# AURORA LOAN SERVICES, LLC *v.* KAREN CONDRON ET AL. (AC 38934)

Alvord, Elgo and Sullivan, Js.

*Syllabus*

The plaintiff loan service company sought to foreclose a mortgage on certain real property owned by the defendants K and J. The plaintiff, as the servicer of the loan at the time, had sent a letter to K and J by certified mail, return receipt requested, notifying them that the loan was in default and advising them of the amount required to cure the default and to reinstate the loan as of that date. Pursuant to the mortgage deed, the plaintiff was required to give notice of default to K and J prior to commencing the present foreclosure action, and the written notice was deemed to have been given to the borrower when mailed by first class mail or when actually delivered to the notice address of K and J if sent by other means. The plaintiff also provided notice to K and J by certified mail of their rights under the statute (§ 8-265ee) that requires a mortgagee to provide specific notice to the mortgagor before it can commence a foreclosure of a qualifying mortgage under the Emergency Mortgage Assistance Program. K and J failed to cure the default and the plaintiff elected to accelerate the balance due on the note, declare the note due in full, and foreclose the mortgage deed securing the note. Thereafter, the plaintiff assigned the mortgage to N Co. by virtue of a corporate assignment of mortgage and N Co. was substituted as the plaintiff. Subsequently, the trial court rendered judgment of strict foreclosure, from which K and J appealed to this court. On appeal, they claimed that the trial court improperly rendered judgment of strict foreclosure because N Co. failed to satisfy a contractual condition precedent to foreclosure, namely, compliance with the requirement of notification by mail specified in the mortgage deed, N Co. failed to satisfy a statutory condition precedent when it did not comply with the notice requirement set forth in § 8-265ee, and N Co. lacked the authority to foreclose. *Held*:

1. K and J could not prevail on their claim that N Co. failed to demonstrate that it had standing to foreclose, which was based on their claim that N Co. did not own the note and that the note's owner, W Co., did not authorize N Co. to foreclose in its own name, as N Co. had standing to foreclose in its own name because it was the holder of the note and it provided sufficient evidence of its authority to foreclose: N Co. presented the original note to the trial court at the foreclosure trial, and even though N Co. did not own the note, it demonstrated that it had the authority to foreclose on the mortgage deed securing the note because N Co. presented evidence that it, as the successor in interest to the plaintiff, was the master servicer as defined by a certain trust agreement,

pursuant to which N Co., as the master servicer, had the authority to, inter alia, effectuate foreclosure on the property; moreover, N Co. presented evidence that W Co., as trustee, unequivocally manifested its intention to authorize N Co. to exercise its rights to enforce the debt when it provided a limited power of attorney to N Co., which included the power to execute and deliver on behalf of W Co. all documents and instruments necessary to conduct any foreclosure.

2. Although the trial court improperly admitted the hearsay testimony of A, a litigation resolution analyst for N Co., regarding the contents of certain business records that were not in evidence to prove that the notice of default letter had been sent, any error was harmless, as N Co. proved by a preponderance of the evidence that the notice of default letter was sent to K and J by certified mail; A's testimony concerning the business records was merely cumulative of properly admitted evidence demonstrating that the default notice was sent by certified mail, as the default letter was admitted into evidence without objection and A testified, on the basis of his review of the file and his familiarity with industry practice, concerning the appearance of the default letter and certain markings on it, which indicated that it had been sent by certified mail.
3. The trial court incorrectly concluded that N Co. satisfied its burden of proof under the mortgage deed to establish that the plaintiff complied with the notification requirements, pursuant to which the plaintiff was required to provide notice of a default to a mortgagee as a condition precedent to the commencement of a foreclosure proceeding; because the delivery of first class mail by certified mail imposes additional restrictions that often make actual delivery less likely, the plaintiff's notice by certified mail was not notice by first class mail, which was afforded a presumption of receipt, and was properly construed as other means of mail service, for which proof of actual delivery was required under the mortgage deed, and because N Co. failed to submit a return receipt or any other evidence into the record to prove that the notice of default was actually delivered to K and J by certified mail, it failed to satisfy its burden of proof to establish that the plaintiff complied with the notification requirements of the mortgage deed.
4. The trial court erred by applying the doctrine of substantial compliance and concluding that the plaintiff had substantially complied with the notice requirements of the mortgage deed when it sent the default letter to K and J by certified mail; although the doctrine of substantial compliance applies in the context of reviewing the substance of a default notice, the doctrine did not apply where, as here, there was a contractual provision requiring proof of actual delivery for a notice of default sent by certified mail, return receipt requested, and there was no evidence that K and J actually received the notice of default.
5. K and J could not prevail on their claim that a statutory condition precedent to the action failed because N Co. did not introduce into evidence the certified mail receipt confirming that the notice required by § 8-265ee

(a) was actually delivered by certified mail; the plain language of § 8-265ee (a) required that the plaintiff give notice to K and J by registered or certified mail but did not require a return receipt, and the plaintiff had satisfied that statutory condition precedent to foreclosure because the record supported the trial court's finding that the § 8-265ee (a) notice was sent by certified mail.

Argued October 11, 2017—officially released April 24, 2018

*Procedural History*

Action to foreclose a mortgage on certain real property of the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendant National City Bank was defaulted for failure to plead; thereafter, the court, *Mintz, J.*, granted the plaintiff's motion to substitute Nationstar Mortgage, LLC, as the plaintiff; subsequently, the court, *Mintz, J.*, denied the substitute plaintiff's motion for summary judgment; thereafter, the defendant People's United Bank et al. were defaulted for failure to appear; subsequently, the matter was tried to the court, *Heller, J.*; judgment of strict foreclosure, from which the named defendant et al. appealed to this court. *Reversed; judgment directed.*

*Christopher G. Brown*, for the appellants (named defendant et al.).

*Christopher S. Groleau*, with whom, on the brief, was *Jonathan Adamec*, for the appellee (substitute plaintiff).

*Opinion*

ELGO, J. The defendants, Karen Condron and James L. Condron,[1] appeal from the judgment of strict foreclosure rendered by the trial court in favor of the plaintiff

[1] Subsequent encumbrancers were also named as defendants in the trial court including National City Bank (National City), People's United Bank (People's United), formerly known as People's Bank, and Rosenthal & Rosenthal, Inc. (Rosenthal). Defaults were entered against People's United, Rosenthal, and National City. In this opinion, we refer to Karen Condron and James L. Condron as the defendants.

Nationstar Mortgage, LLC.[2] On appeal, the defendants claim that the court improperly rendered judgment of strict foreclosure because (1) the plaintiff failed to satisfy a contractual condition precedent to foreclosure, namely, compliance with the requirement of notification by mail specified in the mortgage deed;[3] (2) the plaintiff failed to satisfy a statutory condition precedent, as required by the Emergency Mortgage Assistance Program (mortgage program) pursuant to the provisions of General Statutes § 8-265ee (a); and (3) the plaintiff lacked the authority to foreclose. The judgment is reversed and the case is remanded with direction to dismiss the action.

The following facts and procedural history are relevant to the present appeal. On February 16, 2007, the defendants executed and delivered an adjustable rate promissory note (note) payable to the order of Lehman Brothers Bank, FSB (bank), in the original principal amount of $980,000. The loan was secured by a mortgage (mortgage deed) on the property. The mortgage deed was executed and delivered on February 16, 2007, to Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for the bank. The bank specially endorsed the note to Lehman Brothers Holdings, Inc., which endorsed the note in blank.

On March 1, 2007, Aurora Loan and Lehman Brothers Holdings, Inc., entered into a written servicing

[2] Aurora Loan Services, LLC (Aurora Loan), commenced this action to foreclose a mortgage on real property owned by the defendants and located at 92 Chestnut Hill Road in Wilton (property). On April 8, 2013, Aurora Loan moved to substitute Nationstar Mortgage, LLC, as the plaintiff in the present action and the court granted the motion to substitute on May 1, 2013.

[3] Section 15 of the mortgage deed provides that "[a]ll notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument *shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means*." (Emphasis added.)

agreement (servicing agreement). Structured Asset Securities Corporation, Wells Fargo Bank, N.A. (Wells Fargo), and Aurora Loan entered into a written trust agreement, dated March 1, 2007 (trust agreement). Under the trust agreement, the defendants' note and mortgage deed became part of the trust. Wells Fargo, as trustee, is the owner of the debt under the trust agreement. Aurora Loan, or any successor in interest,[4] is identified in the trust agreement as the master servicer and as a servicer.[5] MERS, as nominee for the bank, assigned the mortgage deed to Aurora Loan by virtue of a corporate assignment of the mortgage deed.

The defendants have been in default on the note and mortgage deed since at least May 1, 2009. On June 19, 2009, Aurora Loan, as the servicer of the loan at the time, sent a letter to the defendants, *by certified mail, return receipt requested*, notifying them that the loan was in default and advising them of the amount required to cure the default and reinstate the loan as of that date. On the same date, Aurora Loan also provided notice to the defendants by certified mail of their rights under the mortgage program, pursuant to the provisions of General Statutes §§ 8-265cc through 8-265kk. The

[4] The parties stipulated at trial that the plaintiff is a successor in interest to Aurora Loan.

[5] Section 9.04 (a) of the trust agreement provides in pertinent part that the master servicer and each servicer "shall have full power and authority (to the extent provided in the applicable Servicing Agreement) to do any and all things that it may deem necessary or desirable in connection with the servicing and administration of the Mortgage Loans, including but not limited to the power and authority . . . to effectuate foreclosure or other conversion of the ownership of the Mortgaged Property securing any Mortgage Loan . . . ." Section 9.04 (a) further provides in relevant part that "[t]he Trustee shall furnish the Master Servicer or a Servicer, upon request, with any powers of attorney prepared by the Master Servicer or such Servicer empowering the Master Servicer or such Servicer . . . to foreclose upon or otherwise liquidate Mortgaged Property, and to appeal, prosecute or defend in any court action relating to the Mortgage Loans or the Mortgaged Property . . . ."

defendants failed to cure the default and Aurora Loan elected to accelerate the balance due on the note, declare the note due in full, and foreclose the mortgage deed securing the note. Aurora Loan commenced the present foreclosure action against the defendants on November 19, 2009. Aurora Loan assigned the mortgage to the plaintiff by virtue of a corporate assignment of mortgage on June 29, 2012. On August 22, 2012, Wells Fargo, as trustee, provided a limited power of attorney to the plaintiff, as assignee of Aurora Loan. The plaintiff was in possession of the note and presented it to the court and to the defendants' counsel for inspection at the foreclosure trial. On April 8, 2013, Aurora Loan moved to substitute Nationstar Mortgage, LLC, as the plaintiff in the present action, and the court granted the motion to substitute on May 1, 2013.

The action was tried to the court on August 25, 2015. At trial, the defendants claimed that they did not receive either the default notice or the mortgage program notice from Aurora Loan. No evidence was offered by either party to show that the mortgage program notice or the default notice had been returned to Aurora Loan by the United States Postal Service (USPS) with an endorsement showing failure of delivery. In addition, no evidence was offered of a return receipt confirming actual delivery. In its memorandum of decision, the court concluded that (1) the plaintiff had standing to prosecute the present foreclosure action; (2) the plaintiff had proven compliance with the notice provisions of the mortgage deed by a preponderance of the evidence; (3) the plaintiff had proven by a preponderance of the evidence that the mortgage program notice was sent to the defendants by certified mail on June 19, 2009; and (4) the plaintiff was entitled to a judgment of strict foreclosure against the defendants. On appeal, the defendants challenge the propriety of that decision. Additional facts will be provided as necessary.

I

We first address the issue of standing because an absence of subject matter jurisdiction would deprive this court of the opportunity to review any other matters raised in the present appeal. See *Wells Fargo Bank, N.A.* v. *Henderson*, 175 Conn. App. 474, 481, 167 A.3d 1065 (2017). The defendants claim that the plaintiff failed to demonstrate that it had standing to foreclose because the plaintiff does not own the note and the note's owner, Wells Fargo, as trustee, did not authorize the plaintiff to foreclose in its own name. The plaintiff maintains that it has standing to foreclose in its own name because it was the holder of the note and it provided sufficient evidence of its authority to foreclose. We agree with the plaintiff.

"Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . Where a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause. . . . Our review of this question of law is plenary." (Citations omitted; internal quotation marks omitted.) *J.E. Robert Co.* v. *Signature Properties, LLC*, 309 Conn. 307, 318, 71 A.3d 492 (2013).

"The rules for standing in foreclosure actions when the issue of standing is raised may be succinctly summarized as follows. When a holder seeks to enforce a note through foreclosure, the holder must produce the note. The note must be sufficiently endorsed so as to demonstrate that the foreclosing party is a holder, either by a specific endorsement to that party or by means of a blank endorsement to bearer. If the foreclosing party shows that it is a valid holder of the note and can

produce the note, it is presumed that the foreclosing party is the rightful owner of the debt. That presumption may be rebutted by the defending party, but the burden is on the defending party to provide sufficient proof that the holder of the note is not the owner of the debt, for example, by showing that ownership of the debt had passed to another party. It is not sufficient to provide that proof, however, merely by pointing to some documentary lacuna in the chain of title that *might* give rise to the possibility that some other party owns the debt. In order to rebut the presumption, the defendant must *prove* that someone else is the owner of the note and debt. Absent that proof, the plaintiff may rest its standing to foreclose on its status as the holder of the note." (Emphasis added; internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Henderson*, supra, 175 Conn. App. 483.

"[I]n defending against an action to enforce a note, a debtor may be able to produce evidence demonstrating that the plaintiff, who might otherwise appear to be entitled to enforce the debt nevertheless lacks standing, perhaps because ownership of the debt has passed to another party." *J.E. Robert Co.* v. *Signature Properties, LLC*, supra, 309 Conn. 325. "[I]t is the foreclosing party's burden, when the issue of standing is raised, to demonstrate by way of proper documentation that it has the right to enforce the note. It may, for example, produce documents showing a valid transfer of the right to enforce the note between the original holder and the foreclosing party." *U.S. Bank, National Assn.* v. *Schaeffer*, 160 Conn. App. 138, 150–51, 125 A.3d 262 (2015).

In the present case, Aurora Loan, the original plaintiff, was the holder of the note when it commenced the present action in November, 2009. Aurora Loan assigned its rights, title, and interest in the mortgage deed to the plaintiff by a corporate assignment of the mortgage on June 29, 2012. As a result, the court granted

Aurora Loan's motion to substitute Nationstar Mortgage, LLC, as the plaintiff in the present action, and the plaintiff is now the holder of the note endorsed in blank. The plaintiff presented the note to the court at the foreclosure trial. According to the trust agreement, however, Wells Fargo is the owner of the debt.

The issue is whether the plaintiff, despite not owning the note, demonstrated that it had the authority to foreclose on the mortgage deed securing the note. See *American Home Mortgage Servicing, Inc.* v. *Reilly*, 157 Conn. App. 127, 134, 117 A.3d 500, cert. denied, 317 Conn. 915, 117 A.3d 854 (2015). "[A] plaintiff, in establishing the loan servicer's authority to enforce the instrument, must provide sufficient evidence of such authority to demonstrate that the principals unequivocally manifested their intention to authorize [the loan servicer] to exercise [those] rights . . . ." (Internal quotation marks omitted.) *J.E. Robert Co.* v. *Signature Properties, LLC*, supra, 309 Conn. 328 n.19.

The defendants argue that the plaintiff failed to present evidence of an unequivocal manifestation of intent for Wells Fargo to authorize the plaintiff to foreclose on the mortgage deed.[6] The plaintiff provided evidence

[6] The defendants claim that the plaintiff does not have authority to bring a foreclosure action in its own name. A similar argument was rejected by our Supreme Court in *J.E. Robert Co.* v. *Signature Properties, LLC*, supra, 309 Conn. 330–31 n.22. In *J.E. Robert Co.*, the defendants argued that even if the pooling agreement controlled the issue of standing, nothing in that document or in the power of attorney conferred upon the plaintiff any right or authority to commence a foreclosure action on its own behalf and in its own name. Id., 330 n.22. Our Supreme Court rejected that argument by citing to a provision in the pooling agreement that required written consent by the note's owner and holder to initiate the action in the plaintiff's name. Id., 330–31 n.22. "In fact, § 3.01 (b) of the pooling agreement provides that the special servicer 'shall not, without [LaSalle Bank National Association's] written consent . . . initiate any action, suit or proceeding solely under [LaSalle Bank National Association's] name without indicating . . . the [s]pecial [s]ervicer's . . . representative capacity. . . .' The logical implication of this language, preceded directly by language seeking to protect the trustee from incurring negligence as a result of actions by the special servicer and viewed in connection with the authority otherwise vested in the special

of the trust agreement, the servicing agreement, the limited power of attorney, and the testimony of Keith Kovalic, a litigation resolution analyst for the plaintiff. On the basis of that evidence, the trial court held that the plaintiff satisfied its burden of proving that it had standing to foreclose the mortgage deed.

Our review of that evidence supports the trial court's findings and conclusion on the issue of standing. The plaintiff presented to the court the trust agreement and Kovalic testified as to the contents of the trust agreement, which pertained to Wells Fargo's authorization for the plaintiff to enforce the debt.[7] The trust agreement defines "Master Servicers" as "[Aurora Loan], or any successor in interest, or if any successor master servicer shall be appointed as herein provided, then such successor master servicer." The plaintiff is, accordingly, a "Master Servicer" as defined by the trust agreement because the parties have stipulated to the fact that the plaintiff is a successor in interest to Aurora Loan.

Section 9.04 (a) of the trust agreement provides in pertinent part that a Master Servicer "shall have full power and authority (to the extent provided in the applicable Servicing Agreement) to do any and all things that it may deem necessary or desirable in connection with the servicing and administration of the Mortgage Loans, including but not limited to the power and

servicer, is that the special servicer may initiate an action in its own name." Id. Similarly, the trust agreement in the present case provides that the master servicer "shall not without Trustee's written consent . . . initiate any action, suit or proceeding solely under the Trustee's name without indicating the Master Servicer's representative capacity . . . ." It follows that the plaintiff may initiate an action in its own name.

[7] Kovalic testified as to the provisions of the trust agreement, including the definition of "Master Servicers" to include "[Aurora Loan] or any successor in interest" and § 9.04 of the Trust Agreement.

authority . . . to effectuate foreclosure or other conversion of the ownership of the Mortgaged Property securing any Mortgage Loan . . . ."[8]

Moreover, Wells Fargo, as trustee, provided a limited power of attorney to the plaintiff. The limited power of attorney provided that the plaintiff has "full authority and power to execute and deliver on behalf of the Trustee . . . all documents and instruments necessary to conduct any (a) foreclosure, or (b) the taking of any deed in lieu of foreclosure, or (c) any judicial or non-judicial foreclosure or termination, cancellation, or rescission of any such foreclosure, or (d) any similar procedure (collectively, as applicable, a 'Foreclosure') . . . ."

The record supports the trial court's finding that Wells Fargo unequivocally manifested its intention to authorize the plaintiff to exercise its rights to enforce the debt. Accordingly, we conclude that the plaintiff had standing to maintain the foreclosure action.

## II

The defendants next claim that the court improperly determined that Aurora Loan satisfied a contractual condition precedent to the commencement of the present foreclosure action regarding notification by mail

[8] In addition, § 9.04 (a) of the trust agreement provides that "[t]he Trustee shall furnish the Master Servicer or a Servicer, upon request, with any powers of attorney prepared by the Master Servicer or such Servicer empowering the Master Servicer or such Servicer . . . to foreclose upon or otherwise liquidate Mortgaged Property, and to appeal, prosecute or defend in any court action relating to the Mortgage Loans or the Mortgaged Property . . . ."

Section 9.20 (a) of the trust agreement provides in pertinent part that "[t]he Master Servicer shall use its reasonable best efforts to, or to cause each Servicer to, foreclose upon, repossess or otherwise comparably convert the ownership of Mortgaged Properties securing such of the Mortgage Loans as come into and continue in default and as to which no satisfactory arrangements can be made for collection of delinquent payments, all in accordance with the applicable Servicing Agreement."

because (1) Kovalic's testimony about certain documents not in evidence was inadmissible hearsay and, as a result, there is no proof of mailing; (2) the notice was not sent by first class mail and, therefore, requires proof of actual delivery; and (3) there was no substantial compliance with the notice provision because there was no notice at all. We address each claim in turn.

A

The defendants claim that Kovalic's testimony regarding the contents of business records that were not in evidence is inadmissible hearsay. Kovalic testified that he reviewed notes in the file, which indicated that the default letter was sent.[9] The notes themselves were not introduced into evidence. As such, the defendants' counsel objected to the testimony as inadmissible hearsay, but was overruled. The defendants now challenge that evidentiary ruling.

"The standard under which we review evidentiary claims depends on the specific nature of the claim presented. . . . To the extent a trial court's admission of evidence is based on an interpretation of [law], our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. . . . We review the trial court's decision to admit evidence, if premised on a correct view of the

[9] The following colloquy transpired: "[The Plaintiff's Counsel]: You indicated that in addition to the documents, such as [the default notice], that there are notes that are uploaded with regard to the previous history—

"[Kovalic]: Correct.

"[The Plaintiff's Counsel]: —is that correct? Have you had an opportunity to review those notes?

"[Kovalic]: Yes.

"[The Plaintiff's Counsel]: Did the notes indicate that this document was sent?

"[Kovalic]: Yes."

law, however, for an abuse of discretion. . . . In other words, only after a trial court has made the legal determination that a particular statement is or is not hearsay, or is subject to a hearsay exception, is it vested with the discretion to admit or to bar the evidence based upon relevancy, prejudice, or other legally appropriate grounds related to the rule of evidence under which admission is being sought." (Citations omitted; internal quotation marks omitted.) *State* v. *Smith*, 289 Conn. 598, 617–18, 960 A.2d 993 (2008).

"An out-of-court statement offered to prove the truth of the matter asserted in the statement is hearsay. . . . Unless subject to an exception, hearsay is inadmissible." (Citation omitted.) *Connecticut Bank & Trust Co., N.A.* v. *Reckert*, 33 Conn. App. 702, 708, 638 A.2d 44 (1994). In his testimony, Kovalic referenced the content of notes which were part of computer records that were not offered into evidence.[10] Those notes, which were offered to prove that the default letter was sent, are out-of-court statements offered to prove the truth of the matter asserted. See *Bell Food Services, Inc.* v. *Sherbacow*, 217 Conn. 476, 488–89, 586 A.2d 1157 (1991); see also *New England Savings Bank* v. *Bedford Realty Corp.*, 238 Conn. 745, 757, 680 A.2d 301 (1996). As such, they are inadmissible hearsay in the absence of any exception.

That determination, however, does not end our analysis. "It is well established that before a party is entitled to a new trial because of an improper evidentiary ruling, that party has the burden of establishing that the improper ruling was harmful. . . . When determining that issue in a civil case, the applicable standard is whether the improper ruling would likely affect the result. . . . If the improperly admitted testimony is

[10] The computer records were sent from Aurora Loan and are contained in a computer system titled LSAMS.

merely cumulative of other evidence presented in the case, its admission does not constitute reversible error." (Citations omitted; internal quotation marks omitted.) *Doe* v. *Thames Valley Council for Community Action, Inc.*, 69 Conn. App. 850, 866–67, 797 A.2d 1146, cert. denied, 261 Conn. 906, 804 A.2d 212 (2002).

We look to the record to determine whether Kovalic's testimony regarding the notation in the file likely would have affected the outcome or whether it was merely cumulative of properly admitted evidence that notice was sent by certified mail. See *Swenson* v. *Sawoska*, 215 Conn. 148, 153, 575 A.2d 206 (1990). In this regard, we note that the defendants do not contest the admissibility of the default letter or Kovalic's testimony about the notations on the letter itself.

During trial, Kovalic reviewed the default letter and testified that the default letter itself revealed that it was sent by certified mail. Based on his review of the file and his familiarity with industry practice, Kovalic testified as to the appearance of the default letter and noted significant markings on the letter that indicated that it was sent by certified mail. As he stated: "[Y]ou've got, obviously, this was a letter that was generated to be sent and you know it has these dotted lines that would have been trifold, similar to say a W-2 tax form, says it was sent by certified mail, it has a tracking number, that tracking number is also on the flip side on the return receipt, same tracking number, and on both the return letter to [Aurora Loan] and to [the defendants]. So, I mean, using those three pieces of information right there, in addition to everything I've reviewed on my system, which is volumes of paperwork, thousands and thousands of pages of internal notes from [the plaintiff], previous notes from Aurora [Loan], all that, looking at this letter I can say that it was sent by certified mail,

and it's all right here, this is exactly what was sent, what was generated, folded along the lines, and sent."[11]

In light of (1) the letter and (2) Kovalic's testimony regarding notations on the letter and industry practice, we conclude that Kovalic's testimony regarding the notations in the file was merely cumulative. We are, therefore, satisfied that the court's improper admission of Kovalic's testimony regarding the notations in the file was harmless and the plaintiff has proved by a preponderance of the evidence that the notice of default letter was sent to the defendants.

B

We next consider whether the court properly determined that Aurora Loan complied with the requirement of notification by mail contained in the mortgage instruments. In its memorandum of decision, the court concluded that certified mail that is sent with a return receipt requested qualifies as "first class mail" for which notice is "deemed to have been given to Borrower when mailed," pursuant to § 15 of the mortgage deed. The defendants now challenge the propriety of that determination.

We begin by noting that the mortgage deed contains a condition precedent to a foreclosure proceeding. Section 22 of the mortgage deed provides in relevant part: "Lender *shall* give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument . . . . The notice shall specify: (a) the default; (b) the action

[11] In addition, referencing his familiarity with the industry practice related to the creation and distribution of the letter, Kovalic testified: "But, like I said, just looking at [the letter] I can tell it was mailed, as is industry practice, this letter wouldn't even be generated unless it was mailed. General industry practice, even at this time was, when these are generated they go through the mailroom, they're folded by machine, and they're automatically put in the mail. So when it's sent—and it's then sent."

required to cure the default; (c) a date, not less than [thirty] days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and foreclosure or sale of the Property. . . ." (Emphasis added.) The intent of such notice of default provisions is to inform "mortgagors of their rights so that they may act to protect them." *Fidelity Bank* v. *Krenisky*, 72 Conn. App. 700, 710, 807 A.2d 968, cert. denied, 262 Conn. 915, 811 A.2d 1291 (2002).

"A promissory note and a mortgage deed are deemed parts of one transaction and must be construed together as such." (Internal quotation marks omitted.) Id., 707. "The use of shall in the note creates a condition precedent that must be satisfied prior to foreclosure. . . . The condition precedent under the note is the notice of the default . . . ." (Internal quotation marks omitted.) *Bank of America, FSB* v. *Hanlon*, 65 Conn. App. 577, 582, 783 A.2d 88 (2001); see also *Fidelity Bank* v. *Krenisky*, supra, 710 ("when the terms of the note and mortgage require notice of default, proper notice is a condition precedent to an action for foreclosure" [internal quotation marks omitted]). Pursuant to § 22 of the mortgage deed, Aurora Loan was required to give notice of default to the defendants prior to commencing the present foreclosure action. As a result, we must determine whether the court properly determined that Aurora Loan complied with the notice requirement.[12]

To answer that question, we must construe § 15 of the mortgage deed, which governs the method of delivery of the default notice. Section 15 provides that "[a]ll

[12] To be clear, the defendants do not challenge whether the information contained in the notice was proper. Rather, the defendants challenge whether the method of delivery was proper.

notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument *shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means*." (Emphasis added.) Accordingly, a default notice sent by first class mail is entitled to a presumption of receipt, while notices sent by other means are not entitled to such a presumption. Rather, proof of actual delivery is required by the mortgage deed when the notice is sent by other means.

We already have concluded that the trial court properly determined that the notice of default letter was sent to the defendants by certified mail. See part II A of this opinion. Throughout this litigation, the defendants have argued that they "did not receive either the default notice, required by the mortgage, or the [mortgage program] notice." At trial, the plaintiff did not present any evidence of actual delivery of the default notice, nor was the return receipt that Aurora Loan requested furnished to the court. The question, then, is whether sending the default notice letter by certified mail without proof of the requested return receipt carries the presumption of receipt afforded to first class mail or whether certified mail is notice "by other means" requiring proof of actual delivery.

We begin with the relevant legal authority and standard of review. "It is well established that [n]otices of default and acceleration are controlled by the mortgage documents. Construction of a mortgage deed is governed by the same rules of interpretation that apply to written instruments or contracts generally, and to deeds particularly. The primary rule of construction is to ascertain the intention of the parties. This is done not only from the face of the instrument, but also from the situation of the parties and the nature and object of

their transactions. . . . A promissory note and a mortgage deed are deemed parts of one transaction and must be construed together as such. . . .

"In construing a deed, a court must consider the language and terms of the instrument as a whole. . . . Moreover, the words [in the deed] are to be given their ordinary popular meaning, unless their context, or the circumstances, show that a special meaning was intended. . . .

"In construing a contract, the controlling factor is normally the intent expressed in the contract, not the intent which the parties may have had or which the court believes they ought to have had. . . . 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." (Citations omitted; internal quotation marks omitted.) *Fidelity Bank* v. *Krenisky*, supra, 72 Conn. App. 706–707.

"In contrast, a contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous." (Internal quotation marks omitted.) *Perez* v. *Carlevaro*, 158 Conn. App. 716, 723, 120 A.3d 1265 (2015). "Ordinarily, such ambiguity requires the use of extrinsic evidence by a trial court to determine the intent of the parties, and, because such a determination is factual, it is subject to reversal on appeal only if it is clearly erroneous." *Bristol* v. *Ocean State Job Lot Stores of Connecticut, Inc.*, 284 Conn. 1, 7, 931 A.2d 837 (2007).

In the present case, even though there is arguably some ambiguity in the mortgage deed, the record con-

tains no extrinsic evidence as to the conduct of the parties to the mortgage instruments in question, or their intent in agreeing thereto. Thus, the trial court's determination of the parties' intent was based solely on the language of the mortgage deed and did not involve the resolution of any evidentiary issues of credibility.[13] Id., 7–8. Accordingly, our review of the trial court's interpretation of the mortgage deed involves a question of law over which our review is plenary. Id., 8.

At the outset, we note a critical difference between first class and certified mail. When a letter is sent by certified mail, there are additional steps that the recipient must perform to receive the letter compared to first

[13] Furthermore, we recognize that § 15 of the mortgage deed is a uniform covenant contained in a Fannie Mae/Freddie Mac Uniform Instrument. See Plaintiff's Exhibit 2. Such uniform covenants are afforded "one uniform meaning rather than multiple inconsistent meanings." *Kolbe* v. *BAC Home Loans Servicing, LP*, 738 F.3d 432, 436 (1st Cir. 2013); see also *Johnson* v. *IndyMac Mortgage Servicing*, Docket No. Civil Action 12-10808-MBB, 2014 WL 1652594, *7 (D. Mass. April 22, 2014).

Moreover, "[e]xtrinsic evidence of the parties' unique intentions regarding a uniform clause is generally uninformative because unlike individually tailored contracts, uniform clauses do not derive from the negotiations of the specific parties to a contract. Instead, courts seek to determine the uniform meaning of the clause as a matter of law . . . ." *Kolbe* v. *BAC Home Loans Servicing, LP*, supra, 738 F.3d 436–37; see also *Sharon Steel Corp.* v. *Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1048 (2d Cir. 1982) ("Boilerplate provisions are thus not the consequence of the relationship of particular borrowers and lenders and do not depend upon particularized intentions of the parties to an indenture. There are no adjudicative facts relating to the parties to the litigation for a jury to find and the meaning of boilerplate provisions is, therefore, a matter of law rather than fact."), cert. denied, 460 U.S. 1012, 103 S. Ct. 1253, 75 L. Ed. 2d 482 (1983); 2 Restatement (Second), Contracts § 211 (2), pp. 119–20 (1981) (standardized agreements are interpreted "wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing"); 2 E. Farnsworth, Contracts (3d Ed. 2004) § 7.9, p. 285 ("[i]nterpretation cannot turn on meanings that the parties attached if they attached none, but must turn on the meaning that reasonable persons in the positions of the parties would have attached if they had given the matter thought"). Accordingly, we seek to determine the uniform meaning of § 15 of the mortgage deed as a matter of law.

class mail.[14] United States Postal Service, Domestic Mail Manual: Mailing Standards of the United States Postal Service 508.1.1.7 (May 11, 2009), available at https://pe.usps.com/Archive/PDF/DMMArchive20090511/508.pdf (last visited March 21, 2018). If the intended

[14] First class mail and certified mail are terms defined and used in the Code of Federal Regulations, as set forth in the United States Postal Service's Domestic Mail Manual. 39 C.F.R. § 111.1 (2009); see *Lee* v. *AIG Casualty Co.*, 919 F. Supp. 2d 219, 226 (D. Conn. 2013) ("[t]he Domestic Mail Manual is the authoritative document published by the administrative agency in charge of mailing service"); *Horton* v. *Washington County Tax Claim Bureau*, 623 Pa. 113, 132, 81 A.3d 883 (2013) (*Baer*, *J.*, dissenting) ("All of these terms—certified mail, restricted delivery, return receipt requested, and postage prepaid—are types of mailings and services added to the mailing; they are not burdens of evidentiary proof that may be provided by a mailer. Indeed, they are terms contained and defined within the Code of Federal Regulations, as incorporated by the United States Postal Service, Domestic Mail Manual.").

The Domestic Mail Manual 508.1.1.7 addresses "Basic Recipient Concerns" including conditions placed on certified mail and return receipt requested, and provides in relevant part:

"The following conditions also apply to the delivery of Express Mail and accountable mail (Registered Mail, Certified Mail, insured for more than $200.00, or COD, as well as mail for which a return receipt or a return receipt for merchandise is requested or for which the sender has specified restricted delivery):

"a. The recipient (addressee or addressee's representative) may obtain the sender's name and address and may look at the mailpiece while held by the USPS employee before accepting delivery and endorsing the delivery receipt.

"b. The mailpiece may not be opened or given to the recipient before the recipient signs and legibly prints his or her name on the delivery receipt (and return receipt, if applicable) and returns the receipt(s) to the USPS employee.

"c. Suitable identification can be required of the recipient (if not known to the USPS employee) before delivery of the mailpiece.

"d. When delivery is not restricted at the sender's request, mail addressed to a person at a hotel, apartment house, etc., may be delivered to any person in a position to whom mail for that location is usually delivered.

"e. USPS responsibility ends when the mailpiece is delivered to the recipient (or another party, subject to 1.1.7d and 1.0).

"f. A notice is left for a mailpiece that cannot be delivered. If the piece is not called for or redelivery is not requested, the piece is returned to the sender after [fifteen] days ([five] days for Express Mail, [thirty] days for COD), unless the sender specifies fewer days on the piece. . . ." United States Postal Service, Domestic Mail Manual: Mailing Standards of the United

recipient is not available at the time a mail carrier attempts to deliver the letter, a notice of attempted delivery is left at the recipient's address and the mail is returned to the post office. Id., 508.1.1.7. The recipient has a limited period of time to retrieve the certified mail letter from the post office before it is returned to the sender. Id., 508.1.1.7.

At trial, the plaintiff's witness, Kovalic, acknowledged that critical distinction between certified mail and first class mail. He stated: "[E]ven though we're only required to send by first class, in an effort to be more thorough and make sure regulatory things, briefs, letters, demand letters, acceleration letters, they're only required to be sent by first class mail, but we send them by certified mail in order to have an extra layer of security there. Plus, you don't want your neighbors to open up your mail, just throw it in your mailbox, you want your mailman to give you something like a notice like that personally. . . . If you have a mailbox anybody can open your mailbox and pull your mail out. You're delivering something by certified mail, the mailman has to hand it to you or you have to go to the post office and personally pick it up . . . an agent or the addressee . . . are the only people that can pick it up."

In considering the express language of the mortgage deed, the two types of mailings underscore what other jurisdictions have identified as the effective difference between the two mailings. First class mail enjoys a presumption of actual delivery, while other mailing services, to effect their purpose, necessarily require proof of actual delivery. Various courts in this country have noted such a distinction between first class and certified mail, including the United States Supreme Court. In

States Postal Service 508.1.1.7 (May 11, 2009), available at https://pe.usps.com/Archive/PDF/DMMArchive20090511/508.pdf (last visited March 21, 2018).

*Jones* v. *Flowers*, 547 U.S. 220, 237, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006), the United States Supreme Court recognized that the use of certified mail for official notices may have significant benefits for governmental agencies, because "[u]sing certified mail provides the State with documentation of personal delivery and protection against false claims that notice was never received." Id. Of great significance to the present appeal is the court's observation that "the use of certified mail might make actual notice less likely in some cases—the letter cannot be left like regular mail to be examined at the end of the day, and it can only be retrieved from the post office for a specified period of time." Id., 235.

Other courts have similarly acknowledged a distinction between first class mail and certified mail. In *In re Frazier*, 394 B.R. 399, 400 (Bankr. E.D. Va. 2008), the court expounded on the method of delivery for certified mail. It stated: "Certified mail is an additional service available for first class mail. First class mail is simply delivered to the address. The addressee need not be home. In fact, the postal service does not usually make any effort to determine whether anyone is at home. It simply leaves the mail in the mailbox. . . . Certified mail, return receipt requested, tends to reduce later challenges by showing that the mail was actually delivered to the address of record and that the defendant had actual notice of the proceeding because the defendant must sign for the mail in order to receive it. It is understandable that plaintiffs like this additional assurance; however, the drawback is that if the defendant is not home, the summons and complaint may never be delivered to him." Id., 400–401; see also *In re Eleva, Inc.*, United States District Court, Docket No. 2:00CV178K (D. Utah April 17, 2000) ("Because there are differences between first class and certified mail [i.e., certified mail requires an affirmative act by a defendant to obtain an unidentified package that is being

held by the post office, and the plaintiff receives actual notice regarding whether the defendant actually received the package], this court finds that service by certified mail is not sufficient, unless the defendant actually receives the mail"); *In re Sheffer*, 440 B.R. 121, 122 (Bankr. E.D. Va. 2009) ("The Federal Rules of Bankruptcy Procedure permit service by first class mail on debtors. First class mail, however, is not the same as certified mail. Certified mail imposes additional obligations and the mail may not be received timely by the named recipient.").

We acknowledge that some courts do not distinguish between certified mail and first class mail, relying on the proposition that certified mail is a form of first class mail. See *Gossett* v. *Federal Home Loan Mortgage Corp.*, 919 F. Supp. 2d 852, 859 (S.D. Tex. 2013) ("[a]ctual receipt of the notice is not necessary" [internal quotation marks omitted]); *Session* v. *Director of Revenue*, 417 S.W.3d 898, 903 (Mo. App. W.D. 2014) ("[c]ertified mail is a form of first class mail and, therefore, [the plaintiff] received notice by first class mail"). Those cases, however, are not persuasive to the extent that they fail to address the manner of delivery when certified mail is utilized.

In construing the language used in § 15 of the mortgage deed and its requirement to show actual delivery for services other than first class mail, we are therefore persuaded by the cases that consider the effect of mail sent by certified mail versus first class mail. For example, in cases arising in the context of a foreclosure proceeding, the Court of Appeals of Ohio held that "no presumption of delivery arose" where the plaintiff failed to comply with the notice requirement in the context of a foreclosure proceeding because the plaintiff "did not mail a notice of default by ordinary mail, either contemporaneously with its certified-mail notice or after return of the certified-mail envelope." *National*

*City Mortgage Co.* v. *Richards*, 182 Ohio App. 3d 534, 545, 913 N.E.2d 1007 (2009). The court in *National City Mortgage Co.* noted: "[The plaintiff] did not send the notice of default via first class mail. Instead, it sent the written notice of default by certified mail to [the defendant] at the property address." Id., 544. Courts in other jurisdictions have also held that where a statute or insurance policy requires that notice of cancellation of the policy be "mailed," notice sent by certified mail or registered mail does not comply with the "mailing" requirement, but instead constitutes an attempt at actual delivery, which is effective only upon receipt. See, e.g., *Cornhusker Casualty Ins. Co.* v. *Kachman*, 514 F.3d 982, 987–88 (9th Cir. 2008) ("a majority of other jurisdictions that have considered whether certified mail qualifies as mail for purposes of notice of insurance cancellation have held that notice sent by certified mail, when not actually received, is insufficient to effect cancellation"); *Cornhusker Casualty Ins. Co.* v. *Kachman*, 165 Wn. 2d 404, 411, 198 P.3d 505 (2008) ("Since certified mail requires more of the insured to effect delivery of a notice of cancellation, it does not satisfy the 'mailed' prong of the statute. Certified mail, as a request of the United States post office to actually deliver a letter to the insured, falls under the 'actually delivered' prong of [the statute]." [Emphasis omitted.]).

We also are unpersuaded by the plaintiff's invocation of the mailbox rule to substantiate its construction of the presumption contained in § 15 of the mortgage deed. That contractual presumption appears to correspond with the common-law presumption known as the "mailbox rule," which provides that "a properly stamped and addressed letter that is placed into a mailbox or handed over to the United States Postal Service raises a rebuttable presumption that it will be received." *Echavarria* v. *National Grange Mutual Ins. Co.*, 275 Conn. 408,

418, 880 A.2d 882 (2005). As the trial court acknowledged, our court, in *Daniels* v. *Statewide Grievance Committee*, 72 Conn. App. 203, 211–12, 804 A.2d 1027 (2002), has applied the mailbox rule to certified mail in the context of a grievance proceeding. The plaintiff in that case failed to respond to a grievance complaint. Id., 207. The notice of the complaint was sent by certified mail, but there was an absence of a copy of the return receipt in the record. Id., 208. The court held that "the mailing of a properly addressed letter creates a presumption of timely notice unless contrary evidence is presented. . . . In attempting to rebut the presumption, the plaintiff offered no evidence to support his allegation that he did not receive a copy of the complaint except his own testimony that he was having trouble getting mail delivered and the absence of a copy of the certified mail receipt in the record." (Citations omitted.) Id., 211–12. As such, the court held that the plaintiff failed to overcome the presumption of timely notice. Id., 212.

It nevertheless remains that the presumption at issue in the present case arises in the contractual context—namely, a mortgage agreement. It is well established that a "contract must be viewed in its entirety, with each provision read in light of the other provisions . . . ." (Internal quotation marks omitted.) *Nation-Bailey* v. *Bailey*, 316 Conn. 182, 192, 112 A.3d 144 (2015). The plain intent of the notification requirements set forth in §§ 15 and 22 of the mortgage deed is to provide notice of a default to a mortgagee prior to the commencement of a foreclosure proceeding. Those notification requirements are not mere formalities but, rather, constitute a condition precedent to the commencement of foreclosure actions like the present case. See *Fidelity Bank* v. *Krenisky*, supra, 72 Conn. App. 710 ("when the terms of the note and mortgage require notice of default, proper notice is a condition precedent to an action for

foreclosure" [internal quotation marks omitted]). That context distinguishes the present case from numerous decisions, such as *Daniels* v. *Statewide Grievance Committee*, supra, 72 Conn. App. 203, addressing the presumption of mail delivery. When properly viewed in that context, the additional restrictions imposed on the delivery of first class mail by certified mail; see footnote 14 of this opinion; which make actual delivery "less likely" in many cases; *Jones* v. *Flowers*, supra, 547 U.S. 235; compels the conclusion that certified mail is properly construed as "other means" of mail service, for which actual delivery is required under § 15 of the mortgage deed. Accordingly, we conclude that the notice sent by Aurora Loan to the defendants in 2009 was done so "by other means." Section 15 of the mortgage deed thus indicates that the notice is "deemed to have been given to Borrower . . . when actually delivered to Borrower's notice address . . . ."

The plaintiff has failed to submit a return receipt or any other evidence into the record to prove that the notice of default was actually delivered to the defendants by certified mail. The court, therefore, improperly determined that the plaintiff satisfied its burden of proof pursuant to § 15 of the mortgage deed to establish that Aurora Loan complied with the notification requirements in the present case.

C

We next consider the plaintiff's alternative argument that Aurora Loan substantially complied with the notice of default provision when it sent the notice of default letter by certified mail. The trial court applied the doctrine of substantial compliance and concluded that Aurora Loan had substantially complied with the provisions of § 15 of the mortgage deed when it sent the default letter to the defendants by certified mail. The

doctrine of substantial compliance, however, is not appropriate in the present case.

We first set out our standard of review for the plaintiff's substantial compliance claim. "To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous. When, however, 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.) *Johnson Electric Co.* v. *Salce Contracting Associates, Inc.*, 72 Conn. App. 342, 344, 805 A.2d 735, cert. denied, 262 Conn. 922, 812 A.2d 864 (2002). "Whether a party to a contract substantially performs its obligations thereunder is ordinarily a question of fact to be determined by the fact finder. . . . Substantial performance occurs when, although the conditions of the contract have been deviated from in trifling particulars not materially detracting from the benefit the other party would derive from a literal performance, [the defendants have] received substantially the benefit [they] expected, and [are], therefore, bound to [perform]." (Citation omitted; internal quotation marks omitted.) *Pack 2000, Inc.* v. *Cushman*, 311 Conn. 662, 685, 89 A.3d 869 (2014).

Our Supreme Court in *Pack 2000, Inc.*, identified the well established principles that guide our analysis of the plaintiff's substantial compliance claim. "[T]he general rule with respect to compliance with contract terms . . . is not one of strict compliance, but substantial compliance. . . . The doctrine of substantial compliance is closely intertwined with the doctrine of substantial performance. . . . The doctrine of substantial performance shields contracting parties from the harsh effects of being held to the letter of their agreements. Pursuant to the doctrine of substantial performance, a technical breach of the terms of a contract is excused, not because compliance with the terms is objectively

impossible, but because actual performance is so similar to the required performance that any breach that may have been committed is immaterial." (Citations omitted; internal quotation marks omitted.) Id., 675.

We recently discussed the doctrine of substantial compliance in *21st Century North America Ins. Co.* v. *Perez*, 177 Conn. App. 802, 815, 173 A.3d 64 (2017), cert. denied, 327 Conn. 995, 175 A.3d 1246 (2018). "[T]he proper application of the doctrine of substantial performance requires a determination as to whether the contractual breach is material in nature. . . . [T]he doctrine of substantial performance applies only where performance of a *nonessential* condition is lacking, so that the benefits received by a party are far greater than the injury done to him by the breach of the other party." (Emphasis in original; internal quotation marks omitted.) Id.

The plaintiff relies on three Appellate Court decisions to support the proposition that the doctrine of substantial compliance applies in the context of compliance with the method of mailing identified in the notice of default provision, i.e., the contractual condition precedent to foreclosure. See *Mortgage Electronic Registration Systems, Inc.* v. *Goduto*, 110 Conn. App. 367, 955 A.2d 544, cert. denied, 289 Conn. 956, 961 A.2d 420 (2008); *Twenty-Four Merrill Street Condominium Assn., Inc.* v. *Murray*, 96 Conn. App. 616, 902 A.2d 24 (2006); *Fidelity Bank* v. *Krenisky*, supra, 72 Conn. App. 700.[15] Those cases cited are factually distinguishable,

[15] In *Fidelity Bank* v. *Krenisky*, supra, 72 Conn. App. 709–10, the plaintiff conceded that its notice of default did not expressly set forth that the defendants had the right to reinstate their mortgage after the debt had been accelerated or their right to contest foreclosure in court. Nonetheless, because the defendants had received sufficient actual notice of these rights, and "the plaintiff's deficient written notice caused no harm," this court concluded that the plaintiff had "substantially complied" with the stipulated notice requirements. Id., 712–13.

In *Twenty-Four Merrill Street Condominium Assn., Inc.* v. *Murray*, supra, 96 Conn. App. 623, this court stated that although generally "contracts

as they all involved the application of the doctrine of substantial compliance to the contents of the notice itself. In each instance, the notice of default was actually received by the defendants.

In the present case, there is no evidence in the record that the notice of default was actually received as a result of the notice sent by certified mail. In fact, the defendants alleged that they never received the notice. The plaintiff now asks for us to apply the doctrine of substantial compliance to the method of mailing and the corresponding proof required to establish that the notice was received by the defendants. While we acknowledge the doctrine of substantial compliance applies in the context of reviewing the substance of the default notice, we decline to apply the doctrine where there is a contractual provision requiring proof of actual delivery for a notice of default sent by certified mail, return receipt requested, and there is no evidence that the defendants actually received the notice of default.

Accordingly, the plaintiff failed to satisfy the contractual condition precedent to foreclosure because it failed to prove that the defendants received the notice of default letter.

III

The defendants' final claim is that a statutory condition precedent to the action failed because the plaintiff

should be enforced as written," we will not require "mechanistic compliance" with the letter of notice provisions if the particular circumstances of a case show that the actual notice received resulted in no prejudice and fairly apprised the noticed party of its contractual rights. (Internal quotation marks omitted.) Notably, we prefaced our analysis with the following statement: "Significantly, this is not a case in which the defendant never received notice of the plaintiff's decision. He merely received late notice." Id., 622.

In *Mortgage Electronic Registration Systems, Inc.* v. *Goduto*, supra, 110 Conn. App. 375–76, this court held that "[a]ny possible discrepancy between the terms of the mortgage and the plaintiff's notices caused no harm to the defendant because he had sixty-five days of actual notice in which to protect his property rights. . . . [Therefore] the plaintiff substantially complied with the notice requirements in the defendant's mortgage."

failed to introduce into evidence the certified mail receipt confirming that the mortgage program notice required by § 8-265ee (a) was actually delivered by certified mail. We note that, similar to the default notice, the defendants do not claim that the admission of the mortgage program notice into evidence was improper. Rather, the defendants claim that § 8-265ee (a) requires proof of actual delivery by certified mail and the plaintiff failed to meet that requirement. We disagree with the defendants' interpretation of the statute.

We begin our review with the relevant standard of review. "To the extent that our review requires us to construe statutory provisions, this presents a legal question over which our review also is plenary. . . . That review is guided by well established principles of statutory interpretation. . . . As with all issues of statutory interpretation, we look first to the language of the statute. . . . In construing a statute, common sense must be used and courts must assume that a reasonable and rational result was intended." (Citation omitted; internal quotation marks omitted.) *Washington Mutual Bank* v. *Coughlin*, 168 Conn. App. 278, 288, 145 A.3d 408, cert. denied, 323 Conn. 939, 151 A.3d 387 (2016).

Section 8-265ee (a) provides in relevant part: "On and after July 1, 2008, a mortgagee who desires to foreclose upon a mortgage which satisfies the standards contained in subdivisions (1), (9), (10) and (11) of subsection (e) of section 8-265ff, *shall give notice to the mortgagor by registered, or certified mail*, postage prepaid at the address of the property which is secured by the mortgage. No such mortgagee may commence a foreclosure of a mortgage prior to mailing such notice. . . ." (Emphasis added.)

The defendants essentially argue that the language of § 8-265ee (a) requires that the plaintiff submit a proof

of mailing receipt from the United States Post Office to satisfy the statutory condition precedent to foreclosure. The plain language of § 8-265ee (a) contains no such requirement. Section 8-265ee (a) provides that "a mortgagee . . . shall give notice to the mortgagor by registered, or certified mail . . . ." The defendants fail to cite case law in support of their interpretation of the statute and we decline to extend the requirements of the statute beyond the plain language to require proof of actual delivery. As one Superior Court judge recently noted, "§ 8-265ee (a) does not require the mailing by return receipt requested." *Bank of America, N.A.* v. *Robles*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-09-5011137-S (February 16, 2017).

The defendants also appear to challenge the admissibility of Kovalic's testimony regarding the "notes" in the files that identified that the mortgage program notice was sent. Similar to our analysis in part II A of this opinion, the admission of Kovalic's testimony regarding his review of the record and the notes in the file was harmless because the evidence was cumulative. In addition, Kovalic testified as to other indications that revealed that the mortgage program notice had been sent, including "a tracking number for the mail under the barcode at the top." Further, Kovalic testified as to his understanding of the mailing of the mortgage program letter as follows:

"[The Plaintiff's Counsel]: Now, is your understanding that the record of this document in DocTrack is it—would it be generated in a similar [way] as it would [the default notice]?

"[Kovalic]: It would be the exact same thing and that's why the dates are important, because these letters, and

I apologize as I'm not an attorney in the state of Connecticut, but these letters are traditionally, to the best of knowledge, sent at the same time and are required to be sent at or around the same time period.

"So just like the demand letter would have been generated, printed, folded by a machine, put in an envelope, and sent. [The mortgage program notice] would have been generated the same way. This is not a personalized letter, per se, somebody didn't sit and type this out word for word just like they didn't with the demand letter. There's certain information that's put into a system to generate this.

"And on [the default notice], I mean, there's—it basically it tells you that the mail has already been paid for, you know, that's usually not stamped unless it's been paid. So, you know, from my review of the file I can ascertain that this went to the homeowners roughly through that same process of being printed, of being generated, folded in the mailroom, put in an envelope. All this is done mechanically, and has been for years, and was sent—was put in the mail."

As a result, the record supports the trial court's finding that the mortgage program notice was sent by certified mail. The statute does not require a return receipt and the lack of a return receipt in the record does not affect the plaintiff's compliance with the statute. Accordingly, the plaintiff has satisfied this statutory condition precedent to foreclosure.

The judgment is reversed and the case is remanded with direction to render judgment in favor of the defendants.

In this opinion the other judges concurred.

# CITY OF BRIDGEPORT *v.* GRACE BUILDING, LLC (AC 38174)

Sheldon, Elgo and Eveleigh, Js.

*Syllabus*

The plaintiff city sought, by way of summary process, to regain possession of certain premises that it had leased to the defendant for a term of ninety-eight years. The trial court denied the defendant's motion to transfer the matter from the Housing Session to the regular docket of the Superior Court. The defendant had claimed in the motion to transfer, inter alia, that good defenses existed to the plaintiff's action and that it wanted to conduct discovery. The defendant further asserted that the purpose of the lease agreement was to allow the defendant to purchase the premises without assuming liability for ground contamination to the property, and that certain of the more than $1 million that the defendant had invested in remediation efforts would be credited toward its back rent. Thereafter, the plaintiff filed an amended complaint in which it revised certain misstatements in its allegations, and the defendant filed an answer and special defenses in which it alleged, inter alia, that it had paid rent in the form of agreed upon repairs, cleanup and improvements to the property, and that ground contamination on the property necessitated remediation. Prior to the trial date, the court granted a motion to withdraw from representation that was filed by the defendant's counsel and admonished the defendant that it could be defaulted if it appeared for trial without counsel. The defendant thereafter appeared for trial without counsel, and the court rendered a judgment of default for failure to appear. The court thereafter denied the defendant's motion to open the default judgment and subsequently issued an articulation of its decision in which it stated, inter alia, that it had denied the motion to open because of dilatory delays by the defendant and that the defendant had not been prevented from obtaining counsel by reason of mistake, accident or other reasonable cause. *Held*:

1. The plaintiff could not prevail on its claim that because the defendant had been evicted from and no longer was in possession of the property, the appeal was moot: although, generally, an appeal becomes moot when, at the time of the appeal, an appellant no longer is in possession of the premises, that rule does not apply when an appellant can demonstrate that the judgment has potentially collateral consequences to the defendant, including the impairment of a party's ability to seek a writ of restoration, and because the defendant sought restoration of its tenancy rights under the lease agreement, an avenue of practical relief remained viable in the form of a writ of restoration, which is available in summary process actions to parties who have been wrongly dispossessed of leased property, provided that the term of the lease agreement has not yet

expired; accordingly, given that the term of the parties' lease agreement was for ninety-eight years and, thus, has not expired, the appeal was not moot.

2. The trial court abused its discretion in denying the defendant's motion to open the default judgment, as the defendant provided sufficient information to satisfy the statutory (§ 52-212 [a]) standard for opening a default judgment, which required a showing that a good defense existed at the time that the default judgment was rendered and that the defense was not raised by reason of mistake, accident or other reasonable cause: the defendant asserted that good defenses existed to the plaintiff's action and the trial court did not conclude that the defendant failed to establish the existence of a good defense at the time of the default judgment; moreover, that court's findings that the defendant had engaged in purely dilatory delays and that no reasonable cause existed for the defendant's failure to appear for trial with counsel were clearly erroneous, as the record indicated, inter alia, that a six month delay at the outset of this litigation was occasioned by the plaintiff's failure to promptly amend its patently defective complaint, the defendant immediately sought to procure new counsel after the trial court granted the motion of its attorney to withdraw, new counsel did appear at the courthouse to try to negotiate with the plaintiff and did not advise the defendant of his unwillingness to file an appearance until the day before trial, the plaintiff's counsel confirmed to the trial court that the defendant's new counsel had attempted to conduct negotiations with him before the court rendered the default judgment, an affidavit filed by the defendant's president, which accompanied the motion to open, chronicled those events, which were unrebutted at the hearing on the motion to open, and the record indicated that the defendant had claimed from the onset of the litigation that good defenses existed to the plaintiff's action.

Argued January 16—officially released April 24, 2018

*Procedural History*

Summary process action, brought to the Superior Court in the judicial district of Fairfield, Housing Session, where the defendant was defaulted for failure to appear; thereafter, the court, *Rodriguez*, *J.*, rendered judgment of possession for the plaintiff, from which the defendant appealed to this court; subsequently, the court, *Rodriguez*, *J.*, denied the defendant's motion to open the judgment, and the defendant filed an amended appeal with this court; thereafter, the court, *Rodriguez*, *J.*, issued an articulation of its decision. *Reversed; further proceedings.*

*Gary A. Mastronardi*, for the appellant (defendant).

*Russell D. Liskov*, associate city attorney, for the appellee (plaintiff).

*Opinion*

ELGO, J. The defendant, Grace Building, LLC,[1] appeals from the judgment of the trial court denying its motion to open the default judgment rendered in favor of the plaintiff, the city of Bridgeport. On appeal, the defendant claims that the court abused its discretion in so doing. We agree and, accordingly, reverse the judgment of the trial court.

The plaintiff commenced this summary process action against the defendant on October 22, 2014. In its complaint, the plaintiff alleged that the parties entered into an oral lease agreement in February, 2011, regarding real property located at 560 North Washington Avenue in Bridgeport (property) owned by the plaintiff. The plaintiff alleged that the agreement was for the term of one year and obligated the defendant to pay it "$70,000 in a lump sum and $20,000 in a lump sum in August, 2012." The complaint further alleged that the defendant had failed to make those payments in accordance with the oral agreement. On November 6, 2014, the defendant filed an answer, in which it denied the substance of the plaintiff's allegations. More specifically, the defendant alleged that the parties had entered

[1] Although the defendant is identified in the summons and complaint as "Grace Building, LLC d/b/a Starlight Properties, Inc.," our Supreme Court has explained that "[t]he designation [doing business as] . . . is merely descriptive of the person or corporation who does business under some other name. . . . [I]t signifies that the individual is the owner and operator of the business whose trade name follows his, and makes him personally liable for the torts and contracts of the business . . . ." (Internal quotation marks omitted.) *Monti* v. *Wenkert*, 287 Conn. 101, 135, 947 A.2d 261 (2008); see also Black's Law Dictionary (9th Ed. 2009) p. 455 (explaining that dba abbreviation "signals that the business may be licensed or incorporated under a different name").

into a written lease agreement on August 18, 2010, for a term of ninety-eight years. The defendant further claimed that the payment schedule alleged in the plaintiff's complaint "does not conform to the terms of the written lease agreement." The defendant also raised three special defenses, all of which pertained to remediation of the property.[2] On November 20, 2014, the defendant filed an amended answer and special defenses, wherein it pleaded, in addition to the aforementioned allegations, that "[d]eductions in rent have not been credited contrary to prior agreement" of the parties.

On January 5, 2015, the defendant filed a motion to transfer the matter from the Housing Session to the regular docket of the Superior Court pursuant to Practice Book § 24-21, asserting that "good defenses exist in this matter," including estoppel, unconscionability, and breach of the covenant of good faith and fair dealing. That motion further stated that the defendant "wishes to utilize the discovery process. The defendant wishes to be able to exercise [its] right to a trial by jury. And the defendant wishes to preserve [its] right to the appellate process, all of which may be had by the granting of this motion."

While the motion to transfer was pending, the court scheduled a trial for February 13, 2015. On January 29, 2015, the defendant filed a motion for a continuance

[2] In its November 6, 2014 special defenses, the defendant alleged that "1. [The plaintiff] retained responsibility for ground contamination to the property. As the [plaintiff] has not undertaken the remediation referenced in the lease, or otherwise, as agreed to, provided financing in the form of a low interest loan for this expense, [the defendant's] plans for development and the overriding purpose of the ninety-eight year lease [has] been frustrated. 2. [The defendant] has made substantial investment in cleanup and development of the property, such that a judgment granting plaintiff immediate possession of the property would be inequitable. 3. [The defendant] has incurred significant costs as a result of relying on repeated promises by representatives of the [plaintiff] that deductions in rent would be made for costs associated with cleanup and repair of preexisting tornado damage."

with the consent of the plaintiff due to ongoing discussions between the parties about a possible resolution to the dispute. That motion was granted, and a new trial date was set for March 13, 2015. On February 11, 2015, the defendant filed a second motion for a continuance with the consent of the plaintiff because the parties were "negotiating a settlement." That motion was granted, and a new trial date was set for March 27, 2015. On March 10, 2015, the defendant filed a third motion for a continuance with the consent of the plaintiff because the parties were "discussing resolution" of their dispute. That motion was granted, and a new trial date was set for May 1, 2015.

On April 30, 2015, the plaintiff filed an objection to the defendant's motion to transfer. In its objection, the plaintiff argued that transfer was unnecessary because "the Housing Session is a full service branch of the Superior Court and is completely and fully equipped and competent to handle such a matter."

The court held a hearing on the defendant's motion to transfer on May 1, 2015. At that hearing, the defendant argued that this case involved a lengthy "lease option agreement [whose] purpose . . . was to . . . allow [the defendant] to purchase the property while not assuming liability for ground contamination to the property . . . ." The defendant emphasized that "there are a lot of complicated issues in which [the defendant had] a lot of back and forth with the [plaintiff]. A lot of problems concerning the property in which [the defendant] relied on or understood that certain amounts of [its] investment in the property would be credited toward [its] back rent. [The defendant has] invested in excess of a million dollars into the property. . . . [G]iven the issues involved here, we feel this would be more properly transferred to the regular civil docket." In response, the plaintiff again argued that "this Housing Session is capable of resolving all issues that we have

. . . ." Significantly, the plaintiff at that time stated that "if [the defendant] wants depositions, notice them, we'll be there. If [the defendant] wants discovery, file them, we'll answer the questions. . . . If [the defendant] needs time to do certain things, I'll give [it] the time [it] needs. . . . If [it] wants to do depositions, I'll give [it] whatever time [it] needs. If [it] wants to file interrogatories . . . file them. We'll answer them. Not a problem." The court then denied the defendant's motion to transfer and the proceeding adjourned.

That afternoon, the plaintiff filed an amended complaint in which it acknowledged the existence of a written agreement, as first alleged by the defendant in its original answer filed almost six months earlier. That amended complaint alleged that the defendant, on August 18, 2010, entered into a written lease agreement (agreement) regarding the property. Appended to that pleading was a copy of the agreement signed by both parties. Pursuant thereto, the defendant agreed to pay the sum of $300,000 in four installments in exchange for a lease of ninety-eight years, as well as an option to purchase. An initial payment of $20,000 was due "[a]t the [c]losing"; a second payment of $10,000 was due two months after the date of the closing; $70,000 was due six months after the date of closing; and $200,000 was due twelve months after the date of closing.[3] The complaint further alleged that although the defendant "uses and occupies the [property] as agreed in the [agreement]," it had failed to make the payments specified therein.

On May 4, 2015, the defendant filed an answer to the plaintiff's amended complaint, in which it denied that it had failed to make the required payments. Rather,

[3] The agreement defines "closing" as "the date upon which the parties execute this [a]greement, a fully-executed original thereof is delivered to [the defendant], and all of the other requirements for entry into the [agreement] have been met pursuant to the terms of the [agreement]."

the defendant alleged that "[r]ent was paid in the form of *agreed upon* repairs, cleanup, and/or improvements to the property." (Emphasis added.) The defendant at that time also raised eight special defenses that primarily concerned the defendant's allegations of "ground contamination" on the property that necessitated remediation.[4]

The court thereafter scheduled a trial for May 15, 2015. On May 11, 2015, the defendant filed a motion for a continuance with the consent of the plaintiff because "the parties have agreed to a sixty day continuance for completion of discovery." That motion was granted, and a new trial date was set for June 19, 2015.

On June 15, 2015, the defendant filed a motion for a continuance with the consent of the plaintiff. In that motion, the defendant's counsel, Attorney Robin H. Lasky, indicated that the reason for the request was that discovery was not complete. As Lasky stated: "My client has been unavailable traveling out of state for

[4] Specifically, the defendant alleged: "1. Enforcement of relevant provisions of the [agreement] . . . [is] unconscionable. 2. Relevant provisions of the [agreement] were formulated as a result of undue influence exercised over Defendant. 3. Plaintiff retained responsibility for ground contamination to the property in the form of facilitating remediation and/or arranging for low interest financing for this purpose. 4. As the remedial action plan for the ground contamination referenced in the [agreement] has not been executed or financed per the [agreement] between the parties, the overriding purpose of the [agreement] has been frustrated. 5. Defendant has detrimentally relied on promises made by Plaintiff and its representatives that investment made for cleanup and development of the property would be credited toward rent due. 6. Defendant has detrimentally relied on promises made by Plaintiff that Plaintiff would arrange for low interest financing for the purposes of development and cleanup of the property. 7. Defendant has made substantial investment in cleanup and development of the property, such that a judgment granting Plaintiff immediate possession of the property would be inequitable. 8. Defendant has made substantial investment in reliance on repeated promises by Plaintiff and its representatives related to cleanup and repair of preexisting and/or subsequent damage to the property, such that a judgment granting Plaintiff immediate possession of the property would be inequitable."

the last two weeks. I have not yet received a response to my request for production which the [plaintiff's] attorney has asked me to anticipate receiving this week. The plaintiff has agreed to a continuance until July 17, 2015, and I humbly request the court grant this motion so that I may have sufficient time to review requested [materials] and confer further with my client."[5] The court denied that request on June 15, 2015.

On June 17, 2015, Lasky filed a motion to withdraw his appearance due to "a breakdown in communication" with his client and an "[i]rreconcilable disagreement as to the best legal strategy . . . ." The court held a hearing on June 19, 2015, at which it heard from Lasky and Femi Olowosoyo, the owner and principal of the defendant. At that time, Olowosoyo communicated his displeasure with Lasky and requested a continuance of eight weeks to enable him to secure new counsel. In response, the plaintiff's attorney stated that he "would like the case to be set down for July 17. I think that's more than enough time for this gentleman to get a lawyer. You can go out the door and knock a tree and knock six lawyers out of the tree with a stick for a case." When the plaintiff's counsel then remarked that "the case has been pending since October of 2014," Olowosoyo stated: "I've never asked for any time to find an attorney, Your Honor. This is the first time I'm asking, and I'm hoping that the court will find it reasonable enough to grant [the request] . . . ."

The court granted a continuance, albeit one four weeks less than Olowosoyo had requested. As it stated:

[5] In its appellate brief, the plaintiff states that "[w]hile it is true that six (6) continuances were consented to by the [plaintiff], the last [continuance request on June 15, 2015 was] *not*." (Emphasis in original.) Nothing in the record substantiates that assertion, which is contrary to the content of the June 15, 2015 motion for continuance before us. The plaintiff did not file an objection to the continuance request, and it has not provided any documentation to support that assertion in the appendix to its appellate brief.

"I'm going to grant the continuance request. I'm going to grant the motion of [Lasky] to withdraw and give you the opportunity to hire a new lawyer. But let me be very clear about this . . . you need to have an attorney because you can't represent your [limited liability company]. On July 17, [2015], which is . . . when this case is scheduled next, if you're not here with an attorney, then a default can enter against you, and [y]our company will lose the case because you cannot represent [the defendant] . . . ." Olowosoyo confirmed that he understood the court's directive.

The court then scheduled the case for trial on July 17, 2015. On that date, Olowosoyo appeared before the court without counsel. The plaintiff's attorney at that time informed the court that Olowosoyo "did have a lawyer here today but he would not enter an appearance on [the defendant's] behalf." Accordingly, the plaintiff asked the court to render a default judgment. The court then addressed Olowosoyo, stating: "Sir, I've had a conversation with you in the past. I'm really not even permitted to allow you to address the court because you're not an attorney and you're not a defendant or a litigant in this case. And today's date was a final date, so a default will enter with regard to the [defendant]." With that, the proceeding adjourned. Later that day, the court issued a notice that the defendant had been defaulted for failure to appear.

Six days later, Attorney David E. Dobin of the law firm of Cohen and Wolf, P.C., filed an appearance on behalf of the defendant. At that time, the defendant commenced an appeal from the default judgment with this court.

On August 7, 2015, the defendant filed with the trial court a motion to open the default judgment,[6] which

[6] That motion to open was filed three weeks after the default judgment was rendered, well within the four month limitation of General Statutes § 52-212 (a).

alleged that reasonable cause and good defenses to the plaintiff's action existed, as specified in the defendant's May 4, 2015 answer and special defenses. The defendant further alleged that "between June 19, 2015, the date [Lasky] withdrew his appearance, and July 17, 2015, the date of [the default judgment], defendant was diligent in searching for replacement counsel. Indeed, by June 22, 2015, defendant had dropped off the file related to this case with Attorney Brendan O'Rourke, who held onto the file for several weeks before telling defendant, *for the first time*, on July 16, 2015—one day before the scheduled trial date—that he would attend court with defendant but *not* file an appearance, severely prejudicing the defendant." (Emphasis in original.)

A sworn affidavit from Olowosoyo accompanied the defendant's motion to open the default judgment, in which Olowosoyo affirmed that he was the owner and president of the defendant. Olowosoyo stated in relevant part that the property "was in a dilapidated condition and the [p]laintiff was interested in the [d]efendant's rehabilitation of the [property]. . . . [B]oth before and after the execution of the [agreement], representatives of the [p]laintiff, including Bill Finch, Bill Coleman, and Max Perez represented to me that expenditures made to improve the [property] including cleaning up the [property] prior to execution of the [agreement] and fixing damage to the [property] caused by a tornado, would be credited towards the rent due under the [agreement], that real property taxes would be abated for [eight] years and that additional amounts spent by [d]efendant to repair the tornado damage would be credited towards future transactions between [the parties]. In reliance on those representations, [d]efendant did not pay the rent that that [agreement] states was due . . . . In further reliance on the [p]laintiff's representations, since 2010, [d]efendant has incurred approximately $2 million in expenses in improving the [property]."

With respect to his efforts to secure legal counsel, Olowosoyo stated in the affidavit that he first spoke with O'Rourke on June 19, 2015, and "dropped off the file at [his] office" on June 22, 2015. The affidavit states that Olowosoyo thereafter spoke with O'Rourke on several occasions about the case, and that O'Rourke informed him that O'Rourke had "reached out" to the plaintiff's counsel on the defendant's behalf and "was waiting to hear back." Olowosoyo then stated that "[o]n July 16, I spoke with [O'Rourke]. The [p]laintiff's counsel called him while he was on the phone with me to discuss the case. [O'Rourke] called me back to let me know that the case was going to go forward the next day and for the first time, told me that he would only be able to go with me to court as an advisor, that he wouldn't be able to enter an appearance because that would hurt my case as he was not prepared and he was afraid the judge might not grant [a] continuance. . . . On July 17, [O'Rourke] attended court with me. However, he did not file an appearance on that date and the court that day entered a default judgment for failure to appear."

The court heard argument on the motion to open on August 10, 2015. At that time, the plaintiff's counsel, Attorney Russell D. Liskov, confirmed that O'Rourke had in fact appeared at the courthouse with Olowosoyo on July 17, 2015. As Liskov stated: "He came and spoke to me to try and negotiate with me, but I wasn't negotiating with him without an appearance in the file." When his negotiation attempts proved unsuccessful, Liskov stated, O'Rourke "left before you opened court . . . ." Those representations are consistent with Liskov's statement at the outset of the July 17, 2015 proceeding that Olowosoyo "did have a lawyer here today but he would not enter an appearance on [the defendant's] behalf." In support of the motion to open the default judgment, the defendant's counsel reiterated the efforts

made by Olowosoyo to secure legal counsel for the July 17, 2015 proceeding, as well as the defendant's position that reasonable cause existed for the nonappearance of counsel and that good defenses existed to the plaintiff's claims. When that hearing concluded, the court summarily denied the motion to open. The relevant portion of the August 10, 2015 judgment file states only that "[t]he court, having heard the parties, finds the issues for the plaintiff."[7]

On September 21, 2015, the defendant filed a notice requesting a statement of decision by the trial court. The record before us does not contain any response to that request. The defendant thereafter filed a motion for articulation with the trial court, in which it asked the court to articulate "the factual and/or legal basis for its August 10, 2015 [judgment] . . . denying the defendant's motion to open default. Without said articulation, an adequate record for appellate review cannot be provided by the [defendant] . . . ."[8] By order dated December 14, 2016, the trial court summarily denied that request.

In response, the defendant filed a motion for review with this court, in which it sought an articulation of the court's August 10, 2015 oral decision denying the motion to open. On March 27, 2017, this court granted that motion and ordered the trial court to "articulate the factual and legal bases for its August 10, 2015 order denying the defendant's motion to open the judgment upon default."

On April 24, 2017, the trial court issued its articulation. It stated: "This is a summary process matter that

[7] On August 21, 2015, the defendant filed an amended appeal with this court, which indicated that the defendant also was appealing from the court's August 10, 2015 judgment denying the motion to open the default judgment.

[8] That motion was signed on behalf of the defendant by Attorney Gary A. Mastronardi, who filed an appearance on July 21, 2016. Approximately one month earlier, this court granted Dobin's motion to withdraw the appearance of Cohen and Wolf, P.C.

commenced [on] October 22, 2014. The matter was assigned an unusually high number of seven trial dates. On the sixth date, Mr. Olowosoyo relieved his attorney of his representation and the defendant was given approximately four weeks to July 17, 2015, to obtain new counsel. The defendant was admonished that a default would enter if attorney representation wasn't achieved by July 17. On July 17, 2015, the defendant appeared sans counsel. This is a commercial eviction with a corporate defendant, and Mr. Olowosoyo could not represent the commercial tenant. A default and judgment of possession entered. On July 23 an appeal was filed. On August 7, 2015, a motion to open was filed, and the motion was denied after a hearing on August 10.

"The motion for articulation requests an articulation regarding the denial of the motion to open based on factual and legal basis. The trial court is vested with discretion to 'determine whether there is a good and compelling reason for its modification or vacation.' . . . *Mazziotti* v. *Allstate Ins. Co.*, 240 Conn. 799, 809, 695 A.2d 1010 (1997). Practice Book § 17-43 states that a motion to open must allege [that] a good defense exists and that the defendant was prevented by mistake, accident or other reasonable cause from appearing. The court finds that that situation did not exist here. The court finds that the motion to open was denied due to the dilatory delays of the defendant. This is a summary process action for nonpayment of rent that commenced on October 22, 2014. An amended answer with special defenses was filed on May 4, 2015. This matter has had numerous continuances and delays. The defendant was notified on June 19, 2015, that the July 17, 2015 trial date was a final date and of the consequences that would follow if he did not obtain attorney representation. The assertion that Mr. Olowosoyo had an attorney on July 17 who did not enter an appearance does not

comply with the court's June 19, 2015 order. Nor does the assertion create a situation where he is prevented by mistake, accident or other reasonable cause from appearing."

I

As a preliminary matter, we address the plaintiff's assertion at oral argument before this court that the present appeal is moot. The following undisputed facts are relevant to that contention. Following the commencement of this appeal, the plaintiff filed a motion to terminate the automatic appellate stay, claiming that the appeal was frivolous and taken only for the purpose of delay. The trial court granted that motion over the defendant's objection, and the defendant did not file a motion for review of that order pursuant to Practice Book § 66-6. The plaintiff then filed an application for an execution for possession, which the trial court clerk issued on November 2, 2015.

This court subsequently ordered the parties to submit simultaneous memoranda of law addressing "whether the defendant is still in possession of the property and, if not, whether the appeal has become moot as a result of the defendant vacating the property." The parties complied with that order and, in their respective memoranda, acknowledged that the defendant had been evicted from the property and no longer was in possession thereof.[9] The parties nevertheless disagreed as to whether that development rendered the present appeal moot.

On March 27, 2017, this court declined to dismiss the defendant's appeal on the ground of mootness. Rather, we marked the matter "off without prejudice to the

[9] Appended to the plaintiff's memorandum of law was an affidavit from Liskov, in which he indicated that the plaintiff enforced that execution of ejectment through service of process by a city sheriff in November, 2015, at which time the plaintiff "took possession of the premises in question."

parties briefing the mootness issue in their briefs on the merits." In their subsequent appellate briefs, neither the plaintiff nor the defendant addressed the issue of mootness. Nevertheless, at oral argument before this court on January 16, 2018, the plaintiff's counsel remarked, at the very end of his argument, that the present appeal was moot. In response, the defendant's counsel began his rebuttal by noting that the plaintiff's mootness argument was a "surprise" to him since that issue had not been briefed by the parties. The defendant's counsel then reiterated his position, originally set forth in the defendant's March 17, 2017 memorandum of law to this court, that the general rule of mootness does not apply because adverse collateral consequences result from the judgment of possession.

We normally decline to review claims asserted for the first time at oral argument, as it is well established that "claims on appeal must be adequately briefed, and cannot be raised for the first time at oral argument before the reviewing court." *Grimm* v. *Grimm*, 276 Conn. 377, 393, 886 A.2d 391 (2005), cert. denied, 547 U.S. 1148, 126 S. Ct. 2296, 164 L. Ed. 2d 815 (2006); *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, 172 Conn. App. 160, 171 n.19, 159 A.3d 684, cert. denied, 326 Conn. 901, 162 A.3d 724 (2017). That precept does not apply when the claim is one of mootness, which implicates the subject matter jurisdiction of this court and thus "may be raised at any time . . . ." *State* v. *Charlotte Hungerford Hospital*, 308 Conn. 140, 143, 60 A.3d 946 (2013). Moreover, the parties already have submitted written memoranda of law to this court outlining their respective positions on the issue. Therefore, despite the plaintiff's belated assertion at the close of its oral argument, we address the merits of that claim.

"Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [this] court's subject matter jurisdiction . . . ."

Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable. . . . A case is considered moot if [the] court cannot grant the appellant any practical relief through its disposition of the merits . . . ." (Citations omitted; internal quotation marks omitted.) *JP Morgan Chase Bank, N.A.* v. *Mendez*, 320 Conn. 1, 6, 127 A.3d 994 (2015). "In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way." (Internal quotation marks omitted.) *Middlebury* v. *Connecticut Siting Council*, 326 Conn. 40, 54, 161 A.3d 537 (2017). Our review of the question of mootness is plenary. *State* v. *Rodriguez*, 320 Conn. 694, 699, 132 A.3d 731 (2016).

"Summary process appeals are particularly susceptible to becoming moot upon some action taken by the parties." *Housing Authority* v. *Lamothe*, 225 Conn. 757, 763, 627 A.2d 367 (1993). As a general matter, this court has concluded that an appeal has become moot when, at the time of the appeal, an appellant no longer is in possession of the premises. See, e.g., *Iacurci* v. *Wells*, 108 Conn. App. 274, 276–83, 947 A.2d 1034 (2008) (concluding appeal was moot when defendants "relinquished possession of the leased property" and "have failed to bring to our attention any adverse collateral consequences that will befall them"); *Cheshire* v. *Lewis*, 75 Conn. App. 892, 893, 817 A.2d 1277 (dismissing appeal as moot where tenant vacated property following trial court termination of stay), cert. denied, 264 Conn. 905, 826 A.2d 177 (2003); *Castle Apartments, Inc.* v. *Pichette*, 34 Conn. App. 531, 533–34, 642 A.2d 57 (1994) (dismissing appeal where tenant vacated property and did not raise right to possession as issue on appeal).

As our Supreme Court has explained, that general rule does not apply when an appellant can demonstrate that "the judgment has potentially prejudicial collateral

consequences to the defendant." *Housing Authority* v. *Lamothe*, supra, 225 Conn. 765; see also *Wilcox* v. *Ferraina*, 100 Conn. App. 541, 548, 920 A.2d 316 (2007) ("[o]ur Supreme Court . . . has allowed us to retain jurisdiction where the matter being appealed creates collateral consequences prejudicial to the interests of the appellant, even though developments during the pendency of the appeal would otherwise render it moot" [internal quotation marks omitted]). Such collateral consequences include the impairment of a party's ability to seek a writ of restoration, which allows "a tenant wrongly evicted to be restored to the premises . . . ." *Housing Authority* v. *Lamothe*, supra, 764. In its March 17, 2017 memorandum of law to this court, the defendant claimed such an impairment.

Almost two centuries ago, this state's highest court recognized that a party to a summary process action that wrongly is dispossessed of leased property "is clearly entitled" to "a writ restoring him to the possession" thereof, provided that the term of the lease "has not yet expired." *Du Bouchet* v. *Wharton*, 12 Conn. 532, 539–40 (1838); accord *Evergreen Manor Associates* v. *Farrell*, 9 Conn. App. 77, 78, 515 A.2d 1081 (1986) ("[w]hile a writ of restoration may issue upon a reversal of a summary process judgment, it can only issue if the lease has not expired by its terms"). As the Supreme Court observed, "courts have been in the habit of awarding such writs . . . ." *Du Bouchet* v. *Wharton*, supra, 540. "If therefore, the tenant has been [wrongly] dispossessed of his property, both justice and authority require, that he be restored." Id., 539.

Particularly relevant to this appeal is *Yankee Sailing Co*. v. *Yankee Harbor Marina, Inc.*, 5 Conn. App. 153, 154, 497 A.2d 93 (1985), which involved "the use of a building" by certain tenants that ultimately were evicted from the property. Like the defendant in this case, the tenants in *Yankee Sailing Co*. "did not pay rent for

the use and occupancy of the building but, instead, compensated the landlords for the use of the building by making improvements to the property under an alleged oral agreement." Id. A summary process action followed, at the conclusion of which the trial court "awarded the landlords immediate possession." Id., 155. This court thereafter concluded that the tenants' appeal was moot. In so doing, we noted that "a writ of restoration may issue upon a reversal of a summary process judgment . . . ." (Citation omitted.) Id., 157, citing *Du Bouchet* v. *Wharton*, supra, 12 Conn. 539. We further emphasized that "such a writ can only issue if the lease has not expired by its terms." *Yankee Sailing Co.* v. *Yankee Harbor Marina, Inc.*, supra, 157. Because there was no lease between the parties in that case, this court concluded that no practical relief could be granted, rendering the appeal moot. Id.

By contrast, the defendant in the present case expressly has indicated that it "seeks restoration of its tenancy rights under the [agreement] in order to allow it to reap the benefits of its substantial monetary investment . . . ."[10] A copy of that agreement is appended

[10] In that regard, we note the defendant's ancillary contention that, as a collateral consequence of the trial court decision, it will be deprived of any recourse for the "substantial monetary investment" it allegedly has made in the property if this appeal is dismissed as moot. In its March 16, 2017 memorandum of law to this court, the plaintiff noted that "the only relief that [the plaintiff] sought and received was possession of the property." In response, the defendant argues that "what is obviously at stake in this case is considerably more than just the adverse effect ordinarily suffered by a tenant in an eviction action where the tenant is merely deprived solely of the right to occupy the leased property. Here, the substantial sums advanced by [the defendant] in improving the [property] created legitimate, investment-backed, business expectations on the part of the defendant . . . of which the defendant stands to be deprived, without any fair opportunity to be heard, should this appeal be dismissed as moot." Should this court reverse the judgment of the trial court denying its motion to open, the defendant argues, it then would have the opportunity to have those allegations decided on their merits. Such allegations were pleaded in the defendant's answers and special defenses to the plaintiff's original and amended complaints. See footnotes 2 and 4 of this opinion.

to the plaintiff's amended complaint. Section 3.1 of the agreement states in relevant part that "[t]he term of this Lease shall be for a period of ninety-eight (98) years . . . ." Because ninety-eight years plainly have not passed since the parties entered into that agreement in 2010, an avenue of practical relief remains viable under Connecticut precedent, in the form of a writ of restoration. See *Du Bouchet* v. *Wharton*, supra, 12 Conn. 539–40; *Yankee Sailing Co*. v. *Yankee Harbor Marina, Inc*., supra, 5 Conn. App. 157. We therefore conclude that the present appeal is not moot and turn our attention to the defendant's claim.

II

The defendant contends that the court improperly denied its motion to open the default judgment. "To open a judgment pursuant to Practice Book § 17-43 (a) and General Statutes § 52-212 (a), the movant must make a two part showing that (1) a good defense existed at the time an adverse judgment was rendered; and (2) the defense was not at that time raised by reason of mistake, accident or other reasonable cause. . . . The party moving to open a default judgment must not only allege, but also make a showing sufficient to satisfy [that] two-pronged test . . . . [B]ecause the movant must satisfy both prongs of this analysis, failure to meet either prong is fatal to its motion." (Internal quotation marks omitted.) *Little* v. *Mackeyboy Auto, LLC*, 142 Conn. App. 14, 18–19, 62 A.3d 1164 (2013).

Our review of a ruling on a motion to open a default judgment is governed by the abuse of discretion standard. *Ruddock* v. *Burrowes*, 243 Conn. 569, 571 n.4, 706 A.2d 967 (1998). As this court has observed, "we review the court's determination to deny [a defendant's motion] to open the default judgment for a clear abuse of discretion. . . . The court's discretion, however, is not unfettered; it is a legal discretion subject to review.

. . . [D]iscretion imports something more than leeway in decision-making. . . . It means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . In addition, 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 [its] day in court." (Citations omitted; internal quotation marks omitted.) *Multilingual Consultant Associates, LLC* v. *Ngoh*, 163 Conn. App. 725, 735, 137 A.3d 97 (2016). With that standard in mind, we turn to the defendant's claim.

A

We begin by noting that the court did not determine, in either its August 10, 2015 oral ruling or its April 24, 2017 articulation, that the defendant had failed to demonstrate the existence of a good defense, consistent with the first prong of the standard set forth in § 52-212 (a). See *Woodruff* v. *Riley*, 78 Conn. App. 466, 471, 827 A.2d 743 (although defendant "asserted that she had a good defense . . . [the trial] court made no finding in that regard"), cert. denied, 266 Conn. 922, 835 A.2d 474 (2003). Rather, the court in its articulation concluded that the defendant had failed to satisfy the second prong of that standard.

The record in this case plainly indicates that, from the very onset of this litigation, the defendant has claimed that good defenses exist to the plaintiff's action. Those defenses were set forth in detail in the defendant's November 6, 2014 answer and special defenses, its November 20, 2014 amended special defenses, and its May 4, 2015 answer and special defenses to the plaintiff's May 1, 2015 amended complaint.[11] See footnotes 2 and 4 of this opinion. The present case thus is

[11] In its answer to the amended complaint, the defendant alleged that payments required under the agreement were made "in the form of agreed upon repairs, cleanup, and/or improvements to the property." In both its

not one in which "the defendant did not present a defense that existed at the time of the rendition of the [default] judgment . . . ." *Pantlin & Chananie Development Corp.* v. *Hartford Cement & Building Supply Co.*, 196 Conn. 233, 241, 492 A.2d 159 (1985).

In its motion to open the default judgment, the defendant incorporated those defenses by reference, stating in relevant part: "At the time of the judgment, good defenses to the claims asserted by the [p]laintiff in this action existed, including lack of subject matter jurisdiction, the doctrine against inequitable forfeiture, and estoppel, as more particularly set forth in the amended answer and special defenses filed May 4, 2014 . . . and the affidavit of [Olowosoyo] in support of the motion to open attached hereto . . . ." In light of the foregoing, the court understandably did not conclude that the defendant had failed to establish the existence of a good defense at the time that the default judgment was rendered.

B

The critical question, then, is whether the court properly concluded that the defendant failed to raise those defenses at the July 17, 2015 proceeding by reason of

special defenses and its motion to open, the defendant further alleged that it had made substantial investments in accordance therewith. In his affidavit appended to the defendant's motion to open, Olowosoyo stated that "[i]n further reliance on the [p]laintiff's representations, since 2010, [d]efendant has incurred approximately $2 million in expenses in improving the [property] . . . ."

The record before us also indicates that although payments of $70,000 and $200,000 were due under § 4.1 (c) and (d) of the agreement in February and August, 2011, respectively, the plaintiff made no demand for payment until 2014. For that reason, Olowosoyo stated in his affidavit appended to the motion to open that "[a]lthough the [agreement] states that rent was due . . . in February 2011 and August 2011, the plaintiff, consistent with [its assurances to the defendant], did not attempt to enforce the rent and tax terms of the [agreement] until a [n]otice of [d]efault was sent in January 2014 . . . ."

"mistake, accident or other reasonable cause . . . ." General Statutes § 52-212 (a). As our Supreme Court has explained, "[i]n order to determine whether the court abused its discretion [in ruling on a motion to open], we must look to the conclusions of fact upon which the trial court predicated its ruling." *New England Floor Covering Co.* v. *Architectural Interiors, Inc.*, 159 Conn. 352, 358, 269 A.2d 267 (1970). Those factual findings are reviewed pursuant to the clearly erroneous standard; *Watkins* v. *Demos*, 172 Conn. App. 730, 735, 161 A.3d 655 (2017); under which a finding is "clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Nutmeg Housing Development Corp.* v. *Colchester*, 324 Conn. 1, 10, 151 A.3d 358 (2016).

In its articulation, the court expressly indicated that it denied the defendant's motion to open "due to the dilatory delays of the defendant."[12] The record before us belies such a finding. We note in this regard that when the plaintiff commenced this action in November, 2014, its complaint contained glaring misstatements that ultimately necessitated revision by the plaintiff. For example, the original complaint claimed that the parties had entered into an "oral" agreement for the lease of the property in "February, 2011." As the defendant pointed out in its November 6, 2014 answer and as confirmed in the agreement appended to the plaintiff's May 1, 2015 amended complaint, the parties actually entered into a written agreement on August 18,

[12] "Dilatory" is defined as "tending or intended to cause delay" and "characterized by procrastination." Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) p. 350. It frequently is utilized to describe deliberate conduct on the part of a litigant to delay or obstruct a court proceeding. See, e.g., *Westport Taxi Service, Inc.* v. *Westport Transit District*, 235 Conn. 1, 43, 664 A.2d 719 (1995); *State* v. *J.M.F.*, 170 Conn. App. 120, 132, 154 A.3d 1, cert. denied, 325 Conn. 912, 159 A.3d 230 (2017).

2010. Moreover, the payment schedule alleged in the original complaint does not accurately reflect that contained in the parties' written agreement. Although the defendant immediately apprised the plaintiff of those fundamental defects in its complaint, the plaintiff did not amend its pleading until six months later on May 1, 2015. By contrast, the defendant filed its answer to the plaintiff's original complaint fifteen days after that complaint was filed, and filed its answer to the amended complaint three days after it was filed by the plaintiff. Unlike the plaintiff, therefore, the defendant cannot "be accused of delinquency in [its] pleadings." *Blue Cross/Blue Shield of Connecticut, Inc.* v. *Gurski*, 49 Conn. App. 731, 737, 715 A.2d 819, cert. denied, 247 Conn. 920, 722 A.2d 809 (1998). Moreover, at no time in these proceedings has the plaintiff offered any "justification for [its] delay . . . in moving to amend the complaint." *Ruggiero* v. *Pellicci*, 294 Conn. 473, 478, 987 A.2d 339 (2010). The record demonstrates, in unequivocal fashion, that a one-half year delay was occasioned by the plaintiff's failure to amend its complaint in a prompt manner.

In addition, we note that, on January 5, 2015, the defendant filed a motion to transfer the case to the regular docket of the Superior Court, claiming that "good defenses exist in this matter" and that the defendant wished to "utilize the discovery process" and "exercise [its] right to a trial by jury." The plaintiff did not file an objection to that request until almost four months later on April 30, 2015.[13] Once again, the plaintiff offered no justification or explanation for its delay in responding to the defendant's motion to transfer. The court ultimately denied the defendant's motion to transfer on May 1, 2015—only seventy-eight days prior to entry of the default judgment in this case.

[13] At that time, the plaintiff still had not filed an amended complaint to rectify the fundamental deficiencies in its original complaint.

Perhaps most astounding is the fact that, during that seventy-eight day period, the plaintiff agreed to afford the defendant a sixty day window to conduct discovery. At the May 1, 2015 hearing on the motion to transfer, the defendant had emphasized "the complexities of the case" and claimed that the present dispute was not "a traditional eviction matter" because "[g]ood defenses exist." In response, the plaintiff submitted that "[t]his Housing Session is capable of resolving all issues that we have . . . . You are a full service court and you're a Superior Court judge." The plaintiff then invited the defendant to conduct discovery and expressly indicated its acquiescence thereto. As Liskov stated, "[i]f [the defendant] wants discovery, file them, we'll answer the questions. . . . If [the defendant] needs time to do certain things, *I'll give* [*it*] *the time* [*it*] *needs*. . . . If [*it*] wants to do depositions, *I'll give* [*it*] *whatever time* [*it*] *needs*. If [*it*] wants to file interrogatories . . . file them. We'll answer them. Not a problem." (Emphasis added.) As reflected in the May 14, 2015 continuance request, the plaintiff thereafter "agreed to a sixty day continuance for completion of discovery." Although the court granted that continuance on May 14, 2015, the record contains no explanation as to why a trial was scheduled only thirty-six days later on June 19, 2015. In any event, the record indicates that, in May, 2015, the plaintiff agreed to postpone proceedings in this case to permit the defendant to conduct discovery until the middle of July, 2015. It bears repeating that the default judgment at issue in this appeal was rendered on July 17, 2015.

The record further indicates that the defendant did, in fact, conduct discovery during that period. The defendant served a request for admissions on the plaintiff; the plaintiff's answers thereto were filed with the court on June 15, 2015. On May 28, 2015, the defendant served a request for production of documents on the plaintiff.

The plaintiff filed its "responses/objections" to that request with the court on June 16, 2015.

Furthermore, the record reflects that *every* motion for a continuance in this case was filed by the defendant with the consent of the plaintiff. As the judgment file that was filed with this court on August 21, 2015, notes, "[s]cheduled trials for the case on February 13, March 13, March 27, May 1 and May 15 were continued with the consent of all parties." Counsel for the defendant likewise stated at the hearing on the motion to open that those continuances all "were consented to continuances" and "were agreed to because there [were] continuing negotiations between the parties." The present case thus resembles *Stevenson* v. *Peerless Industries, Inc.*, 72 Conn. App. 601, 610, 806 A.2d 567 (2002), in which we observed that "this case does not involve a situation that resulted in considerable delay or inconvenience to the court or to opposing parties." As the defendant correctly noted at oral argument before this court, the plaintiff at no time in this case has alleged any prejudice resulting from either the granting of the aforementioned continuances or the granting of the defendant's timely motion to open.

The record also indicates that, on June 19, 2015, the court continued the matter to July 17, 2015, after granting Lasky's motion to withdraw as legal counsel due to what Lasky described as "a breakdown in communication" with his client and "[i]rreconcilable disagreement as to the best legal strategy . . . ." The defendant concedes that it did not appear with legal counsel at the July 17 proceeding. It nevertheless contends that the record does not support the court's finding that the defendant's failure to do so was for dilatory purposes. On the particular circumstances of this case, we agree.

At the June 19, 2015 proceeding, the court granted a continuance to afford the defendant the opportunity to

secure new legal counsel. In the affidavit submitted with the defendant's motion to open, Olowosoyo averred that later on the day of June 19, 2015, he spoke with two attorneys, O'Rourke and Kevin Ahern, regarding legal representation for the defendant, and left a message for another, Attorney Edwin Farrow. Olowosoyo stated that he "dropped off the case file at [O'Rourke's] office" three days later and thereafter spoke with O'Rourke on multiple occasions about the case, with O'Rourke informing him that he had "reached out" to the plaintiff's counsel on the defendant's behalf and "was waiting to hear back."[14] Olowosoyo then stated "[o]n July 16, I spoke with [O'Rourke]. The [p]laintiff's counsel called him while he was on the phone with me to discuss the case. [O'Rourke] called me back to let me know that the case was going to go forward the next day and for the first time, told me that he would only be able to go with me to court as an advisor, that he wouldn't be able to enter an appearance because that would hurt my case as he was not prepared and he was afraid the judge might not grant [a] continuance. On July 17, [O'Rourke] attended court with me. However, he did not file an appearance on that date and the court that day entered a default judgment for failure to appear." (Footnote added.)

At the hearing on the motion to open, the plaintiff's counsel confirmed the accuracy of those latter affirmations. Liskov informed the court that O'Rourke had in fact appeared at the courthouse with Olowosoyo on July 17, 2015. As Liskov stated: "He came and spoke to me to try and negotiate with me, but I wasn't negotiating with him without an appearance in the file." When his negotiation attempts proved unsuccessful, Liskov stated, O'Rourke "left before you opened court . . . ." Those representations are consistent with Liskov's

[14] At oral argument before this court, the plaintiff's counsel confirmed that he received such calls from O'Rourke on the defendant's behalf.

statement at the outset of the July 17, 2015 proceeding that Olowosoyo "did have a lawyer here today but he would not enter an appearance on his behalf."

Although it is undisputed that the defendant did not appear with legal counsel at the July 17, 2015 proceeding, it is equally undisputed that Olowosoyo took steps to secure legal counsel for the defendant and that counsel did in fact appear at the courthouse on July 17, 2015, at which time counsel attempted to negotiate with the plaintiff on the defendant's behalf. Under those particular circumstances, and in light of the entire procedural history of this case as documented in the record before us, we conclude that the court's finding that the defendant had engaged in purely dilatory delays is clearly erroneous. A six month delay at the outset of this litigation was occasioned by *the plaintiff's* failure to promptly amend its patently defective complaint, and the plaintiff did not file its objection to the defendant's January 5, 2015 motion to transfer until nearly four months later. A mere seventy-eight days passed between the filing of the plaintiff's amended complaint on May 1, 2015, and the entry of the default judgment. Moreover, the plaintiff, on May 14, 2015, agreed to a sixty day period of discovery, and discovery thereafter was conducted between the parties. In such circumstances, the defendant's conduct cannot be described as dilatory in nature.

In its articulation, the court also found that no reasonable cause existed for the defendant's failure to appear with counsel at the July 17, 2015 proceeding. The defendant claims, and we agree, that the court's finding is clearly erroneous.

Significantly, this is not a case in which the defendant was notified of the withdrawal of its legal counsel and "the necessity of procuring substitute counsel" but thereafter "did nothing." *Testa* v. *Carrolls Hamburger*

*System*, *Inc*., 154 Conn. 294, 300, 224 A.2d 739 (1966). This also is not a case in which the defendant gave no explanation for its failure to appear at the proceeding in question. *Ryan* v. *Vera*, 135 Conn. App. 864, 870, 43 A.3d 221 (2012).

Moreover, this is not a case in which the defendant "made a conscious decision to ignore" the court's directive. *Dziedzic* v. *Pine Island Marina*, *LLC*, 143 Conn. App. 644, 652, 72 A.3d 406 (2013); see also *Woodruff* v. *Riley*, supra, 78 Conn. App. 471 ("[a] court should not open a default judgment in cases where the defendants admit they received actual notice and simply chose to ignore the court's authority" [internal quotation marks omitted]). Rather, the record before us indicates that (1) soon after this action was commenced, the defendant filed a motion to transfer the case to the regular docket of the Superior Court because "good defenses exist in this matter"; (2) the defendant asserted several defenses to the action in its answer and special defenses to both the plaintiff's original complaint and its May 1, 2015 amended complaint; (3) the parties, on May 14, 2015, agreed to a sixty day period of discovery beginning on May 14, 2015, during which the defendant in fact engaged in discovery; (4) prior to the completion of that period of discovery, the court held a hearing on June 19, 2015, at which it granted Lasky's motion to withdraw and instructed the defendant to procure new counsel prior to the July 17, 2015 proceeding; (5) the defendant immediately consulted with O'Rourke, among other attorneys, later that same day; (6) O'Rourke took custody of the defendant's case file three days later and thereafter engaged in discussions with the plaintiff on behalf of the defendant; (7) O'Rourke did not advise the defendant of his unwillingness to file an appearance until the day before the July 17 proceeding; (8) O'Rourke at that time informed Olowosoyo that he would appear "as an advisor" but would not file an

appearance "because that would hurt [the defendant's] case as he was not prepared and he was afraid the judge might not grant [a] continuance"; (9) the plaintiff's counsel later confirmed that O'Rourke did in fact appear at the courthouse on July 17, 2015, and attempted to conduct negotiations with him on the defendant's behalf; (10) at that July 17 proceeding, the plaintiff's counsel informed the court that O'Rourke had appeared at the courthouse with Olowosoyo "but he would not enter an appearance on [the defendant's] behalf"; (11) Olowosoyo appeared at the July 17 proceeding but was not permitted to address the court beyond identifying himself as the president of the defendant; (12) six days after the default judgment was rendered, new legal counsel filed an appearance for the defendant and commenced an appeal with this court; and (13) three weeks after the default judgment was rendered, the defendant filed a motion to open predicated on both the good defenses outlined in its answer and special defenses to the plaintiff's amended complaint and its efforts to secure new legal counsel for the July 17 proceeding. We note in this regard that Olowosoyo's sworn affidavit chronicles, in great detail, those efforts and O'Rourke's conduct in the days leading up to the July 17 proceeding, which claims went "unrebutted at the hearing" on the motion to open. *Carter* v. *D'Urso*, 5 Conn. App. 230, 235, 497 A.2d 1012, cert. denied, 197 Conn. 814, 499 A.2d 63 (1985).

The undisputed circumstances and the unique procedural history of this case convince us that the court improperly found that the defendant had not established reasonable cause for its failure to appear with counsel at the July 17, 2015 proceeding. In this case, we are left with a firm conviction that a mistake has been made, and we are mindful that the trial court's discretion to open a default judgment must be "exercised in conformity with the spirit of the law and in a

manner to subserve and not to impede or defeat the ends of substantial justice. . . . In addition, 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 [its] day in court." (Internal quotation marks omitted.) *Multilingual Consultant Associates, LLC* v. *Ngoh*, supra, 163 Conn. App. 735. We therefore conclude that the defendant, in moving to open the default judgment, provided "sufficient information"; id., 737; to satisfy both prongs of the standard set forth in § 52-212 (a). Accordingly, the trial court abused its discretion in denying the defendant's motion to open the default judgment.

The judgment is reversed and the case is remanded for further proceedings in accordance with law.

In this opinion the other judges concurred.

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# CAROLINE HIRSCHFELD *v.* ROBERT B. MACHINIST (AC 39772)

Keller, Bright and Norcott, Js.

*Syllabus*

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court rendered on certain postjudgment motions filed by the plaintiff. The plaintiff had filed a motion for order that requested that the trial court order the defendant to divide certain assets identified in the defendant's financial affidavit and a motion for contempt that alleged that the defendant had failed to pay fully his alimony obligation for a certain year. Thereafter, the plaintiff filed a motion for order in which she claimed that the defendant unilaterally had reduced his alimony payment by relying on a certain provision in the separation agreement, which provided, inter alia, that the defendant shall pay a reduced percentage of alimony after a certain step-down date, and that the defendant had misapplied the language of that provision in light of the mandatory minimum alimony obligation set forth in another provision. The plaintiff requested the trial court to order the defendant to pay an arrearage allegedly owed to her. Following an evidentiary hearing on remand from

prior appeals to this court, the trial court denied in part the plaintiff's motion for order seeking the defendant to divide certain assets, denied in part the plaintiff's motion for contempt, and denied the plaintiff's motion for order concerning the defendant's alimony obligations, and the plaintiff appealed to this court. *Held*:

1. The plaintiff could not prevail on her claim that the trial court improperly failed to find the defendant in contempt when it denied in part her motion for order regarding the division of the defendant's interest in various investments and limited partnerships, which was based on her claim that once the court determined that the defendant had underpaid the plaintiff with respect to her share of the distributions from certain assets, it should have found that the defendant's conduct was wilful: although the separation agreement provided that the parties must divide in kind the passive investments and limited partnerships shown in the defendant's financial affidavit, the plaintiff did not seek a finding of contempt on the ground that the in kind division did not occur and she agreed that such a division was not possible, and although the plaintiff argued that the court should have found the defendant in contempt because he failed to distribute properly to the plaintiff her share of the income from the assets pursuant to a modified agreement that the parties had reached after the court rendered the dissolution judgment, the court never incorporated the parties' modified agreement into its dissolution decree or any other court order, and, thus, that modified agreement could not have been the basis for a finding of contempt; moreover, because it was not possible for the defendant to comply with the property division terms of the separation agreement, the defendant could not have been found in contempt.
2. The plaintiff's claim that the trial court erred by not finding the defendant in contempt for underpaying alimony for a certain year was unavailing; even though the trial court found that there was no reasonable basis for the defendant to have made the deduction that resulted in the underpayment, the plaintiff ignored the court's additional findings that the defendant's argument was made in good faith and was not frivolous, and that neither party completely understood the court's orders, and the plaintiff failed to point to anything in the record that undermined or was inconsistent with those findings.
3. The trial court did not err in determining that two provisions in the separation agreement were ambiguous and considering extrinsic evidence when it denied the plaintiff's motion for order concerning the defendant's alleged underpayment of alimony: the defendant's application of the provision that provided for a reduced percentage of alimony after the step-down date resulted in a lower alimony payment than the minimum alimony payment amount specified in the other relevant provision of the separation agreement, that inconsistency in language between the two provisions of the separation agreement created an

ambiguity in that contract, both parties offered reasonable interpretations to resolve the inconsistency in the language of those provisions, and although the plaintiff claimed that the minimum alimony payment provision was clear and unambiguous, her claim was completely undermined by the fact that, during the trial and appellate proceedings in the present action, she had offered two very different interpretations of the two provisions; moreover, the extrinsic evidence relied on by the trial court was properly used to explain an ambiguity that existed in the separation agreement and, thus, that evidence was properly considered by the court even though the separation agreement contained a merger clause and was a fully integrated contract.

4. The plaintiff's claim that the trial court abused its discretion in failing to award her attorney's fees on any of her motions was unavailing; the plaintiff's argument was based on her claim that the defendant should have been held in contempt, but because this court concluded that the trial court did not err in declining to find the defendant in contempt, there was no basis to conclude that the court abused its discretion by not awarding attorney's fees to the plaintiff.

Argued on January 29—officially released April 24, 2018

*Procedural History*

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Hon. Stanley Novack*, judge trial referee; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Shay*, *J.*, denied the plaintiff's motion for order seeking the defendant to divide certain assets and issued certain other postjudgment orders and granted the plaintiff's motion for contempt, and the plaintiff filed separate appeals to this court, which reversed the judgment in part and remanded the case for further proceedings in the first appeal, and reversed the judgment and remanded the case for further proceedings in the second appeal; following an evidentiary hearing on remand, the court, *Colin*, *J.*, denied in part the plaintiff's motion for order seeking the defendant to divide certain assets, denied in part the plaintiff's motion for contempt, and denied the plaintiff's motion for order concerning the defendant's alimony obligations, and the plaintiff appealed to this court. *Affirmed.*

*Kenneth A. Votre*, for the appellant (plaintiff).

*Kenneth J. Bartschi*, with whom were *Dana M. Hrelic* and, on the brief, *Melissa Needle*, for the appellee (defendant).

*Opinion*

BRIGHT, J. The plaintiff, Caroline Hirschfeld, appeals from the judgment of the trial court rendered on three postjudgment motions filed by the plaintiff in this dissolution action. On appeal, the plaintiff claims that the court erred by: (1) failing to find the defendant, Robert B. Machinist, in contempt for not complying with the property division terms of the separation agreement; (2) failing to find the defendant in contempt for underpaying alimony in the same year that their marriage had been dissolved; (3) determining that the parties' separation agreement was ambiguous and improperly considering extrinsic evidence in violation of the parol evidence rule; and (4) failing to award the plaintiff attorney's fees on her motions. We disagree and affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal.[1] On February 2, 2007, the parties' twenty-nine year marriage was dissolved pursuant to a detailed separation agreement negotiated by the parties with the assistance of counsel. Two provisions of that agreement are at the heart of this appeal. First, paragraph 3.1 of the separation agreement addresses the defendant's obligation to pay alimony and child support to the plaintiff. It provides: "During the joint lives of

[1] The parties have been in almost continuous litigation since their marriage was dissolved. Between March 6, 2007, and June 22, 2017, more than 300 entries were added to the case docket, including more than 150 posttrial motions, and the parties have been before this court on four other occasions and before our Supreme Court twice. We have limited our discussion of the procedural history of the parties' dispute to that which relates to the issues now before us.

the parties the [defendant] shall pay unallocated alimony and child support to the [plaintiff] according to the following schedule: a. 40 [percent] of the [defendant's] first $400,000 of earned income in each calendar year; provided, however, if alimony is still being paid by the [defendant] as of *January 1, 2014* this percentage shall be reduced to 32.5 [percent]. b. 30 [percent] of the [defendant's] earned income from $400,001 to $900,000 in each calendar year. c. 20 [percent] of the [defendant's] earned income from $900,001 per year to $1,500,000 in each calendar year. d. 0 [percent of] the [defendant's] earned income that exceeds $1,500,001 in each calendar year. e. The percentages recited in this Paragraph 3.1 are non-modifiable by the parties or the court, except as provided in Paragraph 3.2 (d).[2] f. Minimum alimony under [paragraph] 3.1 (a) shall be $160,000 per year." (Emphasis in original; footnote added.) Although paragraph 3.1 is typewritten, subparagraph (f) was handwritten into the separation agreement and initialed by both parties.

The second provision of the separation agreement at issue is paragraph 6.15, which provides: "The [defendant] and the [plaintiff] shall divide in kind the passive investments or limited partnerships shown in Section [III (G)] of the [defendant's] December 5, 2006 financial affidavit [(financial affidavit)]. Each of the parties shall receive 50 [percent] of such investments and limited partnerships. Each of the parties shall be required to pay out of their separate assets any capital calls or clawbacks required as a consequence of such party's ownership of such passive investments or limited partnerships."

Section III (G) of the defendant's financial affidavit lists eleven items under the heading "Passive Investments/Limited Partnerships Titled in Robert Machinist's

[2] Neither party claims that the exception in paragraph 3.2 (d) was at issue before the court or is relevant to this appeal.

Name." Five of those items are limited partnerships of which the defendant listed an ownership interest of less than 1 percent.

On September 18, 2008, the plaintiff filed a motion for order, seeking an order that the defendant divide the assets identified in § III (G) of the defendant's financial affidavit. The trial court, *Shay*, *J.*, denied this motion on August 24, 2009, without completing the hearing that began on August 4, 2009. On appeal, this court reversed the judgment rendered on that motion and remanded the case for a full evidentiary hearing. *Hirschfeld* v. *Machinist*, 131 Conn. App. 352, 359–61, 29 A.3d 159 (2011).

On remand, the trial court, *Colin*, *J.*, conducted an evidentiary hearing on the plaintiff's motion. In her motion, the plaintiff alleged that "the [defendant] has failed and refused to divide said . . . passive investments and limited partnerships." She sought an order requiring such a division, holding the defendant "financially responsible for any economic loss incurred by the [p]laintiff due to [the defendant's] failure" to divide the assets, awarding her attorney's fees, and fining the defendant $1000. Following the evidentiary hearing, the court found that the plaintiff had failed to prove that the defendant had "refused" to divide the assets. The court found, instead, that the defendant had failed to divide the assets because it was not possible for him to do so pursuant to the various partnership agreements. In particular, the court found that "[i]t is undisputed that the assets that are the subject of this motion, and that are listed on the defendant's financial affidavit at § [III (G)], could not be divided in kind as required under the language of the separation agreement." The court further noted that the parties, with the assistance of their counsel, had "essentially agreed that [because] title to the assets could not be transferred to the plaintiff, the defendant would instead

pay to the plaintiff [one half] of what he received from the assets. It took years for this to be accomplished due to the continued, never-ending saga of these parties [postdissolution], involving many disputes arising under the terms of [the separation] agreement. The defendant did not wrongfully withhold funds from the plaintiff."

The court found that, from the date of the dissolution through December 31, 2013, the defendant principally had complied with the parties' modified agreement regarding the division of assets but had underpaid the plaintiff by $9602.62. The court granted the plaintiff's motion in part and ordered the defendant to pay the plaintiff $9602.62 but declined to award her any interest or attorney's fees. The court explained that it "cannot order the defendant to do something that is a clear legal impossibility. . . . The parties have essentially worked out another way to accomplish what they intended. There is no legal or factual basis to grant much of the relief the plaintiff seeks other than to order the defendant to pay to the plaintiff the remaining amount due in order to effectuate the judgment."

At the same hearing, Judge Colin also heard testimony and argument related to the motion for contempt filed by the plaintiff on September 17, 2010, which alleged that the defendant had failed to pay fully his alimony obligation for 2007. Previously, on May 31, 2011, Judge Shay granted the plaintiff's motion and awarded her $36,959 in unpaid alimony and attorney's fees in the amount of $17,731.97. Nevertheless, the plaintiff appealed from the judgment because she believed that she was owed significantly more in alimony but could not determine the full amount of the underpayment because the court restricted her access to certain documents related to the defendant's earned income. *Hirschfeld* v. *Machinist*, 137 Conn. App. 690, 691–92, 50 A.3d 324, cert. denied, 307 Conn. 939, 56 A.3d

950 (2012). This court agreed, reversed the judgment of the trial court, and remanded the case for further proceedings. Id., 696.

On remand, Judge Colin conducted a full evidentiary hearing after the plaintiff was provided access to the documents she sought. On the basis of the evidence, the court found that the defendant had underpaid alimony to the plaintiff in 2007 in the amount of $80,335.50. The underpayment was the result of the defendant reducing his 2007 income by the $150,025 loss indicated on his 2007 Schedule K-1 that was associated with his approximately 12.15 percent interest in a limited liability company. Although the court found that there was no reasonable or factual basis for the defendant to make such a deduction, it held that "the evidence does not clearly and convincingly establish that the defendant's failure to pay all of what he owed rose to the level of a wilful and intentional violation of the court's orders. Quite frankly, after hearing the parties testify at length regarding a number of aspects of their separation agreement, the court is left with the distinct impression that neither party completely understands the language of the [court's current] orders. [Although] the court has rejected the defendant's claim that a loss should be applied against his earnings in 2007, the argument was not frivolous and was made in good faith." Consequently, the court granted in part the plaintiff's motion, and ordered the defendant to pay the plaintiff $80,335.50, plus simple interest at the rate of 2 percent per year from October 15, 2008. The court concluded that no finding of contempt was warranted and denied the plaintiff's request for attorney's fees.

Finally, the court considered a motion for order filed by the plaintiff on May 29, 2014, in which she claimed that the defendant, relying on the language of paragraph 3.1 (a) of the separation agreement, unilaterally reduced his alimony payment from 40 percent to 32.5 percent

of the first $400,000 of his earned income. Thus, in February, 2014, the defendant paid the plaintiff $10,833.33 instead of $13,333.33 that he had paid each month since the judgment of dissolution. The plaintiff claimed that the defendant misapplied the language of paragraph 3.1 (a) in light of the mandatory minimum alimony obligation in paragraph 3.1 (f). The plaintiff requested that the court order the defendant to pay the arrearage owed to her. She also requested an award of attorney's fees. Finally, she requested that, if the court determined that the defendant's failure to pay was wilful, the defendant "be adjudged in contempt and punished."

Although the plaintiff argued that the language of paragraph 3.1 is clear and unambiguous, the defendant argued that the same language is ambiguous and requested permission to offer extrinsic evidence as to what the parties intended when they agreed to the language of paragraph 3.1. The plaintiff objected to the admission of extrinsic evidence. The court agreed with the defendant and allowed the defendant and his former attorney to testify as to the interpretation of that paragraph. The court credited the testimony of the two witnesses and found that "the minimum alimony payment of $160,000 per year was intended to apply only to the period of time from the date of the [dissolution] until the 'step-down' date of January 1, 2014. It is not reasonable to read the [separation] agreement any other way. It is not reasonable to believe that the parties intended that, after January 1, 2014, the defendant was still required under [paragraph] 3.1 (a) to pay a minimum of $160,000 when that same article specifically says that payments 'shall be reduced to 32.5 [percent]' of the first $400,000 of income, which is $130,000." Consequently, the court denied the plaintiff's motion in its entirety.

This appeal followed. We will address each of the plaintiff's claims in turn, starting with the earliest filed motion.

I

The plaintiff first claims that the court improperly failed to find the defendant in contempt when it granted in part her motion for order regarding the division of the defendant's interest in various investments and limited partnerships. According to the plaintiff, once the court determined that the defendant had underpaid the plaintiff by $9602.62 as her share of the distributions from those assets, it should have concluded that "[t]he only reasonable explanation for why the [p]laintiff was not given the correct share of the [d]efendant's distribution is that the [d]efendant wilfully and intentionally did not tender the correct sum to her." The defendant argues that he could not be found in contempt because: (1) the defendant's division of income from the assets in question did not violate any order of the court; and (2) the defendant substantially complied with any putative order. We agree with the defendant.

We begin with the applicable standard of review and legal principles. "Contempt is a disobedience to the rules and orders of a court which has power to punish for such an offense. . . . A contempt judgment cannot stand when, inter alia, the order a contemnor is held to have violated is vague and indefinite, or when the contemnor, through no fault of his own, was unable to obey the court's order. . . .

"Consistent with the foregoing, when we review such a judgment, we first consider the threshold question of whether the underlying order constituted a court order that was sufficiently clear and unambiguous so as to support a judgment of contempt. . . . This is a legal inquiry subject to de novo review. . . .

"Second, if we conclude that the underlying court order was sufficiently clear and unambiguous, we must then determine whether the trial court abused its discretion in issuing, or refusing to issue, a judgment of contempt, which includes a review of the trial court's determination of whether the violation was wilful or excused by a good faith dispute or misunderstanding." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Parisi* v. *Parisi*, 315 Conn. 370, 379–80, 107 A.3d 920 (2015). "A finding of contempt is a question of fact, and our standard of review is to determine whether the court abused its discretion in failing to find that the actions or inactions of the [party] were in contempt of a court order. To constitute contempt, a party's conduct must be wilful. . . . Noncompliance alone will not support a judgment of contempt." (Internal quotation marks omitted.) *McGuire* v. *McGuire*, 102 Conn. App. 79, 82, 924 A.2d 886 (2007).

We start our review with the order that the plaintiff claims was violated. The plaintiff claims that the defendant violated paragraph 6.15 of the separation agreement, which was incorporated into the court's judgment of dissolution and is, therefore, an order of the court. Paragraph 6.15 requires the parties to "divide in kind the passive investments and limited partnerships shown in Section [III (G)] of the [defendant's] December 5, 2006 financial affidavit." Significantly, the plaintiff did not seek a finding of contempt because the "in kind" division did not occur. In fact, she agrees that such a division was not possible. Instead, the plaintiff argues that the court should have found the defendant in contempt because he failed to distribute properly to the plaintiff her share of the *income* from the assets pursuant to the agreement the parties reached, following the court's judgment of dissolution, when they realized that an "in kind" division was not possible. The court, however, never incorporated the parties' modified

agreement regarding distribution of income from the § III (G) assets into its dissolution decree, or any other court order. Consequently, the plaintiff's claim fails because breaching the modified agreement, which was not an order of the court, cannot be the basis for a finding of contempt.

Furthermore, the court specifically found, and the plaintiff does not dispute, that it was impossible for the defendant to comply with paragraph 6.15. "The inability of a contemnor to obey a court order through no fault of [his] own is a defense to a claim of contempt. . . . In other words, the act for which the penalty was imposed cannot constitute contempt if the actor was unable to obey the order." (Citations omitted.) *Tatro* v. *Tatro*, 24 Conn. App. 180, 186, 587 A.2d 154 (1991).

For these reasons, the court properly declined to find the defendant in contempt even though it ordered him to pay the plaintiff an additional $9602.62, representing her share of the income from the § III (G) assets.

II

The plaintiff next claims that the court erred by not finding the defendant in contempt for underpaying alimony in 2007. The plaintiff argues that because the court found that "the defendant failed to establish a reasonable factual or legal basis, under the circumstances of this case, and under the specific language of the [separation] agreement, for his exclusion from gross income of an ordinary income loss in the amount of $150,025," it was an abuse of discretion not to find the defendant in contempt. The plaintiff argues that such a conclusion is further compelled because the court specifically found the defendant's explanation for the deduction "not credible." The defendant argues that the plaintiff's argument is based on a selective reading of the court's opinion and ignores the court's finding

that the defendant's argument was not frivolous and was made in good faith. We agree with the defendant.

As previously set forth in part I of this opinion: "A finding of contempt is a question of fact, and our standard of review is to determine whether the court abused its discretion in failing to find that the actions or inactions of the [party] were in contempt of a court order. To constitute contempt, a party's conduct must be wilful. . . . Noncompliance alone will not support a judgment of contempt." (Internal quotation marks omitted.) *McGuire* v. *McGuire*, supra, 102 Conn. App. 82. The defendant is correct that the plaintiff ignores significant findings of the court. Although the court rejected the defendant's argument as not having a reasonable basis, it nonetheless concluded that the argument was made in good faith and was not frivolous. Furthermore, after hearing the testimony of both parties, the court concluded that neither party completely understood the current court orders. The plaintiff points to nothing in the record that undermines or is even inconsistent with the court's findings. Consequently, there is no basis to conclude that the court's findings were clearly erroneous or that the court abused its discretion when it refused to find the defendant in contempt.

III

The plaintiff next claims that the court erred by determining that paragraph 3.1 of the separation agreement is ambiguous when it denied her May 29, 2014 motion for order. The plaintiff argues that the court "improperly considered parol evidence in interpreting the [s]eparation [a]greement, and . . . the court . . . ignored the plain language of [paragraph] 3.1 (f) and strained the language, interpreting it to say something that it simply does not." According to the plaintiff, because the separation agreement contains a merger clause, and previously was found by this court

to be a fully integrated agreement, the court should not have considered parol evidence that contradicts the writing. The plaintiff further argues that it was improper for the court to consider parol evidence because paragraph 3.1 (f) is clear and unambiguous. The plaintiff does not challenge the court's conclusion, based on the parol evidence, regarding the parties' intent.

In response, the defendant argues that paragraph 3.1 (f) cannot be read in isolation but must be read in the context of paragraph 3.1 as a whole. The defendant argues that, in context, paragraph 3.1 (f) is not clear and does not unequivocally express the intent of the parties. Consequently, he argues, the court correctly determined that the provision is ambiguous and properly considered parol evidence. The defendant argues further that, because the evidence relied on by the court did not contradict the terms of the separation agreement, the evidence was not precluded by the separation agreement's merger clause or by the fact that the separation agreement is a fully integrated contract. We agree with the defendant.

We begin our analysis by setting forth the applicable standard of review. "It is well established that a separation agreement, incorporated by reference into a judgment of dissolution, is to be regarded and construed as a contract . . . . Accordingly, our review of a trial court's interpretation of a separation agreement is guided by the general principles governing the construction of contracts. . . . A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . If a contract is unambiguous within its four corners, the determination of what the parties intended by their contractual commitments is a question of law. . . . When the language of a contract is ambiguous, [however] the determination

of the parties' intent is a question of fact, and the trial court's interpretation is subject to reversal on appeal only if it is clearly erroneous. . . . In interpreting contract items, we have repeatedly stated that the intent of the parties is to be ascertained by a fair and reasonable construction of the written words and that 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." (Citations omitted; internal quotation marks omitted.) *Hirschfeld* v. *Machinist*, supra, 137 Conn. App. 694–95.

"The court's determination as to whether a contract is ambiguous is a question of law; our standard of review, therefore, is de novo." (Internal quotation marks omitted.) *Meridian Partners, LLC* v. *Dragone Classic Motorcars, Inc.*, 171 Conn. App. 355, 364, 157 A.3d 87 (2017). "A contract is unambiguous when its language is clear and conveys a definite and precise intent. . . . The court will not torture words to impart ambiguity where ordinary meaning leaves no room for ambiguity. . . . Moreover, the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous. . . .

"In contrast, a contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . [A]ny ambiguity in a contract must emanate from the language used by the parties. . . . The contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so. . . . If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous." (Internal quotation marks omitted.) *Parisi* v. *Parisi*, supra, 315 Conn. 383–84.

"The parol evidence rule prohibits the use of extrinsic evidence to vary or contradict the terms of an integrated

written contract. . . . The rule does not forbid the presentation of parol evidence, but prohibits the use of such evidence to vary or contradict the terms of the contract. . . . When a court is faced with an issue of the construction of a contract containing inconsistent clauses, the parol evidence rule does not apply. All relevant evidence is admissible on the issue of contract interpretation . . . . The only limitation is that the asserted meaning must be one to which the language of the writing read in context, is reasonably susceptible in the light of all of the evidence introduced. . . . The operative question becomes whether parol evidence is offered to contradict the writing or to aid in its interpretation." (Citations omitted; internal quotation marks omitted.) *Foley* v. *Huntington Co.*, 42 Conn. App. 712, 733–34, 682 A.2d 1026, cert. denied, 239 Conn. 931, 683 A.2d 397 (1996).

"[W]hen the words used in the contract are uncertain or ambiguous, parol evidence of conversations between the parties or other circumstances antedating the contract may be used as an aid in the determination of the intent of the parties which was expressed by the written words." *Kronholm* v. *Kronholm*, 16 Conn. App. 124, 131, 547 A.2d 61 (1988).

Paragraph 3.1 (f) of the separation agreement provides that "[m]inimum alimony under [paragraph] 3.1 (a) shall be $160,000 per year." The plaintiff argues that this language clearly and unambiguously obligates the defendant always to pay the plaintiff at least $160,000 each year for alimony regardless of his income or any other requirements of the separation agreement. The plaintiff, however, reads paragraph 3.1 (f) in isolation, which is incorrect for two reasons. First, as previously noted, a "contract must be viewed in its entirety, with each provision read in light of the other provisions . . . ." (Internal quotation marks omitted.) *Parisi* v. *Parisi*, supra, 315 Conn. 384. Second, paragraph 3.1 (f)

specifically references paragraph 3.1 (a), and, therefore, the two provisions must be read together. When paragraph 3.1 (f) is read in conjunction with paragraph 3.1 (a), the internal inconsistency readily is apparent.

Paragraph 3.1 (a) obligated the defendant to pay 40 percent of the first $400,000 of his annual income as alimony to the plaintiff until December 31, 2013. As of January 1, 2014, the percentage to be applied to the first $400,000 of income is reduced to 32.5 percent, or $130,000. The question for the court was how to interpret the *minimum* alimony requirement of $160,000 in paragraph 3.1 (f) in light of the explicit language in paragraph 3.1 (a) reducing the *maximum* payment the defendant would have to make on his first $400,000 of income as of January 1, 2014, to $130,000. The court found that the separation agreement was ambiguous "due to the inconsistency between subparagraphs (a) and (f) of [paragraph] 3.1, as each party initially offered a seemingly plausible explanation for their respective positions."

The plaintiff argued before the trial court that the language of paragraph 3.1 was intended to always maintain minimum alimony in the amount of $160,000, and that the language in paragraph 3.1 (a) reducing the percentage from 40 percent to 32.5 percent "only changed the amount of alimony paid on income in excess of $400,000." By way of example, the plaintiff argued that if the defendant made $550,000 in a calendar year after January 1, 2014, he "would pay 32.5 [percent] on the first $400,000 ($130,000) and 30 [percent] of the next $150,000 ($45,000), for a total of $175,000." Prior to January 1, 2014, the same $550,000 in income would have resulted in the defendant paying alimony of $205,000. Thus, according to the plaintiff, the "step-down" language in paragraph 3.1 (a) would not be superfluous because it still confers the intended benefit on the defendant of reducing his alimony obligation,

and paragraph 3.1 (f) simply ensured that the plaintiff would always receive at least $160,000. The defendant argued that paragraph 3.1 (f) was intended only to apply until January 1, 2014, when the percentage due on the first $400,000 of income was reduced to 32.5 percent.

After hearing testimony from witnesses involved in the negotiation of the separation agreement, the court accepted the defendant's proposed interpretation. The court concluded that the plaintiff's proposed reading of paragraph 3.1 was not reasonable because it created a minimum alimony obligation under paragraph 3.1, even though the language of paragraph 3.1 (f) is not that broad. "Notably, [paragraph] 3.1 (f) expressly notes that the minimum alimony of $160,000 per year is *under paragraph 3.1 (a)*, the paragraph that deals with the defendant's first $400,000 of earned income; [paragraph] 3.1 (f) does not say that the minimum alimony is under all of [paragraph] 3.1 in its entirety." (Emphasis in original). The court then used the plaintiff's example to show that the plaintiff's interpretation would result in the defendant paying varying percentages of the first $400,000 of his income depending on how much he made. For example, under the plaintiff's interpretation, if the defendant earned exactly $400,000, he would pay 40 percent of his income, as opposed to 32.5 percent on the first $400,000 of his income if he earned $550,000, as in the plaintiff's example. The court concluded that the language of the separation agreement did not support such an interpretation and that the evidence adduced at trial did not support a finding that the parties ever intended such a result. Consequently, the court held that "the parties intended the minimum alimony under [paragraph] 3.1 (f) to apply only to the period before the 'step-down' on January 1, 2014. There is no provision in the [separation] agreement for a minimum alimony payment after that date."

Because the plaintiff does not claim that the court's finding as to the parties' intent, based on the language of the separation agreement and the parol evidence, was clearly erroneous, the only question for this court is whether the trial court erred in determining that the separation agreement was ambiguous and, thereafter, improperly considered parol evidence. We conclude that the court properly determined that the separation agreement was ambiguous.

The inconsistency in language between paragraphs 3.1 (a) and 3.1 (f) created ambiguity in the contract. See *Thoma* v. *Oxford Performance Materials, Inc.*, 153 Conn. App. 50, 60, 100 A.3d 917 (2014) ("[i]rreconcilable inconsistent provisions have been treated by this court and our Supreme Court as creating an ambiguity within the contract"). Furthermore, both parties offered reasonable interpretations to resolve the inconsistency in the language of paragraphs 3.1 (a) and 3.1 (f). In fact, the plaintiff's claim that the language of paragraph 3.1 (f) is clear and unambiguous is completely undermined by the fact that, during the trial and appellate proceedings in the present case, she has offered two very different interpretations of that paragraph. Before the trial court, she argued that paragraphs 3.1 (a) and 3.1 (f) could be harmonized as set forth in the illustration that she presented to the court. Then, perhaps recognizing the same weakness in her argument that the trial court recognized, the plaintiff has offered a totally different interpretation on appeal. Instead of arguing that the two provisions should be read together, the plaintiff now argues that "[p]aragraph 3.1 (f) *supplants* paragraph 3.1 (a) because that is what it says it does." (Emphasis added.) In support of her most recent interpretation, the plaintiff offers a new illustration that leads to a markedly different result than does the example she offered before the trial court.[3] By offering her

[3] Moreover, the plaintiff's new interpretation would render paragraph 3.1 (a) superfluous. Such an interpretation is contrary to the fundamental princi-

own competing interpretations of paragraph 3.1, the plaintiff effectively has demonstrated that the trial court was correct in determining that the separation agreement is ambiguous, and, thereafter, properly admitted parol evidence to determine the parties' intent.

The fact that the separation agreement is an integrated contract and contains a merger clause does not alter this conclusion. As noted, parol evidence, including conversations of those involved in drafting the contract, "may be used as an aid in the determination of the intent of the parties which was expressed by the written words." *Kronholm* v. *Kronholm*, supra, 16 Conn. App. 131; see also *Brett Stone Painting & Maintenance, LLC* v. *New England Bank*, 143 Conn. App. 671, 687, 72 A.3d 1121 (2013) ("[p]arol evidence may be admissible to explain ambiguities that exist in the contract" [internal quotation marks omitted]). Although the plaintiff contends that the court used parol evidence "to vary or contradict" paragraph 3.1 (f) of the parties' separation agreement, this contention is inaccurate. The court used the parol evidence, including the testimony of the defendant and his former attorney, to resolve the inconsistency between paragraphs 3.1 (a) and 3.1 (f). Thus, the court properly considered the parol evidence to explain an ambiguity that existed in the separation agreement. See *Brett Stone Painting & Maintenance, LLC* v. *New England Bank*, supra, 687.

Because we conclude that paragraph 3.1 of the separation agreement is ambiguous, the court was required to resolve the ambiguity by considering extrinsic evidence and making factual findings as to the parties' intent. Consequently, we conclude that the court properly considered parol evidence in order to determine the parties' intent.

ple that "in construing contracts, we give effect to all the language included therein, as the law of contract interpretation . . . militates against interpreting a contract in a way that renders a provision superfluous." (Internal quotation marks omitted.) *EH Investment Co., LLC* v. *Chappo, LLC*, 174 Conn. App. 344, 358, 166 A.3d 800 (2017).

IV

Finally, the plaintiff claims that the court abused its discretion in failing to award her attorney's fees on any of her motions. This claim requires little discussion. The plaintiff's argument is premised on her preceding claims that the defendant should have been held in contempt pursuant to the three motions before the court because his conduct was wilful and intentional. In short, because we conclude that the trial court did not err in declining to find the defendant in contempt of court, there is no basis to conclude that the court abused its discretion by not awarding the plaintiff attorney's fees.[4]

The judgment is affirmed.

In this opinion the other judges concurred.

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## STATE OF CONNECTICUT *v.* DALE HOLLISTER KUKUCKA (AC 39039)

Lavine, Sheldon and Elgo, Js.

*Syllabus*

Convicted of the crimes of strangulation in the first degree, sexual assault in the third degree and assault in the third degree in connection with an assault at a fife and drum corps gathering, the defendant appealed to this court. He claimed, inter alia, that the trial court improperly failed to inquire into a potential conflict of interest between him and his

[4] To the extent the plaintiff also is claiming that, in the absence of a finding of contempt, the failure to award attorney's fees was an abuse of discretion because it undermines the court's previous financial orders, we agree with the defendant that such a claim was not raised before the trial court. Accordingly, we decline to review it for the first time on appeal. See *DiGiuseppe* v. *DiGiuseppe*, 174 Conn. App. 855, 864, 167 A.3d 411 (2017) ("[w]e 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]" [internal quotation marks omitted]).

defense counsel involving a grievance the defendant had filed against defense counsel. *Held*:

1. The trial court did not fail in its duty to inquire into a potential conflict of interest between the defendant and his defense counsel: because the defendant, at trial, simply moved for new counsel and never made a claim that the grievance he filed against his defense counsel presented a conflict of interest, his claim of a conflict of interest was raised for the first time on appeal and, thus, there was no timely conflict objection at trial, the trial court gave the defendant two days to prepare a specific and extensive list of his complaints against his defense counsel, which it thoroughly addressed with the defendant at a hearing, and even though the court was not asked to address a conflict of interest, the defendant did not demonstrate how an inquiry into the nature of his grievance would have been materially different from the inquiry that the trial court conducted into the nature of his complaints against his defense counsel; moreover, given the context in which the grievance complaint was raised and the defendant's failure to assert a conflict of interest, the trial court had no reason to believe that a particular conflict of interest existed or that further inquiry was necessary, the record revealed nothing in subsequent hearings that triggered any duty to inquire further about the grievance complaint, and in light of the court's extensive exchange with the defendant, the assurances from defense counsel, and the defendant's expressed satisfaction with the resolution of his concerns culminating with his withdrawal of his motion for new counsel, the trial court had no additional duty to inquire about the substance of the grievance.
2. The trial court did not abuse its discretion in denying the defendant's motion to suppress in-court and out-of-court identifications of him that were made by a witness to the assault; even if the identification procedure of showing the witness a Facebook photo on a cell phone of the alleged assailant forty-five minutes after the assault was suggestive, given the public safety concerns and the immediate need to apprehend the assailant, the trial court properly found that the police procedure used was necessary due to exigent circumstances, and the court also concluded that the witness' identification of the defendant was reliable, as he had numerous opportunities to view the defendant during the daylong event, which included several exchanges with the defendant prior to the assault and attempts by the witness to restrain the defendant on the floor following the assault in a face-to-face physical altercation.

Argued October 19, 2017—officially released April 24, 2018

*Procedural History*

Substitute information charging the defendant with the crimes of strangulation in the first degree, sexual assault in the third degree, unlawful restraint in the first degree, assault in the second degree, and assault

in the third degree brought to the Superior Court in the judicial district of Middlesex, where the court, *Gold*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the matter was tried to the jury; verdict of guilty; subsequently, the court rendered judgment in accordance with the verdict on the charges of strangulation in the first degree, sexual assault in the third degree, and assault in the third degree, from which the defendant appealed to this court. *Affirmed.*

*John L. Cordani, Jr.*, with whom was *Damian K. Gunningsmith*, for the appellant (defendant).

*Denise B. Smoker*, senior assistant state's attorney, with whom were *Russell Zentner*, senior assistant state's attorney, and, on the brief, *Peter A. McShane*, state's attorney, for the appellee (state).

*Opinion*

ELGO, J. The defendant, Dale Kukucka, appeals from the judgment of conviction, rendered after a jury trial, of strangulation in the first degree in violation of General Statutes § 53a-64aa (a) (1) (B), sexual assault in the third degree in violation of General Statutes § 53a-72a (a) (1), and assault in the third degree in violation of General Statutes § 53a-61 (a) (1).[1] On appeal, the defendant claims that the trial court improperly (1) failed to inquire into a potential conflict of interest between him and his defense counsel due to the existence of a grievance filed against defense counsel by the defendant and (2) denied his motion to suppress the in-court and out-of-court identifications of him made by a witness to the assault. We affirm the judgment of the trial court.

[1] Although the jury also found the defendant guilty of unlawful restraint in the first degree in violation of General Statutes § 53a-95 (a) and assault in the second degree in violation of General Statutes § 53a-60a (a) (1), the trial court did not enter judgment on those charges because they arose from the "same incident" as the strangulation charge. See General Statutes § 53a-64aa (b).

The following facts, which the jury reasonably could have found, are relevant to our resolution of the defendant's appeal. On October 19, 2013, the victim[2] attended a fife and drum corps muster at the Grange Hall in East Haddam with her friend, Jamie Murray (Jamie), and Jamie's family. The event, which was hosted by the Moodus Drum and Fife Corps, featured a parade of approximately twenty fife and drum corps and a beer tent in the afternoon and a bonfire in the evening. Many members of the participating fife and drum corps set up tents and brought recreational vehicles (RVs) to stay overnight on site. At the event, the victim and Erin Murray, Jamie's sister, were serving beer and cider in the beer tent. The defendant, a member of one of the participating fife and drum corps, visited the beer tent multiple times, both alone and with his date, Melody Baker. At approximately 5 p.m., when the defendant attempted to get another beverage from the beer tent after the beverage supply had been exhausted, Patrick Murray (Murray), Jamie's father and an event organizer, told the defendant that they were finished serving drinks. Later, however, the defendant entered the beer tent again. On that occasion, while Murray was cleaning up the beer tent, Murray's daughter, Erin Murray, called for him from the counter of the beer tent and Murray looked in her direction. When Murray looked up and saw the defendant, he firmly told him, once again, that they were out of drinks. Soon thereafter, when Murray saw the defendant approaching the beer tent a third time, he yelled at the defendant: "We're done. It's gone. Go."

Later in the evening, the victim and Jamie walked to the bonfire at the event. While sitting at the bonfire, the victim and Jamie talked with the defendant and

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

Baker. At approximately 11:45 p.m., the victim went to the women's bathroom in the Grange Hall by herself. The victim was washing her hands when someone came up behind her and attacked her, grabbing her neck with his right hand and covering her mouth and part of her nose with his left hand. In the course of resisting her attacker, the victim broke a window with her left elbow and banged on the wall of the bathroom. The victim was not able to remove her assailant's hands from her mouth or throat and ultimately lost consciousness. The victim was not able to identify her assailant following the incident.

At the same time, Erin McNamara, an event host, and Murray agreed that it was a good time to do a walkthrough of the Grange Hall and close it up for the evening. While McNamara and Murray were walking through the building, they heard grunting and thumping sounds along with sounds of "glass crunching or breaking" coming from the women's bathroom at the front of the building. McNamara proceeded to open the door to the bathroom, when she saw the victim lying motionless on the floor and the defendant straddling her. The victim's shirt had been pushed up to just under her breasts and the defendant's hands were under her shirt. McNamara locked eyes with the defendant and ordered him to leave the bathroom. The defendant then moved out of the bathroom. McNamara went directly to the victim, assessed her condition, and recognized that she was Jamie's friend. As the defendant walked out of the bathroom, Murray attempted to take him to the floor, but was unsuccessful. The defendant punched Murray in the face multiple times while they were fighting in the hallway outside the bathroom. During the altercation, the defendant attempted to enter the bathroom once again but McNamara ordered him out. Murray and the defendant resumed fighting after the defendant left the bathroom the second time. During

the fight, the defendant hit the crash bar on the main door, pushed it open and ran away.

McNamara called 911 and was asked by the dispatcher to provide a description of the assailant. McNamara stated that she distinctly saw that he was Caucasian, approximately six feet tall and weighing approximately 220 pounds, who had dark hair and was wearing dark pants and a Kelly green fleece jacket. The police and an ambulance arrived at the scene shortly thereafter. Once the victim regained consciousness, she left the scene in the ambulance for medical treatment.

Murray gave a statement to the police about what had happened and provided a description of the assailant to Philip Soucy, a trooper with the state police. Approximately ten minutes after Soucy had taken Murray's statement, Baker approached Soucy after she had spoken with people in the area. Baker told Soucy that she knew a man named Dale who people were saying had sexually assaulted a woman. Using her cell phone, Baker showed Soucy a photograph of the defendant from the defendant's Facebook[3] page. With Baker's permission, Soucy took her cell phone and showed the Facebook photograph to Murray.[4] Soucy asked Murray if he recognized anybody in the photograph. Murray responded that he recognized the individual, saying "that's the guy I took off [the victim]."

The defendant subsequently was arrested and charged with strangulation in the first degree, sexual assault in the third degree, unlawful restraint in the first degree, assault in the second degree and assault in the third degree. The defendant was tried to a jury,

[3] "Facebook is a social networking website that allows private individuals to upload photographs and enter personal information and commentary on a password protected 'profile.' " *State* v. *Eleck*, 130 Conn. App. 632, 634 n.1, 23 A.3d 818 (2011), aff'd, 314 Conn. 123, 100 A.3d 817 (2014).

[4] It is undisputed that the police did not preserve the Facebook photo that Soucy presented to Murray.

which found him guilty on all counts. The court rendered judgment on the jury's verdict; see footnote 1 of this opinion; sentencing him to a total effective sentence of fifteen years imprisonment, execution suspended after ten years. This appeal followed.

I

The defendant first claims that the trial court failed to inquire about a potential conflict of interest between him and his appointed legal counsel, James McKay. Specifically, the defendant argues that the court erred in failing to inquire into the nature of a grievance complaint that he had filed against McKay. We disagree.

The following additional facts are relevant to our resolution of the defendant's claim. Approximately six months prior to trial, although he was represented by McKay, the defendant filed a self-represented motion for a speedy trial. The motion was heard in court on April 7, 2015. At that time, the defendant claimed that he was disappointed with McKay's representation and asked that a special public defender be appointed for him by the court in lieu of McKay. The court inquired briefly as to the basis of the defendant's dissatisfaction and ultimately continued the case for two days "so that [the defendant] could have an opportunity to prepare a statement in which he would specifically identify the nature of his dissatisfaction, and point specifically to shortcomings, as he sees it anyway, in . . . McKay's representation."

On April 9, 2015, the defendant appeared before the court and provided the court with "concrete examples of why [he was] dissatisfied." First, the defendant expressed his belief that McKay and the prosecution had "teamed up" against him, as certain items of evidence had not been disclosed to counsel by the prosecution. Second, the defendant stated that McKay had "misinformed and manipulated" him into submitting to

a "psychological evaluation that [McKay] knew, well and good . . . could be used by the prosecution as discovery and outright [lied] to me about the process of this motion he filed." Third, the defendant claimed that the delay in trial had resulted in actual and substantial prejudice against him. Lastly, the defendant listed fifteen "improprieties" by McKay, including his alleged failures to file motions, to seek pretrial discovery, to raise issues of insufficient evidence, to obtain evidence by discovery, to obtain critical documents, to obtain medical records, to properly advise him, to suppress photographs, to pursue his speedy trial claim, to conduct basic legal research, to visit the crime scene, and to interview the victim. The court addressed each of the defendant's claims, explaining McKay's role in the case to the defendant in great detail. McKay also addressed the court at length, explaining that he was ready to continue representing the defendant zealously.

Describing the court's response as a "wonderful representation of conflict resolution," the defendant withdrew his motion for the appointment of new counsel. At the same time, the defendant stated to the court that he had filed a grievance against McKay.[5] In response to that statement, McKay stated that the grievance had not been brought to his attention before and that he would be required to respond to it. The court then asked the defendant if he presently intended to pursue the claims in the grievance. The defendant responded, "that's something I'm gonna have to go home and pray and think about, but the way it's looking right now, *probably not*." (Emphasis added.)

Three months later, the defendant sent the court a letter dated July 8, 2015, in which he wrote that the court had "never granted or denied [his] motion for

[5] The grievance that the defendant filed with the Statewide Grievance Committee was not included in the record.

replacement of counsel." In the letter, the defendant explained that when he reviewed the April 9, 2015 transcript, he realized that the record did not contain a ruling from the court on his motion for new counsel. The defendant stated: "I chose to suspend the speedy trial motion so I could pray, ponder, and think about if I felt comfortable continuing to have . . . McKay represent me . . . . I continue to have an open grievance filed against . . . McKay and have responded in writing to his [rebuttal]."

At the next hearing, on July 14, 2015, the court asked the defendant to clarify his intentions in light of the July 8, 2015 letter and given the court's understanding that his concerns already had been addressed. When the defendant asked the court to rule on his motion for new counsel, the court reminded the defendant that he had withdrawn that motion on April 9, 2015. As the court stated: "I do not believe there are any motions that I have failed to rule upon. So, I ask you, once again, given the fact that I have received this letter dated July [8, 2015], what is it that you are asking me to do?" The defendant stated that "[w]hen [he] suspended [his] motion for a speedy trial . . . [he] was under the impression [he] still needed to go home and to consider, pray and ponder over a difficult decision as to whether or not to retain . . . McKay as counsel." The court then explained to the defendant that "[y]ou are free to file any motions that you want to make. But, right now you keep saying to me you want me to rule on something that you have, previously, withdrawn." The defendant then asked the court to consider a "new motion for replacement of counsel." The court responded by asking, "what will be the reason for that? Are you hiring a new lawyer?" The defendant responded, "I am in the process of contemplating and thinking about that, yes, Your Honor." The court explained to the defendant that "unless you're going to present to me [a] compelling

reason why there should be a new lawyer then . . . McKay is going to remain [your] lawyer. I am not going to accept, at this point, that you are praying and pondering over whether or not you should retain private counsel. So, if you're hiring private counsel I would, sincerely, and seriously, urge you to tell that lawyer with whom you're engaged in negotiations that the trial is scheduled to begin on September 21."

The defendant reiterated that he filed a grievance with the Statewide Grievance Committee but that he had not yet heard back from the committee. The court repeatedly communicated to the defendant that he was free to file another motion for new counsel and to explain why he was not satisfied with McKay. McKay addressed his relationship with the defendant, stating that he was "perfectly willing and able to proceed." Finally, the court advised the defendant: "If you want to come to me with a motion and tell me why you think you're entitled to new appointed counsel, the ball's in your court and you'll have to file it." The defendant thereafter did not file a motion for new counsel, and McKay continued to represent the defendant.

On appeal, the defendant argues that the court was obligated to inquire into a possible conflict of interest as a result of the grievance complaint that he filed against McKay. "The sixth amendment to the United States constitution as applied to the states through the fourteenth amendment . . . guarantee[s] . . . a criminal defendant the right to effective assistance of counsel. . . . Where a constitutional right to counsel exists, our [s]ixth [a]mendment cases hold that there is a correlative right to representation that is free from conflicts of interest. . . . This right requires that the assistance of counsel be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. . . . Moreover, one of the principal safeguards of this right is the rule

announced by this court that [a trial] court must explore the possibility of conflict . . . when it knows or reasonably should know of a conflict . . . .'' (Citations omitted; internal quotation marks omitted.) *State* v. *Vega*, 259 Conn. 374, 386, 788 A.2d 1221, cert. denied, 537 U.S. 836, 123 S. Ct. 152, 154 L. Ed. 2d 56 (2002). ''To safeguard a criminal defendant's right to the effective assistance of counsel, a trial court has an affirmative obligation to explore the possibility of conflict when such conflict is brought to the attention of the trial [court] in a timely manner.'' (Internal quotation marks omitted.) *State* v. *Drakeford*, 261 Conn. 420, 427, 802 A.2d 844 (2002).

Our Supreme Court previously has articulated ''two circumstances under which a trial court has a duty to inquire with respect to a conflict of interest: (1) when there has been a timely conflict objection at trial . . . or (2) when the trial court knows or reasonably should know that a particular conflict exists . . . .'' (Internal quotation marks omitted.) *State* v. *Vega*, supra, 259 Conn. 388. The defendant claims that the latter duty applies in this case, arguing that the filing of a grievance complaint triggered a duty to inquire because the court knew or reasonably should have known that a particular conflict existed. It is undisputed that the defendant never raised a conflict objection at trial.[6]

Our analysis is limited to the actions of the trial court, specifically whether the trial court satisfied its duty to

[6] While we acknowledge that a trial court is obligated to inquire into a conflict when it knows or reasonably should know that a particular conflict exists, given the facts of this case, by failing to submit the very concerns he now pursues on appeal, the defendant essentially asks us to engage in trial by ambuscade. See *State* v. *Campanaro*, 146 Conn. App. 722, 731, 78 A.3d 267 (2013) (''[f]or 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'' [internal quotation marks omitted]), cert. denied, 311 Conn. 902, 83 A.3d 604 (2014). We decline to endorse such behavior.

inquire into a potential conflict of interest.[7] We review the defendant's claim as a question of law, as to which our review is plenary. See *State* v. *Parrott*, 262 Conn. 276, 286, 811 A.2d 705 (2003). In analyzing the defendant's claim, we look to the definition of an attorney's conflict of interest as articulated by our Supreme Court. An attorney conflict of interest is defined as "that which impedes his paramount duty of loyalty to his client. . . . Thus, an attorney may be considered to be laboring under an impaired duty of loyalty, and thereby be subject to conflicting interests, because of interests or factors personal to him that are inconsistent, diverse or otherwise discordant with [the interests] of his client . . . ." (Internal quotation marks omitted.) Id., 287–88.

The defendant relies on *Morgan* v. *Commissioner of Correction*, 87 Conn. App. 126, 866 A.2d 649 (2005), for his claim that the trial court failed in its duty to inquire into the possibility of a conflict of interest. In *Morgan*, this court considered whether the petitioner had been denied effective assistance of counsel when the habeas court denied his motion to disqualify his attorney without inquiring into the nature of three grievances the petitioner had filed. Id., 127–28. This court concluded that the habeas court's summary denial of the motion to disqualify was improper, in that the habeas court failed to inquire whether the grievances concerned a possible conflict of interest. Id., 142–43. As a result, this court remanded the case for further proceedings to determine the nature of the three grievances. Id., 143; see also *In re Ceana R.*, 177 Conn. App. 758, 771–72, 172 A.3d 870 (2017), cert. denied, 327 Conn. 991, A.3d (2018).

In *Morgan*, the petitioner specifically asserted a conflict of interest before the habeas court and claimed that

[7] We note that in claiming trial court error, the defendant makes no claim that there was an actual conflict of interest or that his trial counsel was ineffective.

he disagreed with his habeas counsel's trial strategy.[8] *Morgan* v. *Commissioner of Correction*, supra, 87 Conn. App. 129. When advised that the petitioner had filed three grievances, the habeas court stated that dissatisfaction with trial counsel's strategy was not a conflict of interest. Id. As this court observed in *Morgan*, at no point did the habeas court inquire into the nature of the grievances filed against habeas counsel. Id.

In *Vega*, which the defendant also cites in support of his claims, defense counsel raised before the trial court the claim that the existence of a grievance which the defendant filed against him gave rise to a per se violation of the right to the effective assistance of counsel. *State* v. *Vega*, supra, 259 Conn. 388, 389–90. Like the petitioner in *Morgan*, the defendant in *Vega* specifically argued before the trial court that the filing of the grievance gave rise to a conflict of interest. Id., 389–90. Holding that a grievance does not constitute a per se violation of the right to the effective assistance of counsel, the court in *Vega* also held that the trial court conducted an appropriate inquiry into the "*nature of the defendant's complaints* about [trial counsel's] representation" and properly found no conflict of interest. (Emphasis added.) Id., 390–91.

Here, the defendant contends that the trial court, upon learning of the defendant's grievance, "appears

[8] The petitioner in *Morgan* argued that a conflict of interest existed between him and habeas counsel because he disagreed with the strategy that habeas counsel employed at the habeas proceeding. *Morgan* v. *Commissioner of Correction*, supra, 87 Conn. App. 129. Responding to the petitioner's concern with his counsel's strategy, the court stated: "That is not a conflict of interest." (Internal quotation marks omitted.) Id. The court asked the petitioner, "[h]ow is there a conflict of interest between you and [counsel]?" (Internal quotation marks omitted.) Id. The petitioner replied, "I have filed several grievances [against] him with the statewide [grievance committee], at least five." (Internal quotation marks omitted.) Id. His habeas counsel then corrected him and informed the court that the petitioner had filed three grievances against him. Id. The court did not inquire further into the nature of the grievances that the petitioner filed against counsel. Id.

to have repeated the same error as the trial court in *Morgan*,” because it failed to ask about the specific nature of the grievance. We disagree.

In contrast to the present case, in both *Morgan* and *Vega* the claims were squarely raised before the court that the grievances presented conflicts of interest. Here, the defendant made no such claim. Instead, the defendant moved for new counsel and never specifically asserted a concern that his trial counsel had a conflict of interest. The defendant thus claims a conflict of interest for the first time on appeal. This distinction is significant for several reasons.

We reiterate that our Supreme Court observed in *Vega* that “[t]here are two circumstances under which a trial court has a duty to inquire with respect to a conflict of interest: (1) when there has been a timely conflict objection at trial . . . or (2) when the trial court knows or reasonably should know that a particular conflict exists . . . .” (Internal quotation marks omitted.) *State* v. *Vega*, supra, 259 Conn. 388. Because it is undisputed that the defendant did not raise a timely conflict of interest objection before the trial court, our analysis of the court’s duty to inquire is therefore based on whether the court knew or reasonably should have known that a particular conflict existed.

Whether the trial court knew or reasonably should have known that a particular conflict of interest existed requires this court to consider the context in which a duty to inquire is triggered. See *Cuyler* v. *Sullivan*, 446 U.S. 335, 347, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980) (considering circumstances of case to determine whether trial court had duty to inquire whether there was conflict of interest). Here, the court had before it an oral motion for new counsel, which itself triggered the trial court’s duty to determine the basis for the defendant’s complaints.

“Where a defendant voices a seemingly substantial complaint about counsel, the court should inquire into

the reasons for dissatisfaction." (Internal quotation marks omitted.) *State* v. *Robinson*, 227 Conn. 711, 725, 631 A.2d 288 (1993); see also *State* v. *Gonzalez*, 205 Conn. 673, 685, 535 A.2d 345 (1987). "The extent of an inquiry into a complaint concerning defense counsel lies within the discretion of the trial court. . . . Moreover, the defendant's right to be represented by counsel does not grant a defendant an unlimited opportunity to obtain alternate counsel on the eve of trial . . . and may not be used to achieve delay in the absence of exceptional circumstances. . . . The appellate scrutiny of the trial court's inquiry into complaints concerning adequacy of counsel must be tempered by the timing of such complaints." (Citations omitted; internal quotation marks omitted.) *State* v. *Robinson*, supra, 725.

The trial court, in continuing the hearing for two days, gave the defendant the opportunity to prepare a specific and extensive list of his complaints regarding McKay, which it thoroughly addressed with the defendant. Although the court was not specifically asked to address a conflict of interest, the trial court's approach went far beyond not only the inquiry conducted in *Morgan*, but also the inquiry conducted in *Vega*,[9] which our

[9] In *Vega*, the following colloquy between the defendant and the court took place:

"The Court: . . . I do want to ask you, Mr. Vega, some questions about this matter. Because apparently you do not have a copy of the document you sent to the grievance committee.

"The Defendant: No, I don't.

"The Court: You do not?

"The Defendant: No, sir. . . .

"The Court: All right. Have you in fact filed a grievance against [defense counsel]?

"The Defendant: Yes, I have.

"The Court: And when was that done?

"The Defendant: It was approximately Tuesday last week.

"The Court: Of last week?

"The Defendant: Yes.

"The Court: All right. The record should further reflect that [defense counsel] did call the grievance committee in East Hartford and they indicated that they either don't have it logged in or don't have it there yet, but it's

Supreme Court found to have been appropriate.[10] *State* v. *Vega*, supra, 259 Conn. 389. In conclusory fashion, the defendant argues that the inquiry conducted in the present case, made in response to the motion for new counsel, was inadequate under *Morgan* simply because it did not inquire into the substance of the grievance itself. We are not persuaded.

First, the defendant has not demonstrated how an inquiry into the nature of the defendant's grievance would have been materially different from the inquiry the court conducted into the nature of the defendant's complaints about McKay. At its core, the inquiry on a motion for new counsel is essentially the same inquiry required of the court when a defendant asserts that the filing of a grievance raises a conflict of interest, a claim

possible that it's somewhere in the paperwork. Do you have anything, a copy of anything that would indicate what your claims are against [defense counsel]?

"The Defendant: No, Your Honor, except just my memory.

"The Court: All right. Would you indicate for me as best your memory allows you what is it you have grieved [defense counsel] for? . . .

"The Defendant: . . . Just that counsel and I have not discussed this case thoroughly. There's aspects in this case that I feel like I could shed light upon. He disregards . . . . Really counsel's actions are not to my satisfaction. He ignores my request to interview associates who can describe me as who I am. . . .

"The Court: But is there anything further? . . . So your basic claim with the grievance committee are pretty much the same things you told me here Wednesday of this week as to why you wanted me to dismiss [defense counsel].

"The Defendant: Exactly." *State* v. *Vega*, supra, 259 Conn. 390–91 n.18.

[10] In making this comparison, we do not suggest that the trial court's decision here to continue the hearing for two days to allow the defendant to prepare a list of his concerns should be the standard in all cases. We are mindful of the constraints on our review, articulated in *State* v. *Robinson*, supra, 227 Conn. 725, to the extent that such inquiries must be "tempered by the timing of such complaints." We note that the defendant's oral motion was raised in the context of his motion for a speedy trial, and no trial date appears to have been scheduled. By contrast, our case law suggests that motions for new counsel are often raised on the eve of trial and even mid-trial.

which, we reiterate, was not before the trial court. Compare *State* v. *Robinson*, supra, 227 Conn. 725 ("[w]here a defendant voices a seemingly substantial complaint about counsel, the court should inquire into the reasons for dissatisfaction" [internal quotation marks omitted]), with *State* v. *Vega*, supra, 259 Conn. 390–91 (in order to assess alleged conflict of interest, the trial court was required to inquire about "the nature of the defendant's complaints about his representation").[11]

Here, the court not only reviewed each of the defendant's concerns, but the defendant then withdrew his request for the appointment of new counsel and his motion for a speedy trial and described the hearing as "a wonderful representation of conflict resolution." Apparently as an afterthought, the defendant then advised the court that he had filed a grievance against his defense counsel, at which point the court asked the defendant if he "[*intended*] *to continue to pursue* [*his*] *claims*" in the grievance. (Emphasis added.) Significantly, the defendant responded: "Again, that's something I'm gonna have to go home and pray and think about, *but the way it's looking right now, probably not*." (Emphasis added.) The colloquy reflects not only the trial court's logical assumption that it had just reviewed the sum and substance of the defendant's grievance with defense counsel, but also the defendant's comments as implicitly reinforcing that assumption.[12] Given the context in which the grievance

[11] In *Robinson*, our Supreme Court considered the propriety of the trial court's inquiry into the defendant's complaints concerning his counsel's performance. *State* v. *Robinson*, supra, 227 Conn 725. The Supreme Court stated that "the record reveals that the trial court permitted the defendant an opportunity fully to inform the court of his grievances, treated them as important and took appropriate action where necessary or possible." Id., 726.

[12] In stating that he "would actually welcome the opportunity to sit down and break some bread with . . . McKay, and continue to go forward," the defendant declared his intention to "talk with . . . McKay so [they] could both collaborate and figure out what's gonna be best for [them] moving forward."

complaint was raised and the defendant's failure, unlike in *Morgan* and *Vega*, to assert a conflict of interest, the trial court had no reason to believe that a particular conflict of interest existed or that further inquiry into such a conflict was necessary. As a result of the court's extensive exchange with the defendant, the assurances from McKay, and the defendant's expressed satisfaction with the resolution of his concerns culminating with his withdrawal of his motion for new counsel, we conclude that the court had no additional duty to inquire about the substance of the grievance.

Moreover, the record reveals nothing in subsequent hearings that triggered any duty to inquire further about the grievance complaint. The U.S. Supreme Court has noted that the duty of inquiry is not triggered "when the trial court is aware of a vague, unspecified possibility of conflict . . . ." *Mickens* v. *Taylor*, 535 U.S. 162, 169, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002). "Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." *Cuyler* v. *Sullivan*, supra, 446 U.S. 347. The defendant offered no indication that the grievance complaint expressed concerns about counsel beyond the ones he had articulated in the first hearing. Instead, three months after the hearing in April, the defendant was under the mistaken belief that his motion to withdraw was still pending for the court to rule upon. Reminding the defendant that he had withdrawn his motion for new counsel, the trial court duly asked the defendant for clarification. The defendant then requested that the court appoint new counsel and suggested that he was "contemplating and thinking about" hiring new counsel, to which the court responded by urging him to file a motion for new counsel and to advise new counsel that trial would begin on September 21, 2015. The court at that time made it clear to the defendant that if he was seeking to remove his attorney

he was free to file any motion he wished in order to explain why he was entitled to new counsel. In so doing, the trial court gave the defendant yet another opportunity to formally present to the court, by written motion, any further concerns that he might have about his counsel's representation, an opportunity which the defendant declined to pursue. See *State* v. *Robinson*, supra, 227 Conn. 727 ("[e]ven though the trial court did not continually inquire into the defendant's complaints, it also did not close the line of communication with the defendant and allowed him to make frequent pro se motions to which it gave adequate consideration").

As our Supreme Court observed in *Robinson*, "a trial court has a responsibility to inquire into and to evaluate carefully all substantial complaints concerning court-appointed counsel, [but its] failure to inquire [into the defendant's request for new counsel where the defendant has already made known the reasons for his request] is not reversible error." (Internal quotation marks omitted.) Id., 726. As this court also observed in *State* v. *Patavino*, 51 Conn. App. 604, 609, 724 A.2d 514, cert. denied, 249 Conn. 919, 733 A.2d 236 (1999), it is well established that "a criminal defendant has a constitutional right to the effective assistance of counsel . . . that right, however, is not without limitation. . . . [I]t is clear that the right to effective assistance of counsel does not include an unlimited opportunity to obtain alternate counsel. . . . Inherent in these limitations is a concern for unwarranted interruptions in the administration of justice." (Citations omitted; internal quotation marks omitted.) Our review of the record also indicates that the court carefully advised the defendant of its concerns about the defendant's failure to articulate any reason for his request for new counsel and the timing of his renewed request.[13] "While courts

[13] "The Court: Well, with all due respect Mr. Kukucka, the court has to be careful that it does not cede its duty to a defendant insofar as court scheduling is concerned. This case has been scheduled for trial once at your

must be assiduous in their defense of an accused's right to counsel, that right may not be manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice." (Internal quotation marks omitted.) Id.

Most importantly for purposes of analyzing the court's duty to inquire into a conflict of interest, the defendant's trial counsel assured the court from the outset in April, and repeated again in July, that he could zealously represent his client. In discharging its duty to inquire, "the trial court must be able, and be freely permitted, to rely upon [defense] counsel's representation that the possibility of such a conflict does or does not exist. . . . The reliance in such an instance is upon the solemn representation of a fact made by [the] attorney as an officer of the court. . . . The course there-

demand that there be a speedy trial. When I brought the matter in and told the lawyers to be ready you then pulled back and withdrew your motion for a speedy trial. You then withdrew it at the same time your request for new counsel. And now another three months [have] passed by, uneventfully, and now the lawyers report that they're ready to begin. Now, you're renewing your motion for new counsel.

"I'm not going to turn over to you the right to dictate the timing of this trial. And I'm beginning to have some concerns, in my mind, regarding whether or not that's exactly what you're trying to do, wrest control of this schedule from me and turn it over to yourself.

"This is an old case, the victim of the case, alleged victim of the case, has the right to have a speedy disposition, as do you. When you urged the court, or demanded a speedy trial, I was prepared to give it to you. The parties dropped everything, began to get it ready, then you withdrew that. You said you wanted a new lawyer, I was ready to hear you, then you said, no, I've changed my mind, I'm going to work with . . . McKay. This is not a game of ping-pong where you suddenly change your mind on each court date.

"So, unless you're going to present to me [a] compelling reason why there should be a new lawyer then . . . McKay is going to remain [your] lawyer. I am not going to accept, at this point, that you are praying and pondering over whether or not you should retain private counsel.

"So, if you're hiring private counsel I would, sincerely, and seriously, urge you to tell that lawyer with whom you're engaged in negotiations that the trial is scheduled to begin on September 21."

after followed by the court in its inquiry depends upon the circumstances of the particular case." (Citations omitted; internal quotations marks omitted.) *State* v. *Drakeford*, supra, 261 Conn. 427. Notwithstanding his receipt of the grievance complaint, counsel represented to the court that he felt he had a good working relationship with the defendant and that the issues that had been raised by the defendant had been addressed. The court was free to rely upon defense counsel's representations, and in fact shared with the defendant its observations that counsel had "not only ably, but zealously [represented the defendant] for an extensive period of time, [had] retained an expert on [his] behalf, [had] read all the reports and [was] now ready to begin trial."

The duty of inquiry into a conflict of interest implicates a defendant's sixth and fourteenth amendment right to the effective assistance of counsel. See *State* v. *Crespo*, 246 Conn. 665, 685–86, 718 A.2d 925 (1998), cert. denied, 525 U.S. 1125, 119 S. Ct. 911, 142 L. Ed. 2d 909 (1999). As we have already stated, in the absence of an assertion of a conflict of interest at trial, our review on appeal is limited to determining whether the trial court knew or had reason to believe *a particular conflict* existed. *State* v. *Parrott*, supra, 262 Conn. 286. Here, in response to the defendant's initial motion for new counsel, the trial court's duty was to determine, in the first instance, what was the nature and substance of the defendant's complaints.

Since the filing of a grievance does not give rise to a per se conflict of interest under *Vega*, and the defendant, having led the court to believe it had resolved, to the defendant's satisfaction, his litany of specific complaints, the court had no reason to know a particular conflict of interest existed requiring it to conduct further inquiry about the grievance itself. Given that the trial court was faced in subsequent proceedings with

only vaguely expressed complaints which the defendant declined to specify to the court by filing a written motion, and that it had received several assurances from defense counsel as to his ability to continue representing the defendant zealously, we conclude that the trial court did not fail in its duty to inquire into the specific nature of the grievance.

II

The defendant next claims that the court improperly denied his motion to suppress the out-of-court and in-court identifications of him that were made by Murray. The defendant argues that Murray's identifications were the unreliable results of an unnecessarily suggestive procedure conducted in the absence of exigent circumstances supporting the need for an immediate identification. The defendant argues that the admission of Murray's identification testimony at trial violated his federal and state constitutional rights to due process. We disagree.[14]

The following additional facts are relevant to our resolution of this claim. On September 17, 2015, the defendant filed a motion to suppress identifications made by Murray and McNamara.[15] The trial court held a hearing on the motion to suppress, during which it heard testimony from several people, including McNamara, Murray, Jamie, Baker, Soucy, and the victim. The testimony revealed the following facts.

[14] We need not address the defendant's argument that any subsequent in-court identification was irreparably tainted by the unnecessarily suggestive out-of-court identification because we conclude that the out-of-court identification was the result of a necessary procedure. *State* v. *Dickson*, 322 Conn. 410, 433, 141 A.3d 810 (2016) (in-court identifications do not implicate defendant's due process rights when there has been a nonsuggestive out-of-court identification procedure), cert. denied, U.S. , 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017).

[15] On appeal, the defendant does not contest the trial court's admission of McNamara's in-court and out-of-court identifications of the defendant.

McNamara entered the women's bathroom and observed an assailant in the bathroom, straddling the victim. Her shirt was pushed up to just under her breasts and the assailant's hands were under her shirt. The lights were turned on in the bathroom and in the hallway outside of the bathroom. McNamara ordered the assailant out of the bathroom and Murray attempted to gain control of the assailant and hold him on the ground. After Murray was unable to gain control of the assailant, they were involved in a physical altercation. At some point during the physical altercation, the assailant attempted to reenter the bathroom and McNamara yelled very loudly "get the hell out of here" and pointed to the door. The assailant left the area and McNamara called 911.

Murray described the assailant as a white male with dark hair, 200 pounds, at least six feet tall, and wearing a loose fitting outer garment. McNamara described the assailant as a white male, who was around six feet tall, weighed 220 pounds, had dark hair, and was wearing a very vivid green fleece jacket. Murray had seen the assailant approximately eight times earlier that day, including during the parade, in the beer tent, and at the bonfire.

Murray described the incident to police while at the scene of the assault. Soucy asked Murray if he knew the name of the assailant and Murray replied that he did not know his name, but he knew the person. Murray was presented with a single photograph of the defendant. The photograph was an image that was on a cell phone that the police had obtained from Baker.[16] The

[16] The police failed to preserve the Facebook photo that the police officer showed to Murray. We note that "the failure to preserve a photographic array does not preclude a finding that an identification procedure was not suggestive." *State* v. *Hunt*, 10 Conn. App. 404, 408, 523 A.2d 514 (1987); see also *State* v. *Rivera*, 70 Conn. App. 203, 209, 797 A.2d 586, cert. denied, 261 Conn. 910, 806 A.2d 50 (2002).

police took the cell phone from Baker and, approximately forty-five minutes from the time of the assault, the police showed the picture to Murray. The officer asked Murray if he recognized the person, and Murray identified the image as depicting the person who had committed the assault.

The court denied the defendant's motion to suppress Murray's identifications of him. The court found that the exigencies of this case weighed in favor of the state, and thus concluded that the out-of-court identification procedure had not been unnecessarily suggestive. Furthermore, the court found that Murray's identification was reliable. Subsequently, at trial, both Murray and McNamara positively identified the defendant as the man they had seen in the bathroom straddling the victim on October 19, 2013.

The legal principles guiding our review of a court's denial of a motion to suppress a pretrial identification are well settled. "Upon review of a trial court's denial of a motion to suppress, [t]he court's conclusions will not be disturbed unless they are legally and logically inconsistent with the facts. . . . [W]e will reverse the trial court's ruling [on evidence] only where there is abuse of discretion or where an injustice has occurred . . . and we will indulge in every reasonable presumption in favor of the trial court's ruling. . . . Because the issue of the reliability of an identification involves the constitutional rights of an accused . . . we are obliged to examine the record scrupulously to determine whether the facts found are adequately supported by the evidence and whether the court's ultimate inference of reliability was reasonable." (Internal quotation marks omitted.) *State* v. *Elliston*, 86 Conn. App. 479, 482–83, 861 A.2d 563 (2004), cert. denied, 273 Conn. 906, 868 A.2d 746 (2005).

"In determining whether identification procedures violate a defendant's due process rights, the required

inquiry is made on an ad hoc basis and is two-pronged: first, it must be determined whether the identification procedure was unnecessarily suggestive; and second, if it is found to have been so, it must be determined whether the identification was nevertheless reliable based on examination of the totality of the circumstances. . . . The first suggestiveness prong involves the circumstances of the identification procedure itself . . . and the critical question is whether the procedure was conducted in such a manner as to emphasize or highlight the individual whom the police believe is the suspect. . . . If the trial court determines that there was no unduly suggestive identification procedure, that is the end of the analysis, and the identification evidence is admissible." (Citations omitted; internal quotation marks omitted.) *State* v. *Dickson*, 322 Conn. 410, 420–21, 141 A.3d 810 (2016), cert. denied, U.S. , 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017). "An identification procedure is unnecessarily suggestive only if it gives rise to a very substantial likelihood of irreparable misidentification. . . . The defendant bears the burden of proving both that the identification procedures were unnecessarily suggestive and that the resulting identification was unreliable." (Internal quotation marks omitted.) *State* v. *Thompson*, 81 Conn. App. 264, 269–70, 839 A.2d 622, cert. denied, 268 Conn. 915, 847 A.2d 312 (2004).

"The use of a single photograph for identification purposes is not overly suggestive per se. . . . It is, however, absent exigent circumstances, almost always unnecessarily and impermissibly suggestive. . . . The danger of misidentification of a suspect by a witness is increased where the photograph of an individual is in some way emphasized. . . . Showing a witness a single photograph rather than an array of photographs obviously emphasizes that photograph. . . . Any one-to-one type [of] confrontation between a witness or victim and a person whom the police present to him as a suspect must necessarily convey the message that

the police have reason to believe that person guilty." (Citations omitted; internal quotation marks omitted.) *State* v. *Elliston*, supra, 86 Conn. App. 483–84. Our Supreme Court also has "recognized, however, that the existence of exigencies may preclude such a procedure from being *unnecessarily* suggestive. . . . In the past, when we have been faced with the question of whether an exigency existed, we have considered such factors as whether the defendant was in custody, the availability of the victim, the practicality of alternate procedures and the need of police to determine quickly if they are on the wrong trail." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Ledbetter*, 275 Conn. 534, 549, 881 A.2d 290 (2005), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d. 537 (2006).

In the present case, the single photograph used to identify the assailant was a Facebook photo on a cell phone. In evaluating whether the use of the photograph occurred under exigent circumstances, the court considered the following evidence. First, Murray viewed the photograph forty-five minutes after the assault that he had witnessed, which gave Murray the opportunity to identify the assailant while his memory was still fresh. Second, the identification procedure arose after an assailant had committed a violent sexual assault in a public place where hundreds of people were spending the night in tents and RV's and the assailant was still at large. Third, according to one witness, the name "Dale" was being circulated in the crowd as someone who had committed a sexual assault, and police needed to determine whether their efforts to locate "Dale" were likely to result in the capture of the right person. Finding that these factors amounted to exigent circumstances, the court concluded that the use of the cell phone photograph was not unnecessarily suggestive.

On the basis of our independent review of the record, we conclude that the trial court did not abuse its discretion in denying the defendant's motion to suppress.

Even if we were to assume that the identification procedure was suggestive, we conclude that given the public safety concerns and the immediate need to apprehend the assailant, the court properly found that the procedure was necessary due to exigent circumstances. See *State* v. *Revels*, 313 Conn. 762, 769, 99 A.3d 1130 (2014), cert. denied, U.S. , 135 S. Ct. 1451, 191 L. Ed. 2d 404 (2015).

Moreover, the court also concluded that Murray's identification of the defendant was reliable. "If the court finds that there was an unduly suggestive procedure, the court goes on to address the second reliability prong, under which the corruptive effect of the suggestive procedure is weighed against certain factors, such as the opportunity of the [eyewitness] to view the criminal at the time of the crime, the [eyewitness'] degree of attention, the accuracy of [the eyewitness'] prior description of the criminal, the level of certainty demonstrated at the [identification] and the time between the crime and the [identification]." (Internal quotation marks omitted.) *State* v. *Dickson*, supra, 322 Conn. 421; see also *Manson* v. *Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977).

Murray had numerous opportunities to view the defendant during the daylong event, which included several exchanges with the defendant prior to the assault. On several occasions, the defendant attempted to get another beverage from the beer tent, and Murray had to tell the defendant to leave the beer tent. Murray also paid particular attention to the defendant in the beer tent because he was uncomfortable with the way that he was staring at the victim and his daughter. There was lighting in both the bathroom and the Grange Hall where Murray confronted the defendant. While in the Grange Hall, Murray attempted to restrain the defendant on the floor, which ultimately resulted in a face-to-face physical altercation between them. He provided

the police with a description of the assailant's race, gender, hair color, height, weight, and clothing. Approximately forty-five minutes after the assault, Murray viewed the Facebook photo presented to him by the police on Baker's cell phone, and he was certain that the man in the photo was the man who had assaulted the victim. Accordingly, the court did not abuse its discretion in denying the defendant's motion to suppress Murray's out-of-court identifications.[17]

The judgment of the court is affirmed.

In this opinion the other judges concurred.

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## TOWN OF WINDSOR *v.* LOUREIRO ENGINEERING ASSOCIATES ET AL.
## (AC 39398)

Lavine, Alvord and Bear, Js.

*Syllabus*

The plaintiff town sought to recover damages for professional negligence from, inter alia, the defendant architect firm and its individual employees in connection with the collapse of the roof of a school auditorium in

[17] We further conclude from a review of the entire factual record that the admission of the Murray identification evidence, even if improper, was harmless beyond a reasonable doubt. "If the admission of eyewitness identification testimony is deemed to be improper, it is then subject to harmless error review." *State* v. *Aviles*, 154 Conn. App. 470, 478, 106 A.3d 309 (2014), cert. denied, 316 Conn. 903, 111 A.3d 471 (2015). "[B]ecause of the constitutional magnitude of the error, the burden falls on the state to prove that the admission of the tainted identification was harmless beyond a reasonable doubt." *State* v. *Artis*, 314 Conn. 131, 154, 101 A.3d 915 (2014). Even without Murray's pretrial and trial identifications, the state had a strong case against the defendant. McNamara also witnessed the assailant in the bathroom. McNamara identified the defendant out-of-court, in a double blind photo array administered by the police two days after the assault, and McNamara identified the defendant as the assailant at trial. The defendant also matched the description given by both McNamara and Murray. Furthermore, the defendant had a fair opportunity to cross-examine Murray at trial and challenge his identification of the defendant as the assailant. See id., 161 (defendant's opportunity to cross-examine eyewitness was factor in harmlessness analysis). Accordingly, we conclude that, even if the admission of the eyewitness identification testimony were improper, it was harmless beyond a reasonable doubt. See *State* v. *Aviles*, supra, 482.

2011. The plaintiff had retained the defendants and others, including F, a structural engineer, to produce a report that summarized their analysis of conditions at the school and their conclusion as to whether the existing building was structurally sound so that it could be renovated to standards comparable to a new building. The report was delivered in 1998. The defendants pleaded as their special defense that the present action was barred by the applicable seven year statute of limitations (§ 52-584a). The plaintiff maintained, inter alia, that the "comparable to new" analysis was never substantially completed and, thus, the statute of limitations never began to run. In a series of rulings on certain pretrial motions, the court ordered trial on the statute of limitations issue to be bifurcated from the question of liability and prohibited any argument to the jury that substantial completion had never occurred, ruling that the question for the jury was when, not whether, substantial completion occurred. After trial began, the court, sua sponte, reconsidered the defendants' earlier motion to dispense with the jury and decide the statute of limitations question as a matter of law, and ordered the parties to brief the factual issues and submit admissible evidence akin to a motion for summary judgment. Thereafter, the court rendered judgment in favor of the defendants on their statute of limitations defense. The plaintiff appealed to this court, claiming that that the defendants failed to satisfy their burden to demonstrate that the action was commenced outside the seven year limitation period, as the allegations in its complaint as well as certain documentary evidence and deposition testimony left open a wide range of possible dates of negligence beyond the seven year limitation period. *Held* that the trial court properly rendered judgment in favor of the defendants on their statute of limitations defense, the defendants having established that there was no genuine issue of material fact that the plaintiff commenced this action outside the statutory limitation period: by the plain terms of § 52-584a, an action against an architect or engineer arising out of a deficiency in one or more of the enumerated services must be brought within seven years after the substantial completion of the improvement to real property, with the date of substantial completion being the date the improvement was either first used or first available for use, and under the circumstances here, where the report did not itself require or effect a physical alteration of real property and there was no readily discernible date of substantial completion of such an improvement to real property, the seven year period began to run when the allegedly negligent design was completed, and the defendants satisfied their burden of proving the plaintiff commenced this action more than seven years after the report was completed and more than seven years after the plaintiff held a town referendum for funding the renovation as recommended in the report, which occurred in 1999; moreover, the plaintiff failed in its burden to substantiate its claim that an issue of fact existed as to whether the defendants substantially completed their report by failing to inform the plaintiff about the

defect in the auditorium roof, as such argument was contrary to the plain language and purpose of § 52-584a, which was enacted to end perpetual liability for architects and engineers, and, viewing the plaintiff's evidence in its most favorable light, the last date on which a jury could have found that the defendants were still working on the report was in 2000, the date of the last letter provided by the plaintiff in which F affirmed the conclusions made in the report and which was more than seven years before the plaintiff commenced this action.

Argued December 4, 2017—officially released April 24, 2018

*Procedural History*

Action to recover damages for the defendants' alleged professional negligence, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the defendant Charles V. Francis was defaulted for failure to plead; thereafter, the action was withdrawn as to the named defendant et al.; subsequently, the court, *Elgo, J.*, granted the motion to bifurcate the trial as to certain special defenses filed by the defendant Newman Architects, LLC, et al.; thereafter, the court denied the motion filed by the defendant Newman Architects, LLC, et al. to dispense with the jury and decide the special defenses as a matter of law; subsequently, the court, sua sponte, reconsidered its ruling on the motion to dispense with the jury and decide the special defenses as a matter of law and rendered judgment for the defendant Newman Architects, LLC, et al., from which the plaintiff appealed to this court. *Affirmed.*

*Daniel J. Krisch*, with whom, on the brief, were *John C. DeSimone*, pro hac vice, *John B. DiSciullo*, pro hac vice, and *Richard F. Wareing*, for the appellant (plaintiff).

*Leslie P. King*, with whom were *Christopher A. Klepps* and, on the brief, *Donald W. Doeg*, for the appellees (defendant Newman Architects, LLC, et al.).

*Opinion*

ALVORD, J. The plaintiff, the town of Windsor, appeals from the judgment of the trial court rendered in favor of the defendants Newman Architects, LLC, Herbert S. Newman, and Michael Raso.[1] On appeal, the plaintiff claims that the court improperly discharged the jury and rendered judgment as a matter of law on the defendants' special defense asserting that the plaintiff's action was barred by the seven year statute of limitations set forth in General Statutes § 52-584a. We conclude that the court properly rendered judgment as a matter of law in favor of the defendants and, accordingly, affirm the judgment.

The following facts and procedural history are relevant to our resolution of this appeal. The present appeal stems from a professional negligence action that the plaintiff commenced against the defendants after the auditorium roof at Windsor High School (school) collapsed under the weight of accumulated snow and ice on February 2, 2011.

The defendants previously had performed work for the plaintiff under two separate contracts for services relating to the school. Newman Architects, LLC, which employed Newman and Raso, provided architectural services and Barnhart, Johnson, Francis & Wild, Inc. (BJFW), which employed Charles Francis, provided structural engineering services. The parties designated the defendants' work performed pursuant to the first

[1] Charles V. Francis also was a defendant in this action, but was defaulted for failure to plead. A complaint and an apportionment complaint were filed against O & G Industries, Inc., but were subsequently withdrawn. The plaintiff also filed a complaint against Loureiro Engineering Associates, but the action was withdrawn as to it on September 8, 2016. Francis, O & G Industries, Inc., and Loureiro Engineering Associates are not participants in this appeal. We refer to Newman, Raso, and Newman Architects, LLC, as the defendants.

contract as the "report project." Specifically, the defendants were retained to produce what was called a "Comparable-to-New" report (report), which was required as part of the process for applying for renovation funding from the state of Connecticut pursuant to No. 96-270 of the 1996 Public Acts (P.A. 96-270).[2] The report summarized the defendants' analysis of conditions at the school and the defendants' conclusion as to whether the existing building was structurally sound, so that it could be renovated to standards comparable to a new building. The report was dated June 16, 1998, and was provided to the plaintiff on that day.

On June 29, 1998, the plaintiff submitted the report to the state as part of its application for renovation funding, which application was approved. On February 9, 1999, the town held a referendum on the $35 million appropriation and bond authorization for renovations at the school, which the town's residents voted to approve. By April 12, 1999, the plaintiff had paid the defendants in full for their work under the contract for the report project. In June, 1999, the parties entered into a separate, second contract for the design and construction of the renovation project at the school (renovation project).

The plaintiff commenced this action on July 14, 2011, five months after the auditorium roof collapsed. The plaintiff alleged as the proximate cause of the collapse a deficient steel connection between the main truss and a supporting truss. The plaintiff alleged, inter alia, that the defendant Newman Architects, LLC, was negligent

[2] As noted by the trial court: P.A. 96-270, codified at General Statutes § 10-282 (18), "created a new category of school construction project known as 'renovation,' " which was "a school building project to totally refurbish an existing building as an alternative to new construction and which results in the renovated facility taking on a useful life comparable to that of a new facility."

in four ways: (1) failing to "follow the appropriate standard of care in inspecting existing field welds in areas affected by the renovation"; (2) failing to "follow the appropriate professional standard of care in supervising, as an architect, consultants and subcontractors in making inspections of the existing field welds"; (3) failing to "follow the appropriate professional standard of care in ensuring that existing elements within the high school were brought into compliance with the State Building Code"; and (4) giving "advice below the appropriate professional standard of care to the plaintiff, to whom it had a duty, in advising the renovation project would provide another twenty years of life to the high school, as required by and in accordance with State guidelines and definitions for renovation status and then failing to adequately monitor the project to ensure the structure and renovations satisfied that standard."[3]

In their answer, the defendants asserted a special defense alleging that the plaintiff's action was barred by § 52-584a because the plaintiff had commenced its action more than seven years after substantial completion of the subject improvement.[4] On January 12, 2016, the defendants filed a motion to bifurcate the trial, seeking to have the issue of whether the plaintiff's claims were barred by the statute of limitations heard before the issue of liability. The plaintiff objected on the basis that the statute of limitations issue was "too closely intertwined with the plaintiff's liability case." After oral argument on January 20, 2016, the court, *Elgo, J.*, granted the defendants' motion to bifurcate.

[3] The plaintiff made the same allegations against Raso and Newman, except that it did not allege that they failed to follow the standard of care in supervising consultants and subcontractors.

[4] On February 6, 2015, the defendants filed a motion for summary judgment on their special defense, which the court, *Sheridan, J.*, denied on the basis that "genuine issues of material fact exist as to the date of substantial completion."

On February 1, 2016, the plaintiff filed a motion in limine to preclude evidence regarding the substantial completion date of the renovation project. In its motion, the plaintiff described the defendants' obligations under each of the two contracts. Under the contract for the report project, the "defendants agreed to provide a report outlining the scope of renovations needed to bring the [school] building and site to a 'comparable-to-new' standard . . . ." Under the contract for the renovation project, the "defendants agreed to provide the design, and design documents, and administer the underlying construction contracts on the [plaintiff's] behalf." The plaintiff argued that because it was "not asserting that defendants breached any duties arising out of that second, distinct, contract," any evidence regarding the date on which the renovation project was substantially complete was irrelevant to the issue of whether the plaintiff's claims arising from the report project were timely.

The defendants filed a motion in response, arguing that if evidence of the date of substantial completion of the renovation project was precluded, there would be no factual issue left to be tried during the first phase of trial. According to the defendants, there were "no factual issues in dispute with respect to the completion date of the report project." The defendants requested that the court dispense with the jury and permit the parties to brief the only remaining issue, which would be the legal question of whether the defendants owed the plaintiff "a continuing duty with respect to the report project after the [report] was submitted and the referendum was passed." The parties appeared before Judge Elgo on February 2, 2016, to argue several motions in limine, including the defendants' motion to dispense with the jury. During this hearing, the plaintiff clarified that it was not asserting that the defendants had a continuing duty to correct any alleged mistakes

in the report but rather that the comparable-to-new analysis was never substantially completed. The court prohibited any argument to the jury that substantial completion had never occurred, ruling that the question for the jury was when, not whether, substantial completion occurred. The court further prohibited the plaintiff from arguing to the jury that the date the certificate of occupancy was issued for the school could be the date of substantial completion, after concluding that there was no basis in law for the statute of limitations to be triggered by that date.

The next morning, the parties again appeared before the court. The jury was sworn in and counsel presented opening statements. During the plaintiff's opening statement, counsel indicated an intention to offer evidence in support of legal theories that the court already had ruled irrelevant and inadmissible, and the court sustained five objections on the basis of relevance before excusing the jury. The court thereafter reconsidered the defendants' earlier motion to dispense with the jury and ordered the defendants to "provide this court with affidavits and/or other admissible evidence in support of its claims . . . . [T]he plaintiff shall respond by specifically addressing each of the factual claims raised and assert whether each fact is or is not disputed. If disputed, the plaintiff shall file with its response evidence, which would be admissible at trial, sufficient to create an issue of fact which must be resolved by a jury." The court ordered the parties to brief the factual issues and submit "admissible evidence akin to a motion for summary judgment." The plaintiff objected to the court's proposed procedure.

On February 4, 2016, the defendants filed an offer of proof, setting forth the dates on which (1) the first contract was signed; (2) the report was prepared and submitted to the plaintiff; (3) the report was used by

the plaintiff in its application for funding; (4) the referendum on the project was approved; and (5) the final invoice under the first contract was submitted and paid in full by the plaintiff. The defendants attached to their offer of proof documents in support of those dates and the affidavits of Richard Munday, an employee of Newman Architects, and Francis, who was president of BJFW during the relevant time frame. The plaintiff responded that the defendants had failed to offer adequate proof, in that they were required, and failed, to present evidence that either: "(1) the last day on which they could have been negligent was more than seven . . . years before the commencement of this action; or (2) the date of substantial completion of an improvement to real property occurred more than seven . . . years before the commencement of this action." The plaintiff cited testimony and documentary evidence in support of its claim that there was an issue of fact as to whether the defendants had finished their work as of February 9, 1999, the date of the referendum. Specifically, the plaintiff relied upon language found in the report stating that "[e]xamination of structural elements concealed by finish materials was not made and will need thorough examination during the design and construction phases of the project." The plaintiff also pointed to letters prepared by Raso and Francis after the report had been provided to the plaintiff offering their opinions regarding the structure at the school, which the plaintiff claimed evidenced work performed after the date of the referendum. The plaintiff further noted communications in which Francis indicated he was missing certain original structural drawings, one of which Francis described as especially important to have.

On June 20, 2016, the court rendered judgment as a matter of law in favor of the defendants on their statute of limitations special defense. The court relied upon

the undisputed facts that the defendants completed and submitted the report on June 16, 1998, and that the town used the report on June 25, 1998, when it submitted the report as part of its application for state funding. Noting the plaintiff's argument that the defendants had sent letters confirming their opinions as late as February 15, 2000, the court concluded that even if a jury were to credit that date, the action was still commenced well beyond seven years later. Thus, the court concluded that the defendants had satisfied their burden of showing the absence of any genuine issue of material fact and that they were entitled to judgment as a matter of law.[5] The plaintiff appealed.

On appeal, the plaintiff claims that the court improperly discharged the jury and rendered judgment as a matter of law because the defendants failed to satisfy their burden to demonstrate that the action was commenced outside the seven year statutory limitation period. Specifically, the plaintiff claims that its allegations "le[ft] open a wide range of possible dates of negligence," and that it offered documentary evidence and deposition testimony that supported the possibility that further work was performed after "the dates on which the defendants' entire argument hinged." The defendants argue that the court properly rendered judgment because there were no material issues of fact to be tried and the evidence proved that the plaintiff's claims were time barred as a matter of law. We agree with the defendants.

At the outset, we note that the plaintiff expressly declined to pursue a theory that the defendants breached any obligations with respect to the renovation project under the second contract. As framed by the

[5] The court also rejected the plaintiff's argument that the doctrine of nullum tempus applied to save its action and declined the plaintiff's attempt, on the eve of trial, to assert the doctrine of equitable estoppel. These rulings are not challenged on appeal.

parties, the sole question on appeal is whether the trial court properly concluded that the defendants satisfied their burden of demonstrating that there was no genuine issue of material fact that the plaintiff failed to commence the action within seven years of the date of the alleged negligence arising out of the defendants' work on the report project.

We first set forth our standard of review. Whether a plaintiff's claim is barred by the applicable statute of limitation presents a question of law to which this court affords plenary review. *Sinotte* v. *Waterbury*, 121 Conn. App. 420, 440, 995 A.2d 131, cert. denied, 297 Conn. 921, 996 A.2d 1192 (2010); see also *Doe* v. *Boy Scouts of America Corp.*, 323 Conn. 303, 341, 147 A.3d 104 (2016). The court's decision on reconsideration of the defendants' motion to decide questions of law and to dispense with the jury trial is reviewed under the same standard as a decision on a motion for summary judgment. See *Thomson* v. *Dept. Social Services*, 176 Conn. App. 122, 127–28, 169 A.3d 256 (test for summary judgment is whether moving party would be entitled to directed verdict on same facts), cert. denied, 327 Conn. 962, 172 A.3d 800 (2017). "Summary judgment may be granted where the claim is barred by the statute of limitations. . . . Summary judgment is appropriate on statute of limitations grounds when the material facts concerning the statute of limitations [are] not in dispute . . . ." (Citation omitted; internal quotation marks omitted.) *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 313, 77 A.3d 726 (2013). "A material fact . . . [is] a fact which will make a difference in the result of the case." (Internal quotation marks omitted.) *Flannery* v. *Singer Asset Finance Co., LLC*, 312 Conn. 286, 310, 94 A.3d 553 (2014).

We next set forth the applicable statute of limitations, which provides in relevant part: "No action . . . whether in contract, in tort, or otherwise, (1) to recover

damages (A) for any deficiency in the design, planning, contract administration, supervision, observation of construction or construction of, or land surveying in connection with, an improvement to real property . . . shall be brought against any architect, professional engineer or land surveyor performing or furnishing the design, planning, supervision, observation of construction or construction of, or land surveying in connection with, such improvement more than seven years after substantial completion of such improvement." General Statutes § 52-584a (a). Subsection (c) of § 52-584a further provides: "For purposes of subsections (a) and (b) of this section, an improvement to real property shall be considered substantially complete when (1) it is first used by the owner or tenant thereof or (2) it is first available for use after having been completed in accordance with the contract or agreement covering the improvement, including any agreed changes to the contract or agreement, whichever occurs first."

By the plain terms of § 52-584a, an action against an architect or engineer arising out of a deficiency in one or more of the enumerated services must be brought within seven years after the substantial completion of the improvement to real property, with the date of substantial completion being the date the improvement is either first used or first available for use. Our Supreme Court has previously defined the term "improvement to real property" as "an alteration or development of the property in order to enhance or promote its use for a particular purpose" and has noted that the phrase in this context "ordinarily requires some physical addition to or alteration of the property in question . . . ." *Grigerik* v. *Sharpe*, 247 Conn. 293, 307, 721 A.2d 526 (1998).

Recognizing that the plaintiff had limited its claims to alleged negligence arising out of the report project, which did not itself require or effect a physical alteration of real property, the court noted that there was

no readily discernible date of "substantial completion of an improvement to real property" and turned for guidance to our Supreme Court's application of the statute in a case in which a physical improvement was planned but did not occur because of the alleged negligence. In *Grigerik* v. *Sharpe*, supra, 247 Conn. 293, the plaintiff brought a negligence action against engineers who had performed professional services at his property. Specifically, the defendants were hired "to prepare a site plan, to design a subsurface sanitary sewage disposal system and to perform the necessary soil testing." (Internal quotation marks omitted.) Id., 299. The defendants were told that the site plan was necessary in order to obtain approval of the land as a building lot. Id. The defendants completed their work on the site plan on October 16, 1985. Id., 300. A few months later, the plaintiff applied for the permits to begin construction of a house on the lot, and the application was denied. After performing additional tests, "it was concluded that a curtain drain would have to be installed on the land in order to control the seasonally high groundwater." (Internal quotation marks omitted.) Id. Ultimately, however, after the construction of the curtain drain, the state department of health concluded that "the tests indicated that minimum public health standards for a septic system could not be met and that the building permits could not be issued." (Internal quotation marks omitted.) Id. The jury found for the plaintiff on his negligence claim.

On appeal, this court concluded that a plan or design for a structure was not an "improvement" within the meaning of § 52-584a and held that the two year statute of limitations contained in General Statutes § 52-584 barred the plaintiff's negligence claim. Id., 297. Our Supreme Court reversed, holding that § 52-584a applies "where an improvement is planned but never effectuated." Id., 308. Having concluded that the seven year statutory limitation period applied, the court stated that

"the negligence occurred during October, 1985," which was the date upon which the defendants completed the allegedly defective design, and the plaintiff had commenced its action fewer than seven years later. Id., 309. In essence, the court in *Grigerik* identified the date of negligence as the completion of the allegedly defective design, and thus, that was the date on which the seven year period began to run.

We conclude that the trial court properly determined, using *Grigerik* as guidance, that the defendants satisfied their burden of proving that there was no genuine issue of material fact that the plaintiff commenced its action outside the statutory limitation period.[6] The plaintiff acknowledged to the trial court that the report was "the end product of defendants' work on the report project." With respect to that project, the defendants set forth the following undisputed dates: (1) the first contract was signed on April 20, 1998, (2) the report was dated June 16, 1998, (3) the report was submitted to the plaintiff on that same day, (4) the report was used by the plaintiff as part of its application for state funding on June 25, 1998, (5) the referendum on the renovation project was approved on February 9, 1999, and (6) the defendants' final invoice for the report project was sent to the plaintiff on February 23, 1999 and paid on April 13, 1999. The defendants also presented the affidavits of Francis and Newman, who averred that

[6] To the extent that the plaintiff claims that "the defendants had the burden to prove the date of their negligence" rather than the last date on which they could have been negligent, we reject this argument. The defendants need only "demonstrat[e] that the action had commenced outside of the statutory limitation period"; *Romprey* v. *Safeco Ins. Co. of America*, supra, 310 Conn. 321; which can be proven by evidence that the plaintiff commenced the action more than seven years after the last date on which the defendants could have been negligent. See *Rosenfield* v. *I. David Marder & Associates, LLC*, 110 Conn. App. 679, 692, 956 A.2d 581 (2008) (declining to decide on which specific date statute began to run and concluding that it began to run "no later than April 12, 2000").

the defendants performed no work on the report project after the February 9, 1999 referendum.[7] In June, 1999, the parties entered into a separate, second contract for the design and construction of the renovation project, providing the trial court with additional evidence that the report project had been completed.

The defendants' evidence, which demonstrated that the defendants had completed work on the report project in 1999, and therefore any alleged negligence with respect to the report project had occurred by that date, was sufficient to prove the absence of a genuine issue of material fact that the action, served on July 14, 2011, was commenced well outside the seven year statutory limitation period.[8] Accordingly, the burden shifted to

[7] The defendants provided the affidavit of Richard Munday, an employee of Newman Architects, LLC, and attached: (1) a copy of the first contract dated April 20, 1998, (2) a copy of the report dated June 16, 1998, (3) a certified copy of the Town of Windsor Public Building Commission meeting minutes dated June 25, 1998, and indicating that the town had submitted the report to the state on June 25, 1998, (4) a certified copy of the Windsor Town Council meeting minutes dated February 16, 1999, and indicating that the school renovation project had been approved by referendum on February 9, 1999, and (5) a copy of Newman Architects' accounts receivable ledger showing that it had been paid in full under the first contract by April 13, 1999.

[8] The plaintiff relies on *Rickel* v. *Komaromi*, 144 Conn. App. 775, 73 A.3d 851 (2013), and *Fradianni* v. *Protective Life Ins. Co.*, 145 Conn. App. 90, 73 A.3d 896, cert. denied, 310 Conn. 934, 79 A.3d 888 (2013), in support of its claim that the trial court improperly adopted the defendants' "mechanical application" of the statute. Both cases are inapposite, as the plaintiff in *Rickel* alleged continuing torts and the plaintiff in *Fradianni* alleged conduct that could constitute separate, annual breaches of the contract occurring within the limitation period.

In *Rickel*, the plaintiff had "alleged facts in her complaint to support her claims that the defendants' conduct in planting [invasive] bamboo and then failing to control its growth resulted in a continuing nuisance and a continuing trespass." *Rickel* v. *Komaromi*, supra, 144 Conn. App. 789–90. The trial court relied only upon the date the bamboo was planted in rendering summary judgment for the defendants on the ground that the action was barred by the statute of limitations. Id., 792. This court concluded that the court erred in rendering judgment because the "continuing underground and above ground activity on the plaintiff's property" created a genuine issue of fact as to whether the statute of limitations barred all of the plaintiff's claims. Id., 790.

the plaintiff: "Although the party seeking summary judgment has the burden of showing the nonexistence of any material fact . . . a party opposing summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue." (Internal quotation marks omitted.) *Rosenfield* v. *I. David Marder & Associates, LLC*, 110 Conn. App. 679, 684, 956 A.2d 581 (2008).

The plaintiff does not claim that the statute of limitations was waived or tolled on the basis of a continuing course of conduct. Instead, it suggests that it was a question for the jury "[w]hether the defendants substantially completed their report even though they failed to inform the [plaintiff] about [the] defect [in the auditorium roof]." The trial court properly rejected this contention as inconsistent with the language and purpose of the statute. See *Grigerik* v. *Sharpe*, supra, 247 Conn. 303 n.10 (noting this court's recognition that "at the time the original version of § 52-584a was enacted, two changes recently had altered modern tort law: the fall of the privity requirement; and the death of the completed and accepted rule, [under which] the liability of a design professional or builder terminated when the improvement was finished and accepted by the owner" and that "the legislature's concern over this increasing liability facing architects and professional engineers . . . had prompted the legislature to enact § 52-584a" [citation omitted; internal quotation marks omitted]);

In *Fradianni*, this court concluded that the trial court improperly rendered summary judgment in favor of the defendant insurer where the plaintiff had alleged that "each year the defendant charged him for a cost of insurance that was in excess of the maximum amount allowed under the terms of the contract and then deducted that excessive amount from the policy's accumulated cash value." *Fradianni* v. *Protective Life Ins. Co.*, supra, 145 Conn. App. 103. This court concluded that such claims alleged "separate breaches by the defendant, several of which occurred within the statute of limitations period." Id.

see also *Bagg* v. *Thompson*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. X07-CV-04-4025177-S, (April 17, 2008) (*Berger, J.*) (45 Conn. L. Rptr. 448, 452 n.9) (noting that § 52-584a was enacted to end perpetual liability).[9]

The plaintiff challenges Francis' and Newman's averments that the defendants performed no work on the report project after the referendum held on February 9, 1999.[10] In support of its claims, the plaintiff submitted,

[9] This court, in *R.A. Civitello Co.* v. *New Haven*, 6 Conn. App. 212, 227, 504 A.2d 542 (1986), concluded that General Statutes (Rev. to 2005) § 52-584a was solely a statute of repose. In 1986, the legislature amended § 52-584a to remove the language relied upon by this court in *R.A. Civitello Co.* "[T]he language and the legislative history of [the 1986 amendments to § 52-584a] indicate the legislature's intent to overturn *R.A. Civitello Co.* and to provide a seven year statute of limitations for certain actions against architects and engineers, rather than a two year statute of limitations coupled with a seven year statute of repose." *Grigerik* v. *Sharpe*, supra, 247 Conn. 304.

[10] Attached to the plaintiff's memorandum in support were the following documents: (1) a document entitled "Guidelines for Determining Eligibility of School Construction Projects for Status as Renovations as Defined in P.A. 96-270," (2) excerpts from the deposition of Joseph A. Novak, Jr., (3) a copy of the report, (4) letters from Francis to the state, dated July 1, 1999, and February 15, 2000, stating in part that "it is our professional opinion that the proposed renovations will not compromise the structural integrity of the original building and that it is adequate to provide for continued occupancy for a period of time comparable to that of a new facility," (5) letters from Raso to the Windsor Public Schools and the state dated June 28, 1999, and June 30, 1999, stating in part "that the entire facility will be in compliance with all applicable codes, and shall have a useful life comparable to that of a new facility following the construction budget," (6) a PowerPoint presentation dated September 28, 1998, stating that the "basic building structure, walls, floors and roof are sound and in good condition," (7) the certificate of occupancy for the school issued December 21, 2004, (8) excerpts from the deposition of Raso, (9) excerpts from the deposition of Francis in which he testified that during "design and construction" he "went back and took another look at" exposed structural elements that had previously been concealed, (10) fax memos from Francis to Munday dated April 20, 1998, February 17, 1999, and March 24, 1999, in which Francis noted he was missing certain original structural drawings, one of which "especially will be important to have," and (11) excerpts from the deposition of Munday in which he testified that he did not know "what other steps were taken" regarding evaluation of the auditorium roof structure after the report project

inter alia, a February 17, 1999 memorandum written by Francis explaining why BJFW could not provide structural engineering services for the school at a fee of less than $97,500. The memorandum identified work that had yet to be performed, including a structural evaluation of the roof framing system, which was required by the "comparable to new" criteria. The plaintiff's supporting documents also included communications dated April 20, 1998, and March 24, 1999, which indicated that Francis was missing the original structural drawings showing the foundation and roof framing of the auditorium. The plaintiff also presented letters written by Francis to the state on July 1, 1999, and February 15, 2000, which affirmed the conclusions made in the report, and a similar letter written by Raso and dated June 30, 1999.

The plaintiff claims that its evidence impeached the testimony of Munday and Francis, and argues that if the jury disbelieved them as to when they stopped working on the report project, "it might have found the defendants' entire defense wanting." We disagree. The evidence, viewed in the light most favorable to the plaintiff, did not demonstrate the existence of a genuine issue of material fact as to whether the action was commenced within seven years of the alleged negligence. As the court found, the last date upon which a jury could find that the defendants were still working on the report project was February 15, 2000, the date of the last letter provided by the plaintiff in which Francis affirmed the conclusions made in the report. The plaintiff presented no evidence of alleged negligence with respect to the report project beyond that date. Accordingly, we agree with the trial court that the statute of limitations began to run, at the latest, on February 15, 2000. See *Rosenfield* v. *I. David Marder & Associates*,

and that he could not recall what steps, if any, he took to locate the missing drawing.

*LLC*, supra, 110 Conn. App. 687 (concluding that any alleged breach occurred at latest by April 12, 2000, and explaining that court "need not determine, for purposes of this appeal, whether the statute of limitations began to run on November 9, 1999, or April 12, 2000").

The plaintiff does not dispute that the applicable limitation period under § 52-584a is seven years. Thus, the plaintiff was required to commence this action by February 15, 2007. The plaintiff acknowledges that the summons and complaint in this action were not served until July 14, 2011. Because it failed to commence this action within the seven year limitation period, the court correctly concluded that the plaintiff's claims are barred by § 52-584a.[11]

We conclude that the defendants established the lack of a genuine issue of material fact concerning the statute of limitations. The plaintiff failed to present evidence that would raise such an issue. Accordingly, the court properly rendered judgment as a matter of law in favor of the defendants on their statute of limitations defense.

The judgment is affirmed.

In this opinion the other judges concurred.

[11] In its brief, the plaintiff makes two allegations of negligence that it contends occurred during the renovation project but "implicated the defendants' obligations under the first contract." Specifically, the plaintiff alleged that the defendants negligently "failed to follow the appropriate standard of care in ensuring that existing elements within the high school were brought into compliance with the State Building Code"; and "gave advice below the appropriate professional standard of care to the [plaintiff], to whom it had a duty, in advising the renovation project would provide another twenty years of life to the high school . . . and then failing to adequately monitor the project to ensure the structure and renovations satisfied this standard." In light of when the report project concluded, i.e., no later than 2000, the defendants' responsibilities under that project ended well before July 14, 2004, which date marks seven years prior to the commencement of this litigation.

# MICHAEL ANDERSON *v.* OCEAN STATE JOB LOT ET AL.
(AC 40240)

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

*Syllabus*

The plaintiff sought to recover damages from the defendants for false arrest and malicious prosecution in connection with their alleged conduct in furnishing false information against him. The defendants filed a motion to dismiss the action on the ground that the plaintiff failed to appear for a court-ordered deposition. The trial court granted the motion and rendered a judgment of dismissal. Thereafter, the plaintiff filed a motion to open the judgment on the ground that he was incarcerated at the time of the deposition and, thereby, was prevented from attending it through no fault of his own. The trial court denied the motion to open, and the plaintiff appealed to this court raising claims of fraud. *Held* that the plaintiff's fraud claims were not reviewable on their merits; the plaintiff did not raise those claims before the trial court in his motion to open but, rather, predicated his failure to appear for his deposition solely on his incarceration, and the plaintiff failed to have his motion to open verified by oath as required by the applicable statute (§ 52-212), which was fatal to his claims.

Argued March 5—officially released April 24, 2018

*Procedural History*

Action to recover damages for, inter alia, false arrest, brought to the Superior Court in the judicial district of New Britain, where the court, *Swienton, J.*, granted the defendants' motion to dismiss and rendered judgment thereon; thereafter, the court denied the plaintiff's motion to open the judgment, and the plaintiff appealed to this court. *Affirmed.*

*Michael Anderson*, self-represented, the appellant (plaintiff).

*Evan K. Buchberger*, for the appellees (defendants).

*Opinion*

PER CURIAM. The self-represented plaintiff, Michael Anderson, brought this action alleging that the defendants, Ocean State Job Lot, William Lapore, Tiffany

Canon and Robin Givens, furnished false information, causing his false arrest and malicious prosecution. Before trial, the defendants moved to dismiss the action on the ground that the plaintiff failed to appear for a court-ordered deposition on November 18, 2016, which the court granted on December 12, 2016. The plaintiff then moved to open the judgment on the basis that he was incarcerated at the time of the deposition and was prevented from attending through no fault of his own, which the court denied on January 9, 2017. This appeal followed.

On appeal, the plaintiff claims that the defendants' attorney (1) "influenced the court . . . to grant the dismissal using lies, misrepresentations and deceptions to prevail on his motions and ignored the plaintiff's handwritten change of address notice that the plaintiff mailed to him on November 3, 2016," and (2) "thereafter sought to produce false documents and take certain action to deceive the court and deprive the plaintiff of his right of action and remedy by fraud." We affirm the judgment of the court.

There are two reasons we are unable to entertain the plaintiff's claims on the merits. First, in his motion to open, the plaintiff does not once mention the fraud that he now claims. "To allow the [plaintiff] to argue one theory . . . [before the trial court] and then press a distinctly different theory on appeal would amount to an ambuscade of the trial court." (Internal quotation marks omitted.) *Jahn* v. *Board of Education*, 152 Conn. App. 652, 665, 99 A.3d 1230 (2014). We review a trial court's ruling on a motion to open for an abuse of discretion. *Questell* v. *Farogh*, 175 Conn. App. 262, 267, 167 A.3d 492 (2017). The trial court in this case cannot be said to have abused its discretion as to a theory never presented to it. Because the plaintiff only predicated his failure to appear for his deposition on his incarceration, he cannot prevail on his claims of fraud.

Second, the plaintiff failed to have his motion to open verified by oath. A motion to open a judgment upon default of some order of the court is governed by General Statutes § 52-212, which provides in pertinent part that "[t]he complaint or written motion shall be verified by the oath of the complainant or his attorney . . . ." Although we are solicitous of self-represented litigants and allow them 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.) *Questell* v. *Farogh*, supra, 175 Conn. App. 271. This noncompliance is fatal to his claims.

The judgment is affirmed.

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# LATUAN GAINEY *v.* COMMISSIONER OF CORRECTION (AC 39791)

Lavine, Prescott and Elgo, Js.

*Syllabus*

The petitioner, who had been convicted, on a guilty plea, of various crimes, sought a writ of habeas corpus. Shortly after the petitioner was released from incarceration and began serving his term of special parole, he was arrested and charged with risk of injury to a child and assault in the third degree. Thereafter, the petitioner was served with a notice of parole violation by the parole board on the basis of his failure to register with the state police deadly offender registry unit and his arrest while on parole. The petitioner was found to have violated the conditions of his release and the terms of his special parole, and was sentenced to incarceration for two years and six months of his remaining seven year term of special parole. The habeas court rendered judgment dismissing the habeas petition on the basis of the prior pending action doctrine, from which the petitioner, on the granting of certification, appealed to this court. While the appeal was pending in this court but before oral argument had occurred, the petitioner completed the term of imprisonment imposed by the parole board for the petitioner's violation of special parole. *Held* that the petitioner's appeal was moot: although the petitioner was still in the custody of the respondent Commissioner of Correction and his special parole would not expire for a number of years, the

petitioner, who had been released from incarceration and readmitted to special parole, had obtained the relief he sought in his habeas petition, and there was no practical relief that this court could afford him; moreover, the petitioner's claim did not fall within the capable of repetition, yet evading review exception to the mootness doctrine, as it was unlikely, given the range of possible sentences for a parole violation, that a substantial majority of the appellate cases that contest a habeas court's dismissal, under the prior pending action doctrine, of a petition for a writ of habeas corpus seeking release from incarceration following the parole board's revocation of special parole would become moot as a result of the petitioner completing the term of reimprisonment before the appeal was resolved.

Argued February 1—officially released April 24, 2018

*Procedural History*

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

*Joseph Patten Brown III*, with whom was *Delena Brown*, for the appellant (petitioner).

*Mitchell S. Brody*, senior assistant state's attorney, with whom, on the brief, was *Maureen Platt*, state's attorney, for the appellee (respondent).

*Opinion*

LAVINE, J. Following the habeas court's granting of certification to appeal, the petitioner, Latuan Gainey, appeals from the judgment of the habeas court sua sponte dismissing his petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court abused its discretion by dismissing his petition for a writ of habeas corpus pursuant to the prior pending action doctrine. We dismiss the appeal as moot.

The following procedural history is relevant to our resolution of this appeal. On March 17, 2015, the petitioner pleaded guilty to the charges pending against him in two consolidated criminal files in Waterbury for offenses he committed on March 20, 2014, and May 20,

2012.[1] At that time, the petitioner was sentenced to serve concurrent sentences of two and one-half years incarceration and seven years of special parole.[2]

On April 7, 2015, the petitioner filed a self-represented petition for a writ of habeas corpus (first petition).[3] On September 11, 2015, the petitioner was released from incarceration and began serving his term of special parole. On September 23, 2015, the petitioner was arrested and charged with risk of injury to a child in violation of General Statutes § 53-21 and assault in the third degree in violation of General Statutes § 53a-61 for incidents that took place one day after he was released from prison. In his brief on appeal, the petitioner represents that on September 24, 2015, he was served with a notice of parole violation by the Board of Pardons and Paroles (parole board) on the basis of his failure to register with the state police deadly offender registry unit and his September 23, 2015 arrest.

On December 8, 2015, the petitioner pleaded guilty to one count of breach of peace in the second degree for incidents that occurred on September 20, 2015, and received an unconditional discharge. The petitioner appeared before the parole board for an evidentiary hearing on December 28, 2015. The parole board found

[1] The petitioner was charged with two counts of carrying a pistol without a permit in violation of General Statutes § 29-35, one count of reckless endangerment in the first degree in violation of General Statutes § 53a-63, and one count of possession of narcotics with intent to sell in violation of General Statutes § 21a-277 (a).

[2] The petitioner also was ordered to register as a deadly weapon offender.

[3] In his first petition, the petitioner alleged that the plea agreement underlying his guilty pleas was breached because he received only 619 days of jail time credit rather than 734 days of jail time credit that he was promised. The petitioner contended that he "agreed to plead guilty because [he] was told that [he] would be granted all [his] jail credit from 6-12-12 to 6-20-13 and 3-21-14 to 3/17-15, which is a total of 734 days, not 619, not because [he] was guilty." He claimed, therefore, that he was entitled either to the promised jail time credit or to withdraw his guilty plea. The first petition is not at issue in this appeal.

that the petitioner had violated the conditions of his release and the terms of his special parole. See footnote 1 of this opinion. The parole board, therefore, sentenced the petitioner to incarceration for two years and six months of his remaining seven year term of special parole.

On September 26, 2016, the petitioner filed a self-represented petition for a writ of habeas corpus (second petition), which is the petition at issue in the present appeal.[4] On September 29, 2016, the habeas court sua sponte dismissed the second petition on the basis of the prior pending action doctrine.[5] See Practice Book § 23-29 (5).[6] The habeas court granted the petition for

[4] The second petition concerns the parole board's determination that the petitioner had violated his special parole, its revocation of his special parole, and its imposition of a sentence of incarceration of two years and six months. The parole board's determination was predicated in part on the petitioner's arrest for risk of injury to a child and assault in the third degree while on parole, and his subsequent guilty plea to breach of peace. The petitioner alleged that his renewed incarceration violated his right to due process because he was not permitted to attend a preliminary hearing on the question of whether he had violated his special parole and only was permitted to attend the hearing on the question of whether his special parole should be revoked. The petitioner, therefore, alleged that he was unable to cross-examine witnesses who accused him of violating his special parole and to present alibi evidence. Consequently, the petitioner alleged that the parole board based its determination that he had violated his special parole on "incorrect" evidence and false documents.

[5] "The prior pending action doctrine permits the court to dismiss a second case that raises issues currently pending before the court. The pendency of a prior suit of the same character, between the same parties, brought to obtain the same end or object, is, at common law, good cause for abatement. It is so, because there cannot be any reason or necessity for bringing the second, and, therefore, it must be oppressive and vexatious. This is a rule of justice and equity, generally applicable, and always, where the two suits are virtually alike, and in the same jurisdiction. . . . The policy behind the prior pending action doctrine is to prevent unnecessary litigation that places a burden on our state's already crowded court dockets." (Citation omitted; internal quotation marks omitted.) *Selimoglu* v. *Phimvongsa*, 119 Conn. App. 645, 649, 989 A.2d 121, cert. denied, 296 Conn. 902, 991 A.2d 1103 (2010).

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

certification to appeal from the judgment dismissing the second petition.

The petitioner appealed, claiming that the habeas court committed legal error by dismissing his second petition under the prior pending action doctrine and that he was entitled to a hearing on his second petition before it could be dismissed. While the appeal was pending in this court, but before oral argument had occurred, the petitioner completed the term of imprisonment imposed by the parole board for the petitioner's violation of special parole on September 11, 2015. Thus, during oral argument, the respondent, the Commissioner of Correction, suggested that the appeal was moot. Following oral argument, we sua sponte ordered the parties to provide certain information and submit simultaneous supplemental briefs addressing whether the petitioner's appeal was moot.[7]

In their responses to our sua sponte order, the parties agree that the petitioner has completed the term of his

"(5) any other legally sufficient ground for dismissal of the petition exists." (Emphasis added.)

[7] We sua sponte ordered "that both parties attempt to agree upon a stipulation of facts regarding:

"1. Where the petitioner presently resides;

"2. The petitioner's status, i.e., whether he is on special parole;

"3. Is the petitioner subject to the custody of the commissioner of correction;

"4. Whether the petitioner has a release date, and if so, what is that date;

"The parties may stipulate to other facts that they believe will aid this court in resolving the question of mootness. If the parties are able to stipulate to some or all of the requested facts, they shall file a joint stipulation with the Appellate Court clerk no later than February 16, 2018. If the parties are unable to stipulate to all of the requested facts, each party shall separately file with the Appellate Court clerk, on or before February 16, 2018, a letter, with supporting documentation, setting forth the facts as they believe them to be with respect to the question of mootness.

"The parties are further ordered to file simultaneous supplemental briefs, of no more than [five] pages, on or before February 16, 2018, addressing the issue of whether the appeal is moot, and if so, whether it is capable of repetition yet evading review. See *Loisel* v. *Rowe*, 233 Conn. 370, 378, 660 A.2d 323 (1995)."

reincarceration, has been readmitted to special parole, and is now residing in a halfway house in Waterbury.[8] In his supplemental brief, the respondent argues that the appeal is moot because the remedy the petitioner sought in his second petition was release from incarceration and to be readmitted to special parole, which has taken place. Consequently, he asserts, there is no practical relief that this court can grant the petitioner. The respondent also argues that the issue on appeal is not subject to the capable of repetition, yet evading review exception to the mootness doctrine. See *Loisel* v. *Rowe*, 233 Conn. 370, 378, 660 A.2d 323 (1995).

In his supplemental brief, the petitioner acknowledges that he has been readmitted to special parole but argues that the appeal is not moot because he is still in the custody of the respondent and his special parole will not end until September 9, 2022. Although the petitioner is correct that he is still in the custody of the respondent and his special parole will not expire for some years, that is not the issue with respect to the appeal. In his second petition, the petitioner challenged the parole board's finding that he had violated his special parole and sentenced him to incarceration. The relief he sought pursuant to the second petition was to be released from incarceration and readmitted to special parole. Due to the passage of time, the petitioner has been released from incarceration and is now on special parole, living in a halfway house. Therefore, because the petitioner obtained the relief he sought, there is no practical relief this court can afford him and his appeal is moot.

"Mootness implicates the subject matter jurisdiction of this court. . . . We will not decide questions where there exists no actual controversy or where no actual or practical relief can follow from our determination.

[8] The petitioner was released from incarceration on November 22, 2017.

. . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . Moreover, [w]hen, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Citations omitted; internal quotation marks omitted.) *Peart* v. *Psychiatric Security Review Board*, 41 Conn. App. 688, 691, 678 A.2d 488 (1996); see also id. (relief originally sought by plaintiff was decision transferring him to less restrictive hospital, and because plaintiff since obtained requested relief, appeal was moot).

In his supplemental brief, the petitioner argues that the issue on appeal is subject to the capable of repetition, yet evading review exception to the mootness doctrine. We disagree.

"To qualify under this exception, an otherwise moot question must satisfy the following three requirements: First, the challenged action, or the effect of the challenged action, by its very nature, must be of a limited duration so that there is a strong likelihood that the substantial majority of cases raising a question about its validity will become moot before appellate litigation can be concluded. Second, there must be a reasonable likelihood that the question presented in the pending case will arise again in the future, and that it will affect either the same complaining party or a reasonably identifiable group for whom that party can be said to act as surrogate. Third, the question must have some public importance. Unless all three requirements are met, the appeal must be dismissed as moot." (Internal quotation marks omitted.) *We the People of Connecticut, Inc.* v. *Malloy*, 150 Conn. App. 576, 583, 92 A.3d 961, cert. denied, 314 Conn. 919, 100 A.3d 850 (2014); see also *Loisel* v. *Rowe*, supra, 233 Conn. 382–83.

"The first element in the analysis pertains to the length of the challenged action." *Loisel* v. *Rowe*, supra, 233 Conn. 383. "If an action or its effects is not of inherently limited duration, the action can be reviewed the next time it arises, when it will present an ongoing live controversy. Moreover, if the question presented is not strongly likely to become moot in the substantial majority of cases in which it arises, the urgency of deciding the pending case is significantly reduced. . . . [A] party typically satisfies this prong if there exists a functionally insurmountable time [constraint] . . . ." (Citations omitted; internal quotation marks omitted.) *Patterson* v. *Commissioner of Correction*, 112 Conn. App. 826, 835–36, 964 A.2d 1234 (2009).

In the present appeal, the exception to the mootness doctrine requires that there be a functionally insurmountable time constraint inherent in dismissing a petition for a writ of habeas corpus for a petitioner who has been incarcerated for a portion of his term of special parole; additionally, the time constraint must create a strong likelihood that a substantial majority of cases challenging the dismissal of the petition under the prior pending action doctrine will become moot before the appeal is resolved. A petitioner whose special parole has been revoked faces imprisonment over the term of special parole that may vary in length from a minimum of one year to a maximum of ten years per offense. For certain crimes, and under certain circumstances, the term of special parole may be longer. See General Statutes § 54-125e (c);[9] see also *State* v. *Brown*, 310 Conn.

[9] General Statutes § 54-125e (c) provides that "[t]he period of special parole shall be not less than one year or more than ten years, except that such period may be for more than ten years for a person convicted of a violation of subdivision (2) of section 53-21 of the general statutes in effect prior to October 1, 2000, subdivision (2) of subsection (a) of section 53-21 or section 53a-70, 53a-70a, 53a-70b, 53a-71, 53a-72a or 53a-72b or sentenced as a persistent dangerous felony offender pursuant to subsection (i) of section 53a-40 or as a persistent serious felony offender pursuant to subsection (k) of section 53a-40."

693, 710, 80 A.3d 878 (2013) (legislature has not expressed intention to prevent trial court from imposing sentences of special parole consecutively). Consequently, given the range of possible sentences for a parole violation, it is unlikely that a substantial majority of the appellate cases that contest the habeas court's dismissal, under the prior pending action doctrine, of a petition for a writ of habeas corpus seeking release from incarceration following the parole board's revocation of special parole will become moot as the result of the petitioner's completing the term of reimprisonment before the appeal is resolved. The petitioner, therefore, has failed to meet the first prong of *Loisel*. The petitioner's claim does not qualify for review under the capable of repetition, yet evading review exception to the mootness doctrine, because it cannot satisfy *Loisel*'s three requirements required for review.[10] See *We the People of Connecticut, Inc.* v. *Malloy*, supra, 150 Conn. App. 583. For the foregoing reasons, we dismiss the appeal as moot.

The appeal is dismissed.

In this opinion the other judges concurred.

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## HEATHER SCHIMENTI *v.* MATTHEW SCHIMENTI (AC 39175)

Lavine, Sheldon and Bishop, Js.

*Syllabus*

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the postjudgment orders of the trial court requiring him to pay one half of an initiation fee for the plaintiff's full membership into a certain country club and certain of her counsel

[10] Moreover, we conclude that the petitioner cannot serve as a surrogate for a reasonably identifiable group, as the issue in the present case is one of first impression and is not likely to arise again. See *Loisel* v. *Rowe*, supra, 233 Conn. 384–87. Because it is not likely to arise again and the issue is limited to the petitioner, it, therefore, lacks public importance. See id., 387.

fees. Pursuant to an agreement of the parties, which was incorporated into the modified judgment of dissolution, the defendant agreed to pay 50 percent of the plaintiff's initiation fee to the subject country club. The plaintiff subsequently filed a number of motions for contempt, including one concerning the defendant's alleged failure to comply with the country club initiation fee provision in the modified judgment. The plaintiff also sought counsel fees related to the prosecution of the motions. Following a hearing, the trial court, although not finding the defendant in contempt, determined that the phrase "initiation fee" in the modified judgment was ambiguous and that the plaintiff was entitled to a senior membership rather than a lower level of membership as the defendant had argued. The defendant did not, at any time, request that the court recuse itself or move for disqualification of the trial judge. On appeal, the defendant claimed, for the first time, that the trial court's orders were improperly based on the trial judge's admitted bias and prejudice arising out of her personal experience as a female golfer. *Held* that under the particular circumstances of this case, the trial court committed plain error in making the subject orders and a failure to reverse the judgment would result in manifest injustice to the defendant: the trial judge failed to act impartially and committed obvious error in issuing her orders, as the record clearly revealed that, in determining the level of membership to which the plaintiff was entitled, the judge, instead of ascertaining through a fact bound inquiry the intent of the parties in using the ambiguous phrase "initiation fee," ascribed a meaning to that phrase derived solely from her own perception of the subordinate role to which women golfers are relegated in country clubs, and, therefore, the trial judge, in reaching her decision, improperly relied exclusively on her own prejudices born of her life experiences, instead of well established law; accordingly, the trial court's orders concerning the initiation fee and for the payment of counsel fees could not stand.

Argued January 10—officially released April 24, 2018

*Procedural History*

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Danbury and tried to the court, *Winslow*, *J.*; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to this court; thereafter, the court, *Hon. George Levine*, judge trial referee, rendered a modified judgment in accordance with the parties' agreement and the appeal was withdrawn; subsequently, the court, *Winslow*, *J.*, granted in part the plaintiff's motion for contempt and

issued certain orders; thereafter, the court, *Winslow*, *J.*, denied the defendant's motion to reargue, and the defendant appealed to this court; subsequently, the defendant filed an amended appeal with this court. *Reversed*; *further proceedings*.

*Jeffrey J. White*, with whom, on the brief, were *Kathleen E. Dion* and *Kelly Frye Barnett*, for the appellant (defendant).

*Thomas M. Shanley*, for the appellee (plaintiff).

*Opinion*

BISHOP, J. In this postjudgment marital dissolution matter, the defendant, Matthew Schimenti, appeals from the trial court's orders requiring him to pay for one half of the initiation fee for a full membership into a country club for the plaintiff, Heather Schimenti, and certain of her counsel fees. On appeal, the defendant claims that the court's orders were improperly based on the trial judge's admitted bias and prejudice arising from her personal experience as a female golfer. He additionally claims that the court's order requiring him to pay the plaintiff's counsel fees constituted an abuse of discretion where the court made no finding of contempt on the basis of his challenged conduct and the plaintiff had ample financial means to pay her own counsel fees. We reverse the judgment of the trial court.

The underlying facts are uncontroverted. Following a trial before the court, *Winslow*, *J.*, the marriage of the parties was dissolved by a memorandum of decision dated November 18, 2014. As part of its judgment, the court entered various orders regarding custody, support, periodic and lump sum alimony, and property. Included in these orders was a provision that the defendant would "retain sole rights to the country club membership at Silver Spring Country Club." Shortly thereafter, on December 5, 2014, the defendant

appealed to this court, outlining in his preliminary statement of issues numerous claims as to the trial court's financial orders.[1] In conjunction with the appeal, the parties participated in a preargument conference.[2] At the conference, the parties reached an agreement resolving all the issues on appeal. Accordingly, on May 21, 2015, their agreement was memorialized and entered by the court, *Hon. George Levine*, judge trial referee, as a modified judgment. The modified judgment included the following provision pertinent to the issues now before this court: "The following sentence shall be added to paragraph 38 [of the original judgment]: The defendant agrees to pay 50 percent of the plaintiff's initiation fee to Innis Arden Country Club."[3] Thereafter, upon the entering of the modified judgment, the appeal was withdrawn.

In spite of the parties' accord, disagreements between them continued unabated. By a pleading dated August 17, 2015, the plaintiff moved that the defendant be held in contempt for his alleged failure to comply with the life insurance provision of the dissolution judgment, as modified. Later, by a pleading dated October 6, 2015, the plaintiff moved that the defendant be held in contempt for not timely or fully paying his court-ordered child support. On October 13, 2015, the plaintiff moved that the defendant be held in contempt for his alleged failure to comply with the country club initiation fee

[1] That appeal was docketed as AC 37462.

[2] A preargument conference is a mandatory settlement meeting held in conjunction with a pending appeal and hosted by a judge or judge trial referee. Its purpose, generally, is to explore the possibility of resolving the issues on appeal without the added expense and time of further pursuing an appeal. It is generally scheduled before briefs have been written and before oral argument in order to offer parties the possibility of an expeditious and relatively economical path to resolution by agreement. See Practice Book § 63-10.

[3] We note that the proper name of the club is the to Innis Arden Golf Club, Inc., but because the modified judgment, the parties, and the trial judge referred to it as the Innis Arden Country Club, we do so as well for consistency.

provision in the modified judgment. The plaintiff also sought counsel fees in conjunction with the prosecution of these postjudgment contempt motions. Finally, by a motion dated December 9, 2015, the plaintiff sought an order that the defendant be required to timely meet his obligation to make periodic payments to her in accordance with the terms of the judgment, as modified. That motion was subsequently marked "off."

These postjudgment matters first appeared on the short calendar docket on December 14, 2015. On that date, counsel and the court, *Winslow*, *J.*, engaged in a discussion regarding the nature of the pending motions with an eye toward having them heard on a later date. During this colloquy, the defendant's counsel stated his belief that the court would need to hear evidence concerning the defendant's intentions at the time he entered into the postjudgment country club initiation fee agreement. The court, however, disagreed, stating as follows that the plaintiff should be entitled to a membership level at the Innis Arden Country Club equal to that of the defendant at his own club: "Whatever it is, it's going to be the same for her."[4]

[4] In explaining the nature of the agreement regarding payment of the plaintiff's initiation fee at the Innis Arden Country Club, the defendant's counsel, Attorney Daniel Kennedy, stated: "We have a disagreement over what level of membership. She applied for the top level of full golf privileges, when it was my client's understanding [that] she'd be applying for, what they refer to as, 'house,' but a social membership with some limited playing privileges."

Later, in the same colloquy, the following exchange took place when the plaintiff's counsel indicated that he had not been aware of this issue:

"[The Defendant's Counsel]: There was correspondence, on October 6, indicating that my client was more than willing to immediately pay half the amount of the money for the membership level that he anticipated [the plaintiff was] applying for. That was—

"The Court: All right.

"[The Defendant's Counsel]: —I believe, a day after—

"The Court: I mean, I can give you—

"[The Defendant's Counsel]: —the motion was filed.

"The Court: —a quick answer on this. Do you want it? . . . What's the level of his ownership—of his membership at his club?

On February 8, 2016, the court conducted a hearing on the pending motions for contempt and for counsel fees.[5] Heard and decided by the court on that date were the following: the plaintiff's request for counsel fees in conjunction with her motion for contempt dated August 17, 2015, regarding life insurance;[6] the plaintiff's motion

"[The Plaintiff's Counsel]: Right. And—that's what I'm saying. It's a simple—

"The Court: Whatever it is, it's going to be the same for her.

* * *

"The Court: Why wouldn't it be the same as his membership?

"[The Defendant's Counsel]: Because she's not—he's an active, couple of days a week golfer. She has never been. He never anticipated—and we're going to need testimony on that. He never anticipated that she was going to apply for—

"The Court: And take up golf.

"[The Defendant's Counsel]: —the full soup to nuts membership.

* * *

"The Court: All right. Well, I mean, I'll give you a heads up on it. I'm gonna—I'm going to rule, if it's left to me, but maybe you should take it back to Judge Levine.

"[The Plaintiff's Counsel]: I don't think there's any need to do that, number one. The other motion—

"[The Defendant's Counsel]: I disagree.

"[The Plaintiff's Counsel]: —is simply that—

"[The Defendant's Counsel]: I disagree with him.

"The Court: Okay."

Following discussion on another unrelated motion, the parties and the court agreed to continue the matter to February 1, 2016. In closing, the court indicated it would hear all the pending motions and evidence on the plaintiff's contempt motion. As to the motion regarding the country club initiation fee, the court commented:

"The Court: All right. Mr. Kennedy, you got a hint on that first one?

"[The Defendant's Counsel]: Loud and clear.

"The Court: Okay."

[5] The court marked "off" the plaintiff's December 9, 2015 motion for an order because although the motion alleged that the defendant was not making his periodic payments in a timely manner, the motion sought only an order that the defendant comply with the terms of the judgment in this regard. Because it did not ask that the defendant be found in contempt, the court correctly discerned that it would be superfluous for the court to order the defendant to do what the judgment already required him to do.

[6] During the hearing, the plaintiff's counsel represented that the life insurance issue was complied with after the motion was filed. Nevertheless, the plaintiff requested counsel fees in conjunction with the filing of that motion.

for contempt dated October 6, 2015, regarding child support and request for counsel fees in conjunction with that motion; and the plaintiff's motion for contempt dated October 13, 2015, alleging the defendant's failure to comply with the country club initiation fee provision in the modified judgment and a request for counsel fees in conjunction with that motion. Although not finding the defendant in contempt, the court ordered the defendant to pay one half of the $70,000 initiation fee for a senior membership at the Innis Arden Country Club and to contribute the sum of $5750 toward the plaintiff's counsel fees relating to the life insurance, child support, and country club initiation fee contempt motions. During the hearing, in response to the request of the defendant's counsel to introduce evidence of the plaintiff's golf history, the court stated: "Don't care what her golf history is, it's what her future is going to be."

Subsequently, the defendant filed a motion with the court to reargue and to reconsider its orders. The court conducted a hearing on April 18, 2016, but denied the motion to reargue. As part of its reasoning for the denial, the court stated: "I don't think it was because I had a misapprehension of facts. I think it was because I took what facts were presented and applied my prejudices, and every judge has—has life history, and life experience that comes out, perhaps, in the way that we rule on certain things. And you happened to have hit a nerve on this one." This appeal followed.

We are mindful that the defendant did not, at any time, ask the court to recuse itself or move for disqualification of the judge. Thus, the defendant's claim of judicial bias is raised for the first time on appeal.[7] At the

[7] We note that the defendant did not, in his appellate brief or during oral argument, explicitly request plain error review of his claim of judicial bias. Following oral argument, this court ordered the parties to submit supplemental briefs to address the question of whether we should, sua sponte, accord plain error review to the defendant's unpreserved claim of judicial bias. In response, both parties submitted briefs for this court's review. In his supplemental brief, the defendant raises the argument we should review

outset, we acknowledge that ordinarily a reviewing court will not entertain an issue raised for the first time on appeal. *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 619, 99 A.3d 1079 (2014). We also are mindful that although this court may review an unpreserved claim of judicial bias for plain error, not every claim of partiality warrants reversal on the basis of plain error. See, e.g., *State* v. *D'Antonio*, 274 Conn. 658, 690–91, 877 A.2d 696 (2005) (although it was improper for trial court to sentence defendant after actively participating in negotiations, court's conduct did not rise to level of bias or implicate integrity of process). Nevertheless, under the present circumstances, we find it necessary to review the defendant's claim of judicial bias under our doctrine of plain error. See *Cameron* v. *Cameron*, 187 Conn. 163, 168, 444 A.2d 915 (1982) (Supreme Court reviewed unpreserved claim of judicial bias under plain error because it "implicates basic concepts of fair trial").

"[The plain error] doctrine, codified at Practice Book § 60-5, is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved, 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, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it

his claim of judicial bias under our plain error doctrine. In her supplemental brief, the plaintiff contends that the defendant cannot prevail under the plain error doctrine.

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 discernable on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . This determination clearly requires a review of the plain error claim presented in light of the record.

"Although a complete record and an obvious error are prerequisites for plain error review, they are not, of themselves, sufficient for its application. . . . [I]n addition to examining the patent nature of the error, the reviewing court must examine that error for the grievousness of its consequences in order to determine whether reversal under the plain error doctrine is appropriate. A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice. . . . In *State* v. *Fagan*, [280 Conn. 69, 87, 905 A.2d 1101 (2006), cert. denied, 549 U.S. 1269, 127 S. Ct. 1491, 167 L. Ed. 2d 236 (2007)], we described the two-pronged nature of the plain error doctrine: [An appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest injustice." (Emphasis in original; internal quotation marks omitted.) *Reville* v. *Reville*, 312 Conn. 428, 467–69, 93 A.3d 1076 (2014). Indeed, our jurisprudence mandates reversal when the reviewing court determines that manifest injustice has resulted from the trial court's unpreserved error. *Blumberg Associates Worldwide,*

*Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 150, 84 A.3d 840 (2014).[8]

"[O]ur Supreme Court has recognized that a claim of judicial bias strikes at the very core of judicial integrity and tends to undermine public confidence in the established judiciary. . . . No more elementary statement concerning the judiciary can be made than that the conduct of the trial judge must be characterized by the highest degree of impartiality. If [the judge] departs from the standard, he [or she] casts serious reflection upon the system of which [the judge] is a part. . . . We review this [unpreserved] claim [of partiality] therefore . . . under a plain error standard of review." (Internal quotation marks omitted.) *State* v. *Carlos C.*, 165 Conn. App. 195, 206–207, 138 A.3d 1090, cert. denied, 322 Conn. 906, 140 A.3d 977 (2016).

The teaching of decisional law is that, although plain error review is not automatically accorded to every claim of judicial bias, such a claim bears close scrutiny because it touches upon a judge's impartiality, a core ingredient of a fair judicial process. "In reviewing a claim of judicial bias, this court employs a plain error standard of review. . . . The standard to be employed is an objective one, not the judge's subjective view as to whether he or she can be fair and impartial in hearing the case. . . . Any conduct that would lead a reasonable [person] knowing all the circumstances to the conclusion that the judge's impartiality might reasonably

[8] Specifically, our Supreme Court has stated that "we can perceive no reason why a reviewing court should be precluded from raising issues involving plain error or constitutional error sua sponte, as long as the court provides an opportunity for the parties to be heard by way of supplemental briefing and the other threshold conditions for review are satisfied." *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, supra, 311 Conn. 161–62. From this review of decisional law, it is apparent that a party who seeks plain error review and who adequately briefs such a claim will, indeed, obtain a review of that claim on appeal. That party, however, will obtain a reversal only if the reviewing court finds plain error.

be questioned is a basis for the judge's disqualification." (Internal quotation marks omitted.) Id., 207.

It is axiomatic that in any judicial proceeding in a rule of law system, the disputants are entitled to have their issues heard and decided by an impartial arbiter. This requirement not only benefits the litigants, but it is an essential condition to public confidence in the judiciary. "Of all the charges that might be leveled against one sworn to 'administer justice' and to 'faithfully and impartially discharge and perform all the duties incumbent upon me,' . . . a charge of bias must be deemed at or near the very top in seriousness, for bias kills the very soul of judging—fairness." (Citation omitted.) *Pac-Tec, Inc.* v. *Amerace Corp.*, 903 F.2d 796, 802 (Fed. Cir. 1990), cert. denied sub nom. *Perry* v. *Amerace Corp.*, 502 U.S. 808, 112 S. Ct. 49, 116 L. Ed. 2d 27 (1991).

In assessing a claim of judicial bias, we are mindful that adverse rulings, alone, provide an insufficient basis for finding bias even when those rulings may be erroneous. *Massey* v. *Branford*, 118 Conn. App. 491, 502, 985 A.2d 335 (2009), cert. denied, 295 Conn. 913, 990 A.2d 345 (2010); see also 46 Am. Jur. 2d 267, Judges § 141 (2017). "[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." (Emphasis in original.) *Liteky* v.

*United States*, 510 U.S. 540, 555, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994).

Before we reach the principal issue on appeal, we discuss, generally, the task of a court when confronted with the language of a marital dissolution judgment based on an agreement of the parties.[9] "If the language of a contract is clear and unambiguous, the intent of the parties is a question of law, subject to plenary review." *Eckert* v. *Eckert*, 285 Conn. 687, 692, 941 A.2d 301 (2008). Conversely, if the language of an agreement is not clear and is ambiguous, the court's responsibility is to ascertain the intent of the parties in using the language under review. In such a situation, it is always appropriate and likely necessary for the court to consider extrinsic evidence of the parties' intent in employing the language under scrutiny. See *Hare* v. *McClellan*, 234 Conn. 581, 597, 662 A.2d 1242 (1995) ("extrinsic evidence is always admissible to explain an ambiguity appearing in the instrument" [internal quotation marks omitted]); see also *Lakeview Associates* v. *Woodlake Master Condominium Assn., Inc.*, 239 Conn. 769, 780–81, 687 A.2d 1270 (1997) ("if the meaning of the language contained in [an instrument] is not clear, the trial court is bound to consider any relevant extrinsic evidence presented by the parties for the purpose of clarifying the ambiguity").

These general rules of contract interpretation pertain to marital dissolution agreements. "It is well established that a separation agreement that has been incorporated into a dissolution decree and its resulting judgment must be regarded as a contract and construed in accordance with the general principles governing contracts. . . . When construing a contract, we seek to determine

[9] As noted previously in this opinion, although the original judgment of marital dissolution stemmed from a trial, the modified judgment resulted from the parties' postjudgment agreement.

the intent of the parties from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties 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. . . . When only one interpretation of a contract is possible, the court need not look outside the four corners of the contract. . . . Extrinsic evidence is always admissible, however, to explain an ambiguity appearing in the instrument. . . . When the language of a contract is ambiguous, the determination of the parties' intent is a question of fact." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Isham* v. *Isham*, 292 Conn. 170, 180–81, 972 A.2d 228 (2009).

"A contract is unambiguous when its language is clear and conveys a definite and precise intent. . . . The court will not torture words to impart ambiguity where ordinary meaning leaves no room for ambiguity. . . . Moreover, the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous. . . .

"In contrast, a contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . [A]ny ambiguity in a contract must emanate from the language used by the parties. . . . The contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so. . . . *If the language of a contract is susceptible to more than one reasonable interpretation, the contract is ambiguous*." (Emphasis added; internal quotation marks omitted.) *Gabriel* v. *Gabriel*, 324 Conn. 324, 341–42, 152 A.3d 1230 (2017).

Applying this general overlay to the facts of the present case, the threshold task confronting the court in this instance was to determine whether the phrase "initiation fee," as used by the parties in the modified judgment, was clear and unambiguous. On the basis of representations by counsel, the Innis Arden Country Club offers three levels of membership, with an initiation fee of $70,000 for a senior membership, $38,000 for an associate membership, and $5000 for a house membership. The court opined that it suspected that "neither party anticipated the problem" as to the level of the plaintiff's membership in their agreement, or thus in the modified judgment, and that the judgment "is vague, and needs to be defined." We agree with this legal determination. Because the phrase "initiation fee" in the modified judgment could have referred to any one of three available levels of membership in the Innis Arden Country Club, each with its distinct initiation fee, that phrase, as used in the modified judgment, was ambiguous.

Once the court made this correct determination, its task became to ascertain, through a fact bound inquiry, the intent of the parties in using the subject language in their postjudgment agreement. Rather than doing so, however, the court took a different tack. Instead of attempting to ascertain the intent of the parties, the court read its own outcome preference into the disputed language. In doing so, the trial judge explicitly based her ruling on her personal experiences and resulting prejudices instead of seeking to determine the parties' intent in utilizing the language in question. In other words, the court did not undertake the fact bound task of discerning the parties' intent but, instead, ascribed a meaning to the phrase "initiation fee" derived solely from its own perception of the historically unfair treatment of women golfers in country clubs.[10]

[10] Indeed, the court did not mask its approach or its outcome preferences based on its own experiences. At the outset of the hearing on February

8, 2016, the court observed: "Working our way backwards, we had some discussion about this country club business the last time we were in court. We didn't have a hearing, but I understood what the positions were on each side. And I dropped a very heavy hint as to where the court could be coming from." See footnote 4 of this opinion.

Further on, the following exchange occurred:

"The Court: "[A]ll this discussion last time we were in court and I said she's entitled to the same form of membership that her husband has at the country club he belonged to. Her former husband. You [don't] remember my saying that?

"[The Defendant's Counsel]: I did. But I didn't know at the time . . . what the associate membership provided her with. And I did some digging pursuant to the subpoena—

"The Court: Well, you told me. It was essentially the same as what a social membership would be, pool privileges, restaurant and so forth—

"[The Defendant's Counsel]: She still ha[s]—

"The Court: —but excluding golf.

"[The Defendant's Counsel]: That's not my understanding now is what I'm saying.

"The Court: Ah. What is it?

"[The Defendant's Counsel]: My understanding speaking to Innis Arden, we can certainly bring them here if need be, is that the associate membership still has golf associated but not full golf privileges—

"[The Plaintiff's Counsel]: That's the difference.

"[The Defendant's Counsel]: —but enough. And we looked at—

"The Court: And you're saying that to a female—

"[The Plaintiff's Counsel]: Right.

"The Court: —who's had to put up with golf, having to get different times because the men always get Saturday and Sunday mornings?

"[The Defendant's Counsel]: No. Well, there's an equal number of men who are associate members as well. This isn't a gender thing, Your Honor.

"The Court: Oh, it is so. Don't be ridiculous, Mr. Kennedy.

* * *

"The Court: You take your judges as you find them and unfortunately—

"[The Defendant's Counsel]: Well, I—Respectfully, Your Honor, I don't think that the associate in 2016 at Innis Arden is meant to be discriminatory . . . . I looked up—

"The Court: You're 100 percent wrong, Mr. Kennedy.

"[The Defendant's Counsel]: Okay. I will—

"The Court: This is [a] grandfathering issue. Country clubs are male dominated, they are—set up their golf privileges for the purposes of allowing the men to play and not be bothered with having to deal with those females who are on the course at the same time.

"[The Defendant's Counsel]: If I could, Your Honor, well, I think the issue here is what the parties agreed to. And if you look at—I printed out [the plaintiff's] golf history, 2015—

"The Court: Don't care what her golf history is, it's what her future is going to be.

"[The Defendant's Counsel]: I've given you my . . . argument.

"The Court: I mean now this is—I told you last time what this was going

to be. She's going to be entitled to the same level of membership that her husband enjoys at his club. And if that is a full number one golf membership, that's what she's going to get too."

After additional colloquy between the parties regarding the sales tax related to the country club initiation fee, the court further stated: "Your party agreed to it, Mr. Kennedy, and the motion is granted insofar as it requests that the level of membership needs to be the same as that which is enjoyed by [the defendant] at his club."

The court conducted another hearing on this topic on April 18, 2016, in response to the defendant's motion to reargue the court's ruling that the defendant pay the highest level of initiation fee at the Innis Arden Country Club. At this hearing, once again, the court fully and firmly stated its view of the role and status of women in country clubs. At this hearing, the defendant expressly sought the opportunity to present evidence regarding his intent when he signed the agreement. The transcript reflects the following:

"[The Defendant's Counsel]: Well, we did try to introduce evidence as [to] . . . the number of rounds [the plaintiff] played of golf, in the last four or five years. Which would fall within that asso—

"The Court: I didn't think she played any. She played a few?

"[The Defendant's Counsel]: I believe—I don't have it in front of me, again, but she entered into the GHIN system between one and five rounds per year, the last couple years. And that level of play would fit into this associate membership in Innis Arden. It does allow golf, just doesn't allow golf any day of the week, at any time you want it.

"The Court: Right. It's always difficult when you have a judge who has prejudices.

"[The Defendant's Counsel]: It's a golf day today, by the way, Your Honor?

"The Court: Well, my golf days are on Tuesdays. But in my very limited experience with a country club, which I left because of the surcharge I was having to pay in order to play on the mornings on the weekends, which really frosted me, if I may say so. Because there are some built-in prejudices with country clubs, and their historical makeup, and the way they treat golf. And so, you sort of deal with some of those problems, when you have a judge that feels rather strongly about the access that males and females should have to the golf course.

"I don't think that it's going to be productive to take more evidence from what I already heard, [be]cause you made the same statement to [me] before. I mean, I already was aware that there was a claim that [the plaintiff] had had very limited golfing, in the recent years. In fact, I thought it was virtually, nothing. But I guess, maybe from a golfer's point of view, what you just said is virtually nothing, too. But what I heard was . . . [that] even if she hadn't been doing it, she was going to take it, or wanted the option of taking it up.

"So, it was not from any lack of factual evidence. I mean, if you feel to make a further record that you want [the defendant] to testify as to what you just said, I guess you could do so. . . . I had that information, and maybe it wasn't taken from formal testimony. Maybe it was from argument. I presumed it to be correct when I interpreted the judgment.

"[The Defendant's Counsel]: Okay.

During the hearings on the motions under review, although the trial judge made clear her intent to base the order regarding the country club initiation fee on her own experiences and prejudices, and not the parties' intent, the defendant at no time sought the court's recusal; nor did the defendant bring to the judge's attention any concerns he may have had regarding her impartiality. Rather, we reiterate, he raises the issue of judicial bias for the first time on appeal.

"[A]n appellate court may reach an unpreserved issue sua sponte, pursuant to the plain error doctrine, if: (1) the parties have had a chance to brief the issue; (2) further factual findings are not needed to resolve the issue; (3) the answer to the issue is so obvious as to be not debatable; and (4) leaving the judgment intact would work a manifest injustice." *Matos* v. *Ortiz*, 166 Conn. App. 775, 790, 144 A.3d 425 (2016). We determine that these requirements have all been met.

As discussed previously in this opinion, the parties filed supplemental briefs on the issue of whether this court should accord plain error review. The record clearly reveals that the trial judge repeatedly stated her perception of the subordinate role to which women are relegated in country clubs and, borrowing from her personal experience, determined that the plaintiff should be entitled to precisely the same level of membership in her country club as the defendant enjoyed in his. The court telegraphed this inclination at the December 14, 2015 hearing on this matter and later

"The Court: I don't think it was because I had a misapprehension of facts. I think it was because I took what facts were presented and applied my prejudices, and every judge has—has life history, and life experience that comes out, perhaps, in the way that we rule on certain things. And you happened to have hit a nerve on this one.

"[The Defendant's Counsel]: Understood. I do have one other motion, Your Honor. I take it that's denied?

"The Court: Well, I'm not going to allow further evidence. So, I guess I should just—the easiest way to deal with it is to deny it, yeah."

simply confirmed this view based, not on evidence of the parties' intent in utilizing the language in question, but on the court's stated unfavorable experiences as a woman golfer. Thus, the court not only acted in a partial manner, but it also made plain its biased and prejudiced pathway to making its decision. This impropriety was clear, obvious, and indisputable.

In response, the plaintiff correctly argues that a trial judge need not leave insights and common sense derived from her life's experience at the courthouse door. We do not disagree.[11] Nevertheless, attitudes garnered from personal life experience cannot serve as a substitute for properly admitted evidence at a hearing where the court's mandate is to ascertain the intent of the parties. "Judicial impartiality is the hallmark of the American system of justice." 48A C.J.S., Judges § 247 (2018). The background and experience of a trial judge are disqualifying only if they prevent that judge from assessing the evidence fairly and impartially. "It is assumed that judges, regardless of their personal backgrounds and experiences in life, will be able to set aside any biases or predispositions they might have and consider each case in light of the evidence presented." *People* v. *Tye*, 141 Ill. 2d 1, 25, 565 N.E.2d 931 (1990), cert. denied, 502 U.S. 833, 112 S. Ct. 112, 116 L. Ed. 2d

[11] We do not dispute the principles that "[e]ach judge brings to the bench the experiences of life, both personal and professional. A lifetime of experience that has generated a number of general attitudes cannot be left in chambers when a judge takes the bench. Thus, a judge's average personal experiences do not generally lead to reasonable questions about the judge's impartiality and subsequent disqualification." (Footnotes omitted.) 46 Am. Jur. 2d, supra, § 139, p. 265.

Nevertheless, a judge is also "a minister of justice" and "should be careful to refrain from any statement or attitude which would tend to deny [a party] a fair trial. . . . It is his [or her] responsibility to have the trial conducted in a manner which approaches an atmosphere of perfect impartiality which is so much to be desired in a judicial proceeding." (Internal quotation marks omitted.) *In re Nathan B.*, 116 Conn. App. 521, 525, 977 A.2d 224 (2009); accord *Cameron* v. *Cameron*, supra, 187 Conn. 168–69.

81 (1991). In the present case, however, the trial judge's responsibility did not allow her to borrow from her life experiences extrinsic to the law. As the record plainly reflects, the trial judge did not follow her prescribed decision-making pathway but, instead, relied exclusively on her own prejudices born of her life experiences. The court's proper focus should have been on the well established decisional pathway for determining the intent of parties who use ambiguous language in a contract, requiring it to determine the meaning of that language.

"[T]he floor established by the Due Process Clause clearly requires a fair trial in a fair tribunal . . . before a judge with no actual bias against the defendant or interest in the outcome of [a] particular case." (Citation omitted; internal quotation marks omitted.) *Bracy* v. *Gramley*, 520 U.S. 899, 904–905, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997). In sum, the responsibility of the court in hearing a disputed matter is to act with impartiality. This requirement entails not only being impartial but also acting in a manner that projects impartiality. Because neither occurred in this case, the judgment cannot stand as to either the court's order concerning the country club initiation fee or as to its order for the payment of counsel fees.[12] Reversal under the plain error doctrine requires "the existence of [an] error so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings." (Internal quotation marks omitted.) *Reville* v. *Reville*, supra, 312

[12] On review, we cannot parse the court's bias to determine that it infected only its order regarding the country club initiation fee. Nor do we know from the record the portion of the counsel fees ordered that pertained to the country club initiation fee dispute and the portion that may have related to other pending motions. Additionally, because we resolve this matter on the basis stated, we do not reach the question of whether the court properly could have ordered the defendant to pay counsel fees to the plaintiff where he was not held in contempt and where she had adequate funds to pay her own counsel fees.

Conn. 468. We conclude that under the particular circumstances of the present case, not reversing the judgment would result in manifest injustice to the defendant.

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

In this opinion the other judges concurred.

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# JAY B. PACKARD *v.* REBECCA M. PACKARD (AC 40445)

DiPentima, C. J., and Alvord and Beach, Js.

*Syllabus*

The defendant appealed to this court from the judgment of the trial court dissolving her marriage to the plaintiff, and from certain postjudgment orders concerning the guardian ad litem and pertaining to the sale of the marital residence. *Held* that this court declined to review the defendant's claims, which challenged the trial court's orders, and its findings and conclusions, the defendant having failed to provide this court with an adequate brief setting forth the legal bases for her claims of error and the relief sought.

Argued March 14—officially released April 24, 2018

*Procedural History*

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Fairfield, and referred to the Regional Family Trial Docket at Middletown, where the matter was tried to the court, *Albis*, *J.*; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to this court; thereafter, the court, *Albis*, *J.*, issued certain orders, and the defendant filed an amended appeal; subsequently, the court, *Albis*, *J.*, issued certain orders, and the defendant filed an amended appeal; thereafter, the court, *Albis*, *J.*, issued certain orders, and the defendant filed an amended appeal. *Affirmed.*

*Rebecca M. Packard*, self-represented, the appellant (defendant).

*Jay B. Packard*, self-represented, the appellee (plaintiff), filed a brief.

*Opinion*

PER CURIAM. The defendant, Rebecca M. Packard, appeals from the judgment dissolving her marriage with the plaintiff, Jay B. Packard. This appeal has been amended three times, challenging orders entered after judgment. Specifically, the defendant (1) claims that as to the April 7, 2017 judgment, the findings, conclusions and orders are erroneous; (2) challenges the July 28, 2017 order regarding renovations to the marital home; (3) challenges the August 18, 2017 order requiring her to sign a release of medical information to the guardian ad litem; and (4) challenges the October 6, 2017 orders regarding facilitating the sale of the marital home.[1] Additionally, she asserts state and federal constitutional violations. We affirm the judgment of the trial court.

The defendant, in her lengthy and detailed brief, presents no legal analysis and cites virtually no case law.[2] A narrative account of the demise of the parties' relationship and the effect of various orders on the defendant, however compelling, does not suffice as an adequate brief under our procedural law.[3] "[F]or this

[1] The defendant has filed additional amended appeals that were severed from this appeal and assigned a separate docket number. See *Packard* v. *Packard*, AC 41176.

[2] The defendant's brief, on page 38, footnote 67, cited our decision in *Kelly* v. *Kelly*, 54 Conn. App. 50, 732 A.2d 808 (1999), to support the following statement: "Unfortunately, although caselaw offers some protection of being held in contempt when such orders are in place . . . ."

[3] "[Although] . . . [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.) *Tonghini* v. *Tonghini*, 152 Conn. App. 231, 240, 98 A.3d 93 (2014).

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." (Internal quotation marks omitted.) *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016); see also *Getty Properties Corp.* v. *ATKR, LLC*, 315 Conn. 387, 413, 107 A.3d 931 (2015) (claim inadequately briefed when appellants undertook "no analysis or application of the law to the facts of [the] case"); *Taylor* v. *Mucci*, 288 Conn. 379, 383 n.4, 952 A.2d 776 (2008) (analysis, rather than mere abstract assertion, required to avoid abandoning issue by failing to brief issue properly; where claim receives only cursory attention without substantive discussion or citation of authorities, it is deemed abandoned). In this matter, we are unable to determine the legal bases for the claims and relief that the defendant seeks. As a result of the defendant's inadequate brief, we decline to address the claims raised therein.

The judgment is affirmed.

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# STATE OF CONNECTICUT *v.* WILLIAM A. ARTIACO (AC 40020)

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

*Syllabus*

Convicted of the crimes of sexual assault in the first degree and risk of injury to a child, the defendant appealed to this court. At trial, the defendant sought to have C testify as an expert witness. After C's voir dire, the trial court determined that he was not qualified as an expert on forensic interviews of child victims of sexual abuse and it excluded C's testimony as to whether the forensic interviews of the victim were conducted properly. On appeal, the defendant claimed that the trial court abused its discretion in precluding the testimony of C and that he was deprived of a fair trial due to prosecutorial impropriety during closing argument. *Held*:

1. The defendant's unpreserved evidentiary claim that the trial court abused its discretion in precluding the testimony of C was not reviewable, as the claim that the defendant presented on appeal before this court differed from the one raised before the trial court; during C's voir dire, defense counsel expressly stated before the trial court that his proffer was that C would comment on whether the forensic interviews of the victim were properly conducted, but the defendant raised a different claim on appeal, namely, that the trial court abused its discretion in precluding the testimony of C because he was well qualified to opine on inconsistencies in the victim's trial testimony and recorded interviews, and that his opinions could have been used to impeach the victim's credibility.
2. The defendant's claim that he was deprived of his due process right to a fair trial due to prosecutorial impropriety in closing argument was unavailing: contrary to the defendant's claim, the prosecutor did not argue to the jury that the defendant lied during his testimony and, although the prosecutor did state to the jury that the defendant possessed a motive to lie based on the seriousness of the charges and that the victim had no such motive to lie, it was permissible for the prosecutor to explain to the jury whether the witnesses had a motive to lie; moreover, the prosecutor did not improperly mischaracterize the evidence or shift the burden of proof to the defendant to disprove the state's witnesses when the prosecutor argued to the jury that the victim consistently had claimed that the defendant sexually assaulted her, including when she disclosed his action to two of her friends, as the two friends testified that the victim stated that the defendant molested her, and those witnesses used the verb molest synonymously with the phrase sexual assault in describing the defendant's conduct.

Argued March 5—officially released April 24, 2018

*Procedural History*

Substitute information, in the first case, charging the defendant with the crimes of sexual assault in the first degree and risk of injury to a child, and substitute information, in the second case, charging the defendant with the crimes of sexual assault in the first degree and risk of injury to a child, brought to the Superior Court in the judicial district of Windham, geographical area number eleven, where the cases were consolidated for trial; thereafter, the matter was tried to the jury before *Swords, J.*; verdicts of guilty; subsequently, the court denied the defendant's motion for a judgment of acquittal and the defendant's motion to set aside the verdicts

and for a new trial, and rendered judgments in accordance with the verdicts, from which the defendant appealed to this court. *Affirmed.*

*Robert J. McKay*, assigned counsel, for the appellant (defendant).

*Lisa A. Riggione*, senior assistant state's attorney, with whom were *Bonnie R. Bentley*, senior assistant state's attorney, and, on the brief, *Anne F. Mahoney*, state's attorney, and *Matthew Crockett*, senior assistant state's attorney, for the appellee (state).

*Opinion*

DiPENTIMA, C. J. The defendant, William A. Artiaco, appeals from the judgments of conviction, rendered after a jury trial, of two counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2) and two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2). On appeal, the defendant claims that (1) the trial court abused its discretion in precluding the testimony of his expert witness and (2) he was deprived of a fair trial due to prosecutorial impropriety during closing argument. We disagree and, accordingly, affirm the judgments of conviction.

The state filed two substitute informations against the defendant, each charging him with one count of sexual assault in the first degree and risk of injury to a child. One information charged the defendant with committing the offenses in Putnam and the other with committing the offenses in East Windsor. Both substitute informations alleged that the criminal conduct occurred between 1998 and May 5, 2003, and that the victim was the same in both cases.[1] The defendant's

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

trial commenced on June 1, 2011, and concluded on June 8, 2011, with convictions on all four counts.[2] Following his convictions, the court imposed a total effective sentence of twenty years incarceration and ten years of special parole.[3] This appeal followed.[4]

I

The defendant first claims that the court abused its discretion in precluding the testimony of his expert witness. Specifically, he argues that the court improperly determined that his expert witness, James Connolly, a psychologist and attorney, was not qualified "to be deemed an expert in child abuse in this matter, as he demonstrated to the trial court that [he] had a special skill or knowledge directly applicable to a matter in issue, that his skill or knowledge is not common to the average person, and that the testimony would be helpful to the court or jury in considering the issues."[5] Because the argument presented on appeal differs from the one raised before the trial court, we decline to review this issue.

The following additional facts are necessary. Following the conclusion of the state's case, the defendant

[2] A detailed recitation of the underlying facts is unnecessary. For purposes of this appeal, we note that the victim testified that the defendant had engaged in sexual intercourse with her and had contact with her intimate parts multiple times, starting when she was in kindergarten. This criminal conduct occurred in various ways; see General Statutes § 53a-65 (2) and (8); and occurred in both Putnam and East Windsor.

[3] The jury specifically found in both cases that the victim was under ten years of age. See General Statutes § 53a-70 (b) (2).

[4] On June 21, 2013, we dismissed the defendant's appeal from the judgments of conviction "because no appellate brief was filed in accordance with [our] orders." *Artiaco* v. *Commissioner of Correction*, 180 Conn. App. 243, 244, A.3d (2018). The habeas court concluded that the defendant had been denied the effective assistance of appellate counsel, and restored his appellate case. Id., 244 n.1.

[5] During his voir dire, Connolly testified that he had received a doctorate in clinical psychology in 1978 and a juris doctor in 1998. In the course of his career, Connolly performed evaluations of the psychological status of individuals accused of sexually abusing children.

sought to have Connolly testify as an expert witness. The state requested and received permission to voir dire Connolly regarding his qualifications to testify in the present case. Outside of the presence of the jury, defense counsel and the prosecutor questioned Connolly about his education and experience. During argument, defense counsel expressly stated that his "proffer is that [Connolly] will comment on whether or not the [forensic] interview [of the victim] was well conducted."[6] The state countered that he lacked the training, knowledge, experience and skill to assist the jury in determining whether the forensic interviews of the victim had been conducted properly. The court determined that he was not qualified as an expert on forensic interviews of child victims of sexual abuse.[7]

[6] The following colloquy occurred between the trial court and defense counsel:

"[Defense Counsel]: My proffer is that [Connolly] will comment on whether or not the interview was well conducted.

"The Court: All right. So it's limited to the techniques used in the interview; correct?

"[Defense Counsel]: Yes."

[7] Specifically, the court ruled: "Having listened to the testimony and also having reviewed the testimony during the brief recess, the court is unable to find that the witness' experience and/or training qualifies him as an expert *in the field of forensic interview techniques and protocols of child sexual abuse victims*.

"More specifically, the witness has no publications in the field. He has never attended a course in forensic interview techniques of child sexual abuse victims. He has never conducted a forensic interview of a child sexual abuse victim.

"*All of his evaluations*, of which he indicated were 400 in the field of sexual abuse, *were done of offenders*, *not of child abuse victims*. He has no board certifications that were testified to in any area of psychology. There is absolutely no evidence that he keeps up or reads the research and literature current in the field of child sexual abuse and/or forensic interview techniques of child sexual abuse victims.

"Although he testified he's an expert witness and has been an expert witness in Connecticut, there's no evidence that he has ever testified as an expert witness in the field of the evaluation of forensic interview techniques of child sexual abuse victims. And finally, there is nothing in the witness' educational background which would lead the court to believe that he has any expertise in this field.

On appeal, the defendant does not claim that the court erred in excluding Connolly's testimony as to whether the forensic interview of the victim was conducted properly. Instead, he now argues that Connolly was well qualified to opine on inconsistencies in the victim's trial testimony and recorded interviews and his opinions could have been used to impeach her credibility. This differs markedly from the proffer made at trial, where defense counsel sought to have Connolly review the propriety of the forensic interview techniques and protocols used for child sexual abuse victims.

The trial court's preclusion of Connolly as an expert witness is an evidentiary ruling. *State* v. *Campbell*, 149 Conn. App. 405, 425–27, 88 A.3d 1258, cert. denied, 312 Conn. 907, 93 A.3d 157 (2014). "Appellate review of evidentiary rulings is ordinarily limited to the specific legal [ground] raised by the objection of trial counsel. . . . To permit a party to raise a different ground on appeal than [that] raised during trial would amount to trial by ambuscade, unfair both to the trial court and to the opposing party." (Internal quotation marks omitted.) *State* v. *Bennett*, 324 Conn. 744, 761, 155 A.3d 188 (2017); see *State* v. *Holloway*, 117 Conn. App. 798, 813–14, 982 A.2d 231 (2009), cert. denied, 297 Conn. 925, 998 A.2d 1194 (2010); see generally *State* v. *Paul B.*, 143 Conn. App. 691, 700, 70 A.3d 1123 (2013) (assigning error to court's evidentiary ruling on basis of objections never raised at trial unfairly subjects court and opposing party to trial by ambush), aff'd, 315 Conn. 19, 105 A.3d 130 (2014); *State* v. *Scott C.*, 120 Conn. App. 26, 34, 990 A.2d 1252 (we consistently decline to review claims based on ground different from that raised in trial court), cert. denied, 297 Conn. 913, 995 A.2d 956 (2010).

"So for all of those reasons, the court is unable to find that [Connolly] should testify as an expert witness in this case *as proffered for the evaluation of forensic interview techniques of child sexual abuse victims*." (Emphasis added.)

Accordingly, we decline to review this unpreserved evidentiary claim.[8]

II

The defendant next claims that he was deprived of a fair trial due to prosecutorial impropriety in closing argument. Specifically, he argues that the prosecutor improperly stated to the jury during his closing argument that (1) the defendant had lied and that the victim lacked a motive to lie and (2) the victim had been consistent in her trial testimony and prior disclosure to her friends that the defendant had sexually assaulted her.[9] We conclude that the prosecutor's statements were not improper, and therefore this claim must fail.[10]

"Our jurisprudence concerning prosecutorial impropriety during closing argument is well established. [I]n analyzing claims of prosecutorial [impropriety], we

[8] The defendant also requested that we review this claim pursuant to the *Golding* doctrine. See *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). Unpreserved evidentiary claims, however, fail under the second prong of *Golding*. *State* v. *Stanley*, 161 Conn. App. 10, 28, 125 A.3d 1078 (2015), cert. denied, 320 Conn. 918, 131 A.3d 1154 (2016); *State* v. *Osbourne*, 138 Conn. App. 518, 538, 53 A.3d 284, cert. denied, 307 Conn. 937, 56 A.3d 716 (2012). Accordingly, we decline to review this claim under *Golding*.

[9] Specifically, the prosecutor argued: "You should evaluate [the victim's] testimony. And you'll be told how to when it comes down to credibility, and we'll discuss that in a little bit. To make no mistake, she has been consistent from her first interview, until the time she testified [on the first day of the defendant's trial], that [the defendant] was her abuser and it happened in kindergarten."

Subsequently, the prosecutor stated to the jury: "You have the fact, it's very important, that [the victim] has no motive to lie about these things; *that she's been consistent* from the first interview, *her discussions with her friends before that, all the way up to* [*the first day of trial*], *when she testified that the defendant sexually assaulted her and it happened in kindergarten*." (Emphasis added.)

[10] Accordingly, we need not conduct an analysis of the factors set forth in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987). See *State* v. *Adeyemi*, 122 Conn. App. 1, 18, 998 A.2d 211, cert. denied, 298 Conn. 914, 4 A.3d 833 (2010).

engage in a two step analytical process. The two steps are separate and distinct: (1) whether [impropriety] occurred in the first instance; and (2) whether that [impropriety] deprived a defendant of his due process right to a fair trial. Put differently, [impropriety] is [impropriety], regardless of its ultimate effect on the fairness of the trial; whether that [impropriety] caused or contributed to a due process violation is a separate and distinct question. . . . [W]hen a defendant raises on appeal a claim that improper remarks by the prosecutor deprived the defendant of his constitutional right to a fair trial, the burden is on the defendant to show . . . that the remarks were improper . . . .'' (Citation omitted; internal quotation marks omitted.) *State* v. *Thomas*, 177 Conn. App. 369, 405, 173 A.3d 430, cert. denied, 327 Conn. 985, 175 A.3d 43 (2017); see also *State* v. *Walton*, 175 Conn. App. 642, 647, 168 A.3d 652, cert. denied, 327 Conn. 970, 173 A.3d 390 (2017).

The defendant baldly asserts that the prosecutor argued to the jury that the defendant lied during his testimony. He offers no citation to the transcript to support this contention, and in our own review of the transcript we found no such statement by the prosecutor. The prosecutor did state to the jury that the defendant possessed a motive to lie based on the seriousness of the charges and that the victim had no such motive to lie. ''It is permissible for a prosecutor to explain that a witness either has or does not have a motive to lie.'' *State* v. *Ancona*, 270 Conn. 568, 607, 854 A.2d 718 (2004), cert. denied, 543 U.S. 1055, 125 S. Ct. 921, 160 L. Ed. 2d 780 (2005); *State* v. *Reddick*, 174 Conn. App. 536, 562, 166 A.3d 754, cert. denied, 327 Conn. 921, 171 A.3d 58 (2017), cert. denied, U.S. , 138 S. Ct. 1027, 200 L. Ed. 2d 285 (2018); see also *State* v. *Thompson*, 266 Conn. 440, 466, 832 A.2d 626 (2003) (prosecutor's comments regarding witness' motive to lie were proper); *State* v. *Carlos E.*, 158 Conn. App. 646, 664,

120 A.3d 1239 (permissible for state to make arguments regarding witness' credibility if based on reasonable inferences from evidence), cert. denied, 319 Conn. 909, 125 A.3d 199 (2015). We conclude, therefore, that the defendant has failed to demonstrate that the challenged comments constituted improper argument to the jury.

Finally, the defendant contends that the prosecutor improperly argued to the jury that the victim consistently had claimed that the defendant sexually assaulted her, including when she disclosed his action to two of her friends in the sixth and seventh grades. The defendant contends that these two friends testified that the victim had stated that she had been "molested" but that she had not used the phrase "sexually assaulted." We are not persuaded that the prosecutor improperly mischaracterized the evidence or shifted the burden of proof to the defendant to disprove the state's witnesses. Considering the context of the entire trial and the closing arguments; see *State* v. *Washington*, 155 Conn. App. 582, 606, 110 A.3d 493 (2015); we conclude that the prosecutor's comments were not improper. During the trial, the witnesses used the verb "molest" synonymously with the phrase "sexual assault" in describing the defendant's conduct.[11] The challenged comments were based on the evidence at trial, and did not mischaracterize the evidence or shift the burden of proof to the defendant. See *State* v. *Betancourt*, 106 Conn. App. 627, 641, 942 A.2d 557 (asking jury to believe witness unless there is evidence to discredit that witness is proper and in no way shifts burden of proof), cert. denied, 287 Conn. 910, 950 A.2d 1285 (2008). Accordingly, we reject this argument.

The judgments are affirmed.

In this opinion the other judges concurred.

[11] "Molest" has been defined in relevant part as, "to force physical and [usually] sexual contact on," while the phrase "sexually assault" has been defined as "illegal sexual contact that [usually] involves force upon a person

# IN RE MARIANA A.*
(AC 40760)

Alvord, Prescott and Bear, Js.

*Syllabus*

The petitioner, the Commissioner of Children and Families, appealed to this court from the judgment of the trial court denying her petition to terminate the parental rights of the respondent parents with respect to their minor child. The petitioner had claimed that the respondent mother had failed to achieve such degree of rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, the mother could assume a responsible position in the life of the child. The petitioner claimed, as to the respondent father, that he had abandoned the child because he had failed to maintain a reasonable degree of interest, concern or responsibility as to her welfare. On appeal, the petitioner claimed, inter alia, that the trial court improperly concluded that she had not met her burden of proving that the mother had failed to achieve a sufficient degree of rehabilitation, which was based, inter alia, on the petitioner's assertion that the mother refused to accept that her boyfriend had physically abused the child. *Held*:

1. The trial court's decision to deny the petition for termination of parental rights with respect to the respondent mother was legally and logically correct and was supported by the evidence in the record:

a. The petitioner's claim that the trial court, in evaluating the mother's rehabilitative efforts, failed to consider the mother's refusal to acknowledge the alleged abuse of the child by her boyfriend was unavailing: the record showed that the court gave due consideration to that claim but ultimately rejected it as a basis for concluding that the petitioner had demonstrated the mother's failure to rehabilitate, especially given that there was never any adjudication or express finding in the record definitively identifying the mother's boyfriend as the cause of certain injuries sustained by the child, and the court reasonably could have found that the mother had made and continued to make therapeutic progress and that, accordingly, she soon could assume a responsible position in the child's life; moreover, the record demonstrated that the trial court considered the mother's rehabilitation in light of the child's

without consent or is inflicted upon a person who is incapable of giving consent . . . ." Merriam-Webster's Collegiate Dictionary (11th Ed. 2003).

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

age and particular needs, and reasonably could have concluded that the mother had achieved a sufficient level of progress in her rehabilitation efforts to preclude termination of her parental rights.

b. The trial court's factual finding that the Department of Children and Families had acknowledged the respondent mother's successful completion of a domestic violence program was not clearly erroneous; the petitioner at trial did not challenge the admission of testimony by a social worker that the mother had successfully completed the program, the specific steps that the court had ordered the mother to take toward reunification with the child required the mother to understand domestic violence and how it affected the child and the mother's functioning, and there was no evidence that the mother's belief that the child had lied about having been slapped by the mother's boyfriend rendered meaningless and, thus, unsuccessful the mother's completion of the domestic violence program.

2. The trial court properly denied the petition for the termination of the respondent father's parental rights, the petitioner having failed to demonstrate that the father had abandoned the child; although the father for many years had failed to take any action that would suggest an interest in or concern for the child's welfare, the court reasonably could have concluded that, after the father learned about the child's situation and over some period of time up to the relevant adjudicatory date, the father had made an effort to foster a relationship with the child, which she enjoyed and wanted to continue, by taking actions that included calling her on a regular basis, and providing her with a photograph of himself and financial support to the respondent mother.

Argued January 31—officially released April 18, 2018**

*Procedural History*

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of Hartford, Juvenile Matters, where the respondent father was defaulted for failure to appear; thereafter, the matter was tried to the court, *Hon. Robert G. Gilligan*, judge trial referee; judgment denying the petition, from which the petitioner appealed to this court. *Affirmed.*

** April 18, 2018, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

*Andrei V. Tarutin*, assistant attorney general, with whom were *Benjamin Zivyon*, assistant attorney general, and, on the brief, *George Jepsen*, attorney general, for the appellant (petitioner).

*Karen Oliver Damboise*, for the appellee (respondent mother).

*Joshua Michtom*, assistant public defender, for the minor child.

*Opinion*

PRESCOTT, J. The petitioner, the Commissioner of Children and Families, appeals from the judgment of the trial court denying her petition to terminate the parental rights of the respondent parents, Jane A. (mother) and Johnny B. (father), with respect to their minor child, Mariana A. The petitioner claims that the court improperly (1) concluded that she had not met her burden of proving by clear and convincing evidence that the mother had failed to rehabilitate in accordance with General Statutes § 17a-112 (j) (3) (B) (i), and (2) failed to analyze properly whether the father had abandoned Mariana pursuant to § 17a-112 (j) (3) (A). We disagree with the petitioner's claims and, accordingly, affirm the judgment of the trial court.

The record reveals the following relevant facts and procedural history, as set forth by the trial court in its memorandum of decision, or that otherwise are undisputed in the record. The mother was raised by her aunt in Puerto Rico, but frequently traveled between Puerto Rico and Connecticut. She completed her high school education, attending adult education classes while pregnant with Mariana but is unable to work due to epilepsy. She receives social security disability benefits and food stamps. She became pregnant with Mariana in 2007 while in Puerto Rico but returned to Connecticut when

she was two months pregnant.[1] She currently lives with her unemployed boyfriend, Christian G., with whom she has another child, Alexis. Alexis was born on November 30, 2015.[2]

There is limited information regarding Mariana's father. He lives and works in Puerto Rico. He never has seen Mariana in person, although, after she was placed in foster care, he sent her a photograph of himself and has spoken to her on the telephone. At times, he has paid child support to the mother for Mariana, beginning several months after the Department of Children and Families (department) became involved with the family.[3]

In February, 2014, Mariana's kindergarten teacher reported to the department that Mariana had come to school with a bloody lip. Although Mariana initially told her teacher that her mother had slapped her while walking her to school because she had been "mouthing off," she later said to department investigators that she cut her lip when she fell while jumping on her mother's

[1] The court notes in its memorandum of decision that the Department of Children and Families' social study, which was admitted into evidence, indicates that "[Mariana's] father was married to mother's mother at the time of the affair."

[2] According to the social study admitted into evidence at the trial, the Department of Children and Families (department) received a referral through its Careline on the day that the mother gave birth to Alexis. Because of the department's removal of Mariana from the mother's care, the hospital staff wanted clearance from the department that the newborn infant could be released into the care of her parents. According to the social study, "[t]he Department conducted an assessment of family functioning and of the situation and allowed Alexis to be discharged from the hospital to [the mother]'s care. The Department enacted a Service Agreement/Safety Plan with the family to ensure Alexis' safety and well-being." Shortly thereafter, on December 10, 2015, the petitioner filed a petition alleging that Alexis had been neglected. The petitioner, however, withdrew the petition on May 27, 2016, without any adjudication of the merits or the rendering of any orders.

[3] Although the trial court found that, as of the adjudicatory date, the father continued to pay child support for Mariana, there was no definitive evidence presented at trial as to whether the father currently is employed.

bed. After concluding its investigation of the incident, the department was not able to substantiate any allegations of physical abuse.

Four months later, in June, 2014, the department received a second call from Mariana's school indicating that she again had reported to school with minor injuries, this time on her nose. Although there were visible marks on the skin of Mariana's nose, the skin was not broken. When asked about her nose, Mariana explained that her mother's boyfriend, Christian G., whom she referred to as "father," had bitten her. Mariana nevertheless gave no indication to school officials that she was afraid to return home. When contacted by the department, the mother explained that Mariana had fallen while jumping on a couch. Mariana was taken to a hospital where she was examined independently by two physicians. Each of the physicians concluded that it was not possible to determine the cause of the marks on Mariana's nose and that the marks were too small to be submitted for a forensic dental examination. The physicians did not observe any other questionable marks or bruises on Mariana. On July 24, 2014, following its investigation of this second incident, the department issued a report substantiating allegations of abuse and neglect against Christian G.

On September 23, 2014, the petitioner filed a neglect petition that alleged both physical abuse and neglect of Mariana. In addition to citing the incidents involving Mariana's bloody lip and injured nose, the petition contained allegations that (1) Mariana had been exposed to domestic violence between the mother and Christian G.,[4] (2) Christian G. abused substances and was permitted to be alone with Mariana, and (3) the mother refused

[4] According to the petition, the police were dispatched to the mother's home on July 21, 2013, to respond to a domestic violence complaint involving the mother and Christian G. At that time, the mother indicated to the police that Christian G. had slapped her face during an argument, had a violent temper, and had pushed her in the past. The mother declined, however, to

to engage in services offered by the department unless ordered to do so by a court.

The mother pleaded nolo contendere with regard to the neglect petition, but only as to the neglect allegation that Mariana was "being permitted to live under conditions, circumstances or associations injurious to [her] well-being."[5] On December 30, 2014, the court, *Burgdorff, J.*, accepted the plea and adjudicated Mariana

provide any written statement to the police and refused assistance to locate a safe shelter. A warrant was issued for Christian G., although he was not arrested until nearly one year later.

[5] The petitioner on appeal places great significance on the fact that the mother entered a nolo contendere plea during the neglect proceeding, seeming to suggest that, by doing so, she forfeited her right to disagree with the facts alleged by the department, including that Christian G. was responsible for some or all of Mariana's injuries. Unquestionably, the mother's nolo contendere plea to the neglect allegations relieved the petitioner from having to prove at trial on the termination petition that Mariana previously had been neglected. The nolo plea, however, was not an admission of all factual allegations made by the department in its neglect petition, particularly those supporting the abuse allegations to which the plea did not apply. See *In re Elijah J.*, 141 Conn. App. 173, 199–201, 60 A.3d 1060, cert. denied, 308 Conn. 927, 64 A.3d 332 (2013). As we indicated in *In re Elijah J.*, there is a meaningful distinction between an express admission by a parent of the allegations of a petition and a plea of nolo contendere. "The consequences of an express admission are well understood to be that the parent admits the truth of the facts alleged in the petition for all purposes and agrees to the entry of judgment with respect to his or her child on the basis of those admitted facts. Such an admission can be used against the admitting parent in any future proceeding to which the admission is legally relevant. By contrast, the consequences of a plea of nolo contendere, which is not based upon an express admission of the allegations of the petition, is that those allegations are tacitly admitted for the purpose of the proceeding where the plea is entered, with the understanding that judgment may enter against the pleader with respect to his children on the basis of such allegations. Although a judgment entered against a party on the basis of a plea of nolo contendere can later be used as evidence against that party in any future proceeding to which the judgment is legally relevant, the plea itself is not admissible against him in any such later proceeding, either as an admission of the truth of the allegations underlying the claim or charge to which he pleaded or for any other purpose." (Emphasis omitted.) Id., 200–201. Here, the mother's nolo contendere plea does not constitute an admission that Christian G. abused Mariana.

neglected. The court ordered that Mariana remain in the mother's custody subject to a six month order of protective supervision by the department. On April 9, 2015, the court, *Dannehy, J.*, extended the order of protective supervision for an additional six months at the request of the department, which sought to have additional time to oversee the mother's compliance with treatment services. The mother signed a service agreement/safety plan with the department in which she agreed, inter alia, that Christian G. would leave her residence and have no contact with Mariana.

On June 3, 2015, Mariana's therapist reported to the department that Mariana had arrived for a therapy session with "two faint but visible marks on her face." Mariana told the therapist that Christian G. had slapped her. When the mother was told what Mariana had reported, she stated that Mariana was a liar. Later that same day, the department went to the mother's home to investigate the report. Christian G. was there when investigators arrived, which was in violation of the service agreement/safety plan. He explained that he was present only to clear his name with respect to Mariana's claim that he had slapped her. According to the investigator's report, which was admitted at trial and quoted by the trial court, "the [department] social worker requested the mother to wake Mariana so she could be interviewed. When awakened, Mariana immediately went to Christian G. and sat in his lap. The [child] appeared to be very bonded to Christian and would not talk with [the social] worker at all. [The social worker] observed Mariana's face and did not see the marks that were reported by the [therapist]." Before she left, the social worker had the mother sign another service agreement/safety plan indicating that she would not allow unsupervised contact between Christian G. and Mariana, and that she would not permit Christian G. to return to her home.

On June 5, 2015, on the basis of the June 3, 2015 incident, the petitioner filed for an ex parte order of temporary custody, which the court, *Burgdorff, J.*, granted. On June 8, 2015, the petitioner filed a motion to open and modify the disposition of protective supervision, rendered as part of the earlier neglect adjudication, to an order of commitment to the petitioner. The court, *Lobo, J.*, at a preliminary hearing on June 10, 2015, consolidated the hearing on the order of temporary custody with the hearing on the petitioner's motion to modify disposition.

On June 29, 2015, following that hearing, the court, *Dannehy, J.*, rendered a decision granting the petitioner's motion to modify disposition and finding that commitment to the petitioner was in Mariana's best interest. The court found under the fair preponderance of the evidence standard that the petitioner had established an "ongoing pattern of abuse" involving both the mother and Mariana, and that "the fact that the mother continues to minimize or deny indicates that she has no insight into [Christian G.'s] behaviors." The court further found that the mother had violated her service agreements with the department, which required that she not permit Christian G. to have contact with Mariana or to reside in her home. The court, however, made no express findings regarding any specific instances of abuse of Mariana or her mother by Christian G. Mariana was removed from the home and eventually was placed by the department into foster care with her maternal great aunt.[6]

Judge Dannehy subsequently approved the department's permanency plan of termination of parental

[6] Shortly after the trial on the termination of parental rights petition, the great aunt indicated to the department that she no longer wanted to be considered as a placement option for Mariana and asked that Mariana be removed from her care. At the time of oral argument, however, Mariana remained with the great aunt.

rights and adoption. On September 22, 2016, the petitioner filed the petition for termination of parental rights at issue in this appeal. The sole adjudicatory ground asserted with respect to the mother was that she had failed "to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, [she] could assume a responsible position in the life of the child . . . ." General Statutes § 17a-112 (j) (3) (B) (i). With respect to the father, the petition alleged, pursuant to § 17a-112 (j) (3) (A), that Mariana had been abandoned because he allegedly had "failed to maintain a reasonable degree of interest, concern or responsibility as to the welfare of the child."

Following a trial, the court, *Hon. Robert G. Gilligan*, judge trial referee, issued a memorandum of decision on July 13, 2017, denying the petition. The court made initial findings that the department made reasonable efforts to locate both parents and, having accomplished the same, made reasonable efforts to reunify them with Mariana.[7] Despite the findings of reasonable efforts by the department, the court nonetheless concluded on the basis of the totality of the evidence admitted at trial that the department had failed to meet its burden of demonstrating by clear and convincing evidence the

[7] In particular, the court found that, in addition to providing case management services, the department had made numerous referrals on behalf of the mother for services intended to aid her in addressing the issues that led to her involvement with the department and to facilitate Mariana's return, including parenting education services and intimate partner violence services. With respect to the father, the court found that the department initially offered him an opportunity to be considered as a placement resource for Mariana and offered to pay for the father's plane fare from Puerto Rico and hotel expenses so he could meet Mariana and discuss placement and reunification with the department. Although he initially expressed an interest in being considered as a placement option for Mariana, the father claimed that he could not come to Connecticut. He provided conflicting reasons to the department, stating both that he was unemployed and that his employer would not approve the necessary time off.

adjudicatory ground for termination asserted in the petition against each of the parents.

The court first addressed the petitioner's claim that the mother had failed to demonstrate a sufficient level of personal rehabilitation such that, within a reasonable period of time, she would be able to assume *some responsible position* in Mariana's life. The court recognized that the mother's involvement with the department arose as a result of suspected physical abuse of Mariana as well as intimate partner violence between Christian G. and the mother. The court acknowledged the petitioner's argument that the mother continued to adhere to her belief that Mariana had lied about being abused by Christian G. and that her steadfast adherence amounted to conclusive evidence that she had failed to gain the needed insight and ability to care for Mariana. The court also considered the mother's arguments that there was insufficient evidence corroborating Mariana's inconsistent reports of the cause of her injuries, and, therefore, the mother's beliefs that her daughter had lied and that Christian G. was not an abuser were not unreasonable under the circumstances and cannot provide a sufficient basis for the termination of her parental rights.

The court made no findings on the basis of its review of the record as to whether Christian G. ever had physically injured Mariana. Although the court took judicial notice that Mariana had been found neglected in a prior proceeding, it also noted that the mother had entered a nolo contendere plea only with respect to the allegation that Mariana had been permitted to live in conditions injurious to her well-being, not as to the abuse allegations, which were never adjudicated in the underlying neglect proceedings. The court's recitation of the underlying history demonstrates the lack of any specific findings by a court that Christian G. caused Mariana's

various injuries. For example, there was never any substantiation of abuse with respect to the bloody lip incident. The physicians who examined Mariana's nose were unable to determine the cause of the visible marks observed by the school and also did not observe any evidence of physical mistreatment. With respect to Mariana's reporting that Christian G. slapped her on June 3, 2015, the court highlighted that the department's investigator did not observe the reported marks on Mariana's face on the day that such marks were reported and that the mother believed Mariana was lying, a position to which she consistently has adhered. Moreover, the investigator observed Mariana's demeanor around Christian G., noting that she voluntarily sat in his lap and appeared very bonded to him.

Ultimately, the court found that it was unnecessary to resolve the parties' claims regarding the cause of Mariana's injuries because the court concluded that there were other reasons to deny the petition. The court relied in part on the fact that the mother substantially had completed the specific steps ordered by the court, continued to engage in her individual therapy sessions, and had weekly visits with Mariana. The court noted that Mariana and the mother had a loving relationship with each other. The court also recognized that Mariana had bonded with her half sibling, Alexis, who had remained in the custody of the mother and Christian G. without incident for nineteen months. At the time of the court's decision, Mariana, through counsel, had expressed an interest in continuing to live with her great aunt, which the court recognized might be a "more suitable custodial arrangement" for Mariana. The court opined, however, that the mother could still assume a responsible position in Mariana's life without necessarily regaining full physical custody and that a transfer of guardianship could achieve this objective without

terminating completely the legal relationship between Mariana and her mother.

With respect to the father, the court found that as of the adjudicatory date of September 22, 2016, the father had demonstrated a sufficient degree of interest in Mariana. In particular the court credited the fact that he had sent Mariana a photograph of himself and had called her at her foster home on a regular basis. The court also credited the statement of the attorney for Mariana that Mariana had been excited to learn about the existence of her father and was happy to receive his photograph and phone calls. Furthermore, the court found it significant that the father made monthly child support payments beginning in late 2014 or early 2015, and that those payments had continued through the adjudicatory date.

On the basis of these findings, the court concluded that the petitioner had failed to establish by clear and convincing evidence an adjudicatory ground against either the mother or the father. It did not reach, therefore, whether termination was in Mariana's best interest. This appeal followed.[8]

I

The petitioner first claims that the trial court improperly denied the petition to terminate the mother's parental rights pursuant to § 17a-112 (j) (3) (B) (i). The

[8] At trial, the attorney for the minor child took the position that the petition for termination of parental rights should be granted as to the mother and denied as to the father. The attorney for the minor child has changed that position on appeal as to the mother, however, largely because of the fact that Mariana no longer has the option of a stable and permanent placement with the great aunt, who has indicated to the department that she no longer wants to care for Mariana and that it should find a different placement for her. With respect to the father, the attorney for the minor child continues to advocate that his parental rights should not be terminated. In sum, the attorney for the minor child now advocates that we affirm the trial court's decision as to both parents, which will allow the department to explore all placement options, including the possibility of returning custody of Mariana to her mother or father. Resolution of this appeal does not require us to

petitioner's claim is twofold, each part predicated on the mother's refusal to accept that Christian G. had physically abused Mariana. First, the petitioner claims that Christian G.'s alleged abuse of Mariana was central to the department's involvement with this family, and that the court failed to consider the mother's refusal to acknowledge the abuse in assessing the adequacy of her rehabilitation efforts, particularly in light of Mariana's age and needs. Second, the petitioner claims that, in assessing the mother's rehabilitation efforts, the court relied on an erroneous factual finding, namely, that the mother *successfully* had completed an intimate partner violence program. The petitioner takes the position that successful completion necessarily would have required her to acknowledge the abuse by Christian G. We are not persuaded.

We begin with general principles of law and our applicable standard of review. "Proceedings to terminate parental rights are governed by § 17a-112. . . . Under [that provision], a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more . . . grounds for termination of parental rights set forth in § 17a-112 [(j) (3)] exists by clear and convincing evidence. The commissioner . . . in petitioning to terminate those rights, must allege and prove one or more of the statutory grounds." (Internal quotation marks omitted.) *In re Egypt E.*, 327 Conn. 506, 526, 175 A.3d 21 (2018). "Clear and convincing proof is a demanding standard denot[ing] a degree of belief that lies between the belief that is required to find the truth or existence of the [fact in issue] in an ordinary civil action and the belief that is required to find guilt in a criminal prosecution. . . . [The burden] is sustained if

determine whether the father is a placement option in light of any factual question regarding whether his whereabouts are now unknown.

evidence induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist." (Internal quotation marks omitted.) *In re Carla C.*, 167 Conn. App. 248, 258, 143 A.3d 677 (2016). If the trial court determines that the petitioner has failed to meet this high burden, it must deny the petition.

Turning to the applicable standard of review, we note that the majority of appeals taken from a trial court's decision on a petition to terminate parental rights are brought by a respondent parent challenging the granting of such a petition. Appeals by the petitioner from the denial of a petition are far less common. The difference in procedural posture alters somewhat our standard of review. In an appeal from the granting of a petition, our Supreme Court has indicated that the court's ultimate conclusion as to whether a ground for termination of parental rights has been proven presents a question of evidentiary sufficiency. See *In re Egypt E.*, supra, 327 Conn. 526; *In re Shane M.*, 318 Conn. 569, 587–88, 122 A.3d 1247 (2015). Thus, in reviewing the granting of a petition, "we must determine whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]." (Internal quotation marks omitted.) *In re Egypt E.*, supra, 526.

In an appeal challenging the denial of a petition to terminate parental rights, however, our role as a reviewing court no longer involves evaluating the record for evidentiary sufficiency. In denying a petition, the trial court, in its role as the trier of fact, has evaluated and weighed the evidence admitted in support of the petition and found that evidence lacking or insufficient to meet the petitioner's high burden of proof. In

the absence of clearly erroneous factual findings that are material to the decision, the question is not simply whether there is some evidence that would support the granting of the petition. Rather, we must review whether, in light of the facts found by the court and the evidence it credited, the only rational outcome would have been for the court to grant the petition.[9] We cannot reweigh the evidence or reevaluate the credibility of witnesses to determine whether, in our own view, the evidence could have warranted granting the petition. Every reasonable presumption must be made in favor of the trial court's ruling denying the petition. See *In re Jayce O.*, 323 Conn. 690, 716, 150 A.3d 640 (2016) ("[i]f the [trial court] could reasonably have reached its conclusion, the [judgment] must stand, even if this court disagrees with it" [internal quotation marks omitted]). As indicated, we are bound by the trial court's subordinate factual findings, which are reviewable only for clear error. *In re Shane M.*, supra, 318 Conn. 587. Finally, "[t]o the extent we are required to construe the terms of [a relevant statutory provision] or its applicability to the facts of [a particular] case . . . our review is plenary"; *In re Egypt E.*, supra, 327 Conn. 526; however, it bears repeating that we do not reevaluate de novo the merits of the adjudicatory grounds asserted. With these principles in mind we turn to the petitioner's claims.

A

We begin with the petitioner's claim that the trial court failed to take into account properly the central

[9] To be clear, if a court's decision to deny a petition rested on clearly erroneous and material findings of fact, then the petitioner would be entitled to a new trial in which the evidence could be reconsidered in the absence of the erroneous finding.

It bears noting that in the petitioner's brief, she requests only that we reverse the trial court's decision because "it is legally and factually deficient." She fails to indicate whether, if she were to prevail, we should order a new trial on the petition or direct the trial court to grant the petition and terminate the mother's parental rights.

issue that led to the department's involvement with this family, namely, the abuse allegations against Christian G. The petitioner also suggests that the court failed to consider the mother's rehabilitation efforts in light of Mariana's age and specific needs. We are not persuaded.

Section 17a-112 (j) (3) (B) (i) authorizes the Superior Court to grant a petition for termination of parental rights on the ground of failure to rehabilitate. The petitioner may prove this statutory ground by showing, among other requirements, that the child "has been found by the Superior Court or the Probate Court to have been neglected, abused or uncared for in a prior proceeding . . . and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent . . . and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child."

"[P]ersonal rehabilitation . . . refers to the restoration of a parent to his or her former constructive and useful role as a parent . . . [and] requires the trial court to analyze the [parent's] rehabilitative status as it relates to the needs of the particular child, and further, that such rehabilitation must be foreseeable within a reasonable time. . . . [Section 17a-112 (j) (3) (B) (i)] does not require [a parent] to prove precisely when [she] will be able to assume a responsible position in [her] child's life. Nor does it require [her] to prove that [she] will be able to assume full responsibility for [her] child, unaided by available support systems. It requires the court to find, by clear and convincing evidence, that the level of rehabilitation [she] has achieved, if any, falls short of that which would reasonably encourage a belief that at some future date [she] can assume a

responsible position in [her] child's life." (Internal quotation marks omitted.) *In re Elvin G.*, 310 Conn. 485, 507, 78 A.3d 797 (2013).

"Specific steps provide notice and guidance to a parent as to what should be done to facilitate reunification and prevent termination of rights. Their completion or noncompletion, however, does not guarantee any outcome. A parent may complete all of the specific steps and still be found to have failed to rehabilitate. . . . Conversely, a parent could fall somewhat short in completing the ordered steps, but still be found to have achieved sufficient progress so as to preclude a termination of his or her rights based on a failure to rehabilitate." (Citation omitted.) Id., 507–508.

The petitioner argues that the court's assessment of the mother's rehabilitation level should have included consideration of the mother's alleged lack of progress because she failed to acknowledge that Christian G. had abused both her and Mariana. The petitioner argues that the court "refused" to engage in any analysis of this issue. Our review of the court's memorandum, however, indicates that the court took account of the petitioner's argument that the mother's continued adherence to her belief that Mariana lied regarding physical abuse by Christian G. undermined her progress toward meaningful rehabilitation. The court clearly gave due consideration to the petitioner's argument, but ultimately rejected it as a basis for concluding that the petitioner had demonstrated the mother's failure to rehabilitate.

Although the petitioner argues, as it did before the trial court, that the alleged abuse by Christian G. had already been established as a matter of law in the underlying neglect proceedings, the record does not support this assertion, as indicated by the trial court. There was never any adjudication or express finding that Mariana's injuries were the result of abuse by Christian G. The

mother entered a nolo plea with respect to the abuse and neglect petition but only as to one allegation of neglect, which did not include the abuse. Any findings by Judge Dannehy in modifying the neglect disposition from protective supervision to commitment were made under the fair preponderance of the evidence standard rather than the more exacting clear and convincing standard that applies in termination of parental rights adjudications. Further, although Judge Dannehy stated that the petitioner had established an "ongoing pattern of abuse" involving both the mother and Mariana, he did not state how this was established or make any subordinate findings regarding any particular instances of abuse. Because of the lack of a finding in the record definitively identifying Christian G. as the cause of Mariana's injuries, we cannot conclude that the trial court committed reversible error by failing to focus its analysis on the mother's failure to acknowledge him as an abuser in evaluating her rehabilitative efforts.

We agree with the petitioner that, as a general proposition, the failure to acknowledge and make progress in addressing the issues that led to a child's removal may be one of many contributing factors to a court's determination that a parent has failed to achieve a sufficient degree of personal rehabilitation. None of the cases cited by the petitioner in her appellate brief, however, holds that this factor is necessarily determinative, suggesting only that it is one of any number of considerations that should inform a court's final determination. The court found that the mother continued to fully engage and participate in therapy, and that she continued to visit and bond with Mariana. Thus, contrary to the petitioner's views, the court reasonably could have found on this record that the mother had made and continued to make therapeutic progress and that, accordingly, she soon could assume a responsible position in Mariana's life, if in fact she had not already.

Our review of the record in this case convinces us that the trial court also considered the mother's rehabilitation in light of Mariana's age and particular needs, and reasonably could have concluded that the mother had achieved a sufficient level of progress in her rehabilitation efforts to preclude termination of her parental rights. As the court properly found, the mother successfully participated in and completed her domestic violence program and continued to work through various issues in her individual therapy sessions, which, at the time of the termination trial, remained ongoing. Although the court acknowledged that Mariana had expressed a desire to remain in her placement with her relative foster parent, it also considered that the mother had regular visits with Mariana and that she and Mariana had a loving relationship. Additionally, the court noted in its decision that Mariana had bonded with Alexis, who continued to live with the mother and Christian G. The court certainly appears to have taken the entire broad set of circumstances into account in concluding that, even if full custodial parenting might not resume, Mariana's placement with a close relative coupled with the mother's therapeutic progress to date demonstrated that she could assume a responsible role in Mariana's life. Having reviewed the record in its entirety, we cannot conclude that the trial court failed to consider the mother's refusal to acknowledge the alleged abuse by Christian G. in evaluating the mother's rehabilitative efforts.

B

We next address the petitioner's related claim that, in reaching its decision to deny the petition, the trial court relied on a clearly erroneous factual finding. Specifically, the petitioner asserts that the court erroneously found that the mother completed successfully a domestic violence program and that the department

acknowledged this at trial. This is the sole factual finding of the court challenged by the petitioner. The mother responds that there is ample evidence in the record to support the court's finding. We agree with the mother.

The following additional facts are relevant to our resolution of this claim. Following the adjudication of neglect, the court ordered the mother to comply with a number of specific steps, including that the mother take part in counseling with the following specified goal: "Mother to understand domestic violence and how it affects the child and mother's functioning." The court further ordered a domestic violence assessment and treatment. The orders also provided that the mother shall not permit Christian G. to have contact with Mariana. In its memorandum of decision denying the termination of parental rights petition, the court, in discussing the mother's efforts at personal rehabilitation found that "[the department] acknowledges that [the mother] has engaged in and successfully completed her Intimate Partner Violence program."

At the trial on the petition for termination of parental rights, a department social worker testified in response to direct examination by the petitioner that the mother had accepted all of the department's referrals for treatment and fully complied by attending appointments and participating in programs. The social worker also testified that, despite her compliance with various treatment programs, the mother continued to believe and assert that Mariana had lied about the abuse allegations against Christian G. The petitioner asked the social worker whether she believed that denying the abuse allegations was consistent with being compliant with the specific steps ordered by the trial court, but counsel for the mother objected, arguing that the social worker's belief was irrelevant and what mattered was whether the mother had completed the required programs. The court sustained the objection, indicating that it was the

court's role to determine whether there was compliance or not. The petitioner does not challenge this ruling on appeal.

During cross-examination by counsel for the mother, the social worker was asked again directly whether the mother successfully had completed the domestic violence components of the specific steps. The social worker answered "yes," without any qualifications. The petitioner did not object to her rendering this opinion.

As previously indicated, "[i]t is axiomatic that a trial court's factual findings are accorded great deference. . . . A [factual] finding is clearly erroneous when either there is no evidence in the record to support it, or the reviewing court is left with the definite and firm conviction that a mistake has been made." (Internal quotation marks omitted.) *In re Baciany R.*, 169 Conn. App. 212, 225, 150 A.3d 744 (2016).

With the exception of the requirement that Christian G. not be allowed to have contact with Mariana, the petitioner's social worker testified that the mother successfully complied with all of the specific steps ordered by the court. This necessarily included the requirement that the mother participate in a domestic violence program. The social worker later replied in the affirmative to a question by the mother's counsel asking if the mother completed successfully the domestic violence component of the specific steps. If the social worker believed that the mother's failure to acknowledge Christian G. as an abuser necessarily meant that she had not successfully completed the domestic violence program, she presumably would have answered that question in the negative or answered yes with a qualifying explanation. Instead, she unequivocally testified that the mother had successfully completed the program. Accordingly, there was direct evidence in the record that supports the trial court's factual finding that the department had

acknowledged the mother's successful completion of the domestic violence program.

Furthermore, we are not left with a firm conviction that a mistake was made by the court. The specific steps did not explicitly require the mother to acknowledge that Christian G. had abused her or Mariana. Rather, the steps ordered her to "understand domestic violence and how it affects the child and mother's functioning." Thus, the order focused on education rather than obtaining an admission regarding past instances of abuse. There simply is no evidence in the record before the trial court that the mother's continued belief that Mariana lied about being slapped by Christian G. rendered meaningless, and thus unsuccessful, her completion of the domestic violence program. Although it appears that the department attempted to solicit support for this proposition from the social worker who testified at trial, the court sustained an objection to that inquiry. The petitioner does not challenge that evidentiary ruling on appeal or the admission of the social worker's opinion that the mother successfully completed the program. Accordingly, we reject the petitioner's claim that the trial court rendered its decision on the basis of a clearly erroneous factual finding.

In sum, we cannot conclude on the basis of this record that the trial court's decision to deny the petition for termination of parental rights with respect to the mother was not legally correct or logically supported by the evidence admitted and credited by the court.

II

Finally, the petitioner claims that the court improperly denied the petition for termination of parental rights with respect to the father. Specifically, the petitioner claims that the court failed to properly analyze whether the father had abandoned Mariana pursuant to § 17a-112 (j) (3) (A). We are not persuaded.

We agree with the petitioner that whether the trial court applied the proper legal standard in assessing if the petitioner had presented clear and convincing evidence of abandonment is a question of law over which our review is plenary. If we determine that the court applied the proper statutory requirements, however, we do not engage in a reweighing of the evidence admitted to reach our own conclusion regarding abandonment. Rather, as previously indicated, we review the trial court's decision that the petitioner failed to meet her burden of proof for whether the trial court's conclusion is both legally and logically correct in light of the credited evidence.

"It is not lack of interest alone which is the criterion in determining abandonment. Abandonment under [§ 17a-112 (j) (3) (A)] requires failure to maintain interest, concern or responsibility as to the welfare of the child. Attempts to achieve contact with a child, telephone calls, the sending of cards and gifts, and financial support are indicia of interest, concern or responsibility for the welfare of a child. . . . [If] a parent fails to visit a child, fails to display any love or affection for the child, has no personal interaction with the child, and no concern for the child's welfare, statutory abandonment has occurred. . . . General Statutes [§ 17a-112 (j) (3) (A)] does not contemplate a sporadic showing of the indicia of interest, concern or responsibility for the welfare of a child. A parent must maintain a reasonable degree of interest in the welfare of his or her child. Maintain implies a continuing, reasonable degree of concern." (Internal quotation marks omitted.) *In re Shane P.*, 58 Conn. App. 244, 251, 754 A.2d 169 (2000). In assessing as part of the adjudicatory phase whether the petitioner has proven the asserted ground for termination of parental rights, the trial court generally is confined to consider only evidence occurring prior to the adjudicatory date, i.e., the date the petition was

filed or the date of the latest amendment to the petition. Practice Book § 35a-7.[10]

The court found that the father, who continues to reside in Puerto Rico, has never met Mariana in person, indicating that the mother left Puerto Rico when she was only two months pregnant with Mariana. According to the department social worker, the father acknowledged to the department that he was aware that the mother had given birth to his child in Connecticut but that he knew very little about her. It was only after the department contacted the father to inform him that Mariana was in the custody of the department that he took an interest in Mariana and began to communicate with her. It is not entirely clear from the record precisely when the father became aware that he was Mariana's biological father.

The father also did not appear in the underlying neglect proceedings. Although this reasonably could be construed as demonstrating a lack of interest in the legal proceedings and, thus, an implicit disinterest in remaining a parent to Mariana, that evidence would not have compelled the court to grant the petition and terminate the father's parental rights. Furthermore, this was not the only evidence that the court had to consider.

[10] Practice Book § 35a-7 (a) provides: "In the adjudicatory phase, the judicial authority is limited to evidence of events preceding the filing of the petition or the latest amendment, except where the judicial authority must consider subsequent events as part of its determination as to the existence of a ground for termination of parental rights."

Accordingly, in those instances in which it may be necessary due to the adjudicatory ground asserted, the court may look to evidence arising subsequent to the adjudicatory date. For example, in assessing the ground of failure to rehabilitate, "the court *may* rely on events occurring after the [adjudicatory date] when considering the issue of whether the degree of rehabilitation is sufficient to foresee that the parent may resume a useful role in the child's life within a reasonable time." (Emphasis in original; internal quotation marks omitted.) *In re Jennifer W.*, 75 Conn. App. 485, 495, 816 A.2d 697, cert. denied, 263 Conn. 917, 821 A.2d 770 (2003).

In support of its conclusion that the petitioner had failed to meet her burden of demonstrating abandonment by the father, the court made the following findings: "As of the adjudicatory date, [the father] demonstrated an interest in Mariana. Evidence was received that [the father] sent Mariana a picture of himself and called her by telephone at her foster home on a regular basis. With regard to financial support, [the mother] reported that she began receiving $210-$280 in monthly child support payments for Mariana from [the father] beginning sometime in late 2014 or early 2015, which support she continues to receive." (Internal quotation marks omitted.) As previously indicated, "[a]ttempts to achieve contact with a child, telephone calls, the sending of cards and gifts, and financial support are indicia of interest, concern or responsibility for the welfare of a child." (Internal quotation marks omitted.) *In re Shane P.*, supra, 58 Conn. App. 251.

We recognize that reasonable jurists listening to the testimony and considering the evidence could disagree regarding whether the petitioner had established abandonment by clear and convincing evidence. We further recognize there is merit in the petitioner's assertion that for many years the father appears to have failed to take any action that would suggest an interest in Mariana or a concern for her welfare. Nevertheless, the evidence admitted and credited by the court shows that, after learning of Mariana's situation from the department, the father took some actions to establish a relationship with his daughter, including calling Mariana at her foster home on a regular basis, providing her with a photograph of himself, and providing financial support. Thus, over some period of time up to the relevant adjudicatory date,[11] there was evidence from which the court

[11] We note that the addendum to the social study dated March 6, 2017, which was admitted as exhibit E at trial, indicates that, as of the date of the addendum, the father had stopped communicating with the foster parent about Mariana's well-being, he no longer was in contact with Mariana, and the department was unaware of the father's whereabouts because he had

reasonably could have concluded that the father had made an effort to foster a relationship with Mariana, a relationship that her attorney indicated to the court she enjoys and wants to continue. We simply are not persuaded on this record that the court's decision to reject the petition on the ground of abandonment constitutes reversible error.

The judgment is affirmed.

In his opinion the other judges concurred.

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not made himself available to the department. Because this information, however, postdates the filing of the petition to terminate on September 22, 2016, it properly was not considered by the trial court in evaluating whether the department had proven the asserted ground of abandonment by clear and convincing evidence. See Practice Book § 35a-7 (a).