on" other students or otherwise being unkind to them. At the time of the incident, classroom teachers were on luncheon recess.[5] The court "conclude[d]" that one student intern and three or four staff members were not sufficient to exercise control over as many as 400 students on the playground.

With respect to the incident during which the child was injured, the court found that Avalos saw a student repeatedly punch the child in the face and push her into a wall. A precis prepared by the nursing division of the Waterbury Health Department referenced, "a large,

[5] The court found no evidence to establish that staff lunch times were staggered. It also found no evidence to suggest that only some members of the student body were released from lunch at a given time. The court found it more likely that the student body ate together in the lunchroom and then went outside for recreation in large numbers. On appeal, the defendants dispute the court's findings regarding staggered lunches and the release of students to the playground. They cite testimony to the contrary, e.g., Avalos thought that there were no more than fifty students on the playground at the time of the subject incident. We need not decide whether the court's findings with respect to staggered lunches and release to the playground are clearly erroneous as we reverse the court's judgment on the basis of its conclusion that there was an insufficient number of staff supervising the students on the playground at the time of the incident.

deep cut on the [child's] left cheek" and "a cut of lesser depth on the bridge of her nose." The court found that, at trial, it was clear the child was conscious of her facial scarring and that she considered that scarring to be her primary, perhaps only, sequela of the incident. The scars have diminished significantly. The court's review of the exhibits persuaded it that the most serious of her injuries was the effect the incident has had on the child's behavior. Since the incident, the child has demonstrated unpleasant, even rude, behavior in the presence of family and other caregivers. She acts out, and the suggestion is strong that she presents at school as unfriendly, perhaps even hostile. It was the court's view that the child would benefit from additional behavioral counseling. The court stated that its substantial award was intended to encourage continued therapy and occupational training for the child.

Although the plaintiffs' counsel did not provide the court with a list of medical expenses incurred, the court reviewed all of the exhibits and concluded that the medical expenses were $7090.47. The court stated that, although no evidence was offered to support an ongoing need for continued therapy in any form, its award would permit the same should the family determine future treatment is desirable for the child. The court did not award damages for permanency in the absence of medical testimony in support of it. The court entered judgment in favor of the plaintiffs in the amount of $67,090.47.

The dispositive claim in this appeal is whether the court improperly concluded that "one . . . student intern and three . . . or four . . . staff members were not sufficient to exercise proper control over perhaps as many as . . . (400) students" where there was no evidence that any defendant breached the pertinent standard of care. The defendants argue on appeal that the plaintiffs failed to produce any evidence, let alone

expert testimony, that the pertinent standard of care required more than four or five adults to monitor students on the playground and therefore the court's finding that the defendants breached the standard of care was clearly erroneous. We agree with the defendants that the plaintiffs were required to present expert testimony as to the standard of care applicable to the defendants under the circumstances.

"The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury. . . . Contained within the first element, duty, there are two distinct considerations. . . . First, it is necessary to determine the existence of a duty, and [second], if one is found, it is necessary to evaluate the scope of that duty. . . . We sometimes refer to the scope of that duty as the requisite standard of care." (Internal quotation marks omitted.) *Utica Mutual Ins. Co.* v. *Precision Mechanical Services, Inc.*, 122 Conn. App. 448, 454, 998 A.2d 1228, cert. denied, 298 Conn. 926, 5 A.3d 487 (2010).

The question of whether a duty exists is a question of law over which we exercise plenary review. *LePage* v. *Horne*, 262 Conn. 116, 123, 809 A.2d 505 (2002). Professional negligence "is frequently defined as the failure of one rendering professional services to exercise the degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services . . . ." (Internal quotation marks omitted.) *Keeney* v. *Mystic Valley Hunt Club, Inc.*, 93 Conn. App. 368, 375, 889 A.2d 829 (2006).

"In a negligence action . . . expert testimony will be required [i]f the determination of the standard of care requires knowledge that is beyond the experience of a normal fact finder . . . . The requirement of expert testimony . . . serves to assist lay people, such

as members of the jury and the presiding judge, to understand the applicable standard of care and to evaluate the defendant's actions in light of that standard . . . . [A]lthough expert testimony may be admissible in many instances, it is required only when the question involved goes beyond the field of the ordinary knowledge and experience of the tier of fact." (Footnotes omitted; internal quotation marks omitted.) *Brye* v. *State*, 147 Conn. App. 173, 181–82, 81 A.3d 1198 (2013).

We conclude, as a matter of law, that the standard of care regarding the number of supervisors needed to ensure the safety of elementary school students on a playground is not a matter of common knowledge; far from it. The policies and procedures of our public school system are highly regulated by governing bodies and accreditation organizations. School teachers and administrators are required to be accredited in accordance with educational standards. The plaintiffs themselves alleged that, under the laws of the state, the city is charged with the control and supervision of students in elementary schools. As to the board, the plaintiffs alleged that it was responsible for establishing and enforcing its policies, regulations and procedures regarding the education and safety of students such as the plaintiff. The standards, therefore, are set by professionals and are not within the common knowledge of the general public. A judge's subjective view on the subject is far from sufficient.

In their appellate brief, the plaintiffs argue that the need for expert testimony was not brought to the attention of the court. That argument is unpersuasive given the record[6] and the law. The plaintiffs were required to produce expert testimony on the standard of care

[6] During final argument before the trial court, the following exchange took place between counsel for the defendants and the court.

"[The Defendants' Counsel]: There's been no evidence by anyone—by the plaintiff indicating that—or showing that—how many individuals on a playground would necessarily make it safe. There's been no expert testimony regarding that.

and to prove that the defendants' conduct did not measure up to that standard. See *Buckley* v. *Lovallo*, 2 Conn. App. 579, 582–83, 481 A.2d 1286 (1984) (failure of hospital to have written rules for its conduct was insufficient to establish violation of standard of care in absence of proper showing that having such rules was standard practice).[7]

In the present case, the plaintiffs failed to present expert testimony as to the standard of care related to the number of supervisors needed on an elementary school playground to ensure the safety of the students during recess. The plaintiffs also failed to present expert testimony that the number of staff on the playground supervising the children at the time the child was injured constituted a breach of the standard of care. For the foregoing reasons, the court erred as a matter of law in rendering judgment for the plaintiffs.

The judgment is reversed and the case is remanded with direction to render judgment for the defendants.

In this opinion the other judges concurred.

"The Court: Well, I agree with you on that. I don't know that it's necessary, however."

[7] The plaintiffs also argue on appeal that the defendants could be found negligent pursuant to statute or policy and that there was testimony regarding a board policy that there was to be one staff member for every 125 students on the playground. The written policy, however, was not admitted into evidence, and the court made no finding in that regard.

In the context of medical malpractice actions, our Supreme Court has stated that institutional "rules, regulations and policies do not themselves establish the standard of care." *Van Steensburg* v. *Lawrence & Memorial Hospitals*, 194 Conn. 500, 506, 481 A.2d 759 (1984); see also *Baxter* v. *Cardiology Associates of New Haven, P.C.*, 46 Conn. App. 377, 390–91, 699 A.2d 271 (affirming trial court's exclusion, on relevancy grounds, of evidence related to procedures followed by hospital personnel for obtaining blood and stating evidence "would be relevant only if it was later supported by expert testimony that a cardiologist would rely on a resident to order blood on an expeditious basis"), cert. denied, 243 Conn. 933, 702 A.2d 640 (1997). We need not reach the question of whether such cases are applicable in a suit against a municipality. In the present case, the trial court made no finding as to the standard of care on the basis of school policy.