STATE OF CONNECTICUT *v.* ANTUAN WHITE
(AC 39105)

Prescott, Elgo and Beach, Js.

Syllabus

The defendant, who previously had been convicted of, inter alia, various drug-related offenses following pleas of guilty pursuant to a plea agreement, appealed to this court from the trial court's denial of his motion to correct an illegal sentence. Under the plea agreement, the defendant was to be sentenced to a certain term of incarceration followed by a period of conditional discharge, provided that he appeared for sentencing on a certain date. The defendant failed to appear at the scheduled sentencing and, following his rearrest, ultimately received a sentence for a longer term of incarceration and special parole on the charges to which he previously had pleaded guilty. Thereafter, the defendant, as a self-represented party, filed a motion to correct an illegal sentence and also requested the appointment of counsel. L was appointed to represent the defendant for the purpose of determining, pursuant to *State* v. *Casiano* (282 Conn. 614), whether there was a sound basis for the appointment of counsel to prosecute the merits of the defendant's motion to correct an illegal sentence. After a hearing

thereon, L stated his opinion that there was no sound basis for the defendant's claims, and the trial court agreed, finding that there was no sound basis for L's continued representation. In a subsequent hearing, the defendant, as a self-represented party, argued the merits of his motion to correct before the same trial judge, who denied that motion. On the defendant's appeal to this court, *held*:

1. The defendant could not prevail on his claim that that the trial court erred by not appointing counsel to represent him on the merits of his motion to correct an illegal sentence, which was based on his claim that reversal was required because L was acting as a neutral agent of the court rather than as his advocate in performing the review pursuant to *Casiano*:

   a. Although the precise, narrow issue of whether counsel was performing sufficiently as an advocate was neither presented to nor decided by the trial court, the broader question of whether counsel should continue to represent the defendant was squarely before that court, and, therefore, the defendant's claim was reviewable; there was a sufficient record on which to review the claim, and this court recognized the practical difficulty in requiring the precise claim to be expressly preserved while L was representing the defendant, which would have required L to have asserted that he was assuming an improper role and to have criticized his own conduct during the hearing.

   b. L fulfilled his professional obligation to the defendant and acted as an advocate for him within the dictates of *Casiano*, pursuant to which the defendant had a limited statutory right to representation by counsel in the context of a motion to correct an illegal sentence for the purpose of determining whether he had a sound basis for filing a motion to correct and, if such basis existed, for the purpose of preparing and filing such a motion; L presented a detailed and informed analysis of the issues that possibly could be pursued by a motion to correct, he raised and evaluated the issue that formed the basis of the defendant's written motion to correct, which claimed that his guilty pleas had been vacated by his failure to appear for sentencing, and L orally raised three additional potential claims, which he determined also did not constitute illegality in the defendant's sentencing.

2. The trial court properly determined that a sound basis did not exist for the claims raised in the defendant's motion to correct an illegal sentence and properly declined to appoint counsel to argue the merits of that motion; although the defendant claimed that L neglected to inform the trial court that the sentencing court had relied on an inaccurate date concerning a certain letter that the defendant allegedly had sent from prison prior to sentencing, the record demonstrated that both L and the trial court clearly had read the entire sentencing transcript, and the sentencing court, which stated that the defendant had engaged in criminal behavior while on probation, that he had multiple convictions and that he was a danger to society, said nothing about the date or timing

of the letter as a factor in determining the sentence, nor was there evidence in the record that L misstated the facts, or that the trial court here relied on any fundamentally inaccurate information in determining that there was no sound basis for the appointment of counsel.

3. The defendant's unpreserved claim that the trial court erred by not recusing itself from hearing the merits of his motion to correct because it functionally had predetermined the merits when it found no sound basis for continuing representation by counsel was unavailing; the defendant failed to prove actual bias, which was necessary to prove the existence of a constitutional violation under *State* v. *Golding* (213 Conn. 233), there was no plain error requiring reversal, as the trial judge was not prohibited from deciding related issues in the same case, and the integrity of the proceedings or the perceived fairness of the judicial system objectively had not been threatened so as to warrant the invocation of this court's supervisory authority.

Argued December 6, 2017—officially released June 19, 2018

Procedural History

Information, in the first case, charging the defendant with violation of probation, and information, in the second case, charging the defendant with two counts of the crime of possession of narcotics with intent to sell, and information, in the third case, charging the defendant with the crime of possession of narcotics with intent to sell, and informations, in the fourth and fifth cases, charging the defendant with the crime of interfering with an officer, brought to the Superior Court in the judicial district of New Haven, geographical area number twenty-three, where the defendant was presented to the court *Alexander*, *J.*, on an admission of violation of probation and on pleas of guilty; judgments revoking the defendant's probation and of guilty in accordance with the pleas; subsequently, the court, *Clifford*, *J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed.*

Temmy A. Miller, assigned counsel, with whom were *Catherine Spain*, assigned counsel, and, on the brief, *Owen R. Firestone*, assigned counsel, for the appellant (defendant).

Margaret Gaffney Radionovas, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, *John P. Doyle, Jr.*, senior assistant state's attorney, and *Karen A. Roberg*, assistant state's attorney, for the appellee (state).

Opinion

BEACH, J. This case turns on the issue of the appropriate role of assigned counsel in the context of a motion to correct an illegal sentence following *State* v. *Casiano*, 282 Conn. 614, 922 A.2d 1065 (2007). The defendant, Antuan White, appeals from the judgment of the trial court denying his motion to correct an illegal sentence. The defendant claims that the trial court erred by (1) declining to appoint counsel to represent him on the merits; (2) denying his motion on the merits; and (3) deciding the merits of the motion to correct, despite having previously considered the merits of the issues during the hearing regarding the appointment of counsel. We disagree and affirm the judgments of the trial court.

The following undisputed facts and procedural history are relevant to our resolution of the defendant's claims. They arise primarily from four separate proceedings: a plea hearing on November 22, 2005, arising out of five separate criminal dockets; a sentencing proceeding on December 13, 2006; a hearing on November 25, 2015, to determine whether counsel would be appointed to represent the defendant; and a hearing on the merits of the motion to correct, held on January 4, 2016.

On November 22, 2005, the defendant appeared before the trial court, *Alexander, J.*, and pleaded guilty to, inter alia, three counts of possession of narcotics with intent to sell in violation of General Statutes (Rev. to 2005) § 21a-277 (a). The defendant also admitted violating his probation in violation of General Statutes § 53a-32. The plea agreement was entered into pursuant

to *State* v. *Garvin*, 242 Conn. 296, 699 A.2d 921 (1997).[1] An agreed upon sentence was stated on the record: the defendant was to be sentenced to twelve years of incarceration, suspended after seven years, and a three year period of conditional discharge. The defendant also agreed to the express condition that he appear for sentencing on January 13, 2006. The court advised the defendant that the guilty pleas were "permanent" and that the plea agreement was "off" if he didn't appear on January 13, and that his failure to appear would expose him to a sentence of up to fifty-three years. The defendant affirmed his understanding. The court found the defendant's pleas "to be voluntarily, knowingly made. There was a factual basis [for the pleas]. [The defendant] had the assistance of competent counsel. [His] pleas are accepted and a finding of guilty, finding of violation of probation is made." The court continued the matter to January 13, 2006, for sentencing.

The defendant, however, did not appear for sentencing on January 13, 2006. He was rearrested approximately seven months later. On December 13, 2006, the defendant appeared for sentencing before Judge Alexander on the charges to which he had pleaded guilty on November 22, 2005.

During the sentencing hearing, the state discussed a letter that the Department of Correction had intercepted. It was allegedly written by the defendant prior to sentencing. The letter directed its recipient to a location where drugs and money could be found. The prosecutor stated that the letter was written on approximately October 31, 2006, several days after the defendant's arraignment on his rearrest.

[1] "A *Garvin* agreement is a conditional plea agreement that has two possible binding outcomes, one that results from the defendant's compliance with the conditions of the plea agreement and one that is triggered by his violation of a condition of the agreement." (Internal quotation marks omitted.) *State* v. *Yates*, 169 Conn. App. 383, 387 n.1, 150 A.3d 1154 (2016), cert. denied, 324 Conn. 920, 157 A.3d 85 (2017).

At the sentencing, the court considered the defendant's "significant and serious criminal history," which led the court to conclude that the defendant was "not amenable . . . to any form of rehabilitation." The court then stated: "I understand the *Garvin* rule. I understand the nature of it. I am trying to adhere to what I believe the guidelines are in there. I know it would give the court the authority to impose a full maximum of fifty-three years. . . . [T]hat would be excessive. I recognize that. But I do recognize that this is an egregious case given the number of times [the defendant] has been convicted of the sale of narcotics, and his prior criminal history, and the circumstances that surrounded his being taken into custody for three failures to appear. *As well as what is alleged to be continuing criminal conduct that* [*the Department of*] *Correction believed worthy to bring to the attention of the state police in his attempts to reach out into the community to continue his pattern of narcotics association.*" (Emphasis added.) The court then sentenced the defendant to a total effective sentence of fifteen years of incarceration, to be followed by five years of special parole.

On July 21, 2014, the defendant, representing himself, filed a motion to correct an illegal sentence. He claimed that his sentence was unlawful because he had not been afforded the opportunity to withdraw his pleas after his failure to appear on January 13, 2006. The defendant also asked for the appointment of counsel pursuant to *Casiano*. Joseph Lopez, an attorney in the public defender's office, was appointed, on July 25, 2014, to represent the defendant for the purpose of the review mandated by *Casiano*.

On November 25, 2015, a hearing was held before the trial court, *Clifford, J.*, to determine whether a sound basis existed for the appointment of counsel to

prosecute the merits of the defendant's motion to correct an illegal sentence. The court stated its understanding of the history of the case and invited Lopez to comment as to whether the defendant should be afforded a lawyer to represent him on his motion. Lopez said: "Under the *Casiano* case, when a public defender is appointed for the limited appearance, it is our rule to take a look at these, independently look at the claims to see if there is any sound basis. *It's the one and only time that I'm aware of where I am not an advocate for my client, but really have to do an independent review first.* So it is an unusual situation. I just want my client to understand . . . that that's what the court requires me to do." (Emphasis added.)

Lopez then addressed the ground raised in the defendant's self-represented written motion to correct. He said that he did not think that the court had jurisdiction over the defendant's claim that his guilty pleas had been voided in their entirety by the defendant's failure to appear at the scheduled sentencing proceeding. The court surmised that perhaps the defendant misunderstood the import of Judge Alexander's telling the defendant during the plea hearing that if he did not appear for sentencing on January 13, "then your plea agreement is off"; the defendant may have interpreted the court's statement to mean that, if he did not appear for sentencing, he would "start again" because the prior agreement was "off." Lopez stated his opinion that this issue did not meet the jurisdictional requirements of a motion to correct an illegal sentence.

Lopez then addressed possible claims that had not been raised in the defendant's written motion to correct. Although the record is not clear as to who formulated these claims, it is clear that they were developed prior to the hearing either through consultation between Lopez and the defendant or by Lopez himself. In any event, Lopez discussed a possible claim that Judge Alexander

had relied on inaccurate information in the course of the sentencing hearing, to wit, that the state had misrepresented the date of the intercepted letter. Lopez opined that the court had jurisdiction over this claim, but that the record did not show that Judge Alexander had relied on the incorrect information in sentencing the defendant. Lopez accordingly expressed his opinion that there was not a sound basis for this claim.

Lopez also stated his opinion that the court did not have jurisdiction to consider a claim that Judge Alexander improperly became aware, prior to sentencing, of an offer of ten years of incarceration, which offer had been mentioned in the intercepted letter, and that she was, therefore, prohibited from sentencing the defendant because she had become aware of extraneous information. Finally, Lopez also stated his opinion that the court did not have jurisdiction to consider the defendant's claim that Judge Alexander properly could rely only on the defendant's failure to appear in increasing his sentence. Lopez concluded: "My opinion, which doesn't matter, is that [the defendant] got a heavy sentence, but my job here under . . . *Casiano*, that's none of my—I have no standing. It's not up to me to decide sentences. It's up to me to look [if] there [is] any illegality in the sentencing and I don't see it and I tried looking for something."

The court then ruled only on the issue of appointment of counsel: "I'm ruling on the *Casiano* claims right now. I'm not ruling on the motion substantively." It restated the opinions of Lopez regarding the soundness of the defendant's claims and stated that, having independently examined the claims, it agreed that the claims lacked a sound basis. The court stated: "So even under *State* v. *Francis*, [148 Conn. App. 565, 86 A.3d 1059 (2014) (*Francis I*), rev'd, 322 Conn. 247, 140 A.3d 927 (2016)], I certainly think counsel has explained [his] reasons to you why [he] feel[s] [he] should not be filing

a full appearance . . . after [he] diligently reviewed all of the relevant parts of the record and case law, and I agree with [him] under my understanding and research of the case law also." The court ruled that there was not a sound basis for continued representation and told the defendant that he could argue the merits of the motion himself or retain private counsel.

The defendant attempted to augment his arguments, and the court and the defendant engaged in a brief colloquy in which the court said that it disagreed with the defendant's claims. Lopez volunteered that if the defendant thought of new claims, he should include them in another motion, and a public defender would be appointed to review those claims to determine whether there was a sound basis for them. The matter was continued to January 4, 2016, to allow the defendant time to review relevant transcripts and to prepare for his argument on the merits.

On January 4, 2016, the defendant argued the merits of his motion to correct, again before Judge Clifford. The defendant did not move for Judge Clifford to recuse himself from deciding the merits of the defendant's claims. The court summarized the November 25, 2015 proceeding, reiterating the defendant's arguments as posed at that time by Lopez. The defendant then presented the court with a letter he had written in which he set forth his arguments. He argued in the letter that Judge Alexander had relied on inaccurate information in the sentencing proceeding. He stressed that the letter that he had sent in October, 2006, was dated October 25 rather than October 31. The defendant noted that October 25 predated his arraignment on October 27, 2006, and, therefore, should not have been used as a basis to enhance his sentence; he suggested that Judge Alexander had considered that the defendant continued to engage in criminal conduct, even after his arraignment. The court also reviewed a second letter presented

by the defendant, which argued that, in its application of *Garvin*, the sentencing court should not have considered a police report of an unrelated arrest because there was nothing in the record to indicate that the report had minimal indicia of reliability.[2]

Referring to the topic of the intercepted letter, the defendant argued orally that the date of the intercepted letter made a difference because the sentencing court imputed "egregious misconduct" to him after his arraignment, although the intercepted letter actually had been written prior to arraignment.[3] The court, however, noted that the sentencing court had set forth many reasons for the defendant's sentence, and that the sentencing court had mentioned the letter only briefly. The court concluded that it had jurisdiction over this claim but denied the claim on the merits.

The defendant also argued orally that the sentencing court improperly considered a police report describing the defendant's arrest in August, 2006, because the report had no indicia of reliability. Assuming that it had jurisdiction over this claim, the court stated that the record showed that Judge Alexander did not find that the defendant had violated the *Garvin* agreement by committing another crime. Rather, the court concluded that the defendant had violated the *Garvin* agreement by not appearing at his sentencing hearing in January, 2006. The court explained that his failure to appear exposed the defendant to fifty-three years of incarceration. The defendant argued that the sentencing court could not properly have found a *Garvin* violation without holding an evidentiary hearing, but the court observed that the sentencing court properly found a *Garvin* violation simply by virtue of the defendant's

[2] Both letters apparently served the purpose of trial memoranda.

[3] The underlying premise seems to be that a letter urging further criminal conduct would display contempt for the judicial authority if written after, but not before, arraignment.

failure to appear at the sentencing hearing. The defendant stated that his failure to appear had not been within his control, because he had been addicted to drugs. The court rejected this argument. The court then concluded that it had jurisdiction over the defendant's *Garvin* claim, but denied the defendant's motion to correct, concluding that Judge Alexander had applied *Garvin* properly. This appeal followed.

I

The defendant first claims that the trial court erred by not appointing counsel to represent him on the merits of his motion to correct an illegal sentence. Specifically, he claims that reversal is required because the public defender was acting as a neutral agent of the court rather than as his advocate in performing the *Casiano* review. We disagree.

A defendant does not have a constitutional right to representation by counsel in the context of a motion to correct an illegal sentence, but does have a limited statutory right to counsel. See *State* v. *Francis*, 322 Conn. 247, 262–63, 140 A.3d 927 (2016) (*Francis II*); see also *State* v. *Casiano*, supra, 282 Conn. 620. Section 51-296 (a) of the General Statutes provides in part: "In any criminal action . . . the court before which the matter is pending shall, if it determines after investigation by the public defender or his office that a defendant is indigent as defined under this chapter, designate a public defender, assistant public defender or deputy assistant public defender to represent such indigent defendant . . . ." In *State* v. *Casiano*, supra, 282 Conn. 624, our Supreme Court held that the phrase "any criminal action" in § 51-296 (a) encompassed a motion to correct an illegal sentence. The court held, however, that "a motion to correct an illegal sentence will not be appropriate in every case, and, therefore, we do not believe that the legislature intended for appointed

counsel to be required to file such a motion even if it is frivolous or improper. . . . [A] defendant has a right to the appointment of counsel for the purpose of determining whether a defendant who wishes to file such a motion has a sound basis for doing so. If appointed counsel determines that such a basis exists, the defendant also has the right to the assistance of such counsel for the purpose of preparing and filing such a motion and, thereafter, for the purpose of any direct appeal from the denial of that motion." Id., 627–28.

In *Francis I*, this court held that the procedures outlined in *Anders* v. *California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), were required to be followed in determining whether counsel would be permitted to withdraw after conducting a preliminary review. *Francis I*, supra, 148 Conn. App. 588–90. Our Supreme Court reversed that determination in *Francis II*, which was decided after the defendant's *Casiano* hearing in this case. *Francis II*, supra, 322 Conn. 251. That court held "that the *Anders* procedure is not strictly required to safeguard the defendant's statutory right to counsel in the context of a motion to correct an illegal sentence." Id. The court then clarified its holding in *Casiano*, stating: "[W]hen an indigent defendant requests that counsel be appointed to represent him in connection with the filing of a motion to correct an illegal sentence, the trial court must grant that request for the purpose of determining whether a sound basis exists for the motion. . . . If, after consulting with the defendant and examining the record and relevant law, counsel determines that no sound basis exists for the defendant to file such a motion, he or she must inform the court and the defendant of the reasons for that conclusion, which can be done either in writing or orally. If the court is persuaded by counsel's reasoning, it should permit counsel to withdraw and advise the

defendant of the option of proceeding as a self-represented party." (Citation omitted; footnote omitted.) Id. 267–68.

Initially, the state argues that the defendant's claim regarding the appointment of counsel should not be reviewed because it was not raised in the trial court. The state notes that the defendant did not claim during either the *Casiano* hearing or the hearing on the merits that Lopez failed properly to act as an advocate for the defendant. The defendant argues, however, that the claim is viable for several reasons: it is a subset of the broader claim that there was a sound basis for continuing the representation by counsel, and, in any event, it is reversible pursuant to the plain error doctrine and the court's supervisory authority.

In the unique circumstances of this case, we exercise our discretion to review the claim for the following reasons. We have a sufficient record on which to consider the claim. Although the precise, narrow issue of whether counsel was performing sufficiently as an advocate was neither presented to nor decided by the trial court, the broader question of whether counsel should continue to represent the defendant was squarely before the court. See, e.g., *State* v. *Daniel W. E.*, 322 Conn. 593, 609–10 n.8, 142 A.3d 265 (2016); *Rowe* v. *Superior Court*, 289 Conn. 649, 661–63, 960 A.2d 256 (2008). Moreover, at the time, the defendant was represented by Lopez. In order for Lopez to preserve the claim, he would have had to assert that he was assuming an improper role. In this somewhat awkward circumstance, we recognize the practical difficulty in requiring that the precise claim be expressly preserved because counsel, in order to assert the claim, would in effect have to criticize his own conduct.

The defendant argues that Lopez' statement that he was not acting as an advocate for the defendant was

fatal to the integrity of the proceeding. He claims that the requirement in *Francis I* that counsel act as "an active and conscientious advocate" in conducting a "first tier" review required Lopez to function as the defendant's counselor and legal representative rather than as a neutral officer of the court. He contrasts this duty with the language used by Lopez in introducing his remarks; Lopez said that, in this instance, he was performing an independent review and not acting as an advocate. The defendant also notes, correctly, that *Francis II* did not overrule the requirement of *Francis I* that appointed counsel represent the client.

The flaw in the defendant's position is that the record reveals that, despite the label he employed, Lopez actually acted as an advocate for the defendant within the dictates of *Casiano* and *Francis II*. Lopez was appointed to represent the defendant on July 25, 2014. At the hearing on November 25, 2015, at which he said that he was not advocating for his client, he presented a detailed and informed analysis of the issues that possibly could be pursued by a motion to correct. Not only did he raise and evaluate the issue that formed the basis of the defendant's written motion to correct, which claimed that the guilty pleas had been vacated by his failure to appear for sentencing, but he also orally raised the three additional claims. We infer from the record that Lopez conferred with his client regarding these claims; he clearly conferred with the defendant during the hearing. Throughout the proceeding, Lopez also referred to specific pages of transcripts of prior proceedings. Lopez stated that "my job here under *Casiano* [is] to look [at whether there was] any illegality in the sentencing and I don't see it and *I tried looking for something*." (Emphasis added.)

It is instructive to compare what Lopez actually did with the standards set forth in *Francis II*, in which our Supreme Court concluded that "when an indigent

defendant requests that counsel be appointed to represent him in connection with the filing of a motion to correct an illegal sentence, the trial court must grant that request for the purpose of determining whether a sound basis exists for the motion. . . . *If, after consulting with the defendant and examining the record and relevant law*, counsel determines that no sound basis exists for the defendant to file such a motion, he or she must inform the court and the defendant of the reasons for that conclusion . . . . If the court is persuaded by counsel's reasoning, it should permit counsel to withdraw and advise the defendant of the option of proceeding as a self-represented party." (Citation omitted; emphasis added; footnote omitted.) *Francis II*, supra, 322 Conn. 267–68.

Lopez quite plainly performed his duties as required, professionally and with candor to the court. Lopez' apology to his client—for not advocating his client's ultimate position that counsel should not be permitted to withdraw—is understandable in light of the somewhat dichotomous role of counsel who are appointed pursuant to *Casiano*. Perhaps the role can best be described by requiring traditional standards of advocacy in the preparatory stage, including thorough legal and factual review of the record with an eye to developing a plausible favorable position, but also requiring objective candor in presenting the client's best claims to the court and his client. A client may well not be pleased by his attorney's presentation of a negative appraisal, but this tension results from the dual nature of the role required by *Casiano* and *Francis II*. On the record before us, we hold that counsel fulfilled his professional obligation as set forth by our Supreme Court in *Francis II*. Accordingly, the defendant's claim that the trial court erred by failing to appoint counsel to argue his motion to correct fails.

II

We next briefly consider the defendant's arguments that the trial court improperly determined that a sound basis did not exist for the defendant's claims so that counsel should be appointed. The defendant argues that Lopez neglected to bring to Judge Clifford's attention a reference in the sentencing transcript to the inaccurate date ascribed to the intercepted letter, and that both Lopez and Judge Clifford therefore relied on inaccurate information in failing to find a sound basis for continued representation by counsel. Both Lopez and Judge Clifford, however, quite clearly read the entire sentencing transcript. As to the possibility of reliance on inaccurate information, the sentencing court, in its recitation of reasons for imposing its sentence, stated that the defendant had engaged in criminal behavior while on probation, that he had multiple convictions, and that he was a danger to society. The sentencing court said he had no respect for the court system. The sentencing court added a reference to the "alleged . . . continuing criminal conduct that [the Department of] Correction believed worthy to bring to the attention of the state police in his attempts to reach out into the community to continue in his pattern of narcotics association.§ The sentencing court said nothing about the date or timing of the letter in which the defendant urged further criminal activity.

In the "sound basis" hearing before Judge Clifford, Lopez summarized the comments of the sentencing court and, as to this issue, concluded by saying, "I don't think that we have any basis to claim that Judge Alexander *may have* [*homed*] *in on an inaccurate date and used that in fashioning her sentence.*" (Emphasis added.) Agreeing with Lopez in principle, Judge Clifford, perhaps somewhat mistakenly, said that when Judge Alexander stated the factors she considered in sentencing, she did not mention the letter. It is, of

course, true that she did not mention the *date* of the intercepted letter. Although perhaps there was some lack of precision, it is clear that nothing in the record indicates that the sentencing court relied on the *date* of the letter, that Lopez misstated the facts, or that Judge Clifford relied on any fundamentally inaccurate information.[4]

Additionally, the defendant briefly claims that Judge Clifford merely "rubber-stamped" Lopez' opinions and did not reach his own conclusions. This argument is contradicted by the hearing transcript, which shows that Judge Clifford addressed each of the defendant's claims in turn and stated his reasoning for finding no sound basis. As noted previously, Judge Clifford was not required to conduct a full evidentiary review at that time; rather, at that point the court was to decide only whether it was persuaded by Lopez' reasoning after independent review. *Francis II*, supra, 322 Conn. 268.[5] After considering Lopez' presentation and after its independent review, the court concluded that there was not a sound basis.

We conclude that the court did not err in its decision regarding the appointment of counsel.

III

The defendant claims that the court erred by not recusing itself from hearing the merits because it functionally had predetermined the merits when it found

[4] Additionally, we fail to see how any discrepancy of four days in the date the letter was written could possibly have affected the sentence, regardless of whether the letter was written before or after the arraignment.

[5] The defendant also argues in his brief that both Lopez and the trial court applied an erroneous standard, claiming that the standard should be whether the claim is "nonfrivolous." This claim was not preserved, is not of constitutional dimension and does not result in any manifest injustice. The relevant case law uses the term "sound basis," and all participants in the trial court referred to "sound basis." We decline to review the unpreserved claim.

no sound basis for continuing representation by counsel. We disagree.

The issue was not raised, and thus not preserved, in the trial court. The defendant does not argue that it was preserved, but rather asks us to reverse under *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989), the plain error doctrine, or this court's supervisory authority.

We conclude that this claim does not merit reversal under *Golding*.[6] In order to prove a *constitutional* violation, a litigant must prove *actual* bias. *State* v. *Canales*, 281 Conn. 572, 593–95, 916 A.2d 767 (2007). The record reveals no hint of actual bias or, objectively, the appearance of bias, and none is suggested by the defendant. The defendant's claim fails the third prong of *Golding* because the claimed constitutional violation does not exist.

There is no plain error[7] requiring reversal because "opinions that judges may form as a result of what they learn in earlier proceedings in the same case 'rarely' constitute the type of bias, or appearance of bias, that requires recusal." *State* v. *Rizzo*, 303 Conn. 71, 121, 31 A.3d 1094 (2011), cert. denied, 568 U.S. 836, 133 S. Ct. 133, 184 L. Ed. 2d 64 (2012). A judge is not prohibited

[6] "[A] defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis omitted; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40, as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).

[7] "[An appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest injustice." (Emphasis omitted; internal quotation marks omitted.) *State* v. *McClain*, 324 Conn. 802, 812, 155 A.3d 209 (2017).

from deciding related issues in the same case. See id., 119–21. Additionally, we decline to exercise our supervisory authority; the integrity of the proceedings or the perceived fairness of the judicial system objectively has not been threatened. See *State* v. *Elson*, 311 Conn. 726, 764–65, 91 A.3d 862 (2014).

The judgments are affirmed.

In this opinion the other judges concurred.

CHRISTOPHER HOUK NICHOLS ET AL. *v.* TOWN OF OXFORD (AC 39366)

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

Syllabus

The plaintiffs brought this action, pursuant to statute (§ 13a-103), seeking an order directing the trial court to order the defendant town of Oxford to repair and maintain unimproved sections of a certain highway. The trial court denied the relief sought, and the plaintiffs appealed to this court, claiming that the court erred in finding that certain sections of the road did not comprise part of a highway and that, even if those sections of the road once comprised part of a highway, they since had been abandoned. *Held* that the trial court's finding that the sections of the highway at issue had been abandoned was not clearly erroneous: abandonment of a highway may be inferred from circumstances or presumed from long continued neglect, and there was sufficient evidence in the record demonstrating that the disputed sections were not part of a highway, as the court found that by the time the action was commenced, at least twenty-five years had passed since the unorganized public last used the challenged sections of the road as a highway, and for as long, the town refused to acknowledge those sections as part of the road, did not develop or maintain them, and had no plans to develop or maintain them in the future, all of which suggested an intent to abandon; moreover, this court deferred to the credibility determinations and weighing of the facts by the trial court, which weighed all the evidence and testimony carefully, and personally had visited the road and drove and walked its entire length.

Argued February 22—officially released June 19, 2018

Procedural History

Action for an order directing the named defendant to repair and maintain unimproved sections of a certain highway, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *Tyma*, *J.*, granted the plaintiffs' motion to implead James H. Brewster et al. as defendants; thereafter, the court, *Stevens*, *J.*, granted the plaintiffs' motion to bifurcate hearing; subsequently, the case was withdrawn in part; thereafter, the court, *Stevens*, *J.*, granted the defendant John J. Lucas' motion to be cited in as a party defendant; subsequently, the matter was tried to the court, *Stevens*, *J.*; judgment in favor of the defendants, from which the plaintiffs appealed to this court; thereafter, the court, *Stevens*, *J.*, granted in part the plaintiffs' motion for articulation. *Affirmed.*

Robert J. Nichols for the appellants (plaintiffs).

Michael S. Hillis, with whom was *Kevin Condon*, for the appellee (defendant Town of Oxford).

Opinion

DiPENTIMA, C. J. The plaintiffs[1] petitioned the trial court, pursuant to General Statutes § 13a-103,[2] for an

[1] The six plaintiffs in this action, Christopher Houk Nichols, Frank Samuelson, Robert Samuelson, Larissa Nichols, Richard Barlow and Judy Barlow, all own or reside on properties that are located on or near Old Good Hill Road in Oxford.

[2] General Statutes § 13a-103 provides, in relevant part: "Whenever any town fails to keep any highway within such town in good and sufficient repair or whenever the selectmen of any town fail . . . to make such alterations or improvements therein as may be required by common convenience or necessity, the superior court for the judicial district in which such highway is located, upon the written complaint of six or more citizens of this state under oath, after due inquiry made by it, shall appoint a time and place when and where all persons interested may appear and be heard upon the propriety of such repairs . . . or of the making of such alterations and improvements. . . . If the court finds that such highway should be repaired . . . or that such alterations and improvements should be made, it shall order the selectmen of such town to cause such highway to be repaired . . . and such alterations and improvements to be made, and shall prescribe the manner and extent of such repairs and of the removal of such encroach-

order directing one of the defendants, the town of Oxford (town),[3] to repair and maintain unimproved sections of a highway,[4] Old Good Hill Road (road), located in the town. The trial court denied the relief sought. The plaintiffs appealed, claiming that the court erred in finding that (1) sections two, three and four of the road did not comprise part of a highway, and (2) even if those sections of the road had once comprised part of a highway, they since have been abandoned. We conclude that the court properly found that sections two, three and four of the road have been abandoned, and, accordingly, affirm the judgment of the trial court.[5]

In its thorough and thoughtful memorandum of decision, the trial court found the following facts. "[The

ments and of the making of such alterations and improvements and the time within which the work shall be done, and may, for reasonable cause, extend such time."

[3] In addition to the town, the defendants were John Lucas, James H. Brewster, Robert H. Brewster, Kristine Fierrro, Diane Talbot, Laura Farkas, Linda Czaplinski, Robert Danieliki, Elena Saad, and Lenore Nolan, each of whom own property on the road and were made parties pursuant to the provisions of § 13a-103 because their interests may have been affected by the outcome of the action. Only John Lucas participated in the trial. We refer to the town and Lucas together as the defendants.

[4] The term "highway" refers to "[a] main road or thoroughfare; hence, a road or way open to the use of the public. . . . A highway is a public way open and free to any one who has occasion to pass along it on foot or with any kind of vehicle. . . . The essential feature of a highway is that it is a way over which the public at large has the right to pass. . . . Accordingly, the term highway is ordinarily used in contradistinction to a private way, over which only a limited number of persons have the right to pass. . . . The expression private highway is a misnomer and public highway is tautology." (Citations omitted; internal quotation marks omitted.) *Stavola* v. *Palmer*, 136 Conn. 670, 683–84, 73 A.2d 831 (1950). See also General Statues § 13a-1 (a) (2) ("'[h]ighway' includes streets and roads").

[5] As a result, we do not address the plaintiffs' claim that the court should have found that sections two, three and four of the road comprised part of the highway; to the extent that the challenged sections of the road had been dedicated and accepted, they since have been abandoned. This opinion, however, should not be read to suggest that the court's findings that the plaintiffs failed to prove both dedication and acceptance were erroneous.

road] is a long, winding road in Oxford . . . intersecting Good Hill Road to the north and Freeman Road to the south. [The road] can be described as consisting of four sections. Section one intersects with Good Hill Road. Section one is paved and is maintained by the town. Section one is not specifically at issue in this case because there is no dispute that it is accepted and maintained by the town. The next part of the road, section two, is an unpaved, unimproved dirt road. Nichols' property is located near the end of section two. Section two is passable either by foot or a four-wheel drive vehicle. Section two is not maintained by the town. Section three starts just beyond Nichols' home, and extends down a long, steep hill. While there are some pathways, there is no clearly visible, vehicular roadway in this area. Section three is part of a mountainous area and is steep, rutted and rugged. It is passable only by foot. Section three is not maintained by the town. Section three ends at a paved area near the bottom of the hill. This paved area is part of the driveway of 110 Freeman Road. This property is owned by [the] defendant Lucas. This paved area ends on Freeman Road. During the trial, this paved, driveway area was referred to as section four of [the road]. Sections two and three are referred to as the unimproved sections of the road. With the parties' consent and participation, the court inspected the full length of [the road] on November 9, 2015, driving over sections one and two, and walking over sections three and four.

"The primary areas at issue in this case are sections two and three. The town does not maintain these areas and the plaintiffs contend that the town is required to do so. Section four, Lucas' driveway, is implicated in this dispute because the plaintiffs' claims regarding sections two and three are premised on their argument that [the road] in its *entirety* has been historically dedicated and accepted as a [highway]. . . .

"In 2011, Nichols purchased 108 Old Good Hill Road, consisting of two adjoining parcels. A single family home is on one parcel, and the other parcel is unimproved land. As with other property owners, [the road] is the only way to access his home. His house is the only building on section two of the road. After purchasing the property, Nichols brought in an excavator to smooth the road and to lay processed stone for a base, but he received a cease and desist order from the then town's zoning enforcement official . . . . This order indicated that his excavation work was without permits and in violation of town zoning regulations. Additionally, the order stated that 'consent from the Board of Selectmen of [the town] is required to perform any activity and improvements on town property.' . . . Nichols indicated that town improvements of [the road] would make access to his property more convenient." (Citation omitted; emphasis in original.)

In accordance with § 13a-103, the plaintiffs brought the underlying action on November 20, 2012. On March 2, 2015, the court granted the plaintiffs' motion to bifurcate so that the only issue at trial was whether sections two, three and four of the road comprised part of a highway. By way of special defense, the defendants pleaded, inter alia, that the road had been abandoned.[6] The matter was tried to the court in September and October, 2015. The parties filed posttrial briefs in February and March, 2016, and the court heard final argument on June 14, 2016. On June 21, 2016, the court rendered judgment in favor of the defendants, finding that (1) the challenged sections of the road had not become a highway under the common law doctrine of dedication

[6] Accordingly, the defendants bore the burden of proving abandonment. See *Montanaro* v. *Aspetuck Land Trust, Inc.*, 137 Conn App. 1, 21, 48 A.3d 107, cert. denied, 307 Conn. 932, 56 A.3d 715 (2012) ("[t]he burden of proof is on him who seeks to establish the abandonment of a highway, and the continuance of the street will be presumed until satisfactory evidence is produced to rebut it" [internal quotation marks omitted]).

and acceptance[7] and (2) in the alternative, the defendants had proved by a fair preponderance of the evidence that sections two, three and four of the road had been abandoned. The plaintiffs appealed. Additional facts will be set forth as necessary.

We turn now to the plaintiffs' claim that the court erred in concluding that the defendants had proved by a preponderance of the evidence that the challenged sections of the road had been abandoned. We conclude that the court did not err.

We begin with the applicable legal principles. "The questions of whether there have been dedication, acceptance and abandonment generally are recognized as questions of fact. . . . Our review of the factual findings of the trial court is limited to a determination of whether they are clearly erroneous." (Citations omitted; internal quotation marks omitted.) *Montanaro* v. *Aspetuck Land Trust, Inc.*, 137 Conn App. 1, 8, 48 A.3d 107, cert. denied, 307 Conn. 932, 56 A.3d 715 (2012). "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. . . . Because it is the trial court's function to weigh

[7] "From early times, under the common law, highways have been established in this state by dedication and acceptance by the public. . . . Dedication is an appropriation of land to some public use, made by the owner of the fee, and accepted for such use by and in behalf of the public. . . . Both the owner's intention to dedicate the way to public use and acceptance by the public must exist, but the intention to dedicate the way to public use may be implied from the acts and conduct of the owner, and public acceptance may be shown by proof of the actual use of the way by the public. . . . Thus, two elements are essential to a valid dedication: (1) a manifested intent by the owner to dedicate the land involved for the use of the public; and (2) an acceptance by the proper authorities or by the general public." (Citation omitted; internal quotation marks omitted.) *Drabik* v. *East Lyme*, 234 Conn. 390, 394, 662 A.2d 118 (1995).

the evidence and determine credibility, we give great deference to its findings." (Internal quotation marks omitted.) *Drabik* v. *East Lyme*, 234 Conn. 390, 394–95, 662 A.2d 118 (1995).

"We also must determine whether those facts correctly found are, as a matter of law, sufficient to support the judgment." (Internal quotation marks omitted.) *Benjamin* v. *Norwalk*, 170 Conn. App. 1, 25, 153 A.3d 669 (2016). "[This court] cannot retry the facts or pass upon the credibility of the witnesses." (Internal quotation marks omitted.) *Pandolphe's Auto Parts, Inc.* v. *Manchester*, 181 Conn. 217, 220, 435 A.2d 24 (1980).

A previously established highway "may be extinguished [1] by direct action through governmental agencies, in which case it is said to be discontinued; or [2] by nonuser[8] by the public for a long period of time with the intention to abandon, in which case it is said to be abandoned. The length of time during which such nonuser must continue on the part of the public, before the highway can be presumed to be abandoned, has not been determined in this [s]tate by statute or judicial decision. It must be a long time. . . . Such an abandonment implies, of course, a voluntary and intentional renunciation, but the intent may be inferred as a fact from the surrounding circumstances . . . . Most frequently, where abandonment has been held established, there has been found present some affirmative act indicative of an intention to abandon . . . but nonuser, as of an easement, or other negative or passive conduct may be sufficient to signify the requisite intention and justify a conclusion of abandonment. The weight and effect of such conduct depends not only upon its duration but also upon its character and the accompanying

[8] "User" and "nonuser" are terms of art in early case law. See, e.g., *Beardslee* v. *French*, 7 Conn. 125, 127 (18 Am. Dec. 86) (1828). Where possible, we use the terms "use" and "nonuse" instead.

circumstances." (Citations omitted; footnote added; internal quotation marks omitted.) *Montanaro* v. *Aspetuck Land Trust, Inc.*, supra, 137 Conn. App. 20–21; see also *Benjamin* v. *Norwalk*, supra, 170 Conn. App. 21–22; R. Fuller, 9B Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 49:5, p. 112 ("[o]nce it is shown that the road was a public highway at some point in the past, it remains one under Connecticut law no matter what its state of improvement or deterioration may be unless that status was terminated in one of two ways, [1] abandonment or [2] discontinuance as provided by General Statutes § 13a-49").

Although the individual elements of abandonment are (1) nonuse by the public (2) for a long period of time (3) with the intent to abandon, it has long been the rule that "abandonment may be inferred from circumstances or may be presumed from long continued neglect." (Internal quotation marks omitted.) *Appeal of Phillips*, 113 Conn. 40, 45, 154 A. 238 (1931). With respect to actual nonuse, "[i]t is nonuse by the public, not the municipality, that must be proven." *Benjamin* v. *Norwalk*, supra, 170 Conn. App. 22. Nevertheless, "[i]t is not essential . . . that large numbers of the public participate in the user, or that the user be one which results in a large volume of travel. Each situation must be judged in relation to its own surroundings and conditions, and with a regard for the number of persons who would have occasion to use the way. . . . It is only necessary that those who would be naturally expected to enjoy it have done so at their pleasure." (Citation omitted.) *Phillips* v. *Stamford*, 81 Conn. 408, 414, 71 A. 361 (1908); see also *Benjamin* v. *Norwalk*, supra, 24; *Granby* v. *Feins*, 154 Conn. App. 395, 404, 105 A.3d 932 (2014).

With respect to intent, we iterate that "negative or passive conduct may be sufficient to signify the requisite intention and justify a conclusion of abandonment;"

(internal quotation marks omitted) *Montanaro* v. *Aspetuck Land Trust, Inc.*, supra, 137 Conn. App. 21; and that although "abandonment implies . . . a voluntary and intentional renunciation . . . the intent may be inferred as a fact from the surrounding circumstances . . . ." *Newkirk* v. *Sherwood*, 89 Conn. 598, 605, 94 A. 982 (1915); see also *Cornfield Point Assn.* v. *Old Saybrook*, 91 Conn. App. 539, 567, 882 A.2d 117 (2005) (intent to abandon "can also be inferred from the circumstances, such as the lack of any express plan for the future development of the property" [internal quotation marks omitted]). Logically, it is clear that *both* the public *and* the municipality must intend to abandon a highway for it truly to be abandoned. See, e.g., *American Trading Real Estate Properties, Inc.* v. *Trumbull*, 215 Conn. 68, 77–82, 574 A.2d 796 (1990) (absent evidence of intent to abandon, municipal land is presumed to be held in trust for public use); *Cornfield Point Assn.* v. *Old Saybrook*, supra, 570–73 (same). Nevertheless, municipal ownership of the fee to the roadway itself does not forestall abandonment ipso facto.[9]

With respect to the length of time required to prove abandonment, we emphasize that "[t]he length of time during which such nonuser must continue on the part of the public, before the highway can be presumed to be abandoned, has not been determined in this [s]tate by statute or judicial decision. It must be a long time." (Internal quotation marks omitted.) *Montanaro* v. *Aspetuck Land Trust, Inc.*, supra, 137 Conn. App. 20, citing *Greist* v. *Amrhyn*, 80 Conn. 280, 285, 68 A. 521 (1907). Our courts have considered this issue infrequently. Compare *Newkirk* v. *Sherwood*, supra, 89

[9] We express no opinion as to the present owner of the fee, if any. See generally *American Trading Real Estate Properties, Inc.* v. *Trumbull*, supra, 215 Conn. 77–82; *Burke* v. *Ruggiero*, 24 Conn. App. 700, 707, 591 A.2d 453, cert. denied, 220 Conn. 903, 593 A.2d 967 (1991); R. Fuller, 9B Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 49:5, p. 113–14.

Conn. 605 (sixty years deemed sufficient); *Hartford* v. *New York & New England Railroad Co.*, 59 Conn. 250, 260, 22 A. 37 (1890) (nonuse "for many years" is evidence of abandonment); *Benham* v. *Potter*, 52 Conn. 248, 253 (1884) (fifty years deemed sufficient); *Beardslee* v. *French*, 7 Conn. 125, 127 (18 Am. Dec. 86) (1828) ("desertion of a public road for nearly a century, is strong presumptive evidence that the right of way has been extinguished"); *Litchfield* v. *Wilmot*, 2 Root (Conn.) 288, 290 (1795) (fifteen years of uninterrupted possession of highway bars town from recovering it); with *Brownell* v. *Palmer*, 22 Conn. 106, 120–21 (1852) (questioning, without deciding, whether twenty years was sufficient); *Stohlts* v. *Gilkinson*, 87 Conn. App. 634, 637, 644, 867 A.2d 860 (plaintiffs could not prove abandonment where, approximately eleven years prior to purchase, municipality approved permit pursuant to plot plan showing highway), cert. denied, 273 Conn. 930, 873 A.2d 1000 (2005).

Whether the disputed sections of the road have been abandoned is a question of fact, which we review on the clearly erroneous standard. See *Montanaro* v. *Aspetuck Land Trust, Inc.*, supra, 137 Conn App. 8. On the basis of our review of the record, the law and the trial court's well-reasoned memorandum of decision, we cannot conclude that the court's finding of abandonment was clearly erroneous. The court's memorandum of decision clearly lays out its summation and assessment of each witness' testimony and all the other evidence; the court ultimately concluded that the defendants had met their burden of proving that, even if the disputed sections of the road once had comprised part of a highway, they have long since been abandoned. Specifically, the trial court summarized its factual findings as follows. "[T]he evidence regarding abandonment is conflicting. The 'indicia' of acceptance[10] . . . mitigate against a finding

[10] In its thorough evaluation of all the evidence, the court noted that "[t]he plaintiffs' evidence provides some indicia of acceptance. The plaintiffs

of abandonment, but few of these facts reflect recent incidents. The plaintiffs claim that there was substantial public use of [the road] when the Zoar Bridge existed. As previously addressed, the accuracy and credibility of this claim are questionable. Nevertheless, even the plaintiffs' position contemplates the dissipation of the public's interest and usage of [the road] after the submergence of the Zoar Bridge by the Stephenson Dam construction in 1919. Between 1919 and 1980 (about sixty years), there exists evidence of sporadic but insubstantial work on the road by the town and no evidence whatsoever of any significant public use. The evidence

emphasize that [the road] has been long identified and recognized on deeds and maps, although the town emphasizes that these documents were not produced or created by the town. The earliest references to [the road] are in maps of [the town] dated 1852 and 1868. The plaintiffs identified town logs that were dated 1961 and 1962, indicating that the town did some reconstruction or improvement work on the road which may have included work on the unimproved sections of [the road]. The plaintiffs' evidence also reflects a 2006 easement granted by the town to Lucas for him to install a sanitary sewer line. . . . This easement is equivocal as to the issues of acceptance or ownership as it explicitly states that 'the town of Oxford does not make any representation as to what right it may have, if any, over this easement area.' Over the years, some of the property owners had conversations with town officials that indicated some town interest in or responsibility for the property. For example, Lane testified that she had such communications with town officials, and Nichols received communications [from] the town's zoning enforcement official that his work on the road was being done on town property. The evidence also indicates that in the 1960s, the town's planning and zoning commission approved a subdivision development plan that was not completed. According to the plaintiffs, this approval required the commission to view the road as a public highway. See *Meshberg* v. *Bridgeport City Trust Co.*, [180 Conn. 274, 280, 429 A.2d 865 (1980)] (implied acceptance may not be established solely by approval of subdivision plans because approval of a proposed subdivision and the acceptance of a public street are entirely separate matters.) Additionally, there is no evidence that the areas of the road are taxed by the town. See [id., 284] (in evaluating acceptance '[t]he weight to be accorded the assessment or nonassessment of taxes upon property dedicated to a public use varies according to the other circumstances of the case')." (Citation omitted; footnote omitted.) Ultimately, the court, weighing these indicia of acceptance against the rest of the evidence, concluded that the plaintiffs had failed to prove both dedication and acceptance.

is undisputed that for the last twenty-five years [the road] has been a dead end road, the public has not used the unimproved section of the road and the town has not done any work on this section of the road. For well over sixty years, section four has been used primarily (if not exclusively) as part of the driveway owned by the Lucas family. Based on Watt's testimony,[11] the town has no present intention or plan to engage in any work on the road as the town's records do not show the unimproved section of the road as an accepted town highway." (Footnotes added.)

There is more than sufficient evidence for these findings in the record. The parties disputed whether the road had been used by the public at all since approximately 1919, but agreed that the road became partially impassable sometime in the 1980s. Testimony with respect to use since then was varied. With respect to section two, there is a "dead end" sign at the end of section one where the highway terminates. Lucas testified that he had only seen one car use this section recently, and that he could recall no traffic on the road when he was young. Further, Nichols testified that he is the only homeowner along or near section two of the road. The town does not maintain or repair section two, and Watt testified that it has no intention of doing so.[12] Indeed, numerous witnesses testified that since at least the construction of the house that now belongs to Nichols, the town has not maintained or improved section two; the only improvements to section two were made either by Nichols or by the previous owner, Paul Lane, at their own expense. As a result, section two is passable only by vehicle with four wheel drive.

[11] Wayne Watt testified that he was the foreman/director of the town's public works department.

[12] We note that both Nichols and Watt also testified that Watt informed Nichols upon his purchase of the home that the disputed sections were not a "town approved road" and were not maintained.

With respect to section three, Lucas testified that it has been impassable since a severe storm in 1982. Another witness, Robert Danielecki, who owns property adjacent to Nichols' property, testified that section three has been impassable since at least 1988. Lacinda Lane agreed that section three was washed out in a storm in the 1980s and has been impassable ever since. Photographic evidence in the record shows that section three is steep, narrow and overgrown with vegetation. The court itself concluded that section three is too rugged and steep for a vehicle to traverse.[13]

With respect to section four, although others may once have used section four, Lacinda Lane testified that Lucas' uncle openly and deliberately blocked access thereto with his truck to prevent her and her husband, as well as the general public, from using that section in the 1980s. There is no indication that it has been used as anything other than a private driveway since then; Danielecki testified that, since at least 1990, he had not seen anyone operate a vehicle all the way through the road. He further testified that although several people have been directed by their global positioning system navigation devices to drive up the road from section four, those people "turn right around" because "[t]hey can't get through."

Collectively, this evidence supports the conclusion that the disputed sections are not part of a highway. The court found that by the time the action was commenced, at least twenty-five years had passed since the unorganized public last used the challenged sections of the road as a highway. For as long, the town refused to acknowledge those sections as part of the road and did not develop or maintain them; at trial, representatives from the town testified that it has no plans to do

[13] The plaintiff's expert conceded that, even in its heyday, section three may have been navigable only by "empty wagon."

so in the future. On this evidence, under the specific facts and circumstances of this case, a sufficiently long period of wilful nonuse has passed to imply intent to abandon.

To the extent that the plaintiffs presented evidence and their witnesses testified to the contrary; see, e.g., footnote 10 of this opinion; we emphasize that "[e]vidence is not insufficient . . . because it is conflicting or inconsistent. [The trier of fact] is free to juxtapose conflicting versions of events and determine which is more credible. . . . In this regard, [w]e are not in a position to question the court's credibility finding. The sifting and weighing of evidence is peculiarly the function of the trier. [N]othing in our law is more elementary than that the trier is the final judge of the credibility of witnesses and of the weight to be accorded their testimony. . . . The trier is free to accept or reject, in whole or in part, the testimony offered by either party." (Internal quotation marks omitted.) *Benjamin* v. *Norwalk*, supra, 170 Conn. App. 25.

We note again that, in addition to weighing all the evidence and testimony carefully, the court personally visited the road and drove and walked its entire length. That kind of observation demonstrates exactly why this court cannot relitigate the facts. See, e.g., *Hensley* v. *Commissioner of Transportation*, 211 Conn. 173, 178 n.3, 558 A.2d 971 (1989) ("[w]e have consistently held that the visual observations made by the trier on a visit to the property are as much evidence as the evidence presented for his consideration by the witnesses under oath" [internal quotation marks omitted]); C. Tait & E. Prescott, Connecticut Evidence (5th Ed. 2014) § 11.9.1, p. 730 ("[A] court has discretion to permit the [fact finder], be it court or jury, to view the premises or a location relevant to the trial. . . . Evidence obtained from views is substantive evidence and can independently support a factual finding. . . . The fact that *such*

evidence is unreviewable on appeal in no way impairs its admissibility." [Citations omitted; emphasis added.])

Because we defer to the trial court's weighing of the facts, and because nothing in this record suggests that the court misapplied the law, we conclude that the finding of abandonment was not clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

STEVEN V. PETERS, JR. *v.* UNITED COMMUNITY AND FAMILY SERVICES, INC., ET AL.
(AC 39559)

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

Syllabus

The plaintiff sought to recover damages from the defendant dental surgeon, R, arising out of the allegedly negligent performance of maxillofacial surgery. The plaintiff, pursuant to statute (§ 52-190a), appended to his complaint an opinion letter authored by a maxillofacial surgeon stating that there appeared to be evidence of medical negligence. The letter did not indicate whether the author was board certified. R filed a motion to dismiss the allegations directed toward him, claiming that the trial court lacked personal jurisdiction over him because the author was not a "similar health care provider" as defined by statute (§ 52-184c [c]). The plaintiff claimed that, although the letter was defective, he fully complied with § 52-190a because the author met all necessary qualifications at the time he wrote the letter. The plaintiff filed with his opposition to the motion to dismiss an affidavit from the author attesting to his board certification. The trial court declined to consider the affidavit, which was filed outside the relevant statute of limitations period, granted the motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Held* that the trial court properly granted R's motion to dismiss: although a plaintiff who files a legally insufficient opinion letter may, in certain instances, cure the defective opinion letter through amendment of the pleadings, thereby avoiding the need to file a new action, the plaintiff here did not attempt to cure the defective opinion letter by way of amendment of the pleadings and, instead, submitted the explanatory affidavit with his opposition to the motion to dismiss, after the expiration of the applicable statutes of limitations, because the opinion letter was defective in that it failed to indicate that

the author was board certified in the same specialty as R, there was an adequate ground to dismiss the action pursuant to § 52-190a (c), and even if the affidavit submitted with the plaintiff's opposition to the motion to dismiss was functionally equivalent to a request for leave to file an amended opinion letter, that effort to cure the defect was made well after the statute of limitations had run; moreover, although the plaintiff factually distinguished the affidavit procedure that he employed from the procedure of filing amended pleadings, he failed to provide any legal analysis as to why the procedures should be treated differently for statute of limitations purposes, and it would have been illogical to conclude that the plaintiff could avoid dismissal by submitting an affidavit in lieu of an amendment, both of which would have been untimely.

Argued January 11—officially released June 19, 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 New London, where the court, *Vacchelli*, *J.*, granted the motion to dismiss filed by the defendant Edward Reynolds, Jr., and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Cody A. Layton, for the appellant (plaintiff).

Beverly Knapp Anderson, for the appellee (defendant Edward Reynolds, Jr.).

Opinion

PRESCOTT, J. With the intent to deter the filing of frivolous medical malpractice actions, our legislature in 1986 adopted General Statutes § 52-190a, which makes malpractice actions subject to dismissal unless the plaintiff obtains and attaches to the complaint an opinion letter written and signed by a similar health care provider indicating that there appears to be evidence of medical negligence. The meaning and application of this requirement itself has spawned extensive litigation

since its enactment.[1] This appeal is the latest iteration of this judicial journey.

The plaintiff, Steven V. Peters, Jr., commenced the underlying action for monetary damages arising out of the alleged negligent performance of maxillofacial surgery. He appeals from the judgment of the trial court dismissing, pursuant to § 52-190a (c),[2] count three of his action directed against the defendant, Edward Reynolds, Jr., DDS, because the opinion letter that the plaintiff attached to the complaint failed to provide that its author is board certified by the appropriate American board in the same specialty as the defendant.[3] The plaintiff claims on appeal that the trial court improperly relied on this court's decision in *Gonzales* v. *Langdon*, 161 Conn. App. 497, 128 A.3d 562 (2015), as the basis for its decision to reject the affidavit that he attached to his response to the motion to dismiss, in which he sought to clarify the credentials of the opinion letter's author. We conclude that, because the plaintiff's

[1] A computer search for Connecticut cases citing § 52-190a yields almost a thousand results.

[2] General Statutes § 52-190a (c) provides: "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] In addition to count three, which alleges negligence against Reynolds, the operative complaint contained four additional counts alleging negligence by United Community and Family Services, Inc. (UCFS); and other physicians, namely, Jose Rivero; Graham Garber, and John Doe. Because UCFS, Rivero, Garber and Doe have not participated in the present appeal, all references to the defendant in this opinion are to Reynolds, Jr., only. We note that the partial judgment on the complaint was final for purposes of appellate jurisdiction because it disposed of all causes of action brought against the defendant. See Practice Book § 63-1. Both Rivero and Garber also filed motions to dismiss the counts of the complaint directed at them, citing defects in the qualifications set forth in the opinion letter. Garber's motion, like Reynold's, was granted by the court, *Vacchelli*, *J.*, and the plaintiff filed a separate appeal from the judgment in favor of Garber (AC 40645). Rivero's motion to dismiss, however, was heard by the court, *Cole-Chu*, *J.*, who declined to follow the reasoning of Judge Vacchelli and denied the motion. Accordingly, the present action remains pending before the Superior Court with respect to the counts against UCFS and Rivero.

attempt to cure the defect in the opinion letter came after the relevant statute of limitations had run, the trial court properly granted the motion to dismiss on the basis of an inadequate opinion letter. Accordingly, we affirm the judgment of the trial court.

The following facts, as set forth in the complaint, and procedural history are relevant to our consideration of the plaintiff's claim. Beginning in August, 2012, the plaintiff sought dental treatment from United Community and Family Services, Inc. (UCFS) for a "full maxillary denture over a partial mandibular denture." The defendant was a "servant, agent, apparent agent . . . or employee" of UCFS, who "held himself out to the general public as a physician and surgeon duly licensed to practice medicine in the state of Connecticut, practicing in Norwich *and specializing in oral and maxillofacial surgery*." (Emphasis added.) On September 19, 2012, the plaintiff underwent a procedure known as a decompression of a maxillary cyst. That procedure was performed by the defendant or by someone under his supervision. The plaintiff continued to receive treatment related to the cyst through October 11, 2013, at which time the plaintiff "became aware that there may have been a breach of the standard of care."

The plaintiff commenced the underlying action against the defendant on January 7, 2016, within the applicable limitation period.[4] The complaint had a

[4] General Statutes § 52-584 provides that the statute of limitations for a medical malpractice action is "two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of . . . ." Here, the two year limitation period began to run on October 11, 2013, the date the plaintiff alleges he first became aware of the defendant's negligence. The plaintiff petitioned the clerk of the court pursuant to § 52-190a (b) for an automatic ninety day extension of the limitation period, which was granted. Accordingly, the two year limitation period expired on January 9, 2016. The defendant was served process on January 7, 2016. Even if we assume, however, that the act or omission complained of was the decompression procedure that occurred on September 19, 2012, the action also needed to

return date of February 9, 2016. In his complaint, the plaintiff alleges that, while under the defendant's treatment and care, he suffered serious, painful, and permanent injuries that required additional medical treatment, and that the defendant had failed "to exercise that degree of care and skill ordinarily and customarily used by physicians and surgeons specializing in oral and maxillofacial surgery . . . ."

Attached to the complaint was the requisite good faith certificate signed by the plaintiff's attorney and an opinion letter from a physician who asserts that he had reviewed the plaintiff's medical records and had conducted a clinical exam of the plaintiff. The opinion letter sets forth the author's educational and professional background, including that he graduated cum laude from the Harvard School of Dental Medicine in 1988, and currently is a craniofacial trauma surgeon at Hartford Hospital and the oral and maxillofacial surgeon for the Connecticut Children's Medical Center Craniofacial Team. The letter contains the author's opinion that the plaintiff's diagnosis and overall treatment involved "an extreme departure from the standard of care" and sets forth in some detail the factual underpinning for that opinion. The letter does not provide, however, whether the author is certified as a specialist by any American board.

be brought within three year from that date. Accounting for the ninety day extension, the three year limitation period expired on December 18, 2015. Although the defendant was not served process until January 7, 2016, the affidavit attached to the marshal's return indicates that the marshal personally received the writ, summons and complaint on December 18, 2015. General Statutes § 52-593a provides that a cause of action will not be lost on statute of limitations ground if "the process to be served is personally delivered to a state marshal . . . within [the limitation period] and the process is served, as provided by law, within thirty days of the delivery." The defendant was served twenty days after the marshal took delivery. Thus, using either calculation of the limitation period, the present action was commenced within the applicable period, which expired, at the latest, on January 9, 2016.

On March 8, 2016, the defendant filed a motion to dismiss all allegations in the complaint directed against him on the ground that the opinion letter attached to the complaint did not fully comply with § 52-190a. The defendant claimed that the opinion letter was defective in two ways.

First, the defendant argued that the opinion letter failed to demonstrate that its author is a "similar health care provider" as that term is defined in General Statutes § 52-184c (c).[5] Specifically, the defendant argued that because the plaintiff brought the action against the defendant as a specialist in oral and maxillofacial surgery, the opinion letter's author needed to be "trained and experienced in the same [medical] specialty" as the defendant *and* had to be "certified by the appropriate American [b]oard in the same specialty." General Statutes § 52-184c (c). Because the opinion letter attached to the plaintiff's complaint did not provide whether the author was certified by the American board responsible for certifying oral and maxillofacial surgeons, the defendant argued that it was insufficient to

[5] Section 52-190a (a) provides that the term, "similar health care provider," is defined in § 52-184c. Section 52-184c contains the following definitions:

"(b) If the defendant health care provider is not certified by the appropriate American board as being a specialist, is not trained and experienced in a medical specialty, or does not hold himself out as a specialist, a 'similar health care provider' is one who: (1) Is licensed by the appropriate regulatory agency of this state or another state requiring the same or greater qualifications; and (2) is trained and experienced in the same discipline or school of practice and such training and experience shall be as a result of the active involvement in the practice or teaching of medicine within the five-year period before the incident giving rise to the claim.

"(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'."

demonstrate that the opinion provided was by a similar health care provider.

Second, the defendant argued that the letter contained no opinion of medical negligence with respect to the defendant because there was no express indication by the author that the defendant had provided any treatment in violation of the standard of care. According to the defendant, the letter mentions him only in connection with his supervision of another physician, Jose Rivero; see footnote 3 of this opinion; but does not claim that the defendant's supervision was negligent or breached the standard of care.

On May 9, 2016, the plaintiff filed a memorandum of law in opposition to the defendant's motion to dismiss. The plaintiff argued that the opinion letter he attached to his complaint complies with the requirements set forth in § 52-190a. The plaintiff acknowledged that, due to the allegations in his complaint, he was required to secure an opinion letter from a similar health care provider that was *both* trained and experienced in the same specialty as the defendant *and* certified by the appropriate American board in the same specialty. The plaintiff, however, asserted that he fully complied with those requirements because the author of his opinion letter, in fact, met all necessary qualifications at the time he wrote his letter. According to the plaintiff, the author, in setting forth his credentials, inadvertently left out the fact that he was board certified.

The plaintiff argued that the Superior Court has, in other cases, allowed parties to cure similar defects by submitting an affidavit from the letter's author to supplement or clarify the original letter. The plaintiff attached to his opposition memorandum an affidavit executed on May 4, 2016, by the author of the opinion letter. In that affidavit, the author avers as follows: "I am certified by the American Board of Oral and

Maxillofacial Surgery and have been continuously since October 1, 2008, through the present date, including November 25, 2015, the date I authored said opinion letter." A photocopy of his board certificate is attached to the affidavit. At no time, however, did the plaintiff seek permission to amend the complaint or to file an amended opinion letter.

The court heard argument on the motion to dismiss on July 25, 2016. The defendant argued, in relevant part, that in deciding whether the plaintiff had complied with § 52-190a, the court lacked the discretion to consider the affidavit that the plaintiff submitted with his opposition to the motion to dismiss because the plaintiff's attempt to cure the defect in the opinion letter came more than thirty days after the return date of the original complaint and, more importantly, after the statute of limitations had expired. The defendant cited this court's decision in *Gonzales* v. *Langdon*, supra, 161 Conn. App. 497, as supporting that proposition, relying on the following language: "[I]f a plaintiff alleging medical malpractice seeks to amend his or her complaint in order to amend the original opinion letter, or to substitute a new opinion letter for the original opinion letter, the trial court (1) must permit such an amendment if the plaintiff seeks to amend as of right within thirty days of the return day and the action was brought within the statute of limitations, and (2) has discretion to permit such an amendment if the plaintiff seeks to amend within the applicable statute of limitations but more than thirty days after the return day. The court may abuse its discretion if it denies the plaintiff's request to amend despite the fact that the amendment would cure any and all defects in the original opinion letter and there is an absence of other independent reasons to deny permission for leave to amend." Id., 510.

The plaintiff responded that, at the time this action was commenced, the author of the opinion letter

attached to the complaint met all of the statutory qualifications necessary to render an opinion as a similar health care provider. He admitted that the author inadvertently had failed to include in the letter that he was certified by the appropriate American board, but nevertheless took the position that this was not a fatal defect. The plaintiff argued that, pursuant to Practice Book § 10-31, which governs the filing of oppositions to motions to dismiss, courts may consider affidavits submitted with an opposition to resolve factual ambiguities in the record.[6] Thus, according to the plaintiff, the court properly could consider the affidavit that the plaintiff submitted to resolve in his favor the issue raised in the motion to dismiss with respect to the opinion letter. Moreover, the plaintiff argued that the Superior Court had, in other cases, permitted plaintiffs in medical malpractice actions to cure defects in an opinion letter by way of an affidavit rather than by formal amendment of the pleadings. The plaintiff attempted to distinguish our decision in *Gonzales*, arguing that its application was limited to if and when the court may allow amendments to the complaint or accept the submission of an entirely new opinion letter, and did not address or resolve whether, even after the statute of limitations had run, an affidavit might be sufficient to rectify a deficient opinion letter.

The trial court issued a decision on August 8, 2016, granting the defendant's motion and dismissing the third count of the complaint, without prejudice, on the ground that the required opinion letter was deficient because, as admitted by the plaintiff, it failed to state whether the author was board certified in the same

[6] Practice Book § 10-31 (a) provides: "Any adverse party shall have thirty days from the filing of the motion to dismiss to respond to the motion to dismiss by filing and serving in accordance with [§§] 10-12 through 10-17 a memorandum of law in opposition and, where appropriate, supporting affidavits as to facts not apparent on the record."

specialty as the defendant.[7] The court first rejected the plaintiff's attempt to "stave off dismissal by arguing that it is questionable whether [§ 52-190a] requires that the author [of an opinion letter] describe how he purports to be a similar health care provider in the letter." The court concluded that that issue had been resolved by the Appellate Court in *Lucisano* v. *Bisson*, 132 Conn. App. 459, 466, 34 A.3d 983 (2011) ("[t]he only plausible application of the plain language of §§ 52-190a and 52-184c requires the disclosure of qualifications in the opinion letter"). The court then turned to whether it had authority to rely on the affidavit that the plaintiff had attached to his opposition to the motion to dismiss as a means of curing a defect in the opinion letter. The court acknowledged the plaintiff's argument that "a long line of Superior Court decisions" have sanctioned the use of an explanatory affidavit under similar circumstances, "favorably comparing the affidavit procedure to Appellate Court language sanctioning the curing of such defects by amendment practice, available under Practice Book § 10-60."[8]

[7] At the start of its decision, the court indicated that it had not based its decision to grant the motion to dismiss on the defendant's claim that the letter failed adequately to allege medical negligence by the defendant. The court nevertheless later analyzed this claim and rejected it, concluding that the information provided in the letter was sufficient to satisfy the requirement that the opinion letter set forth a "detailed basis" for the opinion that there appears to be evidence of medical negligence attributable to the defendant. On appeal, the defendant argues that the lack of a proper opinion of medical negligence as to him provides an alternative ground on which to affirm the court's decision to grant the motion to dismiss. Because we affirm the court's judgment on the basis that the letter failed to demonstrate that the author was a similar health care provider, we do not address whether the letter was deficient in other ways or whether the alternative ground actually was decided and, thus, preserved for appellate review. See *Perez-Dickson* v. *Bridgeport*, 304 Conn. 483, 498–99, 43 A.3d 69 (2012) (rule that appellate courts generally will not consider claims not actually raised to and decided by trial court applies equally to alternative grounds for affirmance).

[8] By way of example, the court cited to *Field* v. *Lawrence & Memorial Hospital*, Superior Court, judicial district of New London, Docket No. CV-14-6019542-S (June 10, 2014, *Devine*, *J.*) (58 Conn. L. Rptr. 308), and *Jaboin* v. *Bridgeport Hospital*, Superior Court, judicial district of Fairfield, Docket

The court concluded, however, that it was unnecessary for it to resolve whether the defective opinion letter was amenable to correction through the filing of an affidavit as opposed to the filing of an amended pleading. The court determined that, because the statute of limitations had run, neither procedure was a viable option. It reasoned as follows: "The court is not persuaded that the plaintiff's affidavit should be exempt from the *Gonzales* v. *Langdon* rule. The reason why affidavits have been allowed is because they are compared favorably to Appellate Court authority allowing amendments. [Because] any amendment that sought to supply this missing necessary information would be too late, so too would be an affidavit that sought to accomplish the same thing."

The court also rejected the plaintiff's argument that the defect in his opinion letter was merely circumstantial in nature and, thus, excusable. See General Statutes § 52-123 ("[n]o writ, pleading, judgment or any kind of proceeding in court or course of justice shall be abated, suspended, set aside or reversed for any kind of circumstantial errors, mistakes or defects, if the person and the cause may be rightly understood and intended by the court"). The court explained that "[t]he designation of circumstantial defect is reserved for defects that are not substantive or jurisdiction[al] in nature," and that the failure to provide an opinion letter that complies with statutory requirements constitutes insufficient process, thus implicating the court's personal jurisdiction. See *Morgan* v. *Hartford Hospital*, 301 Conn. 388, 402, 21 A.3d 451 (2011). The court concluded that, because the defect at issue was jurisdictional in nature,

No. CV-09-5023443-S (September 11, 2009, *Bellis*, *J.*) (48 Conn. L. Rptr. 469). In *Jaboin*, the court reasoned that "[i]f the Appellate Court has given a trial court the authority to allow a plaintiff to amend the complaint to add an opinion letter, it seems reasonable that the court could consider [an] affidavit that explains [a]n existing opinion letter." *Jaboin* v. *Bridgeport Hospital*, supra, 473 n.3.

it was not circumstantial. Accordingly, the court granted the defendant's motion to dismiss. This appeal followed.

The sole issue raised by the plaintiff on appeal is whether the trial court, in ruling on the motion to dismiss, correctly determined that our decision in *Gonzales* v. *Langdon*, supra, 161 Conn. App. 497, barred it from considering the affidavit that he had attached to his opposition to the motion to dismiss in an effort to cure the defect in the opinion letter attached to his complaint. The plaintiff concedes, as he did before the trial court, that, on the basis of the allegations alleged in his complaint, he was required by statute to provide an opinion letter from a doctor who not only is trained in oral and maxillofacial surgery, but also is board certified in that specialty. He further concedes that, although the author of the opinion letter had all the necessary bona fides, they were not set forth in the opinion letter attached to his complaint. Nevertheless, the plaintiff argues that the court should have permitted him to avoid dismissal of his action by accepting an affidavit from the author clarifying his credentials. We are not persuaded and agree with the trial court that, regardless of the procedure the plaintiff elected to employ to correct the admittedly defective opinion letter, the plaintiff's efforts came after the statute of limitations had expired. Accordingly, the court was obligated to grant the defendant's motion and dismiss the action.

Our standard of review in an appeal challenging the granting of a motion to dismiss is well settled. "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).

As previously indicated, § 52-190a was enacted by the legislature as part of tort reform efforts in 1986 and was intended to help screen out frivolous malpractice actions. See *Plante* v. *Charlotte Hungerford Hospital*, 300 Conn. 33, 53, 12 A.3d 885 (2011). Subsection (a) of § 52-190a provides in relevant part: "No civil action or apportionment complaint shall be filed to recover damages resulting from personal injury or wrongful death occurring on or after October 1, 1987, 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 or apportionment complaint 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. . . . [T]he 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. . . ."

Furthermore, "§ 52-190a (c) requires the dismissal of medical malpractice complaints that are not supported by opinion letters authored by similar health care providers." *Bennett* v. *New Milford Hospital, Inc.*, supra, 300 Conn. 25; see also *Morgan* v. *Hartford Hospital*,

supra, 301 Conn. 401–402 ("[T]he attachment of a written opinion letter that does not comply with § 52-190a constitutes insufficient process and, thus, service of that insufficient process does not subject the defendant to the jurisdiction of the court. . . . The jurisdiction that is found lacking, however, is jurisdiction over the person, not the subject matter." [Citation omitted; internal quotation marks omitted.]).

In *Bennett* v. *New Milford Hospital, Inc.*, supra, 300 Conn. 21, our Supreme Court indicated that in any case in which the plaintiff alleges in his complaint that a defendant is board certified in a particular specialty or holds himself out as a specialist, "the author of an opinion letter pursuant to § 52-190a (a) must be a similar health care provider as that term is defined by § 52-184c (c), regardless of his or her potential qualifications to testify at trial pursuant to § 52-184c (d)." It also indicated that, although dismissal of an action for relatively insignificant defects in an opinion letter might, at first blush, appear to be a harsh result for plaintiffs; id., 30–31; "plaintiffs are not without recourse when facing dismissal occasioned by an otherwise minor procedural lapse" because "the legislature envisioned the dismissal as being without prejudice . . . and even if the statute of limitations has run, relief may well be available under the accidental failure of suit statute, General Statutes § 52-592." (Citation omitted.) Id., 31.

In *Gonzales* v. *Langdon*, supra, 161 Conn. App. 510, this court recognized an additional avenue of recourse available to plaintiffs to correct defects in an existing opinion letter. We held, as a matter of first impression, that a plaintiff who files a legally insufficient opinion letter may, in certain instances, cure the defective opinion letter through amendment of the pleadings, thereby avoiding the need to file a new action. Specifically, we stated that "if a plaintiff alleging medical malpractice seeks to amend his or her complaint in order to amend

the original opinion letter, or to substitute a new opinion letter for the original opinion letter, the trial court (1) must permit such an amendment if the plaintiff seeks to amend as of right within thirty days of the return day *and the action was brought within the statute of limitations*, and (2) has discretion to permit such an amendment if the plaintiff *seeks to amend within the applicable statute of limitations* but more than thirty days after the return day. The court may abuse its discretion if it denies the plaintiff's request to amend despite the fact that the amendment would cure any and all defects in the original opinion letter *and there is an absence of other independent reasons to deny permission for leave to amend*." (Emphasis added.) Id.

In *Gonzales*, this court reasoned that "[t]he legislative purpose of § 52-190a (a) is not undermined by allowing a plaintiff leave to amend his or her opinion letter or to substitute in a new opinion letter if the plaintiff did file, in good faith, an opinion letter with the original complaint, and later seeks to cure a defect in that letter *within the statute of limitations*. Amending within this time frame typically will not prejudice the defendant or unduly delay the action." (Emphasis added.) Id., 519. Furthermore, the court explained that allowing the correction of a defective opinion letter under the circumstances prescribed favors judicial economy. Id.

In light of the numerous references in *Gonzales* to the statute of limitations, we conclude that the court intended to limit the scope of its newly recognized remedy to those curative efforts initiated prior to the running of the statute of limitations. Logically, it follows that a plaintiff who fails to seek to correct a defective opinion letter within the statute of limitations period will be limited to the remedy previously identified by our Supreme Court in *Bennett*, namely, seeking to file a new action pursuant to § 52-592, the accidental failure of suit statute.

In *Ugalde* v. *Saint Mary's Hospital, Inc.*, 182 Conn. App. 1, A.3d (2018), this court recently had an opportunity to discuss the scope of the remedy recognized in *Gonzales*, stating that "[t]he holding in *Gonzales* permits amendments to legally insufficient opinion letters *only if they are sought prior to the expiration of the statute of limitations*." (Emphasis added.) Id., 12. This court, in *Ugalde*, determined that an amendment filed after the limitations period had run did not comply with the *Gonzales* rule and could not be saved by invoking the relation back doctrine. Id., 9–12. "To hold that an amendment can be permitted after the expiration of the statute of limitations on the theory that the amended pleading relates back to the date of the filing of the improperly pleaded action would render all references to the statute of limitations and the accidental failure of suit statute in *Gonzales* irrelevant, for under that analysis, every amendment, however unseasonable, would relate back to the date of the original complaint without need for invoking, or thus complying with, the requirements of the accidental failure of suit statute." Id., 12.

The plaintiff in the present case takes the position that *Gonzales* applies only in those cases in which a plaintiff has sought to cure a defective opinion letter by way of an amendment of the pleadings, and suggests that a plaintiff can evade the clear limits set forth in *Gonzales* by submitting an explanatory or clarifying affidavit in lieu of amendment, even after the limitations period has expired. Just as this court rejected the plaintiff's attempt in *Ugalde* to evade the statute of limitations problem that existed in that case by invoking the relation back doctrine, we reject the plaintiff's attempt to limit or distinguish *Gonzales* in the present case.

As an initial matter, we recognize that certain Superior Court decisions provide some authority for permitting a plaintiff to cure a defective opinion letter by

supplemental affidavit rather than by following the amendment procedures set forth in Practice Book §§ 10-59 and 10-60.[9] See footnote 8 of this opinion. The Superior Court decisions that have permitted affidavits, however, have done so largely upon a theory that if a plaintiff is permitted to correct a defective opinion letter by amending the pleadings, it would be equally reasonable for a court to permit and consider an affidavit that clarifies a defect in an existing opinion letter. No appellate court to date has sanctioned the use of an affidavit to cure a defective opinion letter. The plaintiff, in his brief to this court, seeks to establish that the use of an explanatory or supplemental affidavit to cure a defect in an opinion letter in response to a motion to dismiss comports with language in Practice Book § 10-31 (a) permitting supporting affidavits to establish facts necessary for the adjudication of the motion to dismiss. Because our resolution of the present appeal does not turn on whether we agree with that analysis, we leave that issue for another day.[10]

[9] Practice Book § 10-59 provides in relevant part: "The plaintiff may amend any defect, mistake or informality in the writ, complaint or petition and insert new counts in the complaint, which might have been originally inserted therein, without costs, during the first thirty days after the return day. . . ."

Practice Book § 10-60 (a) provides in relevant part: "[A] party may amend his or her pleadings or other parts of the record or proceedings at any time subsequent to that stated in [Practice Book § 10-59] in the following manner:

"(1) By order of judicial authority; or

"(2) By written consent of the adverse party; or

"(3) By filing a request for leave to file an amendment together with: (A) the amended pleading or other parts of the record or proceedings, and (B) an additional document showing the portion or portions of the original pleading or other parts of the record or proceedings with the added language underlined and the deleted language stricken through or bracketed. . . ."

[10] In *Gonzales* v. *Langdon*, supra, 161 Conn. App. 510, this court sanctioned the use of amended pleadings to correct a defect in an existing opinion letter, largely resolving a split in the Superior Court arising from dicta in *Votre* v. *Country Obstetrics & Gynecology Group P.C.*, 113 Conn. App. 569, 585, 966 A.2d 813, cert. denied, 292 Conn. 911, 973 A.2d 661 (2009). See *Bennett* v. *New Milford Hospital, Inc.*, supra, 300 Conn. 30–31 n.17; see also *Liu* v. *Yale Medical Group,* Superior Court, judicial district of New Haven, Docket No. CV-14-6050183-S (February 18, 2015), and cases cited

On the basis of our plenary review, we agree with the trial court's decision to grant the defendant's motion to dismiss. There is no question that the opinion letter attached to the plaintiff's complaint was defective. The letter did not establish on its face that its author was a similar health care provider as that term is defined in § 52-184c (c) because the author never indicated that he was board certified in the same specialty as the defendant. Because the opinion letter was defective, this provided an adequate ground to dismiss the action pursuant to § 52-190a (c). Furthermore, the statute of limitations for bringing a medical malpractice action against the defendant expired, at the latest, on January 9, 2016. See footnote 4 of this opinion. The plaintiff took no action to cure the defect in the opinion letter until May 9, 2016, when, in response to a motion to dismiss filed by the defendant, he offered a supplemental affidavit from the letter's author. Even if we assume, for the sake of argument, that the affidavit submitted by the plaintiff was functionally equivalent to a request for leave to file an amended opinion letter, this effort to cure the defect was made well after the statute of limitations had run. Although the plaintiff factually distinguishes the affidavit procedure that he employed from the amendment procedure discussed in *Gonzales*, he has failed to provide any legal analysis why the two procedures should be treated differently for statute of limitations purposes. It simply would be illogical and an unwarranted circumvention of our decision in *Gonzales* to conclude that a plaintiff could avoid dismissal by submitting an affidavit in lieu of an amendment. As the trial court aptly indicated, because "any amendment

therein. Although at this juncture it would seem prudent for a plaintiff to follow the corrective measures approved in *Gonzales*, we do not decide at this time whether a trial court has the authority to permit alternative procedures, such as the use of a clarifying affidavit, to remedy a defective opinion letter.

that sought to supply [the] missing necessary information would be too late, so too would be an affidavit that sought to accomplish the same thing."

In sum, we conclude that the court properly applied our decision in *Gonzales* in granting the motion to dismiss. Regardless of the type of procedure a plaintiff elects to employ to cure a defect in an opinion letter filed in accordance with § 52-190a, that procedure must be initiated prior to the running of the statute of limitations. Otherwise the sole remedy available will be to initiate a new action, if possible, pursuant to § 52-592.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* PAUL WYNNE
(AC 39169)

Sheldon, Bright and Harper, Js.

Syllabus

Convicted of the crime of operating a motor vehicle while under the influence of intoxicating liquor or drugs, the defendant appealed to this court. He claimed that the evidence was insufficient to support his conviction and that the trial court abused its discretion in admitting the testimony of E, the state's expert on drug recognition. *Held*:

1. The evidence was sufficient to support the defendant's conviction of operating a motor vehicle while under the influence of intoxicating liquor or drugs: the arresting police officer testified that he observed the defendant having difficulty maintaining his lane and crossing over the fog line several times while driving, that he noticed the smell of alcohol and marijuana when the defendant lowered his passenger side window and that the defendant was speaking slowly and in a monotone voice, the defendant admitted that he had consumed two beers and smoked marijuana prior to driving, and he was unsteady on his feet after he exited his vehicle and could not keep his balance, exhibited seven out of eight clues indicative of impairment during the walk and turn test, exhibited three out of four clues of impairment during the one leg stand test, and exhibited a lack of smooth pursuit during the horizontal gaze nystagmus test; moreover, the evidence showed that the officer asked the defendant if he had any physical ailments or injuries

that would have prevented him from performing the field sobriety tests, to which the defendant responded negatively, and the jury was not required to accept the defendant's view that there could have been explanations other than intoxication for his poor performance on the tests or that evidence of his cooperation throughout the process proved that he was not intoxicated.

2. The defendant could not prevail on his claim that the trial court abused its discretion in admitting E's testimony, which was based on his claim, inter alia, that the trial court improperly failed to conduct a hearing pursuant to *State* v. *Porter* (241 Conn. 57) prior to admitting E's testimony: the defendant having failed to raise his *Porter* claim before the trial court or in his motion in limine, the claim was not preserved for appellate review, and under the circumstances here, where E was not being offered to testify as to the defendant's level of intoxication, but was offered only to explain the combined effects of marijuana and alcohol on a driver, which was not improper, the trial court's failure to conduct a *Porter* hearing sua sponte on the facts of this case was not the type of extraordinary situation for which plain error review is reserved; moreover, the trial court did not abuse its discretion in determining that E's testimony was relevant, as E testified regarding the physical effects of marijuana on the body and the effects that the combination of marijuana and alcohol could have on a person's performance of field sobriety tests, which in no way required personal observation of the defendant to be relevant; furthermore, the defendant's claim that the trial court improperly permitted E to answer a hypothetical question was not reviewable, as the defendant did not state the basis for his general objection to the hypothetical question, which denied the trial court the opportunity to consider the arguments now made by the defendant on appeal, and his unpreserved evidentiary claim that the trial court improperly permitted E to estimate a blood alcohol content equivalent based on a person's use of marijuana in conjunction with alcohol was not reviewable pursuant to *State* v. *Golding* (213 Conn. 233), as the claim was not of constitutional magnitude, nor did the defendant demonstrate that the claimed error was both so clear and so harmful that reversal was required under the plain error doctrine.

Argued February 8—officially released June 19, 2018

Procedural History

Substitute information charging the defendant with the crime of operating a motor vehicle while under the influence of intoxicating liquor or drugs and the infraction of failure to drive in the proper lane, brought to the Superior Court in the judicial district of Stamford-Norwalk, geographical area number twenty, where the

charge of operating a motor vehicle while under the influence of intoxicating liquor or drugs was tried to the jury before *Hernandez*, *J.*; verdict of guilty; thereafter, the infraction of failure to drive in the proper lane was tried to the court; judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

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

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo, Jr.*, state's attorney, and *Justina Moore*, assistant state's attorney, for the appellee (state).

Opinion

BRIGHT, J. The defendant, Paul Wynne, appeals from the judgment of conviction, rendered following a jury trial, of operating a motor vehicle while under the influence of intoxicating liquor or any drug or both in violation of General Statutes § 14-227a (a) (1). The defendant claims that (1) the evidence was insufficient to support his conviction; and (2) the court abused its discretion in admitting the testimony of the state's expert on drug recognition. We affirm the judgment of the trial court.

The jury was presented with the following evidence on which to base its verdict. On September 6, 2014, at approximately 9:43 p.m., while Trooper Joel Contreras of the state police was patrolling a portion of the Interstate 95 southbound corridor, he observed that the driver of a Nissan pickup truck (vehicle) was "having difficulty maintaining [his] lane" and that he had "cross[ed] into the fog line several times." Contreras followed the vehicle, and the driver of the vehicle continued to drive in a similar manner. As the two vehicles approached the area of exit eighteen, Contreras activated his cruiser's emergency lights and sirens and initiated a traffic stop. Contreras exited his cruiser and

knocked on the passenger window of the vehicle. The defendant, the sole occupant and operator of the vehicle, lowered the passenger window. Contreras immediately noticed the smell of alcohol and marijuana. Contreras then asked the defendant for his driver's license, his vehicle's registration, and his insurance card, and he asked the defendant to what location he was driving. The defendant explained that he was going home to Norwalk. Contreras noticed that the defendant was speaking slowly and in a monotone voice. Contreras also noticed that the vehicle was stopped in an unsafe spot in a curve and asked the defendant to drive approximately one tenth of a mile off of exit eighteen.

After the defendant moved his vehicle, Contreras again approached and asked the defendant if he had consumed any alcoholic beverages prior to driving. The defendant responded that he had consumed two beers. Contreras then asked the defendant if he would submit to standardized field sobriety tests, and the defendant agreed. Contreras noticed that the defendant was "unsteady on his feet" and "couldn't keep his balance" when he exited the vehicle. Before explaining the nature of the field sobriety tests, Contreras asked the defendant if he had any ailments that would impair his ability to perform the tests, and the defendant responded in the negative. Contreras first conducted the horizontal gaze nystagmus test,[1] during which he observed the lack of smooth pursuit in each eye, but did not observe the onset of nystagmus prior to forty-five degrees or at

[1] "The horizontal gaze nystagmus test measures the extent to which a person's eyes jerk as they follow an object moving from one side of the person's field of vision to the other. The test is premised on the understanding that, whereas everyone's eyes exhibit some jerking while turning to the side, when the subject is intoxicated the onset of the jerking occurs after fewer degrees of turning, and the jerking at more extreme angles becomes more distinct." (Internal quotation marks omitted.) *State* v. *Popeleski*, 291 Conn. 769, 770 n.3, 970 A.2d 108 (2009).

maximum deviation. Consequently, Contreras could not conclude that the defendant failed the test.

Contreras then administered the walk and turn test. He explained to the jury that there are a total of eight clues in the walk and turn test, and an individual who displays two or more clues is considered to have failed the test. The defendant exhibited seven clues, including losing his balance, starting too soon, and stopping during the test in order to prevent himself from falling. The defendant also failed the one leg stand test because he swayed while balancing, put down his foot several times, and raised his arms. Based on the totality of Contreras' observations, including the smell of alcohol and marijuana, the field sobriety tests, and the defendant's speech and unsteadiness on his feet, Contreras concluded that the defendant was impaired. Contreras then arrested him for operating a motor vehicle while under the influence of alcohol or drugs or both.

Contreras informed the defendant of his constitutional rights and brought him to the police station for processing. In response to questioning, the defendant stated that between 5 p.m. and 9 p.m. he had consumed two beers and had smoked a marijuana joint prior to driving. The defendant submitted to a Breathalyzer test at approximately 10:41 p.m. that measured his blood alcohol content at 0.0352 percent, which is below the legal limit of 0.08. See General Statutes § 14-227a (a) (2). Nevertheless, on the basis of Contreras' observations, the state charged the defendant with operating a motor vehicle while under the influence of intoxicating liquor or drugs or both.[2]

[2] The defendant was charged only under § 14-227a (a) (1), the behavior subdivision of the statute. The defendant also was charged with failure to drive within the proper traffic lane in violation of General Statutes § 14-236 (1). The court found the defendant guilty of this infraction and imposed a $50 fine.

Following a jury trial, the jury returned a verdict finding the defendant guilty of operating a motor vehicle while under the influence of intoxicating liquor or any drug or both. The trial court rendered a judgment of conviction in accordance with the jury's verdict and sentenced the defendant to a total effective sentence of six months incarceration, execution suspended after twenty days, two days of which were the mandatory minimum, followed by two years' probation with special conditions. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the evidence adduced at trial was insufficient to sustain his conviction of operating a motor vehicle while under the influence of intoxicating liquor or drugs. Specifically, he argues that alleged evidentiary inconsistencies made it unreasonable for the jury to conclude beyond a reasonable doubt that he drove his vehicle while under the influence of intoxicating liquor or drugs such that his mental, physical or nervous processes were so affected that he lacked the ability to operate his vehicle properly in violation of § 14-227a (a) (1). We disagree.

"In reviewing a sufficiency of the evidence claim, we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . In evaluating evidence, the trier of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The trier may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and

logical." (Internal quotation marks omitted.) *State* v. *Stovall*, 316 Conn. 514, 520, 115 A.3d 1071 (2015).

"On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty."[3] (Internal quotation marks omitted.) *State* v. *Torres*, 242 Conn. 485, 490, 698 A.2d 898 (1997).

Section 14-227a (a) provides in relevant part: "No person shall operate a motor vehicle while under the influence of intoxicating liquor or any drug or both. A person commits the offense of operating a motor vehicle while under the influence of intoxicating liquor or any drug or both if such person operates a motor vehicle (1) while under the influence of intoxicating liquor or any drug or both . . . ." Thus, pursuant to § 14-227a (a) (1), "[a] conviction of operating a motor vehicle while under the influence of intoxicating liquor [or any drug or both] . . . requires proof [beyond a reasonable doubt] of (1) operation of a motor vehicle (2) on a public highway or one of the other designated areas (3) while under the influence of intoxicating liquor [or any drug or both]. . . . Driving while under the influence of liquor means, under the law of Connecticut, that a driver had become so affected in his mental, physical or nervous processes that he lacked to an appreciable degree the ability to function properly in relation to the operation of his vehicle." (Citation omitted; internal quotation marks omitted.) *State* v. *Howell*, 98 Conn. App. 369, 374–75, 908 A.2d 1145 (2006).

[3] Although the defendant's second claim challenges the admissibility of certain evidence, "[f]or the purposes of sufficiency review . . . we review the sufficiency of the evidence as the case was tried . . . . [A] claim of insufficiency of the evidence must be tested by reviewing no less than, and no more than, the evidence introduced at trial." (Internal quotation marks omitted.) *State* v. *Chemlen*, 165 Conn. App. 791, 816, 140 A.3d 347, cert. denied, 322 Conn. 908, 140 A.3d 977 (2016).

The defendant does not contest that he was operating a motor vehicle on a public highway or that he had alcohol in his bloodstream. The defendant argues that there was insufficient evidence to prove that his consumption of alcohol, marijuana or both so affected his mental, physical or nervous processes that he lacked, to an appreciable degree, the ability to function properly in relation to the operation of his vehicle. He contends that several reasons unrelated to intoxication caused him to cross the fog line, make an unsafe lane change, and fail two field sobriety tests. He notes that Contreras failed to ask him if he had any medical issues which prevented him from performing the walk and turn test and the one leg stand test. The defendant argues that he was cooperative and polite throughout the process; that Contreras could not recall whether the defendant had any difficulty producing documentation, answering questions or comprehending instructions; that he was able to drive his vehicle without incident when Contreras ordered him to change locations; and that he passed the horizontal gaze nystagmus test, which was a scientific test, unlike the walk and turn test and one leg stand test, which are subjective in nature. The defendant further argues that although his admission to having consumed marijuana is sufficient to establish drug use prior to operation, it does not prove that he was impaired while driving.

Although the jury could have accepted the defendant's view of the evidence, it was not required to do so. The jury had more than sufficient evidence to support the defendant's conviction. Contreras testified that he observed the defendant having difficulty maintaining his lane and crossing over the fog line several times while driving. Contreras further testified that when the defendant lowered the passenger side window, he immediately noticed the smell of alcohol and marijuana, and that the defendant was speaking slowly and in a

monotone voice. The defendant admitted to Contreras that he had consumed two beers and had smoked marijuana prior to driving. Contreras noticed that after the defendant exited his vehicle, he was "unsteady on his feet" and "couldn't keep his balance." During the walk and turn test, the defendant exhibited seven out of eight clues indicative of impairment, and he exhibited three out of four clues of impairment during the one leg stand test. Although the defendant did not fail the horizontal gaze nystagmus test, he exhibited a lack of smooth pursuit. State Trooper Tom Ehret, the state's drug recognition expert, testified that a person who was under the influence of marijuana would only exhibit a lack of smooth pursuit but not the onset of nystagmus prior to forty-five degrees or at maximum deviation in the nystagmus test. Ehret also testified that the walk and turn test and the one leg stand test were "good tests for marijuana because they are divided attention tests." The evidence supports the jury's verdict of guilty.

The defendant's argument that Contreras failed to ask him if he had any physical ailments preventing him from performing the walk and turn test and the one leg stand test is unavailing. Contreras testified that before administering the field sobriety tests and prior to informing the defendant of the nature of those tests, he asked the defendant if he had any physical ailments or injuries to which the defendant responded negatively. Contreras testified that "at that point [the defendant] could be under the impression that he's going to be doing cartwheels, and if he doesn't tell me he has any physical injuries or aliments, then . . . it's telling me . . . that he doesn't have any ailments to do a variety of tests that I would perform on the side of the road."

Furthermore, the jury was not required to accept the defendant's view that there could be explanations other than intoxication for his poor performance on the field sobriety tests, or that evidence of his cooperation

throughout the process proved that he was not intoxicated. "[I]n viewing evidence which could yield contrary inferences, the jury is not barred from drawing those inferences consistent with guilt and is not required to draw only those inferences consistent with innocence. The rule is that the jury's function is to draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Internal quotation marks omitted.) *State* v. *Pulaski*, 71 Conn. App. 497, 505, 802 A.2d 233 (2002). Accordingly, we conclude that there is a reasonable view of the evidence to support the jury's verdict of guilty and the judgment of conviction.

II

The defendant next claims that the court abused its discretion in a number of ways regarding the admission of the testimony of Ehret, the state's drug recognition expert. He contends that the court abused its discretion by (a) failing to conduct a hearing, prior to admitting Ehret's testimony pursuant to *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998), and *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), (b) concluding that Ehret's testimony was relevant, (c) permitting Ehret to answer a hypothetical question, and (d) permitting Ehret to estimate a blood alcohol content equivalent based on a person's use of marijuana in conjunction with alcohol. We disagree with each of the defendant's claims.

The following additional facts are relevant to the defendant's claims. On March 10, 2016, the defendant filed a motion in limine in which he sought to preclude the testimony of Ehret on relevancy grounds. He argued that Ehret's testimony was not relevant under § 4-1 of the Connecticut Code of Evidence because he was not

the arresting officer, was not present at the scene to observe the defendant perform the field sobriety tests, was not the processing officer, and did not observe the defendant on the day of his arrest or at any other time. He further argued that Ehret's testimony should be excluded under § 4-3 of the Connecticut Code of Evidence as confusing and a waste of time. The defendant did not cite *Porter* or *Daubert*, nor did he argue that Ehret's testimony was scientifically unreliable.

On March 14, 2016, the first day of trial, the defendant argued, in support of his motion in limine, that Ehret's testimony was not relevant because he did not observe the defendant on the day of his arrest. In response, the prosecutor explained that Ehret was not being called to testify as to the defendant's condition, but instead would testify as to the effect that the combination of alcohol and marijuana would have on the body and how that differs from how alcohol alone affects the body. The court concluded: "If . . . Ehret were testifying that in his opinion, [the defendant] were intoxicated within the meaning of the statute . . . I would agree that his testimony would be inadmissible. But given [the prosecutor's] proffer, namely that . . . Ehret possesses specialized training and experience outside of the ordinary knowledge of the lay juror and that that testimony will be limited to the effects of alcohol and/or marijuana in combination, I believe that his testimony, A, is relevant, and B, is admissible to explain the effects of alcohol and marijuana in combination on a driver, albeit not [the defendant] in particular. So accordingly, the defendant's motion to preclude the testimony of . . . Ehret is denied."

After Ehret testified regarding his specialized training in drug recognition, the court found him to be an expert. Ehret then testified as to the effects that the combination of a low level of alcohol and a low to moderate level of marijuana would have on the body. He noted

that under such conditions, an individual would display only one of the three clues, a lack of smooth pursuit, during the horizontal gaze nystagmus test. Nevertheless, he testified that an individual with a low blood alcohol content who also had marijuana in his system would display more clues during the one leg stand test and the walk and turn test than would an individual who had only a low blood alcohol content. Thereafter, the following exchange occurred between Ehret and the prosecutor:

"[The Prosecutor]: Okay. Now, have you read any literature about the effect of both moderate levels of marijuana and moderate levels of alcohol in someone's system?

"[Ehret]: Yeah. The National Highway Traffic Safety Administration did a study in either 1999 or 2000 with . . . the University of the Netherlands and . . . basically what it said is if there are low levels of marijuana combined with low levels of alcohol, the effect together could create an impairment of what they approximated as anywhere from 0.09 to 0.16 [blood alcohol content] level if it was just alcohol alone.

"[The Prosecutor]: Okay. And I'm going to pose a hypothetical question to you. Assume a man was pulled over in the evening and assume that . . . when he was pulled over, he smelled of alcohol and the scent of marijuana, assume he had slow speech and lethargic speech, assume he was off balance and unsteady on his feet when he walked toward the end of his vehicle, and assume he further failed the walk and turn and the one [leg] stand [tests]. Assume he admitted to you he consumed two beers and smoked a joint before driving. He did submit to a Breathalyzer revealing a 0.035. . . . What would you conclude from those facts?"

"[Defense Counsel]: Objection, Your Honor.

"[The Court]: Overruled.

"[Ehret]: Based on the facts that you set forth there, I would determine that person was impaired."

We begin by setting forth the standard of review. "We review the trial court's decision to admit evidence, if premised on a correct view of the law . . . for an abuse of discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did." (Internal quotation marks omitted.) *State* v. *Acosta*, 162 Conn. App. 774, 780, 129 A.3d 808 (2016), aff'd, 326 Conn. 405, 164 A.3d 672 (2017). We address the defendant's claims in turn.

A

The defendant claims that the court erred in failing to conduct a *Porter* hearing before admitting Ehret's drug recognition testimony. The defendant acknowledges that he did not specifically request that the trial court conduct a *Porter* hearing but he contends, however, that his motion in limine, in which he argued that Ehret's testimony was not relevant because he did not personally observe the defendant, combined with the trial court's gatekeeping functions, triggered an obligation of the trial court to hold a *Porter* hearing. We decline to review this claim.

Because the defendant did not raise a *Porter* claim in the trial court, the claim is unpreserved for appellate review. "To raise a *Porter* claim, the party opposing the admission of the scientific evidence must first object to the validity of the expert's methods. . . . Once the opponent objects, the proponent of the scientific evidence must demonstrate that the methods underlying the evidence are reliable and, therefore, valid. . . . The failure to raise a *Porter* claim in the trial court results

in waiver of that claim and it will not be considered for the first time on appeal." (Citations omitted.) *Weaver* v. *McKnight*, 313 Conn. 393, 415–16, 97 A.3d 920 (2014).

In the present case, the defendant filed a motion in limine challenging the admission of Ehret's testimony on relevancy grounds only. When the court addressed the motion on the first day of trial, the defendant argued that Ehret did not personally observe the defendant on the night of his arrest and therefore Ehret's opinions were not relevant. He neither argued that Ehret's methods were scientifically unreliable,[4] nor requested that the trial court hold a *Porter* hearing on the scientific validity of Ehret's testimony. "As the sine qua non of preservation is fair notice to the trial court"; (internal quotation marks omitted) *State* v. *Rivera*, 169 Conn. App. 343, 371, 150 A.3d 244 (2016), cert. denied, 324 Conn. 905, 152 A.3d 544 (2017); we conclude that this claim was not preserved and is therefore unreviewable.

The defendant, alternatively, seeks review under the plain error doctrine. See Practice Book § 60-5. The defendant argues that it readily is discernable from the record that the methods Ehret used to formulate his opinions, namely without personally observing the defendant, were scientifically invalid and so harmful as to require reversal. We disagree.

Pursuant to Practice Book § 60-5, the plain error doctrine "is not . . . a rule of reviewability. It is a rule of

[4] The defendant's objection to Ehret's testimony stands in marked contrast to his objection to the proposed testimony of the state's toxicology expert. In the context of his motion in limine seeking to preclude the admission of a toxicology report and testimony from the toxicologist regarding the drug screening test results of a urine sample from the defendant, which revealed the presence of cannabinoids in his system, the defendant argued that the test results were scientifically unreliable under *Porter* and *Daubert*. The court granted the motion and concluded that the testimony of the toxicologist and the toxicology report regarding the testing of the defendant's urine sample did not satisfy the requirements of *Porter*. As noted previously, the defendant did not raise a *Porter* claim in his motion in limine regarding Ehret's testimony.

reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly. . . . A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice. . . . Implicit in this very demanding standard is the notion . . . that invocation of the plain error doctrine is reserved for occasions requiring the reversal of the judgment under review. . . . [Thus, a] defendant 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." (Internal quotation marks omitted.) *State* v. *Terry*, 161 Conn. App. 797, 820, 128 A.3d 958 (2015), cert. denied, 320 Conn. 916, 131 A.3d 751 (2016).

The defendant's argument ignores the basis for the court's denial of the defendant's motion in limine. The court denied the motion because Ehret was not being offered to testify as to the defendant's level of intoxication. He was offered only to explain the combined effects of marijuana and alcohol on a driver. We see no error in permitting his testimony on this subject, let alone plain error. Certainly, the court's failure to conduct a *Porter* hearing sua sponte on the facts of this case is not the type of extraordinary situation for which plain error review is reserved.

B

The defendant next claims that the court abused its discretion in concluding that Ehret's testimony was relevant. Specifically, the defendant argues that, because

Ehret did not personally observe the defendant on the night of his arrest, his testimony was irrelevant. We disagree.

Section 4-1 of the Connecticut Code of Evidence provides: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." "As it is used in [the Connecticut Code of Evidence], relevance encompasses two distinct concepts, namely, probative value and materiality. . . . Conceptually, relevance addresses whether the evidence makes the existence of a fact material to the determination of the proceeding more probable or less probable than it would be without the evidence. . . . In contrast, materiality turns upon what is at issue in the case, which generally will be determined by the pleadings and the applicable substantive law. . . . If evidence is relevant and material, then it may be admissible. . . . [T]he trial court has broad discretion in ruling on the admissibility . . . of evidence." (Citation omitted; internal quotation marks omitted.) *State* v. *Sampson*, 174 Conn. App. 624, 635–36, 166 A.3d 1, cert. denied, 327 Conn. 920, 171 A.3d 57 (2017).

The court did not abuse its discretion in ruling that Ehret's testimony was relevant. In this case, Ehret did not opine as to whether the defendant himself, was under the influence of alcohol or marijuana. Instead, he testified, as an expert witness concerning the physical effects of marijuana on the body and the effects that the combination of marijuana and alcohol could have on a person's performance of field sobriety tests. His testimony included answering a hypothetical question based on facts similar to those presented to the jury through Contreras' testimony. Consequently, his testimony in no way required personal observation of the

defendant to be relevant. Even without such observation, his testimony had a tendency to make the existence of a material fact—whether the defendant was impaired by the combination of alcohol and marijuana—more or less probable.

C

The defendant next claims that the court abused its discretion in permitting Ehret to answer the hypothetical question posed to him by the prosecutor. He argues that the hypothetical question was improper because it constituted an opinion on an ultimate issue in the case and the hypothetical failed to include all essential facts. We decline to review this claim.

At trial, the defendant made a general objection to the following hypothetical question: "Assume a man was pulled over in the evening and assume that . . . when he was pulled over, he smelled of alcohol and the scent of marijuana, assume he had slow speech and lethargic speech, assume he was off balance and unsteady on his feet when he walked toward the end of his vehicle, and assume he further failed the walk and turn and the one [leg] stand [tests]. Assume he admitted to you he consumed two beers and smoked a joint before driving. He did submit to a Breathalyzer revealing a 0.035 . . . . What would you conclude from those facts?" He did not state a basis for the objection.

The defendant's failure to specify the grounds for his objection to the hypothetical question renders his evidentiary claim unreviewable on appeal. "The standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. This court is not bound to consider claims of law not made at the trial. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial

court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling. . . . Once counsel states the authority and ground of [the] objection, any appeal will be limited to the ground asserted. . . .

"These requirements are not simply formalities. They serve to alert the trial court to potential error while there is still time for the court to act. . . . Assigning error to a court's evidentiary rulings on the basis of objections never raised at trial unfairly subjects the court and the opposing party to trial by ambush." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Gonzalez*, 272 Conn. 515, 539–40, 864 A.2d 847 (2005).

Because the defendant did not state a basis for the objection, the court had no opportunity to consider the arguments the defendant now makes on appeal. Furthermore, the state did not have the opportunity to respond to the arguments, reformulate the question or present additional evidence if the objection had been properly argued and sustained. For these reasons, we will not review the defendant's claim.

D

Finally, the defendant claims that Ehret's testimony regarding the resultant blood alcohol content of an individual who had consumed low levels of marijuana and alcohol violated § 14-227a.

Section 14-227a (c) provides that in any prosecution under the behavior subdivision "reliable evidence respecting the amount of alcohol in the defendant's blood or urine at the time of the alleged offense, as shown by a chemical analysis of the defendant's blood, breath or urine, otherwise admissible under subsection (b) of this section, shall be admissible only at the request of the defendant."

During cross-examination of Contreras, the defendant elicited testimony that a Breathalyzer test revealed that the defendant's blood alcohol content at 10:41 p.m. on the night he was arrested was .0352, and offered the Breathalyzer test results into evidence. During direct examination of Ehret, the prosecutor asked if he had read any literature regarding the effects of moderate levels of marijuana and moderate levels of alcohol. Ehret testified regarding a study that indicated that the effect of low levels of both intoxicants on an individual would be equivalent to the effect of a blood alcohol content between 0.09 and 0.16. The defendant neither objected to the state's question, nor moved to strike Ehret's answer.

Because the defendant did not preserve this claim, he seeks review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989),[5] and the plain error doctrine. First, the claim fails under the second prong of *Golding* because it is an evidentiary claim that is not of constitutional magnitude. "[U]npreserved [e]videntiary claims do not merit review pursuant to *Golding* . . . because they are not of constitutional magnitude." (Internal quotation marks omitted.) *State* v. *Terry*, supra, 161 Conn. App. 819. Accordingly, we will not review the defendant's evidentiary claim under *Golding*. Second, the defendant has not demonstrated that

[5] "Under *Golding*, a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail. The appellate tribunal is free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances." (Internal quotation marks omitted.) *State* v. *Dixon*, 318 Conn. 495, 511, 122 A.3d 542 (2015); see also *In re Yasiel*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying third prong of *Golding*).

the claimed error is both so clear and so harmful that reversal is required pursuant to the plain error doctrine. Section 14-227a (c) prohibits the *state* only from offering into evidence the defendant's blood alcohol content at the time of the offense. In this case, it was the defendant who introduced the Breathalyzer test results. By doing so, the defendant opened the door to questioning about those results. Furthermore, Ehret did not testify to the defendant's blood alcohol content at the time of the incident, but rather he discussed in general terms the effect that low levels of marijuana and alcohol have on an individual, and how that would compare to a blood alcohol content that measures the effects of alcohol alone. The defendant has not demonstrated that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest injustice. See *State* v. *Terry*, supra, 820.

The judgment is affirmed.

In this opinion the other judges concurred.

CYNDI LYONS *v.* ROBERT CITRON ET AL.
(AC 39940)

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

Syllabus

The plaintiff landlord sought, by way of summary process, to regain possession of certain premises leased to the defendant tenants. The plaintiff, which had entered into a one year residential rental agreement with the defendants, served them with a notice to quit based on, inter alia, nonpayment of rent for June, 2016. When the defendants failed to vacate the premises, the plaintiff initiated a summary process action in July, 2016. Thereafter, in August, 2016, the plaintiff sent a text message to the defendants asking for the rent, and the defendants moved to dismiss the action, claiming that the text message rendered the notice to quit equivocal and that it did not terminate the tenancy. The plaintiff withdrew the initial action in September, 2016, and on the same day, served the defendants with a second notice to quit, again on the ground of, inter alia, nonpayment of rent. Subsequently, the plaintiff initiated a

second summary process action. The trial court rendered judgment in favor of the plaintiff, and the defendants appealed to this court. They claimed that the court erroneously rendered judgment for the plaintiff on the ground of nonpayment of rent when the plaintiff prematurely served the defendants with the underlying notice to quit on the same day she withdrew her first summary process action, instead of waiting nine days after rent became due to serve the notice as required by statute (§ 47a-15a). *Held* that because the service of the second notice to quit failed to comply with the statutory timing requirements, the trial court lacked subject matter jurisdiction to consider the plaintiff's second summary process action: where, as here, a landlord files a summary process action based on a notice to quit and subsequently withdraws the action, the lease is restored, its terms apply prospectively, rent becomes due on the day the summary process action is withdrawn, and the reinstatement of the lease triggers a new nine day grace period within which the tenant must pay rent in order to avoid a summary process action by the landlord, which must wait nine days after withdrawing a summary process action before serving the tenant with a new notice to quit, and although the defendants moved to dismiss the first action on the ground that the notice to quit had become equivocal and could not serve as a basis for the pending summary process action, that issue was not resolved until the plaintiff withdrew that action and, during the month between the plaintiff's text message and her withdrawal of the first action, the question of whether the lease had been reinstated had not been decided; accordingly, rent became due as of the date of the plaintiff's withdrawal of the first action, and the plaintiff's notice to quit, which was served on that same day, was premature because it was served within the nine day grace period provided by § 47a-15a.

Argued March 15—officially released June 19, 2018

Procedural History

Summary process action, brought to the Superior Court in the judicial district of Stamford-Norwalk, Housing Session, where the plaintiff filed a withdrawal in part; thereafter, the case was tried to the court, *Rodriguez, J.*; judgment for the plaintiff; subsequently, the court denied the defendants' motion to reargue, and the defendants appealed to this court. *Reversed*; *judgment directed.*

Abram Heisler, for the appellants (defendants).

Opinion

BEACH, J. This is a case involving multiple notices to quit. The defendants in this summary process action, Robert Citron and Gail Citron, appeal from the trial court's judgment of possession in favor of the plaintiff, Cyndi Lyons.[1] On appeal, the defendants claim that the court erroneously rendered judgment for the plaintiff on the ground of nonpayment of rent when the plaintiff prematurely served the defendants with the underlying notice to quit on the day she withdrew her first summary process action, instead of waiting nine days after rent became due to serve the notice, as required by General Statutes § 47a-15a.[2] We agree and, accordingly, reverse the judgment of the trial court.

The following undisputed facts and procedural history are relevant to this appeal. On July 6, 2015, the plaintiff and the defendants entered into a one year residential rental agreement for occupancy of a house located at 9 Cannon Street in Norwalk (lease). Under the terms of the lease, the defendants agreed to pay rent on or before the first day of each month. In June, 2016, the plaintiff served the defendants with a notice to quit (first notice to quit) pursuant to General Statutes § 47a-23,[3] based, in relevant part, on nonpayment of rent for that month.

[1] After the defendants filed the present appeal, the plaintiff's attorney moved for permission to withdraw as counsel for the plaintiff, which motion the trial court granted. The plaintiff did not file an appearance in this appeal.

[2] General Statutes § 47a-15a provides in relevant part that "[i]f rent is unpaid when due and the tenant fails to pay rent within nine days thereafter . . . the landlord may terminate the rental agreement in accordance with the provisions of sections 47a-23 to 47a-23b, inclusive."

[3] General Statutes § 47a-23 (a) provides in relevant part: "When the owner or lessor . . . desires to obtain possession or occupancy of any land or building, any apartment in any building, any dwelling unit, any trailer, or any land upon which a trailer is used or stands, and (1) when a rental agreement or lease of such property, whether in writing or by parol, terminates for any of the following reasons . . . (D) nonpayment of rent within the grace period provided for residential property in section 47a-15a or 21-83 . . . such owner or lessor . . . shall give notice to each lessee or occu-

The defendants failed to vacate the premises, and in July, 2016, the plaintiff initiated a summary process action (first action).[4] See *Lyons* v. *Citron*, Superior Court, judicial district of Stamford-Norwalk, Housing Session at Norwalk, Docket No. CV-16-5001142-S. On August 4, 2016, the plaintiff sent a text message to the defendants, asking "[w]here's my rent?" The defendants moved to dismiss the plaintiff's case, arguing that the text message rendered the first notice to quit equivocal.[5] On September 6, 2016, the plaintiff withdrew the first action.

On the same day, September 6, 2016, the plaintiff caused a second notice to quit to be served on the defendants, again on the ground of, inter alia, nonpayment of rent. Again, the defendants did not vacate the premises. Accordingly, on September 13, 2016, the

pant to quit possession or occupancy of such land, building, apartment or dwelling unit, at least three days before the termination of the rental agreement or lease, if any, or before the time specified in the notice for the lessee or occupant to quit possession or occupancy."

[4] "We properly may take judicial notice of [pleadings in that case]." *State* v. *Joseph*, 174 Conn. App. 260, 268 n.7, 165 A.3d 241, cert. denied, 327 Conn. 912, 170 A.3d 680 (2017); see also *Karp* v. *Urban Redevelopment Commission*, 162 Conn. 525, 527, 294 A.2d 633 (1972) ("[t]here is no question . . . concerning our power to take judicial notice of files of the Superior Court, whether the file is from the case at bar or otherwise"); *Folsom* v. *Zoning Board of Appeals*, 160 Conn. App. 1, 3 n.3, 124 A.3d 928 (2015) (taking "judicial notice of the plaintiff's Superior Court filings in . . . related actions filed by the plaintiff").

[5] An equivocal notice to quit does not effectively terminate a tenancy. *Waterbury Twin, LLC* v. *Renal Treatment Centers-Northeast, Inc.*, 292 Conn. 459, 473 n.18, 974 A.2d 626 (2009). Conduct after service of a notice to quit that indicates ambivalence toward termination may render the notice to quit ineffective. See *Centrix Management Co., LLC* v. *Valencia*, 132 Conn. App. 582, 587–89, 33 A.3d 802 (2011) ("[o]ur trial courts consistently have held that providing a tenant with a new lease agreement or with an invitation to enter into a new rental agreement after a notice to quit has been served is inconsistent with an unequivocal notice to quit"). The subsequent conduct does not, of course, amend the language of the notice to quit. Subsequent conduct may, however, be evidence of a landlord's ambivalent intent to terminate the lease. See id.

plaintiff initiated a second summary process action (second action), which is the underlying action in this appeal.[6] The plaintiff alleged, in count one of her complaint, that the defendants had "failed to pay any rent or use and occupancy to the [p]laintiff for the months of June, 2016, July, 2016, August, 2016 and September, 2016 within the grace period provided by law for residential property."[7]

On October 13, 2016, the defendants moved to dismiss count one of the plaintiff's complaint. The defendants argued that the "court lacks subject matter jurisdiction over count one which claims nonpayment of rent" because the plaintiff's withdrawal of the first "action had the effect of reinstating the defendants' lease and creating a new grace period," and "[t]he plaintiff failed to wait the statutory nine day grace period before serving the notice to quit in [the second action]."[8] The plaintiff argued, in her objection to the defendants' motion and at the court's hearing on the motion, that because the text message rendered the first notice to quit equivocal,[9] the lease was never terminated and that, therefore,

[6] The plaintiff also filed a motion for use and occupancy payments, which the court granted. At the subsequent trial, the plaintiff testified that as of that time, the defendants still had not paid rent or use and occupancy to her.

[7] In the second notice to quit, the plaintiff had also demanded that the defendants quit possession or occupancy of the premises because the defendants "originally had the right or privilege to occupy the premises, but [their] right or privilege to occupy has been terminated" and because the "[p]remises [are] occupied by one or more people who never had the right or privilege to occupy such premises." The plaintiff incorporated these two additional grounds as counts two and three of her September, 2016 complaint, respectively, but expressly did not pursue these counts at trial.

[8] Similarly, in the defendants' answer, filed after their motion to dismiss but before the court's hearing and order regarding that motion, the defendants asserted as a special defense that "[t]he plaintiff withdrew an earlier summary process case the same day that she served a notice to quit in this matter. The withdrawal of the earlier complaint had the effect of reinstating the tenants' tenancy and triggering a new nine day grace period."

[9] As noted previously; see footnote 5 of this opinion; the notice to quit is not changed by subsequent conduct. Rather, the landlord's intent to terminate may be rendered ambivalent by subsequent conduct.

the plaintiff did not need to wait nine days after withdrawing the first action before serving the defendants with the second notice to quit. The court denied the defendants' motion to dismiss, and the case proceeded to trial.

On November 22, 2016, following the trial, at which the defendants were not present, the court rendered judgment in favor of the plaintiff for immediate possession. The defendants moved to reargue, arguing that the court improperly rendered judgment for the plaintiff on the ground of nonpayment of rent because the plaintiff had served the underlying notice to quit on the day she withdrew the first action. Following oral argument, the court denied that motion. The defendants brought the present appeal from the court's judgment of possession.[10]

On appeal, the defendants claim that the court erroneously rendered judgment for the plaintiff on the ground of nonpayment of rent because the plaintiff caused the defendants to be served with the underlying notice to quit on the same day that she withdrew the first summary process action.[11] The defendants argue, in essence, that the plaintiff's withdrawal of the first action reinstated the tenancy, thereby triggering a new nine day grace period under § 47a-15a, and that the second notice to quit was invalid because the plaintiff failed to wait nine days after her withdrawal of the first action before causing the notice to quit to be served. We agree.

We begin by setting forth the standard of review and relevant law. "Summary process is a special statutory procedure designed to provide an expeditious remedy. . . . It enable[s] landlords to obtain possession of

[10] At oral argument before this court, the defendants' counsel represented that, as of that time, the defendants remained in possession of the premises.

[11] As noted in footnote 1 of this opinion, the plaintiff did not appear in this appeal.

leased premises without suffering the delay, loss and expense to which, under the common-law actions, they might be subjected by tenants wrongfully holding over their terms. . . . Service of a valid notice to quit, which terminates the lease and creates a tenancy at sufferance . . . is a condition precedent to a summary process action under § 47a-23 that implicates the trial court's subject matter jurisdiction over that action." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Waterbury Twin, LLC* v. *Renal Treatment Centers-Northeast, Inc.*, 292 Conn. 459, 466, 974 A.2d 626 (2009).

Our Supreme Court has "articulated [the] standard of reviewing challenges to the trial court's subject matter jurisdiction in a summary process action on the basis of a defect in the notice to quit. Before the [trial] court can entertain a summary process action and evict a tenant, the owner of the land must previously have served the tenant with notice to quit." (Internal quotation marks omitted.) *Bayer* v. *Showmotion, Inc.*, 292 Conn. 381, 388, 973 A.2d 1229 (2009). "[T]he summary process statute must be narrowly construed and strictly followed. . . . The failure to comply with the statutory requirements deprives the court of jurisdiction to hear the summary process action." (Citations omitted; internal quotation marks omitted.) *Bridgeport* v. *Barbour-Daniel Electronics, Inc.*, 16 Conn. App. 574, 582, 548 A.2d 744, cert. denied, 209 Conn. 826, 552 A.2d 432 (1988). "This court's review of the trial court's determination as to whether the notice to quit served by the plaintiff effectively conferred subject matter jurisdiction is plenary." *Bayer* v. *Showmotion, Inc.*, supra, 388.

Under the summary process statute, one of the grounds for terminating a lease and obtaining occupancy or possession of the premises is "nonpayment of rent within the grace period provided for residential

property in [§] 47a-15a . . . .'' General Statutes § 47a-23 (a) (1) (D). Under § 47a-15a, ''[i]f rent is unpaid when due and the tenant fails to pay rent within nine days thereafter . . . the landlord may terminate the rental agreement'' by serving the tenant with a notice to quit in accordance with § 47a-23. If the landlord does not wait until the expiration of this statutory nine day grace period before serving the notice to quit, the notice to quit is defective and the court does not have jurisdiction to hear a summary process action based on that notice to quit. See *Bridgeport* v. *Barbour-Daniel Electronics, Inc.*, supra, 16 Conn. App. 582.

''A breach of a covenant to pay rent does not automatically result in the termination of a lease. . . . The failure to pay rent gives the landlord a right to terminate the lease. . . . In order to terminate a lease, a landlord must perform some unequivocal act which clearly demonstrates his intent to terminate the lease.'' (Citations omitted.) Id., 583 n.8. ''Service of a notice to quit possession is typically a landlord's unequivocal act notifying the tenant of the termination of the lease.'' (Internal quotation marks omitted.) *Centrix Management Co., LLC* v. *Valencia*, 132 Conn. App. 582, 587, 33 A.3d 802 (2011). ''The lease is neither voided nor rescinded until the landlord performs this act and, upon service of a notice to quit possession, a tenancy at will is converted to a tenancy at sufferance. . . . It is necessary to prove the allegations of the notice to quit possession in order to obtain a judgment for possession.'' (Citations omitted.) *Housing Authority* v. *Hird*, 13 Conn. App. 150, 155, 535 A.2d 377, cert. denied, 209 Conn. 825, 552 A.2d 433 (1988).

Some circumstances may require a landlord to serve a second notice to quit prior to commencing a summary process action in order to create jurisdiction. For instance, if a landlord serves a notice to quit and commences a summary process action based on that notice

to quit, then voluntarily withdraws the summary process action prior to "a hearing and judgment thereon," the original lease is reinstated. See id., 156–57. When a landlord withdraws a summary process action that had been preceded by a valid notice to quit, "the landlord is required to serve a new notice to quit pursuant to § 47a-23 prior to commencing another summary process action against that tenant under § 47a-23a." *Waterbury Twin, LLC* v. *Renal Treatment Centers-Northeast, Inc.*, supra, 292 Conn. 465, 474 (requiring new notice to quit prior to commencement of new summary process action in context of commercial lease).

Whether the withdrawal of the prior action and subsequent reinstatement of a residential lease triggers a new nine day grace period for payment of rent under § 47a-15a is an issue of first impression before this court.[12] When a notice to quit terminates the lease, the tenant "is excused from a duty to pay the stipulated rent under the lease . . . ." *Housing Authority* v. *Hird*, supra, 13 Conn. App. 158. If the landlord files a summary process action based on that notice to quit and subsequently withdraws the action, the lease is restored and the lease's terms apply prospectively. *Sproviero* v. *J.M. Scott Associates, Inc.*, 108 Conn. App. 454, 464, 948 A.2d 379, cert. denied, 289 Conn. 906, 957 A.2d 873 (2008). Because the lease's terms do not apply retroactively, rent becomes due on the day the summary process

[12] As the defendants noted in their brief to this court, this issue has been directly addressed by two decisions of the housing division of the Superior Court, both of which concluded that the withdrawal of a summary process action and consequent reinstatement of the rental agreement triggers a new grace period pursuant to § 47a-15a. See *Tamborra* v. *Jordan*, Superior Court, judicial district of New London, Docket No. CV21-10160 (December 22, 1999) (26 Conn. L. Rptr. 200, 202); *Sammy Redd & Associates* v. *May*, Superior Court, judicial district of Hartford, Housing Session, Docket No. SPH 95376 (January 21, 1998) (22 Conn. L. Rptr. 107, 108); see generally *Centrix Management Co., LLC* v. *Valencia*, supra, 132 Conn. App. 587 n.2 ("Ordinarily, this court does not rely on Superior Court authority. In this instance, however, there is sparse appellate authority directly on point . . . .").

action is withdrawn and the lease is restored. See *Housing Authority* v. *Hird*, supra, 156–57 (rent due for January when summary process action commenced in November and withdrawn in January); see also *Tamborra* v. *Jordan*, Superior Court, judicial district of New London, Docket No. CV21-10160 (December 22, 1999) (26 Conn. L. Rptr. 200, 202) (rent became due on day first action withdrawn). Accordingly, we hold that the reinstatement of the lease triggers a new nine day grace period within which the tenant must pay rent in order to avoid a summary process action; see General Statutes § 47a-15a;[13] and a landlord may serve a new notice to quit on the ground of nonpayment of rent only if the tenant fails to pay rent on the day of the previous action's withdrawal or within nine days thereafter.

In this case, no one has suggested that the plaintiff's first notice to quit did not comply with the statutory requirements and, thus, it served as the plaintiff's "unequivocal act notifying the [defendants] of the termination of the lease." (Internal quotation marks omitted.) See *Centrix Management Co., LLC* v. *Valencia*, supra, 132 Conn. App. 587. Upon receipt of the plaintiff's August 4, 2016 text message inquiring about rent, the defendants moved to dismiss the first action, arguing that the text message had rendered the plaintiff's intent to terminate equivocal. See, e.g., *Bargain Mart, Inc.* v. *Lipkis*, 212 Conn. 120, 134, 561 A.2d 1365 (1989) ("notice to quit will not terminate a lease if the notice itself is invalid"). On September 6, 2016, the plaintiff withdrew the first action; the court did not address the question of whether the first notice had been valid. That same day, the plaintiff served the defendants with the second notice to quit, on the ground of nonpayment of rent. Whether the plaintiff prematurely served this notice to quit depends on whether rent became due as

[13] The grace period pursuant to § 47a-15a begins on the day rent becomes "due."

of her August 4 text message to the defendants or as of her September 6 withdrawal of the first action.

The defendants premise their claim that the second notice to quit was premature on their position that rent became due on the day that the plaintiff withdrew the first action, not on the day she sent the text message. Although the defendants moved to dismiss the first action, arguing that the notice to quit had become equivocal and, therefore, could not serve as the basis for the pending summary process action, that issue was not resolved until the plaintiff withdrew that action.[14] During the month between the plaintiff's text message and her withdrawal of the first action, the question of whether the lease had been reinstated had not been decided. Accordingly, we hold that rent became due as of the date of the plaintiff's withdrawal of the first action, and the plaintiff's notice to quit, which was served on that same day, was premature because it was served within the nine day grace period provided by § 47a-15a.[15] Because the timing of the service of the notice to quit failed to comply with the statutory requirements, the court did not have jurisdiction to hear the

[14] Notably, in cases where notices to quit were served and the leases in question were deemed to remain in effect continuously because of defects in the notices, the notices were defective on their face, and not rendered ineffective by some later event. See, e.g., *Bridgeport* v. *Barbour-Daniel Electronics, Inc.*, supra, 16 Conn. App. 582; *Housing Authority* v. *Hird*, supra, 13 Conn. App. 156–57. Thus, the unequivocal intent had never been expressed where the initial notice to quit was equivocal.

[15] This court's conclusion that a landlord must wait nine days after withdrawing a summary process action before serving the tenant with a new notice to quit is consistent with our Supreme Court's preference for bright line rules in summary process actions. See *Waterbury Twin, LLC* v. *Renal Treatment Centers-Northeast, Inc.*, supra, 292 Conn. 473 ("not requiring the service of a new notice to quit as a per se rule could well complicate the status of the parties' relationship after the withdrawal of the initial complaint, and would require more extensive determinations by the trial court concerning the parties' intentions and whether postwithdrawal payments are for rent, or use and occupancy").

second summary process action. See *Bridgeport* v. *Barbour-Daniel Electronics, Inc.*, supra, 16 Conn. App. 582.

The judgment is reversed and the case is remanded with direction to render judgment dismissing the action.

In this opinion the other judges concurred.

HUGH F. HALL *v.* DEBORAH HALL
(AC 38834)

Lavine, Sheldon and Bear, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court holding him in contempt for violating a court order and from the court's denials of his motion for reconsideration and the parties' joint motion to open and vacate the contempt judgment. Following the commencement of the dissolution action, the parties' entered into a pendente lite stipulation to release certain funds held in an escrow account to them for deposit into a joint bank account that required the signature of both parties prior to any withdrawal of funds. The trial court approved the stipulation and made it an order of the court. The parties then knowingly set up a joint account that did not comply with the court's order because it permitted online access and, therefore, did not require the parties' signatures prior to the withdrawal of funds. Thereafter, the plaintiff unilaterally withdrew $70,219.99 from the joint account and deposited the funds into his personal savings account, allegedly to protect the funds from the defendant's misuse. In response, the defendant filed a motion for contempt alleging that the plaintiff had wilfully violated the court's order by withdrawing the funds. Following a hearing, the trial court granted the motion for contempt, and the plaintiff filed a motion for reconsideration. In support of his motion, the plaintiff submitted an affidavit in which he averred that his counsel had advised him that he could transfer funds from the joint account to prevent the defendant's dissipation of marital assets. He attached to his affidavit an e-mail exchange allegedly between himself and his counsel discussing the subject withdrawal. The trial court denied the motion for reconsideration. Thereafter, the parties entered into a separation agreement, which the court incorporated into its dissolution judgment. In accordance with a provision of the separation agreement, the parties filed a joint motion to open and vacate the judgment of contempt on the ground that the findings therein could interfere with the parties' future employment.

Following a hearing, the court denied the motion, concluding, inter alia, that there was no evidence presented that demonstrated the adverse effect that the contempt finding would have on the plaintiff's employment. On the plaintiff's amended appeal to this court, *held*:

1. The plaintiff could not prevail on his claim that the trial court improperly held him in contempt, which was based on his claim that he was not in wilful violation of the court's order because he relied on the advice of counsel when he withdrew the subject funds from the parties' joint account in violation of the court's order: there was no basis in the record on which to conclude that the trial court abused its discretion in finding the plaintiff in contempt, the record having lacked the evidentiary foundation to support the plaintiff's assertion that he testified repeatedly during the hearing on the motion for contempt about his reliance on his counsel's advice when he withdrew the funds from the joint account, as the plaintiff did not testify or present any evidence that he, in fact, had relied on counsel's advice but, rather, testified, at most, that he had consulted with counsel about the appropriate course of action under the circumstances, and this court could not speculate as to what the plaintiff purportedly meant to say during the contempt proceedings or assume that he actually relied on counsel's advice; moreover, this court was not persuaded by the plaintiff's claim that the trial court compounded its error by denying his motion for reconsideration because it ignored evidence that he had relied on the advice of counsel when withdrawing the funds, as his submission of additional evidence in support of his motion in the form of his affidavit and the e-mail exchange allegedly between himself and his counsel amounted to an attempted impermissible second bite of the apple after a multiday hearing on the defendant's motion for contempt.

2. The trial court did not abuse its discretion in denying the parties' joint motion to open and vacate the judgment of contempt on the basis of its conclusion that there was no evidence presented demonstrating the adverse effect that the contempt finding would have on the plaintiff's employment; although the plaintiff and his counsel both argued during the proceedings on the motion to open and vacate that the contempt finding would be very deleterious to the plaintiff's career, argument is not evidence, and the plaintiff failed to point to any evidence in the record that supported his claim that the contempt finding would have an adverse effect on his career.

Argued December 6, 2017—officially released June 19, 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, where the court, *Colin*, *J.*,

issued an order in accordance with the parties' stipulation; thereafter, the court, *Tindill*, *J.*, granted the defendant's motion for contempt; subsequently, the court, *Tindill*, *J.*, denied the plaintiff's motion for reconsideration; thereafter, the matter was tried to the court, *Hon. Stanley Novack*, judge trial referee; judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; subsequently, the plaintiff appealed to this court; thereafter, the court, *Tindill*, *J.*, denied the parties' joint motion to open and vacate the judgment of contempt, and the plaintiff filed an amended appeal with this court; subsequently, the court, *Tindill*, *J.*, issued an articulation and a memorandum of decision in compliance with an order of this court. *Affirmed.*

Barbara M. Schellenberg, with whom, on the brief, was *Richard L. Albrecht*, for the appellant (plaintiff).

Opinion

LAVINE, J. In this amended appeal, the plaintiff, Hugh F. Hall, appeals from the trial court's judgment of civil contempt rendered against him because he, in violation of an order of the court, unilaterally withdrew funds from a joint bank account and deposited them into his personal savings account, and because the parties placed the funds in an account that did not meet the requirements of the court order. On appeal, the plaintiff claims that the court (1) improperly held him in contempt although he allegedly relied on the advice of counsel when he withdrew the funds, and (2) improperly denied the parties' joint motion to open and vacate the judgment of contempt. We affirm the judgment of the trial court.

The following undisputed facts and procedural history provide the context for this appeal. The parties

were married on August 10, 1996, and have three children together. On February 3, 2014, the plaintiff commenced a dissolution action. The parties subsequently entered into a pendente lite stipulation on October 27, 2014, which provided in relevant part: "The funds currently being held in escrow [by a law firm] in the approximate amount of $533,588 shall be released to the parties for deposit into a joint bank account requiring the signature of both parties prior to any withdrawals . . . ." The court, *Colin*, *J.*, approved the parties' stipulation and made it a court order. After this order, the parties set up a joint account and transferred the escrow funds into it.

Approximately one year later, on September 23, 2015, the defendant, Deborah Hall, filed a motion for contempt. She alleged that on September 22, 2015, the plaintiff committed a wilful violation of the October 27, 2014 court order when he withdrew the sum of $70,219.99 from the joint account—the balance of the account at the time—and placed it into a separate, personal account.[1] Following an evidentiary hearing, the court, *Tindill*, *J.*, on December 7, 2015, granted the defendant's motion for contempt. Thereafter, the plaintiff, who then was self-represented, filed a motion for reconsideration, which the court denied without issuing a written decision.

[1] The plaintiff also filed a motion for contempt on September 24, 2015, alleging that the defendant violated the same October 27, 2014 order on various occasions. The court granted the plaintiff's motion in part and denied it in part. The defendant did not submit a brief in this appeal and, therefore, does not challenge the contempt finding as to her. As discussed in this opinion, however, the court's contempt judgment against the defendant is partially implicated by this appeal insofar as the joint motion to open and vacate the judgments of contempt sought to vacate the court's judgments of contempt rendered against *each* of the parties. Because the judgment of contempt against the defendant is not otherwise implicated by this appeal, however, references in this opinion to the judgment of contempt refers to the judgment rendered against the plaintiff.

Subsequent to the court's judgment of contempt; see footnote 1 of this opinion; on January 27, 2016, the parties entered into a separation agreement. That same day, the court, *Hon. Stanley Novack*, judge trial referee, accepted the parties' separation agreement and incorporated it into its judgment of dissolution. Section 10 of the separation agreement provided in relevant part as follows: "The parties stipulate and agree that they will file a joint motion to open and vacate the findings of contempt in that they believe such findings could interfere with the parties' future employment. . . . The parties understand that this motion must be filed within four (4) months of each of the orders and it is within the discretion of the Court to act thereon." Also on January 27, 2016, the plaintiff filed an appeal from the court's contempt judgment[2] and its denial of his motion for reconsideration.

Five days later, on February 1, 2016, the parties filed a joint motion to open and vacate the judgment of contempt requesting that the court vacate its order of contempt. The parties specifically relied on § 10 of their separation agreement in support of their joint motion to open and vacate. Judge Tindill denied the joint motion to open and vacate on March 9, 2016, without issuing a written decision. The plaintiff then filed an amended appeal on March 29, 2016, challenging the denial of the motion to open and vacate. The plaintiff's amended appeal is now before this court. Additional facts and procedural history will be set forth as necessary.

[2] "[A] trial court ruling on a motion for contempt in a marital dissolution action is a final judgment for purposes of appeal." (Internal quotation marks omitted.) *Baker* v. *Baker*, 95 Conn. App. 826, 827 n.1, 898 A.2d 253 (2006); see also *Bryant* v. *Bryant*, 228 Conn. 630, 636, 637 A.2d 1111 (1994) (civil contempt finding is appealable final order); *Keller* v. *Keller*, 158 Conn. App. 538, 544, 119 A.3d 1213 (2015) (finding of contempt not subsumed into final judgment of divorce action), appeal dismissed, 323 Conn. 398, 147 A.3d 146 (2016) (certification improvidently granted).

I

The plaintiff's first claim is that the trial court improperly held him in contempt of court. He argues that a court should not find that a litigant wilfully violates a court order when he or she reasonably acts in reliance on counsel's advice. According to the plaintiff, his attorney "advised him" to withdraw the funds from the joint account in violation of the October 27, 2014 court order, and the court failed to address "the evidence on advice of counsel, despite the fact that [he] testified about this repeatedly." He also claims that the court "compounded its error by denying reconsideration" because it overlooked the evidence demonstrating that he in fact relied on counsel's advice in withdrawing funds from the joint account. We are unpersuaded.

The record and the court's written memorandum of decision on the defendant's motion for contempt reveal the following undisputed facts and procedural history. After the parties set up the joint bank account pursuant to the court's October 27, 2014 order, they knew that the account did not comply with that order "the very first day" they opened it. More specifically, the joint account they set up permitted online access and, therefore, did not require signatures from either party, as required by the order, prior to the withdrawal or transfer of funds. The plaintiff testified that banks no longer require dual signatures on accounts. Nonetheless, the court order mandating that the funds be placed in an account "requiring the signature of both parties prior to any withdrawals" was not modified before the defendant filed her motion for contempt.

At some point thereafter, the plaintiff became concerned that the defendant was unilaterally withdrawing funds from the joint account and spending them on alcohol and drugs. Therefore, according to the plaintiff, on September 22, 2015, he withdrew the $70,219.99 from

the joint account, without seeking the court's approval, in an attempt to preserve the remaining marital assets contained in that account. He then placed the withdrawn funds into a separate account solely in his name that the defendant could not access. On November 2, 2015, he testified: "I felt I was complying with the terms of the court order by moving the funds and wanting to put them into an account that did comply with the court order. And I demanded that [the defendant] meet me at a bank where we could set up such an account that did comply with the order." Immediately after making this statement, the following examination took place regarding the September 22, 2015 withdrawal of the $70,219.99 from the joint account:

"The Court: *Were you represented by counsel at that time*?

"[The Plaintiff]: *Yes, I did consult with counsel.*

"[The Defendant's Counsel]: Yes. And so is your testimony, Mr. Hall—because I'm hearing you say two different things—is your testimony today [that] the reason why you moved the account, the money from the account, was because it didn't comply with the original court order or was it because you had a concern that [the defendant] was becoming drug-dependent at that point in time?

"[The Plaintiff]: The reason I felt action had to be taken was because I had recently learned about her drug abuse. The reason I felt that it was justified in acting to move the funds at that time was in order—so that I could comply with the court order." (Emphasis added.)

The court then adjourned for the day, and the parties did not appear in court again in connection with the contempt proceeding until December 1, 2015. During the December 1, 2015 hearing, the parties revisited

the plaintiff's September, 2015 withdrawal of the $70,219.99. The plaintiff again testified that he withdrew the $70,219.99 from the joint account because the defendant was withdrawing funds from that same account and "spending it on cocaine binges." The court then asked the plaintiff, "And when was it that you removed the money, September what?" In response, the plaintiff testified, "Sometime in September *after consulting with my counsel about the situation*." (Emphasis added.)

At various times during the proceeding, the plaintiff testified that he withdrew funds from the parties' joint account after consulting with counsel, but did not testify that he was advised by counsel to withdraw the $70,219.99 before he did so.[3] When the plaintiff's counsel asked him why he should not be held in contempt, the plaintiff testified: "I believe that what I was doing was in order to comply with Judge Colin's orders from October, 2014. And that I was not utilizing the funds in any way in violation of the spirit of that agreement and that I took steps to try and work with her to comply with the order, set up a compliant account but at that point in time, there was no further cooperation on her side. *Furthermore, I would say throughout the entire*

[3] For example, the court asked the plaintiff to explain the timing of his withdrawal. He testified: "*That's when I was discussing with my counsel the appropriate course of action* because once there was the violation by [the defendant] of the verbal agreement that we had online access, where we'd agreed we would just not do it even though the court order said something different from what we were doing, we were—we thought [we] were about to settle the entire case, we felt that it was best to just see it through. And it was only when the settlement process fell completely apart and she appeared to be acting erratically, we became more concerned that something had to be done." (Emphasis added.)

In addition, when the court asked him what prevented him from withdrawing the funds before September, he testified: "Nothing prevented me. *It was more in discussion with counsel on what was the appropriate thing to do in that period of time when we were at the eve of settling the case*." (Emphasis added.)

process, I was consulting with counsel about what was the proper course of action." (Emphasis added.)

The court completed the evidentiary portion of the hearing on December 1, 2015. The parties agreed that the record contained sufficient evidence for the court to rule on both motions for contempt; see footnote 1 of this opinion; and waived argument.

In its December 7, 2015 memorandum of decision, the court found that the plaintiff wilfully had violated the court's October 27, 2014 order. The court first found that, on April 28, 2015, the plaintiff "unilaterally and without the defendant's consent, withdrew $237,643.11 and deposited it into his own . . . savings account."[4] It also found that, "[o]n September 22, 2015, the plaintiff wilfully violated the order a second time when he moved $70,219.99 from the joint account to that same savings account. Unlike the account into which the escrow funds were originally deposited pursuant to the court order, the defendant did not have access to the account into which the money was transferred." The court further found that the plaintiff acknowledged that his conduct violated the court order, but that he asserted five reasons as to why it was not "wilful." The court rejected each of the plaintiff's contentions. It did not find that the plaintiff had relied on the advice of counsel when he transferred the funds into his personal account, nor did it state that the plaintiff made any argument to that effect.

[4] The defendant's motion for contempt alleged only that the plaintiff violated the court's order by withdrawing the $70,219.99 from the joint account. During the hearing on November 2, 2015, counsel for the defendant stated that the initial $237,643.11 withdrawal was simply offered "on the issue of wilfulness" regarding the $70,219.99 withdrawal. Nonetheless, the court concluded that such withdrawal was in violation of the court order. The plaintiff makes no claim that he relied on the advice of counsel with respect to that initial unilateral withdrawal from the joint account. Because of the result we reach in this opinion, we do not need to analyze the effect of the court's conclusion with respect to the initial unilateral withdrawal of $237,643.11.

After the court found the plaintiff in contempt, the plaintiff, then self-represented, filed a motion for reconsideration, which was later amended after he retained new counsel. Among other claims, he asserted that "the court inquired of the plaintiff as to whether in moving funds from the parties' joint account he acted on the advice of counsel, to which he testified that he had." He claimed that his previous counsel did not pursue this line of questioning and also "did not offer into evidence exculpatory e-mails from September, 2015." In support of his motion for reconsideration, the plaintiff submitted an affidavit in which he averred that in August, 2015, his previous counsel had advised him that he could transfer funds from the joint account in order to prevent dissipation of marital assets.[5] He further asserted, for the first time, that his previous counsel confirmed that advice via e-mail in September, 2015. In support of this assertion, the plaintiff attached to his affidavit an e-mail chain allegedly between himself and his previous counsel discussing the September 22, 2015 withdrawal. The court denied the motion for reconsideration on January 4, 2016, without issuing a written decision.

On July 15, 2016, the plaintiff filed a motion for articulation, requesting that the court provide the factual and legal bases for denying both the motion for reconsideration and the joint motion to open and vacate. See part II of this opinion. On July 27, 2016, the court denied the plaintiff's motion for articulation, and the plaintiff subsequently filed in this court a motion for review of that denial. This court granted the motion for review and, on October 26, 2016, ordered the court to (1) articulate the factual and legal bases for its denial of the

[5] This court may take judicial notice of filings in the Superior Court. See, e.g., *State* v. *Dyous*, 153 Conn. App. 266, 279–80, 100 A.3d 1004 (2014), appeal dismissed, 320 Conn. 176, 128 A.3d 505 (2016) (certification improvidently granted).

plaintiff's motion for reconsideration, and (2) issue a written memorandum of decision detailing the factual and legal bases for its denial of the joint motion to open and vacate.

On January 9, 2017, in compliance with this court's October 26, 2016 order, the trial court issued an articulation, detailing its factual and legal reasons for denying the plaintiff's motion for reconsideration. Although the court set forth in great detail the reasons for its decision, only the following portions are directly relevant to this appeal. It initially noted "that there had been no misapprehension of facts by the court." The court determined that it was undisputed that the plaintiff violated the court order by making the two separate withdrawals of $237,643.11 and $70,219.99 from the joint account, a total of $307,863.10. It also stated that the plaintiff "is a licensed attorney in New York and Massachusetts and therefore has a better understanding and appreciation of the law and legal procedures than the average litigant or layperson." The plaintiff's assertions in his motion for reconsideration, according to the court, also "validate[d] [its] finding that [he] wilfully engaged in self-help . . . ." Finally, it stated that the plaintiff's "dissatisfaction with the services and counsel of his attorney of record during the evidentiary hearing is not a basis for reconsideration of the court's finding of wilful contempt based on the evidence . . . ."

We now turn to the legal principles governing our review of the plaintiff's claim. "[O]ur analysis of a [civil] 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." (Internal quotation marks omitted.) *Giordano* v. *Giordano*, 127 Conn. App. 498, 502, 14 A.3d 1058 (2011).

"A party to a court proceeding must obey the court's orders unless and until they are modified or rescinded, and may not engage in self-help by disobeying a court order to achieve the party's desired end. . . .

"The court has an array of tools available to it to enforce its orders, the most prominent being its contempt power. Our law recognizes two broad types of contempt: criminal and civil. . . . The two are distinguished by the type of penalty imposed. . . .

"To impose contempt penalties, whether criminal or civil, the trial court must make a contempt finding, and this requires the court to find that the offending party wilfully violated the court's order; failure to comply with an order, alone, will not support a finding of contempt. . . . Rather, to constitute contempt, a party's conduct must be wilful. . . . A good faith dispute or legitimate misunderstanding about the mandates of an order may well preclude a finding of wilfulness. . . . Whether a party's violation was wilful depends on the circumstances of the particular case and, ultimately, is a factual question committed to the sound discretion of the trial court. . . . Without a finding of wilfulness, a trial court cannot find contempt and, it follows, cannot impose contempt penalties." (Citations omitted; footnote omitted; internal quotation marks omitted.) *O'Brien* v. *O'Brien*, 326 Conn. 81, 97–99, 161 A.3d 1236 (2017). The clear and convincing evidence standard of proof applies to civil contempt proceedings like those

at issue here. See *Brody* v. *Brody*, 315 Conn. 300, 318–19, 105 A.3d 887 (2015).

The plaintiff does not challenge the court's finding that the October 27, 2014 order, which incorporated the parties' stipulation, was clear and unambiguous.[6] He focuses his appeal instead on the court's judgment of contempt. He argues that in withdrawing the $70,219.99 from the parties' joint account in September, 2015, he acted on the advice of counsel. He states in support of his argument that he "testified about this repeatedly" during the contempt proceeding and that "his former attorney *advised him*" to remove the funds from the joint account. (Emphasis added.) We disagree that the plaintiff testified, or presented any other evidence, that he *relied* on counsel's advice. At most, he testified that he had *consulted* with his attorney about the appropriate course of action under the circumstances. Nor did the court specifically *ask* the plaintiff whether he acted on the advice of counsel in connection with the September, 2015 transfer of the $70,219.99 from the parties' joint account into a separate account that the defendant could not access. Rather, the court simply asked, "Were you represented by counsel at that time?" And the plaintiff responded, "Yes, I did *consult* with counsel." (Emphasis added.) The record, therefore, does not support the plaintiff's argument on appeal that he repeatedly testified about his *reliance* on counsel's advice when he withdrew the $70,219.99 from the parties' joint account in violation of the October 27, 2014 court order. Nor does it support his argument that counsel advised him to do so. The record therefore lacks the evidentiary foundation necessary for our favorable

[6] On the basis of our independent review of the parties' stipulation, which was incorporated into the court's October 27, 2014 order, we agree with the court's finding that the order was sufficiently clear and unambiguous so as to support a judgment of contempt. See *Giordano* v. *Giordano*, supra, 127 Conn. App. 502.

consideration of the plaintiff's argument. See *Baker* v. *Baker*, 95 Conn. App. 826, 832, 898 A.2d 253 (2006).

In *Baker*, the trial court held the defendant in contempt for failing to make certain alimony and child support payments pursuant to a pendente lite order. See id., 830. While the defendant was testifying in connection with the contempt proceeding brought against him for his failure to pay, his counsel attempted to elicit testimony that "when he failed to make the required payments, he did so in reliance on her legal advice. The plaintiff's counsel objected to these questions as attempts to solicit hearsay, and the court sustained the objections." (Footnote omitted.) Id. During closing arguments, the defendant's counsel "argued that her client's noncompliance with the court's order was not wilful because . . . [h]e relied on the advice of counsel." (Internal quotation marks omitted.) Id.

Much like the plaintiff in the present case, the defendant in *Baker* argued that his conduct was not wilful. See id. This court rejected that argument in *Baker*, holding that "there was no competent evidence before the court to establish that [the defendant acted on his counsel's advice]." Id., 831–32. This court noted that "[i]n urging us to conclude that reliance on counsel's advice is a defense to contempt, the defendant expects this court to assume that he so relied." Id., 832. Because counsel's representations that the defendant acted on her legal advice were not evidence and it was improper for an appellate court to find facts, the defendant's claim failed. See id., 832–33.

The record of the contempt proceedings in the present case similarly lacks the evidentiary foundation claimed by the plaintiff.[7] He, too, asks us to "assume

[7] Our review of the court's judgment holding the plaintiff in contempt is limited to the evidence actually before it on December 7, 2015, the date of its memorandum of decision finding him in contempt. As discussed later in this opinion, it would be improper for us to consider the evidence subsequently submitted in support of the plaintiff's motion for reconsideration,

that he so relied [on his counsel's advice]"; id., 832; when he withdrew the $70,219.99 from the parties' joint account in violation of the court order on the basis of his testimony that he consulted with counsel about "what was appropriate" under the circumstances. Consulting with counsel and *actually relying* on counsel's advice, in our view, are not necessarily the same thing; consulting and thereafter relying on the advice provided involves two separate steps. One need not be a lawyer, like the plaintiff, to appreciate this distinction. Moreover, we cannot speculate as to what the plaintiff purportedly meant to say during the contempt proceedings. See *Baker* v. *Baker*, supra, 95 Conn. App. 832; see also *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 502, 510, 970 A.2d 578 (2009) (speculation and conjecture have no place in appellate review).

It was not error for the court to find that the plaintiff unilaterally withdrew the $70,219.99 from the joint account in violation of its October 27, 2014 order. The court construed his conduct to be a form of impermissible "self-help" and found that he "wilfully violated the [court] order . . . ." See, e.g., *O'Brien* v. *O'Brien*, supra, 326 Conn. 97 (party "may not engage in 'self-help' by disobeying a court order to achieve the party's desired end"). We cannot conclude that the trial court abused its discretion under the circumstances when it found the plaintiff in contempt. See, e.g., *Giordano* v. *Giordano*, supra, 127 Conn. App. 502.

We similarly reject the plaintiff's claim that the trial court "compounded its error" when it denied his motion for reconsideration. "[T]he purpose of a reargument is . . . to demonstrate to the court that there is some

namely, his affidavit and the e-mails he attached to it. See, e.g., *Chartouni* v. *DeJesus*, 107 Conn. App. 127, 129, 944 A.2d 393 (motion to reargue or reconsider is not opportunity to get second bite of apple), cert. denied, 288 Conn. 902, 952 A.2d 809 (2008).

decision or some principle of law which would have controlling effect, and which has been overlooked, or that there has been a misapprehension of facts. . . . [A] motion to reargue . . . is not to be used as an opportunity to have a second bite of the apple or to present additional cases or briefs which could have been presented at the time of the original argument." (Internal quotation marks omitted.) *Chartouni* v. *DeJesus*, 107 Conn. App. 127, 129, 944 A.2d 393, cert. denied, 288 Conn. 902, 952 A.2d 809 (2008). We review a trial court's denial of a motion for reconsideration for an abuse of discretion. *Shore* v. *Haverson Architecture & Design, P.C.*, 92 Conn. App. 469, 479, 886 A.2d 837 (2005), cert. denied, 277 Conn. 907, 894 A.2d 988 (2006). "When reviewing a decision for an abuse of discretion, every reasonable presumption should be given in favor of its correctness. . . . As with any discretionary action of the trial court . . . the ultimate [question for appellate review] is whether the trial court could have reasonably concluded as it did." (Internal quotation marks omitted.) *Liberti* v. *Liberti*, 132 Conn. App. 869, 874, 37 A.3d 166 (2012).

The court stated that it did not misapprehend the facts actually presented to it during the hearing on the motions for contempt. As previously discussed, and contrary to his argument on appeal, the plaintiff *did not* testify in that hearing that he relied on counsel's advice when he made the September, 2015 withdrawal in violation of the October, 2014 court order. Nor did the court specifically "[inquire] of the plaintiff as to whether in moving funds from the parties' joint account *he acted on the advice of counsel*, to which he testified that he had," as the plaintiff argued in his motion for reconsideration. Therefore, both his argument and his attempts to introduce additional evidence in support of that argument—an affidavit indicating that he relied on counsel's advice and the e-mail exchange allegedly

between him and his previous counsel—amounted to an attempted impermissible second bite of the apple after a multiday hearing. See, e.g., *Chartouni* v. *DeJesus*, supra, 107 Conn. App. 129.[8] Accordingly, we find no basis in the record on which to conclude that the court abused its discretion when it denied the plaintiff's motion for reconsideration.

II

The plaintiff's second claim is that the trial court improperly denied the parties' joint motion to open and vacate the judgment of contempt. He argues that the court's memorandum of decision demonstrates that it "ignored or misconstrued important evidence and statements made at the hearing on the motion, thereby improperly turning a remedial order into a punitive one." According to the plaintiff, the trial court improperly concluded that there was no evidence before it demonstrating the "adverse professional effect" that the contempt finding would have on his career.[9] We are unpersuaded.

[8] The court also properly concluded that the plaintiff's reliance on *O'Brien* v. *O'Brien*, 161 Conn. App. 575, 128 A.3d 595 (2015), rev'd, 326 Conn. 81, 161 A.3d 1236 (2017), was misplaced. Although the trial court in *O'Brien* denied the defendant's motion for contempt because the plaintiff acted on counsel's advice when he violated certain automatic orders; see id., 583, 591; this court, on appeal, "[took] no position on whether a party may shield himself or herself from a finding of wilful contempt by showing that he or she relied on the advice of legal counsel." Id., 591 n.15. Nor did our Supreme Court address that specific issue. See *O'Brien* v. *O'Brien*, supra, 326 Conn. 85–86. Therefore, even if the plaintiff in the present case actually testified that he relied on counsel's advice, his motion for reconsideration failed to present any *controlling* authority that the court overlooked. See, e.g., *Chartouni* v. *DeJesus*, supra, 107 Conn. App. 129.

[9] The plaintiff also argues that "there are several problems with [the court's finding with respect to the defendant's reasons for agreeing to the joint motion to open and vacate]." Regarding the motion to open and vacate, the defendant testified that she "agree[d] [to] whatever [the court] decide[s] is in the best interest of us, and I respect your decision. That's what I need to add. That's it." The defendant did not file a brief in this appeal and, therefore, does not challenge the denial of the joint motion to open and vacate. The motion to open and vacate also relied on § 10 of the parties'

The record and the court's memorandum of decision disclose the following undisputed facts and relevant procedural history. On February 1, 2016, the parties, within the four month period set forth in General Statutes § 52-212a, filed a joint motion to open and vacate the judgment of contempt. The motion stated in relevant part: "The parties submit that it would be in the interest of justice to vacate [the findings of contempt] and otherwise leave the compliance orders in force."

The parties appeared before the court on February 22, 2016, to argue that particular motion. During oral argument, the plaintiff asserted: "I do believe there's a sound basis for [the motion to open and vacate]. I also do think that it's very deleterious to my career to have this contempt citation. I'm in the banking—I'm a lawyer. It's a question on every application, have you been . . . in contempt of any order? It would have ramifications for my licensing in the securities industry, et cetera. I think, likewise, the various issues that arose with [the defendant's] potential contempt . . . I think the best thing for us now is to just move on with a clean slate. We had a very contentious fall. Things are working well with us now. And it seems in the best interest of all parties to just start fresh and allow us to put that behind us."[10] Richard Albrecht, the plaintiff's newly retained attorney, was arguing another matter in a different courtroom and, therefore, was not present when the plaintiff made these statements. The court then continued the matter to a later date.

The parties again appeared before the court on March 7, 2016, to argue the motion to open and vacate. During

separation agreement, which states that they agreed to file the motion because "they believe such findings could interfere with the parties' future employment." Accordingly, we do not address the court's finding with respect to the defendant.

[10] The plaintiff was not sworn in to testify and acknowledged that his statements were "argument" in support of the motion to open and vacate.

that proceeding, Albrecht argued, inter alia, that the motion to open and vacate should be granted because the contempt finding would impact the plaintiff's professional career. As previously set forth, the court denied the joint motion to open and vacate on March 9, 2016, without issuing a written decision.

On January 10, 2017, in compliance with this court's October 26, 2016 order, the trial court issued a written decision detailing the factual and legal reasons for its denial of the joint motion to open and vacate. The basis for the motion, according to the court, was that the adverse effects of a contempt finding on the plaintiff's professional career placed the parties in a " 'unique situation' " and, therefore, that the " 'interests of justice' " required vacatur of the contempt findings. The court stated, however, "[t]here is no evidence that the parties' circumstances are unique or distinguishable such that the findings of wilful contempt . . . should be vacated in the interests of justice." It also stated that "[t]here is no evidence of what, specifically, is or will be the adverse professional effect on the [plaintiff's] employment or career." Although the court stated that the defendant did not oppose the motion to open and vacate, the court found that she did not oppose it essentially to bring the proceedings to a close.

"We first set forth the legal standards governing our review. . . . A motion to open a judgment is governed by . . . § 52-212a and Practice Book § 17-4. Section 52-212a provides in relevant part: Unless otherwise provided by law and except in such cases in which the court has continuing jurisdiction, a civil judgment or decree rendered in the Superior Court may not be opened or set aside unless a motion to open or set aside is filed within four months following the date on which it was rendered or passed. . . . Practice Book § 17-4 states essentially the same rule. . . .

"We do not undertake a plenary review of the merits of a decision of the trial court to grant or to deny a motion to open a judgment. . . . In an appeal from a denial of a motion to open a judgment, our review is limited to the issue of whether the trial court has acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action. . . . The manner in which [this] discretion is exercised will not be disturbed so long as the court could reasonably conclude as it did." (Citations omitted; internal quotation marks omitted.) *Gordon* v. *Gordon*, 148 Conn. App. 59, 64–65, 84 A.3d 923 (2014).[11]

After reviewing the record and the court's memorandum of decision, we conclude that the court did not abuse its discretion in denying the motion to open and vacate.[12] On February 22, 2016, the plaintiff argued that

[11] We note that "[c]ivil contempt is designed to compel future compliance. After a finding of civil contempt, the court retains the jurisdiction to vacate the finding or to give the contemnor the opportunity to purge the contempt by later compliance with a court order." *Monsam* v. *Dearington*, 82 Conn. App. 451, 456–57, 844 A.2d 927 (2004); see also *Eric S.* v. *Tiffany S.*, 143 Conn. App. 1, 9, 68 A.3d 139 (2013). Although it could do so, a court is not required, however, to vacate its judgment after a contemnor has purged himself or herself of the contemptuous acts. In this case, the court identified three violations of the court order: the improperly established joint bank account, the $237,643.11 withdrawal, and the $70,219.99 withdrawal. Assuming that the plaintiff corrected the first and third violations identified by the court, there is no evidence in the record that he corrected the second violation by returning the $237,643.11 to a properly constituted joint account. Even if that violation is ignored, however, the plaintiff has not established that the court abused its discretion in declining to vacate the contempt judgment for the reasons it set forth in its December 7, 2015 and January 10, 2017 memoranda of decision, and its January 9, 2017 articulation.

[12] We acknowledge the plaintiff's arguments that the court's denial of the motion to open and vacate "conflicts with the public policy that encourages parties to end their disputes by settling claims" and that "the court in a dissolution case must reach a result that is equitable." As general propositions, we agree that courts favor settlement in dissolution cases and that a dissolution action is essentially equitable in nature. We are unpersuaded by the plaintiff's arguments, however, because the parties asked the court to

the contempt finding would be "very deleterious to [his] career." Albrecht made the same argument on March 7, 2016. Nevertheless, "argument is not evidence. As judges routinely admonish juries: Argument is argument, it is not evidence. . . . So, too, arguments of a pro se litigant are not proof." (Citation omitted; internal quotation marks omitted.) *In re Justin F.*, 116 Conn. App. 83, 96, 976 A.2d 707, appeal dismissed, 292 Conn. 913, 973 A.2d 660, cert. denied, 293 Conn. 914, 978 A.2d 1109 (2009), cert. denied sub nom. *Albright-Lazzari* v. *Connecticut*, 559 U.S. 912, 130 S. Ct. 1298, 175 L. Ed. 2d 1087 (2010); see also *Baker* v. *Baker*, supra, 95 Conn. App. 832–33 (representations of counsel are not evidence). Notwithstanding the arguably commonsense appeal of this argument, the plaintiff fails to point to where in the record supporting *evidence* exists, and we are unable to find such evidence in the record. Accordingly, the court did not abuse its discretion in denying the joint motion to open and vacate.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MICHAEL J. PAPINEAU
(AC 39474)

Keller, Bright and Norcott, Js.

Syllabus

Convicted of the crimes of assault in the first degree and conspiracy to commit assault in the first degree in connection with the beating of the victim, the defendant appealed to this court. The defendant, his coconspirator, W, and the victim had been preparing to spend the night in an abandoned mill when W repeatedly struck the victim with a baseball bat. The defendant and W thereafter pushed the victim into a hole in

undo previous factual findings and the contempt judgment rendered as a result of those findings, made after multiple days of hearings, and agreed that not doing so was within the court's discretion.

the floor, covered him with debris and then left the mill. The next day, while traveling in a car together, W overheard the defendant tell the defendant's former wife, P, in a telephone conversation that the defendant and W had assaulted the victim in the mill. The defendant also asked P in a text message for the phone number of a friend in Ohio because he wanted to find out if the friend would permit him to stay with him. The defendant told P that he intended to leave Connecticut for a five year period because he believed that five years was the length of the statute of limitations for the crime of attempt to commit murder. *Held*:

1. The defendant could not prevail on his claim that the trial court improperly precluded W from testifying about the defendant's telephone conversation with P:

   a. The record was inadequate to review the defendant's claim that W's testimony was offered to impeach P's testimony and as circumstantial evidence of the defendant's state of mind in order to demonstrate that he had not confessed to P that he was involved in the beating of the victim; the defendant's arguments were based on speculation concerning how W may have testified, as the record did not contain the substance of the excluded testimony, the defendant having failed to ask the trial court to hear W's responses to defense counsel's questions outside the presence of the jury.

   b. The defendant's unpreserved claims that W's testimony was admissible under the residual exception to the rule against hearsay and that the trial court's ruling deprived the defendant of his right to present a defense were not reviewable, defense counsel having failed to ask the court to rule on whether his inquiries of W were proper under the residual hearsay exception or to raise any argument concerning the defendant's right to present a defense; moreover, even if the trial court's evidentiary rulings were erroneous, the defendant could not have demonstrated harm, as W had contradicted P's testimony and testified that the defendant, during the telephone conversation, had not discussed traveling to Ohio, that nothing about the telephone conversation bothered or concerned W, and that the conversation concerned normal topics involving the defendant's children.

2. The defendant's unpreserved claim that the trial court improperly precluded defense counsel from eliciting testimony from the defendant's mother, D, that the defendant planned to travel to Massachusetts prior to the events at issue was not reviewable: although the court sustained the prosecutor's objection to certain testimony from D, who answered defense counsel's inquiry before the court ruled on the objection, and the prosecutor did not move to strike D's answer after the court's ruling, nor did the court sua sponte order that the testimony be stricken, D's answer was not part of the evidence, and the defendant did not make a proffer or advance any theory of admissibility following the prosecutor's objection to the question; moreover, even if the claim was reviewable,

the defendant could not demonstrate that the court's ruling deprived him of a fair trial, as other testimony from D and W demonstrated that prior to the assault, the defendant and W had told D that they were going away for Christmas, and the defendant was permitted to present evidence that he had preexisting plans to travel to Cape Cod.

3. The trial court did not abuse its discretion by admitting into evidence a printout of certain text messages between the defendant and P; although the defendant claimed that the messages were not properly authenticated because the phone from which they were sent had not been in the sole custody of the defendant at the time that the messages were sent, the evidence was sufficient to authenticate the messages, as P testified that she and the defendant had been in an ongoing relationship, that the messages were part of an ongoing conversation between them, that the messages prompted telephone conversations between them, which the defendant did not dispute, and that she provided images of the messages to the police, and even if the court's ruling was improper, it was harmless, the defendant having acknowledged that the text messages corroborated P's testimony, which was offered without objection.

4. The evidence was sufficient to support the defendant's conviction of conspiracy to commit assault in the first degree; in light of the evidence presented and the inferences drawn therefrom, the jury reasonably could have found beyond a reasonable doubt that the defendant and W intended to commit the crime of assault in the first degree and agreed with one another to commit the conduct constituting the crime, and that one or both of them engaged in overt acts in furtherance of the conspiracy, as the jury reasonably could have inferred that the defendant and W had a reason to be upset with the victim and planned to retaliate against him in the mill, there was evidence that the defendant actively participated in the crime by joining with W to push the victim into the hole in the floor and cover him with debris, and the defendant did not take any measures to stop the attack or to flee the scene after W violently attacked the victim with the baseball bat, the evidence of the defendant's conduct before, during and after the events at issue reflected that he and W conspired to cause serious physical injury to the victim by means of a dangerous instrument, and the defendant's conduct and statements to P after the events at issue undermined his argument that he was a bystander during those events and, instead, reflected his consciousness of his guilt and bolstered a finding that he had been an active participant with W in a preplanned retaliatory event.

Argued January 29—officially released June 19, 2018

Procedural History

Substitute information charging the defendant with the crimes of assault in the first degree, conspiracy to

commit assault in the first degree and hindering prosecution in the second degree, brought to the Superior Court in the judicial district of Windham, geographical area number eleven, and tried to the jury before *Swords*, *J.*; thereafter, the court granted the defendant's motion for a judgment of acquittal as to the charge of hindering prosecution in the second degree; verdict and judgment of guilty of assault in the first degree and conspiracy to commit assault in the first degree, from which the defendant appealed to this court. *Affirmed*.

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

Laurie N. Feldman, special deputy assistant state's attorney, with whom, on the brief, were *Anne F. Mahoney*, state's attorney, and *Mark A. Stabile*, supervisory assistant state's attorney, for the appellee (state).

Opinion

KELLER, J. The defendant, Michael J. Papineau, appeals from the judgment of conviction, rendered following a jury trial, of assault in the first degree with a dangerous instrument in violation of General Statutes § 53a-59 (a) (1), and conspiracy to commit assault in the first degree in violation of General Statutes §§ 53a-59 (a) (1) and 53a-48.[1] The defendant claims (1) that the trial court erroneously precluded his half brother from testifying about a phone conversation that transpired between the defendant and the defendant's former wife; (2) that the court erroneously precluded him from presenting testimony from the defendant's mother

[1] The court granted the defendant's motion for a judgment of acquittal with respect to one count of hindering prosecution in the second degree in violation of General Statutes § 53a-166.

The court imposed a total effective sentence of fourteen years imprisonment, five years of which are mandatory, followed by six years of special parole.

that, prior to the events at issue, he planned to travel to Massachusetts; (3) the court erroneously admitted a printout of text messages that the state failed to authenticate; and (4) the evidence was insufficient to support his conviction of conspiracy to commit assault in the first degree. We affirm the judgment of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. During the afternoon of December 22, 2014, the defendant and his half brother, Joshua Whittington,[2] were walking along railroad tracks in Danielson, at which time they met up with the victim, Jason Tworzydlo. For a period of time prior to the events at issue, the victim had lived with the defendant. As the three men walked together, they discussed where they would sleep that night. The defendant and Whittington indicated to the victim that they needed a place to spend the night, and the victim suggested that they stay in an abandoned textile mill that was located on Maple Street in Danielson where he recently had been staying. The defendant and Whittington agreed to stay there that night.

At approximately 3 p.m., the victim left the company of the defendant and Whittington so that he could attend a counseling session. Meanwhile, the defendant and Whittington explored the mill without him.

At approximately 6 p.m., the three men reunited and, by maneuvering around a fence that surrounded the mill and crawling through a window, they gained access to the inside of the mill. The men carried some of their possessions with them. Whittington was carrying a metal baseball bat. It was very dark inside of the mill; there were no working lights, and only a few light sources illuminated the mill's interior through openings

[2] Unless, for clarity, we refer to Joshua Whittington by his full name, generally we will refer to him in this opinion as "Whittington."

in the walls. The victim used a flashlight. The victim showed the defendant and Whittington a dry location in the mill where he had slept previously. The defendant and Whittington, however, expressed their opinion that the location did not provide ideal sleeping conditions for all of them, so they led the victim to another location inside of the mill, in an area of the mill that used to house a gym. The defendant and Whittington said that this location, which they had discovered earlier that day, was more suitable to their needs, and the men agreed to spend the night there.

Shortly thereafter, the victim turned away from the defendant and Whittington, at which time Whittington struck him in the head with his baseball bat.[3] He did so with such force that the victim felt the bat "bounce off [his] skull" and "heard the ringing of metal . . . ." Whittington struck the victim several additional times. When the victim asked what was happening, he was told that he had stolen money "from them" on a prior occasion. During some or all of the attack, the defendant used the light on a cell phone to illuminate the victim.

The victim attempted to flee from the defendant and Whittington, but they pushed him into another part of the mill. The victim was stabbed with a sharp object. Ultimately, the defendant and Whittington pushed the victim into a large hole in the floor. As they stood over the victim, he played dead for a brief time. He saw the light of a flashlight from above and overheard the

[3] Whittington testified for the defense. His version of events was that he became angry with the victim because he believed that, on a prior occasion, the victim took money from him and the defendant. He testified that he alone physically attacked the victim with a baseball bat in the mill, that it was a "spur of the moment" decision on his part, and that the defendant, who was present with him and the victim in the mill, fled the scene without harming the victim. He testified that after he had struck the victim several times, the defendant attempted to take the bat away from him. He and the defendant struggled briefly, but he ordered the defendant to "get [the] heck out of there" and "gestured that [he] was gonna hit him next."

defendant and Whittington as they discussed the amount of blood he had lost, questioned whether he was still alive and breathing, and expressed their belief that he would be dead by the next morning. Whittington stated that he wanted to throw a brick at the victim's head to ensure that he was dead, but he did not do so. The defendant and Whittington covered the victim's body with debris, including tires and tables, before they abandoned the victim in the mill.

When he no longer heard voices or footsteps, the victim, fearing for his survival, crawled out of the hole into which he had been pushed, exited the mill, and made his way to a nearby residence. Barely able to stand, the victim knocked on the front door to summon help. The occupant of the residence, Michael Pepe, found the victim in a dire condition; the victim's body and clothing were soaked in blood. Pepe rendered assistance by wrapping the victim in bedsheets and called 911.

Police and emergency medical personnel responded to the scene. The victim, who was in shock, sustained a variety of significant physical injuries, some of which were life-threatening. The victim's injuries included, but were not limited to, stab wounds, deformities to his face and jaw, a hematoma under his skull, a hematoma on his neck, a collapsed internal jugular vein, multiple bone fractures, and a severe neck laceration. Initially, the defendant was transported to Day Kimball Hospital in Putnam. In light of the severity of the victim's numerous injuries and, in particular, a life-threatening neck wound, Joel Stephen Bogner, an emergency department physician, determined that he should be transported to the trauma center at UMass Memorial Medical Center in Worcester, Massachusetts, for further treatment. With further treatment, the victim survived the ordeal.

Immediately following the incident, the victim told the police that he was attacked by unknown assailants

outside of the mill. The following day, on December 23, 2014, the victim identified the defendant and Whittington as his assailants, and indicated to the police that he was afraid that they would retaliate against him. During their investigation, the police spoke with the defendant, who acknowledged having spent time with the victim on the day of the assault but denied that he or Whittington had played any role in the victim's assault. During the police investigation, Whittington also denied any involvement in the victim's assault. When asked by the police where he kept his clothing, the defendant responded that most of his and Whittington's clothes had been stolen. After meeting with the police on December 23, 2014, the defendant had a telephone conversation with his former wife, Chelsea Papineau. During the conversation, he stated that he and Whittington had assaulted the victim in the mill, but that he and Whittington believed that they had "cleared their names" with the police. This telephone conversation took place while the defendant was traveling with Whittington. On December 25, 2014, the defendant sent Chelsea Papineau a text message in which he asked for the telephone number of a friend of his, Corby Julian, who lived in Ohio. During a telephone conversation with Chelsea Papineau later that day, the defendant indicated that he intended to leave the state for a five year period because, to his understanding, that was how long it would take for the statute of limitations for the crime of attempted murder to expire. He stated that he wanted Julian's telephone number because he wanted to find out if Julian would permit him to stay with him. After Chelsea Papineau complied with the defendant's request, he instructed her to delete her text messages.

Several days later, on January 2, 2015, the police executed arrest warrants on the defendant and Whittington in Falmouth, Massachusetts. At the time of his arrest, the defendant was wearing a pair of jeans that

was contaminated with the victim's blood. Additional facts will be set forth as necessary.

I

First, the defendant claims that the court erroneously precluded Whittington's testimony about a phone conversation that had transpired between the defendant and Chelsea Papineau. We disagree.

The following additional facts provide context for the defendant's claim. During the state's case-in-chief, Chelsea Papineau testified that, on December 23, 2014, she had planned for the defendant, who is her former husband and the father of her two children, to visit with his children at his mother's house. At or about 3 p.m., the defendant sent Chelsea Papineau a text message in which he stated that he was unable to visit with his children. Chelsea Papineau testified that, at or about 5:30 p.m., she called the defendant to make other visiting arrangements. The following examination by the prosecutor followed:

"Q. And what was his response?

"A. He said that he wouldn't be able to see them; he didn't know when he'd be able to see them again. He and his brother were on their way to his brother's father's house in Glastonbury, Connecticut.

"Q. What else did you talk about?

"A. He asked me if the police had spoken to me yet, and I told him no.

"Q. What did he say to you then?

"A. After I responded with no, he told me he needed to tell me something. He didn't know when he'd be able to see us again.

"Q. Exactly what did he say?

"A. He told me that the previous night him and his brother had met [the victim] . . . and that they went

to the mill and just lost it. He told me that they had beat him over the head and that they had left him in the mill.

"Q. What was your response?

"A. I really didn't know how to respond at first. I asked [about the identity of the victim]. And he told me Jason Tworzydlo.

"Q. Did you know [the victim]?

"A. I did.

"Q. How did you know him?

"A. He lived with us for a short time.

"Q. And did he indicate that he was part of this assault?

"A. Yes.

"Q. How did he indicate that?

"A. He just kept saying we.

"Q. At any point did he say Josh and I?

"A. Yes.

"Q. Was there any discussion about the defendant . . . having spoken to the police that day?

"A. Yes. He said that he and, I believe, him and his brother had spoken with the police and that they believed that they had cleared their names.

"Q. Did . . . he express any other concerns . . . ?

"A. He said that they were leaving anyway."

Thereafter, Chelsea Papineau testified that, on the following day, she received text messages from the defendant in which he asked her for the telephone number of a friend, Julian, who lived in Ohio, because he needed to talk with him. She testified that this led to

another telephone conversation with the defendant. Chelsea Papineau testified that "[h]e told me that in the past few months [Julian] had offered him a place to stay if he ever needed a place to stay. And he wanted to get a hold of [Julian] to see if that was still available for him." Chelsea Papineau testified that the defendant expressed his belief that he would be charged with attempted murder and that he could evade the charge if he stayed away from Connecticut for five years. Chelsea Papineau testified that after she provided the defendant with Julian's telephone number, he instructed her to delete her text messages. Instead, she provided them to the police.

During the defendant's case-in-chief, Whittington testified in relevant part that on the afternoon of December 23, 2014, he and the defendant were traveling by car to New London. Whittington testified that he overheard a telephone conversation between the defendant and Chelsea Papineau. The present claim is based on two rulings made by the court during Whittington's testimony concerning that telephone conversation.

First, defense counsel asked Whittington, "do you recall what they said—what he said?" The prosecutor objected to the inquiry on the ground that it called for hearsay. Defense counsel stated that the inquiry "goes to impeach [Chelsea] Papineau" and that it "goes to [the defendant's] state of mind, as well." The court sustained the objection.

Second, defense counsel asked Whittington if the defendant said anything to Chelsea Papineau that "implicated him . . . in attacking [the victim]?" The prosecutor objected on the basis of the hearsay ground previously set forth, and the court sustained the objection.

The following examination of Whittington by defense counsel then occurred:

"Q. Okay. How were . . . around that time period . . . [Chelsea] Papineau and [the defendant] getting along?

"A. They were not getting along at all. She was actually trying to get him to sign over his rights to his kids to her.

"Q. And were they communicating very well? . . .

"A. No. They were fighting a lot. They had just gotten divorced and . . . she gets mad a lot. They don't get along even when they were together very much.

"Q. All right. She . . . didn't like [the defendant] at all, did she?

"A. No.

"Q. Was there ever any discussion on . . . the drive down between you and anybody about you and [the defendant] going to Ohio?

"A. No, there was not.

"Q. And . . . in the phone conversation that [the defendant] had, did any of it bother you or concern you?

"A. No, it did not.

"Q. Did it seem just like a normal conversation about what to do with children?

"A. For the most part, yes."

Additionally, Whittington testified that, on December 23, 2014, he and the defendant were traveling to New London to meet with Whittington's father. He testified that, in accordance with plans made prior to the events at issue, he and the defendant traveled with and spent Christmas with Whittington's father in Cape Cod, Massachusetts.

The defendant claims that the court's rulings in response to the state's objections were erroneous. Relying on the theories of admissibility that he raised before the trial court, he argues that Whittington's testimony in response to defense counsel's inquiry would not have constituted hearsay because it was not offered for its truth, but for the purpose of impeaching Chelsea Papineau's testimony concerning what the defendant had stated to her. Also, the defendant argues that Whittington's testimony would not have constituted hearsay because it was offered not for its truth, but as "circumstantial evidence of [his] innocent state of mind by demonstrating to the jury that he did not confess to his involvement in a crime to Chelsea Papineau."

In addition to raising these preserved evidentiary claims, the defendant argues that "[c]ertain other subclaims, specifically, the right to present a defense . . . and the residual hearsay exception . . . were not referenced [at the time of the court's ruling] but are raised on appeal. These theories are part of the same legal claim."

Arguing that Whittington's testimony would have been admissible under the residual exception to the hearsay rule, the defendant states in relevant part: "In this case, the use of the defendant's statements was reasonably necessary. Whittington was privy to the telephone conversation and testifying against his own interests; his testimony was both critical to the defendant's defense, and the only available source of contradiction of Chelsea Papineau's critical testimony [concerning her phone conversation with the defendant]. Further, it was trustworthy. . . . The defendant's statements were [made] in the context of a phone call the day after the assault. . . . Whittington was testifying against his own interests . . . . He was available for cross-examination." (Citations omitted.)

With respect to his right to present a defense argument, the defendant states in relevant part: "In this

case, the defendant's theory of the case was that he had gone to the abandoned mill with [the victim] and Whittington, but he had not participated in the assault. Chelsea Papineau's testimony that the defendant confessed to participating in the assault was the only clear, certain and unequivocal evidence of his participation. Whittington's testimony refuting that testimony was critical to the defense theory of the case. As such, the defendant's constitutional right to present a defense was implicated by its exclusion." The defendant seeks review of the right to present a defense claim under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989).[4]

We will address in turn each of the four subclaims that constitute the present claim. We begin by addressing the defendant's claim under the residual exception to the hearsay rule. We decline to review this unpreserved evidentiary claim. "An appellant who challenges on appeal a trial court's exclusion of evidence is limited

[4] As modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), the *Golding* doctrine provides that "a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail. The appellate tribunal is free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances." (Emphasis omitted; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40.

"The defendant bears the responsibility for providing a record that is adequate for review of his claim of constitutional error. . . . The defendant also bears the responsibility of demonstrating that his claim is indeed a violation of a fundamental constitutional right. . . . Finally, if we are persuaded that the merits of the defendant's claim should be addressed, we will review it and arrive at a conclusion as to whether the alleged constitutional violation . . . exists and whether it . . . deprived the defendant of a fair trial." (Citations omitted.) Id., 240–41.

to the theory of admissibility that was raised before and ruled upon by the trial court. A court cannot be said to have refused improperly to admit evidence during a trial if the specific grounds for admission on which the proponent relies never were presented to the court when the evidence was offered." (Internal quotation marks omitted.) *State* v. *Polynice*, 164 Conn. App. 390, 401, 133 A.3d 952, cert. denied, 321 Conn. 914, 136 A.3d 1274 (2016). We recognize that, during the heat of trial, it is typical for counsel to set forth objections and responses thereto that may not be as complete or well researched as the arguments set forth in an appellate brief, but, at the very least, the arguments raised before the trial court must sufficiently alert the court to their legal significance. As our Supreme Court has observed, "in response to a hearsay objection, although a party need not explicitly identify the hearsay exception that would apply, he or she must at least reference the substance of the applicable exception in order to preserve the claim." *State* v. *Santana*, 313 Conn. 461, 468, 97 A.3d 963 (2014).

Here, defense counsel responded to the state's hearsay objection on the grounds that defense counsel's inquiries would, permissibly, impeach Chelsea Papineau or demonstrate the defendant's state of mind. Defense counsel did not ask the court to rule on whether the inquiries were proper under the residual hearsay exception or make any arguments concerning the trustworthiness or necessity of Whittington's testimony concerning the telephone conversation. Likewise, defense counsel did not raise any arguments concerning the defendant's right to present a defense. Accordingly, the claim based on the residual clause of the hearsay rule is unpreserved. Defense counsel did not assert such ground before the trial court.

The defendant's other evidentiary claims based on impeachment and state of mind are preserved, yet they

are not reviewable on the record before us. The defendant goes to great length in his brief to this court to emphasize the significance of how Whittington possibly may have testified in response to defense counsel's inquiries. He argues that Chelsea Papineau's testimony concerning the defendant's statements to her was highly damaging to the defendant's case. Additionally, he argues: "Whittington's . . . testimony concerning this telephone call was of critical importance. He was present in the car with the defendant while he spoke on the phone with Chelsea Papineau; in fact, it was [Whittington's] cell phone. His testimony would have directly refuted her testimony. It would have impeached Chelsea Papineau. It would have established [that] the telephone call was innocuous, not inculpatory. Without Whittington's testimony, Chelsea Papineau's characterization of the phone conversation was left to stand uncontested, amounting, essentially, to a clear and positive corroboration of the state's version of the assault, in which the defendant played an active part . . . ." The defendant argues that it was critical for the defense that the court permit Whittington to provide detailed information about the conversation he overheard because "Whittington might well have been able to undercut the damning quality of [Chelsea Papineau's] testimony had he been allowed to testify. Had Whittington been allowed to testify . . . it would have explained, refuted, or at a minimum, undercut Chelsea Papineau's testimony."

The defendant's arguments are flawed because they are based on speculation concerning how Whittington *may* have replied to defense counsel's inquiries. The record does not contain the substance of the excluded testimony, and, thus, leaves us without a basis on which to evaluate its relevance. "In Connecticut, our appellate courts do not presume error on the part of the trial court. . . . Rather, the burden rests with the appellant

to demonstrate reversible error." (Internal quotation marks omitted.) *Pettiford* v. *State*, 179 Conn. App. 246, 260–61, 178 A.3d 1126 (2017), cert. denied, 328 Conn. 919, 180 A.3d 964 (2018). The defendant bears the burden of providing this court with an adequate record to review his claims. Practice Book § 61-10. The present claim depends on a record that reflects the substance of Whittington's testimony concerning the conversation that he allegedly overheard. This is necessary not merely to determine whether the court properly excluded the testimony, but whether the court's ruling was harmful to the defense.

Although the defendant urges us to conclude that the excluded testimony was not hearsay and was highly relevant to the defense, the record does not provide an adequate foundation to support such a determination. The defendant easily could have created an adequate record by asking the court to hear Whittington's responses to the questions outside of the presence of the jury. This, however, did not occur. The defendant is unable to demonstrate reversible error on the basis of speculation as to how a witness might have testified at trial because "speculation and conjecture . . . have no place in appellate review." (Internal quotation marks omitted.) *State* v. *Joseph*, 174 Conn. App. 260, 274, 165 A.3d 241, cert. denied, 327 Conn. 912, 170 A.3d 680 (2017).

The same concerns apply to the defendant's right to present a defense claim. Under *Golding*, the defendant bears the burden of demonstrating that the court's exclusion of Whittington's testimony deprived him of a fair trial. Even if we assume, arguendo, that the claim is of constitutional magnitude, it nonetheless fails under *Golding*'s first prong; see footnote 4 of this opinion; because the record is inadequate to review it. Absent a foundation in the record to reflect the substance of

the excluded testimony, we are unable to conclude that the court deprived the defendant of a fair trial.

Alternatively, we observe that, even if we were to presume that the court's evidentiary rulings were erroneous and that Whittington would have testified as the defendant claims on appeal, the record before us leads us to conclude that the defendant would be unable to sustain his burden of demonstrating that he was harmed by them.[5] The defendant argues that he should have been permitted to impeach Chelsea Papineau and to demonstrate his innocent state of mind by eliciting testimony from Whittington that he did not hear the defendant make any incriminatory statements concerning the events in the mill and that nothing about the defendant's conversation reflected a guilty state of mind. Yet, as is reflected in our discussion of the court's rulings, Whittington's testimony unmistakably contradicted Chelsea Papineau's testimony with respect to the telephone conversation that she had with the defendant. In contrast with Chelsea Papineau's testimony that the defendant admitted that he and Whittington perpetuated a brutal attack that led him to believe he could be charged with attempted murder and led him to make plans to leave the state immediately, Whittington testified that the defendant did not discuss traveling to Ohio.

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

He testified, as well, that nothing about the telephone conversation bothered or concerned him, and he agreed that the subject of the conversation was "normal" topics involving the defendant's children. Thus, based on what we may glean from the defendant's arguments on appeal and the record he has provided this court for review, it appears that the rulings were harmless because the excluded testimony would have been substantially cumulative of Whittington's trial testimony.

Moreover, in connection with his claim that the court's rulings infringed on his right to present a defense, one of our important considerations as a reviewing court is not only the nature of the excluded inquiry, but also whether it was adequately covered by other questions that were allowed.[6] For the reasons we have discussed, it appears from the defendant's arguments and the record that defense counsel unambig-

[6] In evaluating a claim of this nature, "[w]e first review the trial court's evidentiary rulings, if premised on a correct view of the law . . . for an abuse of discretion. . . . If, after reviewing the trial court's evidentiary rulings, we conclude that the trial court properly excluded the proffered evidence, then the defendant's constitutional claims necessarily fail. . . . If, however, we conclude that the trial court improperly excluded certain evidence, we will proceed to analyze [w]hether [the] limitations on impeachment, including cross-examination, [were] so severe as to violate [the defendant's rights under] the confrontation clause of the sixth amendment . . . . In evaluating the severity of the limitations, if any, improperly imposed on the defendant's right to confront, and thus impeach, a witness, [w]e consider the nature of the excluded inquiry, whether the field of inquiry was adequately covered by other questions that were allowed, and the overall quality of the cross-examination viewed in relation to the issues actually litigated at trial. . . . In conducting our analysis, we are mindful that trial judges retain wide latitude insofar as the [c]onfrontation [c]lause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. . . . [W]e have upheld restrictions on the scope of cross-examination where the defendant's allegations of witness bias lack any apparent factual foundation and thus appear to be mere fishing expeditions. . . . We consider de novo whether a constitutional violation occurred." (Citations omitted; internal quotation marks omitted.) *State* v. *Halili*, 175 Conn. App. 838, 852–53, 168 A.3d 565, cert. denied, 327 Conn. 961, 172 A.3d 1261 (2017).

uously elicited from Whittington that, during the telephone call with Chelsea Papineau, the defendant did not make any statements of an incriminating nature. Moreover, Whittington testified that the defendant was traveling to Massachusetts with him in accordance with holiday travel plans that existed prior to the events at issue. Unaided by a proffer that would have provided this court with a record reflecting what further details Whittington would have provided if he had been permitted to do so, the defendant merely argues on appeal that "[t]he details of this exchange [between the defendant and Chelsea Papineau] were critical . . . ." The defendant does not demonstrate how further testimony from Whittington would have helped the defense. In the absence of such further details and because the defendant was permitted to elicit testimony from Whittington that reflected the innocent tone and subject of the telephone conversation, thereby impeaching Chelsea Papineau, it is highly unlikely that the excluded inquiry infringed on his right to present a defense.

II

Next, the defendant claims that the court erroneously precluded him from presenting testimony from his mother that, prior to the events at issue, he planned to travel to Massachusetts. We disagree.

The following additional facts are relevant to this claim. The defense presented testimony from Denise Papineau, the mother of the defendant and Whittington. She testified that she was close with both of her sons. During Denise Papineau's direct examination by defense counsel, the following occurred:

"[Defense Counsel]: . . . I want to turn your attention to . . . December 22, 2014, that afternoon, did you see the two of them that afternoon?

"[The Witness]: Yes. They came over in the afternoon before I went to work. They wanted to let me know

that they were going away for Christmas and . . . I wasn't gonna see them for Christmas.

"[Defense Counsel]: And was . . . there . . . any other reason for letting you know about that?

"[The Witness]: So I could make arrangements to see my grandchildren.

"[Defense Counsel]: And . . . who's the mother of the grandchildren?

"[The Witness]: Chelsea [Papineau] was [the defendant's] wife and Lexi, which was [Whittington's] girlfriend.

"[Defense Counsel]: And . . . did [Whittington] and . . . [the defendant] talk about . . . what they . . . were gonna do?

"[The Witness]: They were supposed to go with—

"[The Prosecutor]: Objection.

"[The Witness]: —[Whittington's] dad to—

"The Court: Wait.

"[The Witness]: —Cape Cod.

"The Court: Wait, wait, wait. There's an objection, so you just hold on—

"[The Witness]: I'm sorry.

"The Court: —for a minute.

"[The Prosecutor]: Hearsay.

"The Court: Okay. What was the question, [defense counsel]?

"[Defense Counsel]: I asked what . . . their plans were for Christmas.

"The Court: Okay. I'm gonna sustain the objection."

Without making any further argument regarding admissibility, the state's objection, or the court's ruling, defense counsel proceeded in his examination of Denise Papineau. On appeal, the defendant argues that the court improperly precluded Denise Papineau from testifying that the defendant and Whittington had preexisting plans to vacation in Cape Cod. The defendant argues that the testimony fell within the state of mind and residual exceptions to the hearsay rule. See Conn. Code Evid. §§ 8-3 (4) and 8-9. Also, the defendant argues that the court's ruling represented "a critical blow to the defense," as it desperately needed to refute the state's consciousness of guilt evidence, which included Chelsea Papineau's testimony that the defendant intended on fleeing the state and evidence that the defendant was arrested in Massachusetts.

The defendant argues that he preserved this evidentiary claim by means of "the actual proffer" he made at the time of trial.[7] Alternatively, the defendant argues that the claim is of constitutional magnitude because it implicates "the defendant's right to present a defense and to refute the evidence against him." On this basis, he argues that the claim, if not preserved, is reviewable under the doctrine set forth in *State* v. *Golding*, supra, 213 Conn. 239–40,[8] and that the court's rulings deprived him of a fair trial. Also, the defendant argues that we should grant him relief under the plain error doctrine. See Practice Book § 60-5.

Before considering issues of reviewability related to this claim, we address the state's contention that the claim is undermined by the fact that Denise Papineau's testimony concerning the defendant's plan to travel to Massachusetts was, in fact, part of the evidence before

[7] Presumably, in referencing a proffer, the defendant relies on what Denise Papineau stated following defense counsel's question.

[8] See footnote 4 of this opinion.

the jury. The state correctly observes that although the court sustained the prosecutor's objection, Denise Papineau answered defense counsel's inquiry before the court ruled on the objection, the prosecutor did not move to strike the testimony after the court ruled in its favor, and the court did not sua sponte order that the testimony be stricken. The state argues that, in light of the court's preliminary[9] and final instructions[10] to the jury, the jury would have been left with the impression that her answer was part of the evidence. The defendant argues that, guided by the court's preliminary instructions, the jury would have been left with the impression that the answer was not part of the evidence.

Relying on this court's analysis in *State* v. *Holley*, 160 Conn. App. 578, 626–30, 127 A.3d 221 (2015), rev'd, 327 Conn. 576, 175 A.3d 514 (2018), and binding authority cited therein, which includes *State* v. *Lewis*, 303 Conn. 760, 779–80, 36 A.3d 670 (2012), and *Hackenson* v. *Waterbury*, 124 Conn. 679, 684, 2 A.2d 215 (1938), we conclude that Denise Papineau's testimony concerning the defendant's plan to travel to Cape Cod was not part of the evidence before the jury. As the state argues, the court's preliminary instructions reflect that any testimony that is not stricken by the court is part of the evidence. Yet, the court's instructions do not specifically address the situation that occurred here. The record reflects that the prosecutor timely objected to

[9] Prior to the presentation of evidence, the court instructed the jury in relevant part: "Now, during the trial, counsel on each side may object when the other side offers testimony or evidence which counsel believes is not admissible . . . . If, during the course of the trial, the court sustains an objection by one attorney to a question asked by the other, you should disregard the question, and you must not speculate as to what the answer would have been. So, also, if any testimony is ordered stricken, you should disregard that testimony and must not give it any weight whatsoever in your deliberations."

[10] During its charge, the court instructed the jury that it was to consider the evidence, including the sworn testimony of witnesses, and that "any testimony that has been excluded or stricken" was not evidence.

defense counsel's inquiry. The witness, however, continued to testify despite the fact that the objection was pending, and the court clearly had instructed her to "wait" before continuing to answer. The witness failed to comply with the court's instruction, leading the court, once again, to instruct the witness to "[w]ait, wait, wait." The court stated that an objection was pending. Then, in the jury's presence, the court ruled in favor of the state. In light of these unique circumstances, we conclude that the jury would have believed that Denise Papineau's rushed response to defense counsel's inquiry was improper and, thus, that it was not part of the evidence.[11]

Next, we consider whether the evidentiary claim raised on appeal was adequately preserved. We readily conclude that it was not. The defendant neither made a proffer nor advanced any theory of admissibility to the trial court following the prosecutor's objection on hearsay grounds. Certainly, defense counsel's silence did not alert the court to the present claim. "It is well settled that this court will not entertain claims of evidentiary error that were not distinctly raised before the trial court." *Wilderman* v. *Powers*, 110 Conn. App. 819, 828, 956 A.2d 613 (2008); see also *State* v. *Polynice*, supra, 164 Conn. App. 401 (appellant limited to theory of admissibility raised before and ruled on by trial court). Here, the defendant did not advance any theory of admissibility before the trial court.

We turn now to the defendant's right to present a defense claim, for which he seeks review under *Golding*. See footnote 4 of this opinion. The defendant's

[11] Following the evidentiary ruling, it would have been better practice for the court sua sponte to have ordered that the witness' answer be stricken from the evidence or for the prosecutor to have moved to strike the answer after he had obtained a favorable ruling. Such steps would have provided a greater degree of clarity for the jury and for this court in its evaluation of the evidence.

recourse to *Golding* fails for several reasons. First, the claim is not reviewable under *Golding*'s second prong, which requires that the claim be of constitutional magnitude and that it allege the violation of a fundamental right. Phrasing the claim in terms of his right to present a defense represents the defendant's attempt to clothe an unpreserved evidentiary claim in constitutional garb. "Regardless of how the defendant has framed the issue, he cannot clothe an ordinary evidentiary issue in constitutional garb to obtain appellate review." (Internal quotation marks omitted.) *State* v. *Warren*, 83 Conn. App. 446, 452, 850 A.2d 1086, cert. denied, 271 Conn. 907, 859 A.2d 567 (2004). At trial, the defendant did not advance any theories under which statements to Denise Papineau about his travel plans should have been admitted. Here, he argues that the court's ruling precluding such testimony infringed on his right to refute the state's consciousness of guilt evidence. "It has . . . been stated numerous times that consciousness of guilt issues are not constitutional and, therefore, are not subject to review under [*Golding*]." (Internal quotation marks omitted.) *State* v. *Guzman*, 110 Conn. App. 263, 270, 955 A.2d 72 (2008), cert. denied, 290 Conn. 915, 965 A.2d 555 (2009); see also *State* v. *Lugo*, 266 Conn. 674, 691–92 and 692 n.17, 835 A.2d 451 (2003) (claim that trial court improperly declined to allow defendant to present evidence to refute state's consciousness of guilt evidence deemed to be "purely evidentiary" and not subject to constitutional analysis).

Even if the claim was reviewable under *Golding*, the claim would fail under *Golding*'s third prong because the defendant is unable to demonstrate that he was deprived of a fair trial. As we discussed in part I of this opinion, an important consideration in an evaluation of whether a trial court's decision not to admit evidence infringed on a defendant's right to present a defense is whether the defense was permitted to cover the field

of inquiry by other means. See footnote 6 of this opinion. "A defendant may not successfully prevail on a claim of a violation of his right to present a defense if . . . he adequately has been permitted to present the defense by different means." *State* v. *Santana*, supra, 313 Conn. 470; see also *State* v. *Kelly*, 256 Conn. 23, 76, 770 A.2d 908 (2001) (no violation of constitutional right to present defense where subject matter of precluded testimony was presented through other witnesses).

According to the defendant's theory, Denise Papineau's testimony concerning the defendant's plans to travel to Cape Cod for Christmas was relevant to rebut the inference that he fled to Massachusetts, where he later was arrested, because he was conscious that he was criminally liable for his role in the victim's assault.[12] The defendant was permitted to present evidence that rebutted this inference. Specifically, defense counsel was permitted to elicit testimony from Denise Papineau that during the afternoon of December 22, 2014, prior to the assault, the defendant and Whittington visited with her and told her that they were "going away for Christmas" and that she would not see them on Christmas. Additionally, Whittington testified that between 3 p.m. and 6 p.m. on December 22, 2014, he and the defendant visited with Denise Papineau. He testified: "We discussed going to my dad's and then to Cape Cod to my cousin's for Christmas vacation." Whittington testified that this was something that he did "almost

[12] We observe that the excluded evidence at issue in the present claim did not tend to refute the other highly incriminating consciousness of guilt evidence that was presented by the state, which demonstrated that the defendant, fearing arrest on an attempted murder charge, planned to relocate to Ohio for at least five years. This other consciousness of guilt evidence, as well as the fact that the defense was permitted to present ample evidence concerning the defendant's plans to travel to Cape Cod, leads us to conclude that, even if the court erroneously precluded the narrow inquiry at issue in this claim, such error was harmless beyond a reasonable doubt under *Golding*'s fourth prong. See footnote 4 of this opinion.

every year" and that there was "a discussion about what's gonna happen with the grandkids."

Whittington's father, David Whittington, testified that spending Christmas in Cape Cod with the defendant and Joshua Whittington generally was an annual tradition. David Whittington testified that the "plan" was for the defendant and Joshua Whittington to be at his house in New London on December 23, 2014, and they were there by the time that he finished work on that day. David Whittington testified that, that evening, his wife transported him, the defendant, and Joshua Whittington to her residence in Glastonbury. Thereafter, the defendant and Whittington traveled with David Whittington and his wife to visit with relatives on Cape Cod. David Whittington testified that while the defendant and Joshua Whittington were at his home on December 23, 2014, he invited them to live there with the hope that they could gain employment and "get a life." He testified that, in his view, they enthusiastically accepted that invitation.

The foregoing discussion reflects that the defendant was permitted to present evidence that he had preexisting plans to travel to Cape Cod by means other than the narrow inquiry that was excluded by the trial court. Thus, the defendant is unable to demonstrate that the court violated his right to a fair trial and, thus, his claim fails under *Golding*'s third prong.[13]

III

Next, the defendant claims that the court erroneously admitted a printout of text messages that the state failed to authenticate. We disagree.

[13] In light of our determination that the excluded evidence was cumulative of other evidence that the defendant was permitted to present to the jury, we are not persuaded that the court's ruling reflected that a serious and manifest injustice occurred in the present case. Accordingly, we reject the defendant's recourse to the plain error doctrine. See *State* v. *Myers*, 290 Conn. 278, 289, 963 A.2d 11 (2009) (discussing appellant's burden to satisfy plain error doctrine).

The following additional facts are relevant to this claim. As we have discussed previously in this opinion, Chelsea Papineau testified that, at or about 3 p.m. on December 23, 2014, the defendant sent her a text message in which he indicated that he would not be able to visit with his children at his mother's house that day. At or about 5:10 p.m. that day, Chelsea Papineau called the defendant, and during their conversation, the defendant told her that he did not know when he would be able to see her or the children again, that he and his brother had assaulted the victim in the mill, and that he and his brother had spoken with the police about the incident. Chelsea Papineau testified that although the defendant believed that they had "cleared their names" with the police, "they were leaving anyway."

Chelsea Papineau testified that the next day, December 24, 2014, the defendant sent her another text message in which he asked her for the phone number of their friend, Julian, who lived in Ohio. Chelsea Papineau said that, following this request, she spoke to the defendant on the telephone. The defendant told her that Julian recently had offered him a place to stay if he ever needed a place to stay and that he wanted to see if that invitation was still open to him. Chelsea Papineau testified that the defendant expressed his belief that there was a five year statute of limitation for the crime of attempted murder and, therefore, he believed that he needed to leave Connecticut for at least five years. Chelsea Papineau testified that the defendant asked her to delete her text messages. Instead, setting aside her initial belief that "it was a joke," she brought the text messages to the attention of the state police.

At the prosecutor's request, the court marked a four page document as an exhibit for identification. It suffices to observe that the content of the messages is consistent with Chelsea Papineau's testimony about

them.[14] The following examination of Chelsea Papineau by the prosecutor followed:

"Q. . . . I'm showing you a four page document . . . . I'd ask you to look through those pages at this time; just look through them, and then tell us whether or not you recognize them.

"A. Yes, I do.

"Q. What do you recognize them to be?

"A. This is the phone conversation, the text conversation from the 23rd and the 24th between [the defendant] and myself.

"Q. And how were those created? Do you recall?

"A. I took a screenshot of my cell phone—

"Q. And the police . . . took them.

"A. —and then I e-mailed them.

"Q. So, those are the text messages between you and the defendant from the 23rd and the 24th of December of 2014?

"A. Yes."

When the prosecutor offered the document to be admitted as a full exhibit, defense counsel objected on three grounds, namely, that the document constituted hearsay, the document bolstered the testimony of Chelsea Papineau because she already had testified about

[14] There are fifteen incoming text messages in the document and seven outgoing text messages. One of the incoming messages dated, "Yesterday 2:53 PM," states: "Hey I can't make it to my mom's today. I'll try to figure something out." Another incoming text, dated "Today 4:21 PM," states: "Hey do you have corby's number? And so u don't worry were keeping the phone off w the SD card out unless we have to use the phone." An outgoing text message replies, "Why do u want it?" An incoming message states, "Call me and ill talk to you." The last incoming message states: "Just remember to delete ur messages."

its content and her conversations with the defendant, and the document was not authenticated. With regard to the latter ground, defense counsel stated that there was no way to verify that the messages actually came from the defendant's telephone. The prosecutor replied: "She's established the authenticity. These are part of a series of conversations of the two days, both telephonic and text. Documents and electronic evidence can corroborate a witness' testimony and she has authenticated [them]."

The court overruled defense counsel's objection, stating: "This witness has adequately authenticated those text messages as coming from the defendant. And, of course, they're admissible as statements of the defendant."

During Chelsea Papineau's cross-examination by defense counsel, the following examination occurred:

"Q. . . . Back on December . . . 22nd, 23rd, 24th, did [the defendant] have a telephone?

"A. No.

"Q. So, he was calling you on somebody else's telephone?

"A. His brother's.

"Q. And those texts came from his brother's phone?

"A. Yes.

"Q. So, you . . . have no idea if he entered those texts or not, do you?

"A. I'm very positive it was him, but no.

"Q. You . . . weren't there when . . . it was being done. Is that correct?

"A. No, I didn't see him physically do it. No.

"Q. All right. And it's his brother's telephone?

"A. Yes."

During redirect examination of Chelsea Papineau by the prosecutor, she testified that from the time that she divorced the defendant in August, 2014, until the time of these text messages in December, 2014, she took steps to keep the defendant involved in the lives of their children. She testified that the text messages that she described were interrelated with telephone conversations that she had with the defendant, and agreed that the text messages and telephone conversations were part of a single string of conversations between her and the defendant.

Echoing the arguments that he raised before the trial court, the defendant argues before this court that "[the] text messages, purportedly between the defendant and Chelsea Papineau . . . were not properly authenticated because the phone they were sent from was not in the sole custody of the defendant at the time they were made, and the messages in question cannot be said with sufficient certainty to have been made by the defendant."

"To the extent a trial court's admission of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. They require determinations about which reasonable minds may not differ; there is no judgment call by the trial court, and the trial court has no discretion to admit hearsay in the absence of a provision providing for its admissibility. . . .

"We review the trial court's decision to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion. . . . In other words,

only after a trial court has made the legal determination that a particular statement is or is not hearsay, or is subject to a hearsay exception, is it vested with the discretion to admit or to bar the evidence based upon relevancy, prejudice, or other legally appropriate grounds related to the rule of evidence under which admission is being sought. For example, whether a statement is truly spontaneous as to fall within the spontaneous utterance exception will be reviewed with the utmost deference to the trial court's determination. Similarly, appellate courts will defer to the trial court's determinations on issues dictated by the exercise of discretion, fact finding, or credibility assessments." (Citations omitted; internal quotation marks omitted.) *State* v. *Saucier*, 283 Conn. 207, 218–19, 926 A.2d 633 (2007).

"It is axiomatic that [t]he trial court's ruling on the admissibility of evidence is entitled to great deference. . . . In this regard, the trial court is vested with wide discretion in determining the admissibility of evidence . . . . Accordingly, [t]he trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . Furthermore, [i]n determining whether there has been an abuse of discretion, every reasonable presumption should be made in favor of the correctness of the trial court's ruling, and we will upset that ruling only for a manifest abuse of discretion. . . . Even when a trial court's evidentiary ruling is deemed to be improper, we must determine whether that ruling was so harmful as to require a new trial. . . . In other words, an evidentiary ruling will result in a new trial only if the ruling was both wrong and harmful. . . .

"Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court.

Conn. Code Evid. § 1-3 (a). The requirement of authentication as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the offered evidence is what its proponent claims it to be. Conn. Code Evid. § 9-1 (a). The official commentary to § 9-1 (a) of the Code of Evidence provides in relevant part: The requirement of authentication applies to all types of evidence, including writings, sound recordings, electronically stored information, real evidence such as a weapon used in the commission of a crime, demonstrative evidence such as a photograph depicting an accident scene, and the like. . . . The category of evidence known as electronically stored information can take various forms. It includes, by way of example only, e-mails, Internet website postings, text messages and chat room content, computer stored records and data, and computer generated or enhanced animations and simulations. As with any other form of evidence, a party may use any appropriate method, or combination of methods . . . or any other proof to demonstrate that the proffer is what the proponent claims it to be, to authenticate any particular item of electronically stored information. . . .

"It is well established that [a]uthentication is . . . a necessary preliminary to the introduction of most writings in evidence . . . . In general, a writing may be authenticated by a number of methods, including direct testimony or circumstantial evidence. . . .

"Both courts and commentators have noted that the showing of authenticity is not on a par with the more technical evidentiary rules that govern admissibility, such as hearsay exceptions, competency and privilege. . . . Rather, there need only be a prima facie showing of authenticity to the court. . . . Once a prima facie showing of authorship is made to the court, the evidence, as long as it is otherwise admissible, goes to the

jury, which will ultimately determine its authenticity. . . .

"[T]he bar for authentication of evidence is not particularly high. . . . [T]he proponent need not rule out all possibilities inconsistent with authenticity, or . . . prove beyond any doubt that the evidence is what it purports to be . . . . In addition, [a]n electronic document may . . . be authenticated by traditional means such as direct testimony of the purported author or circumstantial evidence of distinctive characteristics in the document that identify the author. . . .

"Among the examples of methods of authenticating evidence set forth in the official commentary to § 9-1 (a) of the Code of Evidence is that [a] witness with personal knowledge may testify that the offered evidence is what its proponent claims it to be, and [t]he distinctive characteristics of an object, writing or other communication, when considered in conjunction with the surrounding circumstances, may provide sufficient circumstantial evidence of authenticity. Conn. Code Evid. § 9-1 (a), commentary. An unsigned document may be authenticated by any number of circumstances, including its own distinctive characteristics such as its contents and mode of expression, as well as the circumstances and context in which it was found. C. Tait & E. Prescott, Connecticut Evidence (5th Ed. 2014) § 9.2.3.

"This court has observed: The need for authentication arises [in the context of electronic messages from social networking websites] because an electronic communication, such as a Facebook message, an e-mail or a cell phone text message, could be generated by someone other than the named sender. This is true even with respect to accounts requiring a unique user name and password, given that account holders frequently remain logged in to their accounts while leaving their computers and cell phones unattended. Additionally, passwords and website security are subject to compromise

by hackers. Consequently, proving only that a message came from a particular account, without further authenticating evidence, has been held to be inadequate proof of authorship. . . .

"[T]he emergence of social media such as e-mail, text messaging and networking sites like Facebook may not require the creation of new rules of authentication with respect to authorship. An electronic document may continue to be authenticated by traditional means such as the direct testimony of the purported author or circumstantial evidence of distinctive characteristics in the document that identify the author. . . .

"Nevertheless, we recognize that the circumstantial evidence that tends to authenticate a communication is somewhat unique to each medium. . . . [I]n the case of electronic messaging . . . a proponent of a document might search the computer of the purported author for Internet history and stored documents or might seek authenticating information from the commercial host of the e-mail, cell phone messaging or social networking account." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Smith*, 179 Conn. App. 734, 761–64, 181 A.3d 118, cert. denied, 328 Conn. 927, A.3d (2018).

Here, the state presented sufficient evidence to demonstrate that the document at issue was what the state claimed it to be, namely, a series of text messages between the defendant and Chelsea Papineau on December 23 and 24, 2014. The defendant urges us to conclude that the record did not provide "certainty" that the defendant sent the text messages at issue, yet as our discussion of the applicable legal standard reflects, the state did not bear the burden of ruling out any possibility that the messages did not originate with the defendant, but was permitted to establish his

authorship by means of circumstantial evidence. Chelsea Papineau's testimony provided strong circumstantial evidence of authorship. Chelsea Papineau was in an ongoing relationship with the defendant, her former husband, and she testified that these text messages were part of an ongoing conversation between them.[15] Moreover, the text messages at issue prompted telephone conversations between Chelsea Papineau and the defendant. Although the defense disagrees with the state about the content of those telephone conversations, the defense does not appear to dispute that they, in fact, occurred. Chelsea Papineau testified that she captured images of these text messages and provided them to the state police. In these circumstances, no additional means of authentication were necessary.

The defendant relies, in part, on Chelsea Papineau's testimony during cross-examination that the text messages originated from Whittington's telephone to challenge the court's decision to admit the exhibit. We observe that this testimony, which came after the court's ruling, is not a sufficient basis on which to challenge the ruling. See, e.g., *State* v. *Harris*, 32 Conn. App. 476, 481 n.4, 629 A.2d 1166 ("[w]e are bound to evaluate the propriety of the trial court's rulings on the basis of the facts known to the court at the time of its rulings"), cert. denied, 227 Conn. 928, 632 A.2d 706 (1993). Even if we were to consider this later testimony, however, it does not affect our analysis. Chelsea Papineau testified that these messages were part of a series of conversations between her and the defendant, these conversations included telephone calls with the defendant (a person with whom she was very familiar), and that she was "very positive" that the text messages were from the defendant. In light of this evidence, it is of no consequence to our analysis that the defendant utilized

[15] A review of the subject matter of the text messages reflects that, in part, they concerned the topic of the defendant's children with Chelsea Papineau.

Whittington's telephone to send the text messages. The circumstantial evidence provided an adequate foundation upon which to find that the defendant, not Whittington, authored the text messages.[16] The defendant has not demonstrated that the court's ruling reflects an abuse of its discretion.

Assuming, arguendo, that the court's evidentiary ruling, which was not of constitutional magnitude, was improper, we readily would conclude that it was harmless. Previously in this opinion, we set forth the standard for harmless error. See footnote 5 of this opinion. As the defendant acknowledges, the text messages substantially corroborated other evidence that was offered absent objection, namely, Chelsea Papineau's testimony. In light of this other evidence of the defendant's text messages to Chelsea Papineau, the defendant is unable to demonstrate that the court's ruling substantially affected the verdict.

IV

Finally, the defendant claims that the evidence was insufficient to support his conviction of conspiracy to commit assault in the first degree in violation of §§ 53a-59 (a) (1) and 53a-48.[17] We disagree.

The defendant argues that "[t]he evidence, even in the light most favorable to sustaining the verdict, contains no evidence of an agreement between the defendant and [Whittington] to cause serious physical injury

[16] We observe that, following the state's prima facie showing of authenticity, arguments concerning the authorship of the text messages were fodder for the jury's consideration. As our review of the facts underlying this claim reveals, defense counsel availed himself of an opportunity to challenge the state's evidence by eliciting testimony during his cross-examination of Chelsea Papineau to establish that the text messages came from Whittington's telephone and that she did not physically observe the defendant using Whittington's telephone to send her the messages at issue.

[17] At trial, the defendant moved for a judgment of acquittal with respect to this charge. The court denied the motion.

to [the victim] by means of a deadly weapon. Rather, the evidence, even if it is construed as favorably as possible to the state, suggests a spontaneous outburst of violence, not a planned assault. . . .

"[E]ven [when viewed] in the light most favorable to sustaining the verdict, the evidence shows that the defendant, [the victim] and Whittington went to the abandoned mill at [the victim's] suggestion, that there was no expressed preassault animosity between them, and that nothing indicated any possibility that the assault would break out until Whittington suddenly, spontaneously, and without warning hit [the victim] with a baseball bat." Additionally, the defendant argues that although the victim testified that he and Whittington appeared to be working together, he failed to describe "coordination or communication between the two aside from walking through the mill and trying to find a place to sleep before the attack." Moreover, the defendant relies on Whittington's testimony that the defendant had no role in the attack, there had been no conversations about harming the victim, and that Whittington threatened to strike him when he attempted to intervene on the victim's behalf.

"In reviewing a sufficiency of the evidence claim, we apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the jury reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"We note that the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . .

If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . . Moreover, [w]here a group of facts are relied upon for proof of an element of the crime it is their cumulative impact that is to be weighed in deciding whether the standard of proof beyond a reasonable doubt has been met and each individual fact need not be proved in accordance with that standard. It is only where a single fact is essential to proof of an element, however, such as identification by means of fingerprint evidence, that such evidence must support the inference of that fact beyond a reasonable doubt. . . .

"As we have often noted, however, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the trier, would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty. . . . Furthermore, [i]t is immaterial to the probative force of the evidence that it consists, in whole or in part, of circumstantial rather than direct evidence." (Internal quotation marks omitted.) *State* v. *Edwards*, 325 Conn. 97, 136–37, 156 A.3d 506 (2017).

Section 53a-59 (a) provides in relevant part: "A person is guilty of assault in the first degree when: (1) With intent to cause serious physical injury to another person, he causes such injury to such person or to a third

person by means of a deadly weapon or a dangerous instrument . . . .'' ''To obtain a conviction for conspiracy to commit assault in the first degree in violation of §§ 53a-48 (a) and 53a-59 (a) (1), as charged, the state bore the burden of proving beyond a reasonable doubt that the defendant (1) intended that conduct constituting the crime of assault in the first degree be performed, (2) agreed with one or more persons to engage in or cause the performance of such conduct and (3) that any one of those persons committed an overt act in pursuance of such conspiracy. Conspiracy is a specific intent crime, with the intent divided into two parts: (1) the intent to agree to conspire; and (2) the intent to commit the offense that is the object of the conspiracy. . . . To sustain a conviction for conspiracy to commit a particular offense, the prosecution must show not only that the conspirators intended to agree but also they intended to commit the elements of the offense.'' (Internal quotation marks omitted.) *State* v. *Wells*, 100 Conn. App. 337, 347–48, 917 A.2d 1008, cert. denied, 282 Conn. 919, 925 A.2d 1102 (2007).

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

marks omitted.) *State* v. *Danforth*, 315 Conn. 518, 532–33, 108 A.3d 1060 (2015); see also *State* v. *Smith*, 36 Conn. App. 483, 486, 651 A.2d 744 (1994) (sufficient for state to demonstrate that actors mutually agreed to commit forbidden act), cert. denied, 233 Conn. 910, 659 A.2d 184 (1995).

We begin our analysis of the evidence by focusing on the defendant's undisputed relationship with Whittington, who testified that he was the sole perpetrator of the violent assault. The evidence reflects that it was not a coincidence for the defendant and Whittington to be together in the mill on the night of December 22, 2014. They were half brothers who, according to defense witnesses, shared a close relationship. This type of relationship, while not dispositive, makes it less likely that they acted independently in the mill and more likely that they acted in unison. See *State* v. *Henderson*, 83 Conn. App. 739, 748–49, 853 A.2d 115 (evidence of nature of relationship between alleged coconspirators relevant to issue of existence and object of conspiracy), cert. denied, 271 Conn. 913, 859 A.2d 572 (2004).

The evidence supported a finding that, prior to the attack in the mill, the defendant and Whittington were upset with the victim because they believed that he had stolen money from one or both of them on a prior occasion. The defendant and Whittington knew that, later that night, the victim would return to the darkened, abandoned mill because they had made plans to meet him there. After making arrangements to spend the night in the mill with the victim, the defendant and Whittington had an opportunity to explore the mill in the victim's absence and found a favorable location in the mill in which to retaliate against him. Whittington arrived at the mill while carrying a dangerous instrument, namely, a metal baseball bat.[18]

[18] The victim testified that, once he, the defendant, and Whittington were inside the mill, he was using a flashlight, and that the defendant and Whitting-

The evidence demonstrated that, once the three men were alone in the mill, it was Whittington who began the altercation by striking the victim in the back of the head when he had turned away from him. There was evidence that the defendant did not attempt to stop the altercation and did not flee the scene. Whittington struck the victim repeatedly with the bat, and there was evidence that the victim had been stabbed repeatedly. The evidence is undisputed that the three men were alone inside of the mill, and Whittington denied that he stabbed the victim.[19] The victim testified that the defendant and Whittington seemed to be working together as he was pushed into the hole in the floor. This was corroborated by Whittington's testimony that he and the defendant had dragged the victim in the mill. Then, the defendant and Whittington threw debris on top of him. Once he was in the hole, the victim overheard the defendant and Whittington discuss his dire condition before abandoning him in the mill.

After they left the victim, the defendant and Whittington provided false information to the police about the events at issue to conceal their participation in the crime. The defendant told the police that his clothing

ton were using "a flashlight that was . . . on their phone." The victim testified that, after he was struck by the baseball bat, he dropped his flashlight. He testified that, both prior to and following the time that he was struck, the defendant was using a cell phone light and that "[t]hat light never went out." He testified that that light source was shining on him while Whittington was striking him repeatedly. Thus, it would have been reasonable for the jury to find that the defendant illuminated the victim while Whittington struck him.

[19] Considering the undisputed evidence that Whittington struck the victim in the back of the head with a baseball bat and continued to assault him with the bat in the poorly illuminated mill, it is understandable that the victim was unable to shed much light on which of his assailants had stabbed him. The victim testified, in relevant part: "As I turned my head . . . I was hit in the head with a baseball bat numerous times. I was trying to get away. Being pushed toward the darker part of the mill, I then felt like I was being stabbed. All the time asking . . . why is this happening? What are you guys doing? And then I was pushed into a hole."

had been stolen. The defendant and Whittington did not go their separate ways following the assault, but remained together.[20] Ultimately, they left the state together. In his conversation with Chelsea Papineau, the defendant did not express remorse or indicate that he was a bystander to the events at issue, but acknowledged to his former wife that he and Whittington had beaten the victim violently in the mill and had left him there. The defendant, believing that he faced an attempted murder charge, indicated his intention to flee to Ohio for at least five years in an attempt to evade criminal liability for the events that transpired in the mill.

The foregoing subordinate facts, which the jury reasonably could have found, and the rational inferences drawn therefrom, support a finding beyond a reasonable doubt that the defendant and Whittington intended to commit the crime of assault in the first degree, agreed with one another to commit the conduct constituting the crime, and that one or both of them engaged in overt acts in furtherance of the conspiracy.

The jury reasonably could have inferred that the defendant and Whittington had a reason to be upset with the victim prior to the attack.[21] The jury reasonably

[20] Whittington testified, in part, that, following the events in the mill, he tried to conceal his actions in the mill by washing his boots in a river and that the defendant washed his boots in the river, as well.

[21] The defendant argues that he and Whittington did not have a motivation to conspire against the victim on the basis of the stolen money because Whittington did not learn that the victim had stolen the money until seconds prior to the assault. This is not an accurate view of the evidence. First, we observe that, although the defendant denied any involvement in the assault and told the police that he "never had any problem with [the victim]," he nonetheless stated that he had "heard rumors about [the defendant] robbing people who he was staying with in the past." Both the victim and Chelsea Papineau testified that the victim had stayed with the defendant in the past.

Second, during direct examination by defense counsel, the following examination of Whittington occurred:

"Q. And so did something happen between you and [the victim inside of the mill]?

could have inferred that, following their initial meeting with the victim, they planned to retaliate against him in the mill.[22] Whittington, not the victim, initiated the assault by utilizing the baseball bat that he brought with him to the mill. The evidence suggested that Whittington waited for an opportune moment in which to strike the victim with the bat, and that he and the defendant had planned to lure the victim to their choice of location inside of the mill, where they could push the victim

"A. We—I discussed with him because I was told by a mutual friend, Kevin—I don't know his last name, but *he told me that* [*the victim*] *had taken my money before*, so I confronted [the victim] about it and I kept at him, and I got closer to him and asked him, you know, if he took my money. He finally admitted to me he did, and I got angry and I got up in his face. He kind of tried to push me away and I snapped, and I had hold of a bat and I hit him in the head with the bat and when he had fell over, I kept hitting him.

"Q. Let me . . . stop you right there. Now, before that, had there been any discussion about the money?

"A. *He knew we were missing the money* and we weren't thinking it was him at the time, so there was no real big discussion about it.

"Q. Did . . . you and [the defendant] . . . have any discussions about trying to get [the victim] . . . or try to hurt him or anything like that?

"A. No. *We actually found out that day* it was . . . that *we were told that day* it was him when we were meeting back up with him at [Sunnyside Farms] by our mutual friend.

"Q. But was there any plans to . . . get revenge or anything like that?

"A. No. We . . . had no plans. It was spur of the moment." (Emphasis added.)

The jury could accept or reject Whittington's testimony in whole or in part. Setting aside Whittington's testimony that he and the defendant had not planned to retaliate against the victim, a reasonable view of Whittington's testimony reflects that, in the hours prior to the attack, the defendant and Whittington learned information from a third party that caused them to strongly suspect that, on a prior occasion, the victim had stolen money from them. Whittington's testimony reflects that he aggressively confronted the victim and became violent once he had obtained a confession from the victim.

[22] The defendant attempts to undermine a finding that any planning occurred by relying on the undisputed evidence that the victim first suggested that the three men spend the night in the abandoned mill. Simply because the victim first suggested that the men spend the night in the mill does not make it any less plausible that, during the afternoon hours of December 22, 2014, the defendant and Whittington had ample time in which to conspire to assault the victim therein.

into the hole in the floor. The joint efforts of the defendant and Whittington in this location reflected that it was not a spur of the moment occurrence, as the defendant argues. There was evidence to support a finding that the defendant actively participated in the crime by joining with Whittington to push him into the hole in the floor and cover him with debris. See, e.g., *State* v. *Forde*, 52 Conn. App. 159, 168, 726 A.2d 132 (commission of single act in furtherance of conspiracy sufficient to demonstrate knowing participation), cert. denied, 248 Conn. 918, 734 A.2d 567 (1999).

It is significant to our analysis of intent and whether an agreement existed that, according to the victim's testimony, the defendant did not take any measures to stop the attack or to flee the scene after Whittington violently used a baseball bat to strike the victim repeatedly. The defendant did not express surprise or outrage, nor at any point in time did he insist that help be summoned. Instead, the jury reasonably could have found that the defendant was an active participant in the attack by utilizing the light on Whittington's cell phone to illuminate the victim while Whittington struck him with the baseball bat, stabbing the victim repeatedly, working with Whittington to drag the victim into the hole in the floor, and covering the victim's badly injured body with debris. Thereafter, the defendant and Whittington discussed the effects of their attack as the victim was lying in the hole. The evidence supported a finding that the defendant remained on the scene during the multiple phases of the attack, helping to injure the victim severely, until the victim was incapacitated. Thereafter, the defendant left the mill just as he had arrived at the mill, in unison with Whittington. The defendant's coordinated conduct with Whittington strongly reflected his participation in a plan to retaliate against the victim by inflicting serious injury. See *State* v. *Millan*, 290 Conn. 816, 828, 966 A.2d 699 (2009) ("[a] coconspirator's conduct at the scene can provide the requisite

evidence of an agreement"); *State* v. *Elsey*, 81 Conn. App. 738, 747, 841 A.2d 714 ("the jury could have based at least part of its decision regarding the conspiracy charges on the defendant's decision to come to the scene of the crime with the coconspirators, stay at the scene while the crimes were committed and leave the scene with the coconspirators"), cert. denied, 269 Conn. 901, 852 A.2d 733 (2004).

The defendant's conduct and his statements to Chelsea Papineau following the incident not only reflected his consciousness of his guilt, but strongly bolstered a finding that he intended for the victim to sustain serious physical injury and that he had been an active participant with Whittington in a preplanned retaliatory event.

"Although mere presence at a crime scene, standing alone, generally is insufficient to infer an agreement, a defendant's knowing and willing participation in a conspiracy nevertheless may be inferred from his presence at critical stages of the conspiracy that could not be explained by happenstance . . . ." (Internal quotation marks omitted.) *State* v. *Rosado*, 134 Conn. App. 505, 511, 39 A.3d 1156, cert. denied, 305 Conn. 905, 44 A.3d 181 (2012). The defendant's actual participation in the assault and his conduct following the assault undermines his argument that he merely was a bystander during the events at issue. The defendant relies almost exclusively on Whittington's testimony. In accordance with our well settled standard of review, we focus on the evidence that supported the jury's finding of guilt. The defendant attempts to portray Whittington as the sole perpetrator, yet the evidence of the defendant's conduct before, during, and after the events at issue reflect that he and Whittington conspired to cause serious physical injury to the victim by means of a dangerous instrument. See *State* v. *Williams*, 94 Conn. App. 424, 433, 892 A.2d 990 (defendant's conduct before, during, and following incident may shed light on his

state of mind), cert. denied, 279 Conn. 901, 901 A.2d 1224 (2006).

In light of the foregoing, we reject the defendant's argument that the evidence was insufficient to convict him of conspiracy to commit assault in the first degree.

The judgment is affirmed.

In this opinion the other judges concurred.

SIKORSKY FINANCIAL CREDIT UNION, INC. *v.* BERNARDINO PINEDA (AC 40896)

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

Syllabus

The plaintiff credit union sought to recover damages from the defendant borrower for breach of an agreement to repay a personal loan. In its prayer for relief, the plaintiff sought interest. The defendant was defaulted for failure to appear, and the plaintiff filed a motion for judgment, which sought principal and interest calculated through the date of that motion. After a hearing in damages, taken on the papers, the trial court rendered judgment for the plaintiff awarding the amount sought in the motion, but did not expressly state that postmaturity postjudgment interest would continue to accrue. The plaintiff filed an application for financial institution execution seeking payment of the judgment and alleged, inter alia, that the court had ordered postjudgment interest. The clerk rejected this application on the ground that postjudgment interest had not been awarded. The plaintiff then filed a motion for an order of postmaturity postjudgment interest, claiming that the court previously had awarded such interest at the contractual rate. The court denied that motion, and the plaintiff appealed to this court. *Held* that the trial court improperly denied the plaintiff's motion for an order of postmaturity postjudgment interest: the statute (§ 37-1) that governs eo nomine interest as compensation for a loan sets a default rate of 8 percent, but allows the parties to contract for a different rate and, if the parties fail to specify whether interest will accrue after maturity, or to specify the rate of postmaturity interest, § 37-1 (b) mandates that interest eo nomine shall continue to accrue after maturity at the legal rate, such that an award of prejudgment and postjudgment interest on a loan that carries postmaturity interest is not discretionary, and because the parties here did not disclaim the accrual of interest eo nomine after

maturity and the loan agreement provided that the defendant would pay interest at 15.99 percent until the debt was satisfied, the court was, therefore, required, upon entry of judgment, to award postjudgment interest at that rate, which arose by agreement of the parties; moreover, contrary to the trial court's findings, the plaintiff was not required to present additional evidence to support its claim for interest, nor did it make a difference that the plaintiff did not ask specifically for postjudgment interest in its prayer for relief, as the prayer for relief mentioned interest, and where, as here, a lender and borrower both agree that interest continues to accrue on a note balance until it is paid, then, under § 37-1, interest continues to accrue postmaturity and postjudgment.

Argued April 9—officially released June 19, 2018

Procedural History

Action seeking to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Ansonia-Milford, where the defendant was defaulted for failure to appear; thereafter, the court, *Hon. John W. Moran*, judge trial referee, granted the plaintiff's motion for judgment and rendered judgment for the plaintiff; subsequently, the court, *Markle, J.*, denied the plaintiff's motion for an order of postjudgment interest, and the plaintiff appealed to this court. *Reversed; judgment directed.*

William L. Marohn, for the appellant (plaintiff).

Opinion

FLYNN, J. The plaintiff, Sikorsky Financial Credit Union, Inc., appeals from the judgment of the trial court denying its motion for postmaturity postjudgment interest. On appeal, the plaintiff claims that the trial court improperly denied the motion in light of General Statutes § 37-1[1] and our Supreme Court's decision in *Sikorsky Financial Credit Union, Inc.* v. *Butts*, 315 Conn.

[1] General Statutes § 37-1 provides: "(a) The compensation for forbearance of property loaned at a fixed valuation, or for money, shall, in the absence of any agreement to the contrary, be at the rate of eight per cent a year; and, in computing interest, three hundred sixty days may be considered to be a year.

"(b) Unless otherwise provided by agreement, interest at the legal rate from the date of maturity of a debt shall accrue as an addition to the debt."

433, 108 A.3d 228 (2015). We agree and, accordingly, reverse the judgment of the trial court.[2]

The following facts and procedural history are relevant to this appeal. The plaintiff is a credit union chartered under the laws of this state with its principal place of business in Stratford, Connecticut. On or about January 26, 2007, the plaintiff and the defendant, Bernardino Pineda, entered into a credit agreement for a personal loan, whereby the defendant agreed to repay the loan in monthly installments. Subsequently, the defendant defaulted on the agreement, and the plaintiff brought an action for recovery in the Superior Court, returnable to the judicial district of Ansonia-Milford on Tuesday, September 14, 2010. Among the plaintiff's prayers for relief was interest. After the defendant failed to file an appearance, the plaintiff by a motion dated and filed on September 20, 2010, sought a default for failure to appear, which the clerk granted on October 5, 2010. On November 17, 2010, the plaintiff filed a motion for judgment, seeking a sum of $11,923.78, inclusive of $2521.08 in interest through the date of that motion. According to the plaintiff's affidavit of debt, the principal remaining at the time was $7851.22, accruing interest at the rate of 15.99 percent.[3] After a hearing in damages, taken on the papers, the court, *Hon. John W. Moran*, judge trial referee, on November 19, 2010, entered the following judgment: "[T]he defendant(s)

[2] The defendant, Bernardino Pineda, neither filed an appearance in the trial court nor appeared before this court.

[3] Although the plaintiff's motion did not specify the interest rate of 15.99 percent, the affidavit of debt and other loan documents attached to the plaintiff's motion recited that interest rate. The plaintiff's motion sought $2521.08 in prejudgment interest, calculated at the contractual rate of 15.99 percent, which the court awarded. We know therefore that the judgment of November 19, 2010, granted the plaintiff's motion providing for eo nomine interest—interest as compensation for a loan—at the rate of 15.99 percent, which the defendant had agreed to pay postmaturity. The rate of 15.99 percent exceeds the 8 percent default rate of interest provided in § 37-1.

owe the plaintiff(s) the following: Amount due on claims: $7851.22; interest: $2521.08; attorney fees: $1,177.68; costs: $373.80; total amount of judgment: $11,923.78." As part of the judgment, Judge Moran entered a nominal order of weekly payments for $35. The plaintiff subsequently filed two applications for financial institution execution respectively dated February 11, 2015, and March 18, 2016. Neither application noted that Judge Moran's judgment contained an award of postjudgment interest and both were issued by the clerk and returned partially satisfied by a state marshal in the amount of $475.87 and $2085.02, respectively.

On May 8, 2017, the plaintiff filed a third application for financial institution execution, noting that postjudgment interest was awarded upon entry of judgment by Judge Moran. This application was rejected by the clerk on the ground that postjudgment interest had not been awarded. Thereafter, the plaintiff, on July 31, 2017, filed a motion for order of postmaturity postjudgment interest, claiming that Judge Moran had awarded such interest at the contractual rate of 15.99 percent and the clerk, therefore, improperly had rejected the application for financial institution execution. In his motion, the plaintiff also cited *Sikorsky Financial Credit Union, Inc.* v. *Butts*, supra, 315 Conn. 433, for the position that postmaturity interest continues to accrue after judgment, at the rate of 15.99 percent, which was the rate that the borrower had contracted to pay as long as any loan balance was due. In considering the plaintiff's motion, the trial court, *Markle, J.*, made the following findings: "[T]he judgment was entered after a hearing in damages before the court (*Moran, J.*) on [November 19] 2010. . . . In the six years and eight months following the entry of said judgment the plaintiff never filed a motion to open judgment pursuant to [Practice Book §] 17-43. . . . The plaintiff never filed an appeal of the judgment pursuant to [Practice Book §] 61-2. . . . The

plaintiff did not supply in its motion any evidence supporting contractual rights to postjudgment interest such as loan documents. . . . The plaintiff did not support its motion by submitting transcripts of the hearing in damages supporting that there had been in fact a claim for postjudgment interest (in fact there are many cases where debt collectors waive that claim). . . . The complaint does not mention a claim for postjudgment interest under the statutory provisions. . . . [T]he court is not able to make any findings that the plaintiff is entitled to the statutory postjudgment interest under [General Statutes §] 37-1a based on the record."[4] The court then denied the plaintiff's motion. On September 1, 2017, the plaintiff filed a motion to reargue/reconsider, which also was denied by the court. This appeal followed.

On appeal, the plaintiff claims that the trial court erred in concluding that postmaturity interest does not accrue after judgment. Specifically, the plaintiff argues that the trial court failed to recognize that pursuant to § 37-1, and our Supreme Court's decision in *Sikorsky Financial Credit Union, Inc.* v. *Butts*, supra, 315 Conn. 433, postmaturity contractual interest continues to accrue after entry of judgment.

In support of this argument, the plaintiff relies on language from the contract that provides, "[i]f immediate payment is demanded, you will continue to pay interest until what you owe has been repaid at the applicable interest rates in effect, or if applicable, at the default rate disclosed on the Addendum." The addendum in turn lists an interest rate of 15.99 percent for loans payable over twenty-four months, which rate also appears on a transaction receipt supplied by the plaintiff and the affidavit of debt. Throughout its brief,

[4] Although the trial court's order mistakenly cites § 37-1a, it is clear that the relevant statute is § 37-1, and, in fact, the plaintiff, in its motion, specifically sought an award of interest under that statute.

the plaintiff asserts that Judge Moran, upon entry of judgment, on November 19, 2010, had granted postmaturity interest. Consequently, in the plaintiff's view, the trial court, in denying its motion for postjudgment interest, improperly considered the sufficiency of the record. Although the plaintiff frames its claim of error in definitive terms, suggesting that postjudgment interest was awarded upon entry of judgment by Judge Moran on November 19, 2010, the judgment itself contains no express mention of such an award. We, nevertheless, agree with the plaintiff that the November 19, 2010 judgment itself, § 37-1, and our Supreme Court's decision in *Sikorsky Financial Credit Union, Inc.*, interpreting § 37-1, should have guided the trial court.

We begin by setting forth the standard of review and applicable legal principles. "The interpretation and application of a statute . . . involves a question of law over which our review is plenary." (Internal quotation marks omitted.) *Meadowbrook Center, Inc.* v. *Buchman*, 328 Conn. 586, 594, 181 A.3d 550 (2018). Additionally, because the plaintiff's claim "involves the interpretation of definitive contract language, our review is plenary." *American First Federal, Inc.*, v. *Gordon*, 173 Conn. App. 573, 592, 164 A.3d 776, cert. denied, 327 Conn. 909, 170 A.3d 681 (2017).

In *Sikorsky Financial Credit Union, Inc.* v. *Butts*, supra, 315 Conn. 438, our Supreme Court addressed, squarely, the issue of whether contractual postmaturity interest terminates upon entry of judgment. In resolving that inquiry, the court noted that both §§ 37-1 and 37-3a relate to interest, but that the former governs interest, usually by agreement, as compensation for a loan (interest eo nomine), while § 37-3a applies to interest as damages for the detention of money. See id., 439–40. Specifically with reference to § 37-1, the court noted that subsection (a) of that provision sets a default rate of 8 percent, but allows the parties to contract for a

different rate. Id., 440. Subsection (b), on the other hand, allows the parties to forgo postmaturity interest altogether. Id., 441. The court explained, however, that "if the parties fail to specify whether interest will accrue after maturity, or fail to specify the rate of postmaturity interest, § 37-1 (b) mandates that interest eo nomine shall continue to accrue after maturity at the legal rate." Id. Accordingly, "an award of prejudgment and postjudgment interest on a loan that carries postmaturity interest is not discretionary; it is an integral part of enforcing the parties' bargain. . . . The trial court *must*, therefore, as part of any judgment enforcing a loan, allow prejudgment and postjudgment interest at the agreed rate, or the legal rate if no agreed rate is specified. The trial court is relieved of this obligation *only if the parties disclaim any right to interest eo nomine after maturity.*"[5] (Citations omitted; emphasis added.) Id., 441–42.

More recently, this court, in *American First Federal, Inc.* v. *Gordon*, supra, 173 Conn. App. 592–93, applied and reaffirmed the principle from *Sikorsky Financial Credit Union, Inc.* In that case, the plaintiff argued on appeal that the trial court erroneously awarded interest on the unpaid principal rather than the total judgment amount. Id., 592. This court affirmed the judgment of the trial court, reiterating that, unless the parties disclaim postmaturity interest, the trial court has no discretion to apply it in terms other than those agreed by the parties. Id., 593. Consequently, we held that the trial court correctly awarded interest on the principal balance only, as had been agreed by the parties. Id.; see also *Cadle Co.* v. *Ogalin*, 175 Conn. App. 1, 12–13 n.6,

[5] By contrast, although interest under § 37-3a may also accrue both pre- and postjudgment, whether it is awarded is "principally an equitable question lying within the trial court's discretion." *Sikorsky Financial Credit Union, Inc.* v. *Butts*, supra, 315 Conn. 443. Only after the parties expressly reject postmaturiy interest does the court then have discretion to award interest under § 37-3a. Id., 444.

167 A.3d 402 (noting postmaturity interest continues to accrue after entry of judgment and is not discretionary), cert. denied, 327 Conn. 930, 171 A.3d 454 (2017).

Our law after *Sikorsky Financial Credit Union, Inc.* v. *Butts*, supra, 315 Conn. 433, therefore, is clear that the trial court is mandated to enter postmaturity postjudgment interest, unless the parties expressly disclaim its accrual after maturity. Additionally, if the parties do not specify an interest rate, it accrues at the statutory rate of 8 percent. Id., 440–41. In the present case, the parties did not disclaim the accrual of interest eo nomine after maturity. Rather, the loan agreement provided that the defendant would pay interest at 15.99 percent until the debt was satisfied, and the addendum, the transaction receipt, and the plaintiff's affidavit of debt all show a contractual interest rate of 15.99 percent. The court, thus, was required, upon entry of judgment, to award postjudgment interest at that rate, which arose by agreement of the parties. See *American First Federal, Inc.* v. *Gordon*, supra, 173 Conn. App. 592–93.

In the plaintiff's view, Judge Moran necessarily awarded postjudgment interest at 15.99 percent when he expressly granted the prejudgment interest requested in by the plaintiff in its motion for judgment. Specifically, at oral argument before this court, the plaintiff maintained that the judgment necessarily includes postjudgment interest at the rate of 15.99 percent because that was the rate used to compute the prejudgment interest. Post-*Sikorsky*, the rules of the court, and rules of practice have not made the judges' or clerks' role convenient to make ready disposition. Nor have the rules kept up with enforcement or payment of judgment debts where eo nomine interest is bargained for by the parties and continues to accrue at a rate they agreed upon postmaturity until the note is paid. Until some rule amendment is adopted, so that

the application for execution on the judgment succinctly and readily informs a court clerk or judge of the basis of entitlement to running eo nomine interest post note maturity and postjudgment, the court will have to examine the motion for judgment and its attachments to determine if that record suffices to justify the issuance of an execution on the underlying judgment in an amount of eo nomine interest claimed in the application.

In light of these circumstances, we understand how the trial court felt compelled to require the plaintiff to submit additional evidence in support of its claim. The court, however, could have taken judicial notice of the court file and Judge Moran's earlier underlying judgment, which awarded eo nomine interest on the unpaid balance of the judgment on the note, in the exact amount set forth in the plaintiff's motion for judgment and its attachments containing the contractual rate of interest of 15.99 percent. There was no need for transcripts of the proceeding before Judge Moran because the defendant had been defaulted and, therefore, the motion for judgment after that default was taken on the papers; there was no transcript. The trial court's reasoning that the plaintiff should have appealed from Judge Moran's judgment or filed a motion to open is misdirected, because Judge Moran already had awarded eo nomine interest. There was no need to appeal or move to open a judgment that had granted what the plaintiff sought. See *Scarsdale National Bank & Trust Co.* v. *Schmitz*, 24 Conn. App. 230, 233, 587 A.2d 164 (1991) ("[a] party cannot be aggrieved by a decision that grants the very relief sought"). Additionally, it makes no difference that the plaintiff's complaint did not ask specifically for postjudgment interest. The complaint's prayer for relief mentions interest. If a lender and borrower have both agreed that interest continues to accrue on a note balance until it is paid, then, under

§ 37-1, interest continues to accrue postmaturity and postjudgment. The parties in this case contracted for a specific rate of interest eo nomine and did not expressly disclaim its accrual after maturity. See *Sikorsky Financial Credit Union, Inc.* v. *Butts*, supra, 315 Conn. 441–42. Accordingly, the court improperly denied the plaintiff's motion.

The judgment is reversed only as to the denial of the plaintiff's motion for an order of postjudgment interest and the case is remanded to the trial court with direction to grant execution on the judgment, including eo nomine postjudgment interest at the contractual rate of 15.99 percent on that part of the judgment that remains unpaid.

In this opinion the other judges concurred.