IN RE KATHERINE H.*
(AC 41248)

IN RE JAMES H.
(AC 41249)

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

Syllabus

The respondent mother appealed to this court from the judgments of the trial court, which adjudicated her minor children neglected and committed them to the custody of the petitioner, the Commissioner of Children and Families. The trial court found, inter alia, that the respondent had experienced episodic psychotic delusional thinking and that the children had been permitted to live under conditions, circumstances or associations injurious to their well-being, and that they were denied proper care and attention, physically, educationally, emotionally or morally. On appeal, the respondent challenged the manner in which the Department of Children and Families performed its responsibilities and the trial court's factual findings. *Held* that the respondent had not demonstrated that any of the trial court's findings were clearly erroneous or that the court had abused its discretion in committing the children to the petitioner's custody in the interest of the children's sustained growth, development, well-being, and in the continuity and stability of their environment, and, accordingly, the trial court's judgments were affirmed.

Argued June 1—officially released July 6, 2018**

Procedural History

Petitions by the Commissioner of Children and Families to adjudicate the respondents' minor children neglected, brought to the Superior Court in the judicial district of New London, Juvenile Matters at Waterford, where the court, *Driscoll*, *J.*, issued ex parte orders of temporary custody and removed the minor children from the respondents' care; thereafter, the matters were

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

** July 6, 2018, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

transferred to the judicial district of Windham, Child Protection Session at Willimantic; subsequently, the court, *Hon. Francis J. Foley III*, judge trial referee, sustained the orders of temporary custody; thereafter, the matters were transferred to the judicial district of New London, Juvenile Matters at Waterford, and tried to the court, *Hon. Michael A. Mack*, judge trial referee; judgments adjudicating the minor children neglected and committing the minor children to the custody of the petitioner, from which the respondent mother appealed to this court. *Affirmed.*

Ann C., self-represented, the appellant (respondent mother).

Christopher L. Aker, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

Ellin M. Grenger, for the minor children.

Opinion

PER CURIAM. In these consolidated appeals, the self-represented respondent mother, Ann C.,[1] appeals from the judgments of the trial court finding her minor children, Katherine H. and James H., neglected and committing them to the custody of the petitioner, the Commissioner of Children and Families.[2] On appeal, the respondent essentially takes issue with the manner in which the Department of Children and Families (department) performed its responsibilities and the

[1] The court also granted the neglect petitions with respect to the respondent father, Aaron H., who resides in the state of Washington. He has taken no position with respect to the present appeals and asked to be excused from filing a brief and attending oral argument. In this opinion, we refer to the respondent mother as the respondent.

[2] Counsel for the children has adopted the brief filed by the petitioner.

court's factual findings.[3] We affirm the judgments of the trial court.

The following facts and procedural history are relevant to our resolution of the respondent's appeals. The department became involved with the respondent on November 20, 2015, after it received a Careline[4] call from a clinician who reported that the respondent was the caretaker of two young children and that she presented a risk of harm to them given her psychotic thoughts, delusional thinking and consumption of large quantities of wine. The respondent had been employed by Electric Boat Division of General Dynamics Corporation (Electric Boat), but in May, 2016, the yard psychiatrist found her to be unfit for duty. Electric Boat referred her for a psychiatric evaluation, but the evaluation never took place given the terms the respondent wanted placed on the conditions of the evaluation. Between November, 2015, and November 30, 2016, the department made efforts for the respondent to undergo a

[3] On appeal, the respondent claims that (1) it is the responsibility of the department to follow the practices and procedures of state and federal governments, as well as its own policies, (2) the department's responsibility to employ reasonable efforts for the reunification of families is in question, (3) psychiatric evaluations submitted by the respondent and the petitioner vary significantly enough to shed doubt on the elevated nature of the findings of David Mantell, a forensic psychologist, (4) the law references used by the court, *Hon. Francis J. Foley III*, judge trial referee, and the court, *Hon. Michael A. Mack*, judge trial referee, are not valid as they cannot be applied to the present case, (5) the respondent's request to record psychiatric evaluations displays a rational logic to preserve her right to accountability, (6) the validity of the allegations made in regard to the educational, health, and general care of the children are invalid, (7) the accusation that the respondent is delusional due to her belief of potential privacy intrusion is unrealistic, and (8) due diligence was not exhibited by the legal representatives of the respondent, either retained or assigned.

There is no record regarding the respondent's claim that the representation of her counsel was deficient. We, therefore, decline to review it. See Practice Book § 61-10 (a).

[4] Careline is a department telephone service that mandatory reporters and others may call to report suspected child abuse or neglect.

psychiatric evaluation, to enter psychotherapy, and to comply with medication management. Its efforts were unsuccessful. Therapists to whom the respondent was referred expressed concern about her delusional thinking and consumption of alcohol. The court, *Hon. Michael A. Mack*, judge trial referee, found that the respondent does not acknowledge that she has mental health issues or that she needs help.

On August 5, 2016, the petitioner filed the neglect petitions at issue.[5] Before the neglect petitions were adjudicated, however, on December 1, 2016, the petitioner filed ex parte motions for orders of temporary custody of the children. On that same day, the court, *Driscoll*, *J.*, granted the ex parte motions for temporary custody.[6]

[5] The neglect petitions were filed pursuant to General Statutes §§ 46b-120 (6) (B) and (C). The petitions alleged the following jurisdictional facts: the respondent is experiencing psychotic thoughts and delusional thinking, her nurse practitioner states that the respondent does not believe that she is delusional and is only complying with treatment to get the department to close the case, the respondent admitted to drinking a "magnum" of wine at a time, and the respondent has not cooperated with a psychiatric evaluation. The petitions alleged that the children were neglected for reasons other than being impoverished in that they were being denied care and attention, physically, educationally, emotionally or morally, or were being permitted to live under conditions, circumstances or associations injurious to their well-being.

The petitions were accompanied by an affidavit in which the respondent's social worker, Michael Earley, averred in part that "the children are in need of a stable and competent caregiver who can discern between what is real and what is imagined. It has been reported to the [d]epartment that [the respondent] is isolating her children from their maternal grandparents with whom they share the residence . . . which inhibits the full compliance with the safety plan to ensure the children's well-being and safety. . . . As of this writing, [the respondent] has one calendar year of documented noncompliance. As of 11/30/16, the children's safety net with regard to supervision will no longer be available, which places them at great risk of harm."

[6] Judge Driscoll granted the ex parte motions for orders of temporary custody on the ground that the children were in immediate physical danger from their surroundings and, as a result of said conditions, the children's safety was endangered and immediate removal from such surroundings was necessary to ensure the children's safety, and that remaining in the home was contrary to the children's welfare. The court ordered that temporary

A contested hearing on the motions for temporary custody was held on December 14, 2016. The trial court, *Hon. Francis J. Foley III*, judge trial referee, issued a memorandum of decision on December 16, 2016, in which it sustained the orders of temporary custody. In his decision, Judge Foley disagreed with the respondent's contention that the court was required to find predictive neglect in order to sustain the orders of temporary custody.[7] He also made detailed factual findings

care and custody of the children vest in the petitioner and that reasonable efforts to prevent or eliminate the need for removal of the children had been made by the department. The court scheduled a hearing on the temporary custody motions and ordered the respondent to appear.

[7] Judge Foley quoted language from this court, noting that "[o]ur statutes clearly permit an adjudication of neglect based on a potential for harm or abuse to occur in the future. General Statutes § 17a-101 (a) provides: The public policy of this state is . . . [t]o protect children whose health and welfare may be adversely affected through injury and neglect . . . . By its terms, § 17a-101 (a) connotes a responsibility on the state's behalf to act before the actual occurrence of injury or neglect has taken place.

"General Statutes [Rev. to 1999] § 46b-120 (8) provides that a child . . . may be found neglected who . . . (C) is being permitted to live under conditions, circumstances or associations injurious to his well being . . . . The department, pursuant to the statute, need not wait until a child is actually harmed before intervening to protect that child. General Statutes § 46b-129 (b) permits the removal of a child from the home by the department when there is reasonable cause to believe that (1) the child . . . is in immediate physical danger from his surroundings and (2) that as a result of said conditions, the child's safety is endangered and immediate removal from such surroundings is necessary to ensure the child's safety . . . . This statute clearly contemplates a situation where harm could occur but has not actually occurred." (Emphasis omitted; internal quotation marks omitted.) *In re Michael D.*, 58 Conn. App. 119, 123–24, 752 A.2d 1135, cert. denied, 254 Conn. 911, 759 A.2d 505 (2000).

Judge Foley further noted that the authority to issue an order of temporary custody is similar to statutes regarding findings of neglect, but not identical. Practice Book § 33a-6 (a) provides in relevant part: "If the judicial authority finds . . . that there is *reasonable cause to believe* that: (1) the child . . . is suffering from serious physical illness or serious physical injury or *is in immediate physical danger* from his or her surroundings and (2) that as *a result of said conditions*, the child's . . . safety is endangered and *immediate removal from such surroundings is necessary to ensure the child's . . . safety*, the judicial authority shall . . . issue an order [of temporary custody]." (Emphasis added.)

as to the department's efforts on behalf of the respondent, as well as the findings and recommendations of therapeutic providers regarding the respondent's delusional thinking, alcohol consumption, and the risk she posed to the children. The court found that the respondent was aware that she risked losing custody of the children. The court found that the children were in immediate physical danger due to the respondent's delusional disorder and abuse of alcohol and concluded that their removal from the respondent's care was necessary to ensure their safety. The respondent did not appeal from the judgments granting the motions for temporary custody.

On December 5, 2017, following a contested hearing on the neglect petitions, *Hon. Michael A. Mack*, judge trial referee, found "by a fair preponderance of the evidence that the children had been permitted to live under conditions, circumstances or associations injurious to their well-being and that they were being denied proper care and attention, physically, educationally, emotionally or morally. As noted by Judge Foley . . . the court is not required to, nor should it, wait until an actual catastrophe occurs involving the children or either of them. There is significant evidence that under the circumstances before the [orders of temporary custody], it was only a question of time before an act or actual happening of neglect occurred. Living in the presence of actual delusional thinking and acting is itself a condition of negligence and/or neglect. No credible evidence was offered demonstrating that there has been a significant improvement in [the respondent's] situation."[8] Moreover, the respondent did not acknowledge that she had mental health issues or that she needed help.

[8] The court denied the respondent's motion to vacate the orders of temporary custody.

Judge Mack also found pursuant to the evidence presented by the petitioner that "[o]n May 24, 2016, [the respondent's] therapist contacted the Careline to report that [the respondent] was experiencing psychotic thoughts. The therapist felt that [the respondent] having episodic psychotic delusional thinking might be a problem for the children, as she was the only caregiver for the children, and her warped thinking could create a situation that may be dangerous for the children.

"On May 25, 2016, [the department's] Regional Resource [licensed clinical social worker], Lorraine Fleury, was consulted and completed an assessment of [the respondent's] mental health status. She found that [the respondent] . . . had multiple delusions that are paranoid and persecutory in nature and that [the respondent] presents as anxious and hypervigilant. Additionally . . . Fleury assessed [the respondent] to be almost completely consumed and distracted by numerous paranoid and persecutory delusions, which prevents her from attending to her children's emotional and, eventually, their physical needs."[9] (Internal quotation marks omitted.)

The court found by a fair preponderance of the evidence that the children have been permitted to live under conditions, circumstances or associations injurious to their well-being and that they were being denied proper care and attention, physically, educationally, emotionally or morally. In other words, it found that the children had been neglected prior to the entry of the ex parte orders of temporary custody in favor of the petitioner.

"Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. The trial court's findings are binding upon this court

[9] Judge Foley made similar findings in his December 16, 2016 memorandum of decision in which he sustained the orders of temporary custody.

unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . We cannot retry the facts or pass on the credibility of the witnesses. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *In re Michael L.*, 56 Conn. App. 688, 692–93, 745 A.2d 847 (2000).

On appeal, the respondent has not demonstrated to us that any of the court's findings are clearly erroneous. She also has not demonstrated that the court abused its discretion by committing the children to the custody of the petitioner in the interest of the children's "sustained growth, development, well-being, and in the continuity and stability of [their] environment." (Internal quotation marks omitted.) *In re Diamond J.*, 121 Conn. App. 392, 397, 996 A.2d 296, cert. denied, 297 Conn. 927, 998 A.2d 1193 (2010).

The judgments are affirmed.

IN RE ZOEY H.*
(AC 41157)

Elgo, Bright and Mihalakos, Js.

Syllabus

The respondent father appealed to this court from the judgment of the trial court denying his motion to revoke the commitment of his minor daughter to the custody and care of the petitioner, the Commissioner of Children and Families. The father claimed, inter alia, that the trial

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

court improperly failed to hold a hearing to determine his fitness as a parent before infringing on his right to the custody and care of his child. The commissioner, who had been granted an ex parte order of temporary custody shortly after the child was born, had filed a petition alleging that the child was uncared for. The trial court found that the child had been uncared for and committed her to the custody of the commissioner. The man whom the child's mother had identified as the father in that proceeding later was determined not to be the father and was dismissed from the case. The respondent father thereafter was cited into the case and, after genetic testing, was determined to be the child's biological father. The trial court denied the father's first motion to revoke commitment, from which he did not appeal. After the court issued certain specific steps to the father to aid with his reunification with the child, the father filed a second motion to revoke commitment, which the court also denied, concluding that his failure to comply with the specific steps impacted his ability to meet the child's needs and to keep her safe. The court conducted hearings on both motions in which the father was accorded the opportunity to present evidence regarding his fitness to take custody of the child. *Held*:

1. The respondent father could not prevail on his unpreserved claim that the trial court violated his right to procedural due process when it denied his motion to revoke the commitment of the child to the commissioner without first conducting a hearing to determine his fitness as a parent; the procedures set forth in the statute (§ 46b-129 [m]) and rule of practice (§ 35a-14A) pertaining to the revocation of the commitment of a minor child, pursuant to which the moving party bears the burden of proving that a cause for commitment no longer exists, and if the movant is successful, the court must determine whether revocation of commitment is in the best interest of the child, strike the appropriate balance between the commissioner's and the father's interests, and comply with procedural due process requirements, and the procedural requirement advocated by the father, namely, that an adjudicative hearing be held in which the father would be presumed to be a fit parent and would automatically obtain custody of the child unless the commissioner could establish otherwise was inappropriate, unwarranted and ill-advised under the circumstances here, as the child previously had been adjudicated uncared for and committed to the custody of the commissioner, who has a substantial interest in ensuring the well-being of children placed in her custody, and the father's desire to take custody of and care for the child did not justify the creation of a process that would require the court to turn over a child to a person who did not know anything about the child or her needs.
2. The respondent father's unpreserved claim that, as applied, the statute (§ 46b-129 [m]) governing the revocation of a minor child's commitment infringed on his right to substantive due process was unavailing; the trial court, in applying the burden to the father to prove that a cause

for commitment no longer existed, in response to his motion to revoke commitment, properly applied the law and did not violate the father's right to substantive due process, as he was not entitled to a presumption of fitness after the child had been adjudicated uncared for and committed to the custody of the commissioner, there was a compelling reason to protect the child from harm given that she was uncared for when she was merely days old, the court was not required to presume that the father was a fit parent who was acting in the child's best interest where, as here, his motion to revoke commitment had been filed nearly two years after the adjudication and commitment of the child to the commissioner, and although, at the time of that adjudication, another man was alleged to have been the child's father and the respondent father was not a party to that case, that did not change the fact that the child had been adjudicated to be uncared for and was in need of the commissioner's protection and intervention.

Argued May 21—officially released July 11, 2018**

Procedural History

Petition by the Commissioner of Children and Families to adjudicate the minor child of the respondent mother and the putative father uncared for, brought to the Superior Court in the judicial district of New Haven, Juvenile Matters, and tried to the court, *Mosley*, *J.*; judgment adjudicating the minor child uncared for and committing the minor child to the custody of the petitioner; thereafter, the court, *Conway*, *J.*, dismissed the action as to the putative father; subsequently, the court, *Marcus*, *J.*, granted the motion filed by Jonathan S. to be cited in as the respondent biological father of the minor child; thereafter, the court, *Marcus*, *J.*, denied the respondent father's motions to revoke commitment, and the respondent father appealed to this court. *Affirmed.*

Benjamin M. Wattenmaker, assigned counsel, for the appellant (respondent father).

Evan O'Roark, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

** July 11, 2018, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Opinion

BRIGHT, J. The respondent father, Jonathan S., appeals from the judgment of the trial court denying his motion to revoke the commitment of his minor daughter, Zoey H., to the petitioner, the Commissioner of Children and Families.[1] The respondent claims that (1) his right to procedural due process under the United States constitution was violated by the court's failure to hold a hearing to determine his fitness as a parent before depriving him of the custody and care of his child, and (2) as applied, General Statutes § 46b-129 (m) violates his right to substantive due process under the United States constitution and improperly assigns the burden of proof to him. We affirm the judgment of the trial court.

The following factual findings, which are not challenged, and procedural history are relevant to our consideration of the issues raised on appeal. Zoey was born on May 9, 2015. Because her mother, M, was homeless and exhibited behavior that raised concerns about her ability to care for Zoey,[2] the petitioner sought and was granted an ex parte order of temporary custody, thereby removing Zoey from M's custody. Zoey was placed in a nonrelative foster home, where she remained up to and through the hearing that resulted in the judgment at issue in this appeal. On September 23, 2015, following a hearing, and with M's admission, the court adjudicated Zoey to be uncared for and committed Zoey to the custody of the petitioner. The man that M identified as Zoey's father, who appeared at the hearing, stood silent with respect to the adjudication. Thereafter, genetic testing established that he was not Zoey's biological

[1] The attorney for the minor child has submitted a statement, pursuant to Practice Book § 67-13, adopting the petitioner's brief.

[2] M has been diagnosed as having personality disorders. She is not a party to this appeal; accordingly, we refer to the respondent father as the respondent.

father, and on October 13, 2015, he was dismissed from the case. After Zoey's commitment, M engaged in some sporadic mental health services, but soon stopped taking advantage of such services and began to deny the need for further treatment. In March, 2016, the respondent came forward and moved to be cited into the case, asserting that he was Zoey's actual father; the court added him as a party. Genetic testing confirmed that the respondent was Zoey's biological father, and, on May 19, 2016, the court adjudicated him as such.

On May 6, 2016, before the results of genetic testing were submitted to the court, the respondent filed a motion to revoke Zoey's commitment to the petitioner. The motion was supported by M, who did not seek revocation and custody herself. The petitioner filed an objection to the respondent's motion to revoke commitment. The court scheduled a review of the matter for June 20, 2016, at which time the respondent was presented with specific steps that had been drafted by the Department of Children and Families (department) to aid with his reunification with Zoey. The respondent refused to sign the specific steps after objecting to some of them, including undergoing a substance abuse evaluation and a mental health evaluation. Nevertheless, the respondent did agree to visits with Zoey, supervised by All Pointe, LLC, and he agreed to attend psychotherapy at the Yale Child Study Center. The court, over the respondent's objection, accepted all of the specific steps recommended by the department and, on June 20, 2016, made them orders of the court.

On July 14, 2016, the court held a hearing on the respondent's motion to revoke commitment.[3] After considering the evidence presented and the arguments

[3] We have been furnished with an electronic copy of the entire July 14, 2016 hearing transcript. The petitioner, in her appendix, also has provided a paper copy of the portion of the July 14, 2016 transcript that contains the court's oral decision.

advanced, the court denied the respondent's motion. The court commended the respondent for coming forward and for being proactive. It held, however, that the respondent had failed to put forth a prima facie case that would permit the court to revoke Zoey's commitment. The court explained that it would not be in Zoey's best interest for her commitment to be revoked, but that with psychotherapy to assist the respondent with recognizing Zoey's particular needs, and some assistance with creating a better bond with Zoey, the respondent, after continued supervised visitation and psychotherapy sessions, might be successful in reunification. The respondent did not appeal from that July 14, 2016 judgment.

Instead, the respondent continued to engage in supervised visitation with Zoey and actually began some of the services set forth in the specific steps ordered by the court. In particular, in September, 2016, the respondent attended his first appointment at the parent-child psychotherapy program at the Yale Child Study Center. The respondent was discharged from the program one month later when he failed to attend his next scheduled appointment and did not return calls or text messages from the center. Similarly, the respondent attended the first of ten parenting classes through All Pointe, LLC, but never completed another class.

On June 8, 2017, nearly one year after the denial of his first motion to revoke commitment, the respondent filed a second motion to revoke commitment. The court held a hearing on the motion on August 30, October 10 and October 26, 2017, at which the respondent argued that he had done everything necessary to secure reunification with Zoey. The petitioner argued that the respondent had failed to comply with the specific steps that the court had ordered, that he did not have a good understanding of Zoey's needs, that he did not have a sufficient bond with her because he failed to attend

the parent-child therapy as ordered, and that he had engaged in concerning behavior during some of his visits with Zoey.

In a very thorough October 31, 2017 memorandum of decision, the court found that the respondent failed to comply with *any* of the court-ordered specific steps, with the exception of supervised visitation. The court also credited the respondent's testimony that he would not abide by any court orders until he obtained custody of Zoey, and that he would "not participate in recommended services that were ordered by [the] court in order to meet Zoey's needs prior to reunification." The court discussed the respondent's unwillingness to heed the recommendations of medical professionals, and it concluded that the respondent "show[ed] a lack of regard for Zoey's needs . . . putting his need to be sole decision maker regarding Zoey's diet . . . before Zoey's health." The court further found that the respondent was unwilling to communicate with Zoey's foster parents because, in the words of the respondent, "they come from two different worlds and have nothing in common. They have a nanny and he does not. He further stated that there is nothing they can tell him about his own child."

The court also discussed the respondent's inability to recognize safety issues concerning Zoey. It commented on the respondent's testimony that, despite M's unaddressed mental health issues, he would permit her to visit with Zoey whenever she wanted to visit. The court also commented on the respondent's aggression and outbursts at the Boys and Girls Village, which caused Zoey to exhibit fear during several visits that were conducted there. The court credited the testimony of a department social worker, Renata Tecza, that the reason the department was insisting that the respondent undergo a mental health evaluation was because his

"anger 'rises to a different level,' and this is a concern for Zoey's safety going forward."

On the basis of this and other evidence, the court denied the respondent's motion to revoke commitment, finding that "the preponderance of the evidence shows that the [respondent's] failure to comply with his specific steps impacted his ability to meet Zoey's needs both medically and emotionally. This failure also has had an impact upon his ability to keep her safe." This appeal followed. Additional facts will be set forth as necessary.

I

The respondent claims that his right to procedural due process under the United States constitution was violated by the court's failure to hold an adjudicative hearing to determine his fitness as a parent before infringing on his right to the custody and care of his biological child. Insofar as this claim may not have been preserved properly, he requests review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). The petitioner argues that the respondent's claim is not only unpreserved, but that it is unreviewable because the respondent is attempting to attack the original judgment that adjudicated Zoey uncared for and committed her to the petitioner's custody. She contends that the respondent did not request an adjudicative hearing and that he should have filed a motion to open the original judgment on the basis of mutual mistake regarding paternity as soon as he was added as a party to this case and determined to be Zoey's biological father. She argues: "He cannot now, after having twice lost at trial on motions to revoke commitment, argue that the original judgment was defective because he didn't have the opportunity to participate in the dispositional hearing that led to Zoey . . . being committed." We conclude that the respondent's claim is reviewable

under *Golding*, but that the claim fails to satisfy *Golding*'s third prong because the court did not violate the respondent's right to procedural due process when it denied his motion to revoke commitment.

Under *Golding*, "a [respondent] 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 [respondent] of a fair trial; and (4) if subject to harmless error analysis, the [petitioner] has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the [respondent's] claim will fail." (Emphasis omitted; footnote omitted.) Id.; see *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying third prong of *Golding* by eliminating word "clearly").

The respondent's claim meets the first two prongs of *Golding* and, therefore, is reviewable. As to the first prong, as is conceded in the petitioner's appellate brief, the record is clear that the respondent did not receive the type of hearing to which he now claims he was constitutionally entitled, a hearing in which the petitioner would have the burden of proving that the respondent was not fit to have custody of Zoey. As to the second prong, the respondent is claiming a violation of his procedural due process rights in the custody and care of his biological child. We conclude, therefore, that the claim is reviewable. We conclude, however, that the respondent's claim fails to satisfy the third prong of *Golding* because the alleged constitutional violation does not exist.

Whether the lack of an adjudicative hearing at which the petitioner bore the burden of proving that the

respondent was unfit to have custody of Zoey deprived the respondent of procedural due process is a question of law as to which our review is plenary. See *In re Lukas K.*, 300 Conn. 463, 469, 14 A.3d 990 (2011); *In re Shaquanna M.*, 61 Conn. App. 592, 600, 767 A.2d 155 (2001). "The United States Supreme Court in *Mathews* v. *Eldridge*, [424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)], established a three part test to determine whether the actions of the court violated a party's right to procedural due process. The three factors to be considered are (1) the private interest that will be affected by the state action, (2) the risk of an erroneous deprivation of such interest, given the existing procedures, and the value of any additional or alternate procedural safeguards, and (3) the government's interest, including the fiscal and administrative burdens attendant to increased or substitute procedural requirements. . . . Due process analysis requires balancing the government's interest in existing procedures against the risk of erroneous deprivation of a private interest inherent in those procedures." (Internal quotation marks omitted.) *In re Lukas K.*, supra, 469.

The respondent primarily relies on a pre-*Mathews* case, however, *Stanley* v. *Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972), to support his argument that "each biological parent is entitled to a fitness hearing as a matter of procedural due process before the state may infringe his or her fundamental right to the custody of his or her child. In other words, where only one parent is adjudicated to have neglected a child, the state may not deprive the nonoffending parent of custody without a hearing to adjudicate whether he or she has neglected, abandoned, or abused a child . . . . Because the [respondent] has not been provided with such an adjudicatory hearing in this case, this court should reverse the trial court's order denying the [respondent's] motion for revocation and hold that he

is entitled to immediate custody of Zoey." We address *Stanley* first, and we conclude that it is inapposite.

In *Stanley* v. *Illinois*, supra, 405 U.S. 651, the plaintiff, an unwed father who had "sired and raised" his children, wanted to continue to raise them after their mother had died, but the children, after a dependency proceeding in accordance with Illinois law that presumed unwed fathers to be unfit parents, became wards of the state. Id., 646. The United States Supreme Court considered whether the Illinois statutory scheme, which presumed unwed fathers, but not unwed mothers, to be unfit to raise their children, violated the equal protection clause of the fourteenth amendment to the United States constitution. Id., 647. Under Illinois law, the actual fitness of the unwed father was irrelevant. Id. The court held: "[A]s a matter of due process of law, [the plaintiff] was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied [the plaintiff] the equal protection of the laws guaranteed by the Fourteenth Amendment." Id., 649.

In the present case, the respondent was not known to be Zoey's biological father at the time the petitioner filed her preliminary neglect petition, on May 15, 2015, seeking temporary custody of Zoey, who was merely days old, on the ground that she had been permitted to live under conditions that were injurious to her well-being. In fact, M had declared another man to be Zoey's father, and he was named in the case, although he had not acknowledged paternity. At a later hearing on September 23, 2015, the state amended the ground of the petition to allege only that Zoey was uncared for because M was homeless. M admitted that allegation, while the putative father, who was incarcerated at the time but did appear for the hearing, stated that he would

stand silent. The court then adjudicated Zoey uncared for and ordered her committed to the care and custody of the petitioner *by agreement of the parties*.

In contrast, in *Stanley*, the children had not been adjudicated uncared for, abused, or neglected; they simply were made wards of the state because their father had not been married to their mother at the time of their mother's death, despite the fact that he had "sired and raised" the children; id., 651; and, despite the fact that an unwed mother would not automatically have been declared unfit if the father of the children had died. Id., 646–47. The Supreme Court readily acknowledged the importance of a state's right and its duty to protect uncared for or neglected children, but that was not the issue of concern for the court in *Stanley*: "The State's right—indeed, duty—to protect minor children through a judicial determination of their interests in a neglect proceeding is not challenged here. Rather, we are faced with a dependency statute that empowers state officials to circumvent neglect proceedings on the theory that an unwed father is not a 'parent' whose existing relationship with his children must be considered." Id., 649–50.

Although the respondent contends that, before the state can remove children from their biological parents, it first must afford those parents an adjudicatory fitness hearing, in the present case, Zoey was adjudicated uncared for by the Superior Court and committed to the care and custody of the petitioner *before the respondent ever appeared* and asserted that he was Zoey's father; indeed, a different man was purported to be her father, and he appeared at the hearing on the petition. The respondent's later appearance in the case and the results of his paternity test do not change the *historical fact* that, *at the time of her commitment*, *Zoey was homeless and*, *therefore*, *uncared for* within the mean-

ing of our child protection statutes,[4] regardless of parentage.[5] When the respondent filed his motion to revoke

[4] General Statutes § 46b-120 (8) provides in relevant part that a child is "uncared for" if that child "is homeless [or his or her] home cannot provide the specialized care that the physical, emotional or mental condition of the child or youth requires . . . ."

[5] Insofar as the respondent also argues the unconstitutionality of the "one-parent rule"; see *In re Sanders*, 495 Mich. 394, 400–401, 852 N.W.2d 524 (2014) ("The one-parent doctrine permits a court to interfere with a parent's right to direct the care, custody, and control of the children solely because the other parent is unfit, without any determination that he or she is also unfit. In other words, the one-parent doctrine essentially imposes joint and several liability on both parents, potentially divesting either of custody, on the basis of the unfitness of one."); the statutory scheme in Connecticut does not require a finding that a parent is unfit. See *In re David L.*, 54 Conn. App. 185, 191, 733 A.2d 897 (1999); General Statutes §§ 46b-120 and 46b-129 (j). Rather, our statutes focus on the status of the child, at the adjudicatory phase, regardless of who or what may have caused that status. See *In re David L.*, supra, 191; General Statutes §§ 46b-120 and 46b-129 (j). The respondent's contention that a new adjudicatory hearing was required to determine "whether he has ever abused, neglected, or abandoned the child" fails to recognize that our statutory scheme does not require a finding of parental fault. Zoey was adjudicated uncared for in September, 2015, before the respondent had stepped forward claiming to be her father. That is a *historical fact*; *she was uncared for*.

Furthermore, the facts in *In re Sanders* are materially different from those in the present case. In *In re Sanders*, the respondent father was known at the time the mother was adjudicated unfit, and, for a period of time, he had custody of the children. Nevertheless, the petitioner, the Michigan Department of Human Services, avoided a hearing on the father's fitness simply by dismissing the abuse and neglect claims against the father. *In re Sanders*, supra, 495 Mich. 403. Under Michigan's statutory scheme, this apparently allowed the petitioner to move to the dispositional phase and switch the burden of proof to the father. As set forth previously, though, that is not the procedural posture of this case. Zoey was adjudicated uncared for before the respondent even was known to be her father; he did not have custody of her, and there is no indication he was involved in her life at all. In addition, relying on *Stanley*, the Michigan Supreme Court in *In re Sanders* held that the father's "right to direct the care, custody, and control of his children is a fundamental right that cannot be infringed without *some* type of fitness hearing." (Emphasis in original.) Id., 414–15. The court then conducted an analysis under *Mathews* v. *Eldridge*, supra, 424 U.S. 319, to determine whether a hearing at the dispositional phase, after one parent has been adjudicated neglected, satisfies the constitution's due process requirements. We have applied that same analysis to the proceeding on the respondent's motion to revoke commitment in light of the very different facts of this case. Given the differences in the nature of the proceedings in the two cases and the materially different facts, we conclude that the Michigan Supreme Court's conclusion in *In re Sanders* is inapposite to the present case.

commitment, the petitioner was the party who had custody of Zoey, and the respondent was seeking to revoke the petitioner's custody.

Furthermore, unlike the father in *Stanley*, the respondent had hearings on both of his motions to revoke commitment at which he was accorded the opportunity to present evidence regarding his fitness to take custody of Zoey. In *Stanley*, the United States Supreme Court held that the plaintiff had to be "[g]iven the opportunity to make his case" for custody. Id., 655. It further held that "the state's interest in caring for [the plaintiff's] children is de minimis if [the plaintiff] is shown to be a fit father." (Emphasis omitted.) Id., 657–58. Thus, *Stanley* merely requires, as a matter of procedural due process, a hearing at which the parent can present his or her case on fitness. It does not require, as the respondent claims, that the petitioner bear the burden of proving the father unfit at that hearing.[6] Accordingly, *Stanley* is not applicable to this case.

We now examine the three factors set forth in *Mathews* v. *Eldridge*, supra, 424 U.S. 335, which will

Finally, it is also significant that during oral argument, the respondent conceded that if we were to agree with his one-parent argument, we would have to reverse *In re David L.* The respondent, however, did not request an en banc hearing of this court. "[I]t is axiomatic that one panel of this court cannot overrule the precedent established by a previous panel's holding. . . . This court often has stated that this court's policy dictates that one panel should not, on its own, reverse the ruling of a previous panel. The reversal may be accomplished only if the appeal is heard en banc." (Citation omitted; internal quotation marks omitted.) *State* v. *Carlos P.*, 171 Conn. App. 530, 545 n.12, 157 A.3d 723, cert. denied, 325 Conn. 912, 158 A.3d 321 (2017). Prudence, therefore, dictates that we decline the respondent's invitation to revisit such precedent.

[6] Although he acknowledges that *Stanley* does not address the burden of proof at a hearing to adjudicate the fitness of a parent, the respondent argues that the Supreme Court's subsequent decision in *Troxel* v. *Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), makes clear that parents are entitled to a presumption of fitness and the state always bears the burden of proving otherwise. Because the court in *Troxel* addressed a parent's substantive due process rights, we address the respondent's reliance on *Troxel* in part II of this opinion.

assist us in determining whether the level of process afforded the respondent was constitutionally sufficient. The respondent claims that these factors demonstrate that the court infringed on his federal constitutional right to procedural due process by not holding an adjudicatory hearing wherein his fitness as a parent was presumed. We disagree.

As to the first factor, namely, "the private interest that will be affected by the official action"; id.; we agree with the respondent that his private interest in directing the care and custody of his biological child is substantial. See *In re Baby Girl B.*, 224 Conn. 263, 279, 618 A.2d 1 (1992) ("the interest of parents in their children is a fundamental constitutional right that undeniably warrants deference and, absent a powerful countervailing interest, protection").

As to the second factor, namely, "the risk of an erroneous deprivation of such interest, given the existing procedures, and the value of any additional or alternate procedural safeguards"; (internal quotation marks omitted) *In re Lukas K.*, supra, 300 Conn. 469; see *Mathews* v. *Eldridge*, supra, 424 U.S. 335; we are not persuaded under the facts of this case that the court's adherence to our statutory procedures created a substantial risk of an *erroneous* deprivation of the respondent's private interest or that an adjudicatory hearing meant solely to assess the respondent's fitness as a parent for Zoey, at which his fitness would be presumed, would have been an appropriate response to the respondent's motion to revoke commitment.

The respondent argues that "the process afforded to [him] as part of his motion to revoke commitment is insufficient to satisfy the requirement of due process." As examples, the respondent points to the court's having placed the burden of proof on him to establish the absence of a cause for commitment, and the court's

failure to assess whether the respondent, himself, neglected, abused, or abandoned Zoey. Under the facts and circumstances of this case, we conclude that the process afforded the respondent in response to his motion to revoke commitment was constitutionally sufficient in light of Zoey's already having been adjudicated uncared for and placed in the petitioner's custody for her protection.

As previously stated in this opinion, at the time the petitioner filed a neglect petition, Zoey was days old. M identified another man as Zoey's father. At a hearing on September 23, 2015, the petitioner, with the agreement of M, amended the ground of the neglect petition to allege only that Zoey was uncared for. M admitted that allegation while the putative father stated that he would stand silent. The court then adjudicated Zoey uncared for and ordered her committed to the care and custody of the petitioner by agreement of the parties, thus properly proceeding with the two phases, adjudication and disposition, required by § 46b-129 (j) (2).[7] See *In re Joseph W.*, 305 Conn. 633, 643, 46 A.3d 59 (2012). In the September 23, 2015 hearing, the petitioner

[7] General Statutes § 46b-129 (j) (2) provides: "Upon finding and adjudging that any child or youth is uncared for, neglected or abused the court may (A) commit such child or youth to the Commissioner of Children and Families, and such commitment shall remain in effect until further order of the court, except that such commitment may be revoked or parental rights terminated at any time by the court; (B) vest such child's or youth's legal guardianship in any private or public agency that is permitted by law to care for neglected, uncared for or abused children or youths or with any other person or persons found to be suitable and worthy of such responsibility by the court, including, but not limited to, any relative of such child or youth by blood or marriage; (C) vest such child's or youth's permanent legal guardianship in any person or persons found to be suitable and worthy of such responsibility by the court, including, but not limited to, any relative of such child or youth by blood or marriage in accordance with the requirements set forth in subdivision (5) of this subsection; or (D) place the child or youth in the custody of the parent or guardian with protective supervision by the Commissioner of Children and Families subject to conditions established by the court."

bore the burden of proving that Zoey was uncared for, which she clearly met. The next phase of the hearing was the dispositional phase at which the court determined which of the § 46b-129 (j) (2) dispositional options was in the best interest of Zoey *at that time*. Clearly, in this case, at the time of the September 23, 2015 hearing, placement with the petitioner was in Zoey's best interest; her mother was homeless, her purported father did not acknowledge paternity and was incarcerated, and neither of them proposed another option. On these facts, the court properly adjudicated Zoey uncared for and ordered her committed to the care and custody of the petitioner.

Approximately six months later, in March, 2016, the respondent appeared, asserting that he was Zoey's biological father. On May 6, 2016, the respondent filed a motion to revoke commitment on the ground that he was "ready, willing, and able to care for his child," that recent paternity tests revealed him to be Zoey's biological father, and that it was not in Zoey's best interest to be committed to the care and custody of the petitioner. The court received the results of the genetic testing on May 19, 2016, and adjudicated the respondent to be Zoey's father. This adjudication of parentage took place when Zoey was more than one year old, and eight months after she had been adjudicated uncared for and committed to the care and custody of the petitioner, in whose custody she had been since she was days old. Eventually, the court denied the respondent's motion to revoke commitment, and the respondent did not appeal from that judgment.

On June 8, 2017, when Zoey was more than two years old, and approximately twenty-one months after the court adjudicated her uncared for and ordered her committed to the care and custody of the petitioner, the respondent filed a second motion to revoke commitment, on the same grounds set forth in his first motion.

The court denied that motion on October 31, 2017. The denial of this motion is the subject of the present appeal.

A motion to revoke commitment is governed by § 46b-129 (m) and Practice Book § 35a-14A. Section 46b-129 (m) provides: "The commissioner, a parent or the child's attorney may file a motion to revoke a commitment, and, upon finding that cause for commitment no longer exists, and that such revocation is in the best interests of such child or youth, the court may revoke the commitment of such child or youth. No such motion shall be filed more often than once every six months."

Practice Book § 35a-14A provides: "Where a child or youth is committed to the custody of the commissioner . . . the commissioner, a parent or the child's attorney may file a motion seeking revocation of commitment. The judicial authority may revoke commitment if a cause for commitment no longer exists and it is in the best interests of the child or youth. Whether to revoke the commitment is a dispositional question, *based on the prior adjudication*, and the judicial authority shall determine whether to revoke the commitment upon a fair preponderance of the evidence. The party seeking revocation of commitment has the burden of proof that no cause for commitment exists. If the burden is met, the party opposing the revocation has the burden of proof that revocation would not be in the best interests of the child. If a motion for revocation is denied, a new motion shall not be filed by the movant until at least six months have elapsed from the date of the filing of the prior motion unless waived by the judicial authority." (Emphasis added.)

Pursuant to § 46b-129 (m) and Practice Book § 35a-14A, the moving party bears the burden of proving that a cause for commitment no longer exists; if he or she is successful, the court then must determine whether revocation of commitment is in the best interest of the

child. In the present case, the respondent contends that it was a violation of his procedural due process right for the court to place the burden on him to establish that no cause for commitment existed. He argues that the court, instead, should have held an adjudicative hearing wherein it presumed he was a fit parent, and, unless the petitioner could establish otherwise, he, essentially, automatically would get custody of this child, despite the fact that she already had been adjudicated uncared for and her custody had been transferred to the petitioner. We disagree with the respondent.

Zoey was born in May, 2015, and adjudicated uncared for in September, 2015, and committed to the care and custody of the petitioner. The motion to revoke commitment from which the respondent now appeals was filed on June 8, 2017, when Zoey was more than two years old and nearly two years after Zoey's adjudication and commitment. The record indicates that Zoey did not know the respondent for the first year of her life. Similarly, at the time he filed his first motion to revoke commitment, the respondent knew little or nothing about Zoey, other than that he might be her biological father. He had no idea about her medical, social or psychological needs. He was, for all practical purposes, a stranger to Zoey. The respondent did not challenge on appeal the court's denial of his first motion to revoke commitment. Instead, he initially made efforts to comply with some of the specific steps ordered by the court in connection with the first motion, and he participated in supervised visitation with Zoey. Thus, by the time of the hearing on the respondent's second motion to revoke commitment, the court had available to it substantial evidence of the respondent's interactions with Zoey and his efforts to prepare himself to take custody of a child who had spent virtually her entire life in the petitioner's custody. The evidence was presented to the court in a three day hearing that involved numerous

witnesses. The court rendered a detailed opinion on the basis of that evidence and concluded that a cause for commitment still existed.[8] A necessary predicate to this conclusion is the court's determination that the respondent was not fit, at that time, to care for Zoey. On the basis of the record before us, we are confident that the procedure afforded the respondent satisfied the second prong of *Mathews*. The procedures in place did not pose an inappropriate risk of an *erroneous deprivation* of the respondent's interest in the care and custody of his child, and the alternative procedural "safeguard" now advocated by the respondent was not appropriate under the facts and procedural posture of this case.

As for the third *Mathews* factor, "the [g]overnment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail"; *Mathews* v. *Eldridge*, supra, 424 U.S. 335; we conclude that the additional or substitute procedural requirement for which the respondent advocates—namely, an adjudicative hearing wherein he is presumed to be a fit parent, and, unless the petitioner could establish otherwise, he, essentially, automatically would get custody of this child, despite the fact that the child *already had been adjudicated uncared for* and custody had been given to the petitioner for her protection—simply is inappropriate, unwarranted, and ill-advised under the facts and circumstances of this case, regardless of any fiscal and administrative burdens that such a procedure would entail. The petitioner has a substantial interest in ensuring the well-being of children that have been placed in

[8] Specifically, the court found, "the [respondent] presently has not demonstrated that he can meet Zoey's emotional and medical needs as well as her need for safety. As a result, a reason for commitment continues to exist, and the [respondent], having failed to meet his burden that no cause for commitment exists, his motion to revoke is hereby denied."

her custody. Although the respondent's desire to take custody of and care for Zoey is admirable, it does not justify the creation of a process that would require the court to turn over a child who, properly and without contest, has been adjudicated uncared for to a person who does not know anything about the child or her needs.

Balancing the three *Mathews* factors, we conclude that the respondent has not established that his right to procedural due process was violated by the lack of an adjudicatory hearing, in response to his motion to revoke commitment, wherein he would be presumed to be a fit parent for Zoey, a child adjudicated uncared for by the Superior Court almost two years earlier. We conclude that the procedures set forth in § 46b-129 (m) and Practice Book § 35a-14A strike the appropriate balance between the petitioner's and the respondent's interests, and comply with the constitution's procedural due process requirements. Accordingly, there is no procedural due process violation under the facts of this case, and, therefore, the respondent's claim fails under *Golding*'s third prong.

II

The respondent next claims, "as applied to the respondent father in this case . . . § 46b-129 (m) violates his substantive due process right to custody and care of his child." He argues that he "has a substantive due process right to the custody and care for his child that may not be infringed unless he has been adjudicated to be an unfit parent, or a trial court has found that granting his motion to revoke commitment would present a risk of imminent harm to the child." He also argues that the court improperly placed the burden of proof on him and thereby failed to provide adequate protection for his fundamental right. We are not persuaded.

Insofar as the claim is unpreserved, the respondent requests *Golding* review. *State* v. *Golding*, supra, 213 Conn. 239–40. As with the respondent's procedural due process claim, he meets the first two prongs of *Golding* and, therefore, this claim is subject to review. As to the third prong of *Golding*, however, we conclude that the alleged constitutional violation does not exist.

"For all its consequence, due process has never been, and perhaps never can be, precisely defined. *Lassiter* v. *Dept. of Social Services*, 452 U.S. 18, 24, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981). However, [s]ince the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary [government] action. *County of Sacramento* v. *Lewis*, 523 U.S. 833, 845, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998); see also *Tenenbaum* [v. *Williams*, 193 F.3d 581, 600 (2d Cir. 1999)] ([s]ubstantive due-process rights guard against the government's exercise of power without any reasonable justification in the service of a legitimate governmental objective) [cert. denied sub nom. *Tenenbaum* v. *City of New York*, 529 U.S. 1098, 120 S. Ct. 1832, 146 L. Ed. 2d 776 (2000)] . . . ." (Internal quotation marks omitted.) *Kia P.* v. *McIntyre*, 235 F.3d 749, 758 (2d Cir. 2000), cert. denied sub nom. *Kia P.* v. *City of New York*, 534 U.S. 820, 122 S. Ct. 51, 151 L. Ed. 2d 21 (2001).

"Parents have a substantive right under the [d]ue [p]rocess [c]lause to remain together [with their children] without the coercive interference of the awesome power of the state. . . . Such a claim can only be sustained if the removal of the child would have been prohibited by the Constitution even had the [parents] been given all the procedural protections to which they were entitled. . . . In other words, while a procedural due process claim challenges the procedure by which a removal is effected, a substantive due process claim challenges the fact of [the] removal itself." (Citations

omitted; internal quotation marks omitted.) *Southerland* v. *City of New York*, 680 F.3d 127, 142 (2d Cir. 2012), cert. denied, 568 U.S. 1150, 133 S. Ct. 980, 184 L. Ed. 2d 773 (2013).

"The substantive due-process guarantee also provides heightened protection against government interference with certain fundamental rights and liberty interests. . . . We have described the interest of a parent in the custody of his or her children as a fundamental, constitutionally protected liberty interest. . . . No matter how important the right to family integrity, [however] it does not automatically override the sometimes competing compelling governmental interest in the protection of minor children, particularly in circumstances where the protection is considered necessary as against the parents themselves." (Citations omitted; internal quotation marks omitted.) *Kia P.* v. *McIntyre*, supra, 235 F.3d 758.

"In discussing the constitutional basis for the protection of parental rights, the United States Supreme Court observed in *Troxel* [v. *Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000)] that '[t]he liberty interest . . . of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this [c]ourt. More than [seventy-five] years ago, in *Meyer* v. *Nebraska*, 262 U.S. 390, 399, 401 [43 S. Ct. 625, 67 L. Ed. 1042] (1923), we held that the liberty protected by the [d]ue [p]rocess [c]lause includes the right of parents to establish a home and bring up children and to control the education of their own. Two years later, in *Pierce* v. *Society of Sisters*, 268 U.S. 510, [534–35, 45 S. Ct. 571, 69 L. Ed. 1070] (1925), we again held that the liberty of parents and guardians includes the right to direct the upbringing and education of children under their control. . . . We returned to the subject in *Prince* v. *Massachusetts*, 321 U.S. 158 [64 S. Ct. 438, 88 L. Ed. 645] (1944), and again

confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. It is cardinal . . . that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. Id., [166].' . . . *Troxel* v. *Granville*, supra, 530 U.S. 65–66. 'In light of this extensive precedent, it cannot now be doubted that the [d]ue [p]rocess [c]lause of the [f]ourteenth [a]mendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.' Id., 66.

"Connecticut courts likewise have recognized the constitutionally protected right of parents to raise and care for their children. See, e.g., *Denardo* v. *Bergamo*, 272 Conn. 500, 511, 863 A.2d 686 (2005); *Crockett* v. *Pastore*, 259 Conn. 240, 246, 789 A.2d 453 (2002); *Roth* v. *Weston*, [259 Conn. 202, 216, 789 A.2d 431 (2002)]; *In re Baby Girl B.*, [supra, 224 Conn. 279–80] . . . . When legislation affects a fundamental constitutional right, it must be strictly scrutinized." *Fish* v. *Fish*, 285 Conn. 24, 40–41, 939 A.2d 1040 (2008).

Section 46b-129 (m) provides: "The commissioner, a parent or the child's attorney may file a motion to revoke a commitment, and, upon finding that cause for commitment no longer exists, and that such revocation is in the best interests of such child or youth, the court may revoke the commitment of such child or youth. No such motion shall be filed more often than once every six months."

"Our Supreme Court has held that a natural parent, whose child has been committed to the custody of a third party, is entitled to a hearing to demonstrate that no cause for commitment still exists. . . . The initial burden is placed on the persons applying for the revocation of commitment to allege and prove that cause for

commitment no longer exists. . . . If the party challenging the commitment meets that initial burden, the commitment to the third party may then be modified if such change is in the best interest of the child. . . . The burden falls on the persons vested with guardianship to prove that it would not be in the best interests of the child to be returned to his or her natural parents." (Citations omitted; internal quotation marks omitted.) *In re Stacy G.*, 94 Conn. App. 348, 352 n.4, 892 A.2d 1034 (2006); see *In re Nasia B.*, 98 Conn. App. 319, 328–29, 908 A.2d 1090 (2006) (Under § 46b-129 [m], "[t]he burden is upon the person applying for the revocation of commitment to allege and prove that cause for commitment no longer exists. Once that has been established . . . the inquiry becomes whether a continuation of the commitment will nevertheless serve the child's best interests. On this point, when it is the natural parent who has moved to revoke commitment, the state must prove that it would not be in the best interests of the child to be returned to his . . . natural parent." [Emphasis omitted; internal quotation marks omitted.]).

It is the initial burden placed on the respondent to prove a cause for commitment no longer exists that is at the heart of his substantive due process claim. In his appellate brief, the respondent points to specific language from *Troxel* v. *Granville*, supra, 530 U.S. 68–69, which provides: "[T]he [petitioner] did not allege, and no court has found, that [the respondent] was an unfit parent. That aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children. . . . Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's

children." (Citation omitted; emphasis omitted; internal quotation marks omitted.) He also argues that our Supreme Court in *Roth* specifically held that the state may infringe on a parent's fundamental right to the care and custody of his children "only when it can be demonstrated that there is a compelling need to protect the child from harm." *Roth* v. *Weston*, supra, 259 Conn. 229.

We wholeheartedly agree with these statements of the law as quoted by the respondent. Nevertheless, the respondent's attempt to apply this rationale to the present case is flawed. Neither *Troxel* nor *Roth* involved children who previously had been adjudicated neglected or uncared for. Both cases involved the constitutionality, as applied to the facts of the specific cases, of state statutes that permitted courts to interfere with a custodial parent's decision regarding a third party's right to compel visitation with their child or children. See *Troxel* v. *Granville*, supra, 530 U.S. 67 ("[t]hus, in practical effect, in the State of Washington a court can disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests" [emphasis in original]); *Roth* v. *Weston*, supra, 259 Conn. 205–206 (concluding that General Statutes § 46b-59 was "unconstitutional as applied to the extent that the trial court, pursuant to the statute, permitted third party visitation contrary to the desires of a fit parent and in the absence of any allegation and proof by clear and convincing evidence that the children would suffer actual, significant harm if deprived of the visitation").

In this case, there already has been a determination that Zoey was uncared for, i.e., in need of protection, and, on the basis of that adjudication, she was committed to the care and custody of the petitioner. Although

we recognize that at the time of this adjudication, another man was alleged to have been Zoey's father, and the respondent was not a party to the case, it does not change the historical fact that Zoey had been adjudicated an uncared for child, who was in need of the petitioner's protection and intervention.

In applying the burden to the respondent to prove that a cause for commitment no longer existed, in response to his motion to revoke commitment, the court properly applied the law and did not violate the respondent's right to substantive due process. The respondent was not entitled to a presumption of fitness *after* his daughter already had been adjudicated uncared for and committed to the care and custody of the petitioner. Furthermore, there *was* a compelling reason to protect Zoey from harm; she was uncared for when she was merely days old, and this resulted in such an adjudication. As we previously explained in part I of this opinion, Zoey was adjudicated uncared for in September, 2015, and committed to the care and custody of the petitioner, who had been granted custody of her when she was days old. The motion from which the respondent now appeals was filed on June 8, 2017, nearly two years after Zoey's adjudication and commitment. In such an instance, the constitution does not require that the court presume that the respondent is a fit parent, acting in the best interest of his child, when the court is considering the merits of his motion to revoke his daughter's commitment, which commitment was made after the Superior Court adjudicated the child uncared for. In *Troxel* and *Roth*, the courts found that the parents' substantive due process rights were violated because the statutes at issue in those cases permitted interference with the parents' right to make decisions for their children, without the states being required to demonstrate a compelling need that warranted such interference. That is not the case here.

The state, virtually since Zoey's birth, has had the custody and responsibility to care for her. Thus, the respondent is seeking to *acquire* custody of Zoey from the petitioner following Zoey's commitment; he is not seeking to prevent interference with an existing and ongoing parent/child relationship. He has never had custody of Zoey; the petitioner has had custody since Zoey was days old. Indeed, at the time of her commitment to the petitioner, the respondent was not known to be her father. When Zoey was found to be uncared for, the respondent was not in her life providing for her care. These factual distinctions are important. Furthermore, the state's interest in protecting the well-being of Zoey, an uncared for child for whom it has been responsible for since the child's birth, is much greater than was the state's interest in *Troxel* and in *Roth*. Based on the facts of this case, we conclude that the court's application of § 46b-129 (m) did not infringe on the respondent's right to substantive due process. Accordingly, the respondent's claim fails under *Golding*'s third prong.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* KERLYN M. TAVERAS (AC 38602)

Sheldon, Elgo and Eveleigh, Js.

Syllabus

The defendant, who previously had been convicted on guilty pleas of assault and threatening charges, appealed to this court from the judgments of the trial court revoking his probation and sentencing him to eighteen months incarceration. The defendant had been charged in three informations with violation of probation following his arrest on a charge of breach of the peace in the second degree in violation of statute (§ 53a-181 [a]), which involved an incident in which he engaged in a verbal confrontation with staff members at a preschool after he arrived late to pick up his child. After C, the assistant education manager, said

something to the defendant as he walked through the building's inner set of doors to leave the preschool, the defendant responded and stated, "you better watch yourself, you better be careful," and attempted to reenter the building through the locked doors. The defendant's probation officer thereafter applied for a violation of probation warrant and, in an accompanying affidavit, averred that the defendant had said, "you better watch your back." The trial court found, by a preponderance of the evidence, that the defendant violated his probation by committing breach of the peace in the second degree. On appeal, the defendant claimed that the evidence was insufficient to establish that he violated his probation because the words he used to express his frustration with the staff members did not constitute fighting words or a true threat, which are two forms of speech that are not protected by the first amendment to the United States constitution. *Held*:

1. The state could not prevail on its claim that there was sufficient evidence to find that the defendant committed breach of the peace in the second degree on the basis of his nonverbal conduct, which was based on the assertion that the trial court reasonably could have inferred that the alleged threat was a component of the defendant's nonverbal conduct when he attempted to open the door to reenter the preschool after having made the remarks at issue; the trial court stated that its judgments were based on the defendant's threatening nature and demeanor without referencing any specific conduct, the testimony demonstrated that the defendant's conduct, either verbal or nonverbal, was not threatening until he exited the preschool, made the statement at issue and attempted to reenter the school, the record did not indicate the tone in which the statement was communicated or that the defendant made any threatening gestures in conjunction with the statement, and there was no evidence in the record describing how the defendant attempted to open the door, nor did the trial court make an inference that the defendant attempted to reenter the school in an aggressive manner.
2. The evidence adduced at the defendant's probation revocation hearing was insufficient to establish that the defendant's statement constituted either fighting words or a true threat, and because the defendant's speech did not fall within those two categories of unprotected speech, the revocation of his probation on the basis of his speech violated the first amendment:

   a. The defendant's statement that "you better be careful, you better watch yourself," did not constitute fighting words within the meaning of § 53a-181 (a) (1) or (3), as it did not have the tendency to provoke imminent retaliation from an average person in C's position; the defendant's conduct had been nonthreatening until he made the statement at issue that was ambiguous, conditional and contained no reference to an unlawful or violent act, which further reduced the probability that an average person would have responded to it with imminent violence, and the defendant was incapable of immediately following through with his statement, as he had exited the preschool's inner set of doors and was unable to reenter the preschool at the time that he made the statement.

b. The defendant's statement did not constitute a true threat within the meaning of § 53a-181 (a) (3); a reasonable listener would not have been highly likely to interpret the defendant's statement as a serious expression of intent to harm or assault C, as neither "you better watch yourself, you better be careful," or, "you better watch your back," communicated an explicit threat or conveyed his intent to harm or assault C, the defendant's statement and attempt to reenter the preschool was susceptible of being interpreted as either innocent or threatening conditional future conduct, and there was no evidence that C had witnessed prior, similar conduct by the defendant at the preschool or had knowledge of his prior convictions.

Argued January 16—officially released July 17, 2018

Procedural History

Three substitute informations charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Danbury, geographical area number three, where the cases were consolidated and tried to the court, *Russo*, *J.*; judgments revoking the defendant's probation, from which the defendant appealed to this court; thereafter, the court, *Russo*, *J.*, issued an articulation of its decision. *Reversed; judgments directed.*

James B. Streeto, senior assistant public defender, for the appellant (defendant).

Bruce R. Lockwood, senior assistant state's attorney, with whom, on the brief, were *Stephen J. Sedensky III*, state's attorney, and *Sharmese L. Hodge*, assistant state's attorney, for the appellee (state).

Opinion

EVELEIGH, J. The defendant, Kerlyn M. Taveras, appeals from the judgments of the trial court finding him in violation of his probation and revoking his probation pursuant to General Statutes § 53a-32, following his arrest on a charge of breach of the peace in the second degree in violation of General Statutes § 53a-181 (a)

(1).[1] On appeal, the defendant claims that the state adduced insufficient evidence at his probation revocation hearing to establish a violation of probation.[2] Central to the defendant's claim of insufficient evidence is whether the words he used spontaneously to express

[1] The record does not indicate what subdivision was specified, either as charged by the state or as found by the trial court. At the probation revocation hearing, however, the state proceeded under the theory that the defendant had committed a breach of the peace on the basis of his "threatening and violent behavior" at his child's preschool, and referred to the statutory language of § 53a-181 (a) (1) in its closing argument. Section 53a-181 (a) provides in relevant part: "A person is guilty of breach of the peace in the second degree when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person . . . (1) Engages in fighting or in violent, tumultuous or threatening behavior in a public place . . . . For purposes of this section, 'public place' means any area that is used or held out for use by the public whether owned or operated by public or private interests." General Statutes § 53a-181 (a).

On appeal, the state claims § 53a-181 (a) (3) as an alternative ground for affirmance. Section 53a-181 (a) provides in relevant part: "A person is guilty of breach of the peace in the second degree when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person . . . (3) threatens to commit any crime against another person or such other person's property . . . ." General Statutes § 53a-181 (a).

[2] The defendant also claims that (1) the trial court improperly admitted hearsay testimony, and (2) the trial court's finding that he had violated his probation was clearly erroneous, as the only evidence adduced at his probation revocation hearing was unreliable, uncorroborated hearsay testimony admitted in violation of his constitutional right to due process. We address the defendant's sufficiency of the evidence claim before we address any other claim because if a defendant prevails on such a claim in the context of a violation of probation proceeding, the appropriate remedy is to reverse the judgment of the trial court and to remand the case with direction to render judgment in favor of the defendant. See *State* v. *Maurice M.*, 303 Conn. 18, 44, 31 A.3d 1063 (2011); *State* v. *Acker*, 166 Conn. App. 404, 408, 141 A.3d 938 (2016); *State* v. *Edwards*, 148 Conn. App. 760, 769, 87 A.3d 1144 (2014); *State* v. *Fermaint*, 91 Conn. App. 650, 663, 881 A.2d 539, cert. denied, 276 Conn. 922, 888 A.2d 90 (2005).

The state, relying on *State* v. *McDowell*, 242 Conn. 648, 653–54, 699 A.2d 987 (1997) (holding that principles of double jeopardy do not bar criminal trial on underlying charges after defendant found in violation of probation), argues that "even if the evidence was insufficient, the defendant should not be entitled to an acquittal, but rather a new probation revocation hearing because the double jeopardy bar attaches only to proceedings that are essentially criminal, and probation revocation hearings are not criminal proceedings." We are not persuaded. Our Supreme Court has not addressed whether its holding in *McDowell* would permit the state to commence a second probation revocation proceeding on the same set of underlying facts, following a court's conclusion that the state adduced insufficient evidence to support a revocation at the first proceeding. See *State* v. *Daniels*, 248

his frustration with his child's preschool staff, which formed the basis for his violation of probation, constituted "fighting words" or a "true threat," two forms of speech that are not protected by the first and fourteenth amendments to the United States constitution.[3] Under the facts and circumstances of the present case, we conclude that the defendant's speech did not constitute "fighting words" or a "true threat" and, for that reason, cannot be proscribed by § 53a-181 (a) consistent with the first amendment. We therefore agree with the defendant that the evidence adduced at his probation revocation hearing was insufficient to establish a violation of probation and, accordingly, reverse the judgments of the trial court and remand the cases with direction to render judgments in favor of the defendant.[4]

The following evidence, as adduced at the defendant's probation revocation hearing, is relevant to our resolution of this appeal. In May, 2012, in connection with three separate criminal matters, the defendant pleaded guilty to two counts of threatening in the second degree in violation of General Statutes § 53a-62 and one count of assault in the third degree in violation of

Conn. 64, 71 n.9, 726 A.2d 520 (1999) ("[b]ecause we conclude that . . . the evidence adduced at the probation revocation hearing was sufficient to establish a probation violation . . . we need not consider the appropriate relief to be afforded a defendant in a case in which the evidence was insufficient to establish a violation"), overruled in part on other grounds by *State* v. *Singleton*, 274 Conn. 426, 436–39, 876 A.2d 1 (2005). Furthermore, we are persuaded by decisions following *McDowell* and *Daniels*, in which our Supreme Court and this court have reversed the judgment of the trial court and remanded the case with direction to render judgment in favor of the defendant. See, e.g., *State* v. *Maurice M.*, supra, 303 Conn. 44; *State* v. *Acker*, supra, 166 Conn. App. 408.

[3] As we discuss subsequently, "fighting words" are those words that "have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed." (Internal quotation marks omitted.) *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 573, 62 S. Ct. 766, 86 L. Ed. 1031 (1942). A "true threat" is "a serious expression of an intent to commit an act of unlawful violence against another . . . ." *State* v. *Cook*, 287 Conn. 237, 239, 947 A.2d 307, cert. denied, 555 U.S. 970, 129 S. Ct. 464, 172 L. Ed. 2d 328 (2008).

[4] Because we conclude that the judgment of the trial court must be reversed on the basis of insufficient evidence, we do not reach the defendant's other two claims. See footnote 2 of this opinion.

General Statutes § 53a-61 (a) (1). After accepting the defendant's pleas, on August 22, 2012, the trial court sentenced the defendant to a total effective term of one year of incarceration, execution suspended after four months, followed by three years of probation. Following his sentencing, the defendant agreed to the standard conditions of probation, including the condition that he "not violate any criminal law of the United States, this state or any other state or territory." The defendant's term of probation began on July 1, 2013.

On the afternoon of March 11, 2014, the defendant was late for his child's scheduled pickup time at the Head Start Program (Head Start), a preschool in Danbury. Head Start staff telephoned the defendant, who was en route, to ascertain where he was and whether he would be picking up his child.[5] The defendant arrived approximately forty minutes late and was reminded by staff that he needed to pick his child up on time. The defendant appeared "a little irritated and [un]happy" with staff as he walked to his child's classroom. As the defendant was exiting the building with his child, he argued with staff in the lobby in front of other children and their parents, and was asked to leave. After the defendant walked through the building's inner set of doors,[6] Sondra Cherney, Head Start's assistant education manager, "said something back to him . . . ." In response, the defendant said to Cherney, "you better watch yourself, you better be careful," attempted to reenter the building, which was locked, and then left.

Thereafter, Cherney called Monica Bevilaqua, Head Start's director, and reported the incident. Bevilaqua was not present when the incident occurred, but after

[5] The record does not specify which staff member called the defendant. Furthermore, the record does not reveal the content or tone of that telephone call, other than a conversation regarding whether the defendant would be picking up his child.

[6] The preschool has two sets of double doors. One external set opens on the outside. A second set, inside the first, opens into the preschool. As a parent exits the second set, the door locks behind them.

having an opportunity to hear from her staff, she called the Danbury Police Department. Danbury police officers responded to the preschool and took statements from Bevilaqua,[7] Cherney, and other staff members. The next morning, the defendant appeared voluntarily at the Danbury Police Department, where he was arrested and charged with breach of the peace in the second degree.

Christopher Kelly, the defendant's probation officer, was aware of the March 11, 2014 incident and the defendant's subsequent arrest, but chose not to charge him with violation of probation on that basis at that time. Thereafter, on April 16, 2014, in an unrelated incident, the defendant was arrested and charged with violation of a protective order. The next day, Kelly applied for a violation of probation warrant on the basis of both the March 11, 2014 incident and the April 16, 2014 arrest. On May 6, 2014, the defendant was arrested and charged in three separate informations, brought pursuant to § 53a-32,[8] with violating the condition of his probation that he "not violate any criminal law . . . ."[9]

[7] At the probation revocation hearing, Bevilaqua testified that she asked Danbury police that the defendant not be allowed back to the preschool and that she looked into whether Head Start could obtain a restraining order to keep him off the property. Bevilaqua further testified that Head Start hired a police officer to be at the preschool the next morning.

[8] General Statutes § 53a-32 provides in relevant part: "(a) At any time during the period of probation or conditional discharge, the court or any judge thereof may issue a warrant for the arrest of a defendant for violation of any of the conditions of probation . . . .

"(c) . . . [U]pon an arrest by warrant as herein provided, the court shall cause the defendant to be brought before it without unnecessary delay for a hearing on the violation charges. At such hearing the defendant shall be informed of the manner in which such defendant is alleged to have violated the conditions of such defendant's probation . . . and . . . shall have the right to cross-examine witnesses and to present evidence in such defendant's own behalf. . . .

"(d) If such violation is established, the court may . . . revoke the sentence of probation . . . [and] . . . require the defendant to serve the sentence imposed or impose any lesser sentence. . . . No such revocation shall be ordered, except upon consideration of the whole record and unless such violation is established by . . . reliable and probative evidence . . . ."

[9] On May 15, 2015, the trial court granted the state's motion to consolidate the three informations pursuant to Practice Book § 41-19.

The trial court held a hearing on July 15 and July 16, 2015. The state's theory of the case was that on March 11, 2014, the defendant committed a breach of the peace in the second degree in violation of § 53a-181 (a) (1) on the basis of his "threatening and violent behavior" with staff, which "place[d] them in fear and panic."[10] See footnote 1 of this opinion. The state, however, did not offer the testimony of Cherney or any other staff member who witnessed the incident. Furthermore, the state did not attempt to introduce any witness statements taken by Danbury police officers. Instead, the state relied solely on the testimony of Kelly and Bevilaqua. Kelly testified regarding the dates and conditions of the defendant's probation. Kelly further testified that he reviewed the police report regarding the March 11, 2014 incident, but that he did not initially charge the defendant with violating his probation on the basis of that incident because the resulting charge was a misdemeanor and he had "had a discussion with [his] supervisor to give [the defendant] a second chance." At the conclusion of Kelly's testimony, the violation of probation warrant that he drafted was admitted as a full exhibit.[11]

[10] Although the state charged the defendant with violating his probation on the basis of both the March 11, 2014 incident and April 16, 2014 arrest, it did not present any testimony regarding the April 16, 2014 arrest at the probation revocation hearing.

[11] We note that the violation of probation warrant was admitted as court's exhibit A. Neither defense counsel nor the state objected to admission of the warrant as a full exhibit. The violation of probation warrant provided, in relevant part: "On [March 11, 2014], the Danbury Police Department was dispatched to the Head Start Program regarding a dispute involving [the defendant]. [The defendant] was forty minutes late picking up his child at [Head Start] and [staff] reminded [the defendant] that he needed to pick his child up on time. [The defendant] became extremely agitated and began to argue with staff. Staff told [the defendant] that he had to leave because he was arguing with staff in the front lobby in front of other children and their parents. [The defendant] then yelled to the staff 'you better watch your back'. Staff reported to the Danbury Police that [the defendant] was so enraged and intimidating that the school hired a police officer for security the next morning in the event that [the defendant] came back."

Over the hearsay objections of defense counsel, Bevilaqua testified regarding Cherney's summary of the March 11, 2014 incident. Specifically, the state elicited the following testimony:

"[The Prosecutor]: What . . . was the nature of the [March 11, 2014] incident reported to you on that telephone call [with Cherney]? . . .

"[The Witness]: . . . That [the defendant's child] had not been picked up on time. That [staff] called [the defendant]. [The defendant] was coming down. He was not happy. When he had gotten to the school, he entered the doorway, already escalated. . . . [H]e walked down to the classroom to get [his child]. When he came back down the hallway and got to the doors he had words with staff members.

"[The Prosecutor]: Threatening words? . . .

"[The Witness]: At that point they were not.

"[The Prosecutor]: Okay.

"[The Witness]: But they continued. . . .

"[The Witness]: So, he got out the front door, door shut behind him, and [Cherney] had said something back to him, and he turned and said, you better watch yourself, you better be careful, tried to get back in the door and couldn't, and then he left."

In addition, Bevilaqua testified that there had been prior incidents at the preschool involving late pickups of the defendant's child and that her staff was familiar with the defendant. Bevilaqua further testified that this was not the first "escalated interaction" with the defendant and that she had previously witnessed the defendant behave in a threatening manner. Although the state attempted to elicit testimony detailing these prior interactions, it later abandoned that line of questioning upon objection by defense counsel.

In an oral ruling, the trial court found that the state established, by a preponderance of the evidence, that the defendant had violated his probation by committing the crime of breach of the peace in the second degree on the basis of his "threatening nature and . . . demeanor" at the preschool. As a result of this violation, the court revoked the defendant's probation and sentenced him to a total effective term of eighteen months incarceration. This appeal followed. Additional facts will be set forth as necessary.

On appeal, the defendant claims that the evidence presented at his probation revocation hearing was insufficient to support the trial court's finding that he violated his probation by committing the crime of breach of the peace in the second degree. In support of his claim, the defendant primarily argues that the evidence was insufficient to support a finding that his conduct, which consisted solely of speech, constituted fighting words or a true threat and, therefore, cannot be proscribed by statute consistent with the first amendment. In response, the state contends that the defendant's first amendment claim is "unfounded" and, furthermore, that it presented sufficient evidence to support the trial court's finding. We agree with the defendant.

We begin by setting forth our standard of review and the legal principles applicable to probation revocation hearings. "[R]evocation of probation hearings, pursuant to § 53a-32, are comprised of two distinct phases, each with a distinct purpose. . . . In the evidentiary phase, [a] factual determination by a trial court as to whether a probationer has violated a condition of probation must first be made. . . . In the dispositional phase, [i]f a violation is found, a court must next determine whether probation should be revoked because the beneficial aspects of probation are no longer being served. . . .

"Because the present case concerns the evidentiary phase and the trial court's factual finding that the defendant violated his probation, we are guided by the standard of review applicable to that phase. The law governing the standard of proof for a violation of probation is well settled. . . . [A]ll that is required in a probation violation proceeding is enough to satisfy the court within its sound judicial discretion that the probationer has not met the terms of his probation. . . . It is also well settled that a trial court may not find a violation of probation unless it finds that the predicate facts underlying the violation have been established by a preponderance of the evidence at the hearing—that is, the evidence must induce a reasonable belief that it is more probable than not that the defendant has violated a condition of his or her probation. . . . In making its factual determination, the trial court is entitled to draw reasonable and logical inferences from the evidence. . . . Accordingly, [a] challenge to the sufficiency of the evidence is based on the court's factual findings. The proper standard of review is whether the court's findings were clearly erroneous based on the evidence. . . . A court's finding of fact is clearly erroneous and its conclusions drawn from that finding lack sufficient evidence when there is no evidence in the record to support [the court's finding of fact] . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citations omitted; internal quotation marks omitted.) *State* v. *Maurice M.*, 303 Conn. 18, 25–27, 31 A.3d 1063 (2011); see also *State* v. *Davis*, 229 Conn. 285, 301–302, 641 A.2d 370 (1994).

In citing to cases involving criminal prosecutions hereafter, we acknowledge that a probation revocation hearing is not a criminal proceeding, but, instead, "akin to a civil proceeding"; *State* v. *Davis*, supra, 229 Conn.

295; and that "[a]lthough the revocation may be based upon criminal conduct, the constitution does not require that proof of such conduct be sufficient to sustain a criminal conviction." (Internal quotation marks omitted.) *State* v. *Benjamin*, 299 Conn. 223, 235, 9 A.3d 338 (2010); see also *State* v. *Megos*, 176 Conn. App. 133, 139, 170 A.3d 120 (2017). Nevertheless, "there must be proof that the defendant's conduct constituted an act sufficient to support a revocation of probation . . . ." (Internal quotation marks omitted.) *State* v. *Carey*, 30 Conn. App. 346, 349, 620 A.2d 201 (1993), rev'd on other grounds, 228 Conn. 487, 636 A.2d 840 (1994); *Payne* v. *Robinson*, 10 Conn. App. 395, 402–403, 523 A.2d 917 (1987), aff'd, 207 Conn. 565, 541 A.2d 504, cert. denied, 488 U.S. 898, 109 S. Ct. 242, 102 L. Ed. 2d 230 (1988). Therefore, as in the present case, when the defendant is charged with violation of probation on the basis of an alleged violation of a criminal law, the conduct forming the basis of that violation of probation must meet the elements of the relevant crime. The cases involving criminal prosecutions are therefore relevant *qualitatively*, in determining the nature of the alleged conduct at issue.[12]

In the present case, the state charged the defendant with violating § 53a-181 (a) (1) and, on appeal, claims § 53a-181 (a) (3) as an alternative ground for affirmance. See footnote 1 of this opinion. In order to establish a violation of § 53a-181 (a) (1) at a probation revocation hearing, the state must prove, by a preponderance of the evidence, that "(1) the defendant engaged in fighting or in violent, tumultuous or threatening behavior, (2) this conduct occurred in a public place and (3) the defendant acted with the intent to cause inconvenience, annoyance or alarm, or that he recklessly created a risk

[12] We therefore disagree with the dissent's position that "[c]riminal cases . . . in which the beyond a reasonable doubt burden of proof applied . . . are distinguishable from the present case . . . ."

thereof." (Internal quotation marks omitted.) *State* v. *Adams*, 163 Conn. App. 810, 822, 137 A.3d 108 (2016), rev'd in part on other grounds, 327 Conn. 297, 173 A.3d 943 (2017); see General Statutes § 53a-181 (a) (1).

"Our Supreme Court, in order to ascertain the meaning of § 53a-181 (a) (1), looked to the construction given by this court in *State* v. *Lo Sacco*, 12 Conn. App. 481, 490, 531 A.2d 184, cert. denied, 205 Conn. 814, 533 A.2d 568 (1987), to identical language contained in General Statutes § 53a-181a (a) (1), the public disturbance statute. See *State* v. *Szymkiewicz*, [237 Conn. 613, 618, 678 A.2d 473 (1996)]." (Internal quotation marks omitted.) *State* v. *Adams*, supra, 163 Conn. App. 823. In *State* v. *Lo Sacco*, supra, 481, this court stated that " '[t]hreatening' is defined as a 'promise [of] punishment' or, 'to give signs of the approach of (something evil or unpleasant).' [Webster, Third New International Dictionary.] . . . When, [however] two or more words are grouped together, it is possible to ascertain the meaning of a particular word by reference to its relationship with other associated words and phrases under the doctrine of noscitur a sociis. . . . Placed within the context of the other words in the statute, the word 'threatening' takes on a more ominous tone. The statute proscribes 'engaging in fighting or in violent, tumultuous, or threatening behavior.' In *State* v. *Duhan*, [38 Conn. Supp. 665, 668, 460 A.2d 496 (1982), rev'd on other grounds, 194 Conn. 347, 481 A.2d 48 (1984)], the Appellate Session of the Superior Court defined 'tumultuous' as 'riotous' and 'turbulent.' Fighting, by its plain meaning, involves physical force. . . . [T]he language of subdivision (1) of General Statutes § 53a-181a (a) involved in this case, namely, 'violent or threatening behavior,' evinces a legislative intent to proscribe conduct which actually involves physical violence or portends imminent physical violence." (Citations omitted.) *State* v. *Lo Sacco*, supra, 490–91.

Likewise, to establish a violation of § 53a-181 (a) (3), the state must prove, by a preponderance of the evidence, that the defendant "(1) threatened to commit a crime against another person or that person's property; (2) with the intent to cause a disturbance to or impediment of a lawful activity, a deep feeling of vexation or provocation, or a feeling of anxiety prompted by threatened danger or harm." (Internal quotation marks omitted.) *State* v. *DeLoreto*, 265 Conn. 145, 159, 827 A.2d 671 (2003); see General Statutes § 53a-181 (a) (3). With the foregoing factual background and legal principles in mind, we turn to the parties' arguments.

I

We first address the state's assertion, and the dissent's position, that the defendant's first amendment right was not implicated in the present case because the trial court reasonably could have concluded that the defendant violated his probation on the basis of his conduct rather than his speech. Specifically, the state, relying on *State* v. *Simmons*, 86 Conn. App. 381, 861 A.2d 537 (2004), cert. denied, 273 Conn. 923, 871 A.2d 1033, cert. denied, 546 U.S. 822, 126 S. Ct. 356, 163 L. Ed. 2d 64 (2005), argues that the defendant's "[threat] . . . [was] simply a component of his disruptive and aggressive conduct while the preschool was still in session." We are not persuaded.

In *State* v. *Simmons*, supra, 86 Conn. App. 384, the defendant assembled an obstacle blocking the path of public travel around the perimeter of Bradley International Airport in Windsor Locks. The obstacle was discovered by members of the Connecticut Army National Guard while conducting a routine security patrol around the perimeter of the airport. See id. The defendant "[aggressively] approached [the guardsmen's] vehicle . . . flailing his arms and yelling. When [he reached] the truck, he shouted profanities at the

guardsmen; he told them that they were on his property and that military personnel did not belong there." Id. As a result of this incident, the defendant was charged with, and subsequently convicted of, breach of the peace in the second degree. See id., 382. In affirming the judgment of the trial court, this court concluded that (1) the evidence was sufficient to convict the defendant of breach of the peace in the second degree; id., 386–87; and (2) the defendant's first amendment claim was "without merit [because] [t]he record reflect[ed] that the court's judgment was based on the defendant's conduct and not his speech." Id., 389.

This court has similarly declined to consider first amendment claims sounding in pure speech where a defendant's physical conduct was augmented by his or her speech. See *State* v. *Bagnaschi*, 180 Conn. App. 835, 850–54, A.3d (2018) (sufficient evidence to convict defendant of breach of peace in second degree, where defendant, after greeting victim and shaking hands in parking lot, grabbed victim's hand tightly and would not let go, stated that her employer and victim had ruined her life, directed profanities at victim and passenger in victim's vehicle, and followed victim to his home); *State* v. *Andriulaitis*, 169 Conn. App. 286, 288, 150 A.3d 720 (2016) (sufficient evidence to convict defendant of disorderly conduct, where defendant, in addition to shouting profanities, prevented victim from engaging in lawful activity); *State* v. *Lo Sacco*, supra, 12 Conn. App. 489 (sufficient evidence to convict defendant of creating public disturbance, which is similar to breach of peace, where defendant, who appeared to be heavily intoxicated and was excitable, angry and upset, approached victim's car, put hands on window and leaned into car, and yelled at victim for approximately two minutes despite requests to stop).

In the present case, the trial court stated that its judgments were "[b]ased on the [defendant's] threatening nature and . . . demeanor" without referencing

any specific conduct. As we detailed previously, Bevilaqua's testimony reveals that none of the defendant's conduct,[13] either nonverbal or verbal, was threatening until he exited the preschool, made the statement at issue, and attempted to reenter the preschool. The record does not clearly indicate the tone in which the statement was communicated,[14] or that the defendant made any threatening gestures in conjunction with that statement. Furthermore, although the defendant attempted to reenter the preschool after making the statement, we emphasize that there is no evidence in the record describing how the defendant attempted to open the door. Both the state and the dissent posit that the court reasonably could have inferred that the defendant attempted to reenter the preschool in an aggressive manner with the intent to confront Cherney.[15] Although we recognize the trial court's ability to draw reasonable and logical inferences from the evidence; see, e.g., *State* v. *Maurice M.*, supra, 303 Conn.

[13] The dissent takes issue with our position that the defendant's conduct was not threatening until exiting the preschool, stating that "Bevilaqua nonetheless did not testify that the defendant's behavior was not threatening at that time." (Emphasis omitted.) Bevilaqua, however, did not testify regarding any threatening conduct while the defendant was inside the preschool. In fact, at oral argument before this court, when asked to "talk about the conduct that constitutes the threat" the state was unable to direct us to any physical conduct other than the defendant's attempt to open the preschool's inner set of doors.

[14] To that extent, we reiterate that Bevilaqua testified that the defendant, in response to a comment made by Cherney, said, "you better watch yourself, you better be careful"; whereas, Kelly, in his affidavit accompanying the warrant, averred that the defendant yelled to unidentified staff, "you better watch your back . . . ." See footnote 11 of this opinion.

[15] We disagree with the dissent's position that the defendant's prior convictions, which were admitted into evidence, "properly informed the court's perspective" in determining that the defendant engaged in certain conduct in violation of § 53a-181 (a). Evidence of the defendant's prior bad acts or uncharged misconduct was irrelevant to the trial court's determination regarding the nature of his alleged conduct at the preschool. As we subsequently explain in part II of this opinion, Head Start staff's knowledge of the defendant's prior convictions may have been relevant; however, no such testimony was elicited by the state.

26; the court stated no such inference in the present case.

Accordingly, we reject the state's claim that there was sufficient evidence to find that the defendant committed breach of the peace in the second degree on the basis of his nonverbal conduct. Cf. *State* v. *Whitnum-Baker*, 169 Conn. App. 523, 527, 150 A.3d 1174 (2016) (sufficient evidence to convict defendant of creating public disturbance in violation of § 53a-181a, where defendant, while being escorted out of public library by state marshals, "engaged in violent and threatening behavior . . . when she attempted to bite [marshal's] arm"), cert. denied, 324 Conn. 923, 155 A.3d 753 (2017); *State* v. *Adams*, supra, 163 Conn. App. 824–25 (sufficient evidence to convict defendant of breach of peace in second degree in violation of § 53a-181 [a] [1], where defendant, suspected of stealing, "used physical force, namely, a shove, with the intent to impede a lawful activity"); *State* v. *Hawley*, 102 Conn. App. 551, 555, 925 A.2d 1197 (sufficient evidence to convict defendant of breach of peace in second degree in violation of § 53a-181 [a] [1], where defendant "engaged in fighting or violent or tumultuous behavior" "by spitting on [nurse's] face"), cert. denied, 284 Conn. 914, 931 A.2d 933 (2007); *State* v. *Samuel*, 57 Conn. App. 64, 70–71, 747 A.2d 21 (sufficient evidence to find violation of probation by engaging in breach of peace, where defendant threw brick through car window), cert. denied, 253 Conn. 909, 753 A.2d 942 (2000).

II

Because we conclude that the trial count found a violation of probation solely on the basis of the words the defendant used to express his displeasure with Head Start staff, "[f]undamentally, we are called upon to determine whether [his] speech is protected under the first amendment . . . or, rather, constitutes criminal

conduct that a civilized and orderly society may punish through incarceration." *State* v. *Baccala*, 326 Conn. 232, 234, 163 A.3d 1, cert. denied, U.S. , 138 S. Ct. 510, 199 L. Ed. 2d 408 (2017).

We first set forth our standard of review. "Ordinarily, a . . . trial court's findings of fact are not to be overturned on appeal unless they are clearly erroneous. . . . Thus, we [generally] review the findings of fact made by the . . . trial court in its judgment, for clear error. In certain first amendment contexts, however, appellate courts are bound to apply a de novo standard of review. . . . [In such cases], the inquiry into the protected status of . . . speech is one of law, not fact. . . . As such, an appellate court is compelled to examine for [itself] the . . . statements [at] issue and the circumstances under which they [were] made to [determine] whether . . . they . . . are of a character [that] the principles of the [f]irst [a]mendment . . . protect. . . . [I]n cases raising [f]irst [a]mendment issues [the United States Supreme Court has] repeatedly held that an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion [in] the field of free expression. . . . This rule of independent review was forged in recognition that a [reviewing] [c]ourt's duty is not limited to the elaboration of constitutional principles . . . . [Rather, an appellate court] must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. . . . Therefore, even though, ordinarily . . . [f]indings of fact . . . shall not be set aside unless clearly erroneous, [appellate courts] are obliged to [perform] a fresh examination of crucial facts under the rule of independent review. . . .

"[T]he heightened scrutiny that this court applies in first amendment cases does not authorize us to make credibility determinations regarding disputed issues of

fact. Although we review de novo the trier of fact's ultimate determination that the statements at issue constituted a [breach of the peace in the second degree], we accept all subsidiary credibility determinations and findings that are not clearly erroneous." (Citations omitted; internal quotation marks omitted.) *State* v. *Krijger*, 313 Conn. 434, 446–47, 97 A.3d 946 (2014); see also *State* v. *Parnoff*, 160 Conn. App. 270, 275–76, 125 A.3d 573 (2015), aff'd, 329 Conn. 386, A.3d (2018).

Our analysis also is informed by a review of first amendment principles, the statutory elements of the crime of breach of the peace in the second degree and, moreover, how those elements are construed in accordance with constitutional principles. "The [f]irst [a]mendment, applicable to the [s]tates through the [f]ourteenth [a]mendment, provides that Congress shall make no law . . . abridging the freedom of speech. The hallmark of the protection of free speech is to allow free trade in ideas—even ideas that the overwhelming majority of people might find distasteful or discomforting. . . . Thus, the [f]irst [a]mendment ordinarily denies a [s]tate the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence. . . . The [f]irst [a]mendment affords protection to symbolic or expressive conduct as well as to actual speech. . . .

"The protections afforded by the [f]irst [a]mendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the [c]onstitution. . . . The [f]irst [a]mendment permits restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . . Thus, for example, a [s]tate may punish those words which

by their very utterance inflict injury or tend to incite an immediate breach of the peace. . . . Furthermore, the constitutional guarantees of free speech . . . do not permit a [s]tate to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. . . . [T]he [f]irst [a]mendment also permits a [s]tate to ban a true threat." (Citations omitted; internal quotation marks omitted.) *Virginia* v. *Black*, 538 U.S. 343, 358–59, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003); see also *State* v. *DeLoreto*, supra, 265 Conn. 153–54.

"[Section] 53a-181 (a) (1) does not require proof of actual physical contact on the part of the defendant with a victim . . . but rather that, when applied to speech, the parameters of the violent, threatening or tumultuous behavior prohibited by § 53a-181 (a) (1) are consistent with fighting words . . . ." (Internal quotation marks omitted.) *State* v. *Parnoff*, supra, 160 Conn. App. 277–78; see also *State* v. *Szymkiewicz*, supra, 237 Conn. 620 ("speech can be proscribed not only when accompanied by actual physical conduct, but also when it can be identified as fighting words that portend physical violence").

Although § 53a-181 (a) (3) criminalizes true threats, it is well established that "[t]hreatening statements that do not rise to the level of a true threat may nonetheless constitute fighting words that could be criminalized under this subsection consistent with the first amendment." *State* v. *DeLoreto*, supra, 265 Conn. 168; see also *State* v. *Gaymon*, 96 Conn. App. 244, 248, 899 A.2d 715, cert. denied, 280 Conn. 906, 907 A.2d 92 (2006).

Therefore, to establish a violation of § 53a-181 (a) under either subdivision (1) or (3), the state was required to prove that the statement, "you better be careful, you better watch yourself," as testified to by

Bevilaqua, or the statement, "you better watch your back," as averred to by Kelly in the violation of probation warrant, constituted either fighting words or a true threat. With that legal framework in mind, we consider whether the evidence presented at the defendant's probation revocation hearing was sufficient to establish a violation under either subdivision.

A

We first address the defendant's claim that the evidence adduced at his probation revocation hearing was insufficient to establish that his speech constituted fighting words under either § 53a-181 (a) (1) or (3). Specifically, the defendant argues that his alleged statement was not likely to provoke a violent response from Cherney because it was ambiguous, conditional, and contained no reference to an unlawful act or violence. We agree with the defendant.

We begin by setting forth the applicable legal principles. The fighting words exception was first articulated by the United States Supreme Court in the seminal case of *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 573, 62 S. Ct. 766, 86 L. Ed. 1031 (1942). "The *Chaplinsky* doctrine permits the state to prohibit speech that has a direct tendency to inflict injury or to cause acts of violence or a breach of the peace by the persons to whom it is directed." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Szymkiewicz*, supra, 237 Conn. 619. "[Fighting] words touch the raw nerves of one's sense of dignity, decency, and personality and . . . therefore tend to trigger an immediate, violent reaction. . . . They are like sparks, capable of igniting individual reaction as well as setting off a group conflagration by provoking hostile reaction or inciting a riot. . . . Such speech must be of such a nature that it is likely to provoke the average person to retaliation. . . . To be considered fighting words, the speech at issue

need not actually cause those who hear the speech to engage in violent, tumultuous or threatening behavior, but must have the tendency to provoke imminent retaliation from them. . . . Moreover, [w]hether particular language constitutes fighting words . . . depends not only on the language but on the full factual situation of its utterance." (Citations omitted; internal quotation marks omitted.) *State* v. *Parnoff*, supra, 160 Conn. App. 278–79.

It is well settled that "there are no per se fighting words; rather, courts must determine on a case-by-case basis all of the circumstances relevant to whether a reasonable person in the position of the actual addressee would have been likely to respond with violence." *State* v. *Baccala*, supra, 326 Conn. 245;[16] see also *State* v. *Hoskins*, 35 Conn. Supp. 587, 591, 401 A.2d 619 (1978) ("The fighting words concept has two aspects. One involves the quality of the words themselves. The other concerns the circumstances under which the words are used." [Internal quotation marks omitted.]). "[A] proper contextual analysis requires consideration of the actual circumstances, as perceived by both a reasonable speaker and addressee, to determine whether there was a likelihood of violent retaliation. This necessarily includes the manner in which the words were uttered, by whom and to whom the words were uttered, and any other attendant circumstances that were objectively apparent and bear on the question of whether a violent response was likely." *State* v. *Baccala*, supra, 250. Furthermore, "[a]lthough the reaction of the addressee is not dispositive . . . it is probative of the likelihood of a violent reaction. (Citation omitted.) Id., 254.

[16] Although the defendant in *Baccala* was convicted under a different subdivision of the breach of the peace statute, § 53a-181 (a) (5), we note that the case was analyzed under the fighting words exception.

Our analysis is also instructed by this court's decision in *State* v. *Parnoff*, supra, 160 Conn. App. 270. In that case, two employees of a water utility company entered the property of Laurence V. Parnoff to conduct routine maintenance on a fire hydrant located on the property. See id., 272. Parnoff confronted the two men about their presence on his property and "stated that he would retrieve a gun and shoot them if they did not leave." Id., 273. Parnoff was subsequently convicted after a jury trial of disorderly conduct in violation of General Statutes § 53a-182 (a) (1).[17] On appeal, however, this court concluded that there was insufficient evidence to convict Parnoff of disorderly conduct because his statement did not constitute fighting words. See id., 271–72, 279. In so holding, this court reasoned that his conditional threat did not have "the tendency to provoke imminent retaliation" because there was no evidence that he was carrying a gun or went into his home after making the statement and, therefore, that he was not "immediately capable of the violent act he described." (Emphasis omitted.) Id., 279.

With the foregoing legal principles in mind, and after our independent review of the record, we conclude that the defendant's statement did not constitute fighting words because it did not have the tendency to provoke imminent retaliation from an average person in Cherney's position. Bevilaqua specifically testified that the defendant's conduct was nonthreatening until he stated, "you better be careful, you better watch yourself." Although she testified that the defendant "had words" with staff prior to leaving, her testimony does not shed any light on either what type of words were used or the defendant's mannerisms. See *State* v. *Baccala*,

[17] We note that elements of breach of the peace in the second degree are identical to the elements of disorderly conduct, except that breach of the peace in the second degree requires that the proscribed conduct occur in a public place. See General Statutes § 53a-181 (a) (1).

supra, 326 Conn. 241 ("whether the words were preceded by a hostile exchange or accompanied by aggressive behavior will bear on the likelihood of such a reaction"). Additionally, the statement is ambiguous, conditional, and contained no reference to an unlawful or violent act, "further reduc[ing] the probability that the average person would have responded . . . with imminent violence." *State* v. *Parnoff*, supra, 160 Conn. App. 280. Importantly, at the time the defendant made the statement, he had already exited the preschool's inner set of doors and was unable to reenter, and, therefore, incapable of *immediately* following through with his statement.[18] Cf. *State* v. *Baccala*, supra, 253 ("[w]e recognize that a different conclusion might be warranted if the defendant directed the same words at [the victim] after [the victim] ended her work day and left [her place of employment]"). Accordingly, we conclude that the evidence does not sufficiently establish that the defendant violated his probation by committing the crime of breach of the peace in the second degree, in violation of § 53a-181 (a) (1) or (3), under the fighting words exception to speech that is protected under the first amendment.

B

We next consider the defendant's claim that the evidence adduced at his probation revocation hearing was insufficient to establish, by a preponderance of the evidence, that his speech constituted a true threat in violation of § 53a-181 (a) (3). Specifically, the defendant

[18] We further note that, although Bevilaqua generally testified that her staff was "shaken up," there is no evidence in the record regarding Cherney's reaction to the defendant's statement. See *State* v. *Parnoff*, supra, 160 Conn. App. 280 n.6 (noting that although speech need not actually cause those hearing it to respond with immediate violence to constitute fighting words, "it [was] telling that neither [of the two employees] reacted violently in response to [Parnoff's] statement or testified that they had the urge to do so").

argues that his "remarks . . . represented an unplanned, spontaneous reaction to the upset and anger he felt." In response, the state contends that the defendant's statement constituted a true threat "in light of the entire factual context." The state, however, failed to adduce sufficient evidence to contextualize the defendant's ambiguous and conditional statement. Accordingly, we agree with the defendant.

We begin with the applicable legal principles. "True threats encompass those statements [through which] the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. . . . The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur." (Citations omitted; internal quotation marks omitted.) *Virginia* v. *Black*, supra, 538 U.S. 359–60; see also *State* v. *Cook*, 287 Conn. 237, 250, 947 A.2d 307, cert. denied, 555 U.S. 970, 129 S. Ct. 464, 172 L. Ed. 2d 328 (2008). "In the context of a threat of physical violence, [w]hether a particular statement may properly be considered to be a [true] threat is governed by an objective standard—whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault. . . . [A]lleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners. . . . Prosecution under a statute prohibiting threatening statements is constitutionally permissible [as] long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey

a gravity of purpose and imminent prospect of execution . . . .'' (Citation omitted; internal quotation marks omitted.) *State* v. *Krijger*, supra, 313 Conn. 450; cf. *State* v. *Pelella*, 327 Conn. 1, 17, 170 A.3d 647 (2017) (''[t]hough relevant, the primary focus of our inquiry is not immediacy but whether the threat convey[s] a gravity of purpose and likelihood of execution'' [internal quotation marks omitted]).

''[T]o ensure that only serious expressions of an intention to commit an act of unlawful violence are punished, as the first amendment requires, the state must do more than demonstrate that a statement *could* be interpreted as a threat. When . . . a statement is susceptible of varying interpretations, at least one of which is nonthreatening, the proper standard to apply is whether an objective listener would readily interpret the statement as a real or true threat; nothing less is sufficient to safeguard the constitutional guarantee of freedom of expression. To meet this standard . . . the state [is] required to present evidence demonstrating that a reasonable listener, familiar with the entire factual context of the defendant's statements, would be *highly likely* to interpret them as a communicating a genuine threat of violence rather than protected expression, however offensive or repugnant.'' (Emphasis altered.) *State* v. *Krijger*, supra, 313 Conn. 460; see also *State* v. *Krijger*, 130 Conn. App. 470, 484–85, 24 A.3d 42 (2011) (*Lavine*, *J.*, dissenting), rev'd, 313 Conn. 434, 446–47, 97 A.3d 946 (2014) (adopting Appellate Court dissent's position). ''An important factor to be considered in determining whether a facially ambiguous statement constitutes a true threat is the prior relationship between the parties. When the alleged threat is made in the context of an existing or increasingly hostile relationship, courts are more apt to conclude that an objectively reasonable speaker would expect that the

statement would be perceived by the listener as a genuine threat." *State* v. *Krijger*, supra, 453–54; see also *State* v. *Pelella*, supra, 327 Conn. 6 (concluding that, where history of physical acts of violence toward victim, evidence was sufficient for jury to determine whether defendant's statement, "if you go into the attic I will hurt you," constituted true threat).

With the foregoing legal principles in mind, we conclude that the defendant's statement did not constitute a true threat. Several factors bear on our conclusion. To begin, we emphasize that neither of the statements, "you better watch yourself, you better be careful," or, "you better watch your back," communicate an explicit threat or convey the defendant's intent to harm or assault Cherney. Cf. *State* v. *Cook*, supra, 287 Conn. 240 (defendant told victim, "[t]his is for you if you bother me anymore," while wielding wooden table leg [internal quotation marks omitted]); *State* v. *DeLoreto*, supra, 265 Conn. 149 (defendant jumped out of car as victim was jogging by, ran toward victim, pumped his fists and stated, "I'm going to kick your ass" [internal quotation marks omitted]); *State* v. *Gaymon*, supra, 96 Conn. App. 249 (defendant, after being placed in handcuffs, told probation officer, "I'm going to kick your fucking ass," and spat in his face [internal quotation marks omitted]). Instead, the defendant's statement and attempt to reenter the preschool was susceptible of being interpreted as either innocent or threatening conditional future conduct.[19] For that reason, it was the state's "burden [to present] evidence serving to remove that ambiguity" by contextualizing the defendant's statement against the backdrop of his previous interactions with preschool staff and, specifically, Cherney. (Internal quotation marks omitted.) *State* v. *Krijger*, supra, 313 Conn. 458.

[19] As we have previously detailed, there is no evidence describing how the defendant communicated that statement to Cherney, or that he made any threatening gestures in conjunction with that statement.

The state, acknowledging that the defendant's statement was not explicitly threatening, attempts to resolve the ambiguity by relying on (1) Bevilaqua's testimony that she had previously witnessed the defendant engage in similar conduct at the preschool, and (2) the defendant's history of threatening and assaultive behavior. There is, however, no evidence that Cherney had previously witnessed this prior behavior or had knowledge of the defendant's prior convictions. Simply put, the state was required "to do more than demonstrate that [the defendant's] statement could be interpreted as a threat." (Emphasis omitted.) Id., 460. Therefore, in light of the unresolved ambiguity of the defendant's statement, we cannot conclude that a reasonable listener would be highly likely to interpret the defendant's statement as a serious expression of intent to harm or assault. Accordingly, we conclude that the evidence does not sufficiently establish that the defendant violated his probation by committing the crime of breach of the peace in the second degree, in violation of § 53a-181 (a) (3), under the true threat exception to speech that is protected under the first amendment.

In sum, we conclude that, under the circumstances of the present case, the evidence adduced at the defendant's probation revocation hearing was insufficient to establish that the defendant's statement constituted either fighting words or a true threat. Because the defendant's speech did not fall within those two narrowly defined categories of unprotected speech, the revocation of his probation on the basis of his speech violates the first amendment to the United States constitution.

The judgments are reversed and the cases are remanded with direction to render judgments for the defendant.

In this opinion SHELDON, J., concurred.

ELGO, J., dissenting. In the present case, the trial court found, by a preponderance of the evidence, that the defendant, Kerlyn M. Taveras, violated the terms of his probation by committing the misdemeanor of breach of the peace in the second degree in violation of General Statutes § 53a-181 (a) (1).[1] I believe that the testimonial and documentary evidence admitted at the probation revocation hearing substantiates that finding. Accordingly, I respectfully dissent.

At the outset, I note a basic point of disagreement with the majority, as I do not believe that the defendant was found in violation of probation solely on the basis

[1] General Statutes § 53a-181 (a) provides: "A person is guilty of breach of the peace in the second degree when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person: (1) Engages in fighting or in violent, tumultuous or threatening behavior in a public place; or (2) assaults or strikes another; or (3) threatens to commit any crime against another person or such other person's property; or (4) publicly exhibits, distributes, posts up or advertises any offensive, indecent or abusive matter concerning any person; or (5) in a public place, uses abusive or obscene language or makes an obscene gesture; or (6) creates a public and hazardous or physically offensive condition by any act which such person is not licensed or privileged to do. For purposes of this section, 'public place' means any area that is used or held out for use by the public whether owned or operated by public or private interests."

I recognize that the judgment file does not state precisely which subdivision of § 53a-181 (a) the court found applicable to the present case. At the same time, I agree with the majority that the state's theory of the case at trial was that the defendant had committed a violation of § 53a-181 (a) (1) due to his threatening behavior at the preschool on the afternoon of March 11, 2014. I also agree with the majority that the court, in its oral decision, ultimately found that the defendant "violated his probation by committing the crime of breach of the peace in the second degree on the basis of his 'threatening nature and . . . demeanor' at the preschool." In light of the foregoing, the court's decision reasonably may be construed to conclude that the defendant violated § 53a-181 (a) (1). Furthermore, the defendant did not request an articulation to clarify the court's determination; cf. *State* v. *Pierce*, 64 Conn. App. 208, 210, 779 A.2d 233 (2001) (defendant requested articulation of precise crime on which court found him in violation of probation); and the defendant in this appeal has not claimed that he lacked adequate notice of the grounds on which he was found to have violated his probation. See *State* v. *Maye*, 70 Conn. App. 828, 839, 799 A.2d 1136 (2002).

of the words that he used on the afternoon of March 11, 2014. To the contrary, I believe that a fair reading of the trial court's oral decision indicates that the court predicated its finding on the defendant's conduct that afternoon. As the majority acknowledges, the court in its decision explicitly stated that its judgments were based in part on "the threatening nature and demeanor of" the defendant. In my view, the critical question is whether the record contains evidence to support a finding that the defendant, through his conduct and demeanor as the events of March 11, 2014, unfolded, engaged in threatening behavior in a public place, as § 53a-181 (a) (1) requires.

Before turning to the evidence admitted at the probation revocation hearing, I note the well established standard that governs review of the evidentiary phase of such proceedings. "The law governing the standard of proof for a violation of probation is well settled. . . . [A]ll that is required in a probation violation proceeding is enough to satisfy the court within its sound judicial discretion that the probationer has not met the terms of his probation. . . . It is also well settled that a trial court may not find a violation of probation unless it finds that the predicate facts underlying the violation have been established by a preponderance of the evidence at the hearing—that is, the evidence must induce a reasonable belief that it is more probable than not that the defendant has violated a condition of his or her probation. . . . In making its factual determination, the trial court is entitled to draw reasonable and logical inferences from the evidence. . . . Accordingly, [a] challenge to the sufficiency of the evidence is based on the court's factual findings. The proper standard of review is whether the court's findings were clearly erroneous based on the evidence. . . . A court's finding of fact is clearly erroneous and its conclusions drawn from that finding lack sufficient evidence when

there is no evidence in the record to support [the court's finding of fact] . . . 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. . . . In making this determination, *every reasonable presumption must be given in favor of the trial court's ruling*." (Citation omitted; emphasis added; internal quotation marks omitted.) *State* v. *Maurice M.*, 303 Conn. 18, 26–27, 31 A.3d 1063 (2011). Furthermore, as with any evidential insufficiency claim, we do not ask whether there is a reasonable view of the evidence that would result in a finding favorable to the defendant; rather, we ask whether there is a reasonable view of the evidence that supports the finding of the trier of fact. See *State* v. *Revels*, 313 Conn. 762, 778, 99 A.3d 1130 (2014), cert. denied, U.S. , 135 S. Ct. 1451, 191 L. Ed. 2d 404 (2015).

The evidence before the trial court included the testimony of the defendant's probation officer, Christopher Kelly, and Monica Bevilaqua, the director of the preschool where the altercation in question transpired. Also admitted into evidence were various documents regarding the defendant's underlying convictions, as well as the violation of probation arrest warrant application (application) prepared by Kelly, which was admitted as a full exhibit without any objection by the defendant.[2]

[2] At the first day of the probation revocation hearing, the court inquired whether the violation of probation arrest warrant application was a full exhibit. In response, the state's attorney stated: "I have no objection to it being a full exhibit, Your Honor. I know [defense] counsel had referred to the court having it. I don't know if counsel has any objection to the violation of probation [application] being a full exhibit. [Defense counsel]?" The defendant's counsel, Attorney Gerald Klein, at that time stated, "Oh yes. I have no objection." The violation of probation arrest warrant application then was admitted as a full exhibit and marked as court exhibit A. In this appeal, the defendant has raised no claim with respect to the admission of that application or the contents thereof.

As noted in the majority opinion, the defendant arrived at the preschool approximately forty minutes late on the afternoon of March 11, 2014.[3] When he arrived, Bevilaqua testified that the defendant was "irritated and not happy with staff," and "already escalated." After picking up his son from his classroom, Kelly stated, in his sworn affidavit included in the application, that the defendant "became extremely agitated" and then "began to argue with staff." That affidavit further indicates that the argument grew so heated that "[s]taff told [the defendant] that he had to leave because he was arguing with staff in the front lobby in front of other children and their parents."[4] Bevilaqua testified that, as the defendant exited the preschool, the assistant education manager "said something back to him." In response, Bevilaqua testified, the defendant, who was then outside the locked door, "turned and said, better watch yourself, you better be careful . . . ." In the affidavit contained in the application, Kelly stated that the defendant was yelling as he made those remarks.[5] As Kelly's affidavit indicates, preschool staff reported that the defendant was "so enraged" and "intimidating" at that time. Moreover, after uttering those remarks, Bevilaqua testified that the defendant attempted "to get back in" the preschool, but could not penetrate the

[3] Bevilaqua testified that this was not the first time that the defendant had been late to pick up his son from the preschool and acknowledged that there had been prior incidents with the defendant at the preschool. She further testified that, when she received the initial report of the altercation with the defendant, she hurried back to the preschool "because knowing what we knew about the family and the situation, I knew it would get escalated."

[4] I recognize that Bevilaqua was asked whether the defendant had used "[t]hreatening words" prior to exiting the doors of the preschool, and that she responded, "[a]t that point they were not." Bevilaqua nonetheless did not testify that the defendant's *behavior* was not threatening at that time.

[5] Kelly's sworn statement in his affidavit, which was admitted as part of court exhibit A, undermines the defendant's claim in his reply brief that there was no evidence that he "yelled, screamed, [or] raised his voice" when making those remarks.

locked door. Although the majority correctly notes that there is no evidence describing precisely how the defendant attempted to open the door, I believe the critical import of the evidence of his attempted reentry is that it demonstrates that the defendant's shouted remarks not only were made while he was in an enraged state, but were accompanied by a physical gesture that the court reasonably could infer to be aggressive in nature.

The court also was presented with evidence of the reaction that the defendant's conduct and demeanor caused among preschool staff that afternoon. Bevilaqua testified that when she arrived at the preschool shortly after the altercation, her staff informed her that they had been threatened by the defendant and, as a result, were "shaken up" and very concerned. Bevilaqua testified that she personally had observed the defendant behave in a threatening manner on a prior occasion, which informed her response to the reports of her staff. Bevilaqua explained that the preschool's "internal policy" was to contact police "when something escalates" to the point of "[s]taff being threatened." Consistent with that policy, Bevilaqua testified that she contacted the Danbury Police Department, whose officers took statements from staff members. Questioned as to how she differentiates between "a small threat, like . . . I hate this place," and something "larger" and more substantial, Bevilaqua testified that she was "trained to know the difference." In making the determination to contact law enforcement, Bevilaqua also indicated that she was cognizant that this "certainly wasn't our first escalated interaction" with the defendant.

Bevilaqua was present as police officers took statements from her staff regarding the incident. She also confirmed that the altercation had an effect on people within the preschool for the remainder of that day. In light of the defendant's conduct at the preschool, Bevilaqua asked the Danbury Police Department to

ensure that the defendant "not be allowed back on" the preschool property.[6] She also looked into "whether or not we could get a restraining order" against the defendant because she was "that concerned about his behavior." Later that night, Bevilaqua was informed by an officer of the Danbury Police Department that the defendant had been arrested. Despite that arrest, Bevilaqua nevertheless took further actions to protect the preschool, testifying that "[w]e hired a police officer to be there the next morning."

At the probation revocation hearing, Kelly testified that "[the defendant] and I had a conversation after his breach of peace arrest" stemming from the defendant's conduct at the preschool on March 11, 2014. In that conversation, Kelly and the defendant discussed the defendant's need "to cool it" and "not be as confrontational in situations." Also in evidence before the trial court was documentation of the convictions underlying the defendant's probation. The record indicates that the defendant had pleaded guilty, under separate dockets, to two counts of threatening in the second degree in violation of General Statutes § 53a-62 and one count of assault in the third degree in violation of General Statutes § 53a-61 (a) (1). That evidence was admitted without objection by the defendant and properly informed the court's perspective as trier of fact in the present case. See *State* v. *Megos*, 176 Conn. App. 133, 148, 170 A.3d 120 (2017).

In light of the foregoing evidence, I believe that the court reasonably could determine that the defendant, "with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof," engaged in threatening behavior in a public place in violation of

[6] In his affidavit, Kelly stated that, following the defendant's arrest on the charge of breach of the peace in the second degree, the defendant "was advised not to return to the [preschool] again, otherwise he would be arrested for criminal trespass."

§ 53a-181 (a) (1). Significantly, the present case involves not a criminal prosecution, but a probation revocation hearing, which "is not a criminal proceeding." *Minnesota* v. *Murphy*, 465 U.S. 420, 435 n.7, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984). Rather, "the probation revocation procedure established by [General Statutes] § 53a-32 is akin to a civil proceeding." *State* v. *Davis*, 229 Conn. 285, 295, 641 A.2d 370 (1994). Criminal cases such as *State* v. *Krijger*, 313 Conn. 434, 97 A.3d 946 (2014),[7] in which the beyond a reasonable doubt burden of proof applied, therefore are distinguishable from the present case, as "a probation violation need be proven *only* by a preponderance of the evidence" and "need not be sufficient to sustain a violation of a criminal law." (Emphasis altered; internal quotation marks omitted.) *State* v. *Megos*, supra, 176 Conn. App. 139; see also *State* v. *Smith*, 207 Conn. 152, 177, 540 A.2d 679 (1988) ("the authorities are virtually unanimous in concluding that the standard of proof used in a criminal trial, namely 'beyond a reasonable doubt,' is not applicable to a probation revocation hearing"). At a probation revocation hearing, the state, therefore, must present evidence that induces "a reasonable belief that it is more probable than not that the defendant has violated a condition of his or her probation." *State* v. *Davis*, supra, 302. Measured by that standard, I believe the evidence before the court sufficiently established a violation of § 53a-181 (a) (1).

In reaching that conclusion, I am mindful of the trial court's superior vantage point, as finder of fact, to

[7] In *State* v. *Krijger*, supra, 313 Conn. 458, the defendant immediately "apologized for his behavior" following a heated confrontation with an attorney and stated that "he hoped it would not adversely affect their working relationship." As our Supreme Court emphasized, "[t]he defendant's contrition immediately following the incident is decidedly at odds with the view that, just moments beforehand, he had communicated a serious threat . . . ." Id. No such contrition was expressed by the defendant in the present case.

"credit and weigh" the evidence before it. *Rockhill* v. *Danbury Hospital*, 176 Conn. App. 39, 52 n.6, 168 A.3d 630 (2017); accord *Pagano* v. *Ippoliti*, 245 Conn. 640, 654, 716 A.2d 848 (1998) ("[t]he trial court, having heard the testimony and observed the witnesses, was in a position far superior to ours to judge the evidentiary record as a whole"). By their very nature, appellate tribunals are not privy to the inflections in a witness' voice or the body language that the printed record cannot capture. For that reason, courts like ours afford a great degree of deference to the subsidiary findings and credibility assessments of the trial court. See *Jones* v. *State*, 328 Conn. 84, 96–97, 177 A.3d 534 (2018). In its oral decision, the court credited Bevilaqua's testimony, finding that she took steps to secure the preschool on March 11, 2014, which included immediately contacting law enforcement, due to the "threatening nature and the demeanor" of the defendant that afternoon. In so evaluating Bevilaqua's testimony, the court observed details that the record before us does not reflect. We therefore are obligated to defer to the court's assessment of the credibility of, and proper weight accorded to, that evidence.

Furthermore, it is fundamental to our law that the finder of fact is entitled to draw reasonable inferences from the evidence before it. See *State* v. *Berger*, 249 Conn. 218, 224, 733 A.2d 156 (1999) (trier of fact may draw whatever inferences from evidence it deems reasonable or logical). When a trial court "makes a factual determination of whether a condition of probation has been violated," it likewise is free to "draw reasonable and logical inferences from the evidence." (Internal quotation marks omitted.) *State* v. *Faraday*, 268 Conn. 174, 185, 842 A.2d 567 (2004). In its oral decision, the court expressly noted its ability to make such inferences as part of its finding that the defendant violated a condition of his probation. Our obligation to make every

reasonable presumption in favor of the trial court's finding that the defendant violated the terms of his probation; *State* v. *Hill*, 256 Conn. 412, 425–26, 773 A.2d 931 (2001); encompasses such inferences.

In his principal appellate brief, the defendant argues that "if the defendant shouted, 'you better watch yourself, you better be careful,' to [a staff member] as she attempted to cross the street in front of an out-of-control truck, her reaction would not be fear or offense but gratitude." The defendant also offers a series of purportedly "plausible reading[s]" of those remarks. What the defendant fails to appreciate is the precise context in which his remarks arose. This is not a case of a bystander alerting a pedestrian to an errant vehicle. Nor is it a case, as the defendant's counsel hypothetically suggested at the revocation hearing, of a parent who simply "comes to the school [and] gets mad and says . . . you better watch it . . . ." Rather, the evidence adduced at the revocation hearing indicates that this is a case in which those remarks were made by an individual on probation for committing, inter alia, the crime of threatening in the second degree. This is a case in which the evidence indicates that the defendant arrived at the preschool "already escalated" and, after picking his son up from his classroom, engaged in an argument with preschool staff in front of other students and parents. The record further indicates that while arguing with staff, the defendant "became extremely agitated," to the point that staff informed the defendant that he had to leave the premises. In addition, the record indicates that when the defendant made the remarks in question, he was yelling at the preschool staff, and then immediately attempted to penetrate the locked door and reenter the preschool, conduct which the court reasonably could infer to be an aggressive physical gesture.

The court was presented with evidence that the staff present during the altercation with the defendant described him as "so enraged" and "intimidating" at that time. The court also heard testimony that the preschool staff was so shaken and alarmed by the behavior of the defendant that they called the police, explored the possibility of obtaining a restraining order against the defendant, and then hired a police officer to be present at the preschool the following day. The defendant's probation officer testified that, following that incident, he and the defendant discussed the defendant's conduct at the preschool and his need to "cool it" and not be so "confrontational."

Given that evidence, which provides the necessary context in which this altercation arose, I believe that the trial court reasonably could find, by a preponderance of the evidence, that the defendant violated his probation pursuant to § 53a-32 (a) by having committed a breach of the peace in the second degree in violation of § 53a-181 (a) (1). In its appellate brief, the state analogizes the present case to *State* v. *Simmons*, 86 Conn. App. 381, 389, 861 A.2d 537 (2004) (conviction based on defendant's conduct and not his speech), cert. denied, 273 Conn. 923, 871 A.2d 1033, cert. denied, 546 U.S. 822, 126 S. Ct. 356, 163 L. Ed. 2d 64 (2005),[8] and submits that the defendant's threatening remarks "were simply a component of his disruptive and aggressive conduct while the preschool was still in session." I agree.

Were this a criminal prosecution governed by the beyond a reasonable doubt standard, the evidence in the record might well be insufficient to sustain a finding that the defendant violated § 53a-181 (a) (1). This case involves a probation revocation hearing, however, at

[8] In *Simmons*, the beyond a reasonable doubt metric applied. *State* v. *Simmons*, supra, 86 Conn. App. 385–86. The present case, by contrast, involves a preponderance of the evidence determination.

which a less burdensome standard of proof applies. In such proceedings, the trial court, as finder of fact, draws inferences and makes predicate factual findings to which every reasonable presumption must be given in favor of their correctness. *State* v. *Maurice M.*, supra, 303 Conn. 26–27. Applying that standard to the evidence in the record, I would affirm the judgments of the trial court finding the defendant in violation of the terms of his probation.[9]

HEATHER HANDEL, CONSERVATRIX (ESTATE OF ROBERT WOJCIECHOWSKI) *v.* COMMISSIONER OF SOCIAL SERVICES (AC 39372)

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

Syllabus

The plaintiff appealed to the trial court from the decision of an administrative hearing officer for the defendant Commissioner of Social Services upholding the defendant's denial of certain Medicaid benefits. The plaintiff's father had filed an application for Medicaid benefits to cover certain residential care costs at a health care facility, which the defendant denied in part. The plaintiff, who was appointed as the conservatrix for her father, requested that the defendant hold a fair hearing on her challenge to the denial of benefits for three disputed months. A hearing was held before the defendant's hearing officer, who issued a decision concluding that the plaintiff's father was ineligible for benefits for those months. Thereafter, the plaintiff filed an administrative appeal, which the trial court dismissed, and the plaintiff appealed to this court. On appeal, the plaintiff claimed, inter alia, that the defendant's decision was not rendered within ninety days of the date that she requested a fair hearing, as required by statute (§§ 17b-60 and 17b-61) and the applicable federal regulation (42 C.F.R. § 431.244 [f] [2013]), and thus could not stand. *Held* that the plaintiff's administrative appeal from the denial of Medicaid benefits should have been sustained, the defendant having failed to render a decision within ninety days of the date that the plaintiff

[9] I recognize that the defendant has raised other claims in this appeal, including ones pertaining to the admission of hearsay testimony. Having reviewed those arguments in light of applicable law, I perceive no error on the part of the trial court.

requested a hearing; it was undisputed that the defendant rendered the decision beyond the statutorily prescribed ninety day time limit, even factoring in a continuance requested by the plaintiff that resulted in the rescheduling of the hearing, our Supreme Court has determined previously that a plaintiff's appeal from a decision of the defendant should be sustained where the final administrative action is not taken within ninety days of the date the plaintiff originally filed a request for a fair hearing unless the delay in the defendant's decision was attributable to the plaintiff, and although the defendant claimed that there have been changes in the language of the federal regulation, 42 C.F.R. § 431.244 (f), under which the plaintiff sought relief and on which that Supreme Court precedent relied, which the defendant claimed evinced an intent to require substantial rather than strict compliance with the ninety day deadline, the new language had to be read in conjunction with a parallel statute, § 17b-61, previously § 17-2b, on which that Supreme Court precedent relied, which still mandates that a decision be rendered within ninety days after the request for a hearing, and, therefore, that case law has not been superseded by the minor change in the language of the federal regulation.

Argued March 19—officially released July 17, 2018

Procedural History

Appeal from the decision of the defendant Commissioner of Social Services denying in part an application for Medicaid benefits, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Cole-Chu*, *J.*; judgment dismissing the appeal, from which the plaintiff appealed. *Reversed; judgment directed.*

Andrew S. Knott, with whom, on the brief, was *Robert J. Santoro*, for the appellant (plaintiff).

Patrick Kwanashie, assistant attorney general, with whom, on the brief, was *George Jepsen*, attorney general, for the appellee (defendant).

Opinion

SHELDON, J. The plaintiff, Heather Handel, conservatrix for her father, Robert Wojciechowski (applicant), appeals from the judgment of the trial court affirming the denial of certain Medicaid benefits by the defendant,

the Commissioner of Social Services, and dismissing her administrative appeal from that denial. On appeal to this court, the plaintiff claims that she is entitled to the relief requested—Medicaid coverage for a specified period of months—because the decision denying that relief was not issued by the Department of Social Services (department)[1] within the time period mandated by law.[2] We agree and, accordingly, reverse the judgment of the trial court.

The trial court set forth the following relevant factual and procedural history. "On August 2, 2013, the applicant, suffering from a primary diagnosis of dementia, was admitted to Sheriden Woods Health Care Center, a long-term care facility in Bristol, Connecticut. Two days later, with the plaintiff's help he applied for Medicaid for his residential care costs not covered by his Social Security benefits. On August 7, 2013, the plaintiff was appointed to the fiduciary capacity in which she brings this appeal: conservat[rix] of the applicant. Her initial fiduciary certificate did not give her authority to liquidate insurance policies or retirement accounts. On September 16, 2013, the department sent the plaintiff the first of what would eventually be twelve asset verification requests. Each such request informed the plaintiff of the $1600 asset limit for eligibility for the Medicaid benefit applied for. There were only two assets which were not liquidated and spent until June of 2014: a

[1] The plaintiff brought this action against the Department of Social Services through its commissioner, Roderick L. Bremby. For ease of reading, references in this opinion to the department include the Commissioner of Social Services.

[2] The plaintiff also challenges the trial court's decision affirming the department's denial of benefits on the ground that the department erroneously concluded that the applicant was ineligible for benefits during the specified period of time because he had more than $1600 worth of assets available to him during that time period. Because we conclude that the department did not issue its decision within the statutorily prescribed time limit, and reverse the decision on that basis, we need not address the plaintiff's claim regarding the applicant's available assets.

Lincoln Life Insurance account with a cash value of $9315.01 as of June 4, 2014 [insurance policy], and a Fidelity IRA account with a balance of $2187.88 as of June 2, 2014 [IRA].

"In December of 2013, the plaintiff began trying to cash in the insurance policy. On March 14, 2014, after she discovered that Lincoln Life Insurance required specific Probate Court authority to liquidate the insurance policy, the plaintiff asked the Probate Court for authority to liquidate the insurance policy and the IRA. On May 1, 2014, the Probate Court granted the plaintiff that authority. On June 2, 2014, the plaintiff closed the IRA account. On June 4, 2014, the plaintiff liquidated the insurance policy. She promptly applied the proceeds of the IRA and insurance policy to the applicant's debts, thus bringing the applicant's assets under $1600.

"On July 23, 2014, the department granted [the applicant's] application for Medicaid benefits, starting June 1, 2014, and denied benefits for March, April and May, 2014.

"On September 17, 2014, the plaintiff requested that the department hold an administrative hearing on her challenge to the July 23, 2014 denial of benefits for March, April and May, 2014. On September 30, 2014, the department sent the plaintiff a notice that the requested hearing would take place on October 23, 2014. On October 16, 2014, the plaintiff, by her attorney, asked the department for a postponement of the hearing due to a conflict with a court event. On October 21, 2014, the department sent the plaintiff a notice of rescheduled hearing on November 10, 2014.

"On November 10, 2014, the requested hearing was conducted by the department's hearing officer. At the end of the hearing, the hearing officer left the record open, by agreement, for additional information. The hearing record was announced as closing, and did close,

on December 1, 2014. The hearing officer's decision was issued on February 20, 2015, the 81st day after December 1, 2014, and the 127th day after October 16, 2014." (Footnotes omitted.)

The plaintiff filed an administrative appeal, pursuant to General Statutes § 4-183, to the Superior Court from the department's denial of benefits for March, April and May, 2014, on the ground that the department erroneously determined that the life insurance policy and the IRA were assets that were available to the applicant during those months, and thus that he had more than the minimum $1600 worth of assets available to him and was ineligible for Medicaid until those assets were spent down. The plaintiff also argued that her claim for benefits during March, April and May, 2014, should be granted as a matter of law because the decision of the department was impermissibly rendered beyond the ninety day period prescribed by law.

By memorandum of decision filed July 29, 2016,[3] the court rejected both of the plaintiff's arguments and, thus, affirmed the decision of the department and dismissed the plaintiff's appeal therefrom. This appeal followed.

"The [M]edicaid program, established in 1965 as Title XIX of the Social Security Act, and codified at 42 U.S.C. § 1396 et seq., is a joint federal-state venture providing financial assistance to persons whose income and resources are inadequate to meet the costs of necessary medical care. . . . States participate voluntarily in the [M]edicaid program, but participating states must develop a plan, approved by the [S]ecretary of [H]ealth and [H]uman [S]ervices, containing reasonable standards . . . for determining eligibility for and the extent of medical assistance . . . . Connecticut has elected

[3] On June 15, 2016, the court issued an order dismissing the plaintiff's appeal, indicating that a memorandum of decision would follow.

to participate in the [M]edicaid program and has assigned to the department the task of administering the program. . . . The department, as part of its uniform policy manual, has promulgated regulations governing the administration of Connecticut's [M]edicaid system. See General Statutes § 17b-260." (Internal quotation marks omitted.) *Valliere* v. *Commissioner of Social Services*, 328 Conn. 294, 309–10, 178 A.3d 346 (2018).

"The [M]edicaid act . . . requires participating states to set reasonable standards for assessing an individual's income and resources in determining eligibility for, and the extent of, medical assistance under the program. 42 U.S.C. § 1396a (a) (17) [2006] . . . . The resources standard set forth in Connecticut's state [M]edicaid plan for categorically needy and medically needy individuals is $1600. General Statutes §§ 17b-264 and 17b-80 (c); [Dept. of Social Services, Uniform Policy Manual § 4005.10] . . . . Consequently, a person who has available resources; see 42 U.S.C. § 1396a (a) (17) (B) [2006]; in excess of $1600 is not eligible to receive benefits under the Connecticut [M]edicaid program even though the person's medical expenses cause his or her income to fall below the income eligibility standard." (Internal quotation marks omitted.) *Palomba-Bourke* v. *Commissioner of Social Services*, 312 Conn. 196, 205, 92 A.3d 932 (2014).

The plaintiff claims that the department's decision that the applicant was ineligible for benefits for the months of March, April and May, 2014, because his available resources exceeded $1600 during those months, was not rendered within ninety days of the date that she requested a hearing, pursuant to General Statutes § 17b-60, as required by 42 C.F.R. § 431.244 (f) and General Statutes § 17b-61, and thus cannot stand. We agree.

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . . The question of statutory interpretation presented in this case is a question of law subject to plenary review." (Citation omitted; internal quotation marks omitted.) *Commissioner of Public Safety* v. *Freedom of Information Commission*, 312 Conn. 513, 527, 93 A.3d 1142 (2014).

Our Supreme Court's decision in *Persico* v. *Maher*, 191 Conn. 384, 465 A.2d 308 (1983), is dispositive of the plaintiff's claim. In *Persico*, the plaintiff requested a fair hearing, pursuant to General Statutes § 17-2a, now § 17b-60, on her application for Title XIX benefits to cover the costs of her son's orthodontic work. The hearing officer's decision denying the plaintiff's application was rendered more than 136 days after the plaintiff requested the hearing. Our Supreme Court reasoned: "42 U.S.C. § 1396a (a) [1976] requires that '[a] State plan for medical assistance must . . . (3) provide for granting an opportunity for a fair hearing before the State

agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness.' 42 C.F.R. § 431.244 (f) [1982] promulgated under title XIX requires that '[t]he agency must take final administrative action within 90 days from the date of the request for a hearing.' General Statutes § 17-2b [now § 17b-61] tracks the federal regulation and provides that 'final definitive administrative action shall be taken by the commissioner or his designee within ninety days after the request of such [fair] hearing pursuant to section 17-2a [now § 17b-60].'

"The lower court based its ruling on *Labbe* v. *Norton*, [United States] District Court, [Docket No. H-136 (D. Conn. November 4, 1974)]. In *Labbe* the court considered a similar ninety day rule; 45 C.F.R. § 205.10 [a] (16) [1974]; to titles I, IV-A, X, XIV and XVI, the Social Security Act, and ordered, except where a petitioner for a fair hearing has requested a delay, or has failed to appear for a scheduled hearing, that the defendant's predecessor 'grant whatever relief is requested in fair hearing requests filed by applicants for and recipients of categorical assistance benefits . . . in whose cases final administrative action is not taken within ninety (90) days of the date they originally filed their request for a fair hearing . . . .' Since *Labbe* was a proper class action, its ruling was held to apply to all applicants for fair hearing.

"We find that the *Labbe* rule applies to the same provision for ninety day administrative adjudication of Medicaid claims found in [42] C.F.R. § 431.244 and in . . . § 17-2b [now § 17b-61], and now before the court." *Persico* v. *Maher*, supra, 191 Conn. 406–407. The court in *Persico* thus concluded that, unless the delay in the department's decision was attributable to the plaintiff—either by the plaintiff filing a request to delay or a failure to appear at the scheduled hearing—the plaintiff's

appeal therefrom should have been sustained. Id., 406–408.

Here, it is undisputed that the department rendered its decision beyond the statutorily prescribed ninety day time limit. Even factoring in the short continuance requested by the plaintiff, which resulted in rescheduling the hearing from October 23, 2014, to November 10, 2014, the department's decision was rendered 138 days from the date that the plaintiff requested a hearing. The department nevertheless challenges the plaintiff's timeliness claim on the ground that there have been changes in the law rendering *Persico* inapposite to the present case.[4] Specifically, the department argues that *Persico* has been superseded by a change in the language of the applicable federal regulation under which the plaintiff sought relief. When *Persico* was decided, 42 C.F.R. § 431.244 (f) (1982) provided that "[t]he agency must take final administrative action within 90 days from the date of the request for a hearing." That language has been amended and, at the time that the plaintiff filed a request for a hearing, it stated that "[t]he agency must take final administrative action . . . [*o*]*rdinarily*, within 90 days from . . . the date the enrollee filed for . . . a [s]tate fair hearing." (Emphasis added.) 42 C.F.R. § 431.244 (f) (2013). The department argues that the inclusion of the word "ordinarily" "evinces an intent to require substantial rather than strict compliance with its ninety day deadline." (Internal quotation marks omitted.) Although that is one way to interpret the word "ordinarily," that language must be read in conjunction with the parallel state statute, § 17b-61, previously § 17-2b, upon which *Persico* relied in conjunction with 42 C.F.R. § 431.244, which still mandates that a decision be rendered within ninety days

[4] Much of the department's brief reads as reargument of *Labbe* and *Persico*. Whether those cases properly were decided is beyond the purview of this court.

after the request for a hearing. We thus conclude that *Persico* has not been superseded by the minor change in the language of 42 C.F.R. § 431.244. Based upon our Supreme Court's reasoning in *Persico*, the plaintiff's appeal from the denial of benefits should have been sustained because the department failed to render its decision within ninety days of the date that the plaintiff requested a hearing.

The judgment is reversed and the case is remanded to the trial court with direction to render judgment sustaining the plaintiff's appeal.

In this opinion the other judges concurred.

LOUIS D. CORNEROLI *v.* RONALD W. KUTZ ET AL.
(AC 39507)

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

Syllabus

The plaintiff sought to recover damages from the defendant attorney and the defendant law firm for their alleged legal malpractice in connection with their representation of the plaintiff in a probate matter involving the plaintiff's claim to the proceeds of a sale of a certain painting. The painting had been purchased for $3 by the plaintiff's cousin, D. After D died, the plaintiff entrusted the painting to B, who, unbeknownst to the plaintiff, sold the painting to A for approximately $1.2 million. A subsequently sold the painting to an unknown purchaser for millions of dollars more than what he paid for it. After the plaintiff learned about the sales of the painting, he brought an action for, inter alia, fraud and conversion in New York against B, A, and the unknown purchaser, which the New York court dismissed as to all parties except B. Subsequently, after commencing an action against, inter alia, the plaintiff, B, and A, the estate of D reached a settlement agreement for $2.4 million with A, and withdrew its claim against the plaintiff. The plaintiff brought a probate action claiming that he was entitled to 50 percent of the settlement because of an alleged former business partnership with D. The Probate Court granted the estate's motion to disallow the plaintiff's claim, and, thereafter, the defendants, on behalf of the plaintiff, filed an appeal of the Probate Court's decision in the Superior Court. The estate filed a motion to dismiss the appeal for lack of subject matter

jurisdiction on the ground that the appeal was untimely, which the trial court granted, and this court affirmed the dismissal. Subsequently, the plaintiff filed the present legal malpractice action on the basis of the defendants' failure to timely prosecute the appeal from the Probate Court on his behalf. The trial court granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. On appeal, he claimed, inter alia, that it was improper for the trial court to require expert testimony on the issue of causation and, in the alternative, the testimony of his expert, M, on the issue of causation was sufficient to defeat summary judgment. *Held*:

1. The trial court properly rendered summary judgment in favor of the defendants on the basis of its conclusion that there was insufficient expert testimony on the issue of causation: Connecticut law generally requires the plaintiff in a legal malpractice action arising from prior litigation to prove, through expert testimony, that but for the alleged breach of duty, it was more likely than not that he would have prevailed in the underlying cause of action, and, in the present case, the plaintiff failed to prove that, had the defendants filed a timely appeal from the decision of the Probate Court, he was more likely than not to prevail on appeal to the Superior Court, as the opinions of M regarding causation were based on possibility, not probability, and M's testimony, thus, failed to clearly express an opinion that had the defendants timely filed the appeal to the Superior Court, the plaintiff was more likely than not to prevail; furthermore, even if M expressed his opinions in terms of reasonable probabilities rather than possibilities, there was an inadequate basis for any opinion by M on the issue of causation, as the Probate Court's decision relied on the preclusive effect of the New York action, and because M was unfamiliar with the substance of that action, he had no basis on which he could opine, beyond mere speculation, as to what the result of an appeal to the Superior Court would have been.
2. This court declined to review the plaintiff's claim that the trial court improperly considered the defendants' reply brief in support of the motion for summary judgment, which, contrary to its certification, was not received by the plaintiff's counsel prior to the morning of the hearing on the defendants' motion for summary judgment, that claim having been raised for the first time on appeal to this court and having been inadequately briefed; moreover, the plaintiff could not prevail on his claim that the trial court improperly permitted the defendants to file their surreply, as the record was clear that the defendants sought and received the court's permission to file the surreply.

Argued January 9—officially released July 17, 2018

Procedural History

Action to recover damages for legal malpractice, and for other relief, brought to the Superior Court in the

judicial district of Middlesex, where the court, *Aurigemma, J.*, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Daniel H. Kennedy III, with whom was *R. Bartley Halloran*, for the appellant (plaintiff).

Cristin E. Sheehan, with whom, on the brief, was *Michelle Napoli-Lipsky*, for the appellees (defendants).

Opinion

ALVORD, J. The plaintiff in this legal malpractice action, Louis D. Corneroli, appeals from the summary judgment rendered by the trial court in favor of the defendants, Ronald W. Kutz and Kutz & Prokop, LLP. On appeal, the plaintiff claims that the court improperly (1) rendered summary judgment in favor of the defendants on the basis of its conclusion that there was insufficient expert testimony on the issue of causation, and (2) considered certain documents filed by the defendants. We affirm the judgment of the trial court.

The plaintiff's present appeal marks yet another chapter in a saga of extensive litigation over the last twenty years. The litigation arises out of the serendipitous purchase of an original John Singer Sargent painting by the plaintiff's late cousin, Salvatore D. D'Amico (decedent). The defendants represented the plaintiff in a probate matter involving the plaintiff's claim to the proceeds of the sale of that painting, and in subsequent appeals to the Superior and Appellate Courts.

In its memorandum of decision, the trial court set forth the following findings of the Probate Court. "The decedent frequented tag sales in hopes of finding undervalued assets. At some point in 1978, he acquired for $3 a painting which turned out to be an original [John Singer] Sargent painting called 'Carmencita Dancing' worth several million dollars. The problem encountered

by the decedent was that he was unable to get the painting authenticated and thus was unable to realize the full value of the painting during his lifetime. At some point, the decedent's cousin, Louis Corneroli, began working with the decedent, driving him around and also becoming involved in his various projects, including the effort to authenticate the Sargent painting. Mr. Corneroli contends that he and the decedent had a partnership in which they agreed to work on matters together and equally split the profits realized from their activity. The estate of Salvatore D. D'Amico strenuously denies any such partnership. . . .

"After the decedent died, Mr. Corneroli took possession of the painting and entrusted it to Mark Borghi, who owned and operated an art gallery in New York and who was in a better position to have the painting authenticated than Mr. Corneroli. . . . Unbeknownst to Mr. Corneroli, Mr. Borghi sold the painting to a Mr. [Warren] Adelson, another art dealer who specialized in Sargent paintings, for approximately $1.2 million. Mr. Adelson turned around and sold the painting for millions more than what he paid for it, again without the knowledge of Mr. Corneroli. At some point, Mr. Corneroli learned of the sale of the painting and filed the Corneroli Complaint in New York, suing Mr. Borghi, Mr. Adelson and John Doe, the still unknown purchaser of the painting, alleging, inter alia, fraud, conversion and breach of contract claims. Judge Ira Gammerman, of the Supreme Court of the state of New York, after hearing testimony from Mr. Corneroli on the Corneroli complaint, found that Mr. Corneroli testified that he had an agreement with Mr. Borghi under which the parties were to divide the sales price of the sale of the painting with Mr. Borghi receiving half and Mr. Corneroli receiving half. . . . Mr. Corneroli freely acknowledged during the trial that both the decedent while living and his estate had a 50% interest in the

painting. . . . The Corneroli complaint, however, alleged that Mr. Corneroli was the sole owner of the painting. . . .

"After hearing the testimony of Mr. Corneroli, the New York court dismissed the case as to all parties except Mr. Borghi. It is crystal clear from the transcript that the claim against Mr. Adelson was dismissed 'with prejudice.' . . . . The New York court further found the potential recovery from Mr. Borghi in Mr. Corneroli's favor to be approximately $313,000, which was roughly one quarter of the sales price of the sale of the painting from Mr. Borghi to Mr. Adelson. . . . Mr. Corneroli acknowledged that he received about that amount in either paintings or cash in July, 2003, and that the parties thereafter returned to Connecticut to open an estate for the decedent so that the estate could pursue its share.

"The administrators of the newly-opened estate of D'Amico took a vastly different view of the history than Mr. Corneroli. Based on their belief that Mr. Corneroli had denied knowledge as to the location of the painting shortly after the death of the decedent and further had not disclosed that he had given the painting to the New York art dealer until shortly before the proceedings in New York occurred, the estate took the position that there never was any partnership and that Mr. Corneroli had absconded with the painting after the decedent died. The estate filed a lawsuit in federal court in December, 2003, which suit was dismissed without prejudice. A new suit was filed in July, 2005, in which the estate sued, inter alia, Mr. Corneroli, Mr. Borghi and Mr. Adelson, alleging that the painting had been stolen by Mr. Corneroli and that title never passed due to this fact. The estate sought a declaratory judgment that it was the owner of the painting, a replevin of the painting back to the estate and damages from Mr. Corneroli for his alleged misdeeds. Mr. Corneroli filed an answer with

special defenses to the complaint in which he generally alleged that his actions were taken as a partner of the decedent and that he did not steal the painting. Mr. Corneroli did not, however, file a counterclaim or seek to join the [estate] in its claims against the other defendants, including Mr. Adelson.

"A two day mediation to resolve the case occurred on December 11 [and] 12 at New Britain Superior Court. Counsel for Mr. Corneroli attended on the first day but did not return for the second day. The remaining parties reached an agreement on the second day, which involved Mr. Adelson paying the [estate] the sum of $2.4 million. In a lengthy agreement put on the record, the [estate] indicated that the settlement was subject to the [estate] obtaining a release of Mr. Corneroli and the Probate Court approving the settlement as well. It does not appear any formal notice was provided to Mr. Corneroli of the settlement, however, his attorney was called in connection with executing a release, which was refused. The Probate Court hearing occurred and the settlement was approved by the Probate Court. The case against Mr. Corneroli was withdrawn. Thereafter, Mr. Corneroli, in reviewing the probate file, learned about the settlement amount for the first time. He filed a claim with the estate dated August 23, 2007, in which he stated that he was a partner with the decedent in attempting to get the painting authenticated and that their agreement was that any funds received as a result of getting the painting authenticated would be split equally and thus he was entitled to receive 50 [percent] of the 2.4 million settlement." (Emphasis omitted; footnote omitted.) The estate moved to disallow the plaintiff's claim as untimely.

The Probate Court assumed for purposes of deciding the motion that the plaintiff's claim of partnership was true, but nonetheless granted the estate's motion to disallow the plaintiff's claim. The court concluded that

"if, in fact, a partnership existed, the New York action represented the one opportunity it had to obtain a recovery in this matter against Mr. Adelson," and "the dismissal of the New York action against Mr. Adelson, with prejudice, indicates to the court that Mr. Corneroli's future opportunity to pursue a claim against Mr. Adelson, either individually or as part of a partnership, has been forever precluded." The court further determined that the plaintiff or, alternatively, the partnership, "had no claim against Mr. Adelson," and "upon the conclusion of the New York litigation, the last remaining asset of any 'partnership' was the $300,000 claim against Mr. Borghi, which Mr. Corneroli testified to, but which could not be the subject of any award . . . as the estate was not a party plaintiff in the action. Mr. Corneroli cannot claim any interest in that claim as he received his judgment in that amount against Mr. Borghi already."

On the basis of its conclusion that "the New York litigation fully and finally resolved any issues of partnership assets and . . . the fruits of the litigation brought thereafter by the estate in no way can be determined to be considered a partnership asset as a matter of law," the court characterized the plaintiff's claim against the estate as an attempt to claim "an interest in a partnership asset which, as a matter of law, is not a partnership asset." The Probate Court granted the estate's motion to disallow the plaintiff's claim and, on March 27, 2008, sent notice of its decision to the parties and counsel.

On June 4, 2008, the defendants, on behalf of the plaintiff, filed an appeal of the Probate Court's decision in the Superior Court. The estate moved to dismiss the appeal for lack of subject matter jurisdiction, claiming that the appeal was untimely. The court granted the

motion and dismissed the appeal as untimely.[1] This court affirmed the dismissal, and our Supreme Court declined to hear the matter. See *Corneroli* v. *D'Amico*, 116 Conn. App. 59, 67, 975 A.2d 107, cert. denied, 293 Conn. 928, 980 A.2d 909 (2009).

In 2012, the plaintiff filed this legal malpractice action on the basis of the defendants' failure to timely prosecute the appeal from the Probate Court on his behalf. In his fourth amended complaint, the plaintiff alleged that the defendants were negligent in their representation of him in the underlying probate matter, and that "[h]ad the defendants filed a timely appeal, the plaintiff would have had a reasonable basis for a successful outcome of the de novo appeal."

On April 28, 2016, the defendants moved for summary judgment, arguing that no genuine issue of material fact existed because the plaintiff had "failed to disclose any expert who can opine on the issue of proximate cause, a necessary element in any legal malpractice action." On July 27, the court issued a memorandum of decision, in which it granted the defendants' motion. This appeal followed.

I

The plaintiff first claims that the trial court improperly rendered summary judgment in favor of the defendants on the basis of its conclusion that there was insufficient expert testimony to create a genuine issue of material fact as to causation. Specifically, he argues that it was improper for the court to require expert testimony on the issue of causation, and that even if it were proper, his expert's testimony on the issue of

[1] General Statutes § 45a-186 (a) requires the filing of an appeal in the Superior Court no later than thirty days after the mailing of the Probate Court's decision. See *Corneroli* v. *D'Amico*, 116 Conn. App. 59, 67, 975 A.2d 107, cert. denied, 293 Conn. 928, 980 A.2d 909 (2009).

causation was sufficient to defeat summary judgment. We disagree.

The following procedural history is relevant to our resolution of this claim. During discovery, the plaintiff disclosed two experts: (1) Attorney John A. Berman, a retired probate judge, and (2) Professor Jeremy McClane, a professor at the University of Connecticut School of Law.[2]

During his deposition, Professor McClane testified that he is an expert on partnership law. He extensively opined on the issue of partnership in the underlying probate matter, testifying as to his belief that there was "a reasonable basis for a successful outcome of the appeal" because there was "both a reasonable basis that Corneroli would have been able to show that there was a partnership and that the painting was partnership property and that any disposition or any money coming out of a disposition of that painting was also partnership property . . . ." When questioned on the issue of causation, the following colloquy occurred:

[2] Although, in his expert disclosure, the plaintiff represented that Attorney Berman would opine on the issue of causation, at his deposition, Attorney Berman was unable to do so. When asked if he had an opinion "as to whether it is more probable than not that the Superior Court would have decided in Mr. Corneroli's favor," Attorney Berman responded: "I do not have. That would be—I didn't prepare for that answer or that question." He further testified that he could not "answer whether or not [the plaintiff] would prevail."

In its memorandum of decision, the court concluded that Attorney Berman's testimony was "insufficient to establish a prima facie case on the issue of causation," and noted his concessions "that he does not know and cannot predict whether [the Probate Court's] decision would have been upheld or reversed on appeal," and that he was "not prepared to opine as to whether it was more probable than not that the Superior Court would have found in Mr. Corneroli's favor on appeal." On appeal to this court, the plaintiff does not challenge the court's conclusions as to Attorney Berman. Furthermore, the plaintiff's counsel conceded during oral argument before this court that Attorney Berman only opined as to the applicable standard of care. Accordingly, we address the plaintiff's claim only as it relates to the opinions of Professor McClane.

"[The Defendants' Counsel]: Can you state to a reasonable degree of probability that the result of any appeal—of the outcome of an appeal in the Superior Court would have been different as opposed to [the Probate Court's] decision?

* * *

"[Professor McClane]: I mean, it's hard to say what the outcome of a litigation would be just because there are so many moving parts, so many things involved, the skill of the lawyers, you know, what the jury thinks of the witnesses, but I think that there is certainly a very good chance that the outcome would have been different than what was indicated in [the Probate Court's] opinion.

"[The Defendants' Counsel]: But can you say to a reasonable degree of probability that it's more likely than not the outcome would have been different?

* * *

"[Professor McClane]: I think there's a very good chance the outcome would have been different. I don't know that I can say more likely than not. I'm not saying it is or it isn't. I just don't think I can really say simply because, you know, if you were to believe everything—if a finder of fact were to believe everything that is in all of this testimony and all of these document, then I think, yes, there's a—it's likely that the outcome would be different because I think they would understand that this is a partnership asset and the claim is really about liquidating the partnership asset and getting the value for it. But I can't opine on whether or not people are going to believe one set of testimony over another.

"[The Defendants' Counsel]: Okay. So sitting here today, you can't testify—you can only testify you believe there's a very good chance the outcome would have

been different, not that it's more likely than not it would have been different?

* * *

"[Professor McClane]: I can say that if at a trial everybody believed—that all of the testimony of Mr. Corneroli were believed, then I think it's more likely than not.

"[The Defendants' Counsel]: And what are the chances that all of his testimony would be believed?

* * *

"[Professor McClane]: I don't have the crystal ball to say that, unfortunately."

On April 28, 2016, the defendants moved for summary judgment. In their memorandum in support of the motion, the defendants argued that no genuine issue of material fact existed with respect to the issue of causation because "neither of the plaintiff's disclosed experts have offered testimony that the plaintiff would have prevailed on legal and/or factual grounds had the probate appeal been timely commenced and had the Superior Court conducted a trial de novo on the merits of [the] plaintiff's claims." With respect to Professor McClane's testimony on the issue of causation, the defendants argued that he "could not state to a reasonable degree of probability that the outcome of a timely appeal would have differed from [the Probate Court's] decision." The defendants highlighted Professor McClane's testimony that: (1) it was "hard to say what the outcome of a litigation would be just because there are so many moving parts"; (2) he did not know if he could say "more likely than not" that the outcome would have been different; (3) he was not "saying it is or it isn't" more likely than not; (4) he could not opine as to whether a fact finder would believe "one set of testimony over another"; and (5) he did not "have the crystal

ball" to evaluate the chances of the fact finder believing the plaintiff's testimony. The defendants noted that the Probate Court assumed for purposes of its analysis that a partnership existed between the plaintiff and the decedent with respect to the painting, and that Professor McClane could not "articulate any basis on which the Superior Court would have reached a different result." The defendants further argued that Professor McClane's testimony spoke to "possibilities, not probabilities, which is legally insufficient to meet the burden of proof," and accordingly, the plaintiff had failed to establish a prima facie case of legal malpractice.

The trial court rendered summary judgment in favor of the defendants on July 27, 2016. In its memorandum of decision, the court concluded that "Professor McClane could not state to a reasonable degree of probability that the outcome of a timely appeal would have differed from [the Probate Court's] decision," and highlighted his testimony that he did not know if he could say "more likely than not" that the outcome would have been different, and that he was not "saying it is or it isn't" more likely than not. The court further concluded that "Professor McClane failed to offer any testimony as to his bases for challenging the decision of [the Probate Court]." Specifically, the court noted that Professor McClane's testimony did not provide a basis for challenging the Probate Court's conclusion that the New York action represented the plaintiff's only opportunity to recover against Adelson under any legal theory. The court concluded: "[N]either [Professor McClane's] deposition testimony nor his affidavit provide any basis to support the opinion that Mr. Corneroli would probably have prevailed in his de novo probate appeal. To the contrary, Professor McClane testified that he was not familiar with the substance of [the Probate Court's] opinion or Mr. Corneroli's litigation history vis-à-vis the painting at issue. The opinion of

the Probate Court was rational, logical and based on Mr. Corneroli's prior litigation with respect to the painting. In order to decide contrary to the opinion of [the Probate Court], a Superior Court Judge would certainly need a good reason. Professor McClane has completely failed to articulate such [a] reason. Thus, he provided no basis for any opinion as to causation. Without such a basis there is no genuine issue of material fact. Summary judgment enters in favor of the defendants."

We begin with the applicable standard of review and principles of law that guide our analysis. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary. . . . Summary judgment in favor of a defendant is proper when expert testimony is necessary to prove an essential element of the plaintiff's case and the plaintiff is unable to produce an expert witness to provide such testimony. . . .

"Malpractice is commonly defined as the failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services . . . . Generally, a plaintiff alleging legal malpractice must prove all of the following elements: (1)

the existence of an attorney-client relationship; (2) the attorney's wrongful act or omission; (3) causation; and (4) damages. . . .

"The essential element of causation has two components. The first component, causation in fact, requires us to determine whether the injury would have occurred but for the defendant's conduct. . . . The second component, proximate causation, requires us to determine whether the defendant's conduct is a substantial factor in bringing about the plaintiff's injuries. . . . That is, there must be an unbroken sequence of events that tied [the plaintiff's] injuries to the [defendant's conduct]. . . . This causal connection must be based [on] more than conjecture and surmise. . . . [N]o matter how negligent a party may have been, if his negligent act bears no [demonstrable] relation to the injury, it is not actionable . . . .

"The existence of the proximate cause of an injury is determined by looking from the injury to the negligent act complained of for the necessary causal connection. . . . In legal malpractice actions arising from prior litigation, the plaintiff typically proves that the . . . attorney's professional negligence caused injury to the plaintiff by presenting evidence of what would have happened in the underlying action had the [attorney] not been negligent. This traditional method of presenting the merits of the underlying action is often called the case-within-a-case. . . . More specifically, the plaintiff must prove that, in the absence of the alleged breach of duty by her attorney, the plaintiff would have prevailed [in] the underlying cause of action and would have been entitled to judgment. . . . To meet this burden, the plaintiff must produce evidence explaining the legal significance of the attorney's failure and the impact this had on the underlying action." (Citations omitted; emphasis omitted; footnote omitted;

internal quotation marks omitted.) *Bozelko* v. *Papastavros*, 323 Conn. 275, 282–84, 147 A.3d 1023 (2016).

We first address the plaintiff's argument that it was improper to require expert testimony on the issue of causation because the "probability of success of the underlying case is an ultimate issue." According to the plaintiff, "[i]t would be inappropriate for Mr. Corneroli to disclose an expert on the underlying issue, as the court can directly decide the merits of the underlying case." This argument is entirely without merit.

Section 7-3 (a) of the Connecticut Code of Evidence provides in relevant part: "Testimony in the form of an opinion is inadmissible if it embraces an ultimate issue to be decided by the trier of fact, except that . . . an expert witness may give an opinion that embraces an ultimate issue where the trier of fact needs expert assistance in deciding the issue." In regard to the issue of causation in legal malpractice cases, our Supreme Court recently ruled that "although there will be exceptions in obvious cases, expert testimony . . . is a general requirement for establishing the element of causation in legal malpractice cases. Because a determination of what result should have occurred if the attorney had not been negligent usually is beyond the field of ordinary knowledge and experience possessed by a juror, expert testimony generally will be necessary to provide the essential nexus between the attorney's error and the plaintiff's damages." (Footnotes omitted.) *Bozelko* v. *Papastavros*, supra, 323 Conn. 284–85. In *Bozelko*, our Supreme Court recognized the need for expert assistance to decide the issue of whether an attorney's alleged malpractice caused the claimed injury. In light of the holding in *Bozelko*, we reject the plaintiff's argument that it is improper to permit an expert to testify as to his opinion on causation in a legal malpractice

case.[3] See also *Dixon* v. *Bromson & Reiner*, 95 Conn. App. 294, 299–300, 898 A.2d 193 (2006) ("in a legal malpractice case such as this, an expert witness is necessary to opine whether the defendant's alleged breach of care proximately caused the plaintiff's alleged loss or damages").[4]

Because we have concluded that, to defeat summary judgment, the plaintiff was required to present expert testimony to prove causation, we must now examine

[3] The plaintiff similarly argues that by rendering summary judgment in favor of the defendants, the trial court decided an issue of fact as to whether Professor McClane's opinion as to causation was sufficient. This argument also is without merit, because as we have explained, to defeat summary judgment in his legal malpractice case, the plaintiff was required to present expert testimony on the essential element of causation. See *Bozelko* v. *Papastavros*, supra, 323 Conn. 284–85.

[4] The plaintiff now contends that the trial court's statement that "to decide contrary to the opinion of [the Probate Court], a Superior Court judge would certainly need a good reason," indicates a misunderstanding of the nature of a de novo appeal from the Probate Court. Specifically, the plaintiff argues that since the appeal of a probate decision to the Superior Court "is not a challenge to the Probate Court's decision" but, rather, is "a new action," a plaintiff in a probate appeal to the Superior Court "has no duty to demonstrate any flaws in the Probate Court decision." We do not understand the court's statement to indicate a misunderstanding of the nature of a de novo appeal. The court's statement merely recognizes that, to create a genuine issue of material fact to defeat summary judgment, the plaintiff's expert must opine that the plaintiff more likely than not would have prevailed on appeal to the Superior Court, and explain the bases for that opinion. That necessarily would require Professor McClane to provide a "good reason" as to why the Superior Court would "decide contrary to the opinion of [the Probate Court] . . . ."

Furthermore, the plaintiff did not request an articulation on this point, and "[t]o the extent that the [trial] court's decision is ambiguous . . . it was [the appellant's] responsibility to seek to have it clarified." (Internal quotation marks omitted.) *DiRienzo Mechanical Contractors, Inc.* v. *Salce Contracting Associates, Inc.*, 122 Conn. App. 163, 169, 998 A.2d 820, cert. denied, 298 Conn. 910, 4 A.3d 831 (2010). "In the absence of a motion for articulation . . . it would be sheer speculation for this court to assume that the trial court applied the incorrect legal standard." (Citation omitted; internal quotation marks omitted.) *Daly* v. *DelPonte*, 27 Conn. App. 495, 507, 608 A.2d 93 (1992), rev'd on other grounds, 225 Conn. 499, 624 A.2d 876 (1993).

the substance of Professor McClane's testimony to determine whether summary judgment was proper. "Expert opinions must be based upon reasonable probabilities rather than mere speculation or conjecture if they are to be admissible in establishing causation. . . . To be reasonably probable, a conclusion must be more likely than not. . . . Whether an expert's testimony is expressed in terms of a reasonable probability that an event has occurred does not depend upon the semantics of the expert or his use of any particular term or phrase, but rather, is determined by looking at the entire substance of the expert's testimony." (Internal quotation marks omitted.) *Drew* v. *William W. Backus Hospital*, 77 Conn. App. 645, 662–63, 825 A.2d 810, cert. granted, 265 Conn. 909, 831 A.2d 249 (2003) (appeal withdrawn December 22, 2003).

As we have noted, Connecticut law generally requires the plaintiff in a legal malpractice action arising from prior litigation to prove, through expert testimony, that but for the alleged breach of duty, it was more likely than not that he would have prevailed in the underlying cause of action. In this case, the plaintiff was required to prove that, had the defendants filed a timely appeal from the decision of the Probate Court, he was more likely than not to prevail on appeal to the Superior Court. On appeal to this court, the plaintiff argues that "Professor McClane's deposition testimony and expert disclosure make it clear that he believes with a reasonable probability that Mr. Corneroli would have prevailed in the de novo probate appeal." We disagree.

Reviewing in its entirety Professor McClane's testimony, and viewing that testimonial evidence in a light most favorable to the plaintiff, we conclude that the plaintiff failed to produce the expert testimony necessary to prove the essential element of causation in his legal malpractice action. The substance of Professor McClane's testimony on the issue of causation can be

summarized as follows: (1) he found it "hard to say what the outcome of a litigation would be just because there are so many moving parts"; (2) there was "certainly a very good chance" that the plaintiff would have prevailed on appeal from the Probate Court; (3) even though he thought that there was a "very good chance" that the plaintiff would have prevailed on appeal, he did not know that he could "say more likely than not"; (4) he was not saying that "it is or it isn't" more likely than not that the plaintiff would prevail on appeal; (5) he could not "opine on whether people are going to believe one set of testimony over another"; (6) if, at a trial, "all of the testimony of Mr. Corneroli were believed," it was "more likely than not" that he would prevail; and (7) he did not have a "crystal ball" to opine on the chances of the fact finder believing all of the plaintiff's testimony. It is clear from this testimony that Professor McClane's opinions regarding causation were based on possibility, not probability. Those possibilities depended on the "many moving parts" that Professor McClane described, which included: (1) the skill of the lawyers; (2) the jury's opinion of the witnesses; (3) the likelihood of the fact finder believing the testimony and documents; (4) the jury's understanding that the painting was a partnership asset; (5) the jury's understanding that "the claim is really about liquidating the partnership asset and getting the value for it"; and (6) the likelihood of "everybody" believing the testimony of the plaintiff. Professor McClane's testimony fails to clearly express an opinion that had the defendants timely filed the appeal to the Superior Court, the plaintiff was more likely than not to prevail.[5]

[5] The plaintiff also argues that the trial court improperly found that an expert must employ the phrase "more likely than not" as to the issue of causation. The court, however, in its memorandum of decision, cited this court's decision in *Drew* v. *William W. Backus Hospital*, supra, 77 Conn. App. 663, acknowledging that the sufficiency of an expert's testimony does not depend on his use of any particular term or phrase. We, therefore, reject the factual premise of the plaintiff's argument.

Furthermore, even if we were to assume that Professor McClane expressed his opinions in terms of reasonable probabilities rather than possibilities, we conclude that there was an inadequate basis for any opinion by Professor McClane on the issue of causation. The Probate Court largely based its decision on its observation that "if, in fact, a partnership existed, the New York action represented the one opportunity it had to obtain a recovery in this matter against Mr. Adelson." As the trial court noted, Professor McClane failed to review the New York decision. Professor McClane testified that he understood the plaintiff's involvement in the New York litigation and he understood that the plaintiff's claim against Mr. Adelson was dismissed with prejudice, but that, in addition to not reading the New York court's decision, he also did not: (1) read the transcripts of that case; (2) review the evidence presented in that case; or (3) know what the cause of action was in that case. When questioned about his opinion as to the Probate Court's conclusion that the New York action precluded the probate claim, the following colloquy occurred:

"[The Defendants' Counsel]: And in the last paragraph of page three, exhibit 4, it begins, quote, 'The plain conclusion reached by this court, however, is that if, in fact, a partnership existed, the New York action represented the one opportunity it had to obtain a recovery in this matter against Mr. Adelson,' close quote. Do you see that?

"[Professor McClane]: Yes, I do.

* * *

"[The Defendants' Counsel]: Do you agree as to that conclusion?

"[Professor McClane]: I don't actually have any basis on which to evaluate that conclusion, simply because

I don't know what the action—what the specific cause of action was in New York.

"For example, were they suing for a breach of a contract of sale between the partnership and Mr. Borghi? In that case, then that claim is obviously foreclosed. But if there was another sort of duty, some kind of unlawful conversion or something like that, then that's not foreclosed by the New York action.

"But, again, *I just don't know*, right. *So I don't want to speculate.*

"[The Defendants' Counsel]: And you're not here to testify about the effect of that decision; correct?

"[Professor McClane]: Yeah." (Emphasis added.)

The question with respect to the issue of causation is whether, on appeal, the plaintiff was more likely than not to prevail. The result in the Probate Court was determined in large part by the preclusive effect of the New York action. Professor McClane conceded that to opine on the preclusive effect of the New York action, he would have to engage in speculation. Since the Probate Court's decision relied on the preclusive effect of the New York action, and Professor McClane was unfamiliar with the substance of that action, he had no basis on which he could opine, beyond mere speculation, as to what the result of an appeal to the Superior Court would have been.[6] See, e.g., *Weinstein* v.

[6] During his deposition, Professor McClane also opined that there was "a reasonable basis for a successful outcome of the appeal," because there was "a reasonable basis that Corneroli would have been able to show that there was a partnership and that the painting was partnership property and that any disposition or any money coming out of a disposition of that painting was also partnership property . . . ." Professor McClane further testified that although he was aware that the Probate Court, for purposes of deciding the motion to disallow the claim against the decedent's estate, assumed that a partnership did in fact exist between the plaintiff and the decedent, in his opinion, this assumption was "internally inconsistent" with some of the conclusions that the Probate Court reached in that decision. The plaintiff now argues that this testimony demonstrates Professor McClane's opinion that it was reasonably probable that the plaintiff would have prevailed had

Weinstein, 18 Conn. App. 622, 636–37, 561 A.2d 443 (1989) (where expert did not examine books or records of business, trial court did not abuse discretion by refusing to allow testimony regarding valuation of business because there was insufficient basis for opinion on that issue).

We conclude that the defendants established the lack of a genuine issue of material fact concerning the issue of causation, such that they were entitled to judgment as a matter of law. Even viewing the evidence in the light most favorable to the plaintiff, we conclude that he failed to present evidence that would raise such an issue. Accordingly, the court properly rendered summary judgment in favor of the defendants.[7]

the defendants filed a timely appeal. In light of our conclusion that Professor McClane did not have an adequate basis for his opinions, we need not address this argument.

[7] The plaintiff also argues that the trial court: (1) improperly opined that the Probate Court's decision was rational and logical "without any review or knowledge of evidence" presented during the probate proceedings; (2) improperly rendered summary judgment in favor of the defendants without any information regarding the evidence that would be presented at a de novo trial; and (3) failed to "contemplate" that new evidence, not presented to the Probate Court, may exist and be presented during a de novo trial to the Superior Court. We conclude that the plaintiff has abandoned these claims through inadequate briefing.

"It is well settled that [w]e are not required to review claims that are inadequately briefed. . . . We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited. . . . [A]ssignments of error which are merely mentioned but not briefed beyond a statement of the claim will be deemed abandoned and will not be reviewed by this court." (Internal quotation marks omitted.) *Benedetto* v. *Dietze & Associates, LLC*, 159 Conn. App. 874, 880–81, 125 A.3d 536, cert. denied, 320 Conn. 901, 127 A.3d 185 (2015). The plaintiff has devoted just over a page of his brief to these three arguments, in which he does little more than briefly recite various factual assertions

II

The plaintiff also claims that the trial court improperly: (1) considered the defendants' reply brief in support of the motion for summary judgment, and (2) permitted the defendants to file a surreply brief in further support of the motion for summary judgment. These claims are meritless.

The following procedural history is relevant to our resolution of these claims. The defendants filed their motion for summary judgment and supporting memorandum on April 28, 2016. On June 6, the plaintiff filed his memorandum in opposition to the defendants' motion for summary judgment. On June 14, the defendants filed a reply brief in further support of their motion for summary judgment. On the last page of the reply brief, the defendants' counsel certified that a copy was "mailed or electronically delivered on this 14th day of June, 2016, to all counsel . . . ."

On June 20, the court heard argument on the defendants' motion for summary judgment. At that time, the plaintiff's counsel represented to the court that although the defendants' counsel certified that a copy of the reply brief "was e-mailed and sent via mail to both my office and [co-counsel's] office," they had not received a copy. Counsel further represented that she discovered that the reply brief had been filed that morning when a paralegal checked the court docket prior to the hearing. Counsel argued that this was prejudicial, as she had not yet researched any of the cases cited in the defendants' reply brief. Counsel requested the court's permission to file a surreply brief within one week, stating: "[W]e're okay moving forward with the argument today, but we would like a chance to respond without them then responding again, but I think out of

and one general principle of probate law. Accordingly, these claims are briefed inadequately, and we decline to review them.

fairness."[8] The court granted the request of the plaintiff's counsel to file a surreply brief within a week of the hearing.

On June 27, as permitted by the court, the plaintiff filed a surreply brief in opposition to the defendants' motion for summary judgment. The plaintiff attached to his surreply, as exhibit B, an affidavit of Professor McClane, which stated:

"On March 31, 2016, I sat for a deposition by Defendants' counsel in Hartford, Connecticut. . . .

"I was questioned by the Defendants' counsel as to the probability that Mr. Corneroli would have been successful on his appeal from Probate Court had the Defendants filed a timely appeal. I testified that there was a reasonable basis for a successful outcome of that appeal and that there was a very good chance the outcome would have been different than it was in the Probate Court. I believe it was reasonably probable. . . .

"When queried as to whether it was 'more likely than not' I did not understand the terminology in the context of the pending legal malpractice action. As I now understand the Defendants' position, I am comfortable that my reasonable probability standard well exceeds more likely than not. . . .

"It was my opinion on March 31, 2016, and it is still my opinion, that it is more likely than not that Mr. Corneroli would have been successful had the Defendants filed a timely appeal."

On June 30, the defendants filed their own surreply brief in further support of the motion for summary judgment. The defendants argued that exhibit B to the plaintiff's surreply constituted a "sham affidavit," an

[8] The plaintiff's counsel at no time objected to the court's consideration of the defendants' reply brief, nor moved to strike the reply brief.

"affidavit in opposition to a motion for summary judgment that contradicts the affiant's prior deposition testimony," which the court should reject. The defendants acknowledged that Connecticut courts had not expressly adopted the sham affidavit rule but cited cases in which courts had applied the "underlying rationale for the rule" in deciding motions for summary judgment. The defendants argued that the affidavit was an attempt to "submit contradictory testimony from [the plaintiff's] own expert to avoid the entry of summary judgment," and that the affidavit was improper, untimely, lacked credibility, and could not "be explained as the result of confusion." The defendants argued that the affidavit was an attempt to materially alter Professor McClane's testimony and, alternatively, violated the court's scheduling order as the introduction of additional testimony from an expert after expert discovery concluded.

On July 1, the plaintiff filed an objection to the defendants' surreply. The plaintiff cited Practice Book § 11-10,[9] which requires a party seeking to file a surreply to obtain permission from the court, and argued that because the defendants had failed to seek permission to file their surreply, it was not properly before the court. Also on July 1, the defendants filed a caseflow request, in which they requested the court's permission to file a surreply. The defendants listed as a reason for the request: "Plaintiff's counsel offered an affidavit from his expert which contradicts prior testimony. Defendants request that the court give due consideration to a surreply addressed to issues raised by the plaintiff's brief including the expert affidavit." On July 18, the court overruled the plaintiff's objection.[10]

[9] Practice Book § 11-10 (c) provides: "Surreply memoranda cannot be filed without the permission of the judicial authority."

[10] In its memorandum of decision, the trial court refused to consider the affidavit. The court cited the decision of the United States Court of Appeals for the Second Circuit in *Perma Research & Development Co.* v. *Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969), in which that court said: "If a party who

The plaintiff argues, for the first time on appeal, that the court improperly considered the defendants' reply brief, which, contrary to its certification, was not received by the plaintiff's counsel prior to the morning of the hearing on the defendants' motion for summary judgment. We conclude that the plaintiff has abandoned, by failing to adequately brief, this claim. The plaintiff devotes three sentences of his brief to this issue, in which he does not cite or analyze any case law but merely makes bare factual assertions. See footnote 7 of this opinion. Furthermore, "[t]o review claims articulated for the first time on appeal and not raised before the trial court would be nothing more than a trial by ambuscade of the trial judge." (Internal quotation marks omitted.) *Bragdon* v. *Sweet*, 102 Conn. App. 600, 607, 925 A.2d 1226 (2007). Accordingly, we decline to review this claim.

has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." The trial court went on to conclude that, even if it were to "overlook the improbability of Professor McClane's claim that when he was deposed, he did not understand what 'more likely than not' meant, neither his deposition testimony nor his affidavit provide any basis to support the opinion that Mr. Corneroli would probably have prevailed in his de novo probate appeal," as Professor McClane testified that he was not familiar with the substance of the Probate Court's opinion or the New York litigation vis-à-vis the painting.

The plaintiff now argues that the court erred by refusing to consider the affidavit. This claim warrants only a brief analysis. It is within the trial court's discretion whether to accept or decline supplemental evidence in connection with a motion for summary judgment. *Nieves* v. *Cirmo*, 67 Conn. App. 576, 587 n.4, 787 A.2d 650, cert. denied, 259 Conn. 931, 793 A.2d 1085 (2002). Although the court permitted the plaintiff to file a surreply for the purpose of responding to the defendants' reply brief, the plaintiff went beyond merely responding to the defendants' reply brief and attached an affidavit containing statements by Professor McClane, a witness that the defendants would not have the opportunity to redepose prior to the court's decision on the motion for summary judgment. This court will not, on appeal, disturb the trial court's discretion to refuse to consider supplemental evidence submitted after full briefing and argument on a motion for summary judgment.

The plaintiff also argues that the court improperly permitted the defendants to file the June 30 surreply. Specifically, he argues that, because the defendants "neither made any oral request nor filed a request for leave for permission to make such a filing" pursuant to Practice Book § 11-10, the surreply "was not properly before the court." We disagree.

Practice Book § 11-10 (c) provides: "Surreply memoranda cannot be filed without the permission of the judicial authority." The record here is clear that the defendants sought, and received, the court's permission to file the surreply. After it considered the plaintiff's objection, the court overruled the objection and granted the defendants permission to file the surreply.

The judgment is affirmed.

In this opinion the other judges concurred.

JAMES P. CLARK *v.* COMMISSIONER OF MOTOR VEHICLES
(AC 40061)

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

Syllabus

The plaintiff appealed to the trial court from the decision of the defendant, the Commissioner of Motor Vehicles, to suspend the plaintiff's motor vehicle operator's and commercial driver's licenses for operating a motor vehicle while under the influence of intoxicating liquor. The suspension stemmed from an incident in which the plaintiff lost control of his vehicle while driving through an intersection, crashed into a snowbank, and continued approximately sixty-five feet into a field. Prior to the accident, the plaintiff had consumed a number of alcoholic beverages at a restaurant located near the accident scene. Sometime after 8:30 p.m., the plaintiff left the restaurant, and, as he was driving home, his wife called to ask him to pick up their daughter at a dance studio that was ten to fifteen minutes from their house. The plaintiff then turned his vehicle around and headed toward the studio but crashed sometime thereafter. Following the accident, a fire chief from a neighboring town observed the plaintiff's vehicle off the road and stopped to ask the

plaintiff if he was all right. He replied that he was, and the fire chief notified the state police at approximately 9:38 p.m. and left the scene. When the police arrived soon thereafter, they found the vehicle unoccupied. At approximately 10 p.m., a state police officer arrived at the plaintiff's residence and began speaking with the plaintiff's wife. Shortly thereafter, the plaintiff and the daughter returned home in a vehicle driven by a third party. After the plaintiff failed three field sobriety tests, he was arrested and brought to the state police barracks, where he submitted to blood alcohol content tests. The tests commenced at 11:05 p.m., and the results indicated that he had an elevated blood alcohol content. Following an administrative hearing, the commissioner suspended the plaintiff's licenses, finding, inter alia, that the plaintiff was operating his vehicle after 9:05 p.m. and that the blood alcohol content testing commenced at 11:05, which was within two hours of his operation of the vehicle, as required by the statute (§ 14-227a [b]) governing, inter alia, the admissibility of chemical analysis results. The trial court dismissed the plaintiff's appeal, and the plaintiff appealed to this court. *Held*:

1. The trial court correctly determined that there was substantial evidence in the record to support a finding that there was probable cause that the plaintiff operated his motor vehicle while under the influence within the two hours preceding the commencement of his blood alcohol content testing, as the inferences underlying the commissioner's conclusion that the plaintiff was operating his vehicle sometime after 9:05 p.m. were supported by compelling circumstantial evidence in the record: although the plaintiff claimed that he crashed his vehicle before 9:05 p.m. and sat in it for a while until the fire chief arrived at the scene, the evidence indicated that the plaintiff did not wait in his vehicle long after the accident, as the intersection where the accident occurred was a heavily traveled, well marked, four-way intersection that was located close to the restaurant at which the plaintiff had been drinking, and the commissioner reasonably could infer that the fire chief reported the accident shortly after it occurred because the vehicle was in a place where it would have been observable to an average passerby and the longer the vehicle remained off the road, the less likely it would go unnoticed and unreported; moreover, the commissioner reasonably could have concluded that the plaintiff's operation of the vehicle occurred closer to 9:38 p.m. than 9:05 p.m., as the evidence indicated that the plaintiff was in a hurry to pick up his daughter at the dance studio and to bring her home, the plaintiff having requested a ride to the dance studio from a third party, having abandoned his vehicle a short distance from the restaurant, and having failed to return to the scene of the accident to wait for assistance after he already secured a ride for his daughter, even though they drove past it on their way back home.

2. The trial court did not abuse its discretion in denying the plaintiff's motion to reargue or for reconsideration, which was based on his claim that he received ineffective assistance from his counsel at the administrative hearing resulting in a failure to present additional relevant evidence, as the absence of such evidence formed the basis for his motion and the plaintiff failed to make a timely application for remand for the taking of additional evidence pursuant to the applicable statute (§ 4-183 [h]).

Argued February 14—officially released July 17, 2018

Procedural History

Appeal from the decision of the defendant suspending the plaintiff's motor vehicle operator's and commercial driver's licenses, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Huddleston*, *J.*; judgment dismissing the appeal; thereafter, the court denied the plaintiff's motion to reargue or for reconsideration, and the plaintiff appealed to this court. *Affirmed.*

Jack G. Steigelfest, with whom was *Christopher M. Harrington*, for the appellant (plaintiff).

Drew S. Graham, assistant attorney general, with whom, on the brief, was *George Jepsen*, attorney general, for the appellee (defendant).

Opinion

DiPENTIMA, C. J. When a driver is suspected of operating a motor vehicle while under the influence of alcohol, our statutes require that law enforcement commence any consensual chemical alcohol tests within two hours of such operation. Otherwise, the results of those tests, although ostensibly valid, are neither admissible nor competent evidence of operation under the influence. In an administrative appeal from the suspension of both his standard and commercial operator's licenses, the plaintiff, James P. Clark, challenged, among other things, the finding of the defendant, the Commissioner of Motor Vehicles

(commissioner),[1] that his failed chemical alcohol tests were timely. The Superior Court was not persuaded and dismissed his appeal. The plaintiff now appeals, claiming that the court improperly (1) determined that there was substantial evidence in the record to support a finding that there was probable cause to arrest him for operating a motor vehicle while under the influence of alcohol, and (2) denied his motion to reargue or for reconsideration. We disagree and, accordingly, affirm the judgment of the Superior Court.

The court summarized the facts before the commissioner and procedural history as follows: "On the evening of February 10, 2016, the fire chief of the Hebron Fire Department observed a Volkswagen Passat off the roadway at the intersection of New London Road (Route 85) and Lake Hayward Road in Colchester. He saw a man, later determined to be the plaintiff, in the driver's seat. The fire chief approached the vehicle and asked whether the plaintiff was all right. The plaintiff replied that he had [the American Automobile Association (AAA)] en route, and he was okay. The fire chief then returned to his own vehicle and notified the state police of the accident at approximately [9:38 p.m.]

"At [9:41 p.m.], two state police officers were dispatched to the accident scene. Upon arrival, the officers found an unoccupied Volkswagen and deduced from tracks in deep snow that it had been traveling north on Route 85 when its operator disregarded a stop sign at the intersection, crossed over the intersection and crashed into a snowbank at the northeast corner of the intersection, continuing approximately 65.2 feet from the road to its point of final rest. An advertising sign

[1] The administrative hearing was held before a hearing officer. Inasmuch as the hearing officer acts on behalf of the commissioner, we hereinafter substitute commissioner for hearing officer where the facts ordinarily would call for reference to the latter. See *Murphy* v. *Commissioner of Motor Vehicles*, 254 Conn. 333, 341 n.12, 757 A.2d 561 (2000).

for 'NuNu's Bistro' was subsequently found in the snow beneath the Volkswagen, indicating that the vehicle had struck and snapped off the sign as it traveled into the snowbank. The arresting officer, Bryan Kowalsky, noted that the intersection was a well marked major intersection in Colchester, with four-way stop signs and a flashing red light above the intersection. The intersection was in a very heavily traveled area. The road was dry and no adverse weather conditions were present.

"Kowalsky ran the vehicle's license plate number to obtain information about its owner. He then went to the address of the plaintiff, who was the owner of the vehicle, to find out who had been operating the vehicle and whether there were any injuries. He arrived there at approximately [10 p.m.] The plaintiff was not home. His wife answered the door and spoke briefly with Kowalsky. She told him that her husband 'is driving the Volkswagen' and that 'he was on his way to pick up their [fifteen] year old daughter from Doreen's dance studio in Colchester.' . . . Kowalsky testified that the dance studio is located ten to fifteen minutes from the plaintiff's home. Kowalsky informed the plaintiff's wife that the Volkswagen had been in an accident and the operator was not with the Volkswagen.

"A moment[2] after Kowalsky began to speak with the plaintiff's wife, he saw a black pickup truck pull into the driveway. The plaintiff's teenaged daughter got out and came into the house. The plaintiff's wife asked her what had happened. She said that she wasn't in the car and that '[the plaintiff] came and picked [her] up from dance [class] in the truck.' . . .

"Kowalsky then saw the plaintiff get out of the passenger's seat of the truck. The plaintiff entered the

[2] Kowalsky testified that "[f]rom the time that I knocked on the door when I very first arrived at the address to the time that the pickup truck pulled in, I would say it was maybe two minutes."

house through a back door. Kowalsky asked if he had been involved in an accident that evening. The plaintiff replied that he had spun off the road and hit a snowbank. He said he called AAA and then left, 'figuring they would come get the car.' . . . Kowalsky asked why he had not stopped to talk with police at the scene when he rode past on his way home the second time, but the plaintiff had no response. When asked if he had had anything to drink that evening, the plaintiff answered that he had had a few drinks. The plaintiff's speech was slurred, his eyes were glazed, and an odor of alcohol emanated from his person.

"Kowalsky asked the plaintiff to complete certain tasks, including a finger counting test, reciting the alphabet from C to T without singing, and counting down from [thirty-seven] to [thirteen]. The plaintiff was unable to complete these tasks and expressed disbelief that he could not do them.

"Kowalsky then asked him to step outside to complete three standard field sobriety tests. The plaintiff failed all three tests. Kowalsky placed him under arrest for driving under the influence and took him to Troop K for processing. After speaking with an attorney by telephone, the plaintiff agreed to take a breath test. While Kowalsky was processing him, the plaintiff told Kowalsky that he had been drinking at Toyo, a restaurant north of the intersection where he drove off the road, from about [2:30 p.m.] that afternoon. He said he last ate at [2:30 p.m.], and then had about five beers and a couple of glasses of wine. He said he finished drinking at [8:30 p.m.] He said he had been at the restaurant catching up with an old friend and was on his way home when his wife called him and asked him to pick up their daughter from dance class. He said that he should have just continued on his way home rather than turning around to go get his daughter.

"Kowalsky commenced the breath test at [11:05 p.m.], obtaining a reading of .1564. He repeated the test at [11:25 p.m.], obtaining a reading of .1570. The plaintiff was then charged with violations of General Statutes § 14-301 (failure to obey a stop sign); [General Statutes] § 14-224b (evading responsibility); [General Statutes] § 14-12 (operating an unregistered vehicle); and [General Statutes] § 14-227a (operating under the influence). . . .

"On March 4, 2016, the Department of Motor Vehicles (department) held an administrative hearing to determine whether the plaintiff's operator's and commercial driver's licenses should be suspended for failing a chemical test. The attorney presenting the evidence on behalf of the department called Kowalsky as a witness. He testified as to the matters in the A-44 form[3] and attached reports, which were admitted into evidence. The plaintiff was present at the hearing with counsel but did not cross-examine Kowalsky, testify himself, or offer other evidence.

"After Kowalsky testified, the plaintiff's counsel argued that there was no evidence of probable cause for the arrest and no evidence of the time of the accident and, therefore, no way to establish that the plaintiff had operated a vehicle within two hours of the commencement of the chemical test. He also asserted that a friend of the plaintiff, not the plaintiff, had been driving the truck in which the plaintiff and his daughter arrived at their home.

"After the plaintiff's counsel made these arguments, the attorney representing the department asked Kowalsky whether the plaintiff had admitted that he was operating the motor vehicle. Kowalsky testified that

[3] Police use the A-44 form to report an arrest related to operation of a motor vehicle while under the influence of alcohol and the results of any sobriety tests administered or the refusal to consent to such tests.

the plaintiff admitted that he was operating the motor vehicle and that he had been drinking at Toyo.

"On March 7, 2016, the [commissioner] issued a ruling in which he made the four affirmative findings required by General Statutes § 14-227b (g)[4] and further found that the plaintiff is over the age of twenty-one and is the holder of a commercial driver's license. He also made the following subordinate finding: 'Based upon sworn, credible testimony of Officer Kowalsk[y] it is found that there was operation by [the plaintiff] at a point in time after [9:05 p.m.] such that the testing commencing at [11:05 p.m.] was within [two] hours as required by . . . § 14-227a (b).'[5] The [commissioner] suspended the plaintiff's operator's license for forty-five days, required the use of an ignition interlock device for six months, and suspended his commercial driver's license for one year.

"On March 22, 2016, the plaintiff filed a request for reconsideration of the subordinate finding, which he misquoted as stating that '[t]he BAC tests were administered within two (2) hours of the [first] trooper's arrival.' He then argued that the finding was improper because the legal standard required testing within two hours of operation, not within two hours of the officer's arrival.

[4] General Statutes § 14-227b (g) provides, in relevant part, that a hearing to suspend a person's license "shall be limited to a determination of the following issues: (1) Did the police officer have probable cause to arrest the person for operating a motor vehicle while under the influence of intoxicating liquor or any drug or both; (2) was such person placed under arrest; (3) did such person refuse to submit to such test or analysis or did such person submit to such test or analysis, commenced within two hours of the time of operation, and the results of such test or analysis indicated that such person had an elevated blood alcohol content; and (4) was such person operating the motor vehicle."

[5] General Statutes § 14-227a (b) provides in relevant part: "[E]vidence respecting the amount of alcohol or drug in the defendant's blood or urine at the time of the alleged offense, as shown by a chemical analysis of the defendant's breath, blood or urine shall be admissible and competent provided . . . (6) evidence is presented that the test was commenced within two hours of operation. . . ."

"On April 5, 2016, the department denied the request for reconsideration with an order stating that '[t]here is sufficient evidence in the file to support the [commissioner's] decision.' " (Citations omitted; footnotes added.)

The plaintiff then appealed to the Superior Court pursuant to the provisions of the Uniform Administrative Procedure Act, General Statutes § 4-166 et seq. (UAPA). After a hearing, the court dismissed the plaintiff's appeal and subsequently denied his motion to reargue or for reconsideration. The plaintiff thereafter appealed to this court.

Turning now to the plaintiff's arguments on appeal, we preface our review with the applicable legal principles. "[J]udicial review of the commissioner's action is governed by the [UAPA], and the scope of that review is very restricted. . . . [R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither this court nor the [Superior Court] may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . .

"The substantial evidence rule governs judicial review of administrative fact-finding under the UAPA. [See] General Statutes § 4-183 (j) (5) and (6). An administrative finding is supported by substantial evidence if the record affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . The

substantial evidence rule imposes an important limitation on the power of the courts to overturn a decision of an administrative agency . . . .

"It is fundamental that a plaintiff has the burden of proving that the commissioner, on the facts before him, acted contrary to law and in abuse of his discretion [in determining the issue of probable cause]. . . . The law is also well established that if the decision of the commissioner is reasonably supported by the evidence it must be sustained. . . .

"We have stated that [p]robable cause, broadly defined, comprises such facts as would reasonably persuade an impartial and reasonable mind not merely to suspect or conjecture, but to believe that criminal activity has occurred. . . . Reasonable minds may disagree as to whether a particular [set of facts] establishes probable cause. . . . Thus, the commissioner need only have a substantial basis of fact from which [it] can be inferred . . . that the evidence in the administrative record supported a finding of probable cause with respect to the plaintiff's violation of § 14-227a." (Citations omitted; internal quotation marks omitted.) *Murphy* v. *Commissioner of Motor Vehicles*, 254 Conn. 333, 343–44, 757 A.2d 561 (2000); see also *Finley* v. *Commissioner of Motor Vehicles*, 113 Conn. App. 417, 422–23, 966 A.2d 773 (2009).

I

The plaintiff first claims the record does not support the Superior Court's determination that there was substantial evidence to support a finding that there was probable cause that he operated his motor vehicle within the two hours preceding his failed chemical alcohol tests. We do not agree.

The following additional facts are relevant to the plaintiff's claim. The plaintiff consumed no fewer than

seven alcoholic beverages between 2:30 and 8:30 p.m. at Toyo, an establishment "less than thirty seconds away" from the scene of the accident. Sometime after 8:30 p.m., the plaintiff left Toyo for his home. On the way, his wife called to ask him to pick up their daughter at a dance studio ten to fifteen minutes away from their home. Upon receiving this call, the plaintiff turned around his car and headed northbound on Route 85 toward the dance studio. According to Kowalsky's report, the tracks in the snow suggest that when the plaintiff's vehicle reached the intersection of Route 85 and Lake Hayward Road, it ran through a stop sign and flashing red light before crashing through a snowbank and continuing 65.2 feet into a field. There is no evidence to suggest that the plaintiff operated a motor vehicle thereafter.

The question of whether the plaintiff operated his motor vehicle while intoxicated[6] within the two hour statutory window, i.e., at or after 9:05 p.m., is one of fact. As recited earlier in this opinion, our review of administrative fact-finding is circumscribed by the UAPA; the commissioner need only have a "substantial basis of fact" from which the time of operation reasonably can be inferred. *Murphy* v. *Commissioner of Motor Vehicles*, supra, 254 Conn. 344. Put another way, our task is not to choose between two competing factual narratives but, rather, to determine whether there was sufficient evidence in the record to support the commissioner's narrative. Moreover, "there is no requirement that the fact [in question] be established by direct evidence. On the contrary, our case law clearly establishes that sufficient evidence justifying the commissioner's determination of probable cause may be found where

[6] On this record, the plaintiff does not dispute the commissioner's finding that he operated a motor vehicle while under the influence of alcohol, but does dispute that there was sufficient evidence to support a finding that he did so at or after 9:05 p.m. But see part II of this opinion.

the totality of the circumstances existing at the time of the plaintiff's arrest support[s] [such a finding] . . . ." (Footnote omitted; internal quotation marks omitted.) Id., 345. Given that circumstantial evidence can be used to establish the temporal nexus between operation and consumption of alcohol, it can also be used to establish the temporal nexus between operation and intoxication. See id., 347. In fact, "[i]t is *incumbent* upon [appellate courts] to rely on the circumstantial evidence obtained by the police to determine that there was sufficient evidence in the record to support a finding of probable cause." (Emphasis added.) Id.

A series of inferences underlie the commissioner's ultimate conclusion that the plaintiff was driving sometime after 9:05 p.m., all of which are supported by compelling circumstantial evidence. First, the evidence was sufficient to suggest that the plaintiff did not wait in his car long after the accident, which is significant because the plaintiff essentially claims that he crashed before 9:05 p.m. and sat in his car for a while until the fire chief appeared. The record reflects that the intersection at which the plaintiff lost control of his car is a well marked, four-way intersection of major roadways, and being, as Kowalsky testified, "one of the main thoroughfares coming into town," it is "a very heavily traveled very popular area." Additionally, the location is very close to Toyo. Accordingly, it was reasonable for the commissioner to infer that the fire chief reported the accident shortly after it occurred; the longer the car sat off the road, the less likely it would be for it to go unnoticed and unreported.

The plaintiff contends that this inference is not supported by the record. Specifically, he argues that his car came to rest far beyond the view of ordinary drivers on the road, having "crashed through the snowbank and drifted approximately 65.2 feet to final rest." He also argues that the fire chief was more perceptive

than the average driver, and, thus, it is unreasonable to assume that anyone else would have discovered the accident. We are not persuaded. First, the police crash report clearly indicates that the measurement upon which the plaintiff relies reflected how far the car drifted past the intersection *parallel* to Route 85, not perpendicularly into the field. Even if a car were traveling on the other road in the intersection, the four-way stop would demand at least a cursory glance down both directions of Route 85. Moreover, the car came to rest between the roadway and a telephone pole, knocking over a sign for a local establishment somewhere along the way. Additionally, although it may very well be true that the fire chief would be more vigilant than an average passerby, there is nothing in the record to suggest that his special training and experience led to his discovery of the plaintiff's car or that he had especially keen eyesight. Accordingly, we think it entirely reasonable on this record to infer that the car was in a place where it would have been observable to passersby.

Second, the evidence was sufficient to suggest that the plaintiff was in a hurry. The commissioner, therefore, reasonably could have concluded that operation occurred closer to 9:38 p.m. than 9:05 p.m. The plaintiff stated that he was "on his way home when his wife called him and asked him to go pick up their daughter at dance class." The round trip to the dance studio from the plaintiff's house and back took approximately twenty to thirty minutes in total. Furthermore, the fact that the plaintiff apparently requested a ride to the dance studio from someone else and abandoned his vehicle "less than thirty seconds" down the road implies that he was hurrying to pick up his daughter. When Kowalsky eventually arrived at the plaintiff's residence and spoke with his wife, she was not concerned that he had not yet arrived, suggesting either that she had

called the plaintiff recently or that the daughter's dance lesson had yet to end, or both.[7] As a result, it was reasonable to infer that the plaintiff left Toyo shortly before receiving his wife's call and spun off the road closer to 9:38 p.m. than 9:05 p.m.

The plaintiff disputes the reasonableness of these inferences. He contends that there was no evidence to support the notion that his daughter was ready to be picked up from the dance studio when his wife called, and, in the alternative, that even if he had been in a hurry to pick her up, there is no reason for him to have been in a hurry to bring her home. This, however, does not comport with the plaintiff's failure to remain in his

[7] The court noted that the plaintiff's wife also stated, in response to Kowalsky's question as to who was last driving the Volkswagen, that the plaintiff "*is* driving [it]." (Emphasis in original.) The plaintiff contends that this statement is not probative of the time of his operation. We agree that, standing alone, this statement would not provide much insight into the moment of operation. Nevertheless, Kowalsky's testimony and other evidence support the commissioner's findings as to the wife's manner and expectations regarding the plaintiff's arrival.

The plaintiff, however, also contends that his wife's statements constitute hearsay evidence. The plaintiff acknowledges that such evidence is sometimes admissible in administrative proceedings but argues that "[a]lthough the admission of this evidence is not itself grounds for reversal, the trial court's conclusion may be questioned based on specific reliance on inconsistent hearsay as 'reliable, probative and substantial evidence.' " See *Gonzalez* v. *State Elections Enforcement Commission*, 145 Conn. App. 458, 483, 77 A.3d 790 ("[a]dministrative tribunals are not strictly bound by the rules of evidence and . . . they may consider evidence which would normally be incompetent in a judicial proceeding, as long as the evidence is reliable and probative" [internal quotation marks omitted]), cert. denied, 310 Conn. 954, 81 A.3d 1181 (2013). This claim was not argued before the commissioner or in the Superior Court, and, since there is no claim for extraordinary review, we decline to address it now. "[A] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one. . . . For this court to . . . consider [a] claim on the basis of a specific legal ground not raised during trial would amount to trial by ambuscade, unfair to both the [court] and to the opposing party." (Citation omitted; internal quotation marks omitted.) *Dickman* v. *Office of State Ethics, Citizen's Ethics Advisory Board*, 140 Conn. App. 754, 764, 60 A.3d 297, cert. denied, 308 Conn. 934, 66 A.3d 497 (2013).

vehicle after speaking to the fire chief or to return to the scene of the accident to wait for AAA after he had secured a ride for his daughter, even though they rode past it in the pickup truck on their way back to his home. The plaintiff also argues that it was erroneous to consider the time it takes to drive from his home to the dance studio and back, because he was not at home when he left to pick up his daughter. The plaintiff's later admission to Kowalsky that he had to turn the car around after his wife called, however, indicates that he was already somewhere between his home and the dance studio.[8] This suggests an even shorter trip, which, in turn, implies that he received the phone call later in time, i.e., closer to 9:38 p.m. than 9:05 p.m.

Cognizant that our standard of review requires us to confirm only that there is sufficient evidence in the record to support the commissioner's findings, we cannot say that the court improperly found that there was substantial evidence in the record to support a finding that there was probable cause to arrest the plaintiff for operating a motor vehicle while under the influence of alcohol. Individually, each of the commissioner's inferences is clearly supported the record. Together, they buoy the commissioner's conclusion that the plaintiff was operating his motor vehicle while under the influence of alcohol within two hours of the commencement of his chemical alcohol tests.

II

The plaintiff next claims that the Superior Court abused its discretion in denying his motion to reargue or for reconsideration. Specifically, the plaintiff contends that he received ineffective assistance at the administrative hearing from his counsel resulting in a failure to

[8] Kowalsky testified that the studio was in the Westchester portion of Colchester.

present additional relevant evidence, namely, two affidavits, attesting that he had not been the driver of the car. This claim is without merit.

In denying the plaintiff's motion to reargue or for reconsideration, the court stated: "[T]he information presented was known to the plaintiff at the time of the original administrative hearing. Although the plaintiff argues that his counsel failed to present this evidence at the administrative hearing because he was distracted by a serious family emergency, the plaintiff offers no explanation for the subsequent failure to mention this evidence in the motion for reconsideration filed after the [commissioner] issued his final decision. Even more significantly, the plaintiff does not offer any explanation for failing to raise this claim in a motion to remand the matter to the department to present additional evidence pursuant to . . . § 4-183 (h). Such a motion properly could have been made at any time prior to the hearing on the merits, which was held on September 20, 2016. Notably, the plaintiff's counsel obtained [one of the proffered affidavits] nearly five months before the court's hearing on the merits, yet he failed to move for a remand or to present the affidavit to the court prior to the hearing, as required by [the statute]. To the contrary, in the statement of facts in his brief on appeal, the plaintiff's counsel stated that '[t]he plaintiff . . . admitted that he had been driving the vehicle when it went off the road.' The plaintiff cannot try his case on one theory and then seek to reargue it on grounds never presented to the court in the first instance."

Section 4-183 (h) provides in relevant part: "If, before the date set for hearing on the merits of an appeal, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the

agency upon conditions determined by the court. . . ." The language of this statute clearly indicates that the trial court has the discretion to order such a remand where "good reasons" exist for the failure to present the proffered evidence. See *Salmon* v. *Dept. of Health & Addiction Services*, 259 Conn. 288, 315, 788 A.2d 1199 (2002). Furthermore, the ineffective assistance of counsel may, in certain circumstances, constitute a "good reason." Id., 324.

It is important to note, however, that "a court order granting such [an application] does not vitiate the department's original decision, but instead permits [it] to consider new evidence and to modify its decision as necessary. Thus, a remand under § 4-183 (h) does not offer the parties an opportunity to relitigate the case ab initio, but rather represents a continuation of the original agency proceeding." Id., 319. Accordingly, such an application is the appropriate recourse where, as here, a plaintiff seeks to introduce additional evidence. Because the plaintiff failed to make a timely application for remand to the department for the taking of additional evidence pursuant to § 4-183 (h), and because the absence of such evidence formed the basis for his motion to reargue or for reconsideration, the court did not abuse its discretion in denying that motion.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* CHAD PETITPAS (AC 40254)

Elgo, Bright and Mihalakos, Js.

Syllabus

The defendant, who had been convicted of, among other crimes, sexual assault in the first degree, sexual assault in the second degree, sexual assault in the fourth degree, unlawful restraint in the second degree, and risk of injury to a child, and who was sentenced to a total effective term of nineteen years imprisonment followed by twenty years of special

parole, appealed to this court from the trial court's denial of his motion to correct an illegal sentence. Shortly before imposing the defendant's sentence, the sentencing court incorrectly stated the defendant's age and information related to his criminal history on the record. On appeal to this court, the defendant claimed that the trial court had abused its discretion in denying his motion to correct because the sentencing court materially relied on inaccurate information related to his age and criminal history in imposing his sentence. *Held* that the defendant's sentence was not imposed in an illegal manner, as the defendant failed to meet his burden of proving that the inaccurate statements made by the sentencing court were material to the sentence imposed, and, accordingly, the trial court did not abuse its discretion in denying the defendant's motion to correct an illegal sentence: a material factor in sentencing the defendant was not the defendant's exact age but, rather, that he was older than the child victim and a fully mentally and physically developed adult male involved in the sexual assault of a child; moreover, although the sentencing court's reference to the specific term of probation for the defendant's prior conviction was incorrect, that court properly relied on the state's accurate recitation of the defendant's prior convictions and the presentence investigation report, both of which correctly provided the defendant's prior convictions and sentences he received, and the material factor for sentencing was the serious nature of the sentences for the defendant's prior convictions and his extensive criminal history rather than the specific term of probation imposed for one of those prior convictions.

Argued May 21—officially released July 17, 2018

Procedural History

Informations, in three cases, charging the defendant with two counts each of sexual assault in the first degree, sexual assault in the second degree and risk of injury to a child, and with one count each of unlawful restraint in the second degree, sexual assault in the fourth degree, mutilation or removal of a motor vehicle identification number, and larceny in the third degree, brought to the Superior Court in the judicial district of Waterbury, where the cases were consolidated and tried to the jury before *Levin*, *J.*; verdict and judgment of guilty in each case; thereafter, the defendant appealed to the Supreme Court, which affirmed the judgments; subsequently, the court, *Fasano*, *J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed*.

W. Theodore Koch III, assigned counsel, for the appellant (defendant).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Catherine Brannelly Austin*, supervisory assistant state's attorney, for the appellee (state).

Opinion

MIHALAKOS, J. The defendant, Chad Petitpas, appeals from the judgment of the trial court denying his motion to correct an illegal sentence under Practice Book § 43-22. On appeal, the defendant claims that the sentencing court materially relied on inaccurate information pertaining to his age and criminal record. We disagree and, accordingly, affirm the judgment of the trial court.

The defendant's conviction was the subject of a direct appeal before our Supreme Court. See *State* v. *Petitpas*, 299 Conn. 99, 6 A.3d 1159 (2010). In affirming the defendant's conviction, our Supreme Court concluded that the jury reasonably could have found the following facts: "In August, 2006, the fifteen year old victim[1] lived with her mother, her mother's boyfriend, her brother and the defendant. One day in October, 2006, after the defendant had moved out of the victim's residence, he visited the victim at her residence and forced her to engage in oral and vaginal intercourse. Approximately one month later, the victim reported the incident to her school psychologist, which led to a police investigation. During the investigation, the police discovered at the defendant's residence a stolen motorcycle that had its vehicle identification number removed. The defendant

[1] "In accordance with our policy of protecting the privacy interests of the victims of sexual abuse, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e." *State* v. *Petitpas*, supra, 299 Conn. 101 n.3.

was arrested and charged with ten counts in three separate informations that were later consolidated for trial . . . .'' (Footnote in original.) Id., 101–102.

Following a jury trial in July, 2007, the defendant was convicted of two counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1), two counts of sexual assault in the second degree in violation of General Statutes (Rev. to 2005) § 53a-71 (a) (1), and one count each of sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (2), unlawful restraint in the second degree in violation of General Statutes § 53a-96 (a), risk of injury to a child in violation of General Statutes § 53-21 (a) (1), and risk of injury to a child in violation of § 53-21 (a) (2).[2] Id., 100–101.

Prior to sentencing, the court ordered the preparation of a presentence investigation report (PSI) by the Office of Adult Probation. The report contained the defendant's correct birth date, July 9, 1979, but incorrectly listed his age as thirty-eight rather than twenty-eight. Additionally, the PSI correctly set forth the defendant's criminal record, listing his sentence for a prior assault conviction as ''[seventeen] years jail, [suspended] after 102 months, [five] years probation.''

The court sentenced the defendant on September 28, 2007. In the course of the state's sentencing presentation, the state summarized the charges of which the defendant had been convicted and requested a total effective sentence of twenty-five years imprisonment followed by twenty years of special parole. In support of its recommendation, the state asked the court to

[2] The defendant also was convicted of larceny in the third degree in violation of General Statutes (Rev. to 2005) § 53a-124 (a) (1) and mutilation or removal of a vehicle identification, factory or engine number in violation of General Statutes § 14-149 (a). Those convictions, however, are not the subject of the defendant's motion to correct an illegal sentence.

consider, inter alia, the defendant's age and criminal record. The state correctly stated that "[t]he defendant was twenty-eight years old; the victim was fifteen years old," and, with regard to the defendant's prior assault conviction, "he received a sentence of seventeen years suspended after he served 102 months, five years probation." Defense counsel admitted that the defendant had "a prior criminal record" and that he was "still a roughly young man," but requested that the court impose "the least amount of reasonable time possible, looking at all circumstances in this case" for the defendant.

Shortly before imposing the sentence, the court, *Levin*, *J.*, incorrectly stated that the defendant was "now about age thirty-eight." With regard to the defendant's criminal record, the court stated: "[T]he defendant was convicted of assault in the first degree and received seventeen years suspended after 120 months. I believe 502 months of probation." The court indicated that it had considered the trial transcripts, the PSI, the victim's position as indicated in the PSI, the defendant's age, record, employment history and the acts underlying his conviction. The court then sentenced the defendant to a total effective term of nineteen years in prison followed by thirty years of special parole. Following a brief recess and discussion between the prosecutor and defense counsel off the record, the following colloquy ensued:

"The Court: Okay. I'll vacate the orders of special parole and . . . refashion it as follows: The sentences imposed remain the same, however . . . . It will be twenty years special parole. Excuse me . . . fifteen years special parole. . . . That was my intent. So fifteen on count four and fifteen on count five. Anything else?

"[The Prosecutor]: Your Honor . . . my understanding then it would be a sentence of nineteen years, fifteen years special parole.

"[Defense Counsel]: That's what he just said, correct?

"The Court: I'm sorry. . . . No. He's thirty-eight. No. Let me correct that again. Count four, ten years in prison, twenty years special parole and the same on count five."

Accordingly, the court sentenced the defendant on all ten convictions to a total effective term of nineteen years in prison followed by twenty years of special parole.[3]

On July 18, 2016, the defendant filed a renewed motion to correct an illegal sentence pursuant to Practice Book § 43-22.[4] In this motion, the defendant argued that his sentence was based on a materially inaccurate understanding of his prior criminal history and age. The court, *Fasano*, *J.*, held a hearing on November 10, 2016. On that date, the defendant argued that "although the presentence investigation itself was accurate or at least materially accurate, the court's statement on the record of the underlying basis of [the defendant's] sentence—both his age and his prior criminal history [were] materially inaccurate in a significant way that violates his due process rights." In response, the state noted that it correctly had stated the defendant's age as twenty-eight during the sentencing hearing and that the defendant

[3] We note that, on February 13, 2015, for reasons unrelated to this appeal, the defendant's term of special parole was reduced to ten years in response to a separate motion to correct an illegal sentence.

[4] Practice Book § 43-22 provides: "The judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner."

The self-represented defendant filed a second motion to correct an illegal sentence on February 24, 2015. That motion was subsequently stayed in light of his pending appeal that was eventually rendered moot by our Supreme Court's decision in *State* v. *Victor O.*, 320 Conn. 239, 128 A.3d 940 (2016). Thereafter, the defendant, represented by appointed counsel, renewed his motion to correct an illegal sentence on July 18, 2016.

had not objected to the court's inaccurate statements at that time.

In a memorandum of decision filed on November 22, 2016, the court denied the defendant's motion. The court held that although the defendant had met his burden of showing that the sentencing court did give "*actual* consideration and weight to the serious nature of the [defendant's] criminal history and to [the defendant's] maturity as an adult relative to the child complainant," he had not "satisfied [his] burden of demonstrating that, in the context of the above stated considerations, the sentencing court gave *material* consideration and actual weight to the inaccuracies reflected by the transcript." (Emphasis added.) This appeal followed.

On appeal, the defendant claims that the trial court abused its discretion in denying his motion to correct an illegal sentence because the sentencing court materially relied on inaccurate information pertaining to his age and criminal history prior to imposing the sentence. The state responds that the trial court did not abuse its discretion by denying the defendant's motion because the inaccurate statements made by the sentencing court were not material to the sentence imposed. We agree with the state.

We begin by setting forth our standard of review and applicable legal principles. "[A] claim that the trial court improperly denied a defendant's motion to correct an illegal sentence is reviewed pursuant to the abuse of discretion standard. . . . In reviewing claims that the trial court abused its discretion, great weight is given to the trial court's decision and every reasonable presumption is given in favor of its correctness. . . . We will reverse the trial court's ruling only if it could not reasonably conclude as it did." (Citation omitted; internal quotation marks omitted.) *State* v. *Charles F.*, 133 Conn. App. 698, 704–705, 36 A.3d 731, cert. denied, 304 Conn. 929, 42 A.3d 390 (2012).

"[A]n illegal sentence is essentially one [that] either exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. By contrast . . . [s]entences imposed in an illegal manner have been defined as being within the relevant statutory limits but . . . imposed in a way [that] violates [a] defendant's right . . . to be addressed personally at sentencing and to speak in mitigation of punishment . . . *or his right to be sentenced by a judge relying on accurate information or considerations solely in the record* . . . . These definitions are not exhaustive, however, and the parameters of an invalid sentence will evolve . . . as additional rights and procedures affecting sentencing are subsequently recognized under state and federal law." (Emphasis in original; internal quotation marks omitted.) *State* v. *Antwon W.*, 179 Conn. App. 668, 672–73, 181 A.3d 144, cert. denied, 328 Conn. 924, 180 A.3d 965 (2018).

"[D]ue process precludes a sentencing court from relying on materially untrue or unreliable information in imposing a sentence. . . . To prevail on such a claim as it relates to a [PSI], [a] defendant [cannot] . . . merely alleg[e] that [his PSI] contained factual inaccuracies or inappropriate information. . . . [He] must show that the information was *materially*[5] inaccurate and that the [sentencing] judge *relied* on that information. . . . A sentencing court demonstrates actual reliance on misinformation when the court gives explicit attention to it, [bases] its sentence at least in part on it, or gives specific consideration to the information before imposing sentence." (Footnote added; citation omitted;

[5] "[E]vidence is material when it has an influence, effect, or bearing on a fact in dispute . . . ." (Internal quotation marks omitted.) *State* v. *Erick L.*, 168 Conn. App. 386, 397, 147 A.3d 1053, cert. denied, 324 Conn. 901, 151 A.3d 1287 (2016); see also Black's Law Dictionary (10th Ed. 2014) (defining "material" as "[o]f such a nature that knowledge of the item would affect a person's decision-making; significant; essential").

emphasis in original; internal quotation marks omitted.) *State* v. *Bozelko*, 175 Conn. App. 599, 609–10, 167 A.3d 1128, cert. denied, 327 Conn. 973, 174 A.3d 194 (2017).

After thoroughly reviewing the record in the present case, we conclude that the trial court did not err in determining that the defendant had not met his burden of proving that the inaccuracies mentioned by the court were material to the sentence imposed. With regard to the inaccurate age stated by the sentencing court, we are persuaded by the trial court's assessment that the material factor in sentencing was not the defendant's exact age, but rather, the fact that he was older than the victim. The court reasonably concluded that "the significant and material factor relative to sentencing [was] not the specific numerical age of the [defendant], but the fact that [the defendant] was an adult male, fully developed mentally and physically; and, whether [twenty-eight] years of age, [thirty-eight] years, or [forty-eight] years, involved in a sexual assault of a child."[6]

With regard to the defendant's criminal history, the sentencing court referenced the state's recitation of the defendant's prior convictions and the PSI report, both of which correctly provided the defendant's prior convictions and the sentences he received therein. The sentencing transcript indicates that the court's inaccurate statement, "seventeen years suspended after 120 months. I believe 502 months of probation," was a mention of the prior conviction only in rote recitation. Additionally, the sentencing court's use of the term "believe," rather than a more definitive assertion, indicates that it properly relied on the accurate representation of the defendant's criminal history contained within the PSI and the state's accurate recitation, rather than

[6] Additionally, the sentencing court was provided with the defendant's correct age by the state and did not reference the PSI when discussing the defendant's age.

its own memory of the specific sentences imposed. The court did not discuss any of the particulars of that conviction or its probationary period, and thus there is no evidence in the record to indicate that the sentencing court believed that the defendant previously had been sentenced to a period of more than forty-one years of probation, rather than his actual sentence of five years. We agree with the trial court, therefore, that the material factor for sentencing was "the serious nature of the sentences" and the fact that the defendant had an extensive criminal history, rather than the specific term of probation imposed. Finally, we note that neither the defendant nor his counsel objected to the misstatements made by the sentencing court, thereby indicating that he also did not see them as material.[7]

Indulging every reasonable presumption in favor of the court's ruling as our standard of review requires; *State* v. *Carter*, 122 Conn. App. 527, 533, 998 A.2d 1217 (2010), cert. denied, 300 Conn. 915, 13 A.3d 1104 (2011); we conclude that the trial court reasonably determined that the sentencing court did not materially rely on inaccurate information in sentencing the defendant on his charges, and thus that the defendant's sentence was not imposed in an illegal manner. Accordingly, we conclude that the trial court did not abuse its discretion by denying the defendant's motion to correct an illegal sentence.

The judgment is affirmed.

In this opinion the other judges concurred.

[7] We are cognizant of the fact that the defendant failed to file a motion for articulation to explain the inaccuracies, and this further signifies that the defendant did not view the errors as material. See, e.g., *State* v. *Bozelko*, supra, 175 Conn. App. 611–12 (defendant failed to demonstrate actual reliance on inaccuracies in PSI where defendant did not file motion for articulation with sentencing court).

KAREN ZILKHA *v.* DAVID ZILKHA
(AC 40019)

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

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the postjudgment order of the trial court increasing the fees payable, pursuant to statute (§ 46b-62), to S, the guardian ad litem appointed for the parties' minor children. When S was appointed, the court temporarily set her fees at the rate of $75 per hour, without prejudice. Subsequently, S filed a motion requesting an upward adjustment to her fees, retroactive to the date of her appointment, which the court granted. Thereafter, the court granted the defendant's motion to reargue and held a hearing on the matter of S's fees, at which both parties and S testified. Thereafter, the court issued an order setting S's hourly rate at $225, retroactive to the date of her appointment, and the defendant appealed to this court. *Held*:

1. The trial court did not abuse its discretion by precluding the defendant from presenting evidence of S's background as an alleged abuse victim, her purported dislike of British individuals and her failure to disclose those alleged facts, as such evidence was irrelevant to determining the amount and apportionment of fees under § 46b-62.
2. The defendant could not prevail on his claim that the trial court erred in modifying S's hourly rate; that court did not abuse its discretion in increasing S's fees and properly exercised its discretion by implementing the sliding scale model developed by the Judicial Branch pursuant to § 46b-62 and adjusting its award upward on the basis of the delineated factors, at the court determined that the present case was very complex, the parties had conducted continuing expensive litigation for years using resources beyond any employment or other regular income that they reported on their respective financial affidavits, and it would have been inequitable and unreasonable for S to be compensated at the same rate that would be payable under the sliding scale by parents in a far less complex case who had none of the other resources that were available to these parties.

Argued April 12—officially released July 17, 2018

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Abery-Wetstone*, *J.*; judgment dissolving the marriage and

granting certain other relief in accordance with the parties' separation agreement and stipulation; thereafter, the matter was transferred to the judicial district of Waterbury; subsequently, the court, *Maureen Murphy*, *J.*, appointed a guardian ad litem for the parties' minor children; thereafter, following a hearing, the court, *Albis*, *J.*, set a new hourly rate for the fees charged by the guardian ad litem retroactive to the date of her appointment, and the defendant appealed to this court. *Affirmed*.

Edward N. Lerner, for the appellant (defendant).

Opinion

DiPENTIMA, C. J. In this protracted and bitterly contested dissolution action,[1] the defendant, David Zilkha, appeals from the postjudgment order of the trial court increasing the fees payable to the guardian ad litem. On appeal, the defendant claims that the court erred by (1) refusing to permit evidence of misrepresentations by the guardian ad litem and (2) modifying the hourly rate of the guardian ad litem. We affirm the judgment of the trial court.[2]

The defendant and the plaintiff, Karen Zilkha, were married in 1998; on May 31, 2005, that marriage was dissolved by the court, *Abery-Wetstone*, *J. Zilkha* v. *Zilkha*, 159 Conn. App. 167, 169, 123 A.3d 439 (2015).

[1] Since the judgment of dissolution was rendered in May, 2005, there have been approximately 600 filings in this case. See also *Zilkha* v. *Zilkha*, 182 Conn. App. 459, A.3d (2018), petition for cert. filed (Conn. June 25, 2018) (No. 170555); *Zilkha* v. *Zilkha*, 180 Conn. App. 143, A.3d , cert. denied, 328 Conn. 937, A.3d (2018); *Zilkha* v. *Zilkha*, 167 Conn. App. 480, 144 A.3d 447 (2016); *Zilkha* v. *Zilkha*, 159 Conn. App. 167, 123 A.3d 439 (2015); *Zilkha* v. *Zilkha*, Appellate Court, Docket No. 35781 (October 16, 2013), cert. denied, 310 Conn. 965, 83 A.3d 545 (2013).

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

The parties had twin children in February, 2001. *Zilkha* v. *Zilkha*, 180 Conn. App. 143, 146, A.3d , cert. denied, 328 Conn. 937, A.3d (2018).

The procedural events pertinent to this appeal[3] began in late March, 2015. On March 27, 2015, the court, *Maureen Murphy*, *J.*, appointed Attorney D. Susanne Snearly as guardian ad litem (guardian) for the minor children and temporarily set her fees at the rate of $75 per hour,[4] without prejudice.[5] On February 17, 2016, the guardian filed a motion requesting an upward adjustment to her fees, retroactive to the date of her appointment. The court, *Hon. Barbara M. Quinn*, judge trial referee, granted the request and raised the guardian's hourly rate to $300. Thereafter, the defendant filed a motion to reargue, which was granted; the court, *Albis*, *J.*, held a hearing on the matter on November 2, 2016. At the hearing, the guardian and both parties testified. On December 27, 2016, the court issued its ruling setting the guardian's hourly rate at $225 retroactive to the date of her appointment.[6] This appeal followed.

I

The defendant first claims that the court should have allowed him to introduce evidence of misrepresentations by the guardian. The defendant acknowledges that

[3] See footnote 1 of this opinion.

[4] The court apportioned 40 percent of the cost of the fees to the plaintiff and 60 percent to the defendant.

[5] Specifically, the court stated: "Temporarily, the guardian ad litem is to be paid at the lowest level of the sliding fee scale based upon the available income the parties have. The amount of the retainer is to be determined. These orders are entered without prejudice."

[6] The court noted: "Faced with a pressing need to appoint the [guardian] as quickly as possible, the court had only the parties' financial affidavits and their limited testimony as the basis for setting the rate of compensation on March 27, 2015. The court noted the complexity of the parties' financial situations and their apparent access to funds from sources beyond the scope of their financial affidavits. It explained that it was entering the order at the lowest rate on the sliding scale temporarily in order to allow the guardian to start working on the case, rather than delay her work while the court and parties devoted more time to a dispute about the fees."

the standard of review for this evidentiary claim is abuse of discretion. See *Jewett* v. *Jewett*, 265 Conn. 669, 679, 830 A.2d 193 (2003) ("It is well settled that the trial court's evidentiary rulings are entitled to great deference. . . . The trial court is given broad latitude in ruling on the admissibility of evidence, and we will not disturb such a ruling unless it is shown that the ruling amounted to an abuse of discretion." [Internal quotation marks omitted.]). In support of his claim, the defendant refers to language in General Statutes § 46b-62[7] allowing the court to order the payment of "reasonable fees" for an appointed guardian. With an extremely sparse analysis bordering on the inadequate, the defendant appears to argue that the preclusion of certain evidence, namely, of the guardian's background as an alleged abuse victim, her purported dislike of British individuals and her failure to disclose those alleged facts, was an abuse of discretion because a correct determination of the "reasonable fees" required a consideration of this precluded evidence.[8] We are not persuaded.

[7] General Statutes § 46b-62 provides in relevant part: "(a) . . . If . . . the court appoints counsel or a guardian ad litem for a minor child, the court may order the father, mother or an intervening party, individually or in any combination, to pay the reasonable fees of such . . . guardian ad litem . . . .

"(c) In any proceeding . . . in which the court appoints . . . a guardian ad litem for a minor child, the court may order that the fees to be paid to such . . . guardian ad litem be calculated on a sliding-scale basis after giving due consideration to the income and assets of the parties to the proceeding.

"(d) The Judicial Branch shall develop and implement a methodology for calculating, on a sliding-scale basis, the fees owing to . . . a guardian ad litem for a minor child . . . ."

[8] The defendant's examination of the guardian included the following:

"[The Defendant's Counsel]: Let's get to a couple of other things. One of the issues in this case was assault; is that correct? [The defendant] assaulted [the plaintiff]. That was one of the issues in the case?

"[Guardian]: It was one of many. Yes.

"[The Defendant's Counsel]: Yeah. And isn't it a fact that you never revealed to [the defendant] that you had been physically abused as a child?

"[Guardian]: I am not going to answer that question."

In denying the defendant's request to question the guardian on these topics, the court stated: "This is not a hearing on guardian ad litem alleged misconduct. This is a hearing on an appropriate hourly rate. The case is over and decided. You, yourself, have indicated that she's been paid the fees she put in for at the previously ordered rate." The court nevertheless allowed the defendant to make an offer of proof, which included a recitation of instances of alleged physical abuse in the guardian's childhood and early adulthood as well as documents purporting to prove that the guardian had a particular dislike of British men.[9]

The court has the discretion to preclude irrelevant evidence in determining the amount and apportionment of fees pursuant to § 46b-62. See, e.g., *Jewett* v. *Jewett*, supra, 265 Conn. 679 ("[r]elevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue" [internal quotation marks omitted]); *Rubenstein* v. *Rubenstein*, 107 Conn. App. 488, 506, 945 A.2d 1043 (no abuse of discretion in precluding evidence of fault for dissolution where only issue at hearing was apportionment of guardian ad litem fees on basis of parties' incomes), cert. denied, 289 Conn. 948, 960 A.2d 1037 (2008). In this case, we find no abuse of discretion in the court's decision to preclude the line of questioning at issue.

II

The defendant also claims that the court erred in modifying the hourly rate of the guardian. In this claim, he cites subsections (c) and (d) of § 46b-62. See footnote 7 of this opinion. Under the sliding scale methodology developed by the Judicial Branch, "the sliding fee scale is based upon the combined gross income of the parents and assumes one child. The scale is only applicable to cases where the combined gross income of the parents

[9] The defendant holds both Swiss and French citizenship.

is $100,000 or less."[10] See Press Release, Connecticut Judicial Branch, Guardian Ad Litem/Attorney for Minor Child (GAL/AMC) Sliding Fee Scale, effective October 1, 2014 (September 11, 2014), available at https://www.jud.ct.gov/external/news/press387.pdf (last visited July 12, 2018) (sliding scale announcement); Press Release, Connecticut Judicial Branch, Update on the Judicial Branch Family Court Initiatives (November 23, 2015), available at https://www.jud.ct.gov/family/family_court_initiatives15.pdf (last visited July 12, 2018) (2015 Family Court Initiatives).

The defendant takes issue with the court's application of three of the six factors listed in the Judicial Branch's sliding scale methodology.[11] The three factors the court found pertinent were the hourly rate charged by the parties' own attorneys, the complexity of the issues before the court and the sources of additional household income.[12] The court summarized its consideration

[10] The lowest hourly rate on the sliding scale is $75; the highest is $225. The sliding scale does not apply to those parents whose combined annual income is greater than $100,000.

[11] "In addition to considering the parents' gross income, the court may also consider other factors to determine whether application of the scale is appropriate and at what level, including, but not limited to:

"1. All other information set forth on the parents' financial affidavits;

"2. Total number of dependent children;

"3. The hourly rate charged by the parties' own lawyers;

"4. The complexity of the issues before the court;

"5. The gross income and other information on the financial affidavit of an intervening party or third party applicant;

"6. Source(s) of additional household income, including funding source for current litigation." Sliding scale announcement, supra; see also 2015 Family Court Initiatives, supra, p. 2.

[12] We note that, as with statutory criteria, the trial court need not make express findings on each sliding scale criterion. See, e.g., *Rubenstein* v. *Rubenstein*, supra, 107 Conn. App. 495 ("The court must consider all of these criteria. . . . It need not however, make explicit reference to the statutory criteria that it considered in making its decision or make express finding[s] as to each statutory factor. . . . Nor need it give each factor equal weight." [Internal quotation marks omitted.]).

of these factors in making its determination. "The inclusion of additional factors beyond the parties' income in the sliding scale allows the court to adjust, or even ignore, the prescribed hourly rates in cases where the parties' incomes alone do not provide a complete and fair picture of what the [guardian] should be paid. That is most certainly the case here, for reasons that relate directly to several of the listed factors. The case is very complex. Despite what their financial affidavits show, the parties have conducted continuing expensive litigation for years using resources beyond any employment or other regular income they report. The plaintiff is the joint owner of a home of substantial value yet pays no living expenses, and she has provided no specific accounting for the combined one million dollar bounty that she and her current husband received. The defendant claims to have no source for payment of more [guardian] fees, yet he continues to be represented by counsel in his trial court motions and his appeals who is somehow compensated at the rate of $450 per hour.

"In light of all these factors, it would be inequitable and unreasonable for the [guardian] to be compensated at $75 per hour—the same rate that would be payable under the sliding scale by parents in a far less complex case who had none of the other resources made available to these parties during the course of their litigation." It further concluded that "while their incomes qualify the parties to have [guardian] fees set within the range of the sliding scale, they should pay fees at the highest end of the range ($225 per hour), not the lowest."

The defendant posits that the decision to increase the guardian fees is "clearly erroneous." Citing no case law, he argues that the evidence before the court does not support its determination. We disagree.

"[A]n appellate court will not disturb a trial court's orders in domestic relations cases unless the court has

abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . The court may order either party to pay the fees for [a] guardian ad litem pursuant to General Statutes § 46b-62, and how such expenses will be paid is within the court's discretion. . . . [W]e may not alter an award of [guardian ad litem] fees unless the trial court has clearly abused its discretion, for the trial court is in the best position to evaluate the circumstances of each case. . . . Because the trial court is in the best position to evaluate the circumstances of each case, we will not substitute our opinion concerning counsel fees or alter an award of [guardian ad litem] fees unless the trial court has clearly abused its discretion. . . . An abuse of discretion in granting [guardian ad litem] fees will be found only if [an appellate court] determines that the trial court could not reasonably have concluded as it did." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Rubenstein* v. *Rubenstein*, supra, 107 Conn. App. 499–500; see also *Kavanah* v. *Kavanah*, 142 Conn. App. 775, 783–84, 66 A.3d 922 (2013) (court abused its discretion where it ordered, sua sponte, parties to pay $5000 in fees to guardian ad litem where fees were not in dispute and court had no evidence by which to calculate amount).

Applying the appropriate standard of review to this claim, we conclude that the court did not abuse its discretion in increasing the guardian's fees. Rather, it properly and correctly *exercised* its discretion by implementing the Judicial Branch's sliding scale model pursuant to § 46b-62 (c) and (d) and then adjusting its award upward based on the delineated factors.[13]

The judgment is affirmed.

In this opinion the other judges concurred.

[13] We note that the court's award still falls within the overall range prescribed by the sliding scale. This fact counsels in favor of its propriety.

KATIE N. CONROY *v.* AMMAR A. IDLIBI
(AC 39538)

Alvord, Keller and Bishop, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court dissolving his marriage to the plaintiff. The trial court found that the marriage had broken down irretrievably, without allocating fault for the breakdown, and issued certain orders for the payment of alimony and the distribution of property. On appeal, the defendant claimed that the trial court erred by finding that neither party bore greater responsibility for the breakdown of the marriage and in making financial awards that were favorable to the plaintiff. *Held*:

1. The trial court's factual finding that neither party was more responsible than the other for the breakdown of the marriage was supported by the evidence and was not clearly erroneous; although the defendant claimed that the court should have found that the plaintiff bore greater responsibility for the breakdown of the marriage because she had engaged in a sexual extramarital affair, the court considered the evidence of the plaintiff's affair and found that it was not sexual in nature, and the record provided an ample basis to conclude that, despite the evidence of the plaintiff's alleged affair, both parties bore some responsibility for the breakdown of the marriage, as the plaintiff's testimony, which the court was free to credit, provided an account of the defendant's attempts to control varied aspects of her life and allegations against the defendant of physical abuse, which left the court to balance the evidence of the plaintiff's affair with the defendant's own misconduct.
2. The trial court did not err in making its financial awards; a review of the record showed that the court properly considered the appropriate statutory factors and that the awards were both supported by the evidence and within the parameters of the court's discretion, as the defendant's claims were premised on the argument that because the court did not find that the plaintiff's extramarital affair was the cause of the breakdown of the marriage, the court abused its discretion by not considering that fault when making the financial awards, and this court determined that the trial court did not err by finding that neither party was more at fault for the breakdown of the marriage.

Argued February 20—officially released July 17, 2018

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Carbonneau*,

J.; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to this court; thereafter, the court, *Carbonneau*, *J.*, denied the defendant's motion for modification of alimony; subsequently, the court, *Carbonneau*, *J.*, denied the plaintiff's motion for contempt. *Dismissed in part*; *affirmed.*

Tareq Al Ahmad, for the appellant (defendant).

Jeremiah Ollennu, for the appellee (plaintiff).

Opinion

KELLER, J. The defendant, Ammar A. Idlibi, appeals from the judgment of the trial court dissolving his marriage to the plaintiff, Katie N. Conroy. The defendant claims that the court erred (1) by finding that neither party bore greater responsibility for the breakdown of the marriage and (2) in making financial awards that were favorable to the plaintiff.[1] We affirm the judgment of the court.[2]

[1] At oral argument, the defendant waived his claim that "the trial court err[ed] by awarding [the] plaintiff attorney's fees postjudgment while an appeal is pending."

The defendant also claims that the court made improper credibility determinations. "An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences from them." (Internal quotation marks omitted.) *Cimino* v. *Cimino*, 174 Conn. App. 1, 11, 164 A.3d 787, cert. denied, 327 Conn. 929, 171 A.3d 455 (2017). Mindful of these principles, we decline to review the court's credibility determinations.

[2] We dismiss the portion of the appeal in which the defendant claims that the trial court improperly determined that if the plaintiff is found to be liable to the defendant in a separate matter commenced by the defendant, that finding shall be deemed a substantial change in the plaintiff's circumstances to warrant a review of the defendant's alimony obligation because it is moot. We take judicial notice that the defendant has withdrawn the separate action. As a result, this claim is moot. See *Sweeney* v. *Sweeney*, 271 Conn. 193, 201, 856 A.2d 997 (2004).

The court found the following facts. In 2005, the plaintiff, when she was eighteen years old and while living in California, began to communicate with the defendant over the internet. The plaintiff was estranged from her mother at the time and living with her grandmother. At first, the plaintiff and the defendant discussed the plaintiff's interest in the defendant's faith, Islam. The topic of conversation quickly shifted from the defendant's faith to marriage. "About three weeks after meeting online, [the] defendant flew to California, picked up [the] plaintiff, brought her to Connecticut and they married."

Initially, the plaintiff and the defendant were happily married. The defendant, a dentist, opened his own practice in 2007. His high income level from this practice enabled the parties to enjoy a lavish lifestyle. They had three children during the marriage.

Despite initial marital bliss, "[t]he seeds of this dissolution were sown at the very time the relationship began." The plaintiff alleged that the defendant exerted overbearing control over many aspects of her life and that he physically assaulted her. The defendant harbored suspicions that the plaintiff was unfaithful during the marriage. The defendant's dental practice also went through down periods, placing financial strain upon them and forcing the plaintiff to loan the business the total balance of an education fund, about $132,000, left to her by her deceased father.

The plaintiff commenced this proceeding on May 19, 2015, seeking to dissolve her ten year marriage to the defendant. Following a trial, the court, on August 15, 2016, rendered a judgment of dissolution, finding that the marriage had broken down irretrievably. The court did not allocate fault for the breakdown of the marriage.

Pursuant to the dissolution decree, the court made certain orders for the payment of alimony and the distribution of property.[3]

I

The defendant first claims that the court should have found that the plaintiff was at fault for the breakdown of the parties' marriage due to an alleged affair.

The court made the following findings relevant to this claim. "The marriage of the parties is dissolved on the grounds of irretrievable breakdown. Both parties are declared to be single and unmarried." The court "ascribe[d] no greater fault for the breakdown of the marriage to either party." With respect to the alleged affair, the court, having considered the allegation that the plaintiff engaged in a relationship during the marriage with another man named George Jones, found that there was "no direct evidence of [the plaintiff] and [Jones] ever having sex."

"The trial court's findings [of fact] are binding upon this court unless they are clearly erroneous in light of the evidence . . . ." (Internal quotation marks omitted.) *Marinos* v. *Building Rehabilitations, LLC*, 67 Conn. App. 86, 89, 787 A.2d 46 (2001). "A factual finding is clearly erroneous when it is not supported by any evidence in the record or when there is evidence to support it, but the reviewing court is left with the definite and firm conviction that a mistake has been made. . . . Simply put, we give great deference to the findings of the trial court because of its function to weigh and interpret the evidence before it and to pass upon the credibility of witnesses." (Internal quotation marks

[3] The court did not make findings with regard to child custody. The court noted that "there is an ongoing proceeding before the Juvenile Court against [the] plaintiff and [the] defendant" and, as a result, left any determinations on custody to that court. At the time of oral argument, the state had custody of the parties' children.

omitted.) *DiVito* v. *DiVito*, 77 Conn. App. 124, 137, 822 A.2d 294, cert. denied, 264 Conn. 921, 828 A.2d 617 (2003).

After carefully reviewing the evidence, we conclude that the court's factual finding that neither party was more responsible than the other for the breakdown of the marriage was not clearly erroneous. The defendant argues that the court should have found that the plaintiff bore greater responsibility for the breakdown of the marriage because she engaged in a sexual extramarital affair. The court considered the evidence of the plaintiff's extramarital affair and found that it was not sexual in nature. The plaintiff, although admitting during her testimony that she had an affair with Jones, did not state that she had a sexual relationship with him. The court was free to credit her testimony. In addition, the record provides an ample basis to conclude that, despite the evidence of the plaintiff's alleged affair, both parties were responsible for the breakdown of the marriage. The plaintiff's testimony provides an account of the defendant's attempts to control varied aspects of her life and allegations of physical abuse. This left the court to balance the evidence of the plaintiff's affair with the defendant's own misconduct. Accordingly, the court's finding that neither party was more at fault for the breakdown of the marriage was supported by the evidence and, thus, it was not clearly erroneous.

II

The defendant claims that the court erred in making several financial awards. Specifically, the defendant claims that the court erred in (1) setting the amount and duration of alimony; (2) rendering a monetary judgment in favor of the plaintiff; (3) allowing the plaintiff to take sole possession of certain marital property; (4) finding that he should be solely liable for certain debts; and (5) awarding the plaintiff attorney's fees.

The court found the following facts relevant to this claim. "This is a ten year marriage. The plaintiff is twenty years younger than [the] defendant. Both are now highly stressed by the breakdown of their marriage and the ensuing conflict resulting in their numerous, adversarial and tension-filled appearances in various courtrooms. [The] plaintiff suffers from temporary or treatable conditions, and [the] defendant is relatively healthy for his age. They lived a high [lifestyle] thanks to [the] defendant's many years of training and his earnings as a dental specialist. The lurid drama of this dissolution and the other court proceedings will eventually fade from public view. [The] defendant's dental practice will recover, giving him a greater capacity than [the] plaintiff for future acquisition of capital assets and income. However, [the] plaintiff is—using [the] defendant's words—'intelligent and capable.' While her vocational skills and employability may be limited now, she has many years to seek an education or training in order to provide for herself and the support of her children."

The court found that there should be "a sufficient amount of rehabilitative alimony flowing from [the] defendant to [the] plaintiff for a term allowing [the] plaintiff a realistic opportunity to seek education or vocational training . . . . [O]ne or both of these parents may in the future have a support obligation to their children. Such a future support obligation shall not be considered a substantial change of circumstances to raise or lower alimony because the court took these circumstances into account when deciding its alimony order."

The court ordered that the defendant "shall pay $1250 per week alimony to [the] plaintiff for a term of five years from the date of this decision. Such alimony shall be taxable income to [the] plaintiff and deductible to [the] defendant. The term of the alimony is nonmodifiable. . . . Alimony ends upon the death of either party

or [the] plaintiff's remarriage. The terms of [General Statutes §] 46b-86 (b) are incorporated by reference into these orders."

With respect to property distributions, the court issued the following orders: "[The] defendant shall immediately transfer by means of a qualified domestic relations order (QDRO) one half . . . of his RBC Wealth Management retirement account . . . that accrued from the date of the marriage to the date of this decision plus gains and losses incurred from the date of the decision until the date of distribution. [The] defendant may choose a qualified professional to assist in the preparation of such an order. He shall be solely responsible for any and all costs of preparation or implementation. The court retains jurisdiction over the preparation and effectuation of any QDRO. . . .

"[The] plaintiff shall keep all other personal property now in her possession without further claim by [the] defendant. . . .

"[The] defendant shall pay [the] plaintiff a lump sum property settlement of $132,000 on or before five years from the date of this decision."

With respect to the debts, the court made the following factual findings. "[The] defendant shall be solely responsible for the timely payment of all debts listed under 'III Liabilities,' including the addendum for this category, on his May 23, 2016 financial affidavit. These debts include the full amounts owed to the Internal Revenue Service and Connecticut's Department of Revenue Services.

"[The] defendant shall also be solely responsible for the timely payment of the following debts listed by [the] plaintiff on her May 11, 2016 financial affidavit: 'Federal Tax Lien,' CCMC (children's care/copay) and four bills

to Bristol Hospital totaling $474. He shall hold her harmless thereon. If [the] plaintiff provides written proof of her payment of any of these bills, then [the] defendant shall reimburse her for that which she paid. Otherwise, he may pay the provider directly. . . .

"[The] plaintiff shall be solely responsible for all other debts listed on her May 11, 2016 financial affidavit. She shall hold [the] defendant harmless thereon." (Footnote omitted.)

With respect to attorney's fees, the court found that "[the] defendant has been the sole support of this family since 2008. [The] plaintiff has not worked outside her home since that time, and she suffers from a medical condition that currently keeps her from working. She has no substantial assets or resources upon which she may draw except from [the] defendant. . . . The court previously ordered [the] defendant to pay [the] plaintiff an allowance to prosecute of $5000 . . . and an additional $2500 later on." (Citations omitted.)

The court ordered that the "defendant shall pay the sum of $12,500 toward [the] plaintiff's attorney's fees as follows: $2500 by December 31, 2016, $5000 by June 30, 2017, and $5000 by December 31, 2017."

"An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . This standard of review reflects the sound policy that the trial court has the opportunity to view the parties first hand and is therefore in the best position to assess all of the circumstances surrounding a dissolution action, in which such

personal factors such as the demeanor and the attitude of the parties are so significant. . . .

"Importantly, [a] fundamental principle in dissolution actions is that a trial court may exercise broad discretion in . . . dividing property as long as it considers all relevant . . . criteria [in General Statutes § 46b-81].[4] . . . While the trial court must consider the delineated statutory criteria [when allocating property], no single criterion is preferred over others, and the court is accorded wide latitude in varying the weight placed upon each item under the peculiar circumstances of each case. . . . In dividing up property, the court must take many factors into account. . . . A trial court, however, need not give each factor equal weight . . . or recite the statutory criteria that it considered in making its decision or make express findings as to each statutory factor." (Footnote added; internal quotation marks omitted.) *Kent* v. *DiPaola*, 178 Conn. App. 424, 431–32, 175 A.3d 601 (2017).

"The generally accepted purpose of . . . alimony is to enable a spouse who is disadvantaged through divorce to enjoy a standard of living commensurate with the standard of living during marriage. . . . In addition to the marital standard of living, the trial court must also consider the factors in [General Statutes] § 46b-82 when awarding alimony. . . .

"General Statutes § 46b-82 (a) provides in relevant part that [i]n determining whether alimony shall be

[4] General Statutes 46b-81 (c) provides: "In fixing the nature and value of the property, if any, to be assigned, the court, after considering all the evidence presented by each party, shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates."

awarded, and the duration and amount of the award, the court shall consider the evidence presented by each party and shall consider the length of the marriage, the causes for the . . . dissolution of the marriage . . . the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and the [division of property made] pursuant to [General Statutes §] 46b-81 . . . .'' (Citations omitted; internal quotation marks omitted.) *Horey* v. *Horey*, 172 Conn. App. 735, 740–41, 161 A.3d 579 (2017). ''The court is to consider these factors in making an award of alimony, but it need not give each factor equal weight. . . . We note also that [t]he trial court may place varying degrees of importance on each criterion according to the factual circumstances of each case. . . . There is no additional requirement that the court specifically state how it weighed the statutory criteria or explain in detail the importance assigned to each statutory factor. . . .

''[T]he record must indicate the basis for the trial court's award. . . . There must be sufficient evidence to support the trial court's finding that the spouse should receive time limited alimony for the particular duration established. If the time period for the periodic alimony is logically inconsistent with the facts found or the evidence, it cannot stand.'' (Citation omitted; internal quotation marks omitted.) Id., 741.

''General Statutes § 46b-62 governs the award of attorney's fees in dissolution proceedings. That section provides in part that the court may order either spouse . . . to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities and the criteria set forth in [§] 46b-82.'' (Footnote omitted; internal quotation marks omitted.) *Bornemann* v. *Bornemann*, 245 Conn. 508, 542, 752 A.2d 978 (1998). ''[These criteria include] the length of the marriage, the

causes for the . . . dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate and needs of each of the parties . . . . In making an award of attorney's fees under [§ 46b-82], [t]he court is not obligated to make express findings on each of these statutory criteria. . . .

"Courts ordinarily award counsel fees in divorce cases so that a party . . . may not be deprived of [his or] her rights because of lack of funds. . . . Where, because of other orders, both parties are financially able to pay their own counsel fees they should be permitted to do so. . . . An exception to the rule . . . is that an award of attorney's fees is justified even where both parties are financially able to pay their own fees if the failure to make an award would undermine its prior financial orders . . . . Whether to allow counsel fees [under § 46b-82], and if so in what amount, calls for the exercise of judicial discretion. . . . An abuse of discretion in granting counsel fees will be found only if [an appellate court] determines that the trial court could not reasonably have concluded as it did." (Citations omitted; internal quotation marks omitted.) Id., 542–43.

Our review of the record leads us to conclude that the court properly considered the appropriate statutory factors and that the awards made by the court were both supported by the evidence and within the parameters of the court's discretion. The defendant's claims are premised on the argument that because the court did not find that the plaintiff's affair was the cause of the breakdown of the parties' marriage, the court abused its discretion by not considering that fault when making financial awards. As previously discussed in this opinion, however, the court did not err by finding that neither party was more at fault for the breakdown of the

marriage. Thus, the defendant's claims warrant no further review.

The portion of the defendant's appeal challenging the trial court's finding that if he obtains a monetary judgment against the plaintiff in a separate proceeding, that shall be considered a significant change in circumstances to warrant a review of the defendant's alimony obligation is dismissed. The judgment is affirmed in all other respects.

In this opinion the other judges concurred.

JEAN ST. JUSTE *v.* COMMISSIONER OF CORRECTION (AC 33424)

Lavine, Alvord and Keller, Js.

Syllabus

The petitioner, who had been convicted in 2007, on a guilty plea, of the crimes of assault in the second degree and possession of a sawed-off shotgun, sought a writ of habeas corpus, claiming that his trial counsel had provided ineffective assistance in failing to inform him that his conviction of assault in the second degree would result in his certain deportation. The habeas court rendered judgment denying the habeas petition, from which the petitioner, on the granting of certification, appealed to this court, which dismissed the appeal as moot. Thereafter, the petitioner, on the granting of certification, appealed to our Supreme Court, which reversed this court's judgment and remanded the case to this court with direction to consider the merits of the petitioner's appeal. On appeal, the petitioner claimed that the judgment of the habeas court should be reversed because, under the standard set forth in *Padilla* v. *Kentucky* (599 U.S. 356), his trial counsel provided ineffective assistance in failing to advise the petitioner, prior to entering the plea agreement, that his assault conviction would make him subject to automatic deportation. After the parties filed their principal briefs, the United States Supreme Court, in *Chaidez* v. *United States* (568 U.S. 342), held that *Padilla* does not apply retroactively to petitioners whose convictions had become final by the time that the *Padilla* decision was announced in March, 2010. *Held* that the habeas court properly denied the habeas petition; under the law as it existed prior to *Padilla*, the petitioner failed to sustain his burden of demonstrating that his trial counsel performed

deficiently, as legal advice concerning the deportation consequences of a guilty plea was not constitutionally guaranteed prior to *Padilla*, appellate courts in Connecticut having concluded that advice concerning collateral consequences such as deportation was not within the scope of the constitutional protection afforded by the sixth amendment, and, thus, the petitioner failed to demonstrate that his counsel's performance was constitutionally deficient or that it rendered his plea unintelligent or involuntary in a constitutional sense.

Argued May 30—officially released July 17, 2018

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *T. Santos*, *J.*; judgment denying the petition; thereafter, the petitioner, on the granting of certification, appealed to this court, which dismissed the appeal; subsequently, the petitioner, on the granting of certification, appealed to our Supreme Court, which reversed this court's judgment and remanded the matter to this court. *Affirmed.*

Justine F. Miller, assigned counsel, for the appellant (petitioner).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, *Adam E. Mattei*, former assistant state's attorney, and *Gerard P. Eisenman*, former senior assistant state's attorney, for the appellee (respondent).

Opinion

KELLER, J. This appeal returns to the Appellate Court on remand from our Supreme Court for resolution of the claim raised by the petitioner, Jean St. Juste. In 2011, following a grant of certification to appeal by the habeas court, the petitioner appealed to this court from the judgment of the habeas court denying his amended petition for a writ of habeas corpus, which challenged a conviction of assault in the second degree in violation of General Statutes § 53a-60 (a) (2). The petitioner

claimed that the habeas court improperly rejected his claim that his trial counsel had rendered ineffective assistance because he failed to inform him that if he were convicted of the crime of assault in the second degree, his conviction would result in his certain deportation. In 2015, this court dismissed the appeal on mootness grounds. *St. Juste* v. *Commissioner of Correction*, 155 Conn. App. 164, 181, 109 A.3d 523 (2015). In 2018, following a grant of certification to appeal, our Supreme Court reversed the judgment of this court and remanded the case to this court with direction to consider the merits of the petitioner's appeal. *St. Juste* v. *Commissioner of Correction*, 328 Conn. 198, 219, 177 A.3d 1144 (2018). Having done so, we affirm the judgment of the habeas court.

The relevant facts and procedural history were set forth in this court's prior opinion, as follows: "On July 26, 2010, the petitioner filed an amended petition for a writ of habeas corpus in which he alleged that, on December 17, 2007, he pleaded guilty to assault in the second degree in violation of . . . § 53a-60 (a) (2), and guilty under the *Alford* doctrine[1] to possession of a sawed-off shotgun in violation of General Statutes § 53a-211. He was represented by Attorney Howard Ignal. On January 28, 2008, he was sentenced pursuant to a plea agreement to a total effective sentence of five years incarceration, execution suspended after eighteen months, followed by five years of probation. On July 27, 2009, the petitioner, represented by Attorney Anthony Collins, filed a motion to withdraw his guilty pleas on the ground that at the time he entered them, he did not understand their immigration consequences. On November 17, 2009, the court denied the motion.

[1] "See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)." *St. Juste* v. *Commissioner of Correction*, supra, 155 Conn. App. 166 n.1.

"In his two count amended petition, the petitioner alleged that Ignal rendered ineffective assistance of counsel because, among other deficiencies, he (1) failed to educate himself about the immigration consequences of the pleas, (2) misadvised the petitioner with respect to the immigration consequences of the pleas, and (3) failed to meaningfully discuss with the petitioner what immigration consequences could and/or would flow from the pleas. The petitioner alleged that Ignal's representation was below that displayed by attorneys with ordinary training and skill in the criminal law, and that but for such representation, he would not have pleaded guilty and he would have resolved the case in a way that would not result in 'deportation consequences.' In the second count of his petition, the petitioner alleged that his pleas were not knowingly, voluntarily, and intelligently made because he made them under the mistaken belief that his conviction would not subject him to deportation. The petitioner alleged that '[a]s a result of his conviction, [he] has been ordered removed from this country by an immigration judge, and the judge's order has been affirmed by the Board of Immigration Appeals.' Additionally, the petitioner alleged that '[t]he basis for the removal order was the conviction for assault in the second degree and possession of a sawed-off shotgun.'[2]

"Following an evidentiary hearing, the habeas court orally rendered its decision denying the petition.[3] In relevant part, the court stated that it accepted as true the testimony of the petitioner's trial attorney, Ignal. The court stated: '[Ignal] clearly saw all of the problems

[2] "[T]he record suggests that the petitioner was deported solely because of his conviction of assault in the second degree." *St. Juste* v. *Commissioner of Correction*, supra, 155 Conn. App. 167 n.2.

[3] "Subsequently, the court filed a signed transcript of its decision in accordance with Practice Book § 64-1 (a)." *St. Juste* v. *Commissioner of Correction*, supra, 155 Conn. App. 167 n.3.

with this case, and they all spelled the word "immigration." From day one, I think, he was alerted to this and did everything he could, from what I can see, to try to avert the ultimate result.' The court found that Ignal was well aware of the adverse consequences of the pleas insofar as they involved deportation, and that he had thoroughly discussed that issue with the petitioner. The court rejected the claim of ineffective assistance of counsel. Later, the court granted the petitioner's petition for certification to appeal."[4] (Footnotes in original.) *St. Juste* v. *Commissioner of Correction*, supra, 155 Conn. App. 166–67. We observe that the court's ruling was based on its finding that the petitioner failed in satisfying his burden to demonstrate that Ignal's performance was deficient. The court did not reach the issue of whether the petitioner sustained his burden of demonstrating that he was prejudiced by Ignal's representation. Moreover, we observe that the petitioner's claim on appeal is limited to representation afforded to him in connection with his guilty plea for assault in the second degree.

In his principal appellate brief, the petitioner argues that the judgment of the habeas court should be reversed because, under the standard set forth in *Padilla* v. *Kentucky*, 599 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010),[5] Ignal rendered deficient representation in that, prior to entering the plea agreement, Ignal

[4] "In his brief before this court, the petitioner represents that he was in the United States as a permanent legal resident and that, after he served the eighteen month term of incarceration imposed by the trial court as a result of his conviction of assault in the second degree and possession of a sawed-off shotgun, he was detained in a federal facility pending his removal from the United States. Further, the petitioner represents, and it is not in dispute, that on April 15, 2011, he was deported to Haiti. Relying on the September 2, 2009 decision of the United States Immigration Court ordering the petitioner's deportation to Haiti, the respondent acknowledges that the petitioner's assault conviction was a factor in his deportation." *St. Juste* v. *Commissioner of Correction*, supra, 155 Conn. App. 169.

[5] "*Padilla* held that before an alien criminal defendant pleads guilty to a criminal offense for which he is subject to deportation, his defense attorney

failed to advise him "that his [assault] conviction would make him subject to automatic deportation."[6] Moreover, the petitioner argues that he suffered actual prejudice as a result of the ineffective representation because there is a reasonable probability that, if he had known the adverse immigration consequences of his plea, he would not have pleaded guilty but would have proceeded to trial. After the parties filed their principal briefs, the United States Supreme Court, in *Chaidez* v. *United States*, 568 U.S. 342, 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013), held that *Padilla* does not apply retroactively to petitioners whose convictions had become final by the time that the *Padilla* decision was announced on March 31, 2010. See *Guerra* v. *State*, 150 Conn. App. 68, 74 n.4, 89 A.3d 1028 (interpreting *Chaidez*), cert. denied, 314 Conn. 903, 99 A.3d 1168 (2014); *Alcena* v. *Commissioner of Correction*, 146 Conn. App. 370, 374, 76 A.3d 742 (same), cert. denied, 310 Conn. 948, 80 A.3d 905 (2013).

By way of supplemental briefing, the parties have addressed the effect of *Chaidez* on the present appeal.

must advise him of the deportation consequences of his plea and resulting conviction. On that score, the Supreme Court concluded that because deportation is such a great, life-altering consequence of a criminal conviction, an alien defendant's plea of guilty to a deportable offense without knowledge of that consequence cannot be considered a knowing and intelligent waiver of his right not to be convicted of that offense unless his guilt is established beyond a reasonable doubt at a full, fair adversary trial." *Guerra* v. *State*, 150 Conn. App. 68, 72–73, 89 A.3d 1028, cert. denied, 314 Conn. 903, 99 A.3d 1168 (2014).

[6] The petitioner argues that the evidence presented at the habeas trial reflects that he and Ignal "did not talk much about immigration consequences" and that Ignal merely informed him that "immigration would deal with him" after he served his sentence. The petitioner does not argue that Ignal provided him with inaccurate information concerning immigration consequences but that he was not advised of the certainty of the immigration consequences of his plea. The petitioner argues: "Although Attorney Ignal never told his client that he wouldn't get deported if he pleaded guilty, Ignal also never told his client that he would face inevitable deportation if he did plead guilty."

The parties do not dispute, and we agree, that *Padilla* does not apply to the petitioner. The issue correctly framed by the parties' supplemental briefs is whether the petitioner has sustained his burden of demonstrating that Ignal performed deficiently under the law as it existed prior to *Padilla*.

"[T]he governing legal principles in cases involving claims of ineffective assistance of counsel arising in connection with guilty pleas are set forth in *Strickland* [v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] and *Hill* [v. *Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)]. [According to] *Strickland*, [an ineffective assistance of counsel] claim must be supported by evidence establishing that (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense because there was a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance. . . . The first prong requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . Under . . . *Hill* . . . which . . . modified the prejudice prong of the *Strickland* test for claims of ineffective assistance when the conviction resulted from a guilty plea, the evidence must demonstrate that there is a reasonable probability that, but for counsel's errors, [the petitioner] would not have pleaded guilty and would have insisted on going to trial. . . . An ineffective assistance of counsel claim will succeed only if both prongs [of *Strickland* as modified by *Hill*] are satisfied." (Citation omitted; internal quotation marks omitted.) *Bozelko* v. *Commissioner of Correction*, 162 Conn. App. 716, 722–23, 133 A.3d 185, cert. denied, 320 Conn. 926, 133 A.3d 458 (2016); see also *Carraway* v. *Commissioner of Correction*, 317 Conn. 594, 600 n.6, 119 A.3d 1153 (2015) (clarifying

that when *Hill*'s prejudice standard governs, petitioners bear burden of demonstrating that, but for counsel's ineffective performance, they would not have pleaded guilty and would have proceeded to trial).

The petitioner argues that Ignal rendered deficient performance by failing to adequately inform him of the inevitable deportation consequences of his guilty plea. Prior to *Padilla*, however, the overwhelming majority of state and federal courts to have considered whether the sixth amendment's guarantee of effective representation required attorneys to inform their clients of such consequences decided that such advice was not constitutionally guaranteed. See *Chaidez* v. *United States*, supra, 568 U.S. 350–51. It is a settled proposition that, prior to *Padilla*, appellate courts in Connecticut also had concluded that advice concerning collateral consequences such as deportation was not within the scope of the constitutional protection afforded by the sixth amendment. See *Thiersaint* v. *Commissioner of Correction*, 316 Conn. 89, 115–17, 111 A.3d 829 (2015), and cases cited therein. As our Supreme Court has explained, "even if professional norms [prior to *Padilla*] required that trial counsel inform a noncitizen criminal defendant of a plea's virtually mandatory deportation consequences, the rule announced in *Padilla* was a new rule under Connecticut law because more than one Connecticut court had noted . . . that such advice was not constitutionally required." Id., 116–17.

Because the petitioner cannot demonstrate that advice concerning deportation consequences was constitutionally required prior to *Padilla*, he has failed to sustain his burden of demonstrating that Ignal's representation was constitutionally deficient or that it rendered his plea unintelligent or involuntary in a constitutional sense. This conclusion is amply supported by this court's pre-*Padilla* jurisprudence. See, e.g., *Niver* v. *Commissioner of Correction*, 101 Conn.

App. 1, 4–5, 919 A.2d 1073 (2007) (impact of plea's immigration consequences on defendant is not direct impact of plea and is not of constitutional magnitude); *State* v. *Aquino*, 89 Conn. App. 395, 404–405, 873 A.2d 1075 (2005) (same), rev'd on other grounds, 279 Conn. 293, 901 A.2d 1194 (2006); *State* v. *Irala*, 68 Conn. App. 499, 520, 792 A.2d 109 (same),[7] cert. denied, 260 Conn. 923, 797 A.2d 519, cert. denied, 537 U.S. 887, 123 S. Ct. 132, 154 L. Ed. 2d 148 (2002).

The judgment is affirmed.

In this opinion the other judges concurred.

BANK OF AMERICA, N.A. *v.* ANDREW D. KYDES
(AC 39350)

Alvord, Sheldon and Bear, Js.

Syllabus

The plaintiff B Co. sought to foreclose a mortgage on certain real property owned by the defendant. After commencing this action, B Co. served the defendant with requests for admission, including that he admit that B Co. was the holder of the note when the action was commenced and that he had defaulted on his obligation to make payments under the note. In response, the defendant filed a motion for a protective order, asserting that the requests for admission were improper. The trial court sustained B Co.'s objection to the defendant's motion. More than six weeks after the expiration of the thirty day period within which the defendant was required to answer or object to the requests for admission pursuant to the applicable rule of practice (§ 13-23 [a]), the defendant denied the requests for admission without limitation or qualification. B Co. then filed a motion for summary judgment as to liability on the ground that the defendant, by failing to timely answer or object to its requests for admission, had admitted all matters as to which admissions had been requested, which included all facts necessary to establish both its standing to bring this action and its right to prevail against the defendant. Thereafter, B Co. assigned the subject mortgage to C Co.,

[7] To the extent that the petitioner interprets isolated statements in *Irala* to support his argument that advice concerning the collateral consequences of a guilty plea, such as immigration consequences, was constitutionally required prior to *Padilla*, we disagree with his interpretation of *Irala*.

which was substituted as the plaintiff, and the court granted the motion for summary judgment as to liability, finding that there was no genuine issue of material fact as to B Co.'s standing or the defendant's liability on the note. Subsequently, the court granted C Co.'s motion for a judgment of strict foreclosure and rendered judgment thereon, from which the defendant appealed to this court. *Held*:

1. The defendant's claim that the trial court improperly relied on his admissions, which he claimed resulted from a "procedural default," as a basis for finding that B Co. had standing to bring this action and for rendering summary judgment was unavailing; in light of this court's decision in *JPMorgan Chase Bank, N.A.* v. *Eldon* (144 Conn. App. 260), in which this court, on facts indistinguishable from the facts of the present case, affirmed a summary judgment rendered by the trial court on the basis of admissions resulting from a party's failure to respond in timely fashion to its opponent's requests for admission, there was no merit to the defendant's claim.
2. The defendant could not prevail on his claim that the trial court erred in failing to hold an evidentiary hearing on his challenge to B Co.'s standing to bring this action; the defendant never presented any evidence that might have called B Co.'s standing into question, and because B Co. alleged that it possessed the note at the time it commenced the action and the defendant failed to raise a genuine issue of fact as to whether B Co. was the holder of the note when it commenced this action, the trial court was not required to hold an evidentiary hearing on that issue.

Argued May 23—officially released July 17, 2018

Procedural History

Action to foreclose a mortgage on certain of the defendant's real property, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where Christiana Trust was substituted as the plaintiff; thereafter, the court, *Heller, J.*, granted the substitute plaintiff's motion for summary judgment as to liability; subsequently, the court, *A. William Mottolese*, judge trial referee, granted the substitute plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon, from which the defendant appealed to this court. *Affirmed.*

Hugh D. Hughes, for the appellant (defendant).

Jeffrey M. Knickerbocker, for the appellee (substitute plaintiff).

Opinion

SHELDON, J. The defendant, Andrew D. Kydes, appeals from the judgment of strict foreclosure rendered by the trial court in favor of the substitute plaintiff, Christiana Trust, a Division of Wilmington Savings Fund Society, FSB Not in Its Individual Capacity but as Trustee of ARLP Trust 5 (Christiana Trust).[1] On appeal, the defendant claims that the trial court erred: (1) in relying upon a "procedural default" to find that the named plaintiff, Bank of America, N.A. (Bank of America), had standing to bring the instant action, and thus that the court had subject matter jurisdiction over the action; and (2) in failing to hold an evidentiary hearing on his claim that Bank of America lacked standing to bring this action. We disagree, and thus affirm the judgment of the trial court.

The following procedural history is relevant to the defendant's claims on appeal. In 2012, Bank of America commenced this action against the defendant. On March 13, 2014, the defendant filed an answer and several special defenses, including the special defense alleging that Bank of America "has made false and fictitious claims without any supporting admissible evidence," and thus that it lacked standing to bring this action.

On March 13, 2015, the defendant filed a motion to dismiss this action on the ground, inter alia, that Bank of America lacked standing to bring it. On April 29, 2015, the court denied the motion to dismiss because the defendant failed to appear on the date the motion was scheduled for argument.[2]

[1] On June 15, 2015, the named plaintiff, Bank of America, N.A., assigned the subject note and mortgage to Christiana Trust. Consequently, on October 2, 2015, Christiana Trust was substituted as the plaintiff in place of the named plaintiff.

[2] The record indicates that the defendant filed two additional motions to dismiss on the ground that the court lacked subject matter jurisdiction, but it does not appear that the defendant ever pursued those motions.

On May 14, 2015, Bank of America served the defendant with requests for admission pursuant to Practice Book § 13-22, in which it asked the defendant to admit, inter alia, that Bank of America was the holder of the underlying promissory note when this action was commenced and that the defendant had defaulted on his obligation to make payments to it under the note. On June 4, 2015, the defendant, without answering or objecting to the requests for admission, filed a motion for a protective order, pursuant to Practice Book § 13-5, in which he asserted that the plaintiff's requests for admission, in their entirety, were "fraudulent" and "made in bad faith . . . as a perpetuation of systematic unfair and deceptive practices." He further asserted that the "requests for admission and its content is outside of the scope of allowable discovery, and seeks an admission of facts which are known by [the] plaintiff to be false." On June 5, 2015, Bank of America filed an objection to the defendant's motion for a protective order.

On June 19, 2015, the defendant filed a corrected motion for a protective order concerning several additional discovery requests that Bank of America had directed to him. On July 17, 2015, the court sustained Bank of America's objection to the defendant's original motion for a protective order and summarily denied his corrected motion for a protective order.

On July 29, 2015, Bank of America filed a "Notice of Intent to Rely on [the] Requests to Admit," in which it asserted that the defendant's failure to respond to its requests for admission had resulted in his admission of all matters as to which admissions had been requested pursuant to Practice Book § 13-23 (a).[3] On July 31, 2015,

[3] Practice Book § 13-23 (a) provides: "Each matter of which an admission is requested is admitted unless, within thirty days after the filing of the notice required by Section 13-22 (b), or within such shorter or longer time as the judicial authority may allow, the party to whom the request is directed files and serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney. Any such answer or objection shall be inserted directly on the original

more than six weeks after the thirty day period within which the defendant was required to answer or object to the requests for admission pursuant to Practice Book § 13-23 (a) had expired, the defendant finally responded to such requests for admission, denying them all without limitation or qualification.

On July 31, 2015, Bank of America filed a motion for summary judgment as to liability only. Bank of America reiterated, in support of that motion, that by failing to answer or object to its requests for admission in the time required by law, the defendant had admitted all matters as to which admissions had been requested, which included all facts necessary to establish both its standing to bring this action and its right to prevail against the defendant. The defendant filed an objection to Bank of America's motion for summary judgment, claiming, inter alia, that the underlying note was fraudulent, that Bank of America had not been the holder of

request. In the event that an answer or objection requires more space than that provided on a request for admission that was not served electronically and in a format that allows the recipient to electronically insert the answers in the transmitted document, it shall be continued on a separate sheet of paper which shall be attached to the response. Documents sought to be admitted by the request shall be filed with the response by the responding party only if they are the subject of an answer or objection. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his or her answer or deny only a part of the matter of which an admission is requested, such party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless such party states that he or she has made reasonable inquiry and that the information known or readily obtainable by him or her is insufficient to enable an admission or denial. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may deny the matter or set forth reasons why he or she cannot admit or deny it. The responding party shall attach a cover sheet to the response which shall comply with Sections 4-1 and 4-2 and shall specify those requests to which answers and objections are addressed."

the note prior to the commencement of this action, and thus that it lacked standing to pursue this foreclosure action. The defendant filed no affidavits or other evidence in support of his standing challenge.

On September 8, 2015, the court held a hearing on the motion for summary judgment and the defendant's objection thereto. At the hearing, Bank of America argued that the defendant's failure to timely answer or object to its requests for admission had resulted in his admission, inter alia, that when Bank of America commenced this action, it was the holder of the underlying note, and that the defendant had defaulted on his obligation to make payments to it under the note. Bank of America, through its counsel, also presented to the court the original note. The defendant sought to have the hearing on the motion for summary judgment continued and requested an evidentiary hearing thereon. In support of that request, the defendant argued that an evidentiary hearing was necessary so that he might submit "[t]wo certified sealed depositions from entities in this case, who are admitting that they did not sign documents in other cases." When asked about his failure to timely answer or object to the plaintiff's requests for admission, the defendant argued that he had not been properly served with those requests because they had been served upon his counsel electronically. The court responded by observing that the defendant had not filed any motion asserting that the plaintiff's requests for admission had not been properly served. Because, moreover, notwithstanding the defendant's eleventh hour claim that the requests for admission had not been properly served upon him, he had previously moved for a protective order with respect to such requests and later denied them, the court ruled that he had waived his claim of improper service. The court finally noted that the defendant had not filed any motion "asking the court to be relieved from the failure to

initially file responses to the request[s] for admission, [pursuant to Practice Book § 13-24 (a)][4] and the time has passed." (Footnote added.) The court thereafter informed the parties that it would consider the motions on the papers.

On September 18, 2015, Bank of America filed a motion to substitute Christiana Trust as the party plaintiff, claiming that it had assigned the underlying mortgage to it. On October 2, 2015, the trial court summarily granted the motion to substitute.[5]

On December 30, 2015, the court issued the following order: "Having heard the plaintiff's motion for summary judgment . . . the court finds that no genuine issue of material fact exists as to . . . (i) the plaintiff's standing to prosecute this foreclosure action and (ii) the liability of the defendant . . . on the note and mortgage. Accordingly, the plaintiff's motion for summary judgment as to liability only is hereby granted with respect to the defendant. A determination of the amount of

[4] Practice Book § 13-24 provides: "(a) Any matter admitted under this section is conclusively established unless the judicial authority on motion permits withdrawal or amendment of the admission. The judicial authority may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the judicial authority that withdrawal or amendment will prejudice such party in maintaining his or her action or defense on the merits. Any admission made by a party under this section is for the purpose of the pending action only and is not an admission by him or her for any other purpose nor may it be used against him or her in any other proceeding."

"(b) The admission of any matter under this section shall not be deemed to waive any objections to its competency or relevancy. An admission of the existence and due execution of a document, unless otherwise expressed, shall be deemed to include an admission of its delivery, and that it has not since been altered."

[5] On October 5, 2015, the defendant filed an objection to Bank of America's motion to substitute party plaintiff, wherein he reiterated his argument that Bank of America was not the holder of the note and thus that it lacked standing to assign it to "any other person." The record does not indicate that the defendant's objection was considered by the court.

indebtedness is deferred until such time as the plaintiff seeks a judgment of foreclosure. Practice Book §§ 17-44 through 17-51." On February 4, 2016, the defendant filed a motion to reargue, which the court denied on May 13, 2016, reasoning as follows: "The defendant . . . has failed to demonstrate a controlling decision or principle of law that has been overlooked, a misapprehension of facts, inconsistencies in the court's order . . . granting the plaintiff's motion for summary judgment as to liability on its complaint against the defendant . . . or claims of law that were not addressed; rather, the defendant improperly seeks to have a 'second bite of the apple' under the guise of a motion for reconsideration."

On March 24, 2016, Christiana Trust filed a motion for judgment of strict foreclosure. An evidentiary hearing on the motion was held on June 15, 2016. At that hearing, the defendant repeatedly attempted to reargue the motion for summary judgment, but not on the ground that Christiana Trust lacked standing. Instead, the defendant argued that Christiana Trust did not have a valid lien against him. The court repeatedly reminded the defendant at the hearing that his argument was improper because it had already ruled that Bank of America had standing to pursue its foreclosure claim against him and that he was liable to Christiana Trust on the underlying note. Later that same day, the court rendered a judgment of strict foreclosure, determined the amount of the debt and set the law day for July 19, 2016. This appeal followed.

On appeal, the defendant claims that the trial court erred in relying upon a "procedural default" as the basis for finding that Bank of America had standing to bring the instant action against him, and in failing to hold an evidentiary hearing on his challenge to Christiana Trust's standing.

"Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . [When] a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause. . . . We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . .

"Generally, in order to have standing to bring a foreclosure action the plaintiff must, at the time the action is commenced, be entitled to enforce the promissory note that is secured by the property. . . . The plaintiff's possession of a note endorsed in blank is prima facie evidence that it is a holder and is entitled to enforce the note, thereby conferring standing to commence a foreclosure action. . . . After the plaintiff has presented this prima facie evidence, the burden is on the defendant to impeach the validity of [the] evidence that [the plaintiff] possessed the note at the time that it commenced the . . . action or to rebut the presumption that [the plaintiff] owns the underlying debt. . . . The defendant [must] set up and prove the facts [that] limit or change the plaintiff's rights . . . ." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Cornelius*, 170 Conn. App. 104, 110–11, 154 A.3d 79, cert. denied, 325 Conn. 922, 159 A.3d 1171 (2017).

"If . . . the defendant submits either no proof to rebut the plaintiff's jurisdictional allegations . . . or only evidence that fails to call those allegations into question . . . the plaintiff need not supply counteraffidavits or other evidence to support the complaint, but may rest on the jurisdictional allegations therein." (Internal quotation marks omitted.) *Rocky Hill* v.

SecureCare Realty, LLC, 315 Conn. 265, 278, 105 A.3d 857 (2015).

Here, the defendant filed a motion for a protective order in response to Bank of America's requests for admission, arguing that they were all improper, but did not file a written answer or objection to those requests in accordance with § 13-23 (a). The defendant's failure to timely answer or object to the requests for admission pursuant to § 13-23 (a), and his subsequent failure to ask the court for permission to withdraw or amend those admissions pursuant to § 13-24 (a), resulted in his admission of all the matters as to which admissions were requested.

The defendant claims that the court erred in relying on his admissions, which he claims to have resulted from a "procedural default," as a basis for finding that Bank of America had standing to bring this action against him. The defendant's argument must be rejected, however, on the basis of this court's decision in *JPMorgan Chase Bank, N.A.* v. *Eldon*, 144 Conn. App. 260, 265, 73 A.3d 757, cert. denied, 310 Conn. 935, 79 A.3d 889 (2013). In that case, the plaintiff bank failed to timely respond to the defendant's requests for admission in accordance with the rules of practice. This court recited the ground asserted in the defendant's motion for summary judgment, that "due to the plaintiff's failure to respond to the request[s] for admission, the relevant admissions—that the plaintiff had no legal or equitable interest in the note and mortgage and that the note had been paid in full by a third party—were deemed admitted." Id., 265. On the basis of those admissions, the trial court rendered summary judgment in favor of the defendant, and this court affirmed that judgment. The facts of *JPMorgan Chase Bank, N.A.* are indistinguishable from the facts of this case, as both cases involved the rendering of summary judgment on the basis of party admissions resulting from a party's

failure to respond in timely fashion to its opponent's requests for admission. We therefore conclude that the defendant's claim that the court improperly relied on such admissions as a basis for rendering summary judgment in this case is without merit.

As for the defendant's claim that the trial court erred in failing to hold an evidentiary hearing on his oft-repeated challenge to Bank of America's standing to bring this action, that claim must be rejected for the simple reason that the defendant never presented any evidence that might have called Bank of America's standing into question. Because Bank of America duly alleged that it possessed the note at the time it commenced this action, it was entitled to rely upon that allegation unless the defendant presented facts to the contrary, which he did not. Because the defendant failed to raise a genuine issue of fact as to whether Bank of America was the holder of the note when it commenced this action, the trial court was not required to hold an evidentiary hearing on that issue. See *Equity One, Inc.* v. *Shivers*, 310 Conn. 119, 136, 74 A.3d 1225 (2013).

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

In this opinion the other judges concurred.

CHI HUM ET AL. *v.* MARK S. SILVESTER ET AL. (AC 39977)

Lavine, Alvord and Beach, Js.

Syllabus

The plaintiffs sought to enjoin the defendants, owners of real property abutting the plaintiffs' real property, from using a driveway that is located on the plaintiffs' property and that is the only means of access to both properties from a nearby road. The plaintiffs purchased their property in 2004. The defendants purchased their property in 2013 from the previous owner, D, who had built a house on that property in 1986 and

acquired a certificated of occupancy in 1987. Shortly after the defendants acquired their property from D, the plaintiff asked them to stop using the driveway and subsequently commenced this action. The trial court rendered judgment for the defendants, concluding that they established that they had acquired both a prescriptive easement and an implied easement over the driveway. Thereafter, the plaintiffs appealed to this court, claiming, inter alia, that the trial court incorrectly determined that the defendants were entitled to a prescriptive easement. *Held* that the trial court correctly determined on the basis of the evidence that the defendants had a prescriptive easement over the driveway, as there was ample evidence to support the court's finding that the defendants' and D's use of the driveway was open, visible, and continuous for more than fifteen years under a claim of right; the documentary and testimonial evidence established that D built a house on what is now the defendants' property in 1986 and owned the property until it was conveyed to the defendants in 2013, that the plaintiffs were aware in 2004 that D resided there, that the driveway was the only means of egress and ingress to the property, and that D used that driveway to access the property, and, because D was the defendants' predecessor in title, the defendants could utilize the doctrine of tacking to supplement their use of the driveway with that of D's use in order to satisfy the statutory period required for a prescriptive easement.

Argued April 19—officially released July 17, 2018

Procedural History

Action for a judgment determining the rights of the parties as to a claimed right-of-way on certain of the plaintiffs' real property, and for other relief, brought to the Superior Court in the judicial district of New London and tried to the court, *Hon. Robert C. Leuba*, judge trial referee; judgment for the defendants, from which the plaintiffs appealed to this court. *Affirmed.*

Lloyd L. Langhammer, with whom, on the brief, was *Shruthi Reddy*, for the appellants (plaintiffs).

F. Jerome O'Malley, for the appellees (defendants).

Opinion

LAVINE, J. This appeal centers on an easement for shared use of a driveway over a lot of land in Stonington providing access to an adjacent lot. The plaintiffs, Chi Hum and Mai Lee Yue Hum, owners of the burdened

lot, appeal from the judgment of the trial court, rendered after a trial to the court, in favor of the defendants, Mark S. Silvester and Nancy J. Hoerrner. On appeal, the plaintiffs claim that the trial court improperly found on the basis of the evidence that (1) the defendants were entitled to a prescriptive easement over the driveway, (2) the defendants were entitled to an implied easement over the driveway, and (3) granting an implied easement was legally consistent with the grant of a prescriptive easement. We affirm the judgment of the trial court.[1]

The court found the following uncontested facts. The plaintiffs acquired their lot, 62 Wilbur Road, in 2004. The defendants purchased the adjacent lot, 60 Wilbur Road, in 2013. The defendants' lot contains a house that was constructed in approximately 1986 by the previous owner. Both the plaintiffs' lot and the defendants' lot were once part of a larger parcel of land that was subdivided. Each lot is shaped like a "flag lot," which means that it is connected to Wilbur Road through contiguous strips of land. The sole means of accessing the parties' lots is the driveway located on the plaintiffs' strip of land, which both parties used. Although the defendants have a strip of land connecting their lot to Wilbur Road, it is inclined, laden with trees and boulders, and never was developed or cleared for use.

Not long after the defendants acquired their property, the plaintiffs asked them to stop using the driveway. The plaintiffs commenced the present action on August 19, 2015, seeking an injunction prohibiting the defendants from using the driveway and seeking damages for claimed harm to vegetation on their property. The court found that the defendants established that they

[1] Because we conclude that the court properly found that the defendants were entitled to a prescriptive easement over the driveway, we need not address the plaintiffs' remaining claims.

had acquired both a prescriptive easement and an implied easement over the driveway.

Regarding the prescriptive easement, the court found that "the defendants and their predecessors in title have used the gravel driveway to access their lot since the property was developed in 1986. It is reasonable and logical to infer that since there has been no other usable access to the defendants' lot, the owner of that lot used the gravel driveway in a manner which was open, visible, continuous and uninterrupted for more than [fifteen] years and made under a claim of right."

The plaintiffs claim that the court improperly found that the defendants were entitled to a prescriptive easement. Specifically, the plaintiffs argue that there was insufficient evidence of prior use of the driveway by the defendants' predecessor in title to establish open, visible, continuous and uninterrupted use for the court to utilize the doctrine of tacking.[2] According to the plaintiffs, it was not proven that the defendants' predecessor in title resided on the property, how the predecessor used the driveway, and how the predecessor accessed the property during the construction. We are unpersuaded.

"[General Statutes §] 47-37 provides for the acquisition of an easement by adverse use, or prescription. That section provides: No person may acquire a right-of-way or any other easement from, in, upon or over the land of another, by the adverse use or enjoyment thereof, unless the use has been continued uninterrupted for fifteen years. . . . [A] party claiming to have

[2] The doctrine of tacking allows a party to supplement its use of land with the use of a predecessor in interest in order to meet a statutory period, as long as there is privity of estate. See, e.g., *Murphy* v. *EAPWJP, LLC*, 306 Conn. 391, 393 n.4, 50 A.3d 316 (2012). As the defendants acquired the property in 2013, the establishment of a prescriptive easement relied on the tacking of the use by the defendants' immediate predecessor in title.

acquired an easement by prescription must demonstrate that the use [of the property] has been open, visible, continuous and uninterrupted for fifteen years and made under a claim of right. . . . The purpose of the open and visible requirement is to give the owner of the servient land knowledge and full opportunity to assert his own rights. . . . To satisfy this requirement, the adverse use must be made in such a way that a reasonably diligent owner would learn of its existence, nature, and extent. . . . An openly visible and apparent use satisfies the requirement even if the neighbors have no actual knowledge of it. A use that is not open but is so widely known in the community that the owner should be aware of it also satisfies the requirement." (Citations omitted; internal quotation marks omitted.) *Slack* v. *Greene*, 294 Conn. 418, 427, 984 A.2d 734 (2009).

It is well established that "[u]nder Connecticut law, a party claiming a prescriptive easement may tack on the statutory period of predecessors in interest when there is privity of estate." *Murphy* v. *EAPWJP, LLC*, 306 Conn. 391, 393 n.4, 50 A.3d 316 (2012). Parties can therefore support their claim of a prescriptive easement, and meet the fifteen year requirement, through use of the driveway by their predecessor in title that was open, visible, and continuous under a claim of right.[3] See id.; see also *Caminis* v. *Troy*, 300 Conn. 297, 310 n.14, 12 A.3d 984 (2011).

"Whether a right of way by prescription has been acquired presents primarily a question of fact for the trier after the nature and character of the use and the surrounding circumstances have been considered. . . . When the factual basis of a trial court's decision [regarding the existence of a prescriptive easement] is challenged, our function is to determine whether, in light

[3] On appeal, the plaintiffs do not challenge the trial court's finding regarding the defendants' and their predecessor's use "under a claim of right."

of the pleadings and evidence in the whole record, these findings of fact are clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling." (Citation omitted; internal quotation marks omitted.) *Slack* v. *Greene*, supra, 294 Conn. 426–27.

"[A] finding is not clearly erroneous merely because it relies on circumstantial evidence. . . . [T]riers of fact must often rely on circumstantial evidence and draw inferences from it. . . . Proof of a material fact by inference need not be so conclusive as to exclude every other hypothesis. It is sufficient if the evidence produces in the mind of the trier a reasonable belief in the probability of the existence of the material fact. . . . In short, the court, as fact finder, may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Citation omitted; internal quotation marks omitted.) *Lyme Land Conservation Trust, Inc.* v. *Platner*, 325 Conn. 737, 755–56, 159 A.3d 666 (2017).

On the basis of our review of the record, we conclude that there is ample evidence to support the court's finding that the defendants and their predecessor used the driveway in a manner that was open, visible, and continuous for more than fifteen years under a claim of right. Documentary and testimonial evidence shows that the defendants' predecessor in title acquired the lot in 1985, obtained a building permit in 1986, built a house on the lot, and acquired a certificate of occupancy in 1987. It is undisputed that the predecessor in title owned the lot until 2013, when the defendants purchased the property. Chi Hum testified that the plaintiffs were aware, in 2004,

that the defendants' predecessor in title resided in the house on the adjacent lot, that the driveway was the only means of egress and ingress to the lot, and that the driveway was being used to access it.[4] It was, therefore, reasonable for the court, in its fact finding role, to draw the inference that the defendants' predecessor in title made open, visible, and continuous use of the driveway—the only means of ingress and egress to the lot during the construction and subsequent use of the house—up until the defendants purchased the lot, a time period exceeding fifteen years. We conclude, therefore, that the court's finding that the use of the driveway by the defendants' predecessor in title was open, visible, and continuous for more than fifteen years under a claim of right was not clearly erroneous. Thus, the court properly found on the basis of the evidence that the defendants had a prescriptive easement.

The judgment is affirmed.

In this opinion the other judges concurred.

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[4] The defendants' attorney cross-examined Chi Hum as follows:

"Q. Were you aware that Mr. Dokladal [the defendants' predecessor in title] was your neighbor residing at 60 Wilbur Road when you moved in in 2004?

"A. Yes.

"Q. Okay. Now you never objected to Mr. Dokladal's use of the gravel driveway, correct?

"A. Correct.

"Q. And you never claimed that he was trespassing on your property by using the driveway.

"A. Correct.

* * *

"Q. Mr. Hum, was the only way Mr. Dokladal could drive to and from his house at 60 Wilbur Road via the gravel driveway that's in dispute here today?

"A. As far as I know, yes."