MICHAEL S. BRACKEN, JR. *v.* TOWN OF WINDSOR LOCKS
(AC 39680)

Lavine, Alvord and Prescott, Js.

Syllabus

The plaintiff, who had been employed as a police officer by the defendant town and had entered into a settlement agreement with the town arising out of a prior action concerning his wrongful termination, sought to recover damages arising out of the town's alleged breach of that agreement. The agreement provided that, for the period between 1987 and 1993 during which the plaintiff was not employed by the town, the town would restore him to "full benefits, privileges and emoluments of employment." He claimed that the town breached that agreement by failing to purchase certain credits toward his pension for those years. The matter was tried to the court, which determined that the plaintiff's action, which was commenced in 2014, was barred by the six year statute of limitations pertaining to contracts (§ 52-576) and the doctrine of laches. On the plaintiff's appeal to this court, *held*:

1. The trial court improperly concluded that the plaintiff's action was barred by § 52-576; that court based its conclusion on an erroneous factual finding that the action accrued when the town first failed to make the

pension contributions after the plaintiff's employment was reinstated, as the plaintiff pleaded and proved that pension credits could be purchased retroactively at any time prior to the date that he began to receive pension benefits such that the town could have performed its obligation under the agreement by purchasing the pension credit at any time after he was reinstated, and because neither the testimony of the former police chief that he had no involvement in and was not aware of any decision as to whether the town would purchase the pension credits, nor the statute (§ 7-441) that obligated the town to make monthly contributions to the pension system while the employee worked for the town and participated in the system, supported the town's position that the breach occurred when the town first failed to make a payment to the plan after the plaintiff was reinstated, the town failed to meet its burden of proof on its statute of limitations defense.

2. The trial court improperly determined that the plaintiff's action was barred bythe doctrine of laches: that court's determination that the delay was unreasonable and inexcusable was premised on its erroneous factual finding that the alleged breach occurred upon the town's failure to make the contribution to the pension plan, and its finding that the town was prejudiced because it would incur significantly larger damages in order to purchase the pension credit at that time was clearly erroneous and not supported by the record, which showed that the town presented no evidence beyond a certain letter from the retirement commission as to the relative cost of purchasing the pension credit; accordingly, because the town failed to show prejudicial delay, the court incorrectly concluded that it had established the defense of laches.

Argued February 14—officially released June 5, 2018

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the matter was tried to the court, *Elgo*, *J.*; judgment for the defendant, from which the plaintiff appealed to this court. *Reversed; further proceedings.*

Gregg D. Adler, with whom, on the brief, was *Zachary L. Rubin*, for the appellant (plaintiff).

Kevin M. Deneen, for the appellee (defendant).

Opinion

ALVORD, J. In this action for breach of a settlement agreement, the plaintiff, Michael S. Bracken, Jr., appeals from the judgment of the trial court rendered in favor

of the defendant, the town of Windsor Locks. On appeal, the plaintiff claims that the court erroneously concluded that the plaintiff's action was barred by (1) the six year statute of limitations set forth in General Statutes § 52-576, and (2) the doctrine of laches.[1] We conclude that the central factual finding underlying the court's conclusion that the defendant's special defenses barred the action was clearly erroneous. We further conclude that the defendant failed to meet its burden of proving that its special defenses barred the plaintiff's action. Accordingly, we reverse the judgment of the trial court and remand this case for further proceedings.

The following facts, which were found by the trial court in its memorandum of decision or are otherwise undisputed, and procedural history are relevant to this appeal. At all times relevant, the defendant participated in the Connecticut Municipal Employee Retirement System (CMERS) for police officers employed by the defendant.[2] The plaintiff was formerly employed by the

[1] By way of relief, the plaintiff asserts that he is entitled to judgment as a matter of law and requests that this court "find that the defendant breached the settlement agreement when it refused to purchase pension credits or otherwise provide plaintiff with retirement benefits from the period of September 13, 1987 through June 18, 1993." Because the trial court rendered judgment in favor of the defendant on its special defenses, the court did not reach the merits of the plaintiff's claims, which involve questions of fact. See *McCoy* v. *Brown*, 130 Conn. App. 702, 707, 24 A.3d 597 ("[w]hether there was a breach of contract is ordinarily a question of fact" [internal quotation marks omitted]), cert. denied, 302 Conn. 941, 29 A.3d 467 (2011). "This court cannot find facts in the first instance." *Fazio* v. *Fazio*, 162 Conn. App. 236, 251, 131 A.3d 1162, cert. denied, 320 Conn. 922, 132 A.3d 1095 (2016). Accordingly, although we agree with the plaintiff that the judgment of the court must be reversed, we cannot grant the relief requested, and we remand this case to the trial court to consider the merits of the plaintiff's cause of action. See id. (concluding that trial court improperly found separation agreement unambiguous and remanding case to trial court to determine "the intent of the parties after consideration of all the available extrinsic evidence and the circumstances surrounding the entering of the agreement").

[2] The statutory framework establishing and governing the retirement system for certain municipal employees is codified at General Statutes § 7-425 et seq., and is referred to as the Municipal Employees' Retirement Act. See *Maturo* v. *State Employees Retirement Commission*, 326 Conn. 160, 172,

defendant as a supernumerary police officer, until his employment was terminated in 1987. In August, 1990, the plaintiff filed an action in federal court against the defendant. While that litigation was pending, the plaintiff returned to employment with the defendant on June 19, 1993, as a full-time police officer. The federal action was resolved by way of a written settlement agreement executed on April 21, 1994, between the plaintiff and the defendant. That settlement agreement (agreement) provided, in relevant part: "As further consideration for Bracken's agreement to be bound by the terms of this agreement, defendant town of Windsor Locks agrees to reinstate Bracken to a full-time police officer position as of June 19, 1993 with a seniority date of one day earlier than Officer Squires and to restore to Bracken as of June 19, 1993 full benefits, privileges and emoluments of employment based upon that seniority date." Officer Squires had a seniority date of September 14, 1987.[3]

Following the execution of the agreement, the defendant restored certain benefits, privileges, and emoluments of employment based on a seniority date of

162 A.3d 706 (2017). Section 7-425 defines a " '[m]ember' " of the retirement system as, among other things, "any regular employee or elective officer receiving pay from a participating municipality . . . who has been included by such municipality in the pension plan as provided in [§] 7-427 . . . ." General Statutes § 7-425 (5). "General Statutes § 7-427 (a) authorizes each municipality to opt into the retirement system with respect to any department or departments that it chooses to designate for participation." *Maturo* v. *State Employees Retirement Commission*, supra, 172. General Statutes (Supp. 2018) § 7-441 (c) provides in relevant part: "All participating municipalities shall pay monthly to the Retirement Commission to be credited to the fund such proportion of the pay of all members employed by such municipality as is determined from time to time by the Retirement Commission on sound actuarial principles to be necessary in addition to the contributions by members to provide future pensions based on service rendered by members subsequent to the effective date of participation as defined in section 7-427 other than the excess pensions referred to in subsection (b) of this section. . . ."

[3] Officer Squires was the police officer who was hired into the position that the plaintiff contended should have been given to him.

September 13, 1987. The defendant did not purchase pension credit for the plaintiff covering the period of time from September 13, 1987 through June 18, 1993 (pre-reinstatement period), and the plaintiff became aware in late 2002 or early 2003 that the defendant had not purchased the credit. The plaintiff was placed on administrative leave in August, 2007. In September, 2007, the plaintiff wrote a letter to CMERS stating that he had brought the issue of the pension credit to the defendant's attention on many occasions, but it had done nothing to resolve the issue. The plaintiff stated that Chief of Police John Suchocki had told him that the defendant wanted to wait until the plaintiff retired to make the payments, a position that the plaintiff found "unacceptable." The plaintiff's employment with the defendant terminated on or about November 19, 2009. By letter dated March 16, 2010, the defendant inquired of the Statement Employee Retirement Commission (retirement commission) as to the cost to purchase the pension credit for the pre-reinstatement period. The retirement commission responded by letter dated April 29, 2010, that a payment in the amount of $99,316 would be necessary to purchase the additional pension credit. Beginning in May, 2010, the State Board of Mediation Arbitration held hearings on a grievance the plaintiff had filed challenging his termination of employment.

On February 11, 2014, the plaintiff commenced the present action alleging breach of contract and breach of the implied covenant of good faith and fair dealing. In his amended complaint filed December 16, 2015, the plaintiff alleged that after he resumed his employment as a police officer, the defendant had restored to him "all benefits, privileges and emoluments of employment based on the seniority date of September 13, 1987, with the exception of his pension benefits." Specifically, he alleged that "[p]ension credits for Windsor Locks police officers are purchased by the town through the State

of Connecticut Municipal Employees Retirement Fund" and that such credit "can be purchased retroactively at any time prior to the date the employee begins receiving retirement benefits." He alleged that he became aware that the defendant had not yet purchased pension credit for him for the pre-reinstatement period and that he raised his concerns with the defendant on several occasions. He claimed that "at no time prior to 2013 was the plaintiff informed by the town that it would not comply with its contractual agreement to provide pension credits" for the pre-reinstatement period.

The plaintiff further alleged that his counsel wrote letters to the defendant on July 30, 2013, and October 3, 2013. The plaintiff alleged that his counsel, in the October 3, 2013 letter, requested that the defendant provide "written confirmation that the town is currently refusing to purchase pension credits or otherwise provide retirement benefits to the plaintiff" for the pre-reinstatement period. The plaintiff alleged that the letter concluded: "If I do not receive a response to this letter by October 31, 2013, we will assume that the town has formally refused to provide these benefits . . . ." The plaintiff alleged that the defendant did not respond to the letter.

In count two of the complaint, the plaintiff claimed that the defendant breached the implied covenant of good faith and fair dealing in that it had no good faith basis for refusing to purchase the pension credit and that its reasons for "refusing to comply with the terms of the contract are based on personal animosity toward the plaintiff." The plaintiff sought an order requiring the defendant to purchase the pension credit for the pre-reinstatement period.

The defendant answered and filed special defenses to the amended complaint alleging, inter alia, that the plaintiff's action was barred by the statute of limitations

set forth in § 52-576[4] and the doctrine of laches. The parties elected a court trial, which was held on February 17 and 18, 2016. The parties stipulated to a number of facts, and the stipulation was entered into evidence as a court exhibit. Eight of the plaintiff's exhibits and four of the defendant's exhibits were agreed upon and received by the court as full exhibits. During trial, two witnesses testified: the plaintiff, and John Suchocki, former chief of police for the town of Windsor Locks. Both parties filed posttrial briefs.

On August 3, 2016, the court issued a memorandum of decision, in which it rendered judgment for the defendant after concluding that the plaintiff's action was barred both by the statute of limitations and the doctrine of laches. The court in its memorandum noted that the action involved the plaintiff's claim that the agreement included the retroactive purchase of pension credit for the pre-reinstatement period. The court also found that the "defendant has consistently denied having an obligation under the contract" to purchase the credit, and that the plaintiff learned in late 2002 or early 2003 that the defendant had not purchased the credit. The court in its memorandum stated that since then, the plaintiff had been in a dispute with the defendant and had engaged counsel to assist with his claim. After referencing both parties' inquiries to the retirement commission, the plaintiff in September, 2007, and the defendant in spring, 2010, the court then rejected the plaintiff's argument that the defendant's spring, 2010 inquiry constituted evidence that the defendant had not yet decided that it would not purchase the pension credit for the plaintiff. It found instead that the plaintiff

[4] Although the defendant has cited various statutory sections in its pleadings and posttrial brief, such discrepancies appear to reflect scrivener's errors, given that the defendant has consistently argued at trial and on appeal that the plaintiff's action is barred by the six year breach of contract statute of limitations.

had been aware since 2002 that the defendant "was refusing to make those contributions" pursuant to the agreement.

Turning to when the cause of action accrued, the court found that "[t]he plaintiff does not dispute that the defendant, if it had been required to make pension contributions, would have been making those monthly contributions from the time of his reinstatement in 1993. Under well established law, the plaintiff's ignorance until 2002 of the fact that those contributions were not being made, absent fraud which is not alleged here, does not save his action." Recognizing that there was "no basis in law" for a claim that the plaintiff's knowledge of the defendant's decision in late 2002 or early 2003 should operate as the accrual date, the court stated that even using that later date the plaintiff's action was still untimely.

With respect to the defendant's special defense of laches, the court found: "In this case, the plaintiff discovered for the first time in late 2002 or early 2003 that the defendant had not been making contributions to his retirement since his reinstatement. He did not file this action until 2014, nearly eleven years after he first learned of the alleged breach. The plaintiff cannot refute the defendant's claim that the delay is unreasonable and inexcusable. Moreover, the defendant has offered credible evidence that it would incur significantly larger damages in order to purchase pension credits at this time, compared to the costs it would have incurred had the plaintiff timely [filed] his claim."

The plaintiff filed a motion to reargue pursuant to Practice Book § 11-11, which the court denied on September 14, 2016. This appeal followed.

I

The plaintiff first claims that the trial court erroneously concluded that his action is barred by the six

year statute of limitations set forth in § 52-576. Specifically, he claims that the defendant had no obligation under the agreement to purchase the pension credit until October 10, 2017—the date on which the plaintiff became eligible to receive retirement benefits. He argues that "the town's October, 2013 refusal to honor its obligation to provide retirement benefits covering the pre-1993 period as required under the agreement (by failing to respond to plaintiff's counsel's second letter on the issue) is a repudiation of its promise to do so upon [the plaintiff's] future retirement."[5] In other words, the plaintiff claims that this action accrued in October, 2017, but that the defendant's October, 2013 repudiation permitted the plaintiff to proceed with his action under the theory of anticipatory breach. The defendant responds that "[t]he fact that pension benefits could not be realized until [the plaintiff's] 2009 retirement or 2017 eligibility is immaterial here, as the town would have been obligated to make monthly contributions toward pension funds throughout the entirety of its member's employment, creating a cause of action the first time it fails to do so. (Conn. Gen. Stat. Section 7-441)."[6] We first conclude that the factual finding underlying the court's conclusion that the action was time barred was clearly erroneous. Second, mindful that the statute of limitations is an affirmative defense that the defendant must prove by a preponderance of the evidence, we conclude that the defendant failed to meet its burden.

[5] We resolve the plaintiff's appeal on the ground that the defendant failed to carry its burden of proving that the action was commenced outside the statute of limitations or barred by the doctrine of laches. Our resolution of the appeal on these narrow grounds obviates the need for this court to address the question of when the plaintiff's cause of action accrued.

[6] Section 7-441 was recently amended by No. 17-107, § 1, of the 2017 Public Acts. These amendments have no bearing on the outcome of this appeal. All references in this opinion to § 7-441 are to the 2018 supplement of the General Statutes.

As an initial matter, we set forth the appropriate standard of review. "The question of whether a party's claim is barred by the statute of limitations is a question of law, which this court reviews de novo. . . . The factual findings that underpin that question of law, however, will not be disturbed unless shown to be clearly erroneous." (Internal quotation marks omitted.) *Nassra* v. *Nassra*, 180 Conn. App. 421, 435, A.3d (2018); accord *Travelers Casualty & Surety Co. of America* v. *Caridi*, 144 Conn. App. 793, 801, 73 A.3d 863 (2013). "[When] the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous. . . . A finding is clearly erroneous 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." (Citation omitted; internal quotation marks omitted.) *Gugliemi* v. *Willowbrook Condominium Assn., Inc.*, 151 Conn. App. 806, 811, 96 A.3d 634 (2014).

Both parties agree that the six year statute of limitations set forth in § 52-576 (a) applies in the present case. That statute provides: "No action for an account, or on any simple or implied contract, or on any contract in writing, shall be brought but within six years after the right of action accrues, except as provided in subsection (b) of this section." General Statutes § 52-576 (a). Our Supreme Court has previously recognized that "[o]rdinarily, a defendant must plead the failure to meet the applicable statute of limitations as an affirmative defense, and the defendant bears the burden of proving the elements of the defense by a preponderance of the evidence." *St. Paul Travelers Companies, Inc.* v. *Kuehl*, 299 Conn. 800, 815, 12 A.3d 852 (2011).

We next set forth the well settled law concerning when a breach of contract action accrues. "[I]n an action for breach of contract . . . the cause of action is complete at the time the breach of contract occurs, that is, when the injury has been inflicted. . . . Although the application of this rule may result in occasional hardship, [i]t is well established that ignorance of the fact that damage has been done does not prevent the running of the statute, except where there is something tantamount to a fraudulent concealment of a cause of action."[7] (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Tolbert* v. *Connecticut General Life Ins. Co.*, 257 Conn. 118, 124–25, 778 A.2d 1 (2001). "Applied to a cause of action, the term to accrue means to arrive; to commence; to come into existence; to become a present enforceable demand." (Internal quotation marks omitted.) *Bouchard* v. *State Employees Retirement Commission*, 328 Conn. 345, 369, 178 A.3d 1023 (2018). "While the statute of limitations normally begins to run immediately upon the accrual of the cause of action, some difficulty may arise in determining when the cause or right of action is considered as having accrued. The true test is to establish the time when the plaintiff first could have successfully maintained an action." (Internal quotation marks omitted.) *Amoco Oil Co.* v. *Liberty Auto & Electric Co.*, 262 Conn. 142, 153, 810 A.2d 259 (2002). "The phrase 'successfully maintain an action' refers to the time at which the facts exist (or allegedly exist) to establish the legal elements of the cause of action." *Bouchard* v. *State Employees Retirement Commission*, supra, 370.

In the present case, the trial court's legal conclusion that the statute of limitations barred the plaintiff's action was premised on its factual finding that "[t]he

[7] We note that the plaintiff does not claim that the statute of limitations was tolled by the continuing course of conduct doctrine or by the doctrine of fraudulent concealment.

plaintiff does not dispute that the defendant, if it had been required to make pension contributions, would have been making those monthly contributions from the time of his reinstatement in 1993. Under well established law, the plaintiff's ignorance until 2002 of the fact that those contributions were not being made, absent fraud which is not alleged here, does not save his action."[8] We conclude that this factual finding, in light of the evidence and the pleadings in the record, was clearly erroneous because there was no evidence in the record to support it. To the contrary, the plaintiff consistently represented to the trial court, beginning with the allegations of his complaint, that "[p]ension credits can be purchased retroactively at any time prior to the date the employee begins receiving retirement benefits." In his posttrial brief, the plaintiff repeated his claim that the defendant could have performed its obligation under the agreement by purchasing the pension credit at any time. Finally, in his motion to reargue, the plaintiff again argued that he "has not alleged that the town had a duty to purchase the credits in 1994. Rather, the plaintiff has alleged that the town must comply with the settlement agreement by restoring Bracken's retirement benefits for the period of September 13, 1987 through June 18, 1993 and that the town may retroactively purchase pension credits at any time prior to the date [Bracken] begins receiving retirement benefits."

On appeal, the plaintiff reiterates that the present dispute has "nothing to do with" monthly contributions made by the defendant to the retirement commission pursuant to § 7-441. The plaintiff argues, and we agree,

[8] On appeal, the defendant construes this statement contained in the trial court's memorandum as determining that if the plaintiff was entitled to pension credit for the pre-reinstatement period pursuant to the agreement, his "right of action would have accrued at the time of the breach, *that is in 1993*." (Emphasis added.) The defendant's position is untenable, given that the agreement was not executed until April 21, 1994.

that his recognition that the defendant had been making such contributions while he was employed as a police officer is unrelated to and does not weigh against his claim that the defendant was obligated, at any time until the date on which the plaintiff became eligible to receive retirement benefits, to purchase pension credit for the pre-reinstatement period.

We have independently examined the record and conclude that there is no evidentiary support for a factual finding that the alleged breach occurred upon the failure to make "monthly contributions" following the execution of the agreement. The defendant presented no testimonial evidence in support of its claim that any alleged breach of the agreement would have occurred the first time it failed to make a monthly contribution. The only witness for the defendant was Suchocki, who testified that he did not recall having any conversations with the plaintiff regarding the defendant's purchase of any pension credit on his behalf; he never spoke to the plaintiff about the credit; he was not aware of anyone communicating on behalf of the defendant to the plaintiff that the defendant would not be purchasing the credit; he did not believe that he made any representations to the plaintiff that the defendant would purchase the credit when he retired and that he did not have "the authority to do that"; the decision as to whether to purchase the credit would not have been his; he was unaware of any decision by the board of selectmen or the police commission as to whether or not to purchase the credit; and he was aware the defendant was making inquiries in the spring of 2010 regarding the cost of purchasing the credit during a grievance proceeding related to the termination of the plaintiff's employment, but he did not know what happened to that settlement.

The defendant argues that "the crux of the decision came down to the issue of the credibility of the two witnesses," and that the trial court found Chief

Suchocki's testimony credible and the plaintiff's testimony not credible. The plaintiff responds that the court did not expressly make credibility findings, and that the credibility issues raised by the defendant are not relevant to the appeal. The record reveals that the plaintiff testified that when he inquired of Suchocki after learning that the defendant had not purchased the pension credit, Suchocki told him that "they would make me whole when I was ready to retire." Suchocki denied having any such conversation, and the trial court properly could have credited Suchocki's testimony on this point. See *Martinez* v. *Commissioner of Correction*, 147 Conn. App. 307, 324, 82 A.3d 666 (2013) ("we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude" [internal quotation marks omitted]), cert. denied, 311 Conn. 917, 85 A.3d 652 (2014). The core of Suchocki's testimony, however, was that he had no involvement in and was not aware of any decision as to whether the defendant would purchase the pension credit, and therefore, his testimony provides no support for the defendant's argument that the alleged breach would have occurred upon the failure to make a monthly contribution.

Moreover, the defendant produced no documentary evidence to support its statute of limitations defense. To the contrary, the only documentary evidence addressing the method for retroactive purchase of pension credit for the plaintiff consisted of communications between the defendant and the retirement commission in 2010. The trial court found that the defendant made inquiries in the spring of 2010 regarding purchasing the pension credit for the pre-reinstatement period as part of settlement discussions. The retirement commission informed the defendant that it could purchase pension credit for the plaintiff for the pre-reinstatement period at a cost of $99,316. The letter further informed the

defendant that the calculation would be effective through May 1, 2010, and that if the defendant "does not purchase the service within this one-year period a new calculation will be required."

The trial court rejected the plaintiff's claim that the inquiry to the retirement commission constituted evidence that the defendant had not, by that point, decided that it would not provide retirement benefits to the plaintiff. The court's rejection of the evidentiary significance ascribed by the plaintiff, however, does not bear on the status of the record. That is, the commission's response, calculating the cost of the pension credit should the defendant wish to purchase it in the spring of 2010 is the only evidence in the record as to any process for the retroactive purchase of credit, and it provides no support for the defendant's claim that the defendant "would have been obligated to make monthly contributions . . . creating a cause of action the first time it fails to do so."

The defendant cites § 7-441 as support for its argument that its "obligation is to make monthly contributions while an employee works for the town and participates" in CMERS. The plaintiff recognizes that § 7-441 requires monthly payments for " '[m]embers,' " which the statute defines, with certain exceptions, as "any regular employee or elected official receiving pay from a participating municipality . . . who has been included by such municipality in the pension plan as provided in [§] 7-427 . . . ." General Statutes § 7-425 (5). The plaintiff argues, however, that he was not a member of CMERS during the pre-reinstatement period and that "the defendant obviously did not and could not make retirement contributions for him during that time frame." The plaintiff claims that after his "reinstatement on June 19, 1993 until his employment ended on November 19, 2009, he was a member of [CMERS]

and the defendant made monthly retirement contributions for him as required by the statute. . . . The issue here has nothing to do with those monthly contributions; it is about at what point in time the defendant had to purchase credits for the designated period prior to the time [the plaintiff] was reinstated as an active employee."

We agree with the plaintiff that § 7-441 does not provide support for the defendant's claim that the cause of action for breach of the settlement agreement would have accrued upon the failure to make a monthly payment.[9] Section 7-441 (c) provides in relevant part: "All participating municipalities shall pay monthly to the Retirement Commission to be credited to the fund such proportion of the pay of all members employed by such municipality as is determined from time to time by the Retirement Commission on sound actuarial principles to be necessary in addition to the contributions by members to provide future pensions based on service rendered by members subsequent to the effective date of participation as defined in section 7-427 other than the

[9] The defendant argues that the plaintiff misstates the defendant's obligations under the retirement system and contends that it "does not provide or administer retirement benefits." Although the plaintiff at times has characterized his claim as one for "retirement benefits," he specifically sought, in his prayer for relief, "[a]n order directing the defendant to perform the contract by purchasing pension credits for the plaintiff covering the period of September 13, 1987 through June 18, 1993." He further indicated in his appellate brief: "As an administrative and practical matter, in order to provide Bracken with retirement benefits pursuant to the town's pension plan with CMERS, the town must purchase the pension credits through CMERS based on an employee's accrued service."

At oral argument before this court, the plaintiff's counsel represented that the plaintiff had turned fifty-five in October, 2017, and had begun receiving pension benefits. He further represented that in the event the judgment for the defendant was reversed, the plaintiff would seek to amend its prayer for relief to seek damages, rather than specific performance, in order to make up the difference between the retirement benefits the plaintiff is currently receiving and the benefits he would have received had the defendant purchased the pension credit for the pre-reinstatement period.

excess pensions referred to in subsection (b) of this section. . . .'' The defendant does not direct this court to any provision of the statute addressing the procedure for the retroactive purchase of pension credit, pursuant to a settlement agreement, covering a period of time prior to that employee's reinstatement.[10]

Accordingly, we conclude that the court's central finding that ''[t]he plaintiff does not dispute that the defendant, if it had been required to make pension contributions, would have been making those monthly contributions from the time of his reinstatement in 1993'' is clearly erroneous because there is no evidence in the record to support it. ''A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'' (Internal quotation marks omitted.) *Noroton Properties, LLC* v. *Lawendy*, 154 Conn. App. 367, 378, 107 A.3d 980 (2014); see also *Tobet* v. *Tobet*, 119 Conn. App. 63, 70, 986 A.2d 329 (2010) (where this court's review of the transcript revealed that no evidence as to the cost of tuition and board at University of Connecticut at Storrs was provided to the court, court's finding that the tuition and board was ''$16,000 or $17,000'' was clearly erroneous). We further conclude that because the evidence adduced at trial did not support the defendant's claim that the statute of limitations began to run upon its failure to make a monthly contribution, the defendant has failed to meet its burden of proof on its statute of limitations special defense.

[10] Neither party argues that the date the plaintiff discovered that the defendant had not yet purchased the pension credit serves as the accrual date for the plaintiff's action, and the trial court correctly recognized that ''there is no basis in law'' for any claim that the plaintiff's discovery in 2002 or 2003 that the defendant had not yet purchased the credit could serve as the accrual date.

II

The plaintiff next claims that the court erroneously concluded that his action was barred by the doctrine of laches. Specifically, he claims that he did not inexcusably delay filing suit and that the defendant failed to prove that the alleged delay has caused undue prejudice. We conclude that the defendant failed to meet its burden of proving that the elements of the doctrine of laches had been satisfied.

We first note the standard of review. "The defense of laches, if proven, bars a plaintiff from seeking equitable relief in a case in which there has been an inexcusable delay that has prejudiced the defendant. . . . First, there must have been a delay that was inexcusable, and, second, that delay must have prejudiced the defendant. . . . A conclusion that a plaintiff has been guilty of laches is one of fact for the trier and not one that can be made by this court, unless the subordinate facts found make such a conclusion inevitable as a matter of law. . . . We must defer to the court's findings of fact unless they are clearly erroneous. . . . Whether the defense of laches was applicable to this action, however, is a question of law. When there is a question of law, our review of the court's decision is plenary." (Citation omitted; internal quotation marks omitted.) *Florian* v. *Lenge*, 91 Conn. App. 268, 281, 880 A.2d 985 (2005). "[T]he burden is on the party alleging laches to establish that defense." (Internal quotation marks omitted.) *Lynwood Place, LLC* v. *Sandy Hook Hydro, LLC*, 150 Conn. App. 682, 690, 92 A.3d 996 (2014); see also *Price* v. *Independent Party of CT—State Central*, 323 Conn. 529, 544, 147 A.3d 1032 (2016).

The trial court, in support of its conclusion that the doctrine of laches barred the plaintiff's action, stated: "In this case, the plaintiff discovered for the first time in late 2002 or early 2003 that the defendant had not

been making contributions to his retirement since his reinstatement. He did not file this action until 2014, nearly eleven years after he first learned of the alleged breach. The plaintiff cannot refute the defendant's claim that the delay is unreasonable and inexcusable. Moreover, the defendant has offered credible evidence that it would incur significantly larger damages in order to purchase pension credits at this time, compared to the costs it would have incurred had the plaintiff timely [filed] his claim."

The plaintiff first argues that "[t]he trial court's finding that the action is barred by the doctrine of laches was premised on the court's erroneous conclusion that the plaintiff could have maintained a cause of action in 2002 or 2003 when he first learned that the defendant had not purchased pension credits covering the period identified in the settlement agreement—despite the defendant having no obligation to provide him with retirement benefits until 2017 and the town not yet having repudiated its obligation to do so." We agree that the trial court's determination that the delay was unreasonable and inexcusable was premised on its erroneous factual finding that the alleged breach occurred upon the failure to make a monthly contribution, as shown by its statement that the plaintiff learned in 2002 or 2003 that "the defendant had not been making contributions to his retirement *since his reinstatement*." See part I of this opinion.

The plaintiff further claims that the defendant has failed to prove that the alleged delay has caused undue prejudice and argues that the trial court's finding that the defendant would incur significantly larger damages in order to purchase the pension credit at this time is unsupported by any evidence. The plaintiff claims that the "only evidence in the record concerning the costs associated with purchasing the pension credits" is the letter from the retirement commission dated April 29,

2010, indicating that a payment in the amount of $99,316 would be necessary to purchase the additional pension credit. The plaintiff claims that although the letter reflected that a new calculation would be required if the defendant declined to purchase the credit within one year and that it indicated an interest adjustment would be required up until the date of payment, there was no evidence that the "apparent increase would unduly prejudice the defendant." He further argues that "[t]he defendant presented no evidence concerning the relative cost of purchasing the pension credits in 1994 as opposed to in 2014 when this action was filed."

The defendant, in its three sentence response in its brief on appeal, generally asserts that the lapse of time would unduly prejudice the defendant; cf. *Lynwood Place, LLC* v. *Sandy Hook Hydro, LLC*, supra, 150 Conn. App. 691 ("[a] mere lapse of time does not constitute laches unless it results in prejudice to the defendants" [internal quotation marks omitted]); and repeats the trial court's challenged finding. The defendant does not direct this court to any evidence in the record that supports the challenged finding underlying the court's prejudice determination. Moreover, our independent review of the record reveals that the defendant presented no evidence, beyond the April 29, 2010 letter, as to the relative cost of purchasing the pension credit. Accordingly, we conclude that the trial court's finding that the defendant was prejudiced is clearly erroneous because it is not supported by evidence in the record. Because the defendant failed to show prejudicial delay, the court incorrectly concluded that it had established the defense of laches. See *Cifaldi* v. *Cifaldi*, 118 Conn. App. 325, 336, 983 A.2d 293 (2009); see also *Burrier* v. *Burrier*, 59 Conn. App. 593, 597, 758 A.2d 373 (2000) (holding that trial court incorrectly concluded that laches barred the plaintiff from seeking the relief she requested after it concluded that prejudicial delay had

not been established where defendant failed to offer evidence concerning prejudice).

In its memorandum of decision, the trial court did not reach the merits of the plaintiff's claims because it concluded that the action was barred by the statute of limitations and the doctrine of laches. Accordingly, we remand this case to the trial court to decide the merits of the plaintiff's claims.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

BARBARA B. HAMBURG *v.* JEFFREY R. HAMBURG (AC 38225)

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

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved pursuant to a foreign dissolution judgment, appealed to this court from the judgments of the trial court ordering him to pay to the substitute plaintiff, R, the temporary administrator of the estate of the deceased plaintiff, certain funds that the defendant had misappropriated from his children's education accounts, and granting the motion to intervene filed on behalf of his daughter, A. The foreign dissolution judgment and a subsequent stipulated agreement both required the defendant to place funds for the children's education into certain accounts. R filed an application for order to show cause as to why an order should not enter that the defendant, inter alia, make payments to R to reimburse funds the defendant had misappropriated from the children's education accounts. Subsequently, the defendant filed a motion to dismiss, in which he claimed that R lacked standing and, therefore, that the court lacked subject matter jurisdiction over that portion of the action. The trial court denied the defendant's motion to dismiss, granted in part R's application for order to show cause, and ordered the defendant to make payments on the debt owed to the children. On appeal, the defendant claimed that the trial court improperly determined that because he previously had failed to challenge R's standing at the time R filed a motion to be substituted as the party plaintiff, he could not oppose the application for an order to show case on the ground of standing. *Held*:

1. The trial court improperly denied the defendant's motion to dismiss filed in response to R's application for order to show cause, that court having erroneously concluded that R had standing to prosecute an action for the repayment of the funds that the defendant took from the children's education accounts: that court improperly determined that because the defendant did not object to R's motion to be substituted as the plaintiff, he was precluded from questioning R's standing to pursue the moneys owed the children, as the issue, at the time R filed the motion to be substituted as the plaintiff, was whether R had standing to pursue the decedent's claims against the defendant that had been reduced to judgment, whereas the standing issue raised by the application for order to show cause concerned whether R, on behalf of the decedent's estate, could pursue the children's claims against the defendant, which had not previously been raised or litigated, and, therefore, the defendant properly raised the issue of standing, which may be raised at any time; moreover, R failed to demonstrate standing with respect to the moneys the defendant owed the children, as R did not point to any evidence presented demonstrating a personal and direct interest in the money the defendant owed his children, R did not claim the existence of a fiduciary relationship with the children, and the court made no factual finding that R had a direct and personal interest in the moneys or the right to collect the funds on behalf of the children, unlike the direct interest R had in the money the defendant owed the decedent.
2. The trial court properly granted the motion to intervene filed on behalf of A: the evidence in the record showed that A, who had reached the age of majority, had a direct and personal interest in having the defendant reimburse her education funds, as the separation agreement and the subsequent stipulated agreement both provided that the children were to be the beneficiaries of certain accounts intended to fund their educational expenses through postsecondary school, the stipulated agreement further provided that any remaining funds in the account were to be divided between the children equally once they graduated from college, and no other party had standing to pursue repayment from the defendant of the funds he took from the education accounts for his own use; moreover, the defendant failed to establish his claim that the motion to intervene should have been denied because it was not timely, and he failed to show that he was prejudiced by the court's granting of A's motion to intervene to obtain the moneys he took from her education account.

Argued January 3—officially released June 5, 2018

Procedural History

Action to enforce a foreign judgment of dissolution, brought to the Superior Court in the judicial district of New Haven, where the court, *Abery-Wetstone*, *J.*,

rendered a modified judgment in accordance with an agreement of the parties; thereafter, the court, *Abery-Wetstone*, *J.*, granted the motion to substitute Richard Beach, the temporary administrator of the estate of the named plaintiff, as the plaintiff; subsequently, the court, *Emons*, *J.*, denied the defendant's motion to dismiss the substitute plaintiff's motion to show cause for the defendant's failure to comply with certain orders and granted in part the substitute plaintiff's motion to show cause, and the defendant appealed to this court; thereafter, the court, *Emons*, *J.*, granted the motion to intervene filed by Barbara A. Hamburg, and the defendant filed an amended appeal with this court; subsequently, the court, *Emons*, *J.*, denied the defendant's motion for an articulation. *Reversed in part; judgment directed in part; further proceedings*.

Chris R. Nelson, for the appellant (defendant).

Richard W. Callahan, for the appellees (substitute plaintiff and intervening plaintiff).

Opinion

LAVINE, J. In this protracted postmarital dissolution action, the defendant, Jeffrey R. Hamburg, appeals from the judgments of the trial court (1) ordering him to pay to the estate of the deceased plaintiff, Barbara B. Hamburg (decedent), funds he had misappropriated from his children's education accounts, and (2) granting the motion to intervene filed on behalf of his daughter, Barbara A. Hamburg (Ali). On appeal, the defendant claims that the court improperly (1) denied his motion to dismiss for lack of subject matter jurisdiction and (2) granted the motion to intervene. We agree that the trial court erred when it denied the defendant's motion to dismiss but conclude that it properly granted Ali's motion to intervene. We, therefore, reverse in part and affirm in part the judgments of the trial court.

A lengthy factual and procedural history underlies the defendant's appeal. The decedent and the defendant were married in March, 1989, and had two children: a son, Madison Hamburg, born in 1991, and a daughter, Ali, born in 1993. In 2001, the decedent commenced an action for dissolution of marriage in the Superior Court of Fulton County, Georgia, where the decedent and the defendant reached an agreement (separation agreement) that was incorporated in the Georgia court's September 5, 2002 judgment dissolving their marriage. Among other things, the judgment required the defendant to pay the decedent alimony and child support and to place funds for the children's education in certain accounts.[1]

On April 5, 2005, the decedent filed a certified copy of the Georgia dissolution judgment in our Superior Court pursuant to General Statutes § 46b-71,[2] and the trial court domesticated the Georgia judgment. The decedent and the defendant subsequently filed numerous motions for contempt in which they claimed, primarily, that the other had failed to comply with his or her financial obligations under the separation agreement. On March 6, 2009, the court, *Markle, J.*,

[1] In addition, the defendant agreed to maintain life insurance "in an amount equal to the remaining balance of his minimum obligations for child support . . . . Said insurance policy or policies shall remain in full force and effect, naming [the decedent] and the minor children as beneficiary, until [the defendant] has no further financial obligation for any child . . . ."

With respect to the children's education funds, the decedent and the defendant agreed that each of them "shall maintain any and all custodial accounts held in his or her individual name for the benefit of the children. Said accounts shall be used only for the educational expenses of the children . . . . Notwithstanding the foregoing, [the defendant] shall not utilize said custodial accounts for payment of his child support obligation . . . . Each party shall provide the other party a copy of the statement for all custodial accounts in which he or she is custodian on a quarterly basis."

[2] General Statutes § 46b-71 (a) provides in relevant part: "Any party to an action in which a foreign matrimonial judgment has been rendered, shall file, with a certified copy of the foreign matrimonial judgment, in the court in this state in which enforcement of such judgment is sought . . . ."

issued a memorandum of decision with respect to the parties' postjudgment motions. The court found that the defendant was in wilful violation of the dissolution judgment that required him to pay the decedent $2000 per month for child support for the period of October, 2007, through February, 2009. The child support arrearage was $32,000 at that time. The court ordered the defendant to pay the decedent $16,000 on or before March 31, 2009, and to pay the decedent an additional $1000 a month in child support until the arrearage was paid.The court, however, denied the defendant's motion to modify his child support obligation, after finding that there had been no substantial change downward in his financial circumstances. In fact, the court found that his income had increased. With respect to the decedent's motion for contempt for the defendant's failure to pay educational and medical expenses for the children, the court ordered the decedent and the defendant to family relations for mediation.[3]

During a hearing on June 4, 2009, Judge Markle heard evidence that, in 2005, there was $150,000 in the education account of each child. On the date of the hearing, the defendant testified that there was then remaining $10,050 in Madison Hamburg's account and $23,000 in Ali's account. He also testified that he had taken the children's funds for his own use. The court again found the defendant in contempt and ordered him incarcerated until he paid $8000 to purge the contempt.

On November 24, 2009, the decedent and the defendant appeared before the court on a motion for contempt and a motion to modify the dissolution judgment

[3] On May 14, 2009, Judge Markle ordered the defendant to pay the decedent certain counsel fees and to provide counsel for the decedent with seven years' worth of records regarding the children's education funds. On June 3, 2009, the court found the defendant in wilful contempt for failing to produce records regarding the education funds, and for failing to make any payments for current child support and toward the arrearage owed the decedent.

that had been filed by the decedent. The documents presented to the court demonstrated that the defendant had taken funds from the children's education accounts for his personal use. After he was advised by counsel, the defendant invoked his right to remain silent. At the request of the parties, the court continued the matter to permit the decedent and the defendant to negotiate a settlement.

On December 23, 2009, the court, *Abery-Wetstone*, *J.*, opened the judgment of dissolution, and accepted a stipulation (2009 stipulation) from the decedent and the defendant that modified portions of the separation agreement, particularly custody and their respective financial obligations.[4] The 2009 stipulation required the

[4] The relevant portions of the 2009 stipulation provided in part:

"1. . . .

"b. The defendant shall pay to the [decedent] the sum of $245 per week . . . for the benefit of the minor child [Ali] . . . .

"c. The [decedent] shall open an account for the benefit of the minor children. The account shall be used to pay for the educational expenses of the minor children, through postsecondary school, excluding any graduate studies. Once both children have graduated from college, the balance of any funds in the account shall be divided between the children 50/50.

"d. The defendant shall pay to the [decedent] $324,000, plus 4 [percent] interest per annum, until the sum is paid in full. [The decedent] shall deposit the payments received into the account referenced above for the benefit of the minor children. The defendant shall pay the $324,000 plus interest at the following nonmodifiable rate . . . .

"i. The defendant shall maintain, until all financial obligations to the [decedent] and children under the judgment and orders of the court are paid in full, life insurance in the amount of $600,000, name the [decedent] and the minor children as irrevocable, equal beneficiaries. . . .

"2. Defendant owes the [decedent] the following additional sums:

"a. $30,000 in child support arrears;

"b. $30,000 in attorney fees and costs;

"c. $25,000 toward unreimbursed medical and health related expenses; and,

"d. $25,000 toward the tuition costs for the parties' son for the payment due in January.

"e. $41,000 toward educational costs for [the] children paid by [the decedent]. . . .

"5. These orders are domestic support orders, and are in the nature of support, and are nondischargeable in bankruptcy. Defendant shall hold the

defendant to make payments on the arrearage owed the decedent pursuant to a court-ordered schedule. The court ordered the decedent and the defendant to appear in court periodically so it could monitor the defendant's compliance with the 2009 stipulation. On February 3, 2010, during a compliance hearing, the defendant, who previously had invoked his right to remain silent with respect to the children's education funds, did so again. The court found that the defendant had the ability to pay the sums ordered under the 2009 stipulation and found him in wilful contempt for failing to pay. The court ordered him to reinstate his life insurance policy and provide the decedent with proof of the policy's beneficiaries. The court warned the defendant that if he failed to comply with its orders, he would go to jail.

The defendant and counsel for the parties appeared in court on March 3, 2010, but the decedent did not. She later was discovered at her home, murdered. On March 12, 2010, Richard Beach, the temporary administrator of the decedent's estate, filed a motion to be substituted as the party plaintiff (substitute plaintiff).[5] The defendant voiced no objection to the motion to substitute, and Judge Abery-Wetstone granted it on March 17, 2010. At the time, however, the court questioned whether the children should have counsel to protect their rights under the 2009 stipulation. Counsel for the estate did not agree that the children needed

[decedent] harmless and indemnify the [decedent] for any and all expenses and fees she incurs to respond to any bankruptcy petition by the defendant."

The court canvassed the parties and each of them stated that the 2009 stipulation was fair, reasonable, and in the best interests of their children. Note that in December, 2009, Madison Hamburg was eighteen.

[5] At trial and on appeal, the parties use the terms substitute plaintiff and decedent's estate interchangeably. Because an estate is not a legal entity; see *Estate of Rock* v. *University of Connecticut*, 323 Conn. 26, 32, 144 A.3d 420 (2016); and the substitute plaintiff was acting in a representative capacity on behalf of the estate, we refer to the substitute plaintiff in this opinion. See *Silver* v. *Holtman*, 114 Conn. App. 438, 443, 970 A.2d 740 (2009) (fiduciary of estate has standing in representative capacity to assert rights of estate).

their own counsel. At that time, the defendant's bankruptcy counsel informed the court that the defendant had, that day, filed a petition in bankruptcy.

On March 24, 2010, the defendant and the substitute plaintiff appeared before Judge Markle to enter into an agreement (2010 agreement).[6] The court approved the 2010 agreement.[7]

Between April 23, 2010, and February 1, 2012, the defendant and the substitute plaintiff appeared in court many times for compliance hearings.[8] On November 7, 2011, the substitute plaintiff filed a motion for contempt

[6] The 2010 agreement provided in part:

"[1.] The parties agree that the court has *continuing jurisdiction over compliance* with the orders of the court. . . .

"4. The parties agree that under paragraph 1 (d) of the 12/23/09 order, the payment shall be reduced to $4500 ($1,061.67 shall be paid as current child support, which the substitute plaintiff shall use for the benefit of the minor child, and deliver to any guardian [of the minor child] once appointed by the probate court; and $3,438.33 to be applied toward the replenishment of the $324,000 debt owed to [Uniform Gifts to Minors Act]), subject to a final accounting. . . .

"7. The defendant shall immediately apply for life insurance in an amount required by the court order with at least 5 insurance companies within 7 days. He shall bring proof of the applications to the next court date. . . .

"10. All other orders, not herein modified shall remain in full force and effect.

"11. All outstanding discovery orders shall be complied with by 3/31/10." (Emphasis added.)

[7] At the time the court accepted the 2010 agreement, Judge Markel stated for the record: "First and foremost, pursuant to the first agreement that the parties agree that the court has continuing jurisdiction over *compliance* with the prior court orders entered by this court. . . . After reviewing that law, the court finds that it can accept the agreement of the parties that the court has continuing jurisdiction over the *compliance* of the outstanding court orders on this date." (Emphasis added.)

[8] On July 29, 2011, and again on May 2, 2012, the state charged the defendant with larceny in the first degree for his misappropriation of the children's education funds. See *State* v. *Hamburg*, N23N-CR-11-0121767-S, and *State* v. *Hamburg*, N23N-CR-12-0128767-S. The trial court in the criminal matters, *Keegan*, *J.*, permitted the defendant to enter the accelerated rehabilitation program on September 10, 2013, and further ordered him to comply with the family court orders for repayment within twenty-four months.

against the defendant, which was heard by the court, *Conway*, *J.*, on February 1, 2012. During the hearing, the substitute plaintiff represented that the defendant had not repaid any of the moneys he had taken from the children's education funds. The court found the defendant in contempt and ordered him committed to the custody of the Commissioner of Correction and that he pay $50,000 to purge the contempt. On April 18, 2012, the substitute plaintiff agreed to have the record reflect that $20,000 had been tendered toward the $50,000 purge amount, and requested that the court stay the order of incarceration. The court, *Gould*, *J.*, ordered the defendant released from incarceration and that he not leave either Connecticut or New York without a court order.[9] On June 5, 2012, Judge Gould also ordered the defendant to continue to pay the estate $500 per week toward the remaining $30,000 purge amount. The defendant did not comply.

On March 12, 2015, the substitute plaintiff filed an application for order to show cause why an order should not enter that the defendant (1) reimburse the estate for the fees and costs it incurred to defend the bankruptcy action; (2) commence making payments on the debt owed to the children; and (3) provide proof that he is maintaining life insurance to secure the judgment debt. On May 13, 2015, in response to the substitute plaintiff's application for order to show cause, the defendant filed a motion to dismiss, claiming that the substitute plaintiff lacked standing and, therefore, the court lacked subject matter jurisdiction over that portion of the action.

In his memorandum of law in support of his motion to dismiss, the defendant argued with respect to the claims made in the application for order to show cause that the substitute plaintiff had failed to demonstrate why his "obligations" inure to its benefit and how the substitute plaintiff is aggrieved by his actions or inactions in the context of the present case. He argued

[9] The defendant resided on Park Avenue in New York City.

that the substitute plaintiff is neither classically nor statutorily aggrieved by the debt he owes the children and his failure to procure life insurance. The defendant also argued that the substitute plaintiff lacks standing to pursue a claim against him for the claimed attorney's fees and costs to defend the bankruptcy proceeding. Moreover, the defendant argued that the substitute plaintiff could not rely on the 2010 agreement and related court order, as the order was improper and void as a matter of law. More specifically, the defendant argued that upon the decedent's death, the court lacked subject matter jurisdiction to enter an order approving the 2010 agreement.

The substitute plaintiff objected to the motion to dismiss on the grounds that "(1) [the] [s]ubstituted plaintiff is [a] proper party; (2) [r]es judicata/collateral estoppel; (3) [the] [s]ubstituted party has interests; [and] (4) [p]ublic policy." On June 17, 2015, the court, *Emons*, *J.*, denied the defendant's motion to dismiss after finding that the "children's claim to the money is solely through the estate."[10] The court scheduled a hearing on the merits of the application to show cause.

[10] In denying the defendant's motion to dismiss, the court stated that it has a legal and equitable interest in enforcing its orders. Although the children are no longer minors and the decedent is no longer alive, the order "was in the form of [the 2009 stipulation] for the benefit of the children. The children's claim to the money is solely through the estate." The defendant has not done what he promised to do and was ordered to do pursuant to the 2009 stipulation. The 2009 stipulation carries out a previous court order regarding postsecondary education expenses for the children. The 2009 stipulation gave rights to the decedent for the benefit of the children, one of whom was eighteen years old at the time.

The court also stated that the defendant previously had an opportunity to litigate whether the estate had an interest in the matter at the time Judge Abery-Wetstone ruled on motion 172 to substitute the temporary administrator of the estate. The court found that the estate has used other moneys to pay the educational expense of the children to its detriment and to their detriment.

The court also found that there was "a follow-up motion . . . agreement . . . dated March 24, 2010, where . . . the estate and [the defendant] agreed that the court has continuing jurisdiction over this case." Despite the defen-

On July 14, 2015, the defendant filed an objection to the substitute plaintiff's application for order to show cause in which he claimed that he was sixty-six years old, has a debilitating back injury, was unemployed, and did not have the financial ability to pay the funds requested by the substitute plaintiff. He also claimed that the substitute plaintiff's request is not enforceable on the ground of laches, his obligation to pay funds to the estate ended when the children reached the age of majority, and the substitute plaintiff had no authority to prosecute a motion on behalf of the children. The defendant also objected to the use of any funds intended to benefit the children to pay the counsel fees of the estate. Judge Emons again found that the estate, through the substitute plaintiff, had standing to pursue the judgment debt and, on July 14, 2015, ordered the defendant to pay to counsel for the estate $500 per week to be applied toward the $324,000 plus 4 percent annual interest that the defendant owed the children. The court ordered counsel for the estate to place the moneys the defendant paid in a trust account until further order of the court. The defendant appealed from the judgment on August 3, 2015.[11]

On September 9, 2015, counsel for the estate filed a motion to intervene on Ali's behalf for the limited purpose of asserting her rights and interests "in the enforcement of court orders related to the [Uniform Gifts to Minors Act] funds that are the subject of this court's jurisdiction."[12] The defendant objected to Ali's motion

dant's argument that the 2010 agreement is void, the defendant has adhered to part of the agreement but not to other parts. For the foregoing reasons, the court denied the defendant's motion to dismiss.

[11] On his appeal form, the defendant stated that he was appealing from the postjudgment order of "7/14/2015," as well as the denial of his motion to dismiss.

[12] No trial court made a finding as to the nature of the custodial accounts that held the moneys intended for the children's education. The 2009 stipulation makes reference to a custodial account into which the decedent was to place funds for the children's education. At the time, one of the children had already turned eighteen.

to intervene as a matter of right on the ground that she lacked standing to do so and argued that she cannot satisfy the intervention test set forth in *Kerrigan* v. *Commissioner of Public Health*, 279 Conn. 447, 456–57, 904 A.2d 137 (2006). He further argued that, although he does not agree that the substitute plaintiff has standing to recoup the funds he took from the children's education accounts, given the court's ruling on the application for order to show cause, he claimed that Ali's interest in the funds was being represented adequately by the estate and, therefore, Ali did not need to be made a party. He also argued that by permitting Ali to intervene, multiple parties would be pursuing him for the moneys he took from the children's education fund. Judge Emons granted Ali's motion to intervene. The defendant amended his appeal to challenge the court's granting of Ali's motion to intervene.

On appeal, the defendant claims that (1) the substitute plaintiff lacks standing to prosecute the present action for repayment of moneys he owes the children and (2) Ali failed to demonstrate that she has a direct and substantial interest in the case and, therefore, she also lacks standing. Standing is at the core of each of the defendant's claims.[13] We agree with the defendant that the substitute plaintiff lacks standing to prosecute repayment of the children's education funds and, therefore, the court improperly denied the motion to dismiss and granted the application for order to show cause requiring him to make payments to counsel for the estate to reimburse the moneys he owes the children. We conclude, however, that the court properly granted

[13] In the separation agreement, the parties agreed that the application and interpretation of said agreement shall be governed by the laws of Georgia. The choice of law provision dictates matters of substance, but procedural issues such as the standard of review are governed by Connecticut law. *Ferri* v. *Powell-Ferri*, 326 Conn. 438, 447, 165 A.3d 1137 (2017). "The issue of standing is also a procedural issue and is, therefore, governed by Connecticut law." Id.

Ali's motion to intervene, as she has a direct interest in the repayment of the education funds, but that she must assert her rights against the defendant in the civil, not family, court.

We begin by setting forth the legal principles regarding standing. "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. . . . [When] a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause. . . . We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . In addition, because standing implicates the court's subject matter jurisdiction, the issue of standing is not subject to waiver and may be raised at any time. . . .

"Because lack of standing implicates the trial court's subject matter jurisdiction, it is properly raised by way of a motion to dismiss. . . . Our standard of review of a trial court's findings of fact and conclusions of law in connection with a motion to dismiss is well-settled. A finding of fact will not be disturbed unless it is clearly erroneous. . . . [If] the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts . . . . Thus, our review of the trial court's ultimate legal conclusion and resulting [denial] of the motion to dismiss will be de novo." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Property Asset Management, Inc.* v. *Lazarte*, 163 Conn. App. 737, 745–46, 138 A.3d 290 (2016).

"A motion to dismiss [for lack of standing] . . . properly attacks the jurisdiction of the court, essentially

asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . .

"Standing is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented." (Citations omitted; internal quotation marks omitted.) *Emerick* v. *Glastonbury*, 145 Conn. App. 122, 127–28, 74 A.3d 512 (2013), cert. denied, 311 Conn. 901, 83 A.3d 348 (2014).

"The requirement of directness between the injuries claimed by the plaintiff and the conduct of the defendant also is expressed, in our standing jurisprudence, by *the focus on whether the plaintiff is the proper party to assert the claim at issue*." (Emphasis added.) *Ganim* v. *Smith & Wesson Corp.*, 258 Conn. 313, 347, 780 A.2d 98 (2001). "The plaintiff bears the burden of proving subject matter jurisdiction, whenever and however raised." (Internal quotation marks omitted.) *Emerick* v. *Glastonbury*, supra, 145 Conn. App. 128.

I

The defendant first claims that the court erroneously concluded that the substitute plaintiff has standing to prosecute an action for repayment of the funds he took from the children's education accounts. He argues, among other things, that the court improperly denied his motion to dismiss by concluding that the defendant had a prior opportunity to raise his lack of standing claim at the time the temporary administrator filed his motion to be substituted as the party plaintiff. He also

argues that the substitute plaintiff failed to prove that he was authorized to act on behalf of the children. We agree.

A

The defendant claims that the court improperly determined that, because he previously had failed to challenge the standing of the substitute plaintiff at the time he filed a motion to be substituted as the party plaintiff, the defendant could not oppose the application for order to show cause on the ground of standing. We agree because, at the time the substitute plaintiff filed a motion to be substituted, the issue was whether he had standing to pursue the decedent's claims against the defendant that had been reduced to judgment. The standing issue raised by the application for order to show cause is whether the substitute plaintiff may pursue the children's claims against the defendant.

In his motion to dismiss, the defendant argued that the substitute plaintiff had failed to demonstrate in its application for order to show cause why his "obligations" inure to the benefit of the substitute plaintiff and how the substitute plaintiff, acting on behalf of the estate, is aggrieved by his actions or inactions in the context of the present case, i.e., the moneys owed to the children. In other words, he claimed that the substitute plaintiff had failed to demonstrate that he was either statutorily or classically aggrieved.

In opposing the defendant's motion to dismiss, the substitute plaintiff argued on the ground of collateral estoppel that because the defendant did not object to his motion to be substituted as the party plaintiff in March, 2010, the defendant was precluded from questioning the substitute plaintiff's standing to pursue the moneys owed the children. Judge Emons agreed with the substitute plaintiff, stating that the defendant "had ample opportunity to litigate the issue as to whether

or not there was standing of the estate" when Judge Abery-Wetstone heard and ruled on the motion to substitute. Unlike the issue in the application for order to show cause, however, the issue before Judge Abery-Wetstone was whether the substitute plaintiff had standing to pursue compliance with the court's orders regarding the decedent and her estate, not the children's right to their education funds. At the time the motion to substitute the party plaintiff was granted, there was a judgment against the defendant for the tens of thousands of dollars in past due alimony and child support he owed the decedent. In its application for order to show cause, the substitute plaintiff, on behalf of the decedent's estate, was pursuing the defendant for the judgment debt he owed the children for the moneys he took from their respective education funds. As we discuss in part I B of this opinion, the substitute plaintiff lacked standing to enforce the judgment related to the children's money, and the defendant, therefore, properly raised the issue of standing and the court's subject matter jurisdiction.

On appeal, the substitute plaintiff claims that *Sousa* v. *Sousa*, 322 Conn. 757, 143 A.3d 578 (2016), controls the defendant's claim.[14] We disagree, as *Sousa* is procedurally distinct. The issue in *Sousa* was whether it was "entirely obvious" that the trial court lacked subject matter jurisdiction to open a stipulated judgment between the parties, who were former husband and wife. (Internal quotation marks omitted.) Id., 761. The parties in *Sousa* did not agree to open the modified dissolution judgment. The decedent and the defendant in the present case, however, agreed to open the dissolution judgment and enter into the 2009 stipulation. Judge

[14] In his brief, the substitute plaintiff also contends that we should not review the defendant's claim because it is inadequately briefed on appeal. We do not agree, as the substitute plaintiff's contention is predicated on collateral estoppel grounds.

Abery-Wetstone accepted the stipulation as a judgment of the court. In his motion to dismiss, the defendant is not challenging the court's subject matter jurisdiction over the money he owed the decedent. He also is not challenging the substitute plaintiff's standing to pursue the debt he agreed to pay the decedent. With regard to the motion for order to show cause, the defendant is challenging the substitute plaintiff's standing to pursue the moneys he owes his children for having used the funds in their education accounts for himself.

The issue of whether the substitute plaintiff had standing to pursue the moneys the defendant owes his children was not raised or litigated prior to May, 2015, when the defendant filed his motion to dismiss. There is no legal basis to preclude the defendant from filing a motion to dismiss the application for order to show cause. Moreover, standing implicates the court's subject matter jurisdiction and may be raised at any time. See, e.g., *Manning* v. *Feltman*, 149 Conn. App. 224, 231, 91 A.3d 466 (2014). "Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Internal quotation marks omitted.) *O'Reilly* v. *Valletta*, 139 Conn. App. 208, 212–13, 55 A.3d 583 (2012), cert. denied, 308 Conn. 914, 61 A.3d 1101 (2013).

B

The defendant also claims that the court improperly denied his motion to dismiss because the substitute plaintiff failed to prove, and the court did not find, that the substitute plaintiff had a direct interest in the

moneys he took from the children's education funds. We agree.

In his brief, the defendant argues that at the time the court heard his motion to dismiss, the substitute plaintiff did not present any evidence of standing to pursue the moneys he owes his children or under what statutory or other right the substitute plaintiff may collect the money on behalf of the children.[15] As previously noted, "[a] plaintiff has the burden of proof with respect to standing." *Emerick* v. *Glastonbury*, supra, 145 Conn. App. 128. The substitute plaintiff has not directed us to any evidence presented at the time the court ruled on the motion to dismiss that would demonstrate a personal and direct interest in the money the defendant owes the children, and our review of the record did not disclose any such evidence.

The substitute plaintiff also does not claim that he has a fiduciary relationship with the children. "It is the infant, and not the next friend, who is the real and proper party. The next friend, by whom the suit is brought on behalf of the infant, is neither technically nor substantially the party, but resembles an attorney, or a guardian ad litem, by whom a suit is brought or defended in behalf of another." (Emphasis omitted; internal quotation marks omitted.) *Lowe* v. *Shelton*, 83 Conn. App. 750, 756, 851 A.2d 1183, cert. denied, 271 Conn. 915, 859 A.2d 568 (2004). More importantly, however, the court made no factual finding that the substitute plaintiff has a direct and personal interest in those moneys or the right to collect the funds on behalf of

[15] The defendant properly points out that, pursuant to the 2009 stipulation, the decedent was to be the custodian of the children's education accounts. General Statutes § 45a-559c sets forth the requirements for the appointment of a successor custodian upon the death of the prior custodian. The substitute plaintiff presented no evidence that the decedent designated a successor prior to her death or that a successor trustee has been appointed by the Probate Court.

the children, unlike a direct interest in the money the defendant owed the decedent. The substitute plaintiff, therefore, failed to carry his burden to demonstrate standing with respect to the moneys the defendant owes his children.

For the foregoing reasons, the court improperly denied the defendant's motion to dismiss filed in response to the application for order to show cause. The case is remanded to the trial court with direction to grant the motion to dismiss and to vacate the order that the defendant make periodic payments to counsel for the estate regarding the debt he owes the children.

II

The defendant's second claim is that the court improperly granted the motion to intervene filed on behalf of his daughter. We disagree.

On September 9, 2015, counsel for the estate filed a postjudgment motion to intervene on behalf of Ali. The motion was predicated on General Statutes § 52-107[16] and the corresponding rules of practice, i.e., Practice Book §§ 25-6 and 9-18. The motion to intervene stated in part that the undersigned counsel moved on behalf of Ali to intervene for the limited purpose of asserting her rights and interest in the enforcement of the orders related to her education funds. Ali had relied on the substitute plaintiff to advance her interests, but in light of the defendant's assertion that the substitute plaintiff lacks standing, she moved to intervene.

[16] General Statutes § 52-107 provides: "The court may determine the controversy as between the parties before it, if it can do so without prejudice to the rights of others; but, if a complete determination cannot be had without the presence of other parties, the court may direct that such other parties be brought in. If a person not a party has an interest or title which the judgment will affect, the court, on his application, shall direct him to be made a party."

Judge Emons determined that the defendant's "obligation goes to the estate,"[17] and that is the reason that the court denied the motion to dismiss. To the extent, however, that the defendant argued that "the money now flows to the children, who have now reached the age of majority," the court found that Ali "does have a sufficient interest and that the legal requirements are met . . . ." The court, therefore, granted Ali's motion to intervene.

On appeal, the defendant claims that the court improperly granted Ali's motion to intervene as a matter of right because she not only failed to meet her burden to establish her right to intervene, but also the motion to intervene was untimely. We disagree.

To establish that he or she is entitled to intervene as a matter of right, "the proposed intervenor must satisfy a well established four element conjunctive test: [T]he motion to intervene must be timely, the movant must have a direct and substantial interest in the subject matter of the litigation, the movant's interest must be impaired by disposition of the litigation without the movant's involvement and the movant's interest must not be represented adequately by any party to the litigation." (Internal quotation marks omitted.) *BNY Western Trust* v. *Roman*, 295 Conn. 194, 205, 990 A.2d 853 (2010); see also *Kerrigan* v. *Commissioner of Public Health*, supra, 279 Conn. 456–57.

"A proposed intervenor must allege sufficient facts, through the submitted motion and pleadings, if any, in order to make a showing of his or her right to intervene. The inquiry is whether the claims contained in the motion, if true, establish that the proposed intervenor has a direct and immediate interest that will be affected by the judgment." *Washington Trust Co.* v. *Smith*, 241 Conn. 734, 747, 699 A.2d 73 (1997), overruled in part on

[17] We disagree with the court's determination. See part I of this opinion.

other grounds by *Kerrigan* v. *Commissioner of Public Health*, supra, 279 Conn. 455.

On the basis of our review of the record, beginning with the separation agreement, the children were to be the beneficiaries of certain financial accounts intended to fund their private school and college educations. See footnote 1 of this opinion. On December 23, 2009, the decedent and the defendant agreed to open the dissolution judgment and enter into the 2009 stipulated judgment. According to the 2009 stipulation, the decedent was to open an account for the benefit of the children and the account was to be used to pay their educational expenses through postsecondary school, excluding any graduate studies. Once the children were graduated from college, any funds in the account were to be divided between the children equally. See footnote 4 of this opinion. The evidence in the record discloses Ali's direct and substantial interest in the education account. No other party has standing to pursue repayment from the defendant of the funds he took from the accounts for his own use.[18] The substitute plaintiff has no fiduciary relationship with the children and, therefore, cannot adequately represent them. Because Ali has a direct and personal interest in having the defendant reimburse the education funds, she has carried her burden and the court properly granted her motion to intervene.

The defendant also argues that Ali's motion to intervene should have been denied because it was not timely, having not been filed until after he took the present appeal. As the substitute plaintiff points out, the motion to intervene was filed after the defendant took an appeal because he appealed from the court's denial of his motion to dismiss on the ground that the substitute

[18] Madison Hamburg, who may have an interest in the education funds, is not a party to the present action.

plaintiff lacked standing. The defendant has not explained how, if at all, he has been prejudiced by the court's granting of Ali's motion to intervene to obtain the money the defendant—her father—took from an account that was to be used to pay for her education through college. Although the defendant was ordered to repay the moneys he took from the children's education accounts beginning on January 1, 2010, several courts have found him in wilful contempt for failing to do so. The defendant opposed the substitute plaintiff's effort to pursue repayment of the education funds on the ground that he lacked standing and, therefore, Ali filed a motion to intervene to protect her interest in the funds. The court, therefore, properly granted the motion to intervene.

The judgment denying the motion to dismiss is reversed and the case is remanded with direction to grant the motion to dismiss and to vacate the order that the defendant make periodic payments to counsel for the estate regarding the debt he owes the children. The judgment with respect to the motion to intervene is affirmed and the case is remanded for further proceedings.

In this opinion the other judges concurred.

KYLE S. *v.* JAYNE K.*
JAYNE K. *v.* KYLE S.
(AC 39969)

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

Syllabus

The plaintiff in the first action, K, sought a dissolution of his marriage to the defendant in that action, J. The trial court rendered judgment dissolving the marriage, and the dissolution judgment incorporated the parties'

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

written agreement, which provided the parties with joint custody of their minor child, T, and that T's primary residence would be with K. In February, 2016, J filed an application for an emergency ex parte order of custody pursuant to statute (§ 46b-56f), seeking temporary custody of T with no visitation between T and K. In her application, J alleged that K had physically abused his fiancée in T's presence, and that K had been arrested as a result of the altercation. In a second action, J filed an application for relief from abuse seeking a restraining order pursuant to statute (§ 46b-15) to protect both herself and T, alleging that K had threatened to kill J if she took T away from K, that K had been arrested as a result of the altercation with his fiancée, and that K had a violent history and criminal record of abuse. The trial court granted the ex parte applications, issued a restraining order, awarded temporary custody of T to J and scheduled further hearings. At a hearing in August, 2016, the court modified custody, ordered the parties to have joint legal custody of T, with T's primary residence with J, permitted K to see T in therapeutic sessions with C, a psychologist with whom T had begun therapy, and ordered that T continue therapy with C until no longer needed and that K could have contact with T as permitted by J. At a hearing in December, 2016, the court, with a waiver by both parties, admitted into evidence an updated mental health report from C regarding T's progress. The court also extended the restraining order only as to J, ordering K to stay 100 yards away from J at all times and not to have any contact with J. The court further ordered that it would rely on C to dictate the scope of K's conduct with T in a therapeutic setting and stated that C would be in charge of contact between K and T. On K's appeal to this court, *held:*

1. K could not prevail on his claim that J had failed to meet her burden of proof with respect to her applications for relief from abuse and for an emergency ex parte order of custody: the trial court properly issued the restraining order to include protection for both J and T, as J presented evidence of K's altercation with his fiancée and his threat to harm J and, thus, there was sufficient evidence before the court to prove that a continuous threat of present physical pain or physical injury to J existed as required by § 46b-15, and it was within the court's discretion to make such order it deemed appropriate for the protection of J, the applicant, and T, her dependent child; moreover, there was sufficient evidence to support the court's determination that an immediate and present risk of physical danger or psychological harm to T existed at the time of J's application for an emergency ex parte order of custody pursuant to § 46b-56f, as the court heard evidence that K had engaged in a physical altercation with his fiancée while T was present, T's teacher expressed concern about T's behavior, C's reports expressed concern about incidents of violence at K's home, and T's babysitter testified that T became scared, upset, and hurt when asked about going to K's home.

2. K failed to establish his claim that the court committed plain error in admitting into evidence T's mental health records, which was based on his claim that certain waivers executed by the parties were invalid due the existence of a conflict; the claimed error of the trial court was neither readily discernible on its face nor obvious in the sense of not debatable, as the parties, as the parents and de facto guardians of T, agreed that the court should review T's mental health reports, noted the importance of protecting T's privacy with respect to the records and agreed it would be beneficial for the court to review them, K did not provide any authority requiring the court to appoint a guardian ad litem or showing that the parties' agreement to allow the court to use the records was improper, and K's argument that the parties were disqualified from waiving T's privilege because the parties were custody combatants, and that waiver was done to advance each party's own interest instead of for T's benefit was speculative and, therefore, unpersuasive.

3. The court's order regarding K's parenting time and custody of T constituted an impermissible delegation of judicial authority to C; although it was permissible for the court to seek advice and to accept recommendations from a nonjudicial entity, the court, which expressly stated that it would rely on C with respect to issues involving T and noted that C would dictate the scope of K's contact with T in a therapeutic setting, improperly granted decision-making authority to C by removing itself from the process and permitting C to decide the nature and scope of K's contact with T.

Argued December 7, 2017—officially released June 5, 2018

Procedural History

Action, in the first case, for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the court, *Dolan*, *J.*, rendered judgment dissolving the marriage and granting certain other relief; thereafter, the defendant in the first case filed a motion to modify custody and an application for an emergency ex parte order of custody, and an application, in a second case, for relief from abuse; subsequently, the court, *Carbonneau*, *J.*, granted the application for ex parte order of custody in the first case, and granted the application for relief from abuse in the second case as to the applicant and minor child; thereafter, the matters were consolidated for a hearing before *Carbonneau*, *J.*; orders extending

the order of temporary custody; subsequently, the court, *Carbonneau*, *J.*, rendered judgments modifying custody in the first case and extending the temporary restraining order only as to the applicant in the second case, from which the plaintiff in the first case and respondent in the second case appealed to this court. *Reversed in part; further proceedings.*

Allen G. Palmer, with whom, on the brief, was *Logan A. Carducci*, for the appellant (plaintiff in the first case, respondent in the second case).

Opinion

DiPENTIMA, C. J. In this protracted domestic litigation, arising out of a dissolution of marriage action and a separate application for relief from abuse, the plaintiff/respondent, Kyle S., appeals from postjudgment orders of the court rendered in favor of the defendant/applicant, Jayne K.[1] On appeal, Kyle S. claims that (1) Jayne K. failed to meet her burden of proof with respect to her application for relief from abuse filed pursuant to General Statutes § 46b-15, her application for an emergency ex parte order of custody filed pursuant to General Statutes § 46b-56f and her motion for modification of custody filed pursuant to General Statutes § 46b-56, (2) the court committed plain error by

[1] This appeal comes to us from two distinct yet intertwined files from the Superior Court. In the divorce and custody action, Docket No. FA-08-4016382-S, Kyle S. was the plaintiff and Jayne K. the defendant. In the relief from abuse action, Docket No. FA-16-4038505-S, Jayne K. was the applicant and Kyle S. the respondent. For purposes of clarity and consistency, we refer to the parties by name in this opinion.

We also note that Jayne K. represented herself in the proceedings before the trial court. On June 30, 2017, we ordered that the appeal would be considered solely on the basis of the record and Kyle S.'s brief and oral argument as a result of Jayne K's failure to file her brief by the established deadline. See, e.g., *Ellen S.* v. *Katlyn F.*, 175 Conn. App. 559, 560 n.1, 167 A.3d 1182 (2017); *Gail R.* v. *Bubbico*, 114 Conn. App. 43, 45 n.1, 968 A.2d 464 (2009).

accepting the parties' waiver of the minor child's privileged mental health records and admitting the records into evidence and (3) the court improperly delegated its authority to decide Kyle S.'s parenting time and custodial rights to a nonjudicial entity. We agree with Kyle S.'s third claim and, accordingly, reverse in part the judgments of the trial court.

The following facts and procedural history are relevant to our discussion. In 2008, Kyle S. initiated a dissolution proceeding. On May 2, 2008, the parties agreed to the appointment of Katarzyna Maluszewski as guardian ad litem for T, the minor child of the parties, whose date of birth is in May, 2004 . On September 8, 2009, Jayne K. filed an application for relief from abuse against Kyle S., and the court issued an ex parte restraining order. See *Jayne S.* v. *Kyle S.*, 116 Conn. App. 690, 690–91, 978 A.2d 94 (2009). Jayne K. alleged that a previous restraining order had been issued against Kyle S. as a result of a January, 2008 incident when he had kicked Jayne K., breaking her rib. Id., 691. The September, 2008 application sought a restraining order after Jayne K. had claimed, inter alia, that Kyle S. left a voicemail in which he had threatened "to kill" her. Id. Following a hearing, the court, *Hon. Bernard D. Gaffney*, judge trial referee, extended the restraining order for a period of six months, from October 3, 2008, to April 3, 2009. Id., 691–92.

On April 22, 2009, the court, *Dolan*, *J.*, rendered a judgment dissolving the parties' marriage. It found that the parties had been married in July, 2006, and had one child, T. The court incorporated the parties' written agreement dated April 17, 2009, into the dissolution judgment. The agreement provided that the parties would have joint custody of T, with his primary residence with Kyle S. The agreement also provided that Jayne K. would not pay child support and neither party would pay or receive alimony. In 2011, Maluszewski

accepted $3000 as a full and final settlement of her fees as the guardian ad litem for T.[2]

For the period between February, 2013, and February, 2016, the parties filed no motions, and the dissolution/custody file remained static. On February 11, 2016, Jayne K. filed an application for an emergency ex parte order of custody of T, pursuant to General Statutes § 46b-56f.[3] She sought, inter alia, an order of temporary custody of T, with no visitation between T and Kyle S. In the affidavit attached to her motion, she claimed that Kyle S. had physically abused his fiancée in the presence of T. Jayne K. further stated that Kyle S. had been arrested and that the Department of Children and Families (department) had been contacted. She also filed a motion for modification of custody seeking sole custody of T, listing Kyle S.'s arrest as the requisite material change in circumstances.[4]

[2] In the middle of a flurry of postjudgment child related filings, the court reappointed Maluszewski as guardian ad litem on November 10, 2011. The record does not reveal when thereafter Maluszewski ceased acting as T's guardian ad litem. At the July 25, 2016 hearing, the court noted that there was no guardian ad litem in the case.

[3] General Statutes § 46b-56f provides in relevant part: "(a) Any person seeking custody of a minor child pursuant to section 46b-56 or pursuant to an action brought under section 46b-40 may make an application to the Superior Court for an emergency ex parte order of custody when such person believes an immediate and present risk of physical danger or psychological harm to the child exists.

"(b) The application shall be accompanied by an affidavit made under oath which includes a statement (1) of the conditions requiring an emergency ex parte order, (2) that an emergency ex parte order is in the best interests of the child, and (3) of the actions taken by the applicant or any other person to inform the respondent of the request or, if no such actions to inform the respondent were taken, the reasons why the court should consider such application on an ex parte basis absent such actions."

[4] "General Statutes § 46b-56 provides trial courts with the statutory authority to modify an order of custody or visitation. When making that determination, however, a court must satisfy two requirements. First, modification of a custody award must be based upon either a material change [in] circumstances which alters the court's finding of the best interests of the child . . . or a finding that the custody order sought to be modified was not based upon the best interests of the child. . . . Second, the court shall

At this time, Jayne K., in a separate file, also filed an application for relief from abuse against Kyle S., pursuant to General Statutes § 46b-15,[5] seeking a restraining order to protect both herself and T. In her affidavit attached to this application, Jayne K. expressed fear for her safety, stating that Kyle S. had been arrested for attacking his fiancée, had a violent history and criminal record of abuse, stalking and harassment, and had threatened to kill Jayne K. if she took T from him.

That day, the court, *Carbonneau*, *J.*, granted Jayne K.'s ex parte applications and awarded the relief sought without holding a hearing. Specifically, the court issued a restraining order and awarded temporary custody of T to Jayne K. It further ordered the parties to cooperate with the department and to follow any reasonable mandates. Additionally, the court scheduled a hearing on these matters.

consider the best interests of the child and in doing so may consider several factors. . . . Before a court may modify a custody order, it must find that there has been a material change in circumstances since the prior order of the court, but the ultimate test is the best interests of the child. . . . These requirements are based on the interest in finality of judgments . . . and the family's need for stability. . . . The burden of proving a change to be in the best interest of the child rests on the party seeking the change." (Citations omitted; emphasis omitted; footnotes omitted; internal quotation marks omitted.) *Petrov* v. *Gueorguieva*, 167 Conn. App. 505, 511–12, 146 A.3d 26 (2016).

[5] General Statutes § 46b-15 (a) provides: "Any family or household member, as defined in section 46b-38a, who has been subjected to a continuous threat of present physical pain or physical injury, stalking or a pattern of threatening, including, but not limited to, a pattern of threatening, as described in section 53a-62, by another family or household member may make an application to the Superior Court for relief under this section. The court shall provide any person who applies for relief under this section with the information set forth in section 46b-15b." As former spouses, Kyle S. and Jayne K. fall within the statutory definition of "family or household member." General Statutes § 46b-38a (2) (A); see also *Princess Q. H.* v. *Robert H.*, 150 Conn. App. 105, 113 n.4, 89 A.3d 896 (2014). Additionally, "[t]he court, in its discretion, may make such orders as it deems appropriate for the protection of the applicant and such dependent children or other persons as the court sees fit." General Statutes § 46b-15 (b).

Four days of hearings regarding Jayne K.'s applications and motion commenced on July 25, 2016. Jayne K. testified that in February, 2016, T's teacher had emailed her that T had exhibited "goofy behaviors" at school. She also received a call from Kyle S.'s fiancée, informing Jayne K. about the events of Kyle S.'s arrest.[6]

Jayne K. also indicated that T had started treatment with Warren Corson, a psychologist, on June 9, 2016. According to Jayne K., T benefitted greatly from this therapy. She requested sole custody of T. The court continued its temporary order of sole custody in favor of Jayne K.

At the next hearing date, on August 12, 2016, the court ordered that the parties would share joint legal custody of T, with primary residence with Jayne K. The court ordered that Kyle S. could see T in therapeutic sessions with Corson, and ordered other contact as permitted by Jayne K., including access via electronic means. It further ordered that the therapy sessions with Corson were to continue until no longer needed or beneficial. At the September 23, 2016 hearing, following the agreement of the parties, the court admitted into evidence a mental health report from Corson regarding T.

At the December 9, 2016 hearing, the court noted that the restraining order was scheduled to expire on February 19, 2017.[7] Again with the agreement of the parties, the court admitted into evidence an updated report of T's progress with Corson. Following Kyle S.'s testimony, and closing arguments from the parties, the court orally rendered its decision.

[6] The parties stipulated that the state nolled all of the charges against Kyle S. stemming from this incident on July 13, 2016, involving his fiancée.

[7] After a hearing on March 18, 2016, the court extended the restraining order against Kyle S. to February 19, 2017.

The court found Jayne K.'s testimony credible and that she had sustained her burden of proof under § 46b-15. Accordingly, it continued the existing restraining order, iterating that Kyle S. was "not to assault, threaten, abuse, harass, follow, interfere with or stalk [Jayne K.]." The court ordered Kyle S. to stay away from Jayne K.'s home and work, to not have any contact with her for any reason, and "to stay 100 yards away from her at all times [and] for all reasons."

The court then considered the issue of Kyle S.'s contact with T. The court stated that it would rely on Corson to dictate the scope of Kyle S.'s conduct with T in a therapeutic setting. The court specifically noted: "So . . . I'm not extending any aspect of the temporary restraining order to [T] but, in the other file, the custody file, *I am restricting that contact so that the mental health professional can be in charge*." (Emphasis added.) This appeal followed. Additional facts will be set forth as necessary.

I

Kyle S. first claims that Jayne K. failed to meet her burden of proof with respect to her application for relief from abuse, her application for an emergency ex parte order of custody and her motion to modify custody. Specifically, Kyle S. argues that neither the application for a restraining order nor the evidence at the hearings were sufficient to establish that he presented an immediate and present risk of physical danger or psychological harm to T, or that a change in custody was warranted. We disagree.

"The standard of review in family matters is well settled. An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . Likewise, [a] prayer for injunctive relief

is addressed to the sound discretion of the court and the court's ruling can be reviewed only for the purpose of determining whether the decision was based on an erroneous statement of law or an abuse of discretion. . . .

"In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citations omitted; internal quotation marks omitted.) *Putman* v. *Kennedy*, 104 Conn. App. 26, 31, 932 A.2d 434 (2007), cert. denied, 285 Conn. 909, 940 A.2d 809 (2008); see also *Jordan M.* v. *Darric M.*, 168 Conn. App. 314, 318, 146 A.3d 1041, cert. denied, 324 Conn. 902, 151 A.3d 1287 (2016).

A

We first address Kyle S.'s argument that there was insufficient evidence to support the granting of Jayne K.'s application for a restraining order pursuant to § 46b-15.[8] "The plain language of § 46b-15 clearly requires a continuous threat of present physical pain

[8] As we have noted, the restraining order expired on February 19, 2017. Despite the expiration of the restraining order, Kyle S.'s appellate claim is not subject to dismissal pursuant to the mootness doctrine. In *Putman* v. *Kennedy*, 279 Conn. 162, 164–65, 900 A.2d 1256 (2006), our Supreme Court concluded that the adverse collateral consequences exception to the mootness doctrine applied to appeals from domestic violence restraining orders. See also *Rosemarie B.-F.* v. *Curtis P.*, 133 Conn. App. 472, 475, 38 A.3d 138 (2012) (same); *Jayne S.* v. *Kyle S.*, supra, 116 Conn. App. 692 (same); *Gail R.* v. *Bubbico*, supra, 114 Conn. App. 47 n.5 (appeal of restraining order issued pursuant to § 46b-15 rescued from mootness by collateral consequences doctrine).

or physical injury before a court can grant a domestic violence restraining order." *Krystyna W.* v. *Janusz W.*, 127 Conn. App. 586, 590, 14 A.3d 483 (2011); *Putman* v. *Kennedy*, supra, 104 Conn. App. 32. "[D]omestic violence restraining orders will not issue in the absence of the showing of a threat of violence, specifically a continuous threat of present physical pain or physical injury to the applicant. . . . The legislature promulgated § 46b-15 to provide an expeditious means of relief for abuse victims. . . . It is not a statute to provide a remedy in every custody and visitation dispute, however urgent." (Citations omitted; internal quotation marks omitted.) *Jordan M.* v. *Darric M.*, supra, 168 Conn. App. 319–20.

At the hearing, Jayne K. testified that she had spoken with Kyle S.'s fiancée following the incident resulting in Kyle S.'s arrest. The fiancée told "her side of what happened while [T] was present in [Kyle S.'s] care." Jayne K. also testified that T had been exposed to a "history of violence" and that the department had investigated the charges filed against Kyle S. During cross-examination, Jayne K. testified that Kyle S. had threatened her in February, 2016.[9] Additionally, in the August 9, 2016 mental health report, T's therapist reported that T had been "very concerned about incidents of violence that reportedly occurred at [Kyle S.'s] home . . . ." In its oral decision, the court expressly found Jayne K.'s testimony to be credible.

The court granted the application for a restraining order on the bases of Jayne K.'s credible testimony, all of the evidence, and the incident that had occurred between Kyle S. and his fiancée in February, 2016, that led to this arrest. We previously have recognized that a single incident, coupled with the findings that the

[9] Jayne K. acknowledged, however, that she could not recall the words used by Kyle S., only that he had threatened her.

subject of the restraining order presently poses a continuous threat, may satisfy the requirement of § 46b-15. *Rosemarie B.-F.* v. *Curtis P.*, 133 Conn. App. 472, 477, 38 A.3d 138 (2012); see also *Putnam* v. *Kennedy*, supra, 104 Conn. App. 34 (requirement for multiple incidents of physical abuse would defy prophylactic purpose of § 46b-15). In the present case, Jayne K. presented evidence of Kyle S.'s altercation with his fiancée and his threat to harm Jayne K. We conclude, therefore, that there was sufficient evidence before the court to prove the existence of a continuous threat of present physical pain or physical injury to Jayne K. Furthermore, it was within the court's discretion to "make such orders as it deems appropriate for the protection of the applicant *and such dependent children . . . as the court sees fit*." (Emphasis added.) General Statutes § 46b-15 (b); see also General Statutes § 46b-15 (e). Accordingly, we cannot conclude that the court improperly issued the restraining order to include protection for both Jayne K. and T.

B

Next, we address Kyle S.'s argument that there was insufficient evidence to support the February 11, 2016 granting of Jayne K.'s application for an emergency ex parte order of custody pursuant to § 46b-56f.[10] Subsection (c) of this statute provides in relevant part: "The court shall order a hearing on any application made pursuant to this section. If, prior to or after such hearing, the court finds that an immediate and present risk of physical danger or psychological harm to the child exists, the court may, in its discretion, issue an emergency order for the protection of the child . . . ." We

[10] In passing, Kyle S. notes that Jayne K.'s application for an emergency ex parte order of custody included an "appended motion for modification of custody." Jayne K., however, failed to adequately brief, and thus abandoned any challenge on appeal, to the court's granting of the motion for modification of custody.

note that this order was superseded by the August 12, 2016 order. As with an order pursuant to § 46b-15, a § 46b-56f order is not subject to dismissal pursuant to the mootness doctrine. See generally, *Putnam* v. *Kennedy*, 279 Conn. 162, 164–65, 900 A.2d 1256 (2006); *Gail R.* v. *Bubbico*, 114 Conn. App. 43, 47 n.5, 968 A.2d 464 (2009).

We recite again our standard of review. "The proper standard of proof in a trial on an order of temporary custody is the normal civil standard of a fair preponderance of the evidence. . . . We note that [a]ppellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . We cannot retry the facts or pass on the credibility of the witnesses. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . With those principles in mind, we will review the evidence presented at the hearing . . . to determine whether the court's determination is supported by the evidence in the record." (Internal quotation marks omitted.) *Garvey* v. *Valencis*, 177 Conn. App. 578, 597, 173 A.3d 51 (2017).

As we previously noted, the court heard evidence that Kyle S. engaged in a physical altercation with his fianceé while T was present. Following this incident, the parties exchanged text messages, where Jayne K. indicated that she had spoken with T's teacher. The teacher indicated that T was having a "hard time" and that the teacher was "worried" about him. According to Corson's August 9, 2016 report, T was "very concerned" about the "incidents of violence" at Kyle S.'s home.

Courtney Harris, T's babysitter, testified that T became scared, upset and hurt when asked about going to Kyle S.'s home. According to Harris, T's demeanor and behavior improved from February, 2016 through July, 2016, when T was living with Jayne K.

In short, there was evidence to support the court's determination that an immediate and present risk of physical danger or psychological harm to T existed at the time of Jayne K.'s application pursuant to § 46b-56f (c). See *Garvey* v. *Valencis*, supra, 177 Conn. App. 597–99. On the basis of this evidence, we conclude that the evidence was sufficient to support the court's conclusion to sustain the emergency ex parte custody order.

II

Kyle S. next claims that the court committed plain error by admitting T's mental health reports into evidence following the parties' waiver of T's privileged mental health records. Specifically, he contends that the parties' waiver was invalid because each had a conflict "based on his or her own self-interest to advance his or her own case." We conclude that Kyle S. failed to establish plain error in this case.

The following additional facts are necessary for our discussion. At the outset of the August 12, 2016 hearing, Kyle S.'s counsel noted that T had continued his treatment with Corson, that Kyle S. had the opportunity to meet with and speak to Corson, and that it was appropriate for the court to hear Corson's suggestions regarding the familial dynamic. Counsel did note one area of concern: "One of the things, though, that I wanted to make sure of, with no [guardian ad litem] in, is that, you know, from my client's perspective, he wanted to proceed cautiously as far as we don't want this be an absolute and open-ended waiver of the [psychologist]/client privilege that [T] has with Dr. Corson.

But we do think that the court's going to want some continuing input from him."

After discussing other matters, the court returned to the issue of T's privileged communications with Corson. "There is no guardian in this case. Ordinarily it is the guardian that holds the privilege for the minor child. Right now, as I understand it, the parents, as the co-equal guardians of the child, would hold that privilege . . . ." The court clarified that previously there had been joint custody, but presently a temporary order of custody in favor of Jayne K. was in effect. As a prophylactic measure, the court stated: "I will allow [the privileged material be admitted into evidence] only if mother and father waive that privilege on their child's behalf." Kyle S.'s counsel agreed with the court's caution.[11] Additionally, both parties agreed that they shared the goal of protecting T's privacy. They then agreed that a mental health report regarding T, dated August 9, 2016, should be admitted into evidence. Similarly, on September 23, 2016, and December 9, 2016, the court admitted updated reports from Corson into evidence without objection.[12]

General Statutes § 52-146c (b) prohibits a psychologist from disclosing any communications between a person and the psychologist absent a waiver of this privilege. See also *Cabrera* v. *Cabrera*, 23 Conn. App. 330, 335, 580 A.2d 1227, cert. denied, 216 Conn. 828, 582 A.2d 205 (1990); see generally *In re Jacklyn H.*, 162 Conn. App. 811, 824, 826, 131 A.3d 784 (2016). In the present case, the parties, the parents of T,[13] consented

[11] Specifically, Kyle S.'s counsel stated: "That makes sense, your Honor. . . . I think in fairness to both parties, it probably would be a good idea that if this came in, that they would—they would end up waiving the privilege."

[12] The report from the September 23, 2016 proceeding is not listed on the exhibit list and is not included in the exhibits provided to this court.

[13] We note that General Statutes § 45a-606 provides in relevant part: "The father and mother of every minor child are joint guardians of the person of the minor, and the powers, rights and duties of the father and the mother in regard to the minor shall be equal." See also *In re Tayquon H.*, 76 Conn.

to the admission into evidence of the mental health screening reports. Indeed, a review of the transcripts reveals that it was Kyle S., acting through his counsel, who advocated for the admission of these documents. On appeal, however, he changed course and now contends that it was plain error for the court to admit the mental health reports of T after soliciting waivers from the parties.[14]

"It is well established that 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 [and nonconstitutional in nature], are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. [T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, 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 affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly. . . .

App. 693, 698, 821 A.2d 796 (2003) (mother and father of minor child are de facto guardians of that child).

[14] It would appear that Kyle S., at least in part, induced the claimed error of the trial court by his actions regarding the admission of the mental health reports. The appellate courts of this state have recognized the uncertainty in our law regarding whether claims of induced error may be considered under the plain error doctrine. See *State* v. *Darryl W.*, 303 Conn. 353, 371 n.17, 33 A.3d 239 (2012); *Healey* v. *Haymond Law Firm, P.C.*, 174 Conn. App. 230, 243–44, 166 A.3d 10 (2017); *State* v. *Rios*, 171 Conn. App. 1, 47–48, 156 A.3d 18, cert. denied, 325 Conn. 914, 159 A.3d 232 (2017). Generally, even in instances of induced error, courts have considered claims of plain error.

"There are two prongs 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. . . . With respect to the first prong, the claimed error must be patent [or] readily [discernible] on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . With respect to the second prong, an appellant must demonstrate that the failure to grant relief will result in manifest injustice." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted). *State* v. *Outlaw*, 179 Conn. App. 345, 354–55, A.3d , cert. denied, 328 Conn. 910, A.3d (2018); see also *State* v. *McClain*, 324 Conn. 802, 812–13, 155 A.3d 209 (2017).

We conclude that Kyle S. has failed to establish the first prong of the plain error doctrine. See *State* v. *Bialowas*, 178 Conn. App. 179, 190, 174 A.3d 853 (2017) (defendant bore burden of establishing entitlement to relief under plain error doctrine). Specifically, the claimed error of the trial court was neither readily discernible on its face nor obvious in the sense of not debatable. The parties, parents and de facto guardians of T, agreed that the court should review T's mental health reports. Both noted the importance of protecting T's privacy with respect to these records, and agreed it would be beneficial for the court to review Corson's reports. Kyle S. has not provided us with any authority requiring the court in this case to appoint a guardian ad litem, or showing that the parties' agreement to the use of the records by the court was improper.[15] Instead, he merely speculates that, due to their status as "custody combatants," the parties' waiver was done in "his

[15] However, on remand, we believe the court should seriously consider appointing counsel for the minor child, T, in order for T, through counsel, to have the opportunity to argue whether his privacy rights in these records should be protected.

or her own self-interest to advance his or her own case" and thus the parties are disqualified from waiving T's privilege. Additionally, he assumes that T's "treatment records were not offered in his best interests, [as] no [minor] wants it known that he may be in therapy, let alone having his therapist's treatment records in the public domain." Such speculation fails to persuade us that the court committed plain error in accepting the parties' waivers and admitting the exhibits into evidence. See generally *In re Samantha S.*, 120 Conn. App. 755, 759, 994 A.2d 259 (2010) (speculation and conjecture have no place in appellate review), appeal dismissed, 300 Conn. 586, 15 A.3d 1062 (2011). We conclude, therefore, that Kyle S. failed to meet his burden with respect to his claim of plain error.

III

Finally, Kyle S. claims that the court improperly delegated its authority to decide his parenting time and custody to a nonjudicial entity. Specifically, he contends that it was error for the court to delegate the determination of the scope, nature and duration of his contact with T to Corson. We agree.

The following additional facts are necessary. In the court's December 9, 2016 oral decision, it noted that T had been impacted by the events of the past year. It then discussed the positive effect of T's therapy with Corson. "Again, I'm delighted at the involvement and the progress that [T] has made with Dr. Corson. That is the path for [T] out of this darkness and that will happen in due course. Dr. Corson has been involved in planning with events unfolding as predictably as possible. One of the events that he has to deal with is the effect of this restraining order."

After explaining the conditions of its restraining order, the court addressed T's contact with Kyle S. "As far as [T] being involved, I'm going to rely on Dr. Corson.

Dr. Corson will dictate the scope of your contact with [T] in a therapeutic setting. Again, I think he's done a marvelous job as I gleaned from the reports that have been submitted to this court and I want that to continue very sincerely. I want there to be normalcy between you and your son. I want to go carefully and delicately so that [T's] needs and wishes are foremost." (Emphasis added.)

After Kyle S.'s counsel inquired about the scope of the order, the court explained as follows: "What I'm—what I'm intending—I have two files to work with here. The restraining order—the remedies with a restraining order are rather a sledge hammer. I'm trying to be a little more deft and I am simply in the other file entering an order that says that [Kyle S.'s] contact with [T] will be therapeutic in nature as dictated by Dr. Corson. I want the mental health professional to guide me and I want [Kyle S.'s] contact with [T] to be expandable or contractible in conjunction with the child's needs. So you are correct . . . I'm not extending any aspect of the temporary restraining order to [T] but, in the other file, the custody file, *I am restricting that contact so that the mental health professional can be in charge*." (Emphasis added.) The court further noted that the parties could "clarify" with Corson as needed.

"It is well settled authority that [n]o court in this state can delegate its judicial authority to any person serving the court in a nonjudicial function. The court may seek the advice and heed the recommendation contained in the reports of persons engaged by the court to assist it, but in no event may such a nonjudicial entity bind the judicial authority to enter any order or judgment so advised or recommended. . . . A court improperly delegates its judicial authority to [a nonjudicial entity] when that person is given authority to issue orders that affect the parties or the children. Such orders are part of a judicial function that can be done

only by one clothed with judicial authority." (Citation omitted; internal quotation marks omitted.) *Keenan* v. *Casillo*, 149 Conn. App. 642, 660, 89 A.3d 912, cert. denied, 312 Conn. 910, 93 A.3d 594 (2014); see also *Valante* v. *Valante*, 180 Conn. 528, 532–33, 429 A.2d 964 (1980) (rendering of judgment is judicial function and can only be accomplished by one clothed with judicial authority); *Nashid* v. *Andrawis*, 83 Conn. App. 115, 120, 847 A.2d 1098 (while judicial authority may seek advice and recommendations, in no event may nonjudicial entity bind judicial authority to enter any order or judgment), cert. denied, 270 Conn. 912, 853 A.2d 528 (2004).

In the present case, Kyle S. argues that the court improperly delegated the determination of parenting time and custodial rights to Corson. We agree. The court expressly stated that it would "rely" on Corson with respect to issues involving T It noted that Corson would "dictate" the scope of Kyle S.'s contact with T in a therapeutic setting. After Kyle S.'s counsel sought a further explanation, the court iterated and emphasized Corson's role in determining the contact between T and Kyle S. It further ordered that this contact was subject to expansion or contraction depending on T's needs and that Corson would be "in charge."

The court's orders regarding Kyle S.'s contact with T constituted an impermissible delegation of judicial authority to Corson. Pursuant to the orders of the court, Corson was to "dictate" the scope of the contact between Kyle S. and T, and Corson was authorized to increase or decrease said contact as he saw fit. The court also noted that Corson was "in charge." We recognize that "[a] court is permitted to seek advice, and accept recommendations from [a nonjudicial entity]." *Keenan* v. *Casillo*, supra, 149 Conn. App. 160. Here, the court advanced past that point, and instead granted decision making authority to Corson. *Valante* v. *Valante*, supra, 180 Conn. 532–33; *Weinstein* v.

Weinstein, 18 Conn. App. 622, 628–29, 561 A.2d 443 (1989). Put another way, the court in the present case improperly removed itself from the decision making process by permitting Corson to decide the nature and scope of Kyle S.'s contact with T. See, e.g., *Zilkha* v. *Zilkha*, 180 Conn. App. 143, 171–72, A.3d (2018) (contrary to parties' claim of improper delegation, court properly considered and fully resolved custody and visitation issues).

The judgment in the dissolution action is reversed only as to the orders providing that a nonjudicial entity determine the contact between Kyle S. and T and the case is remanded for further proceedings solely as to that issue; the judgment in that action is affirmed in all other respects. The judgment in the application for relief from abuse action is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* DARREN MATTHEW CROSBY
(AC 37523)

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

Syllabus

Convicted of the crimes of robbery in the first degree and larceny in the third degree in connection with a 2008 bank robbery, the defendant appealed to this court. The defendant claimed, inter alia, that his rights under the Interstate Agreement on Detainers (§ 54-186 et seq.) were violated as a result of the state's delay of more than four years after a warrant for his arrest had been issued before extraditing him to Connecticut from Massachusetts. The police in 2010 had faxed a copy of the arrest warrant to the Massachusetts correctional facility, where the defendant was then incarcerated, at the request of the correctional facility. The correctional facility did not provide the defendant with the appropriate detainer forms and later advised him to submit a request to Connecticut authorities to lodge a detainer for his extradition. Connecticut authorities thereafter lodged a detainer in 2013, after which the defendant was extradited to Connecticut. *Held*:

1. The defendant could not prevail on his claim that the trial court improperly denied his motions to dismiss the robbery and larceny charges, which was based on his assertion that the state's delay in executing the arrest warrant and extraditing him violated his due process rights and his rights under § 54-186:

   a. The trial court did not err in determining that the stated lodged the detainer in 2013, and not in 2010, as the defendant alleged; the copy of the arrest warrant that was faxed to Massachusetts in 2010 did not establish the intent to lodge a detainer, as the fax did not include language that the warrant was sent for the purpose of lodging a detainer, Massachusetts did not consider the faxed warrant to be a detainer, and the defendant was informed multiple times prior to 2013 that a detainer had not been lodged, and the defendant's claim that his rights under § 54-186 were violated was unavailing, as the defendant did not analyze his claim that the alleged failure to comply with the requirements of § 54-186 resulted in a presumption that he was prejudiced, custodial state delays do not automatically require the dismissal of criminal charges in the demanding state, and the defendant failed to demonstrate that any delay was unjustifiable or that he was prejudiced thereby.

   b. The defendant could not prevail on his claim that his rights to due process were violated as a result of the state's delay in lodging the detainer, which he claimed had an impact on the memory of eyewitnesses at trial, thereby resulting in substantial prejudice to him, he having failed to demonstrate that the state's alleged delay in executing the warrant against him resulted in actual, substantial prejudice to him; a general claim of weakened witness memory was insufficient to establish prejudice, any defect in the memory of the state's primary witness prejudiced the state and worked to the defendant's advantage, as his cross-examination of her was effective at exposing her memory gaps and she testified on direct examination by the state that she could not recall the events in question, and the prejudice that the defendant alleged pertained to concerns that are generally protected by the applicable statute of limitations.

2. The defendant's claim that the trial court improperly denied his motion to suppress two eyewitness identifications of him that were made from a police photographic array was unavailing: the identification procedure that the police used was not unnecessarily suggestive, as the photographs in the array were not too dissimilar from the photograph of the defendant, the defendant was not pictured in apparent prison garb, the absence of the use of a sequential, double-blind photographic array, which was not required in 2009, did not render the identification procedure unnecessarily suggestive, the witnesses were not told that a known suspect was in the array, and neither eyewitness was presented with multiple arrays repeating the suspect's photograph; moreover, even if the photographic array was unduly suggestive, the identifications were reliable under the totality of the circumstances, as they were made close

in time to the robbery by witnesses who saw the robber up close in a well lit room and were 100 percent certain that he was the perpetrator when they identified him in the array, and the state's primary witness accurately described the defendant in a sworn statement that she had given to the police.

3. The defendant could not prevail on his claim that he was denied a fair trial because the trial court's jury instruction on identification failed to explain certain factors that negatively impact identifications made by witnesses, and excluded instructions necessary to assist the jury in assessing the accuracy of eyewitness perception and credibility: there were minimal differences between the defendant's request to charge and the instruction given by the court, which included, in substance, the defendant's requested instructions regarding the use of a double-blind identification procedure and the impact of the passage of time on memory, the court did not err in omitting the defendant's request for an instruction on unconscious transference, as there was no evidence to establish that unconscious transference could be an issue for the jury to consider and the defendant provided no authority that such an instruction was required, nor did he offer an expert witness to testify at trial about unconscious transference, and the court's instructions were neither overbroad nor overgeneralized, but were correct in law, adapted to the issue of eyewitness identification and sufficient to guide the jury, as the court, in its discretion, did not need to tailor its charge to the precise letter of the defendant's request.

Argued November 27, 2017—officially released June 5, 2018

Procedural History

Substitute information charging the defendant with the crimes of robbery in the first degree and larceny in the third degree, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Mullarkey*, *J.*; thereafter, the court denied the defendant's motion to suppress certain evidence; verdict of guilty; subsequently, the court denied the defendant's motions to dismiss; judgment of guilty, from which the defendant appealed to this court; thereafter, the court, *Hon. Edward J. Mullarkey*, judge trial referee, issued an articulation of its decision. *Affirmed.*

Alec Gulash, certified legal intern, with whom was *James B. Streeto*, senior assistant public defender, for the appellant (defendant).

Harry Weller, senior assistant state's attorney, with whom were *Elizabeth S. Tanaka*, assistant state's attorney, and, on the brief, *Gail P. Hardy*, state's attorney, for the appellee (state).

Opinion

BEAR, J. The defendant, Darren Matthew Crosby, appeals from the judgment of conviction, rendered after a jury trial, of robbery in the first degree in violation of General Statutes § 53a-134 (a) (4)[1] and larceny in the third degree in violation of General Statutes (Rev. to 2007) § 53a-124 (a) (2).[2] On appeal, the defendant claims that the trial court erred in denying his motions to dismiss and his motion to suppress, and improperly concluded that (1) the state and the Massachusetts Department of Correction did not violate his rights under article IV, § 2, clause 2, of the United States constitution and the Interstate Agreement on Detainers (IAD), General Statutes § 54-186 et seq.; (2) the state's delay in executing an arrest warrant against him did not violate his due process rights; (3) the witnesses' identification of him from a photographic array was not the product of an unreliable identifiable procedure; and (4) the jury charge on eyewitness identification was sufficient. We affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to this appeal. On December 18, 2008, at approximately 1:44

[1] General Statutes § 53a-134 (a) provides in relevant part that "[a] person is guilty of robbery in the first degree when, in the course of the commission of the crime of robbery as defined in section 53a-133 or of immediate flight therefrom, he or another participant in the crime . . . (4) displays or threatens the use of what he represents by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun or other firearm . . . ."

[2] General Statutes (Rev. to 2007) § 53a-124 (a) provides that "[a] person is guilty of larceny in the third degree when he commits larceny as defined in section 53a-119 and . . . (2) the value of the property or service exceeds one thousand dollars . . . ." All references herein to § 53a-124 refer to the 2007 revision of the statute, the revision in effect on the date of the crimes.

p.m., a robbery took place at the Webster Bank in Enfield. The perpetrator of the robbery was described as a tall black male, clean cut, with an athletic build, and wearing a black hooded type jacket, eyeglasses, a white Red Sox ball cap with a black brim, and black gloves with a Cincinnati style "C" on the backs. Suzanne McVey, a bank teller, acknowledged the man's presence while she assisted another customer and told him that she would be with him shortly. When called forward to the teller window, the man approached McVey, mumbled something inaudible, and handed her a note, which stated, "this [is] a robbery, give [me] all [the] fifties and hundreds, and . . . [I have] a gun." McVey complied with the demand and gave the man cash from her drawer, which later was determined to total $1730. After the man left the bank, McVey informed the bank manager, Kathleen Lee, that she had just been robbed. Lee had been standing behind the teller line, about a foot and one-half from McVey, during the robbery. In accordance with bank procedure, the doors of the bank were locked to prevent the perpetrator from returning, and Lee called 911.

Detective Michael Bailey of the Enfield Police Department arrived at the bank at about 2 p.m., approximately fifteen minutes after the robbery. Lee assisted Bailey in reviewing the bank's surveillance footage. Multiple images of the perpetrator were captured by the bank's security camera. Detective David Thomas of the Enfield Police Department also assisted with the investigation of the robbery. After arriving at the bank, Thomas took a sworn statement from McVey, in which she described the perpetrator as a "[b]lack male, six feet to six feet, five inches, about thirty years old, thin to a medium build, well groomed, no facial hair . . . . Wearing a white baseball type cap possibly with a Nike logo . . . dark-rimmed regular eyeglasses, black fleece pullover

and black pants." No written statement was taken from any other witness.

Detective William Cooper of the Enfield Police Department, who also responded to the bank on the day of the robbery, was assigned as the case officer for the investigation. On February 3, 2009, Cooper went to the bank to present a photographic array to the witnesses to the robbery. McVey and Lee viewed the photographic array separately, and each identified the defendant as the perpetrator of the robbery. An arrest warrant for the defendant, charging him with larceny in the third degree in violation of § 53a-124 (a) (2), and robbery in the first degree in violation of § 53a-134 (a) (4), was issued on February 18, 2009. The defendant was taken into custody by the Enfield police on November 6, 2013.

On April 21, 2014, the defendant filed a motion to dismiss and an accompanying memorandum of law, asserting, inter alia, that the state's unreasonable and unjustifiable delay in executing the arrest warrant violated his rights under the sixth and fourteenth amendments to the United States constitution, and article first, § 8, of the Connecticut constitution.[3] Also on April 21, 2014, the defendant filed a motion to suppress the witnesses' identifications of him. Evidentiary hearings on the motion to dismiss and motion to suppress took place on April 24 and 25, 2014. On April 28, 2014, the court denied the defendant's motion to suppress the witnesses' identifications. The court did not render a decision on the defendant's motion to dismiss prior to trial.

[3] The defendant also asserted in his motion to dismiss that the arrest warrant application contained multiple misrepresentations and material omissions that entitled him to a dismissal pursuant to Practice Book § 41-8 (1) and (9). The defendant has not challenged on appeal the court's dismissal of this claim.

Following a jury trial, on May 5, 2014, the defendant was found guilty of robbery in the first degree in violation of § 53a-134 (a) (4) and larceny in the third degree in violation of § 53a-124 (a) (2). On June 18, 2014, another hearing was held on the defendant's motion to dismiss. On July 1, 2014, the defendant filed a supplemental memorandum of law in support of his motion to dismiss, and he also filed a second motion to dismiss and supporting memorandum of law asserting a violation of his rights under the IAD. On July 9, 2014, the state filed an opposition to the defendant's second motion to dismiss. On August 13, 2014, the court denied the defendant's motions to dismiss. On August 15, 2014, the court sentenced the defendant to a total effective term of five years imprisonment, with five years of special parole, to run consecutively with sentences pursuant to which he was incarcerated in Massachusetts. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the court erred in denying his motions to dismiss and improperly concluded that (1) the state and the Massachusetts Department of Correction did not violate his rights under article IV, § 2, clause 2, of the United States constitution and the IAD, § 54-186; and (2) the state's delay in executing an arrest warrant against him did not violate his due process rights. We are not persuaded.

The following additional facts, as set forth in the court's memorandum of decision and otherwise contained in the record, and procedural history are relevant to these claims. On February 18, 2009, a warrant was issued for the defendant's arrest in connection with the December 18, 2008 robbery. At that time, the defendant remained incarcerated in Massachusetts for multiple

bank robberies committed in that state.[4] On July 9, 2010, Enfield Police Detective Willie Pedemonti and James Howard, an inspector with the Hartford state's attorney's office, discussed, through facsimile transmissions, authorization to extradite the defendant from Massachusetts to Connecticut, and such extradition was authorized. Extradition, however, was not pursued at that time.

On September 1, 2010, the Enfield Police Department received a telephone request from "Rafael" of the MCI-Cedar Junction correctional facility at South Walpole in Massachusetts, for the defendant's warrant. The telephone call was followed by a facsimile transmission from the MCI-Cedar Junction records department, requesting a copy of the warrant for the defendant's arrest "[i]n order to be able to initiate the IAD process." In response to the request, Stephanie "Dee" Beninato, the records clerk for the Enfield Police Department, faxed a copy of the warrant that same day. It is undisputed that Massachusetts did not treat the faxed warrant as a detainer, and therefore, it did not provide the defendant with IAD forms at that time.

On or about October 13, 2011, in response to an inquiry by the defendant, the Massachusetts Department of Correction advised the defendant that an IAD detainer had not been lodged, and that he should submit a written request to the state to lodge a detainer. On or about December 19, 2011, the defendant sent a "Notice of Whereabouts & Demand for Speedy Trial" to the geographical area number thirteen court in Enfield. Maria Reed-Cook, deputy clerk for that court, advised the defendant in a letter dated December 19, 2011, instead to contact the state's attorney's office in Hartford. On or about April 30, 2012, the defendant sent a

[4] The defendant pleaded guilty to seven counts of robbery in Massachusetts, and he was sentenced on July 23, 2010, to ten to twelve years of incarceration.

"Notice of Whereabouts and Demand for a Speedy Trial" and accompanying letter to Howard at the Hartford state's attorney's office, advising him of his location of incarceration and his efforts to have the arrest warrant served, and asserting his right to a speedy trial.[5] On May 2, 2012, Howard responded to the defendant and notified him that, as an incarcerated prisoner in another state, his speedy trial request did not apply because he was incarcerated in another state, but that he should contact his prison counselor to assist him in making the necessary arrangements to be brought to Connecticut under the provisions of the IAD.

On or about January 28, 2013, the Massachusetts Department of Correction Souza-Baranowski Correctional Center records manager, Jamie Lewis, notified the defendant in a written letter that "[o]ur records . . . indicate that you have been previously advised that in order to begin the IAD process a detainer must be lodged by the requesting state. A detainer has not been lodged. You have previously been advised that you must write to [Connecticut] and request that a detainer be lodged. Once a detainer is received the IAD process may be initiated." On February 1, 2013, in response to another inquiry from the defendant, Lewis wrote to the defendant to explain that "speedy trial requests are for same state open legal issues. For out of state open detainers IADs are filed. As previously indicated to you, there is no detainer filed therefore IADs do not currently apply . . . ." The defendant then made a written inquiry, dated February 3, 2013, to the geographical area number thirteen court in Enfield. On

[5] In that letter, the defendant stated, in relevant part: "Now comes Darren Crosby, the defendant acting pro-se in the above captioned matter, and respectfully moves the Honorable Court, pursuant to Rule 36, Mass. R. Crim. P., to schedule a trial or other disposition in this action without further delay. The defendant is presently incarcerated within the Massachusetts Department of Correction at MCI Cedar Junction Walpole."

February 6, 2013, Reed-Cook responded to the defendant, informing him again that "[i]f the warrant to which you refer has not been served on you by an arresting agency, the clerk's office is not the appropriate office to contact. [The clerk's office] only handles matters after an arrest has been made. You must contact the [Hartford state's attorney office], which handles the lodging of detainers."

On May 22, 2013, Pedemonti sent a letter to Kathy Guenther at the Souza-Baranowski Correctional Center, which stated: "The Enfield Police Department currently holds an active arrest warrant for [the defendant] . . . for Robbery 1st and Larceny 3rd. Both are felonies in the [s]tate of Connecticut. Extradition has been authorized by our State's Attorney's Office and the Enfield Police Department will extradite." After receiving the letter, Massachusetts asked the Enfield Police Department to clarify whether Connecticut was lodging a detainer for IAD purposes. On July 23, 2013, the defendant was notified that a detainer had been lodged against him, and he was provided with the necessary IAD forms, which he signed. On August 6, 2013, the Hartford state's attorney's office received the IAD forms. On November 6, 2013, Enfield police arrested the defendant, and he was transported from Massachusetts to Connecticut.

On April 21, 2014, the defendant filed a motion to dismiss the pending Connecticut charges. During the April 25, 2014 hearing on the motion to dismiss, Carl J. Sferrazza, the police chief for the Enfield Police Department, testified about the general procedure for executing a detainer—that when a warrant is secured for the arrest of a person located out of state, the process is "normally [to] send a copy of that warrant to the home state or the jail where he's being held so they know that he's wanted by us; that would be our normal procedure." Sferrazza testified that he did not believe

there was any written procedure, but that "our practice has been, we e-mail or we fax the holding facility our warrant so they're on record that the person is wanted by us." Defense counsel then asked whether Sferrazza was aware that "the process can be accelerated either through extradition or what's called the interstate agreement on [detainers] act," to which Sferrazza explained that "we work hand in hand with the state's attorney's office to get these things done. I, personally, in my career have never been involved in that portion of it, but we work through the state's attorney's office to get these things done."

At the April 25, 2014 hearing, Beninato, the records clerk for the Enfield Police Department, testified that when she faxed the arrest warrant to the Massachusetts correctional facility, she was merely responding to the request from Rafael, that she was not responsible for lodging detainers, and that lodging a detainer is not something she would be asked to do as part of her duties as records clerk. She was asked whether she attached anything to the warrant to show that the state was "making a demand for the defendant's return to . . . Connecticut," to which she responded, "no."

"We initially address the standard of review for a trial court's denial of a motion to dismiss. Because a motion to dismiss effectively challenges the jurisdiction of the court, asserting that the state, as a matter of law and fact, cannot state a proper cause of action against the defendant, our review of the court's legal conclusions and resulting denial of the defendant's motion to dismiss is de novo. . . . Factual findings underlying the court's decision, however, will not be disturbed unless they are clearly erroneous. . . . The applicable legal standard of review for the denial of a motion to dismiss, therefore, generally turns on whether the appellant seeks to challenge the legal conclusions of the trial court or its factual determinations." (Citation omitted;

internal quotation marks omitted.) *State* v. *Samuel M.*, 323 Conn. 785, 794–95, 151 A.3d 815 (2016).

A

We first address the defendant's claim that, because the state allegedly lodged a detainer against him on September 1, 2010, but he was not extradited from Massachusetts until 2013, he was entitled to dismissal of the charges against him. Specifically, the defendant contends that his rights were violated when the Massachusetts Department of Correction failed to provide him with the necessary IAD forms after Connecticut lodged a detainer and misinformed him of his rights, and that Connecticut is vicariously liable for Massachusetts' actions. We are not persuaded.

We begin our analysis by setting forth our standard of review and the relevant legal principles governing the defendant's claim. "The IAD is a congressionally sanctioned interstate compact the interpretation of which presents a question of federal law. . . . Our standard of review of the [defendant's] claim is plenary. We must decide whether the court's conclusion is legally and logically correct and find[s] support in the facts that appear in the record." (Citations omitted; internal quotation marks omitted.) *State* v. *Taylor*, 63 Conn. App. 386, 411–12, 776 A.2d 1154, cert. denied, 257 Conn. 907, 777 A.2d 687, cert. denied, 534 U.S. 978, 122 S. Ct. 406, 151 L. Ed. 2d 308 (2001).

"The purpose of the IAD is to establish a cooperative procedure for disposition of charges against a prisoner in one state who is wanted to respond to untried criminal charges in another state. . . . The IAD is activated when the state seeking the prisoner (the receiving state) files written notice that he is wanted to answer charges in that state. . . . This notice, referred to as a detainer, is simply a notification filed with the institution in which the prisoner is serving a sentence, advising that he is

wanted to face pending criminal charges in another jurisdiction." (Citations omitted; internal quotation marks omitted.) Id., 412.

"After lodging the detainer an appropriate officer of the demanding state may make a written request for temporary custody of the prisoner for the purpose of trying these indictments, informations, or complaints that form the basis of the detainer. . . . Unless the governor of the asylum state disapproves the request for temporary custody within thirty days of its filing, the demanding state shall be entitled to have a prisoner against whom [it] has lodged a detainer. . . . Once a detainer has been filed against a prisoner, custodial officials must promptly notify the prisoner of the source and contents of the detainer and of the prisoner's right to request a final disposition of the foreign charge; General Statutes § 54-186, art. III (c); the prisoner, upon notifying prosecuting officials in the demanding state of his or her request for a final disposition of the charge, must be brought to trial within 180 days of the request; General Statutes § 54-186, art. III (a)." (Citations omitted; internal quotation marks omitted.) *Remick* v. *Lopes*, 203 Conn. 494, 502–503, 525 A.2d 502 (1987).

"The provisions of the [IAD] are activated only when the receiving or charging state lodges with the sending or asylum state a detainer based on a pending indictment, information or complaint." (Internal quotation marks omitted.) Id., 501. Accordingly, the state was not required to comply with the provisions of the IAD until it lodged a detainer against the defendant. See *United States* v. *Mauro*, 436 U.S. 340, 361, 98 S. Ct. 1834, 56 L. Ed. 2d 329 (1978) ("[b]ecause . . . the [g]overnment never filed a detainer against [the defendants], the [IAD] never became applicable and the United States was never bound by its provisions"). Therefore, we first must determine when the state lodged a detainer against

the defendant before we address his claim that his rights under the IAD were violated.

The defendant argues that the court erred in determining that a detainer was lodged against him in May, 2013. He contends that a detainer instead was lodged against him when the Enfield Police Department faxed a copy of his arrest warrant to Massachusetts on September 1, 2010. We disagree.

A detainer is "a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction." (Internal quotation marks omitted.) *State* v. *Milton*, 26 Conn. App. 698, 708, 603 A.2d 750, appeal dismissed, 224 Conn. 163, 617 A.2d 460 (1992). "A detainer . . . need not take any particular form; its purpose is to provide written notice to prison authorities . . . that charges are pending against the prisoner. . . . Thus, a letter from a police department to prison officials . . . a letter from the clerk of court to prison officials . . . and a letter from a prosecuting attorney to prison officials . . . have all been held to fall within the IAD definition of a detainer." (Citations omitted; internal quotation marks omitted.) Id., 708–709.

In the present case, the court found that the state did not lodge a detainer on September 1, 2010, because "it cannot be ascertained whether [state] officials requested that Massachusetts hold the defendant or notify [the state] when the defendant's release was imminent" through the mere sending of the faxed warrant. Importantly, a detainer is initiated by the receiving state (Connecticut), not by the sending state (Massachusetts). See *State* v. *Taylor*, supra, 63 Conn. App. 412. Thus, the fact that the Enfield records clerk faxed a copy of the arrest warrant *in response to a request* for the warrant from Massachusetts does not establish the

state's intent to lodge a detainer. As the defendant concedes in his principal brief, "the fax sent by the Enfield Police Department did not include language expressly stating that the warrant was being sent for the purpose of lodging a detainer . . . ." In contrast, the May 22, 2013 letter, signed by Pedemonti of the Enfield Police Department, did indicate the state's intent to lodge a detainer. It provided, in relevant part: "The Enfield Police Department currently holds an active arrest warrant for [the defendant] . . . for Robbery 1st and Larceny 3rd. Both are felonies in the [s]tate of Connecticut. *Extradition has been authorized by our State's Attorney's Office and the Enfield Police Department will extradite*." (Emphasis added.)

The trial court also found it relevant that, although the warrant was faxed in response to a request from Massachusetts to do so, Massachusetts did not consider the faxed warrant to be a detainer. The parties stipulated to the trial court that "the Massachusetts [Department of Correction] will consider a written document as a detainer triggering the IAD process if the document references a pending criminal charge and requests either (a) that the criminal justice agency be notified when the inmate's sentence is completed or (b) that the Massachusetts [Department of Correction] hold the subject after his sentence is completed so that he can be taken into custody by the receiving state." Although the May, 2013 letter satisfied these criteria, the September, 2010 fax did not.

Furthermore, the defendant was informed multiple times prior to May, 2013, by Massachusetts correctional employees that a detainer had not been lodged against him. It was not until July 23, 2013, that he was notified that a detainer had been lodged against him by the state. On the basis of the foregoing, we conclude that the court did not err in determining that the detainer was lodged against the defendant in May, 2013.

We next consider whether the defendant's rights under the IAD were violated. The defendant claims that "Massachusetts, in [its] capacity as [agent] for [the state], violated the IAD through inaction [and that the state], as principal, is liable for this violation." The defendant contends that Massachusetts' failure to recognize the state's detainer halted the filing procedure, and delayed the triggering of the defendant's rights and duties under the IAD. We are not persuaded. As set forth previously in this opinion, the state lodged a detainer against the defendant in May, 2013. Thus, only two months elapsed between the detainer being lodged and the defendant being informed in July, 2013, that the state had lodged a detainer against him. Even if a detainer effectively had been lodged in September, 2010, however, the defendant's claim still would fail because he has failed to demonstrate that any delay was unjustifiable or that he was prejudiced by any delay.

"Article III of the IAD governs inmate requests for a prompt disposition of outstanding detainers. The centerpiece of Article III is subsection (a), which states that a prisoner shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint . . . . Failure to comply with Article III (a) mandates dismissal with prejudice of the underlying charges." (Citation omitted; internal quotation marks omitted.) *State* v. *Herring*, 210 Conn. 78, 85–86, 554 A.2d 686, cert. denied, 492 U.S. 912, 109 S. Ct. 3230, 106 L. Ed. 2d 579 (1989). "The remaining provisions of Article III address the custodial state's duty 'promptly' to inform a prisoner of outstanding detainers; General Statutes § 54-186, Article III (c); and 'promptly' to forward a request for prompt disposition

to the demanding state. General Statutes § 54-186, Article III (b) and (d)." (Footnote omitted.) *State* v. *Herring*, supra, 86.

"Although custodial state delays do not automatically require the dismissal of criminal charges in the demanding state, we would be remiss in our obligation to effectuate the IAD's purposes and principles if we were simply to ignore such a violation. Indeed . . . under the IAD, officials of the custodial state act as the agents of the demanding state. . . . When, in somewhat similar circumstances, we sought to enforce a criminal defendant's right to have his appeal defended by the state with due diligence . . . we found a useful analogy in the rules that have been developed to protect a defendant's constitutional right to a speedy trial. So too [a] defendant's right to prompt IAD notification can appropriately be protected by invoking the balancing principles of *Barker* v. *Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), which determine when a deprivation of speedy trial rights requires dismissal of criminal charges against a defendant. . . . The four factors that form the matrix of a *Barker* v. *Wingo* [supra, 530] analysis are: the length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." (Citations omitted.) *State* v. *Herring*, supra, 210 Conn. 89–90. "We recognize that these factors have no talismanic qualities but rather must be considered together with such other circumstances as may be relevant. . . . The triggering mechanism for our consideration of the *Barker* factors is the length of the delay that the defendant has experienced. . . . As the tolerable length of delay may vary greatly between cases, our inquiry into the length of the delay is necessarily dependent upon the peculiar circumstances of the case." (Citations omitted; internal quotation marks omitted.) *State* v. *Roman*, 320 Conn. 400, 418–19, 133 A.3d 441 (2016).

On appeal, the defendant fails to analyze his claim pursuant to the *Barker* factors, and instead argues that "prejudice is presumed for failure to comply with IAD regulations." As the state asserts, however, the defendant's argument conflicts with established case law, which explicitly states that "custodial state delays do not automatically require the dismissal of criminal charges in the demanding state . . . ." *State* v. *Herring*, supra, 210 Conn. 89. We agree with the state and, thus, reject the defendant's argument that prejudice is presumed by "a delay of this magnitude." Rather, a claim of prejudice resulting from the delay is properly analyzed pursuant to the four *Barker* factors.

Utilizing the *Barker* factors, the trial court in the present case determined that, as to the first factor, the length of the delay between the defendant's sentencing in Massachusetts on July 23, 2010, and his receipt of the IAD forms on August, 26, 2013, was "sufficient to trigger an application of the remaining three factors."[6] As to the second factor, the court concluded that "much of the delay seems to be attributable to a misunderstanding, or miscommunication, on the part of officials in both states concerning whether an IAD detainer had been lodged and the proper way in which to initiate the lodging of a detainer" but that "this factor cuts slightly in favor of the defendant." As to the third factor, the court noted that the defendant made at least one attempt to assert his right to a speedy trial by sending a letter to Howard, but there were also periods of inactivity in asserting that right. Finally, as to the fourth factor, the court concluded that the defendant failed to establish prejudice.[7] The defendant has failed to demonstrate on appeal that any delay was unjustifiable or

[6] We note that the defendant did not pursue a claim that his right to be brought to trial within 180 days of notice of the detainer was violated and explicitly waived such a claim before the trial court.

[7] Specifically, the court noted that "[t]he defendant contends that the delay in his case adversely affected him personally by creating prolonged angst and uncertainty as to the outstanding charges and their effect on his

that he was prejudiced by any delay. Accordingly, we conclude that the court properly denied the defendant's motion to dismiss.

B

We next address the defendant's claim that the court erroneously denied his motion to dismiss because his due process rights were violated by the state's "unreasonable and unjustifiable delay" in executing the arrest warrant against him, extraditing him four years after the warrant was issued. The defendant contends that the unjustifiable delay had an impact on the memory of the eyewitnesses, which resulted in actual, substantial prejudice to him. We are not persuaded.

"The role of due process protections with respect to pre-accusation delay has been characterized as a limited one. . . . [T]he Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment." (Internal quotation marks omitted.) *Slater* v. *Commissioner of Correction*, 158 Conn.

term of imprisonment in Massachusetts. Although the uncertainty surrounding pending charges may surely generate feelings of anxiety, the defendant failed to provide any direct evidence that he suffered in this way. . . . The defendant also failed to introduce any evidence regarding the effect, if any, the pending Connecticut charges had on the conditions of his physical incarceration or on his ability to participate in rehabilitation programs while incarcerated in Massachusetts. As for the defendant's claims that the fading memories of the witnesses were exacerbated by the delay, [r]elying on the simple passage of time, cannot, without a more specific showing, be said to prejudice the defendant any more than the state. As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so. And it is the prosecution which carries the burden of proof. . . . Finally, the defendant again asserts that the delay hampered his defense due to the change in his appearance from the date of the offense to the time of trial. The court has already addressed that aspect of the defendant's prejudice claim and has determined it is unsupported by the evidence." (Citations omitted; internal quotation marks omitted.)

App. 522, 536, 119 A.3d 1221, cert. denied, 319 Conn. 932, 125 A.3d 206 (2015). "This court need only determine whether the action complained of . . . violates those fundamental conceptions of justice which lie at the base of our civil and political institutions . . . and which define the community's sense of fair play and decency . . . . The due process clause has not replaced the applicable statute of limitations . . . [as] . . . the primary guarantee against bringing overly stale criminal charges." (Citations omitted; internal quotation marks omitted.) *State* v. *John*, 210 Conn. 652, 685, 557 A.2d 93, cert. denied, 493 U.S. 824, 110 S. Ct. 84, 107 L. Ed. 2d 50 (1989); see also *Slater* v. *Commissioner of Correction*, supra, 536. "In order to establish a due process violation because of pre-accusation delay, the defendant must show both that actual substantial prejudice resulted from the delay and that the reasons for the delay were wholly unjustifiable, as where the state seeks to gain a tactical advantage over the defendant. . . . [P]roof of prejudice is generally a necessary but not sufficient element of a due process claim, and . . . the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." (Internal quotation marks omitted.) *State* v. *John*, supra, 685–86. "Mere allegations of potential prejudice or dimmed memory are insufficient." *State* v. *Hanna*, 19 Conn. App. 277, 278, 562 A.2d 549 (1989).

In the present case, the arrest warrant for the defendant for the December 18, 2008 robbery was issued on February 18, 2009. The defendant was taken into custody and transported to Connecticut from Massachusetts by the Enfield Police Department on November 6, 2013. Although approximately four years and eleven months passed from the date of the robbery to the execution of the arrest warrant, and approximately four years and nine months passed from the date of the arrest warrant to its execution, those periods of time standing alone do not require a finding of a due

process violation. See *State* v. *Haynes*, 8 Conn. App. 361, 364, 513 A.2d 160 (1986) ("A delay of nearly twenty-one months between the date of the crime and the date of the arrest has been held insufficient to dismiss charges against a defendant, absent a showing of any specific prejudice to the defendant; *State* v. *Aspinall*, 6 Conn. App. 546, 549, 506 A.2d 1063 [1986]; as has a delay of more than five years. *State* v. *Littlejohn*, [199 Conn. 631, 646, 508 A.2d 1376 (1986)]."). The defendant must establish that the passage of time was wholly unjustifiable and caused him actual, substantial prejudice.[8]

[8] The defendant cites to *State* v. *Soldi*, 92 Conn. App. 849, 857, 887 A.2d 436, cert. denied, 277 Conn. 913, 895 A.2d 792 (2006), for the proposition that "once a defendant puts forth evidence to suggest that [he] was not elusive, was available and was readily approachable, the burden shifts to the state to prove that the delay in executing the warrant was not unreasonable." As the trial court indicated in its memorandum of decision, however, *Soldi* is inapplicable to the present case.

The decision in *Soldi* and subsequent cases citing *Soldi* make clear that this burden shifting rule applies in the context either of a warrant for violation of probation or a warrant executed outside of the statute of limitations. See, e.g., *State* v. *Swebilius*, 325 Conn. 793, 803–804, 159 A.3d 1099 (2017) (warrant executed outside statute of limitations period); *State* v. *Woodtke*, 130 Conn. App. 734, 736, 25 A.3d 699 (2011) (same); *State* v. *Pittman*, 123 Conn. App. 774, 775, 3 A.3d 137 (delay in executing warrant charging defendant with violation of probation), cert. denied, 299 Conn. 914, 10 A.3d 530 (2010). Neither of those circumstances is present in this case, as the arrest warrant was not for a violation of probation, and the warrant was executed within the five year statute of limitations. See footnote 10 of this opinion.

Instead, the defendant has the burden of establishing "both that actual substantial prejudice resulted from the delay and that the reasons for the delay were wholly unjustifiable, as where the state seeks to gain a tactical advantage over the defendant." (Internal quotation marks omitted.) *State* v. *John*, supra, 210 Conn. 685–86; see also *Slater* v. *Commissioner of Correction*, supra, 158 Conn. App. 536–37 (applying two-pronged test set forth in *John*); *State* v. *Santos*, 108 Conn. App. 250, 263, 947 A.2d 414 (2008) ("[t]he law is quite clear that [i]n order to establish a due process violation because of pre-accusation delay, the defendant must show both that actual substantial prejudice resulted from the delay and that the reasons for the delay were wholly unjustifiable, as where the state seeks to gain a tactical advantage over the defendant" [internal quotation marks omitted]).

The defendant claims that the delay resulted in actual, substantial prejudice because "[a]t trial, the state's primary witness, McVey, revealed that she had no recollection of the suspect or of her conversations with investigating officers in which she described that suspect. McVey's lack of memory deprived defense counsel of the chance to effectively cross-examine [her] . . . regarding her identification." We note, however, that "[a] claim of general weakening of witnesses' memories, relying on the simple passage of time, cannot, without a more specific showing, be said to prejudice the defendant." (Internal quotation marks omitted.) *State* v. *Lacks*, 58 Conn. App. 412, 420, 755 A.2d 254, cert. denied, 254 Conn. 919, 759 A.2d 1026 (2000); see also *State* v. *Hanna*, supra, 19 Conn. App. 278. Furthermore, because McVey was the state's primary witness, any defect in her memory prejudiced the state, not the defense. See *State* v. *Morrill*, 197 Conn. 507, 528, 498 A.2d 76 (1985). Indeed, "[a]s the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so. And it is the prosecution which carries the burden of proof." *Barker* v. *Wingo*, supra, 407 U.S. 521. As the state points out in its brief, and the record supports, the delay worked to the defendant's advantage, as the defendant's cross-examination of McVey was effective at exposing her memory gaps. McVey's responses to many questions on both direct examination and cross-examination was that she could not recall the events in question.[9]

[9] We also reject the defendant's claim that the delay resulted in actual, substantial prejudice because "McVey's and Lee's identifications of the defendant were the only evidence in the case that placed the defendant in the Webster Bank during the robbery" and their lack of memory at trial impacted the defense. This argument ignores the fact that there was other evidence presented at trial from which the jury could determine the defendant's guilt, including surveillance photographs of the defendant on the day of the robbery at the bank and at another bank where he was dressed in the same attire. Evidence of the defendant's guilty plea to a robbery in East

Additionally, as the trial court pointed out in its memorandum of decision, the defendant's claimed prejudice pertains to concerns generally protected by the applicable statute of limitations.[10] We reiterate that "[t]he due process clause has not replaced the applicable statute of limitations . . . [as] . . . the primary guarantee against bringing overly stale criminal charges." (Internal quotation marks omitted.) *State* v. *John*, supra, 210 Conn. 685.

The defendant has not demonstrated that the state's alleged delay in executing the warrant against him resulted in actual, substantial prejudice to him.[11] See id., 686 ("we cannot find in this record that the defendants have shown, as they must, actual substantial prejudice, such as the death or disappearance of a vital defense witness" [internal quotation marks omitted]). Accordingly, the trial court did not err in denying the defendant's motion to dismiss.

II

The defendant next claims that the court erred in denying his motion to suppress and improperly concluded that the witnesses' identification of him from the suspect photographic array was not the product of an unreliable identification procedure. Specifically, the

Longmeadow, Massachusetts, was not admitted at trial; thus, the jury was told that the images from the East Longmeadow bank were from a commercial establishment. The jury reviewed these photographs during its deliberations.

[10] As the court noted in its memorandum of decision, "[t]here is a five year statute of limitations for the offenses charged in the defendant's case. . . . The Webster Bank robbery occurred on December 18, 2008. The defendant was arrested on November 6, 2013—which is within the five year limitation period. Thus, the defendant had adequate protections against the disadvantages to an accused attending stale prosecutions . . . ." (Citations omitted; internal quotation marks omitted.)

[11] Because we conclude that the first prong of *John* has not been satisfied, we need not consider whether the state's delay was wholly unjustifiable under the second prong of *John*. See *State* v. *John*, supra, 210 Conn. 685–86.

defendant claims that the photographic array was unnecessarily suggestive and unreliable because "(1) the 'filler' photographs[12] were too dissimilar from the defendant; (2) the defendant was the only individual pictured in apparent prison garb; (3) the array was simultaneous, as opposed to sequential; and (4) the police department did not use a 'double-blind' identification procedure." (Footnote added.) We are not persuaded.

The following additional facts are relevant to this claim. On February 3, 2009, Cooper separately presented to McVey and Lee a photographic array created by Massachusetts State Police Trooper Kevin O'Toole, which contained eight photographs of males of the same race and with similar features. Prior to presenting the array to each witness, Cooper read the following required warning: "You will be asked to look at a group of photographs. The fact that the photographs are shown to you should not influence your [judgment]. You should not conclude or guess that the photographs contain the picture of the person who committed the crime. You are not obligated to identify anyone. It is just as important to free innocent persons from suspicion as to identify guilty parties. Please do not discuss the case with other witnesses or indicate in any way that you have identified someone." Lee and McVey each signed the page from which the warning was read to them, acknowledging that they understood the warning. After viewing the array, each witness selected photograph number three, the photograph of the defendant, and identified him as the perpetrator of the December 18, 2008 robbery at the bank.

On April 21, 2014, the defendant filed a motion to suppress the witnesses' identification of him on the

[12] " 'Filler' means either a person or a photograph of a person who is not suspected of an offense and is included in an identification procedure." General Statutes § 54-1p (a) (5).

ground that the photographic array was unnecessarily suggestive and unreliable. A hearing on the motion to suppress took place on April 25, 2014. At the hearing, the two witnesses, McVey and Lee, testified. Lee testified that she "was 100 percent certain" of her identification of the defendant as the perpetrator of the robbery when Cooper presented her with the photographic array on February 3, 2009. Lee also testified that her attention was drawn to the defendant for "two reasons; the first reason was, I didn't recognize him as a depositor, and people that don't deposit with us are sales opportunities and we really [have] a strong sales culture, so that was one thing; that's what I'm trained to do. And the other reason why he caught my attention was, he looked just like my husband, and I took a second look and that's why he caught my attention, those two reasons. . . . My husband wears similar glasses, and he had at the time the same mustache and the same skin tone and a very similar build." Defense counsel asked Lee whether she saw any significance in the defendant's clothing, to which she stated that she did not.

McVey testified at the hearing that she recalled describing some of the defendant's features to the police, such as his clothing and his race, but that she could not recall her description of his build or certain facial features. McVey did testify that, at the time of the photographic array, she was "100 percent" certain of her identification of the defendant as the perpetrator of the robbery. McVey stated that she selected the defendant's photograph from the array because "[s]omething just triggered a memory and it was the correct memory. . . . [S]omething about that particular picture just brought the whole thing back." Similar to Lee, McVey testified that she saw no significance in the defendant's clothing.

Following the hearing, on April 28, 2014, the court denied the defendant's motion to suppress. Lee and

McVey both testified at trial. In response to the defendant's motion for an articulation, the court issued a written articulation of its decision on October 4, 2016.

"Our standard of review of a trial court's findings and conclusions in connection with a motion to suppress is well defined. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [W]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision . . . ." (Internal quotation marks omitted.) *State* v. *Salmond*, 179 Conn. App. 605, 615–16, 180 A.3d 979, cert. denied, 328 Conn. 936, A.3d (2018). "[A] claim of an unnecessarily suggestive pretrial identification procedure is a mixed question of law and fact. . . . [B]ecause 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. . . . Because the inquiry into whether evidence of pretrial identification should be suppressed contemplates a series of factbound determinations, which a trial court is far better equipped than this court to make, we will not disturb the findings of the trial court as to subordinate facts unless the record reveals clear and manifest error." (Citation omitted; internal quotation marks omitted.) *State* v. *Johnson*, 149 Conn. App. 816, 822, 89 A.3d 983, cert. denied, 312 Conn. 915, 93 A.3d 597 (2014). "[W]e will reverse the trial court's ruling [on evidence] only where there is an 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." (Internal quotation marks omitted.) *State* v. *Salmond*, supra, 616; see also

State v. *Marquez*, 291 Conn. 122, 137–38, 967 A.2d 56, cert. denied, 558 U.S. 895, 130 S. Ct. 237, 175 L. Ed. 2d 163 (2009). "[I]f we find that the court incorrectly permitted, as reliable, evidence flowing from an unreliable and unduly suggestive identification procedure, there remains the further issue of whether the ensuing judgment of conviction may be affirmed on the ground that the due process violation was, nevertheless, harmless in light of all the evidence correctly adduced at trial and untainted by the admission of an unreliable identification." (Internal quotation marks omitted.) *State* v. *Day*, 171 Conn. App. 784, 809, 158 A.3d 323 (2017).

On appeal, the defendant claims that his due process rights were violated by the admission of the witnesses' identification of him at trial. "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." (Internal quotation marks omitted.) *State* v. *Marquez*, supra, 291 Conn. 141. "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. . . . 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]." (Citations omitted; internal quotation marks omitted.) *State* v. *Dickson*, 322 Conn. 410, 421, 141 A.3d 810 (2016), cert. denied, U.S. , 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017). "[A]n out-of-court eyewitness identification should be excluded on the basis of the procedure used to elicit that identification only if the court is convinced that the procedure was so suggestive and otherwise unreliable as to give rise to a very substantial likelihood of irreparable misidentification." (Internal quotation marks omitted.) *State* v. *Salmond*, supra, 179 Conn. App. 617.

"In evaluating the [first factor concerning] suggestiveness of a photographic array, a court should look to both the photographs themselves and the manner in which they were presented to the identifying witness. . . . We consider the following nonexhaustive factors in analyzing a photographic array for unnecessary suggestiveness: (1) the degree of likeness shared by the individuals pictured . . . (2) the number of photographs included in the array . . . (3) whether the suspect's photograph prominently was displayed or otherwise was highlighted in an impermissible manner . . . (4) whether the eyewitness had been told that the array includes a photograph of a known suspect . . . (5) whether the eyewitness had been presented with multiple arrays in which the photograph of one suspect recurred repeatedly . . . and (6) whether a second eyewitness was present during the presentation of the array. . . . It is important to note, however, that [p]hotographs will often have distinguishing features. The

question . . . is not whether the defendant's photograph could be distinguished from the other photographs . . . but whether the distinction made it unnecessarily suggestive." (Citations omitted; internal quotation marks omitted.) *State* v. *Marquez*, supra, 291 Conn. 161.

In the present case, the court determined that the identification procedure was not unnecessarily suggestive. In its written articulation of its decision denying the defendant's motion to suppress, the court analyzed the photographic array pursuant to the six factors set forth in *Marquez*. As to the first factor, which addresses the degree of similarity between the individuals in the array, the court noted that "[e]ach person is posed in front of a solid color background which contains no marking for height or other characteristics. Three appear to be some shade of grey, while five, including the defendant at number three, appear white. Each photo appears to be of similarly aged males of the same race with brown eyes. Seven photos, including the defendant's, display some facial hair. While the defendant may have been in prison garb, the defense provided no proof of that. The defendant thoroughly examined . . . Cooper and the two eyewitnesses on that point. During a previous hearing on April 24, 2014, on motions to dismiss, defense counsel made claims about Massachusetts prison garb, but provided no evidence. . . . The tan v-necked shirt is not obvious prison garb with numbers or lettering on it. It is not a luminous orange or yellow color. And most importantly, this court finds that neither eyewitness saw any significance in the shirt's appearance." (Citation omitted.)

As to the second factor, the court noted that "the number of photographs was the standard of eight photographs. While not presented in a sequential, double-blind manner, these photo boards met the standards in effect on February 3, 2009." See *State* v. *Marquez*, supra,

291 Conn. 164 ("the failure to use a double-blind procedure does not automatically render an identification suspect, particularly when, as in the present case, there is no evidence that the detectives conducting the procedure influenced the witnesses in any discernible way prior to their making the identification").

As to the third factor, the court noted that "Cooper was questioned extensively on the procedures he followed, particularly with regard to the composition and timing of the array. Th[e] robbery [at issue in the present case] occurred on December 18, 2008. The defendant was arrested in Massachusetts for other robberies on January 25, 2009. The array was shown to the two eyewitnesses on February 3, 2009. Extensive examination of [Cooper] in several areas of his investigation included possible third-party suspects, composition of the array and witnesses he did not interview. He testified that he relied more on the bank's surveillance photos than on witness descriptions, did not use Connecticut driver's license photos because they cannot be sorted by physical characteristics . . . and did not use Springfield Police Department photos because [they] did not fit [in] Enfield Police Department folders. . . . Instead, [Cooper] used an array composed by . . . O'Toole of the Massachusetts State Police . . . . The defendant's photo does not conflict with the statement . . . given by . . . McVey except on facial hair, which is also worn by six others depicted in the array. The detective gave no feedback to either eyewitness after the positive identifications. . . . Lee's description was that the perpetrator was African-American, wore glasses, a mustache and a lot of clothing, and looked to be in his thirties with an average build. While [Cooper] was asked to speculate as to the last known mug shot of the defendant available to him, that evidence was never elicited." (Citations omitted.)

As to the fourth factor, the court noted that "the witnesses were not told that a known suspect was in the array. In fact, each was told the opposite and given the approved warnings to that effect . . . . Lee . . . testified at the motion to suppress [hearing] that she was behind the teller line when she first saw the perpetrator from a distance, whom she did not recognize as a depositor but at first took to be her husband until apparently dissuaded by the team logo on his [baseball] cap. She further testified that [Cooper] showed her the array when only they were in her office and after he had given and she signed [the standard warning]. The only difference between the picture and the robber was an absence of eyeglasses. [Lee testified that she] was '100 [percent]' sure of her identification. . . . McVey testified at the hearing that she had been trained to hand over the money and to remember the perpetrator. She was shown a copy of the same photo array [as Lee] and selected the defendant. While [McVey] did not recall her level of certainty at the time of the identification, at the hearing she was '100 [percent]' sure. . . . McVey was also given the standard warning . . . . She testified that as to photo number three in the array, 'something just triggered a correct memory.' "

As to the fifth factor, "neither eyewitness was presented with multiple arrays repeating the suspect's photo. Similarly, the sixth factor was not violated, as each witness was shown the array in the presence of . . . Cooper only in attendance." Having concluded that the identification procedure was not unnecessarily suggestive, the court did not reach the second prong of reliability but concluded that the month and one-half delay "goes to the weight of the identification, not the fairness of the procedure, and would not change this court's opinion even if the [reliability based] totality of [the] circumstances prong were reached."

On the basis of our review of the record, we find ample support for the court's findings. We cannot conclude that the photographs in the array were too dissimilar. During the April 25, 2014 motion to suppress hearing, both Lee and McVey testified that they were "100 percent" certain of their photographic array identification of the defendant as the perpetrator of the robbery, and neither testified that they considered the photographs to be dissimilar. The photographic array was admitted as an exhibit, and the photographs in the array depict similarly aged males of the same race with brown eyes, all posed in front of a solid color background.

We are not persuaded by the defendant's claim that, at trial, McVey found every photograph aside from the defendant's "to be dissimilar from her recollection of the suspect either because of age, face shape and/or skin color." McVey did not testify that she found the photographs to be dissimilar. Instead, consistent with her testimony on direct examination, McVey testified on cross-examination that she selected the defendant's photograph because of his "eyes."[13] She identified him in the array because "[h]is eyes were what determined it for me." Although McVey agreed with defense counsel

[13] At trial, the following examination took place:

"[Defense Counsel]: Now, you knew the individual that had—the perpetrator, the individual who robbed you, had a relatively thin apparent face, correct? Long and narrow?

"[McVey]: I would say it was the eyes.

"[Defense Counsel]: Well, you knew the face was long and narrow, right?

"[McVey]: Okay. Yes.

"[Defense Counsel]: Okay. All right. Let's—let's look at the array. You said you looked through all the pictures, right?

"[McVey]: Yes.

"[Defense Counsel]: Okay. Showing you what's been admitted as state's [exhibit] 11. Excuse me while I get my copy. So, there—the person, in number one, his face isn't exactly long and narrow, is it?

"[McVey]: No.

"[Defense Counsel]: Okay. And you look at—you looked at all these, you said?

"[McVey]: I did.

that there were differences among the photographs, at no point did she testify, nor was she asked to comment on, whether she found the photographs too dissimilar. Importantly, "[p]hotographs will often have distinguishing features. The question . . . is not whether the defendant's photograph could be distinguished from the other photographs . . . but whether the distinction made it unnecessarily suggestive." (Internal quotation marks omitted.) *State* v. *Marquez*, supra, 291 Conn. 161.

We also cannot conclude that the court erred in determining that the defendant was not pictured in apparent prison garb. The photograph of the defendant

"[Defense Counsel]: Okay. Number two, he's a little on the young side, right?

"[McVey]: I guess.

"[Defense Counsel]: Okay. Do you remember giving a sort of age description of the person?

"[McVey]: No.

"[Defense Counsel]: Okay. Number three, we've already talked about, right?

"[McVey]: Yes.

"[Defense Counsel]: Number four, he's a little too light skin and his face is wrong, right?

"[McVey]: Yes.

"[Defense Counsel]: Okay. And number five, he might be the right complexion, but his face is wrong, too, right?

"[McVey]: Right.

"[Defense Counsel]: Number six, his face is long and narrow, right?

"[McVey]: Correct.

"[Defense Counsel]: But his complexion is a little on the light side from what you saw, right?

"[McVey]: It has nothing to do with the complexion.

"[Defense Counsel]: I understand. But he's fairly—

"[McVey]: It was the eyes.

"[Defense Counsel]: I understand that's your testimony—

"[McVey]: Uh-huh.

"[Defense Counsel]: —please answer my question.

"[McVey]: Okay.

"[Defense Counsel]: Number seven, again, face is wrong, right?

"[McVey]: Uh-huh.

"[Defense Counsel]: And number eight, again, sort of long and narrow, but, again, a little bit light—more lightly reflected than number three, right?

"[McVey]: Correct."

in the array depicts him wearing a tan v-neck shirt that is not bright in color or imprinted with any insignia. Both Lee and McVey testified at the motion to suppress hearing that they did not see any significance in the defendant's shirt.

Additionally, we are not persuaded by the defendant's argument that the absence of a sequential, double-blind photographic array rendered the identification procedure unnecessarily suggestive.[14] As the defendant concedes in his principal brief, "Cooper was not required by statute to utilize the double-blind, sequential procedure in 2010," but the defendant nevertheless argues that "studies were already out and ongoing at that time, which indicated that these procedures were the best practices for law enforcement." The defendant contends that "[t]he identification methods that Cooper used . . . put [him] in a position to purposefully or inadvertently provide confirmatory feedback that could have influenced the witnesses' confidence in their identifications," and that "[t]his could have been avoided by using a sequential array [and] . . . by sending another officer to the bank."

Although we recognize that a sequential, double-blind procedure now is mandated pursuant to General Statutes § 54-1p,[15] it was not the required procedure in 2009,

[14] "A double-blind photographic identification procedure is one in which the officer conducting [the procedure] has not been involved in the investigation and does not know who the target is." (Internal quotation marks omitted.) *State* v. *Patterson*, 170 Conn. App. 768, 772 n.1, 156 A.3d 66, cert. denied, 325 Conn. 910, 158 A.3d 320 (2017). Because Cooper knew that the defendant was a suspect when he presented the photographic array to the witnesses, the procedure was not double-blind.

"A sequential photographic identification procedure involve[s] showing the witness the suspect and other fillers on the identification procedure one at a time, rather than the traditional practice of simultaneous presentation." (Internal quotation marks omitted.) Id., 772 n.2. Because eight photographs were presented to the witnesses simultaneously, the procedure was not sequential.

[15] General Statutes § 54-1p (c) provides in relevant part that "[n]ot later than May 1, 2013, each municipal police department and the Department

when the photographic array was presented to the witnesses in this case. See *State* v. *Marquez*, supra, 291 Conn. 164 ("the failure to use a double-blind procedure [did] not automatically render an identification suspect, particularly when . . . there is no evidence that the [police officer] conducting the procedure influenced the witnesses in any discernible way prior to their making the identification"); *State* v. *Outing*, 298 Conn. 34, 49, 3 A.3d 1 (2010) ("[a] simultaneous photographic array is not unnecessarily suggestive per se, however, even if it was not administered in a double-blind procedure"), cert. denied, 562 U.S. 1225, 131 S. Ct. 1479, 179 L. Ed. 2d 316 (2011). The defendant does not argue that § 54-1p applies retroactively, but maintains that he was prejudiced by the procedure utilized by Cooper. This court previously has rejected a similar claim. In *State* v. *Johnson*, supra, 149 Conn. App. 821, this court rejected the defendant's argument that "[t]he absence of double-blind, sequential arrays makes a photo array unduly suggestive"; (internal quotation marks omitted); where the eyewitness identification was made in 2009, prior to the requirement that a sequential, double-blind procedure be utilized. This court upheld the trial court's application of the law in effect at the time of the identification and rejected the defendant's claim that "a non-double-blind photographic array procedure, per se, is

of Emergency Services and Public Protection shall adopt procedures for the conducting of photo lineups . . . that comply with the following requirements: (1) Whenever a specific person is suspected as the perpetrator of an offense, the photographs included in a photo lineup . . . shall be presented sequentially so that the eyewitness views one photograph . . . at a time . . . (2) The identification procedure shall be conducted in such a manner that the person conducting the procedure does not know which person in the photo lineup . . . is suspected as the perpetrator of the offense, except that, if it is not practicable to conduct a photo lineup in such a manner, the photo lineup shall be conducted by the use of a folder shuffle method, computer program or other comparable method so that the person conducting the procedure does not know which photograph the eyewitness is viewing during the procedure . . . ."

unduly suggestive." Id., 829. We similarly reject the defendant's claim in the present case that the absence of a sequential, double-blind procedure per se rendered the identification unnecessarily suggestive.[16]

Even if we assume, arguendo, that the photographic array procedure was unduly suggestive, the identification nevertheless would be reliable on the basis of the totality of the circumstances. See *State* v. *Dickson*, supra, 322 Conn. 421 ("[i]f 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

[16] We also are not persuaded by the defendant's reliance on *Guilbert* for the proposition that "identifications are likely to be less reliable in the absence of a double-blind, sequential identification procedure . . . ." *State* v. *Guilbert*, 306 Conn. 218, 238 n.39, 49 A.3d 705 (2012). This court previously has corrected a defendant's statement that *Guilbert* stands for such a proposition, noting that "[t]he principal issue before the court in *Guilbert* was not whether any particular identification procedures are constitutionally mandated, but whether courts are obligated to admit under specified circumstances qualified expert testimony concerning the fallibility of eyewitness identification under *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997) (en banc), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998), to aid juries in their evaluation of identification evidence. . . . The court in *Guilbert* acknowledged 'widespread judicial recognition that eyewitness identifications are potentially unreliable in a variety of ways unknown to the average juror. . . .' In particular, the court mentioned that '[c]ourts across the country now accept that [among other things] . . . identifications are likely to be less reliable in the absence of a double-blind, sequential identification procedure . . . .' (Citations omitted.) *State* v. *Grant*, 154 Conn. App. 293, 311, 112 A.3d 175 (2014), cert. denied, 315 Conn. 928, 109 A.3d 923 (2015).

"*Nothing in Guilbert, however, suggests that if the police show the photographs to the witness simultaneously and the procedure is administered by an officer who knows the identity of the suspect, the procedure is unnecessarily suggestive as a matter of law.* In ruling that experts in appropriate circumstances should be allowed to testify about issues that may affect the accuracy of identifications, the court was not concerned with the admissibility of identification evidence, but rather with a jury's proper exercise of its duty to evaluate the weight to be given to a particular eyewitness' identification." (Emphasis added and omitted.) Id.

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]). As the defendant concedes, "McVey and Lee saw the robber up close, and in a well lit room." Additionally, McVey accurately described the defendant in her sworn statement to the police, and her description matched the depiction of the perpetrator in the bank surveillance photographs. Lee and McVey both testified that they were 100 percent certain at the time of the identification that the defendant was the perpetrator. The identification in February, 2009, was made close in time to the December, 2008 robbery. Thus, even if there was an unduly suggestive procedure, which we conclude there was not, the defendant's claim would fail under the second reliability prong. See *State* v. *Marquez*, supra, 291 Conn. 141. On the basis of the foregoing, we conclude that the court did not err in denying the defendant's motion to suppress the eyewitnesses' identification of him.

III

The defendant claims that "[t]he jury charge on identification . . . failed to provide an in-depth explanation of factors that have a negative impact on witness identification and . . . incorrectly excluded instructions necessary to assist the triers of fact in assessing the accuracy of eyewitness perception and credibility." Specifically, the defendant contends that he was deprived of a fair trial because the jury instructions were incomplete, as several of the factors from *State* v. *Guilbert*, 306 Conn. 218, 245, 49 A.3d 705 (2012), that he included in his request to charge were missing or not explained in sufficient depth. We are not persuaded.

The following additional facts and procedural history are relevant to this claim. On April 30, 2014, the defendant filed a request to charge. A charging conference began that same day and continued on the morning of May 1, 2014. Discussion at the conferences centered on the defendant's request to charge on eyewitness identification. The jury was instructed on May 1, 2014. Following the instructions, the court asked the parties if they had any exceptions to the charge. The state had none. Defense counsel stated to the trial court that he "appreciate[d] [that] the court gave . . . in substance what I requested" for the jury instructions, and he then went on to clarify that he was not making additional exceptions "other than what we had already argued about yesterday in terms of crafting the identification instructions. . . . I still don't mean to abandon any of the . . . arguments that . . . I made . . . yesterday . . . ."

"Our Supreme Court has held that identification instructions are not constitutionally required and [e]ven if [a] court's instructions were less informative on the risks of misidentification . . . the issue is at most one of instructional error rather than constitutional error. A new trial would only be warranted, therefore, if the defendant could establish that it was reasonably probable that the jury was misled. . . . The ultimate test of a court's instructions is whether, taken as a whole, they fairly and adequately present the case to a jury in such a way that injustice is not done to either party under the established rules of law." (Internal quotation marks omitted.) *State* v. *Day*, supra, 171 Conn. App. 831.

"We review nonconstitutional claims of instructional error under the following standard. While a request to charge that is relevant to the issues in a case and that accurately states the applicable law must be honored, a [trial] court need not tailor its charge to the precise letter of such a request. . . . If a requested charge is

in substance given, the [trial] court's failure to give a charge in exact conformance with the words of the request will not constitute a ground for reversal. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper." (Internal quotation marks omitted.) Id., 831–32. "A challenge to the validity of jury instructions presents a question of law over which this court has plenary review." (Internal quotation marks omitted.) *State* v. *Holley*, 174 Conn. App. 488, 493–94, 167 A.3d 1000, cert. denied, 327 Conn. 907, 170 A.3d 3 (2017), cert. denied, U.S. , 138 S. Ct. 1012, 200 L. Ed. 2d 275 (2018).

The defendant claims that the following requested *Guilbert* factors were omitted or understated in the jury instructions: "there is at best a weak correlation between a witness' confidence in his or her identification and its accuracy"; *State* v. *Guilbert*, supra, 306 Conn. 237; "identifications are likely to be less reliable in the absence of a double-blind, sequential identification procedure"; "witnesses are prone to develop unwarranted confidence in their identifications if they are privy to postevent or postidentification information about the event or the identification"; and "the accuracy of an eyewitness identification may be undermined by unconscious transference, which occurs when a person seen in one context is confused with a person seen in another." Id., 238–39. To the extent that the defendant suggests that the *Guilbert* factors are required in the jury instructions, we reject that argument. As an initial matter, *Guilbert* concerned the admissibility of expert testimony, not a challenge to jury instructions. Although the court in *Guilbert* did acknowledge the "widespread judicial recognition that eyewitness identifications are potentially unreliable in a variety of ways unknown to the average juror"; (internal quotation marks omitted) *State* v. *Grant*, 154 Conn. App. 293, 311, 112 A.3d 175

(2014), cert. denied, 315 Conn. 928, 109 A.3d 923 (2015); it did not mandate that such factors be included in jury instructions. See footnote 16 of this opinion. In fact, in *Guilbert*, the court even noted that jury instructions are less effective than expert testimony, stating that "research has revealed that jury instructions that direct jurors in broad terms to exercise caution in evaluating eyewitness identifications are less effective than expert testimony in apprising the jury of the potential unreliability of eyewitness identification testimony." *State* v. *Guilbert*, supra, 245. The court in the present case expressed its concern that, for the requested instructions to be provided in the charge, an expert, which the defendant did not offer during the trial, would be needed to explain eyewitness identification issues and principles to the jury. It is undisputed that neither party presented expert testimony at trial regarding such eyewitness identification issues and principles.

Certainly, while the court is not required to tailor its instructions to the exact request of a party for a specific instruction, "broad, generalized instructions on eyewitness identifications . . . do not suffice." (Citations omitted.) Id., 258. As set forth in the subsequent paragraphs, we conclude that the substance of the defendant's requested instructions was given to the jury and that the instructions were neither overbroad nor overgeneralized.

As to his claim regarding double-blind procedure, the defendant requested the following language: "A law enforcement officer who knows which photo is of the suspect may intentionally or unintentionally convey that knowledge to the witness. That increases the chance that the witness will identify the suspect, even if the suspect is innocent. For that reason, whenever possible, photo arrays should be conducted by an officer who does not know the identity of the suspect. If

a police officer who does not know the suspect's identity is not available, then the officer should not see the photos as the witness looks at them. In this case, there has been testimony that Detective Cooper knew the identity of the suspect. It is also alleged that Detective Cooper did not compensate for that by conducting a procedure in which he did not see the photographs as the witnesses looked at them." (Footnote omitted.) The court gave the following instruction: "A law enforcement officer who knows which photo is of the suspect may intentionally or unintentionally convey that knowledge to the witness. . . . In this case, the identification procedure utilized by Detective Cooper involved showing all eight photographs at the same time in the array to each witness. You may consider whether the witness was comparing each photograph in the array to one another or each photograph in the array to her own memory in making an identification." The jury also was instructed that "[f]eedback occurs when police officers signal to eyewitnesses that they correctly identified the suspect. Feedback may be either verbal or nonverbal. Feedback may reduce doubt and engender or produce a false sense of confidence in a witness." Thus, the defendant's requested instruction, in substance, was given.[17]

As to the defendant's claim regarding unconscious transference, he did not include an instruction on

[17] Despite the fact that the charge was in substance given, the defendant argues that the double-blind instruction "does not further instruct [on] the desirability of the 'double-blind' procedure . . . ." The court explained that it excluded such language because it determined that it was prejudicial to the state. The court expressed its concern that a double-blind procedure was not required in 2009 and that, to include the defendant's requested language, the jury may assume that Cooper employed the wrong procedure. See *State* v. *Johnson*, supra, 149 Conn. App. 821; see also *State* v. *Grant*, supra, 154 Conn. App. 311. We reiterate that the court's instructions must "fairly and adequately present the case to a jury in such a way that injustice is not done to *either party* under the established rules of law." (Emphasis added; internal quotation marks omitted.) *State* v. *Day*, supra, 171 Conn. App. 831.

unconscious transference in his request to charge.[18] He did, however, ask for the court to include such an instruction at the April 30, 2014 charging conference, and again on May 1, 2014. The court did not include an instruction on unconscious transference. The defendant argues that this was error and that an instruction on unconscious transference was necessary because Lee testified that the defendant looked just like her husband, and there were no experts to point out the potential problems with unconscious transference. As previously discussed in this opinion, the court in *Guilbert* noted that "research has revealed that jury instructions that direct jurors in broad terms to exercise caution in evaluating eyewitness identifications are less effective than expert testimony in apprising the jury of the potential unreliability of eyewitness identification testimony." *State* v. *Guilbert*, supra, 306 Conn. 245. No experts testified in the present case, and the court expressed its reluctance to instruct on scientific theories and studies where the defendant did not offer expert testimony. The court did not err in omitting an instruction on unconscious transference. There was no evidence at trial to establish that unconscious transference could be an issue for the jury to consider, and the defendant provided no authority for the proposition that such an instruction was required. The defendant could have offered an expert to testify at trial as to unconscious transference, but he did not do so.

As to the charge on eyewitness identification, the differences in the defendant's request to charge and the jury instruction were minimal.[19] The court did not use

[18] "[U]nconscious transference . . . occurs when a person seen in one context is confused with a person seen in another." *State* v. *Guilbert*, supra, 306 Conn. 253–54.

[19] In his request to charge, the defendant requested the following language: "It is your function to determine whether the witnesses' identifications of the defendant are reliable and believable, or whether they are based on a mistake or for any reason are not worthy of belief. You may consider that eyewitnesses are often not able to accurately recall the source of their

the following requested language: "You may consider that eyewitnesses are often not able to accurately recall the source of their memories. In other words, their belief that the identification was based on observations at the time of the offense may be wrong. When a witness makes an identification, that witness is expressing an opinion that may be accurate or may be inaccurate. . . . Eyewitness misidentification is the single greatest source of wrongful convictions in the United States." The court gave, in substance, what the defendant requested by including in the instruction similar language to what it omitted from his request, including that "[e]yewitnesses can be truthful but mistaken. The identifications must be analyzed critically. Human

memories. In other words, their belief that the identification was based on observations at the time of the offense may be wrong. When a witness makes an identification, that witness is expressing an opinion that may be accurate or may be inaccurate. Eyewitnesses can be truthful but mistaken. Eyewitness misidentification is the single greatest source of wrongful convictions in the United States. Even where a witness believes that his or her testimony is accurate, it is your function to determine whether the witness' identification of the defendant is reliable, or whether it is based on a mistake or for any reason is not worthy of belief.

"Human memory is not foolproof. Research has revealed that human memory is not like a video recording that a witness need only replay to remember what happened. Memory is far more complex. The process of remembering consists of three stages: acquisition—the perception of the original event; retention—the period of time that passes between the event and the eventual recollection of a piece of information; and retrieval—the state during which a person recalls stored information. At each of these stages, memory can be affected by a variety of factors.

"Relying on some of the research that has been done, I will instruct you on specific factors you should consider in this case in determining whether the eyewitness identification evidence is reliable. In evaluating these identifications, you should consider the observations and perceptions on which each identification was based, the witnesses' ability to make those observations and perceive events, and the circumstances under which the identifications were made. Although nothing may appear more convincing than a witness' categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken. Therefore, when analyzing such testimony, be advised that a witness' level of confidence, standing alone, may not be an indication of the reliability of the identification." (Footnotes omitted.)

memory is not foolproof. . . . [B]e advised that a [witness'] level of confidence, standing alone, may not be an indication of the reliability of the identification."

The defendant also requested the following instruction regarding the impact of the passage of time on memory: "Memories fade with time. As a result, delays between the commission of a crime and the time an identification is made can affect the reliability of the identification. In other words, the more time that passes, the greater the possibility that a witness's memory of a perpetrator will weaken or be influenced by post-event information." The court omitted only the last sentence of the request, which, again, was in substance what the defendant requested.

We reiterate that the court, in its discretion, need "not tailor its charge to the precise letter" of the defendant's request. (Internal quotation marks omitted.) *State* v. *Day*, supra, 171 Conn. App. 831. "Significantly, our Supreme Court in *Guilbert* emphasized that a trial court retains the discretion to decide whether, under the specific facts and circumstances presented, focused and informative jury instructions on eyewitness testimony are warranted. . . . In reviewing the discretionary determinations of a trial court, every reasonable presumption should be given in favor of the correctness of the court's ruling." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Faust*, 161 Conn. App. 149, 189 n.11, 127 A.3d 1028 (2015), cert. denied, 320 Conn. 914, 131 A.3d 252 (2016). The jury instructions were correct in law, adapted to the issue of eyewitness identification, and sufficient to guide the jury. See *State* v. *Day*, supra, 832. Accordingly, the jury instructions given by the court were not improper.

The judgment is affirmed.

In this opinion the other judges concurred.

THE BANK OF NEW YORK MELLON, SUCCESSOR TRUSTEE *v.* WADE H. HORSEY II ET AL.
(AC 39665)

Prescott, Elgo and Bright, Js.

Syllabus

The plaintiff bank, B Co., sought to foreclose a mortgage on certain real property owned by the defendant H. In its complaint, B Co. alleged, inter alia, that it was the holder of the subject note and mortgage and that the note was in default for nonpayment. After B Co. filed a motion for a judgment of strict foreclosure, it assigned the mortgage to T Co., which subsequently was substituted as the plaintiff. Thereafter, H filed a motion pursuant to the relevant rule of practice (§ 14-3) requesting the court to render a judgment of dismissal on the ground that T Co. had failed to prosecute the action with reasonable diligence. The trial court issued an order denying H's motion but directing T Co. to take some action to advance the case within sixty days. The court also indicated that if T Co. failed to comply, the court would entertain a renewed motion to dismiss. Approximately seven months later, T Co. filed a motion for summary judgment as to liability only and submitted copies of the note, mortgage and assignments, and an affidavit from its loan servicing agent. H filed an objection to the motion but did not attach an affidavit or any other evidence that disputed factually T Co.'s submissions. H also filed a motion renewing his request for a judgment of dismissal pursuant to § 14-3, noting that T Co. had not filed its motion for summary judgment within the sixty day time period established by the court's order. Following a hearing, the trial court denied H's motion to dismiss without comment and granted T Co.'s motion for summary judgment as to liability, finding that no genuine issue of material fact existed as to H's liability on the note and mortgage. Thereafter, the parties appeared before the court on the dormancy docket to address the status of the case, and, after hearing from counsel on the matter, the court dismissed the action. T Co. subsequently filed a motion to open the judgment of dismissal, arguing that it had filed and reclaimed a motion for a judgment of strict foreclosure prior to the court's dismissal and that it had in its possession all documents necessary to proceed to a final judgment, including an updated appraisal and affidavit of debt, which were later filed with the court. The court summarily granted the motion to open and, on the basis of its review of the documents submitted by T Co., rendered a judgment of strict foreclosure. On H's appeal to this court, *held*:

1. H could not prevail on his claim that the trial court improperly granted T Co.'s motion to open the disciplinary judgment of dismissal: there

was nothing in the record to support H's assertion that the court disregarded the standard for opening a disciplinary judgment set forth in the applicable statute (§ 52-212) and rule of practice (§ 17-43), which require, inter alia, a showing that the plaintiff was prevented by mistake, accident or other reasonable cause from prosecuting the action, and H failed to demonstrate that the court abused its discretion in granting the motion, as the record indicated that T Co. timely moved to open the judgment of dismissal on the ground that any delay in proceeding to a final judgment was not the result of lack of diligence on its part but, instead, was caused by a delay in receiving certain original documents necessary to foreclose, which was outside of its direct control, that H did not dispute the veracity of T Co.'s factual assertions, that no real argument existed that a good cause of action failed to exist at the time of the dismissal because the motion for summary judgment as to liability already had been granted, and that the court expressed skepticism that H had been unduly prejudiced by any delay in bringing the action to a final judgment; accordingly, on that record and in light of the well established policy that courts should favor bringing about a trial on the merits whenever possible, this court could not conclude that the trial court abused its considerable discretion in opening the judgment or that its implicit finding of reasonable cause to do so was clearly erroneous.

2. This court declined to review H's unpreserved claims that the trial court exhibited bias against him in ruling on the motion to open the judgment of dismissal and that the court improperly rendered a judgment of strict foreclosure because T Co. failed to comply with the five day notice provision of the relevant rule of practice (§ 23-18 [b]), as those claims were never raised before or decided by the trial court and, therefore, were not properly before this court on appeal.

3. The trial court properly granted T Co.'s motion for summary judgment as to liability, as there was no genuine issue of material fact precluding summary judgment; T Co. submitted sufficient evidence in support of its motion for summary judgment to establish its prima facie case of foreclosure, including copies of the note, mortgage and relevant assignments, and a sworn affidavit from its loan servicing agent averring that T Co. was the holder of the original note and mortgage, the note was in default for nonpayment, notice of the default was sent to H and H had not cured the default, and H failed to submit any competent or admissible evidence to counter T Co.'s evidentiary submissions and to demonstrate the existence of a genuine issue of material fact that precluded summary judgment as to liability.

4. This court declined to review H's claim that the trial court abused its discretion by not dismissing the foreclosure action pursuant to the relevant rule of practice (§ 17-19) for T Co.'s failure to comply with that court's order directing T Co. to advance the case within sixty days, that claim having been inadequately briefed; H's brief contained no citations to the record demonstrating that he requested the court to exercise

its discretion pursuant to § 17-19 and legal analysis of the claim was essentially limited to a single sentence, and H did not provide any analysis or cite to any legal authority suggesting that the court was required to exercise its discretion under § 17-19 sua sponte.

5. This court declined to review H's claim that the trial court improperly failed to give credence to the bifurcation of the subject note and mortgage, as H failed to adequately brief this claim beyond his mere abstract legal assertion that the splitting of the note and mortgage created an immediate and fatal flaw in title; it was unclear from H's brief whether his claim challenged the summary judgment as to liability, the judgment of strict foreclosure or both, and the brief contained only bald citations to two out-of-state cases, without explanation as to how the cited case law was applicable to the specific facts of the present case, whether there was Connecticut authority on the question or why this court should adopt the reasoning of the cited cases.

6. H could not prevail on his claim that the trial court improperly failed to address whether T Co. had standing to prosecute the foreclosure action and that T Co., in fact, lacked standing: the record did not support H's assertion that the court failed to consider the issue of T Co.'s standing but, rather, indicated that the court implicitly determined that T Co. had standing and rejected H's argument to the contrary, and H did not seek an articulation of either the court's ruling on the motion for summary judgment or the judgment of strict foreclosure; moreover, neither of H's arguments on appeal implicated T Co.'s standing, and, on the basis of the record presented, this court concluded that H failed to rebut the presumption that T Co. had standing to prosecute this action as the holder of the note and mortgage.

7. This court summarily rejected H's claim that the trial court ignored fraud perpetrated by T Co., as that unsupported claim lacked merit; although H referenced instances of bank fraud associated with the recent mortgage crisis, he failed to cite to any evidence in the record indicating that that type of fraud occurred in the present case.

Argued January 30—officially released June 5, 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 Hartford, where The Bank of New York Mellon, successor trustee, was substituted as the plaintiff; thereafter, the court, *Robaina*, *J.*, granted the substitute plaintiff's motion for summary judgment as to liability; subsequently, the court, *Noble*, *J.*, dismissed the action for

failure to prosecute with reasonable diligence; thereafter, the court, *Dubay, J.*, granted the substitute plaintiff's motion to open the judgment; subsequently, the court, *Dubay, J.*, granted the substitute plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon, from which the named defendant appealed to this court. *Affirmed.*

Wade H. Horsey II, self-represented, the appellant (named defendant).

Marissa I. Delinks, with whom, on the brief, was *Valerie N. Doble*, for the appellee (substitute plaintiff).

Opinion

PRESCOTT, J. The defendant, Wade H. Horsey II,[1] appeals from the judgment of strict foreclosure rendered in favor of the substitute plaintiff, The Bank of New York Mellon, as Successor Trustee for JPMorgan Chase Bank, N.A., as Trustee for Novastar Mortgage Funding Trust, Series 2005-2 Novastar Home Equity Loan Asset-Backed Certificates, Series 2005-2. The defendant claims on appeal that the trial court improperly (1) granted the substitute plaintiff's motion to open a disciplinary judgment of dismissal because it disregarded the standard set forth in General Statutes § 52-212 and Practice Book § 17-43; (2) exhibited bias against the defendant; (3) failed to ensure that the defendant timely received a preliminary statement of the substitute plaintiff's monetary claim in accordance with Practice Book § 23-18 (b); (4) rendered summary judgment as to the defendant's liability; (5) declined to dismiss the foreclosure action pursuant to Practice Book § 17-9; (6) failed to consider his argument that "bifurcation"

[1] Jacquelyn Costa Horsey and Sovereign Bank also are named as defendants in the foreclosure action. Neither, however, has appealed from the judgment of foreclosure or participated in the present appeal, and, therefore, we refer in this opinion to Wade H. Horsey II as the defendant.

of the note and mortgage had rendered them unenforceable; (7) failed to address the issue of the substitute plaintiff's standing to prosecute this action; and (8) failed to consider whether the substitute plaintiff had engaged in fraud upon the court. The defendant's claims either are unpreserved, inadequately briefed, or fail to persuade us that the court's actions constitute reversible error. Accordingly, we affirm the judgment of strict foreclosure and remand the case to the trial court for the purpose of setting new law days.

The record reveals the following relevant facts and procedural history. The original plaintiff, The Bank of New York Mellon, as Successor Trustee under Novastar Mortgage Funding Trust 2005-2, commenced this action in September, 2009. Its complaint contained two counts. Count one sought to foreclose on a mortgage that the defendant had executed in 2005 on property in Avon as security for a note in the principal amount of $390,000.[2] The original plaintiff alleged that it was the holder of the note and mortgage and that the note was in default for nonpayment. Count two sought reformation of the mortgage in order to correct a minor defect in the property description.

On April 23, 2010, the original plaintiff filed a motion for a judgment of strict foreclosure and a motion to default the defendant for failure to appear. Soon thereafter, it also filed an appraisal, an affidavit of debt, a foreclosure worksheet and other documents necessary to obtain a foreclosure judgment. The court clerk

[2] The note originally was executed by the defendant in favor of Novastar Mortgage, Inc. (Novastar), and the mortgage securing the note was executed in favor of Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Novastar and its successors and assigns. In October, 2008, MERS assigned the mortgage to the original plaintiff. The note was endorsed from Novastar to JPMorgan Chase Bank, N.A., the original trustee of the Novastar Mortgage Funding Trust 2005-2, and then from JPMorgan Chase Bank, N.A., to the substitute plaintiff as the successor trustee.

defaulted the defendant for failure to appear on May 3, 2010. On that same day, however, the defendant filed an appearance as a self-represented party along with a request to participate in the court-sponsored foreclosure mediation program. The default was set aside and the court granted the defendant's request for mediation. See Practice Book § 17-20 (d) (default automatically set aside if defaulted party files appearance before judgment on default is rendered).

Foreclosure mediation began and continued through the end of 2010. Over the following year and a half, the parties filed a number of motions related to discovery. On September 26, 2012, the original plaintiff assigned the mortgage to the substitute plaintiff, which the court substituted into the action for the original plaintiff on November 19, 2012.

The defendant filed an answer to the complaint and a disclosure of defense on October 9, 2013. In his answer, the defendant admitted to executing the note and mortgage but denied the allegations that he was in default on the note or had been provided proper notice of default. The defendant did not assert any special defenses or raise any counterclaims. In his disclosure of defense, the defendant indicated that he reserved the right to dispute the amount of the debt.

No further activity in the action occurred until April 17, 2015, at which time the defendant filed a motion pursuant to Practice Book § 14-3 asking the court to render a judgment of dismissal on the ground that the substitute plaintiff had failed to prosecute the action with reasonable diligence. The court, *Vacchelli*, *J.*, issued an order on May 6, 2015, denying the defendant's motion, but directing the substitute plaintiff to move for summary judgment or to take some other action to advance the case within sixty days. The court indicated

that, if the substitute plaintiff failed to comply, the court would entertain a renewed motion to dismiss.

The substitute plaintiff filed a motion for summary judgment as to liability only on December 21, 2015. Along with its motion, the substitute plaintiff submitted copies of the note, the mortgage and assignments, and an affidavit averring, inter alia, that the substitute plaintiff was the holder of the note and the mortgagee of record, the note was in default, notice of the default had been sent to the defendant, and the default had not been cured. The defendant filed an objection to the motion for summary judgment on February 29, 2016.[3] He did not attach an affidavit or any other evidence that disputed factually the summary judgment submissions of the substitute plaintiff.[4]

When the defendant filed his objection to the motion for summary judgment, he also filed a motion renewing his request for a judgment of dismissal pursuant to Practice Book § 14-3, noting that the substitute plaintiff had not filed its motion for summary judgment within the sixty day time period established by the court's May 6, 2015 order. The substitute plaintiff filed an objection to the motion to dismiss, arguing that dismissal was not an appropriate remedy at that juncture because the defendant had not established that he was prejudiced by the delay and the parties were now "postured to litigate the matter in short order."

[3] We note that the copy of the objection to the motion for summary judgment included in the defendant's appendix, although substantially similar, is not the objection filed with the court. Because our review is limited to the record before the trial court, any reference to the defendant's objection to the motion for summary judgment is to the objection that is contained in the trial court file.

[4] The defendant submitted three documents: An article of unknown origin titled "Robo-Signer Misdeeds May Help Homeowners" attributed to Jorge Newbery; an incomplete copy of a Wikipedia article titled "Libor scandal"; and a search result page from a website called MERS ServicerID.

The court, *Robaina*, *J.*, heard argument on the motion for summary judgment on March 21, 2016. On April 14, 2016, the court issued orders, without comment, denying the defendant's renewed motion to dismiss for lack of diligence and overruling his objection to the motion for summary judgment. The court also issued the following order granting the motion for summary judgment as to liability only: "[I]t is hereby found that no genuine issue of material fact exists as to the defendants' liability on the note and mortgage. . . . Determination of the amount of indebtedness is deferred until such time as plaintiff seeks a judgment of foreclosure."

On April 19, 2016, the defendant filed an appeal from the court's April 14, 2016 orders granting the motion for summary judgment as to liability and denying his motion for a disciplinary dismissal of the action. The substitute plaintiff filed with this court a motion to dismiss that appeal for lack of a final judgment. The motion was granted on May 25, 2016. See *Wells Fargo Bank, N.A.* v. *Tarzia*, 150 Conn. App. 660, 662 n.2, 92 A.3d 983 (entry of summary judgment as to liability only not final judgment for purposes of appeal), cert. denied, 314 Conn. 905, 99 A.3d 635 (2014); *Deutsche Bank National Trust Co.* v. *Bialobrzeski*, 123 Conn. App. 791, 794 n.7, 3 A.3d 183 (2010) (denial of motion to dismiss generally not appealable final judgment). On July 20, 2016, the substitute plaintiff reclaimed for the short calendar list its April 23, 2010 motion seeking a judgment of strict foreclosure.

On August 1, 2016, the parties appeared before the court, *Noble*, *J.*, on the court's dormancy docket. The court had issued a notice to appear and show cause on March 18, 2016, prior to the hearing on the motion for summary judgment, directing the parties to appear to address the status of the case and indicating that "the court may dismiss this action at the hearing." The court first heard from counsel for the substitute plaintiff, who

indicated that the substitute plaintiff was ready to proceed to judgment but was awaiting the return of the original note and other documents necessary to secure the judgment. According to counsel, at some point, the substitute plaintiff had hired another law firm to represent it in this action, and the original documents had been transferred to that firm. The matter subsequently was transferred back to counsel's firm, but, according to counsel, the original documents had not yet been received back. Without first hearing from the defendant, the court indicated that it would give the substitute plaintiff one more chance, but if the matter did not proceed to judgment by November 14, 2016, the substitute plaintiff would be nonsuited and the matter dismissed.

The defendant then asked the court if he could be heard. The court apologized for not giving the defendant an opportunity to speak prior to ruling. The defendant brought to the court's attention that he previously had filed a motion to dismiss for lack of diligence and that the substitute plaintiff had failed to comply with the court's order directing the substitute plaintiff to take some action to advance the case within sixty days. The substitute plaintiff responded that the same argument had been raised to and rejected by the court as part of its consideration of the motion for summary judgment and renewed motion to dismiss. Nevertheless, after confirming that the case had been on the docket since 2009, the court reversed its earlier ruling and dismissed the action.

On August 31, 2016, the substitute plaintiff filed a motion to open and set aside the judgment of dismissal. It argued that it had filed and reclaimed a motion for a judgment of strict foreclosure prior to the court's dismissal and now had in its possession all documents necessary to proceed to a final judgment, including an updated appraisal and updated affidavit of debt. It also

argued that "it would be an exercise in futility and would unduly burden the court's docket to require [it] to commence a new action." The substitute plaintiff filed the updated appraisal on September 6, 2016, and, on September 8, 2016, filed a new foreclosure worksheet, an updated affidavit of debt, and an affidavit regarding attorney's fees. The defendant filed an objection to the motion to open on September 6, 2016, in which he argued that the substitute plaintiff could not demonstrate that it was prevented from prosecuting the action by mistake, accident or other reasonable cause or that a good cause of action existed at the time of the judgment of dismissal.

Both the motion to open and the reclaimed motion for a judgment of strict foreclosure appeared on the court's September 12, 2016 foreclosure docket. The court, *Dubay, J.*, asked the defendant at the beginning of that hearing whether he was objecting to the motion to open or the motion for a judgment of strict foreclosure. The defendant replied: "I'm objecting to the motion to open because my understanding is without opening the judgment the court can't consider any other motion." The court acknowledged that the case had been pending for a long time but asked the defendant to explain how he had been prejudiced by that delay. The defendant answered that he had been under the strain of not knowing whether he would be able to remain in his home. The court suggested that, with respect to prejudice, the defendant actually benefitted from the delay because he was able to remain in his home for seven years without making mortgage payments. After some further discussion with the defendant, including about the nature of his defense to the foreclosure action, the court summarily granted the motion to open.

The court then immediately turned to consideration of the motion for a judgment of strict foreclosure. It

began by confirming that summary judgment as to liability previously had been rendered in this case. The defendant then requested that the court grant a two month continuance to November 16, 2016, arguing that the substitute plaintiff had filed its updated financial information after the action had been dismissed and prior to it having been opened, and the defendant claimed that he needed additional time to prepare a defense. The court denied the request, explaining to the defendant that he had had seven years to prepare and, furthermore, that it intended to set law days to commence on November 28, 2016, and, thus, the defendant would have ample time to file a motion to open any judgment it rendered "based upon whatever reasons you think it . . . should be reopened for." Other than arguing that the substitute plaintiff's financial documents were filed too close in time to the hearing on the motion for a judgment of strict foreclosure, the defendant did not advance any reason why the court could not determine the amount of indebtedness on the basis of those documents. Because the defendant's liability already had been established, calculating the total net amount of the debt owed and establishing law days were the only outstanding issues for the court to resolve before it could render a judgment of strict foreclosure.[5]

[5] "In a mortgage foreclosure action, a defense to the amount of the debt must be based on some articulated legal reason or fact." (Internal quotation marks omitted) *Bank of America, N.A.* v. *Chainani*, 174 Conn. App. 476, 486, 166 A.3d 670 (2017). Although, unlike a defense to liability, a defense challenging the amount of the debt does not need to be disclosed prior to a judgment hearing, the defense nevertheless "must be squarely focused on the amount of the debt rather than other matters that are ancillary to the amount of the debt, such as whether the loan is in default, which is a matter of liability, or challenges that attack the credibility of the affiant or defects in the execution of the affidavit itself." Id., 487. If a proper defense as to the amount of the debt is not pursued, Practice Book § 23-18 (a), which authorizes the plaintiff to prove the amount of the debt through affidavit and documentary submissions, is applicable. Id., 486. The defendant never advanced any theory of defense to the court related to the amount of indebtedness. Rather, he returned to challenges related to the substitute plaintiff's authority to prosecute the action and whether alleged irregular

The court, on the basis of its review of the documents submitted by the substitute plaintiff, including the revised affidavit of debt and updated appraisal, rendered a judgment of strict foreclosure, finding that the property had a fair market value of $390,000 and that the debt owed as of the judgment date was $644,382.77. The court also awarded attorney's fees, an appraisal fee, and a title search fee, and it set law days to commence on November 28, 2016. Finally, the court also rendered judgment for the substitute plaintiff, without objection, on count two of the complaint seeking reformation of the mortgage's property description. This appeal followed.

I

The defendant first claims that the court improperly granted the substitute plaintiff's motion to open the disciplinary judgment of dismissal. Specifically, the defendant argues that the court disregarded the standard for opening a judgment set forth in General Statutes § 52-212 and Practice Book § 17-43. The substitute plaintiff responds that the defendant's claim is not reviewable because the trial court did not state the factual or legal basis for its decision to grant the motion to open and the defendant never requested an articulation. Alternatively, the substitute plaintiff argues that, on the basis of the record and arguments presented, the trial court reasonably could have concluded that the criteria set forth in § 52-212 and Practice Book § 17-43 for opening a judgment were met, and, therefore, the defendant has failed to demonstrate that the court abused its discretion. We agree with the substitute plaintiff that, on the basis of the record before us, the defendant has failed to demonstrate that the court

procedures regarding the assignment of the note and mortgage invalidated the foreclosure action; issues that already had been raised and implicitly rejected by the court in rendering summary judgment as to liability.

abused its discretion in granting the motion to open the judgment of dismissal.

"If a party shall fail to prosecute an action with reasonable diligence, the judicial authority may, after hearing, on motion by any party to the action . . . or on its own motion, render a judgment dismissing the action with costs." Practice Book § 14-3 (a). "Practice Book § 14-3 reflects the judicial branch's interest in having counsel prosecute actions with reasonable diligence. Judges, faced with case flow management concerns, must enforce the pace of litigation coming before the court, rather than allowing the parties to do so. . . . Our judicial system cannot be controlled by the litigants and cases cannot be allowed to drift aimlessly through the system. . . . [Therefore], lengthy periods of inactivity by the plaintiff constitute sufficient grounds for a trial court to determine that the plaintiff has failed to prosecute an action with reasonable diligence." (Citations omitted; internal quotation marks omitted.) *Brochu* v. *Aesys Technologies*, 159 Conn. App. 584, 593, 123 A.3d 1236 (2015).

"Courts must remain mindful, however, that [i]t is the policy of the law to bring about a trial on the merits of a dispute whenever possible . . . and that [o]ur practice does not favor the termination of proceedings without a determination of the merits of the controversy [if] that can be brought about with due regard to necessary rules of procedure." (Internal quotation marks omitted) Id., 594. Disciplinary dismissals pursuant to Practice Book § 14-3, thus, are not favored and, accordingly, may be set aside and the action reinstated to the docket upon the granting of a motion to open filed in accordance with Practice Book § 17-43 and § 52-212.

Practice Book § 17-43 provides in relevant part that the disciplinary dismissal of an action may be set aside within four months "upon the written motion of any

party or person prejudiced thereby, showing reasonable cause, or that a good cause of action in whole or in part existed at the time of the rendition of such judgment . . . and that the plaintiff . . . was prevented by mistake, accident or other reasonable cause from prosecuting" the action. Section 52-212 contains nearly identical language. "A motion to open . . . is addressed to the [trial] court's discretion, and the action of the trial court will not be disturbed on appeal unless it acted unreasonably and in clear abuse of its discretion." (Internal quotation marks omitted.) *Rino Gnesi Co.* v. *Sbriglio*, 83 Conn. App. 707, 711, 850 A.2d 1118 (2004).

In the present case, the court granted without comment the substitute plaintiff's motion to open the disciplinary judgment of dismissal. The defendant did not request an articulation of that decision. It is the appellant's burden to provide this court with an adequate record for review of all claims raised on appeal. Practice Book § 61-10 (a). In a situation in which the court has not set forth the factual and legal basis for a discretionary ruling, and the appellant has failed to seek an articulation in accordance with Practice Book § 66-5, we must presume that the court acted correctly and can only conclude that there has been an abuse of discretion if such abuse is apparent on the face of the record before us. See *Equity One, Inc.* v. *Shivers*, 310 Conn. 119, 132, 74 A.3d 1225 (2013) ("The correctness of a judgment of a court of general jurisdiction is presumed in the absence of evidence to the contrary. We do not presume error. The burden is on the appellant to prove harmful error." [Internal quotation marks omitted.]). We cannot reach such a conclusion in the present case.

Pursuant to statute and our rules of practice, in order to justify the opening of a judgment rendered for failure to prosecute an action with reasonable diligence, the court must be satisfied only that there has been some

"mistake, accident *or other reasonable cause*" that justifies setting aside the judgment. (Emphasis added.) General Statutes § 52-212; Practice Book § 17-43. There is nothing in the record to support the defendant's assertion that the court failed to apply that standard. Moreover, we cannot conclude that the court abused its discretion in granting the motion to open under the circumstances. The substitute plaintiff timely moved to open the disciplinary dismissal well within the requisite four month period. It argued to the court that any delay in proceeding to a final judgment was not the result of lack of diligence on the part of the substitute plaintiff but, rather, was caused by a delay in receiving original documents necessary to foreclose, a delay that was outside of its direct control. The defendant did not dispute the veracity of the substitute plaintiff's factual assertions. Furthermore, because summary judgment as to liability already had been rendered prior to the court's dismissal, no real argument existed that a good cause of action failed to exist in whole or in part at the time of the dismissal. Finally, the court expressed skepticism that the defendant had been unduly prejudiced by any delay in bringing the action to a final judgment. We cannot conclude on this record that the court abused its considerable discretion in opening the judgment of dismissal or that its implicit finding of reasonable cause to do so was clearly erroneous, particularly in light of the well established policy that courts should favor bringing about a trial on the merits whenever possible. Accordingly, we reject the defendant's claim.

II

The defendant next claims that the court exhibited bias against him in ruling on the motion to open the judgment of dismissal. Specifically, he maintains that the court displayed bias by questioning him about how he was prejudiced by the substitute plaintiff's delay in

prosecuting the action, seeming to presume that judgment inevitably would be rendered against him. The substitute plaintiff argues that this claim is not reviewable because no claim of judicial bias was ever brought to the attention of the trial court. We agree with the substitute plaintiff.

In order to preserve a claim for appellate review, it generally must have been distinctly raised to and decided by the trial court. See Practice Book § 60-5; *Connecticut Bank & Trust Co.* v. *Munsill-Borden Mansion, LLC*, 147 Conn. App. 30, 36–37, 81 A.3d 266 (2013). This rule applies equally to claims of judicial bias. See *Burns* v. *Quinnipiac University*, 120 Conn. App. 311, 316, 991 A.2d 666 (claims alleging judicial bias should be raised at trial or claim will be deemed waived), cert. denied, 297 Conn. 906, 995 A.2d 634 (2010). Although the defendant was not required in this case to file a written motion to disqualify pursuant to Practice Book § 1-23 because the circumstances giving rise to the defendant's claim had not arisen prior to the hearing; see *In re Messiah S.*, 138 Conn. App. 606, 625, 53 A.3d 224, cert. denied, 307 Conn. 935, 56 A.3d 712 (2012); the defendant nevertheless had a duty to assert seasonably his claim of alleged judicial bias to the court at the hearing on the basis of his perception of the events transpiring in court. See id. (respondent preserved claim of judicial bias by orally asking court during trial to recuse itself in response to court's comments and rulings). Here, the defendant never complained of judicial bias during the hearing, nor did he ask the court to disqualify itself. Because this claim is unpreserved, we decline to review it.[6]

[6] Even if we considered the merits of the defendant's claim, we are unconvinced on the basis of our review of the hearing transcript that there is any compelling argument for the finding of judicial bias in this case. Although the court mentioned several times that the defendant had been able to live at the foreclosed property for approximately seven years without paying his mortgage, those statements, rather than necessarily evincing bias, were made in response to the legal arguments of the defendant and in the context

III

The defendant also claims that the court improperly rendered a judgment of strict foreclosure because the substitute plaintiff failed to comply with the five day notice provision of Practice Book § 23-18 (b). As with his claim of judicial bias, this claim is unpreserved because it was never raised or decided at the hearing on the motion for a judgment of strict foreclosure. Accordingly, we decline to review it.

As previously noted, Practice Book § 23-18 governs the proof required to establish the amount of indebtedness in a foreclosure action. Subsection (a) of § 23-18 "serve[s] as an exception to the general prohibition of hearsay evidence"; *Bank of America, N.A.* v. *Chainani*, 174 Conn. App. 476, 484, 166 A.3d 670 (2017); and provides: "In any action to foreclose a mortgage where no defense as to the amount of the mortgage debt is interposed, such debt may be proved by presenting to the judicial authority the original note and mortgage, together with the affidavit of the plaintiff or other person familiar with the indebtedness, stating what amount, including interest to the date of the hearing, is due, and that there is no setoff or counterclaim thereto." Subsection (b) of § 23-18 provides in relevant part: "No less than five days before the hearing on the motion for judgment of foreclosure, the plaintiff shall file with the clerk of the court and serve on each appearing party . . . a preliminary statement of the plaintiff's monetary claim." This obligation ordinarily is satisfied by the filing of an affidavit of debt.

The original plaintiff filed an affidavit of debt in this matter on April 28, 2010, shortly after filing the motion

of assessing whether the defendant was prejudiced by the substitute plaintiff's purported lack of diligence in bringing the action to judgment following the granting of the motion for summary judgment as to liability. The court's assertions were factual and supported by the evidence and thus do not reflect bias.

for a judgment of strict foreclosure, which was later reclaimed by the substitute plaintiff. Accordingly, some preliminary statement of the defendant's indebtedness was filed more than five days before the hearing on the motion for a judgment of foreclosure. Four days before the hearing on the motion, the substitute plaintiff also filed and served an updated affidavit of debt. The defendant, in requesting a continuance of the motion, raised to the court that the substitute plaintiff had filed the updated affidavit of debt and other paperwork only a few days prior to the hearing. The defendant, however, never made any reference to Practice Book § 23-18 or a five day notice period, nor did he argue that the updated affidavit of debt or other submissions were inadmissible as evidence of the amount of indebtedness because they were not timely filed. Because those issues were not raised distinctly before the trial court, they are not properly before this court on appeal. Accordingly, we do not decide whether Practice Book § 23-18 was satisfied by the filing of the initial affidavit of debt or whether the five day notice requirement is mandatory or subject to waiver at the discretion of the parties or the court.[7]

[7] We feel compelled to note that the defendant has not distinctly raised or briefed as a claim on appeal whether the court properly denied his request for a continuance. It is well settled that "[a] trial court holds broad discretion in granting or denying a motion for a continuance. Appellate review of a trial court's denial of a motion for a continuance is governed by an abuse of discretion standard that, although not unreviewable, affords the trial court broad discretion in matters of continuances." (Internal quotation marks omitted.) *Marshall* v. *Marshall*, 71 Conn. App. 565, 574, 803 A.2d 919, cert. denied, 261 Conn. 941, 808 A.2d 1132 (2002). Given the equitable nature of foreclosure proceedings and the important interests at stake, we question the court's decision to adjudicate immediately the reclaimed motion for a judgment of strict foreclosure, particularly in light of the defendant's request for a continuance and given that the court, immediately prior to the defendant's request, had set aside a disciplinary judgment of dismissal based on the substitute plaintiff's failure to exercise due diligence in prosecuting the action. We do not mean to suggest that the court abused its discretion in denying the defendant's request for a lengthy, two month continuance, which, as we have indicated, is not an issue that is properly before us because he has not raised it as a claim on appeal. We simply take this opportunity to suggest that it may have been equitable under the circum-

IV

The defendant next claims that the court improperly granted the substitute plaintiff's motion for summary judgment as to liability. The substitute plaintiff responds that the defendant failed to present any competent or admissible evidence to rebut its right to enforce the note and to foreclose the mortgage and failed to demonstrate the existence of any disputed issue of fact or law that would have barred summary judgment as to liability. We agree with the substitute plaintiff and, accordingly, reject the defendant's claim.

"Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Internal quotation marks omitted.) *GMAC Mortgage, LLC* v. *Ford*, 144 Conn. App. 165, 175, 73 A.3d 742 (2013). "[I]n seeking summary judgment, it is the movant who has the burden of showing . . . the absence of any genuine issue as to all the material facts [that], under applicable principles of substantive law, entitle him to a judgment as a matter of law." (Internal quotation marks omitted) Id.

"In order to establish a prima facie case in a mortgage foreclosure action, the plaintiff must prove by a preponderance of the evidence that it is the owner of the note and mortgage, that the defendant mortgagor has defaulted on the note and that any conditions precedent to foreclosure, as established by the note and mortgage, have been satisfied. . . . Thus, a court may properly grant summary judgment as to liability in a foreclosure action if the complaint and supporting affidavits establish an undisputed prima facie case and the defendant fails to assert any legally sufficient special defense." (Citations omitted.) Id., 176.

stance for the court to have provided the defendant some additional time to evaluate the revised documents submitted by the substitute plaintiff.

A party opposing summary judgment "must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment." (Emphasis omitted; internal quotation marks omitted.) *Little* v. *Yale University*, 92 Conn. App. 232, 234, 884 A.2d 427 (2005), cert denied, 276 Conn. 936, 891 A.2d 1 (2006). In other words, "[d]emonstrating a genuine issue of material fact requires a showing of evidentiary facts or substantial evidence outside the pleadings from which material facts alleged in the pleadings can be warrantably inferred. . . . A material fact is one that will make a difference in the result of the case. . . . To establish the existence of a [dispute as to a] material fact, it is not enough for the party opposing summary judgment merely to assert the existence of a disputed issue. . . . Such assertions are insufficient regardless of whether they are contained in a complaint or a brief. . . . Further, unadmitted allegations in the pleadings do not constitute proof of the existence of a genuine issue as to any material fact . . . . The issue must be one which the party opposing the motion is entitled to litigate under [its] pleadings and the mere existence of a factual dispute apart from the pleadings is not enough to preclude summary judgment." (Citations omitted; internal quotation marks omitted.) *New Milford Savings Bank* v. *Roina*, 38 Conn. App. 240, 244–45, 659 A.2d 1226, cert. denied, 235 Conn 915, 665 A.2d 609 (1995).

At the hearing on the motion for summary judgment, the defendant described his argument in opposition to summary judgment as encompassing two issues: fraud and lack of standing. With respect to fraud, the defendant first asserted that he had been unable to refinance his loan because of what he described as an unfair

prepayment penalty. Second, he asserted that the substitute plaintiff and its predecessors in interest utilized the London Interbank Offered Rate to set and adjust rates, despite knowing that it, according to the defendant, "had been determined to be a fraudulent index." With respect to standing, the defendant first asserted his belief that errors had been made with respect to how the note and mortgage had been transferred and assigned and that so-called "robo-signers" may have been used to reconstruct documents. The defendant also asserted the "possibility of bifurcation," which the defendant described as the note and mortgage having been legally separated and rendered unenforceable. The various arguments made by the defendant to the court, however, were unsupported by reference to any evidentiary submissions included as part of the summary judgment record, nor did he offer other evidentiary proof or affidavits in support of his arguments at the hearing.

In support of its motion for summary judgment as to liability only, the substitute plaintiff's evidentiary submissions included copies of the note, the mortgage and relevant assignments. It also submitted a sworn affidavit from its loan servicing agent. The affidavit provided, inter alia, that the substitute plaintiff was the holder of the original note and the mortgagee of record, the note was in default for nonpayment, the defendant was provided notice of that default in accordance with the terms of the note and mortgage, and, as of that date, the defendant had not cured the default. This evidence, which was not countered by the defendant through his own evidentiary submission, was sufficient to establish the substitute plaintiff's prima facie case and there was no genuine issue of material fact precluding summary judgment as to liability. We conclude on the basis of our plenary review that the trial court properly rendered summary judgment as to liability only.

V

We next turn to the defendant's claim that the court abused its discretion by not dismissing the foreclosure action pursuant to Practice Book § 17-19. The substitute plaintiff argues that the defendant has failed to brief this claim adequately and that he failed to preserve the claim for review because he never expressly moved for dismissal of the action pursuant to Practice Book § 17-19. We agree that the claim, even if preserved, is inadequately briefed.

Practice Book § 17-19 provides: "If a party fails to comply with an order of a judicial authority or a citation to appear or fails without proper excuse to appear in person or by counsel for trial, the party may be nonsuited or defaulted by the judicial authority." The defendant argues that the substitute plaintiff failed to comply with the court's May 6, 2015 order to advance the case within sixty days, instead filing its motion for summary judgment more than six months later. As the defendant acknowledges, however, he did not file a motion raising the substitute plaintiff's noncompliance until he objected to the motion for summary judgment. At that time, he renewed his request for a dismissal pursuant to Practice Book § 14-3 for lack of reasonable diligence. He did not, however, invoke Practice Book § 17-19.

The defendant's appellate brief contains no citations to the record demonstrating that he ever asked the court to exercise its discretion pursuant to Practice Book § 17-19. Furthermore, his legal analysis is essentially limited to a single sentence: "By not following the court's [May 6, 2015] order in a timely fashion, this case should have been dismissed with prejudice." The defendant has provided no analysis or cited any legal authority, however, suggesting that a court is required to exercise its discretion under Practice Book § 17-19 sua sponte. "We are not required to review issues that

have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *Kelib* v. *Connecticut Housing Finance Authority*, 100 Conn. App. 351, 353, 918 A.2d 288 (2007). Thus, even if preserved, the defendant has failed to brief this claim adequately. Accordingly, we decline to review it.

VI

We turn next to the defendant's claim that the court improperly failed to "[give] credence to" what he describes as "the bifurcation of the note and mortgage." The defendant asserts that "[t]he splitting of the note and mortgage creates an immediate and fatal flaw in title." We decline to review this claim because it is not adequately briefed.

As we previously have indicated in this opinion, we will not review a claim that is devoid of any legal analysis. With respect to this claim, the defendant's brief is inadequate in at least two ways. First, it is unclear from the brief whether the defendant's claim challenges the court's decision to render summary judgment as to liability, the judgment of strict foreclosure, or both. Second, the defendant's brief contains only bald citations to two out-of-state cases, presumably because he believes that those decisions support his claim. The defendant does not explain, however, how the cited case law is applicable to the specific facts of the present case, whether there is Connecticut authority on the question, or why this court should adopt the reasoning of the cited cases. "[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). This would include the requirement that an appellant adequately brief all claims raised on appeal. Id. Because the defendant has not adequately briefed this claim beyond his mere abstract legal assertion, we decline to review it.

VII

The defendant next claims that the court improperly failed to address whether the substitute plaintiff had standing to prosecute this action and that the substitute plaintiff, in fact, lacks standing. We reject this claim and conclude on the basis of the record presented that the defendant failed to rebut the presumption that the substitute plaintiff has standing to prosecute this action as the holder of the note and mortgage.

"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. . . . [If] a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause. . . . [B]ecause [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . In addition, because standing implicates the court's subject matter jurisdiction, the issue of standing is not subject to waiver and may be raised at any time." (Internal quotation marks omitted.) *U.S. Bank, National Assn.* v. *Schaeffer*, 160 Conn. App. 138, 145, 125 A.3d 262 (2015).

"The rules for standing in foreclosure actions [in which] the issue of standing is raised may be succinctly summarized as follows. [If] 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 in original; footnote omitted.) Id., 150.

Turning to the defendant's claim, we first reject the defendant's suggestion that the trial court failed to consider his standing arguments because that claim is not supported by the record. The defendant arguably raised standing both in objection to the motion for summary judgment and at the hearing on the motion for a judgment of strict foreclosure. Although neither judge filed a written memorandum of decision addressing standing, it nevertheless is implicit in the court's decision to grant the motion for summary judgment as to liability that it concluded there was no genuine issue of fact regarding the substitute plaintiff's status as the holder of the note or mortgage. In order to be entitled to summary judgment as to liability, the substitute plaintiff had to establish that there was no factual dispute as to its status as the holder of the note and mortgage. See *GMAC Mortgage, LLC* v. *Ford*, supra, 144 Conn. App. 174. Further, in rendering the judgment of strict foreclosure, the court implicitly rejected the defendant's suggestion at the hearing that it remained undetermined

whether the substitute plaintiff was "the right holder." The defendant never sought an articulation of either the court's ruling on the motion for summary judgment or the judgment of strict foreclosure. An articulation is the proper vehicle to test whether a court has failed to consider or overlooked an argument properly raised. See *Brennan* v. *Brennan Associates*, 316 Conn. 677, 705, 113 A.3d 957 (2015) (responsibility of appellant to ask trial judge to rule on overlooked matter). Because the defendant has provided no support for his assertion that the trial court failed to consider his standing arguments, we reject that aspect of his claim.

Because standing can be raised at any stage of the proceedings, we next consider the merits of the standing arguments briefed by the defendant on appeal. First, the defendant argues that the original plaintiff "is not on file as licensed to do business in Connecticut," relying on a business inquiry search for The Bank of New York Mellon on the Secretary of the State's website. The defendant cites case law for the proposition that a plaintiff must have an actual legal existence and cannot bring an action using a fictitious name. Second, the defendant raises a number of allegations the gravamen of which is that the note and mortgage were transferred in violation of terms of the mortgage trust's pooling and servicing agreement. For the reasons that follow, we conclude that neither of the defendant's arguments implicates standing and that the record establishes that the substitute plaintiff has standing to assert its claims.

First, the defendant's business inquiry search for The Bank of New York Mellon on the Secretary of the State's website, without more, is insufficient to establish as a matter of law that The Bank of New York Mellon is either an improper legal entity or a fictitious name. As the substitute plaintiff correctly notes in its appellate brief, the defendant's argument is belied by the fact that the Connecticut Department of Banking's website

includes The Bank of New York Mellon in its list of out-of-state banks operating branches in Connecticut. See Connecticut Dept. of Banking, Banks in Connecticut, available at http://www.ct.gov/dob/cwp/view.asp?a=2228&q=296954&dobNAV_GID=1660 (last visited May 30, 2018).

Second, the defendant is not a party to the pooling and servicing agreement at issue. In *Wells Fargo Bank, N.A.* v. *Strong*, 149 Conn. App. 384, 89 A.3d 392, cert. denied, 312 Conn. 923, 94 A.3d 1202 (2014), this court rejected arguments nearly identical to those made by the defendant, concluding that they did not implicate standing. "Our appellate courts have not required a foreclosure plaintiff to produce evidence of ownership deriving from a pooling and servicing agreement in making its prima facie case . . . ." Id., 399. "The relevance of securitization documents [to] a lender's standing to foreclose a mortgage is questionable. Simply put, a borrower has a contract—the note and mortgage—with the owner or holder of the loan documents. The borrower, however, is not a party to the pooling and servicing agreement, commonly referred to as a trust document. . . . It is a basic tenet of contract law that only parties to an agreement may challenge its enforcement. . . . [C]lose scrutiny of trust documents and challenges to their veracity appear to offer little benefit to the court in determining the owner or holder of a note in a particular case. If admissible evidence of holder status has been presented, a borrower must then challenge those facts by competent evidence addressed to the delivery of the loan documents. In most instances, a borrower's challenge to the content of trust documents or other borrower claims appear to have little relevance to the issue of standing." (Internal quotation marks omitted.) Id., 393–94. The defendant has not addressed *Wells Fargo Bank, N.A.*, or in any way tried to distinguish its holding from the facts of the present case. We conclude

that, like in *Wells Fargo Bank, N.A.*, the defendant's claim here does not implicate the plaintiff's standing to bring the action.

The original plaintiff alleged in the complaint that it was the holder of the note and mortgage. The mortgage later was transferred during the pendency of the action to the substitute plaintiff, who was substituted in as the plaintiff. Along with its motion for summary judgment, the substitute plaintiff submitted an affidavit averring that it was currently the holder of the note and the mortgage. Neither the factual allegations of the original plaintiff nor the affidavit submitted by the substitute plaintiff were disputed by any evidence provided by the defendant. At the time judgment was rendered, the substitute plaintiff demonstrated that it was in possession of the original note, which included an allonge with a specific endorsement to the substitute plaintiff. In addition, the substitute plaintiff presented to the court original copies of the mortgage and assignments. The defendant has failed to direct our attention to any evidence in the record that would rebut the presumption that the substitute plaintiff, as the holder of the note, owns the debt. Because the record before us establishes that the substitute plaintiff has standing, we reject the defendant's claim.

VIII

Finally, the defendant claims that the court "ignored fraud upon the court" perpetrated by the substitute plaintiff. The defendant suggests that the substitute plaintiff (1) misrepresented to the court that it was the holder of the original note, (2) fabricated its excuse of waiting for the return of the original note as the reason for the delay in prosecuting the action, and (3) "fabricated documents, used robo-signers and claimed money that was not due to them because they did not have the proper paperwork when the suit was initiated."

In support of these assertions, the defendant makes reference to instances of bank fraud associated with the recent mortgage crisis but fails to cite to any evidence in the record indicating that this type of fraud occurred in his case. As we have indicated previously, "we take seriously all allegations of fraud and misdeeds in the prosecution of residential mortgage foreclosure actions before the courts of this state. Some evidence suggesting actual wrongdoing, however, and not merely the specter of such, is necessary in order to set aside a final adjudication." *Bank of America, N.A.* v. *Thomas*, 151 Conn. App. 790, 806 n.7, 96 A.3d 624, 634 (2014). The defendant's unsupported claim that the court turned a blind eye to fraud in this case lacks merit, and, accordingly, we summarily reject it.

The judgment is affirmed and the case is remanded for the purpose of setting new law days.

In this opinion the other judges concurred.

GEORGE LABISSONIERE, COEXECUTOR (ESTATE OF ROBERT LABISSONIERE), ET AL. *v.* GAYLORD HOSPITAL, INC., ET AL.
(AC 39681)

Sheldon, Elgo and Harper, Js.*

Syllabus

The plaintiffs, the coexecutors of the estate of R, sought to recover damages for the alleged medical malpractice of the defendant hospital and several individual physicians. The plaintiffs, pursuant to statute (§ 52-190a), appended to their original complaint an opinion letter stating that there appeared to be evidence of medical negligence, which was authored by M, a physician and general surgeon who was board certified in surgery.

* This case was argued before a panel of this court consisting of Judge Sheldon, Judge Bright, and Justice Harper. Thereafter, Judge Bright recused himself from consideration of this case and Judge Elgo was added to the panel. Judge Elgo has read the briefs and the record, and has listened to a recording of the oral argument prior to participating in this decision.

Thereafter, the plaintiffs filed an amended complaint in which they alleged that the defendant physicians were board certified in internal medicine and that the treatment and diagnosis of R was within the medical specialty of surgery. The defendants filed motions to dismiss, with supporting affidavits, in which they claimed that the court lacked personal jurisdiction over them because M was not a "similar health care provider" to them as defined by statute (§ 52-184c [c]). The trial court granted the motions to dismiss and rendered judgment thereon, from which the plaintiffs appealed to this court. *Held*:

1. The plaintiffs could not prevail on their claim that the trial court improperly considered the defendants' supporting affidavits and thereby applied an incorrect legal standard in deciding the defendants' motions to dismiss, which was based on their claim that the issues here did not involve a factual dispute concerning personal jurisdiction that was not determinable on the face of the record; although the plaintiffs alleged in their amended complaint that the defendant physicians were board certified in internal medicine, it was not improper for the court to consider the affidavits in deciding the motions to dismiss because the affidavits provided independent evidence of the physicians' medical specialty, and the undisputed facts contained in the defendants' affidavits supplemented the allegations contained in the amended complaint.
2. The trial court properly granted the defendants' motions to dismiss: where, as here, it was undisputed that the defendant physicians were board certified in internal medicine and not surgery, § 52-184c (c) required the plaintiffs to obtain an opinion letter from an expert who was trained and experienced in internal medicine and was board certified in internal medicine, which they failed to do, as M was not board certified in internal medicine, and, contrary to the plaintiffs' claim, the trial court did not require that the opinion letter state that the physicians were acting outside the scope of their medical specialty and, instead, properly determined that the plaintiffs failed to expressly allege in their amended complaint that the physicians were acting outside the scope of their medical specialty so as to qualify for an exception in § 52-184c (c) that applies when a physician provides treatment or diagnosis for a condition that is not within the physician's specialty, and because such an allegation was absent from the amended complaint, the trial court, which looked to M's affidavit and the opinion letter only as alternative sources for such allegation and could not find the necessary evidence in those documents, properly concluded that the opinion letter was not compliant with § 52-190a (a); furthermore, the exception in § 52-184c (c) did not apply here, where R was admitted to the hospital for medical care and rehabilitation following a hip replacement surgery and nothing contained in the plaintiffs' complaint suggested that the physicians were acting as surgeons and not acting as internists when they diagnosed and treated R's postoperative condition.

Argued February 8—officially released June 5, 2018

Procedural History

Action to recover damages for the defendants' alleged medical malpractice, and for other relief, brought to the Superior Court in the judicial district of Tolland, where the court, *Cobb*, *J.*, granted the defendants' motions to dismiss, and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

Keith A. Yagaloff, for the appellants (plaintiffs).

Thomas O. Anderson, with whom were *Kyle W. Deskus* and, on the brief, *Cristin E. Sheehan*, for the appellees (defendant Eileen Ramos et al.).

Michael G. Rigg, for the appellee (named defendant).

Opinion

HARPER, J. This appeal arises out of a medical malpractice action brought by the plaintiffs, George Labissoniere and Helen Civale, coexecutors of the estate of Robert Labissoniere (decedent), against the defendants, physicians Moe Kyaw, Madhuri Gadiyaram, and Eileen Ramos (physicians), and their employer, Gaylord Hospital, Inc. (hospital). The plaintiffs appeal from the judgment of the trial court dismissing their amended complaint for lack of personal jurisdiction. On appeal, the plaintiffs claim that the court erred by (1) failing to apply the appropriate legal standard for a motion to dismiss, and (2) determining that the author of the plaintiffs' opinion letter was not a similar health care provider on the basis of their related claim that they had alleged that the defendants were acting outside of their medical specialty such that their conduct should be judged against the standard of care applicable to that specialty. We disagree and, accordingly, affirm the judgment of the trial court.

The following undisputed facts and procedural history are relevant to our disposition of this appeal. The plaintiffs commenced this action against the defendants on April 28, 2015. In their original complaint, the plaintiffs alleged that the decedent was admitted to the hospital on February 14, 2013, for medical care and rehabilitation following hip replacement surgery that had been performed at St. Francis Hospital. The plaintiffs alleged that while under the care of the physicians, the decedent suffered from a retroperitoneal hematoma, a postoperative condition that resulted in irreversible nerve damage, as well as hemorrhagic shock and multiorgan failure, requiring the decedent to be transferred back to St. Francis Hospital as an emergency admission on March 11, 2013.[1]

In an attempt to comply with General Statutes § 52-190a (a),[2] the plaintiffs appended to their original complaint an opinion letter authored by David A. Mayer, a

[1] Unrelated medical issues caused the death of the decedent. The plaintiffs claim malpractice only in regard to the defendants' diagnosis and treatment of the retroperitoneal hematoma and associated injuries.

[2] General Statutes § 52-190a provides in relevant part: "(a) No civil action . . . shall be filed to recover damages resulting from personal injury or wrongful death . . . whether in tort or in contract, in which it is alleged that such injury or death resulted from the negligence of a health care provider, unless the attorney or party filing the action . . . has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint . . . shall contain a certificate of the attorney or party filing the action . . . that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant . . . . To show the existence of such good faith, the claimant or the claimant's attorney . . . shall obtain a written and signed opinion of a similar health care provider, as defined in section 52-184c, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. Such written opinion shall not be subject to discovery by any party except for questioning the validity of the certificate. The claimant or the claimant's attorney . . . shall retain the original written opinion and shall attach a copy of such written opinion, with the name and signature of the similar health care provider expunged, to such certificate. . . .

physician and general surgeon who was board certified in surgery. The physicians and the hospital subsequently filed motions to dismiss pursuant to Practice Book § 10-30 (a) (2). In their respective motions, the defendants argued that because Mayer was board certified in surgery and not internal medicine, he was not a "similar health care provider," as defined in General Statutes § 52-184c,[3] and, therefore, the court lacked personal jurisdiction over them.[4] Included with the defendants' motions were affidavits,[5] which established that the physicians are board certified in internal medicine and are not surgeons, that surgeries are not performed at the hospital, and that there are no surgeons on staff at the hospital.

"(c) The failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action."

[3] General Statutes § 52-184c provides in relevant part: "(a) In any civil action to recover damages resulting from personal injury or wrongful death . . . in which it is alleged that such injury or death resulted from the negligence of a health care provider, as defined in section 52-184b, the claimant shall have the burden of proving by the preponderance of the evidence that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that health care provider. The prevailing professional standard of care for a given health care provider shall be that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers. . . .

"(c) If the defendant health care provider is certified by the appropriate American board as a specialist, is trained and experienced in a medical specialty, or holds himself out as a specialist, a similar health care provider is one who: (1) Is trained and experienced in the same specialty; and (2) is certified by the appropriate American board in the same specialty; provided if the defendant health care provider is providing treatment or diagnosis for a condition which is not within his specialty, a specialist trained in the treatment or diagnosis for that condition shall be considered a similar health care provider. . . ." (Internal quotation marks omitted.)

[4] Similar health care provider status of an institution is determined by the specialty of its alleged agent. See *Wilkins* v. *Connecticut Childbirth & Women's Center*, 314 Conn. 709, 719–21, 104 A.3d 671 (2014).

[5] Each of the physicians submitted an affidavit in support of their motion to dismiss. Attached to the motion of the hospital was the affidavit of Stephen Holland, the Vice President and Chief Medical Officer of the hospital.

On November 20, 2015, the plaintiffs filed a request for leave to file an amended complaint together with a proposed amended complaint in which they alleged that the physicians were board certified in internal medicine and that the treatment and diagnosis of the decedent was within the medical specialty of surgery. The plaintiffs did not attach to their amended complaint a new or amended opinion letter, nor did they explicitly allege that the defendants had acted outside the scope of their specialty of internal medicine.

The physicians and the hospital subsequently filed amended motions seeking dismissal of the plaintiffs' amended complaint. The defendants again alleged that Mayer was not a similar health care provider under § 52-184c. The plaintiffs objected, arguing that the physicians were acting as surgeons during their diagnosis and treatment of the decedent's retroperitoneal hematoma. Attached to their objection was Mayer's affidavit, in which he stated that the decedent's condition was a postoperative condition that required consultation with a surgeon. The plaintiffs argued that their amended complaint and Mayer's affidavit demonstrated that the decedent's condition was within the specialty of surgery and, therefore, that the physicians had acted outside the scope of their medical specialty and that Mayer was a similar health care provider under § 52-184c (c).

During oral argument on the defendants' motions, the court asked the plaintiffs' counsel several times to identify where the plaintiffs had alleged that the defendants acted outside the scope of their specialty of internal medicine. The plaintiffs' counsel then cited multiple paragraphs from the amended complaint, which stated that the physicians are board certified in internal medicine and provided the decedent with treatment and diagnosis for a postoperative condition that was within the specialty of surgery. The court responded that the amended complaint "doesn't say

that the doctors were acting outside of their specialty [of internal medicine]. It just says that this happened to be a surgery issue."

The court granted the defendants' amended motions to dismiss. In so doing, the court reasoned that "neither the amended complaint (filed after the court allowed discovery on the issues involved in the motion to dismiss) nor the surgeon's written opinion letter allege or state that the defendants were acting outside their specialty of internal medicine in treating the [decedent] or that they undertook the diagnosis and treatment of a condition outside of their specialty such that their conduct should be judged against the standards of care applicable to that specialty. Such an allegation and expert opinion is necessary to fall within the exception contained in [§ 52-184c (c)]. . . . Therefore, there being no such allegation or expert opinion, this case must be dismissed as to all defendants." (Citation omitted.) This appeal followed.

Before we address the plaintiffs' claims on appeal, we set forth the well settled standard of review. "A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . When a . . . court decides a . . . question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone."

(Internal quotation marks omitted.) *Bennett* v. *New Milford Hospital, Inc.*, 300 Conn. 1, 10–11, 12 A.3d 865 (2011).

"In reviewing a challenge to a ruling on a motion to dismiss . . . [w]hen the facts relevant to an issue are not in dispute, this court's task is limited to a determination of whether, on the basis of those facts, the trial court's conclusions of law are legally and logically correct. . . . Because there is no dispute regarding the basic material facts, this case presents an issue of law, and we exercise plenary review." (Internal quotation marks omitted.) *Doyle* v. *Aspen Dental of Southern CT, PC*, 179 Conn. App. 485, 491–92, 179 A.3d 249 (2018). "Our review of a trial court's ruling on a motion to dismiss pursuant to § 52-190a is plenary." *Torres* v. *Carrese*, 149 Conn. App. 596, 608, 90 A.3d 256, cert. denied, 312 Conn. 912, 93 A.3d 595 (2014).

I

The plaintiffs' first claim is that the trial court applied an incorrect legal standard in deciding the defendants' motions to dismiss. The plaintiffs argue that it was improper for the court to consider the affidavits that the defendants attached to their motions because "the issues here do not involve factual issues concerning personal jurisdiction that are not determinable on the face of the record." The plaintiffs aver that "the correct standard on [these] motion[s] is that the court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." (Citation omitted; internal quotation marks omitted.) We disagree that the court erred by considering the defendants' affidavits.

Practice Book § 10-30 (a) provides in relevant part: "A motion to dismiss shall be used to assert . . . (2) lack of jurisdiction over the person . . . ." A motion

to dismiss "shall always be filed with a supporting memorandum of law and, where appropriate, with supporting affidavits as to facts not apparent on the record." Practice Book § 10-30 (c). "[I]f the complaint is supplemented by undisputed facts established by affidavits in support of the motion to dismiss . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations in the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts]. . . . If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits . . . or other evidence, the trial court may dismiss the action without further proceedings." (Citations omitted; internal quotation marks omitted.) *Dorry* v. *Garden*, 313 Conn. 516, 522–23, 98 A.3d 55 (2014).

The court did not err when it considered the defendants' affidavits in deciding their motions to dismiss. Although the plaintiffs alleged in their amended complaint that the physicians were board certified in internal medicine, it was not improper for the court to consider the affidavits in deciding the amended motions because the affidavits provided independent evidence of the physicians' medical specialty. See *Bennett* v. *New Milford Hospital, Inc.*, supra, 300 Conn. 21. Thus, the undisputed facts contained in the defendants' affidavits supplemented the allegations contained in the amended complaint. The plaintiffs also were able to conduct discovery and submit Mayer's counteraffidavit, which did not undermine the conclusion established by the defendants' affidavits that the court lacked jurisdiction. Therefore, it was appropriate for the court to consider

the defendants' affidavits in granting their motions to dismiss for lack of personal jurisdiction.

II

The plaintiffs next raise the interrelated claims that the court erred in determining that (1) the opinion letter did not comply with § 52-190a, and (2) the exception under § 52-184c (c) was not applicable. The defendants argue that because the plaintiffs did not allege that the physicians were acting outside the scope of their medical specialty of internal medicine, the exception under § 52-184c (c) did not apply, and the plaintiffs were thus obligated to obtain an opinion letter authored by a physician board certified in internal medicine. We agree with the defendants.

We begin by discussing the relevant statutory provisions. "Section 52-190a (a) provides that before filing a personal injury action against a health care provider, the attorney or party filing the action must make a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. . . . To show a good faith belief, the complaint must be accompanied by a written and signed opinion of a similar health care provider, as defined in § 52-184c, stating that there appears to be evidence of medical negligence and including a detailed basis for the formation of that opinion. . . . To determine if an opinion letter meets the requirements of § 52-190a (a), the letter must be read in conjunction with § 52-184c (c), which defines the term similar health care provider. . . . For health care providers who are board certified or who hold themselves out as specialists . . . § 52-184c (c) defines similar health care provider as one who: (1) [i]s trained and experienced in the same specialty; and (2) is certified by the appropriate American board in the same specialty . . . ." (Citations omitted; footnote omitted; internal quotation marks

omitted.) *Torres* v. *Carrese*, supra, 149 Conn. App. 608–609.

Here, it is undisputed that the physicians were board certified in internal medicine and not surgery. On the basis of the physicians' board certification, § 52-184c (c) required the plaintiffs to obtain an opinion letter from an expert who: (1) is trained and experienced in internal medicine; and (2) is board certified in internal medicine. The plaintiffs failed to obtain an opinion letter from a similar health care provider because Mayer is not board certified in internal medicine. Therefore, the opinion letter that the plaintiffs appended to their original complaint did not comply with the requirements of § 52-190a (a) and dismissal was required. See *Bennett* v. *New Milford Hospital, Inc.*, supra, 300 Conn. 28–30.

The plaintiffs rely on the exception in § 52-184c (c), which provides that "if the defendant health care provider is providing treatment or diagnosis for a condition which is not within his specialty, a specialist trained in the treatment or diagnosis for that condition shall be considered a similar health care provider." The trial court properly determined that the plaintiffs failed to expressly allege in their amended complaint that the physicians were acting outside the scope of their medical specialty.

The trial court did not, as the plaintiffs claim on appeal, create a requirement that the *opinion letter* state that the physicians were acting outside the scope of their medical specialty. As the plaintiffs point out, doing so would require an expert to opine on the standard of care for a specialty not within his or her expertise. What the court sought, however, was some basis from which it could glean that the physicians here were acting outside the scope of internal medicine. Because such an allegation was absent from the amended complaint, the court looked to Mayer's affidavit and the

opinion letter only as alternative sources for the allegation that the defendants were acting outside the scope of their medical specialty. The court could not find the necessary evidence in these documents and thus properly concluded that the opinion letter was not compliant with § 52-190a (a).

The plaintiffs further argue that the exception in § 52-184c (c) applies because they alleged that the treatment and care the physicians rendered to the decedent fell "within the specialty of surgery" and, therefore, the physicians were acting outside of their specialty of internal medicine. This court's opinion in *Lohnes* v. *Hospital of Saint Raphael*, 132 Conn. App. 68, 31 A.3d 810 (2011), cert. denied, 303 Conn. 921, 34 A.3d 397 (2012), informs our resolution of this claim. In *Lohnes*, the plaintiff was admitted to the emergency department of the defendant hospital for respiratory issues. Id., 71. The plaintiff suffered an allergic reaction to the medication the defendant physician administered to him, and filed suit for medical negligence. Id., 71–72. The plaintiff attached to his complaint an opinion letter from a pulmonologist, and the defendants moved to dismiss on the ground that the opinion letter was not authored by a similar health care provider within the meaning of §§ 52-190a and 52-184c. Id. In support of his motion, the defendant physician submitted an affidavit in which he stated that he was board certified in emergency medicine. Id. The trial court subsequently granted the defendants' motions. Id.

On appeal in *Lohnes*, the plaintiff argued, inter alia, that the defendant physician acted outside of his medical specialty of emergency medicine when he rendered care to the plaintiff. Id., 75. This court rejected this claim, stating that the plaintiff conceded before the trial court that "his complaint did not contain an express allegation that [the defendant physician] was practicing

outside of his field of practice. In light of that concession, the [trial] court declined to infer from the plaintiff's single and fleeting reference to treatment of [the plaintiff's] pulmonary symptoms that the complaint contained any specific allegations of negligence based on [the defendant physician's] having acted outside of his area of specialty." (Internal quotation marks omitted.) Id., 78. This court further reasoned that it was undisputed that (1) the plaintiff sought treatment from the emergency department, not a pulmonologist; (2) the plaintiff complained of shortness of breath and tightness in his chest, and was treated for those symptoms; and (3) nothing on the face of the complaint suggested the defendant physician rendered pulmonology treatment as opposed to emergency medical treatment. See id., 78–79.

Similarly, in the present case, the decedent was admitted to the hospital for "medical care and rehabilitation" following a hip replacement, the actual surgical procedure having been performed at another hospital, by an independent surgeon. While under the defendants' care, the decedent developed complications, which required treatment and diagnosis by the physicians. Although the physicians appear to have initially misdiagnosed the decedent's postoperative condition, nothing contained in the plaintiffs' complaint or opinion letter suggests that the physicians were not acting as internists. In fact, the crux of the plaintiffs' complaint was that the physicians were negligent in their initial assessment of the decedent's condition, not that the physicians were negligent in performing a surgical procedure.

The plaintiffs have alleged that the condition from which the decedent suffered was a postsurgical complication, and thus that the physicians were acting within the specialty of surgery and outside their specialty of internal medicine. The plaintiffs overlook, however,

that a broad specialty such as internal medicine often overlaps with other medical specialties. Under the plaintiffs' argument, there likely never would be a situation where a physician's treatment of a patient falls within the specific specialty of internal medicine, as physicians who are board certified in that specialty are often called upon to diagnose and treat a variety of conditions that could fall within a variety of medical specialties.[6] Our case law has declined to create such scenarios. See, e.g., *Lohnes* v. *Hospital of Saint Raphael*, supra, 132 Conn. App. 79 ("[I]n light of the fact that emergency medicine physicians are charged with rendering care to and treating patients with a

[6] Cases from our Superior Court have highlighted similar concerns. In *Kroha* v. *LaMonica*, Superior Court, judicial district of Waterbury, Docket No. X02-CV-98-0160366-S (July 29, 2002), the court explained that, under an argument similar to the one advanced by the plaintiffs' here, "the statute would unfairly impose a form of strict liability upon any physician who agreed to treat or diagnose a patient with an unknown ailment or condition. If, for example, a patient seeking treatment for what appeared to be a common cold was actually suffering from a rare tropical disease, the internist who treated him would unwittingly expose himself to post hoc criticism and evaluation under the standard of care for doctors specializing in tropical diseases. . . . The obvious problem with the foregoing interpretation of the statute is that it would discourage medical practitioners from doing what they do best—that is, gathering information about their patients' unsolved medical problems and finding solutions for those problems by applying professional skill and judgment to what they learn. It is highly unlikely that the legislature intended to create such a strong disincentive for doctors to accept challenging cases. In fact, an alternative reading of the statute would avoid creating this disincentive while protecting patients from risky dabbling by physicians in specialties not their own. . . . So understood, the statute would subject a physician to evaluation under the standard of care for a different medical specialist *only* if he undertook to treat or diagnose a patient after he learned or should have learned that the patient was suffering from a condition that was not within his own medical specialty." (Emphasis in original.) See also *Nestico* v. *Weyman*, 52 Conn. Supp. 463, 471–73, 473, 59 A.3d 338 (2011) (court agreed with and extensively quoted *Kroha*, concluding that "[t]he exception provision of § 52-184c does not apply unless it is alleged that the defendant physician actually undertook the diagnosis and treatment of a condition not within his specialty such that his conduct should be judged against the standards of care applicable to that specialty"), aff'd, 140 Conn. App. 499, 59 A.3d 337 (2013).

potentially limitless variety of symptoms or injuries, the plaintiff's argument, namely, that the defendant was acting outside his area of specialty, potentially could yield a situation where no condition or illness would be considered within the scope of emergency medicine. Accordingly, there is no basis for the claim that, in treating the plaintiff for his symptoms in the emergency department of the hospital, [the defendant physician] was acting outside his specialty of emergency medicine.")

Because the plaintiffs here have not alleged that the physicians acted outside the scope of their specialty of internal medicine, the exception to the definition of similar health care provider in § 52-184c (c) does not apply. Accordingly, the plaintiffs were required to obtain an opinion letter from an expert who (1) had training and experience in internal medicine, and (2) was board certified in internal medicine. *Torres* v. *Carrese*, supra, 149 Conn. App. 609. The plaintiffs did not provide such a letter and, therefore, the court properly granted the defendants' motions to dismiss for lack of personal jurisdiction.

The judgment is affirmed.

In this opinion the other judges concurred.

KAREN ZILKHA *v.* DAVID ZILKHA
(AC 39832)

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

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court denying his motion to return certain escrow funds that the trial court had ordered be dispersed to pay the fees of the guardian ad litem, the attorney for the parties' minor children and the custody evaluator. Following the dissolution of the parties' marriage, the plaintiff filed a

motion to open the dissolution judgment, alleging that, during the pendency of the dissolution action, the defendant fraudulently had failed to disclose a claim that he had against his former employer. At the time the motion to open was filed, the defendant had received a certain amount of money pursuant to a settlement with his former employer regarding this claim, and the defendant was anticipating receipt of the final installment payment from that settlement. The trial court thereafter ordered the defendant to place a certain amount of the final installment payment in escrow pending the outcome of a hearing to determine whether the plaintiff could sustain her allegations of fraud by more than a mere suspicion. Following that hearing, the court concluded that there was more than a mere suspicion that the defendant had committed fraud. Thereafter, the attorney for the minor children filed a motion to compel the payment of present and future fees for himself, the guardian ad litem and the custody evaluator. The court granted that motion, approved certain fees and ordered the disbursement of funds from the escrow account to pay those fees. The defendant then appealed to this court, which reversed the judgment as to the order disbursing the escrow funds and vacated that portion of the order, concluding that the trial court lacked authority to order the disbursement of the funds without first opening the judgment. Thereafter, the defendant filed a motion to return the disbursed funds to the escrow account. The trial court denied the motion, concluding that it could not afford the defendant any practical relief because equity did not permit the return of the court-approved fees. On appeal, the defendant claimed that, in denying his motion, the trial court disregarded an order of this court by failing to effectuate the return of the funds to the escrow account. *Held* that the trial court properly denied the defendant's motion to return the escrow funds: contrary to the defendant's claim, the trial court did not ignore an order of this court that provided for the recoupment of the subject funds, as this court in the prior appeal did not remand the case with direction that the funds be returned to the escrow account, the rescript having stated only that the trial court's order to disburse the funds from the escrow account be vacated; moreover, the defendant's assertion that the trial court erred by not using its equitable powers to effectuate the return of the funds disbursed from the escrow account was unavailing, as the court properly concluded that it could not afford the defendant any practical relief because there was no way to recoup funds that properly were awarded and paid for services rendered by the guardian ad litem, the children's attorney and the custody evaluator, and the defendant failed to cite any equitable or legal basis requiring the return of the funds.

Argued April 12—officially released June 5, 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, *Abery-Wetstone*, *J.*; judgment dissolving the marriage and granting certain other relief in accordance with the parties separation agreement and stipulation; thereafter, the plaintiff filed a motion to open the judgment; subsequently, the court, *Shay*, *J.*, issued an order directing the defendant to place certain settlement proceeds in escrow; thereafter, the court, *Shay*, *J.*, granted the motion filed by the attorney for the minor children for fees and retainers for the guardian ad litem et al. and ordered, inter alia, the disbursement of certain escrow funds, from which the defendant appealed to this court; subsequently, the matter was transferred to the judicial district of Waterbury; thereafter, this court reversed the judgment in part and vacated the judgment in part; subsequently, the court, *Hon. Lloyd Cutsumpas*, judge trial referee, denied the defendant's motion to return the dispersed escrow funds, and the defendant appealed to this court. *Affirmed.*

Edward N. Lerner, with whom, on the brief, was *George Kent Guarino*, for the appellant (defendant).

Opinion

LAVINE, J. The defendant, David Zilkha, has brought multiple postjudgment appeals in this exceedingly bitter and protracted dissolution litigation. His present appeal arises out of this court's judgment, holding that the trial court was without authority to disburse funds owned by the defendant that were being held in a court-ordered escrow account. See *Zilkha* v. *Zilkha*, 159 Conn. App. 167, 175, 123 A.3d 439 (2015).[1] On appeal, the defendant

[1] In *Zilkha*, the defendant appealed, in part, from the judgment of the trial court, *Shay*, *J.*, claiming that the court improperly dispersed "escrow money held from settlement funds received [by the defendant] from his former employer to pay postjudgment fees to the guardian ad litem, the attorney

claims that by denying his "motion to turn over—post-judgment," the trial court disregarded an order of this court by failing to effectuate the return of his funds to the escrow account. We affirm the judgment of the trial court.[2]

The following facts, as set forth in *Zilkha*, are relevant to our resolution of the present appeal. The marriage of the defendant and the plaintiff, Karen Zilkha, was dissolved by the court, *Abery-Wetstone*, *J.*, on May 31, 2005. *Zilkha* v. *Zilkha*, supra, 159 Conn. App. 169. On November 14, 2008, the plaintiff filed a motion to open and set aside the dissolution judgment in which she alleged that during the dissolution litigation, the defendant fraudulently failed to disclose a claim that he had against his former employer. Id. At the time the plaintiff's motion to open was filed, the defendant had received $1,400,000 as part of the settlement he had obtained from his former employer. Id. The former employer was to make a final payment of $700,000 to the defendant in April, 2009. Id. On April 9, 2009, the plaintiff amended her motion to open the judgment, requesting that the court order the defendant to place the $700,000 settlement proceeds in escrow. Id., 169–70. Following an April 30, 2009 hearing, the court, *Shay*, *J.*, ordered the defendant to place $250,000 of the settlement proceeds in an escrow account pending the outcome of an *Oneglia* hearing.[3] Id., 170. Judge Shay held

for the minor children, and a custody evaluator." *Zilkha* v. *Zilkha*, supra, 159 Conn. App. 168–69.

[2] The plaintiff, Karen Zilkha, failed to file an appellee's brief as ordered by this court. This court, therefore, ordered the appeal to be considered on the basis of the defendant's brief and the record as defined by Practice Book § 60-4.

[3] "Under *Oneglia* v. *Oneglia*, 14 Conn. App. 267, 269, 540 A.2d 713 (1988), a party seeking to open a judgment of dissolution on the basis of allegations of fraud does not have a right to conduct discovery based only on its filing of a motion to open. Instead, a hearing is held to determine if the party can substantiate the allegations of fraud beyond a mere suspicion. . . . If so, the court opens the judgment for the limited purpose of discovery, and later issues an ultimate decision on the postjudgment motion to open after

an *Oneglia* hearing in February, 2010, and thereafter concluded that there was more than a mere suspicion that the defendant had committed fraud.[4] Id., 170–71. See footnote 3 of this opinion.

On September 10, 2012, the attorney for the minor children filed a "postjudgment motion for fees and replenishment retainers" to compel the parties to pay him, the guardian ad litem, and the custody evaluator (experts) for the services they had rendered and retainers for costs to be incurred by the ongoing litigation.[5] Following a hearing, and in accordance with the criteria set forth in General Statutes §§ 46b-62 and 46b-82, Judge Shay ordered the plaintiff and the defendant each to pay $500 to the attorney for the minor children, $1500 to the guardian ad litem, and $500 to the custody evaluator. Id., 172. The court also ordered the following payments to be made from the defendant's funds in the escrow account: $40,000 to the attorney for the minor children, $62,577.95 to the guardian ad litem, $9000 to the custody evaluator, and an additional $15,000 each to the attorney for the minor children and to the guardian ad litem as retainers for future services related to the litigation.[6] Id.

The defendant appealed from the court-ordered disbursement of funds from the escrow account, claiming that the court "lacked authority to distribute the escrow funds because the judgment of dissolution had not been opened."[7] Id. He argued that the court's ruling at the end of the *Oneglia* hearing only permitted the plaintiff

discovery is completed and another hearing is held." (Citation omitted.) *Zilkha* v. *Zilkha*, supra, 159 Conn. App. 170 n.4.

[4] The record reflects that the plaintiff withdrew her motion to open the judgment subsequent to *Zilkha*.

[5] The ongoing dispute between the parties concerns custody and visitation.

[6] At the present time, there are more than 850 entries on the trial court docket sheet for this matter.

[7] The defendant did not challenge the court's order that he pay the experts or the amount of the fees that the court ordered him to pay.

to conduct limited discovery after which the court was required to consider the plaintiff's motion to open. Id., 173. This court agreed with the defendant that the trial court lacked authority to order the distribution of the defendant's funds in the escrow account to pay the experts. Id., 174.

In reaching our conclusion, this court stated: "General Statutes § 46b-81 (a) provides in relevant part: At the time of entering a decree . . . dissolving a marriage . . . the Superior Court may assign to either spouse all or any part of the estate of the other spouse. The court can redistribute assets pursuant to a motion to open. . . . Nevertheless, [u]ntil a motion to open has been granted, the earlier judgment is unaffected . . . . In this case, although the court was free to order that the defendant pay some or all of the fees to the [experts], it lacked the authority to direct that these payments be made from the escrowed funds." (Citations omitted; internal quotation marks omitted.) Id., 174–75. A court is not authorized to decide which of a party's assets must be used to pay a party's share of fees. Id., 175. "[T]he court could not make orders for funds to be disbursed from the escrow account because those funds belonged solely to the defendant, until and unless, the court opened the judgment and distributed the escrowed funds, if at all." Id. This court reversed the judgment as to the order to disburse escrow funds to the experts and vacated that portion of the order. Id. This court made no further orders with respect to the escrow funds that had been disbursed.[8]

On October 20, 2015, the defendant filed his motion to turn over the funds and an application for order to show cause why the plaintiff and the experts should

[8] The rescript stated: "The judgment is reversed only as to the disbursement of funds from the escrow account and that portion of the order is vacated. The judgment is affirmed in all other respects." *Zilkha* v. *Zilkha*, supra, 159 Conn. App. 180.

not be ordered to appear and show cause why the defendant's motion to turn over should not be granted. The court, *Nastri*, *J.*, granted the order to show cause and ordered the plaintiff and the experts to appear.

The hearing was held before the court, *Hon. Lloyd Cutsumpas*, judge trial referee, on November 3, 2016. During the hearing, counsel for the defendant represented that after all the payments ordered by Judge Shay had been made, the parties stipulated that the funds remaining in the escrow account should be disbursed to the plaintiff and the defendant.[9] The defendant did not dispute that the funds that were in the escrow account were disbursed according to Judge Shay's orders and the accounting with respect to the disbursements was proper. Counsel for the defendant acknowledged that the fees were proper but argued that Judge Shay would not conduct a visitation hearing until the fees that were owed were paid. The court summarized the issue as the defendant wanting the court to "clawback" fees Judge Shay had approved and ordered paid to the experts.

On November 10, 2016, the court issued an order denying the defendant's motion to turn over, stating in part that the holding in *Zilkha* "clearly stated that the [trial] court was without authority to disburse funds from the named escrow account to the three court-appointed experts. That portion of the order was simply vacated by the Appellate Court. There was no remand or further direction on what this court was to do. . . . [E]quity does not permit the relief requested in the [defendant's] motion, i.e., the return of court-approved fees paid to court-appointed experts. There is no practical relief which can be afforded to the defendant." The defendant thereafter appealed to this court.

[9] The court summarized the stipulation as follows: "The parties stipulate that $44,566 shall be paid to the plaintiff and the balance of $42,657 shall be paid to [counsel for the defendant trustee]." The disbursement to the plaintiff was for a child support arrearage.

On appeal, the defendant argues that the trial court erred by not using its equitable powers to effectuate the return of the funds disbursed from the escrow account to pay the experts. The defendant contends that the court ignored an order of this court in *Zilka* providing for recoupment of his funds. The flaw in the defendant's argument is that this court did not order the trial court to recoup or effectuate the return of his funds in the escrow account that were used to pay the three experts who had rendered services to the parties' children and the trial court. The rescript merely stated that the order to pay was to be vacated, nothing more. See *Zilkha* v. *Zilkha*, supra, 159 Conn. App. 180.

"Well established principles govern further proceedings after a remand by this court. In carrying out a mandate of this court, the trial court is limited to the specific direction of the mandate as interpreted in light of the opinion. . . . [T]his is the guiding principle that the trial court must observe. . . . The trial court should examine the mandate and the opinion of the reviewing court and proceed in conformity with the views expressed therein. . . . These principles apply to criminal as well as to civil proceedings. . . . The trial court cannot adjudicate rights and duties not within the scope of the remand. . . . It is the duty of the trial court on remand to comply strictly with the mandate of the appellate court according to its true intent and meaning. No judgment other than that directed or permitted by the reviewing court may be rendered . . . ." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Brundage*, 320 Conn. 740, 747–48, 135 A.3d 697 (2016). Significantly, in *Zilkha*, this court ordered only that the trial court's order to disburse funds from the escrow account be vacated. This court did not order a remand for any purpose. We, therefore, disagree with the defendant's claim that the trial judge

ignored the precedent of an appellate court when he denied the motion to turn over.

The defendant also argues that the court should have used its equitable powers to order the experts to return the funds from the escrow account that were used to compensate them for services that they had rendered. Despite his argument, the defendant has not cited any legal or equitable authority supporting it, and we know of none. Notably, the defendant does not contend that the experts were not entitled to be paid for their services, nor does he argue that the court-ordered fees were improper in amount. In *Zilkha*, this court determined that Judge Shay improperly ordered the disbursement of the escrow funds without first opening the judgment of dissolution in violation of § 46b-81 (a), but this court did not conclude that Judge Shay improperly ordered the experts to be paid. See *Zilkha* v. *Zilkha*, supra, 159 Conn. App. 175.

Although the defendant asked the trial court to use its equitable powers to effectuate the return of the funds that had been in the escrow account, on appeal, he has failed to cite any equitable basis requiring the experts to return the funds that Judge Shay found they were owed. The record discloses that after the *Oneglia* hearing, Judge Shay determined that there was more than a mere suspicion that the defendant had committed fraud. Thereafter, the attorney for the minor children filed a motion "for fees and retainers in order *to compel* the payment of present and future fees for himself, as well as for the guardian ad litem and the custody evaluator." (Emphasis added.) Id., 171. We are reminded of the premise of equity. "One who seeks equity must also do equity and expect that equity will be done for all." *LaCroix* v. *LaCroix*, 189 Conn. 685, 689, 457 A.2d 1076 (1983). Judge Shay ordered the defendant to pay the debt he owed the experts, which he was unwilling do by himself. For the sake of argument,

even if the court had granted the defendant's motion to turn over, the defendant still would be obligated pursuant to court order to pay the fees he owed the experts.

We do not minimize the error Judge Shay made in ordering the experts to be paid with the defendant's funds in the escrow account prior to opening the judgment of dissolution. As the court, however, stated in its order denying the defendant's motion to turn over, the defendant's success in his appeal in *Zilkha* "clarified somewhat the law regarding court established escrow accounts," but equity does not permit the return of the court-approved fees.

For the foregoing reasons, we agree with the court that that it could not afford the defendant any relief– there is no way to recoup funds that properly were awarded and paid for services rendered by the experts. More importantly, in *Zilkha*, this court did not remand the case with direction that the funds be returned to the escrow account. The court, therefore, properly denied the defendant's motion to turn over.

The judgment is affirmed.

In this opinion the other judges concurred.

JEAN-PIERRE BOLAT *v.* YUMI S. BOLAT
(AC 37788)

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

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court denying his motion for child support and finding him in contempt for failing to pay for certain extracurricular activity expenses. In September, 2013, the defendant had filed a motion seeking, inter alia, to modify the custody orders, which the trial court denied. Attached to that motion, the defendant included a financial affidavit reflecting gross and net

weekly incomes that were more than those amounts on the financial affidavits submitted at the time of the dissolution. Thereafter, the plaintiff filed a motion for modification form to which he appended a motion for child support. The plaintiff identified the decision of the trial court denying the defendant's September, 2013 motion to modify the custody orders and his loss of employment as substantial changes in circumstances warranting a modification of child support. In his attached motion for child support, the plaintiff claimed that the defendant was employed and listed her salary, and attached the parties' 2014 financial affidavits. While the plaintiff's motion for modification was pending, the defendant filed a motion seeking to hold the plaintiff in contempt for failing to pay his share of certain expenses for extracurricular activities, pursuant to the parties' separation agreement, which had been incorporated into the dissolution judgment. At a hearing on the parties' motions, the trial court stated that it would consider only the grounds raised in the plaintiff's motion for modification of child support form, namely, the trial court's decision denying the defendant's September, 2013 motion and the plaintiff's claim as to loss of employment. In denying the plaintiff's motion, the court found no substantial change in circumstances warranting an order of child support and further ordered the plaintiff to pay the defendant $847.99 for his share of the extracurricular activities. On appeal, the plaintiff claimed, inter alia, that the trial court should have reviewed the exhibits that he had submitted with the motion and the parties' current financial affidavits prior to concluding that no substantial change in circumstances had occurred. *Held:*

1. The trial court abused its discretion in denying the plaintiff's motion for modification of child support: in addition to the testimony of the parties, the plaintiff attached a child support worksheet and the parties' 2014 financial affidavits, and both parties filed financial affidavits on the day of the hearing on the motions, a comparison of the defendant's financial affidavits from the time of the dissolution to the day of the hearing on the motion to modify revealed a change in her net weekly income, and, therefore, the increase in the defendant's income properly was before the court and should have been considered by the court prior to ruling on the plaintiff's motion; accordingly, because the court did not consider the increase in the defendant's income from the date of the initial order to the date of the modification hearing prior to determining that there was no substantial change in circumstances, further proceedings on the plaintiff's motion for modification were necessary.
2. The trial court abused its discretion in finding the defendant in wilful contempt for failing to pay the extracurricular activity expenses for the parties' minor children; although the order was sufficiently clear and unambiguous to support a finding of contempt, the court erred in finding that the defendant had wilfully disobeyed the order, as the parties' separation agreement provided that they would share agreed upon expenses for extracurricular activities, the defendant testified that the

plaintiff had not agreed to pay for certain expenses for sailing and lacrosse, and admitted that the plaintiff never had failed to pay for an agreed upon extracurricular expense, and, therefore, the defendant failed to prove, by clear and convincing evidence, that the plaintiff had failed to comply with a prior court order.

Argued January 8—officially released June 5, 2018

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Abery-Wetstone, J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Gould, J.*, denied the plaintiff's motion for child support and granted the defendant's motion for contempt, and the plaintiff appealed to this court. *Reversed; further proceedings.*

Steven R. Dembo, with whom, were *Caitlin E. Kozloski* and, on the brief, *P. Jo Anne Burgh*, for the appellant (plaintiff).

Richard W. Callahan, for the appellee (defendant).

Opinion

DiPENTIMA, C. J. The plaintiff, Jean-Pierre Bolat, appeals from certain postdissolution orders denying his motion for child support and finding him in contempt. On appeal, the plaintiff argues that the court erred in (1) denying his motion for child support and in finding no substantial change in the parties' financial circumstances since the date of judgment despite an increase in the income of the defendant, Yumi S. Bolat, and (2) finding him in contempt for failing to pay extracurricular activity expenses. We agree with the plaintiff as to both claims and, accordingly, reverse the judgment of the trial court.

The following facts are relevant to the resolution of the issues on appeal. The plaintiff and the defendant

were married on September 21, 1998, in Harpswell, Maine. At the time the parties met and married, the plaintiff was an active duty officer in the Navy. The defendant is a Japanese national. The parties have three children: a son born in 1999, a son born in 2001, and a daughter born in 2003. The parties raised their children in Japan until the breakup of their marriage in 2010. Thereafter, the plaintiff moved to Connecticut with the children, where they have resided since that time. The defendant followed the family to Connecticut. She initially entered the United States on a visitor's visa but eventually was granted her green card.

In 2010, the plaintiff instituted this action for dissolution of marriage. On June 21, 2011, the court, *Abery-Wetstone*, *J.*, rendered a judgment of dissolution, which incorporated the parties' separation agreement and parenting plan-final custody stipulation (parenting plan). According to the parenting plan, the plaintiff would have sole legal and primary physical custody of the three minor children. Pursuant to the separation agreement, the parties agreed that, on the basis of the total coordination of family finances, and because the plaintiff was unemployed and receiving only retired military pay, there would be no order of child support. The separation agreement also provided that the parties would share agreed upon extracurricular expenses for the minor children and that each party would notify the other of any change in his or her employment status or income. Finally, the parties acknowledged that, due to a qualifying disability pursuant to General Statutes § 46b-84c, their elder son was entitled to receive child support until he attained the age of twenty-one years.

The parties filed financial affidavits at the time of the dissolution. The plaintiff's financial affidavit, filed June 21, 2011, reflected a gross weekly income of $830.46 and a net weekly income of $709.59. The defendant's

affidavit, filed June 21, 2011, reflected a gross weekly income of $134 and a net weekly income of $181.[1]

On September 6, 2013, the defendant filed a motion seeking, inter alia, to modify the custody orders. The defendant filed a financial affidavit, dated March 20, 2014, reflecting a total gross weekly income of $1150 and a total net weekly income of $901. On July 15, 2014, the court, *Munro*, *J.*, denied the defendant's motion.

On August 13, 2014, the plaintiff, as a self-represented party, filed a motion for modification form (JD-FM-174) in which he identified the "[r]ecent decision by Judge Munro and loss of employment" as substantial changes in circumstances warranting the modification of child support. While the plaintiff's motion for modification was pending, the defendant filed a motion seeking to hold the plaintiff in contempt for his failure to pay his share of extracurricular activities. Following a hearing on March 2, 2015, the court, *Gould*, *J.*, denied the plaintiff's motion for modification, finding that there was no substantial change in circumstances warranting an order of child support. The court also found the plaintiff in wilful contempt of a prior court order. Specifically, the court found that the plaintiff owed the defendant for approximately 50 percent of all extracurricular activities for the minor children in the amount of $847.99. The plaintiff then filed the present appeal.

I

The plaintiff first claims that the trial court erred in finding no substantial change of circumstances and denying the motion for child support where the evidence clearly established that the defendant's income had increased significantly. Specifically, the plaintiff argues that the court should have reviewed the exhibits

[1] The $134 in gross weekly income for the defendant was made up of $103 from her principal employment and $31 from other sources. It is unclear why the defendant's net income was higher than her gross income.

submitted with the motion and the parties' then current financial affidavits prior to concluding that no substantial change in circumstances had occurred. We agree.

We first set forth our standard of review. "The standard of review in family matters is well settled. An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action." (Internal quotation marks omitted). *O'Donnell* v. *Bozzuti*, 148 Conn. App. 80, 82–83, 84 A.3d 479 (2014). "Notwithstanding the great deference accorded the trial court in dissolution proceedings, a trial court's ruling . . . may be reversed if, in the exercise of its discretion, the trial court applies the wrong standard of law." (Internal quotation marks omitted.) *Tuckman* v. *Tuckman*, 308 Conn. 194, 200, 61 A.3d 449 (2013).

The following additional facts are necessary for the resolution of this issue. On August 13, 2014, the plaintiff filed a motion for modification form (JD-FM-174) identifying the "[r]ecent decision by Judge Munro and loss of employment" as substantial changes in circumstances warranting the modification. On the motion for modification form, the plaintiff also directed the court to "[s]ee motion attached," which appears to be a "motion for child support" that was submitted along with the motion for modification form.[2] In the attached motion for child support, the plaintiff indicated that, in accordance with Judge Munro's July 15, 2014 memorandum of decision, he was requesting an order requiring the defendant to

[2] There is no separate file stamp date on the attached "motion for child support."

pay child support to the plaintiff in the amount of $1165.65 per month. The plaintiff indicated in the motion that he was unemployed and "receiving only his military retired pay (less 10 [percent] to the defendant), his VA disability payment, and temporary unemployment compensation (until February, 2015 at the latest)." The plaintiff further indicated that he had retained over $150,000 of family debt at the time of dissolution and that the defendant was employed at Maritime Program Group in Westbrook and was earning approximately $60,000 per year. The plaintiff attached a child support worksheet, the defendant's March 20, 2014 financial affidavit and the plaintiff's August 13, 2014 financial affidavit to the motion.

At the hearing on March 2, 2015, the court indicated that it would consider only the grounds raised in the plaintiff's motion for modification of child support form, namely, the "recent decision by Judge Munro and loss of employment." The court indicated that it would not "take any evidence regarding another judge's decision that in any way would affect a motion for [modification]." After inquiring whether the plaintiff was ready to proceed "with this motion regarding loss of employment," the plaintiff responded, "Yes, Your Honor, and other factors."[3] The court then allowed the plaintiff to testify in narrative form.

[3] The transcript reveals the following:

"The Court: All right, I've got 253; I'm going backwards from there; it looks like I have a fairly large offering of financial affidavits that are attached to a motion. I have an undated motion for child support dated August 12.

"[The Plaintiff]: That would be the motion we're talking about.

"The Court: Is there a motion before—252, I have a motion for modification regarding support.

"[The Plaintiff]: Yes, Your Honor, that is what 252 is the child support.

"The Court: All right. The motion— the reason for the motion says, recent decision by Judge Munro and loss of employment. I'm not going to take any evidence regarding another judge's decision that in any way would affect a motion for [modification]. Are you planning to proceed with this motion regarding loss of employment?

"[The Plaintiff]: Yes, Your Honor, and other factors."

The plaintiff testified as follows: "[I]n July of 2014 I lost my employment. My previous employment was at the rate of $113,000 a year, give or take, a bonus of about $1000 or $3000 at the end of the year. At that time, I filed for child support. The defendant, according to her financial affidavits, is making $56,000 a year; has no debt. At the judgment of dissolution, I retained all of the family debt between $150,000 and $200,000." Later, following a series of objections by counsel for the defendant, the plaintiff testified that "[d]ue to the loss of that, the incurred debts; the changes in the children since the judgment. There are other reasons for the modification that are inherent reasons that previous—Judge Emons recognized . . . ." After the court sustained the defendant's objection, the plaintiff stated: "Well if—if you're only going to allow the testimony of myself regarding the loss of my employment, then, I believe, the facts are there in the case." On cross-examination, the plaintiff testified that he was unemployed at the time of the dissolution in 2011 and that, since that time, he had obtained and lost employment at various times. He conceded that he was in the same financial circumstances at the date of the hearing that he was in at the time of the dissolution judgment. Following the hearing, the court found that there was no substantial change in circumstances to warrant an order of child support and, therefore, denied the motion for modification.[4]

Modification of child support is governed by General Statutes § 46b-86 (a), which provides in relevant part: "Unless and to the extent that the decree precludes

[4] In its subsequent memorandum of decision dated June 7, 2016, the court stated: "The plaintiff testified that, as of March 2, 2015, the date of the hearing of the instant motions, his employment and financial situation was the same as it was on . . . June 21, 2011, the date of the dissolution of his marriage. Based on the plaintiff's sworn testimony, the undersigned finds there is no substantial change in circumstances and therefore denies the plaintiff's motion, #252."

modification, any final order for the periodic payment of . . . support . . . may, at any time thereafter, be continued, set aside, altered or modified by the court upon a showing of a substantial change in the circumstances of either party . . . .''

''We previously have explained the specific method by which a trial court should proceed with a motion brought pursuant to § 46b-86 (a). When presented with a motion for modification, a court must first determine whether there has been a substantial change in the financial circumstances of one or both of the parties. . . . Second, if the court finds a substantial change in circumstances, it may properly consider the motion and, on the basis of the . . . § 46b-82 criteria, make an order for modification. . . . The court has authority to issue a modification only if it conforms the order to the distinct and definite changes in the circumstances of the parties. . . . Simply put, before the court may modify . . . [a child support order] pursuant to § 46b-86, it must make a threshold finding of a substantial change in circumstances with respect to one of the parties.

''The party seeking the modification has the burden of proving a substantial change in circumstances. . . . To obtain a modification, the moving party must demonstrate that circumstances have changed since the last court order such that it would be unjust or inequitable to hold either party to it. Because the establishment of changed circumstances is a condition precedent to a party's relief, it is pertinent for the trial court to inquire as to what, if any, new circumstance warrants a modification of the existing order. In making such an inquiry, the trial court's discretion is essential.'' (Citations omitted; emphasis omitted; internal quotation marks omitted.) *O'Donnell* v. *Bozzuti*, supra, 148 Conn. App. 87.

In the present case, in addition to the testimony of the parties, the plaintiff attached a child support worksheet,

the defendant's March 20, 2014 financial affidavit and the plaintiff's August 13, 2014 financial affidavit to the motion to modify. In addition, the parties both filed financial affidavits on March 2, 2015, the date of the modification hearing. Finally, the defendant introduced into evidence the parties' 2011 financial affidavits filed at the time of dissolution. According to the defendant, these documents demonstrate that the plaintiff had been able progressively to reduce his unsecured debt despite having expenses that exceeded his net income while the defendant had increased unsecured debt as her expenses continued to exceed her net income. A comparison of the defendant's financial affidavits from the time of the dissolution in 2011 to the 2015 hearing, however, reveals a change in her net weekly income from $181 to $767.[5] Notwithstanding the financial affidavits, however, the court did not allow the plaintiff to

[5] The defendant's financial affidavit, filed on June 21, 2011, reflected a gross weekly income of $134 and a net weekly income of $181. The defendant argues, however, that her actual weekly gross income in 2011 was $550. According to the defendant, her 2011 financial affidavit was based on the "weekly average not less than 13 weeks" as required by the financial affidavit form. The defendant points to the child support guidelines filed in 2011, which reflects $550 per week gross income for the defendant. We note, however, that "[a] court is entitled to rely upon the truth and accuracy of sworn statements required by . . . the [rules of practice], and a misrepresentation of assets and income is a serious and intolerable dereliction on the part of the affiant which goes to the very heart of the judicial proceeding. . . . These sworn statements have great significance in domestic disputes in that they serve to facilitate the process and avoid the necessity of testimony in public by persons still married to each other regarding the circumstances of their formerly private existence." *Reville* v. *Reville*, 312 Conn. 428, 442–43, 93 A.3d 1076 (2014).

Furthermore, Article XVI of the parties' separation agreement provides, in relevant part: "The financial affidavit of the [plaintiff] and the financial affidavit of the [defendant] are hereby incorporated and made a part of this Agreement, it being expressly understood that the terms of this Agreement and the financial arrangement hereunder were made upon the representations contained in said affidavits. It is further understood and agreed that the parties hereto relied upon said representations in executing this Agreement."

proceed on his claim regarding the change in the defendant's income. It permitted the plaintiff to proceed only with regard to his claim of loss of employment as stated on the motion for modification form. That form, however, directed the court to "see motion attached" which was the motion for child support listing additional factors regarding a change in circumstances. Specifically, the plaintiff claimed in the attached motion that the defendant was employed and earning approximately $60,000 per year. Under these circumstances, the increase in the defendant's income properly was before the court and should have been considered by the court prior to ruling on the plaintiff's motion.[6]

Because the court did not consider the increase in the defendant's income from the date of the initial order to the date of the modification hearing prior to determining that there was no substantial change in circumstances, we conclude that the court abused its discretion in denying the plaintiff's motion for modification of child support. We therefore remand this matter to the trial court to conduct further proceedings addressing the plaintiff's motion for modification of child support.

II

The plaintiff next claims that the court erred in holding him in contempt for failing to pay extracurricular

[6] The court's only mention of the increase in the defendant's income was in its memorandum of decision dated June 7, 2016, filed after the plaintiff had filed several motions to complete and perfect the record. In that decision, the court stated that the plaintiff had "also alleged that, as a result of the marital dissolution agreement, he retained over $150,000 in family debt, and that the defendant was making $60,000 a year." In its decision the court held, however, based on the plaintiff's testimony that his financial situation was the same on the date of the hearing on the motion to modify that it was on June 21, 2011, the date of the dissolution of the parties' marriage, that there was no substantial change in circumstances. The court did not address the increase in the defendant's income as stated in the plaintiff's motion to modify.

activity expenses for the minor children. Specifically, the plaintiff argues that the language contained in section 4.3 of the parties' separation agreement was not clear and unambiguous and, therefore, cannot support a finding of contempt. The plaintiff further argues that, even if the order was sufficiently clear and unambiguous to support a finding of contempt, the court erred in finding that the plaintiff wilfully disobeyed such language. Although we conclude that the order was sufficiently clear and unambiguous to support a finding of contempt, we agree with the plaintiff that the court erred in finding that he had wilfully disobeyed the order.

"[O]ur analysis of a judgment of contempt consists of two levels of inquiry. First, we must resolve 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.

"The abuse of discretion standard applies to a trial court's decision on a motion for contempt. . . . A finding of contempt is a question of fact, and our standard of review is to determine whether the court abused its discretion in [finding] 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. . . . We review the court's factual findings in the context of a motion for contempt to determine whether they are clearly erroneous. . . . A

factual finding is clearly erroneous when it is not supported by any evidence in the record or when there is evidence to support it, but the reviewing court is left with the definite and firm conviction that a mistake has been made." (Internal quotation marks omitted.) *Marshall* v. *Marshall*, 151 Conn. App. 638, 650, 97 A.3d 1 (2014). A finding of indirect civil contempt must be supported by clear and convincing evidence. *Brody* v. *Brody*, 315 Conn. 300, 318–19, 105 A.3d 887 (2015).

"[A] court may not find a person in contempt without considering the circumstances surrounding the violation to determine whether such violation was wilful. . . . [A] contempt finding is not automatic and depends on the facts and circumstances underlying it. . . . [I]t is well settled that the inability of [a] defendant to obey an order of the court, without fault on his part, is a good defense to the charge of contempt . . . . The contemnor must establish that he cannot comply, or was unable to do so. . . . It is [then] within the sound discretion of the court to deny a claim of contempt when there is an adequate factual basis to explain the failure." (Citation omitted; internal quotation marks omitted.) *Mekrut* v. *Suits*, 147 Conn. App. 794, 799–800, 84 A.3d 466 (2014).

Section 4.3 of the parties' separation agreement provides: "The parties shall share agreed upon extracurricular expenses for the minor children 50/50, said agreement not to be unreasonably withheld; except mother shall pay for the Japanese cultural camp, if any, as referred to and ordered in the Parenting Plan." On September 10, 2014, the defendant filed a motion seeking to hold the plaintiff in contempt for his failure to pay his share of the children's extracurricular expenses. At the hearing on the motion for contempt, the defendant submitted an itemized list of extracurricular activities, the year that the children attended each activity

and the amount that the defendant paid for each activity. The activities listed on this document were sailing for one of the parties' sons and for their daughter, and lacrosse for their daughter. The defendant testified that the plaintiff was aware that the children were participating in the activities, but had not contributed toward the cost of those activities.

On cross-examination, however, the defendant testified that the plaintiff had not agreed to pay for their son's sailing in 2014 or their daughter's sailing or lacrosse in 2013. The defendant also testified that a "dear friend of [her] fiancé" had given her the money to pay for the sailing camps as a gift. The plaintiff asked the defendant if the plaintiff had ever failed to pay for any extracurricular activity that they had mutually agreed upon and the defendant responded that he had not. The plaintiff testified that he withheld his consent for the extracurricular activities because he could not afford to pay for them.

Following the hearing, the court found the plaintiff in wilful contempt of a prior court order and ordered the plaintiff to pay $847.99 for the extracurricular activities for the minor children. In its subsequent memorandum of decision, the court stated that "[t]he plaintiff testified at the subject hearing that he agreed to the activities, and did not pay his percentage share of the expenses related thereto." The court then found, "[b]ased on the aforementioned testimony," that the plaintiff was in wilful contempt of the prior court order, that he had knowledge of the court order, that the order was unambiguous and understandable by the plaintiff, and that, based on the sum of money in his bank account and his income at the time, the plaintiff had the ability to pay.

We first consider whether the order was sufficiently clear and unambiguous so as to support a judgment of

contempt. Although the plaintiff contends that the plain language of section 4.3, which provides that "the parties shall share agreed upon extracurricular expenses for the minor children 50/50" clearly and unambiguously refers to agreed upon expenses, he argues that the order is nonetheless ambiguous because the trial court and the defendant construed it to mean that he was obligated to pay for agreed upon extracurricular activities. We disagree and conclude that the order clearly and unambiguously refers to agreed upon expenses. We further conclude, however, that the court abused its discretion in finding the plaintiff in wilful contempt of the order.

As stated previously in this opinion, the agreement provided that the parties would share "agreed upon extracurricular expenses for the minor children 50/50, said agreement not to be unreasonably withheld." On cross-examination, the defendant testified that the plaintiff had not agreed to pay for their son's sailing in 2014 or their daughter's sailing or lacrosse in 2013. She also admitted that the plaintiff never had failed to pay an agreed upon extracurricular expense.[7] In light of the defendant's own testimony, the defendant failed to prove, by clear and convincing evidence, that the plaintiff had failed to comply with a prior court order. The court, therefore, abused its discretion in finding the plaintiff in in wilful contempt for failing to pay extracurricular activities for the minor children.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

In this opinion, the other judges concurred.

[7] The transcript reveals the following:

"[The Plaintiff]: Did I ever fail to pay for any extracurricular activity that we mutually agreed upon?

"[The Defendant]: No."

DEUTSCHE BANK NATIONAL TRUST COMPANY, TRUSTEE *v.* ALVIN POLLARD ET AL.
(AC 40259)

Lavine, Bright and Bishop, Js.

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property of the defendant P, who filed an answer with special defenses and a six count counterclaim. The counterclaim contested, inter alia, the plaintiff's standing to bring the foreclosure action and alleged that the mortgage lien and underlying debt had been discharged in bankruptcy. Thereafter, the plaintiff filed a motion for summary judgment as to liability on its complaint and on the counterclaim. The trial court granted the motion for summary judgment, and P appealed to this court. In an articulation of its decision, the trial court stated that it had granted the motion for summary judgment on the ground of legal insufficiency and because the counterclaim did not relate to the making, validity or enforcement of the note or mortgage, and, therefore, failed to satisfy the transaction test. This court, thereafter, dismissed the portion of P's appeal challenging the trial court's granting of the motion for summary judgment as to liability on the complaint for lack of a final judgment. *Held* that the trial court properly rendered summary judgment in favor of the plaintiff on P's counterclaim; that court aptly applied the transaction test and did not abuse its discretion in determining that the claims asserted in the counterclaim did not have a sufficient nexus to the making, validity or enforcement of the note or mortgage to survive summary judgment, and other than a broad and conclusory claim in his appellate brief that the court construed the transaction test too narrowly, P provided this court with no argument specific to any claim in his counterclaim and failed to set forth any reasoning in support of his contention that the counterclaim fell within the parameters of the transaction test.

Argued April 18—officially released June 5, 2018

Procedural History

Action to foreclose a mortgage on certain of the named defendant's real property, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the named defendant filed a counterclaim; thereafter, the court, *Dubay, J.*, granted the plaintiff's motion for summary judgment as to liability on

the complaint and on the counterclaim and rendered judgment for the plaintiff on the counterclaim; subsequently, the court, denied the named defendant's motion to reargue, and the named defendant appealed to the court; thereafter, the court, *Dubay, J.*, issued an articulation of its decision; subsequently, this court dismissed the appeal in part. *Affirmed.*

Alvin Pollard, self-represented, the appellant (defendant).

Melanie Dykas, with whom, on the brief, was *Tara L. Trifon*, for the appellee (plaintiff).

Opinion

PER CURIAM. In this foreclosure action, the self-represented defendant Alvin Pollard[1] appeals from the trial court's rendering of summary judgment in favor of the plaintiff, Deutsche Bank National Trust Company,[2] as to liability on the complaint and rendering summary judgment in favor of the plaintiff on the defendant's counterclaim. The defendant appeals, as well, from the court's denial of his motion to reargue. We affirm the judgment of the trial court as to the defendant's counterclaim.

The following facts and procedural history are relevant to our discussion of the issues on appeal. By complaint dated August 14, 2015, the plaintiff brought this action against the defendant to foreclose a mortgage on residential property located at 6 Wild Rose Court in

[1] Wynfield Homeowners Association, Inc., New Century Mortgage Corporation, United States of America, Secretary of Department of Housing and Urban Development, State of Connecticut, Department of Revenue Services, and University of Connecticut Health Center-John Dempsey Hospital also were named as defendants but are not parties to this appeal. We therefore refer in this opinion to Pollard as the defendant.

[2] The plaintiff is acting as trustee for New Century Home Equity Loan Trust, Series 2005-D, Asset Backed Pass-Through Certificates.

Bloomfield. The loan indebtedness and related mortgage arose in conjunction with a loan to the defendant from the plaintiff's predecessor in interest, New Century Mortgage Corporation. In response, by pleading dated September 14, 2015, the defendant filed an answer, numerous special defenses and a six count counterclaim contesting, inter alia, the plaintiff's standing to bring this action and alleging that the mortgage lien and underlying debt in question had been discharged in bankruptcy. Thereafter, on April 6, 2016, the plaintiff moved for summary judgment as to liability on its complaint and the counterclaim asserted by the defendant. On January 6, 2017, the court granted the plaintiff's motion for summary judgment. Subsequently, on March 3, 2017, the court denied the defendant's motion to reargue. This appeal followed.

During the pendency of this appeal, the trial court, on prompting from this court, articulated its reasons for granting the motion for summary judgment. On April 27, 2017, the court stated that it had granted the motion for summary judgment as to liability on the plaintiff's complaint and that the eight special defenses and the six count counterclaim filed by the defendant were legally insufficient to the extent they could be comprehended. The court stated, as well, that the special defenses and counterclaim did not satisfy the transaction test requiring that they relate to the making, validity or enforcement of the note or mortgage.

Also, while this appeal was pending, this court dismissed the portion of the defendant's appeal regarding the trial court's granting of the motion for summary judgment as to liability on the complaint on the ground that the court's order in this regard is not a final judgment. See *Danbury* v. *Hovi*, 34 Conn. App. 121, 123, 640 A.2d 609 (1994) (appeal dismissed for lack of final judgment when trial court rendered summary judgment as to liability only); see also *Essex Savings Bank* v.

Frimberger, 26 Conn. App. 80, 597 A.2d 1289 (1991) (appeal dismissed for lack of final judgment from summary judgment on plaintiff's complaint when "[t]rial court has yet to determine the amount of the debt, the attorney's fees, or even whether the foreclosure shall be strict or by sale"). Accordingly, all that remains for this court to decide on review is the defendant's claim that the court incorrectly rendered summary judgment as to his counterclaim.[3]

In brief, the defendant argues that the court too narrowly construed the transaction test in determining that his counterclaim did not relate to the making, validity or enforcement of the note or mortgage.[4] As a result,

[3] We briefly comment on the defendant's argument that his discharge in bankruptcy served to release the subject property from the plaintiff's lien securing the underlying debt. The following additional information is pertinent to this claim.

The record reflects that the defendant filed a bankruptcy petition under chapter 7 of the United States Bankruptcy Code, 11 U.S.C. § 701 et seq., in the United States Bankruptcy Court for the District of Connecticut on May 5, 2016, and that he received a discharge in bankruptcy under 11 U.S.C. § 727 on August 31, 2016. He claims this occurrence served to relieve him not only of the obligation reflected in the note, but also as a result of the bankruptcy discharge, the plaintiff no longer has a lien on his property. He is incorrect. Apparently, the defendant has the mistaken belief that because he did not list the plaintiff therein as a secured creditor in his bankruptcy petition but, rather, claimed, in his filing, that the debt alleged by the plaintiff was unsecured, he is not only discharged from the underlying obligation but that the plaintiff's security interest in the subject property is no longer valid. In making this assertion, the defendant, however, highlights a misunderstanding of bankruptcy law; he also ignores the clear statement made by his assigned bankruptcy trustee in papers filed in conjunction with his bankruptcy proceedings that secured obligations are not subject to discharge in the chapter 7 filing. As part of its order of discharge, the Bankruptcy Court noted that "a creditor with a lien may enforce a claim against the debtors' property subject to that lien unless the lien was avoided or eliminated." There is no evidence of either occurrence. In short, the defendant is under an incorrect apprehension of the legal effect of his discharge in bankruptcy.

[4] "[I]n assessing the legal viability of counterclaims to a foreclosure action, the court should employ the transaction test set forth in Practice Book § 10-10, and . . . although this test may require an assessment of whether the counterclaim in question relates to the making, validity or enforcement of

the defendant asserts that the court erred in rendering summary judgment in favor of the plaintiff. "Our review of the decision to grant a motion for summary judgment is plenary." (Internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Sorrentino*, 158 Conn. App. 84, 94, 118 A.3d 607, cert. denied, 319 Conn. 951, 125 A.3d 530 (2015). "The transaction test is one of practicality, and the trial court's determination as to whether that test has been met ought not be disturbed except for an abuse of discretion." (Internal quotation marks omitted.) *Morgera* v. *Chiappardi*, 74 Conn. App. 442, 449, 813 A.2d 89 (2003).

Other than a broad and conclusory claim that the court too narrowly construed the transaction test, the defendant has provided this court with no argument specific to any count of his counterclaim; nor has he set forth any reasoning in support of the notion that his pleadings fall within the parameters of the transaction test.[5] Although we recognize and adhere to the well-founded policy to accord leeway to self-represented parties in the appeal process, our deference is not unlimited; nor is a litigant on appeal relieved of the obligation to sufficiently articulate a claim so that it is recognizable to a reviewing court. "[I]t is the established policy of the Connecticut courts to be solicitous of [self-represented] litigants and when it does not interfere

the subject note and mortgage, there can be such a nexus even though the counterclaim may not directly attack the making, validity or enforcement of the mortgage and note which form the basis of the foreclosure complaint." *CitiMortgage, Inc.* v. *Rey*, 150 Conn. App. 595, 605–606, 92 A.3d 278 (trial court incorrectly struck defendant's counterclaim because it satisfied transaction test), cert. denied, 314 Conn. 905, 99 A.3d 635 (2014).

[5] We also note that the defendant did not raise the transaction test argument in his objection to the plaintiff's motion for summary judgment. This court typically will not review arguments raised for the first time on appeal to prevent trial by ambuscade. See, e.g., *Billboards Divinity, LLC* v. *Commissioner of Transportation*, 133 Conn. App. 405, 411, 35 A.3d 395, cert. denied, 304 Conn. 916, 40 A.3d 783 (2012). We review this claim in this instance only because the court, in its decision, expressly found that the counterclaim did not meet the transaction test.

with the rights of other parties to construe the rules of practice liberally in favor of the [self-represented] party. . . . This rule of construction has limits, however. Although 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. . . . In addition, while courts should not construe pleadings narrowly and technically, courts also cannot contort pleadings in such a way so as to strain the bounds of rational comprehension." (Internal quotation marks omitted.) *Mourning* v. *Commissioner of Correction*, 120 Conn. App. 612, 624–25, 992 A.2d 1169, cert. denied, 297 Conn. 919, 996 A.2d 1192 (2010); see also *Rutka* v. *Meriden*, 145 Conn. App. 202, 218, 75 A.3d 722 (2013).

On the basis of our thorough review of each count of the defendant's counterclaim, we conclude that the court aptly applied the transaction test and did not abuse its discretion in determining that the matters asserted therein by the defendant did not have a sufficient nexus to the making, validity or enforcement of the note or mortgage to survive summary judgment. See *U.S. Bank National Assn.* v. *Sorrentino*, supra, 158 Conn. App. 97.

The judgment is affirmed as to the counterclaim.