ANNA IZABELA PALOSZ, COADMINISTRATOR (ESTATE OF BARTLOMIEJ F. PALOSZ), ET AL. *v.* TOWN OF GREENWICH ET AL. (AC 40315)

Bright, Moll and Sullivan, Js.

Syllabus

The plaintiffs, coadministrators of the estate of the decedent, sought to recover damages from the defendants, the town of Greenwich and its board of education, for the wrongful death of the decedent, who committed suicide after being subjected to severe and continual bullying from his classmates while he was enrolled in the town's public school system. During that time, the board was mandated by statute ([Rev. to 2011] § 10-222d [as amended by Public Acts 2011, No. 11-232, § 1]) to develop and implement a policy to address the issue of bullying in the public school system. In compliance with the statute, the board adopted a policy that, inter alia, required the board to appoint administrators and specialists, who were responsible for the development and implementation of the policy, and provided detailed procedures for employees and specialists to follow if they had knowledge of a bullying incident or if a bullying incident had been reported. In their complaint, the plaintiffs alleged that, despite being aware that the decedent was being subjected to unremitting bullying, the board's administrators, supervisory personnel and other school employees failed to comply with the mandatory provisions of the policy in numerous ways, that, in failing to do so, they engaged in gross, reckless, wilful and wanton misconduct, which was a substantial factor in causing the decedent's suicide, and that the board was liable for the decedent's wrongful death and related damages. The board filed a motion to strike the complaint on the ground that it was entitled to sovereign immunity because it was acting as an agent of the state when it allegedly failed to carry out its state mandated duties under § 10-222d. The trial court denied the motion strike concluding, inter alia, that the board was not entitled to sovereign immunity because it was acting on behalf of the town, not the state, when it allegedly failed to comply with the policy. On the board's appeal to this court, *held* that the board could not prevail on its claim that the trial court improperly concluded that it was not entitled to sovereign immunity from the plaintiffs' wrongful death claim; the board was acting as an agent of the town, not the state, when its employees allegedly failed to comply with the terms of the policy that it had adopted in accordance with § 10-222d, as the state action mandated by that statute begins and ends with the development, implementation, submission and assessment of the policy, and the claim that the board was entitled to sovereign immunity was untenable in light of the qualified immunity specifically

provided to a local board of education pursuant to a related statute (§ 10-222*l*) for actions taken by the board in connection with a policy developed and implemented pursuant to § 10-222d, as that qualified statutory immunity is irreconcilable with the complete protection from suit afforded by sovereign immunity, and there would have been no need for the legislature to create limited statutory immunity for local boards of education of those boards already were protected by sovereign immunity.

Argued May 25—officially released August 14, 2018

Procedural History

Action to recover damages for the wrongful death of the plaintiffs' decedent as a result of, inter alia, the defendants' alleged gross misconduct, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Jacobs*, *J.*, denied the defendants' motion to strike, and the defendant Board of Education of the Town of Greenwich appealed to this court. *Affirmed.*

Brett R. Leland, pro hac vice, with whom were *Harold J. Friedman*, pro hac vice, and *Fernando F. De Arango*, for the appellant (defendant Board of Education of the Town of Greenwich).

David S. Golub, with whom were *Jennifer Goldstein* and, on the brief, *Jonathan M. Levine*, for the appellees (plaintiffs).

Opinion

BRIGHT, J. In this wrongful death action, the defendant, Board of Education of the Town of Greenwich,[1] appeals from the judgment of the trial court denying its motion to strike[2] the first count of the operative

[1] The town of Greenwich is also a defendant in this action, but it is not a party to this appeal. Accordingly, we refer to the Board of Education of the Town of Greenwich as the defendant.

[2] Although the denial of a motion to strike is interlocutory and, thus, generally not a final judgment for purposes of appeal; *White* v. *White*, 42 Conn. App. 747, 749, 680 A.2d 1368 (1996); the denial of a motion filed on the basis of a colorable claim of sovereign immunity is an immediately appealable final judgment. *Shay* v. *Rossi*, 253 Conn. 134, 167, 749 A.2d 1147 (2000), overruled in part on other grounds by *Miller* v. *Egan*, 265 Conn.

complaint filed by the plaintiffs, Anna Izabela Palosz and Franciszek Palosz, coadministrators of the estate of Bartlomiej F. Palosz (decedent), which stems from the decedent's tragic suicide. On appeal, the defendant claims that the court improperly concluded, as a matter of law, that it is not entitled to sovereign immunity from the plaintiffs' wrongful death claim, in which the plaintiffs allege, in part, that the defendant's employees failed to comply with the antibullying policy that the defendant developed and implemented pursuant to General Statutes (Rev. to 2011) § 10-222d, as amended by Public Acts 2011, No. 11-232, § 1.[3] We affirm the judgment of the trial court.

In count one of the operative amended complaint[4] (complaint), the plaintiffs allege the following relevant facts. The defendant serves as the agent of the town of Greenwich to maintain control of all of the public schools in Greenwich, which include Western Middle School and Greenwich High School. On August 27, 2013, after being subjected to unremitting bullying for several

301, 828 A.2d 549 (2003). On June 23, 2017, the plaintiffs filed a motion to dismiss this appeal on the ground that there is no "colorable basis" for the defendant's sovereign immunity claim, which was denied by this court on September 7, 2017.

[3] General Statutes (Rev. to 2011) § 10-222d (b), as amended by Public Acts 2011, No. 11-232, § 1, provided in relevant part: "Each local and regional board of education shall develop and implement a safe school climate plan to address the existence of bullying in its schools. . . ." The alleged tortious conduct of the defendant's employees began prior to 2011, and continued after 2011, and the plaintiffs' claims do not involve the specific requirements of that statute. Accordingly, all references to § 10-222d in this opinion are to the 2011 revision, as amended by No. 11-232 of the 2011 Public Acts.

[4] The plaintiffs filed their original complaint on August 17, 2015. On May 6, 2016, the plaintiffs filed an amended complaint in two counts, both of which sound in wrongful death. Count one is addressed to the defendant; count two is addressed to the town of Greenwich. On May 25, 2016, the plaintiffs filed an amendment to the amended complaint, which revised two paragraphs in each count. Accordingly, the operative complaint is the May 6, 2016 amended complaint, as partially revised by the May 25, 2016 amendment.

years in the Greenwich public school system, the decedent died by suicide on the first day of his sophomore year at Greenwich High School. At the time of his death, the decedent was fifteen years old and had been a student enrolled in the Greenwich public school system for seven years.

Throughout those years, the defendant was mandated by § 10-222d to develop and implement a safe school climate plan to address the existence of bullying in the Greenwich public school system. In compliance with this statutory mandate, the defendant adopted the "Whole Student Development Policy" (policy) in April, 2009, which later was strengthened in July, 2012. The policy requires that the defendant appoint administrators and specialists who are responsible for the development and implementation of the policy. The policy further mandates an employee who has knowledge of a bullying incident to notify, by an oral report, the specialist or another school administrator within one school day and to file a written report not later than two school days after such verbal notification. Upon receipt of a report, the policy requires the specialist to investigate, or to supervise the investigation of, the bullying incident. If the acts of bullying are verified, the policy requires the specialist or designee to develop a student safety plan to protect against further bullying, to notify the parents of the students involved not later than forty-eight hours following the completion of the investigation, and to invite the parents to a meeting to discuss the measures being taken to intervene. If there are repeated instances of bullying against a single individual, the policy requires the development of a specific written intervention plan. Moreover, the policy mandates that any students who engage in bullying behavior be subject to school discipline. In addition to the written policy provisions, the defendant has oral policies and

procedures that require school employees to intervene to protect students from being bullied repeatedly.

During the time in which the policy was effective, the decedent was subjected to severe and continual verbal and physical bullying by his fellow classmates. Greenwich school employees, including supervisory employees, were "long aware" that the decedent was being subjected to such bullying. Despite being aware of said bullying, the defendant's administrators, and supervisory personnel, and other school employees[5] did not comply with the mandatory provisions of the policy in that they failed to: report the repeated instances of bullying to the specialist or other school administrator orally and/or in writing within the required timeframes; investigate the repeated incidents of bullying; notify the parents of the findings of any such investigation; meet with the parents to communicate appropriate remedial measures being taken by the school to ensure the decedent's safety and to prevent further acts of bullying; develop a student safety support plan in response to all verified acts of bullying with safety measures to protect against further acts of bullying; develop a specific written intervention plan to address the repeated instances of bullying; direct appropriate discipline to the student or students who bullied the decedent; and properly oversee and implement the provisions of the policies and procedures.

The plaintiffs further allege that the defendant and its administrators, supervisory personnel, and other school employees, in failing to comply with the policy requirements, engaged in "gross, reckless, wilful or wanton misconduct," which was a substantial factor in causing the decedent's death by suicide. On the basis of the

[5] Although they do not utilize the talismanic phrasing, the plaintiffs' allegations are framed in vicarious liability against the defendant for the actions of its employees.

foregoing, the plaintiffs allege that the defendant is liable, pursuant to General Statutes § 52-557n,[6] for the wrongful death of the decedent and for the related damages caused by the defendant and its administrators, supervisory personnel, and other school employees.

On July 6, 2016, the defendant filed a motion to strike the complaint.[7] The defendant argued, in relevant part, that it is entitled to sovereign immunity because it was acting as an agent of the state when it allegedly "failed to carry out its state mandated duties under the antibullying statute . . . § 10-222d et seq." Following a hearing, the court issued a memorandum of decision, dated March 21, 2017, denying the defendant's motion to strike. The court held that the defendant is not entitled to sovereign immunity because it was acting on behalf of the municipality, as opposed to the state, when it failed to comply with the policy. The court also held that there is no sovereign immunity protection for the defendant and its employees when their actions or omissions constitute gross, reckless, wilful, or wanton misconduct because the qualified immunity provided to them by General Statutes § 10-222*l*[8] specifically limits

[6] General Statutes § 52-557n (a) (1) provides in relevant part: "Except as otherwise provided by law, a political subdivision of the state shall be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties . . . ."

[7] The defendant and the town of Greenwich filed a joint motion to strike on four grounds. In the first ground, which is at issue in the present appeal, the defendant argued that it is entitled to sovereign immunity. The second, third, and fourth grounds, which contested the legal sufficiency of the complaint based upon §§ 52-557 and 10-222d, are not at issue on appeal.

[8] Even though it is ultimately immaterial, the court relied upon § 10-222*l* (a), instead of § 10-222*l* (c). The import of both subsections is congruent, however; subsection (a) applies to claims made against school employees, and subsection (c) applies to claims made against a board of education. In light of the fact that this action is brought against a board of education, we rely on § 10-222*l* (c), which provides in relevant part: "No claim for damages shall be made against a local or regional board of education that implements the safe school climate plan, described in Section 10-222d, and reports,

sovereign immunity in that regard. This appeal followed.

We begin by setting forth the standard of review and legal principles that govern our resolution of this appeal. Notwithstanding the fact that the issue of sovereign immunity was presented to the court by way of a motion to strike, as opposed to a motion to dismiss,[9] "[s]overeign immunity relates to a court's subject matter jurisdiction over a case, and therefore presents a question of law over which we exercise de novo review. . . . In so doing, we must decide whether [the court's] conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Columbia Air Services, Inc.* v. *Dept. of Transportation*, 293 Conn. 342, 349, 977 A.2d 636 (2009).

In Connecticut, "[w]e have long recognized the common-law principle that the state cannot be sued without its consent. . . . The doctrine of sovereign immunity protects the state, not only from ultimate liability for alleged wrongs, but also from being required to litigate whether it is so liable." (Internal quotation marks omitted.) *Henderson* v. *State*, 151 Conn. App. 246, 256, 95 A.3d 1 (2014). "The protection afforded by this doctrine has been extended to agents of the state acting in its behalf. . . . Town boards of education, although they are agents of the state responsible for education in the towns, are also agents of the towns and subject to

investigates and responds to bullying . . . if such local or regional board of education was acting in good faith in the discharge of its duties. The immunity provided in this subsection does not apply to acts or omissions constituting gross, reckless, wilful or wanton misconduct."

[9] See *Bruno* v. *Travelers Cos.*, 172 Conn. App. 717, 723 n.6, 161 A.3d 630 (2017) (explaining distinction between motion to strike and motion to dismiss); see also *Lane* v. *Cashman*, 179 Conn. App. 394, 423, 180 A.3d 13 (2018) (when issue raised by motion to strike concerns trial court's subject matter jurisdiction, we view and review court's ruling on motion as one made in connection with motion to dismiss).

the laws governing municipalities." (Citations omitted.) *Cahill* v. *Board of Education*, 187 Conn. 94, 101, 444 A.2d 907 (1982). "[O]ur jurisprudence has created a dichotomy in which local boards of education are agents of the state for some purposes and agents of the municipality for others. . . . To determine whether the doctrine of sovereign immunity applies to a local school board, we look to whether the action would operate to control or interfere with the activities of the state . . . ." (Citation omitted; internal quotation marks omitted.) *Purzycki* v. *Fairfield*, 244 Conn. 101, 112, 708 A.2d 937 (1998), overruled on other grounds by *Haynes* v. *Middletown*, 314 Conn. 303, 323, 101 A.3d 249 (2014); see also *Cahill* v. *Board of Education*, supra, 101–102 (local school board not entitled to sovereign immunity from claim of breach of employment contract because such action would not operate to control state's activities or subject it to liability).

Consistent with the foregoing, our Supreme Court specifically has held that "[a] local board of education acts as an agent of the *state* when it performs those duties delegated to it by the state. . . . A board of education acts as an agent of its respective *municipality* when it performs those functions originally entrusted by the state to the municipality that the municipality has subsequently delegated to the board of education . . . ." (Citations omitted; emphasis added; internal quotation marks omitted.) *Board of Education* v. *New Haven*, 237 Conn. 169, 181, 676 A.2d 375 (1996). For example, a local board of education acts as an agent of the state when it furnishes an education for the public pursuant to General Statutes § 10-220. See *Cheshire* v. *McKenney*, 182 Conn. 253, 257–58, 438 A.2d 88 (1980). Conversely, a local board of education acts as an agent of the municipality when it maintains control over the public schools within the municipality's limits pursuant to General Statutes § 10-240. Id., 258; see *Purzycki* v.

Fairfield, supra, 244 Conn. 103–105, 112 (local board of education not entitled to sovereign immunity from claim that child tripped in hallway notwithstanding existence of related "policies, rules and regulations promulgated by school officials" because "duty to supervise students is performed for the benefit of the municipality").

On appeal, the defendant maintains that § 10-222d deputizes local boards of education as agents of the state to carry out and effect the state's public policy, imposes specific duties upon the local boards of education, and subjects them to ongoing state oversight and control. Thus, the defendant argues that it was acting as an agent of the state when it failed to comply with the policy adopted pursuant to § 10-222d.[10] The defendant also contends that the qualified statutory immunity

[10] The decisions of the Superior Court are split as to whether a local board of education is entitled to sovereign immunity when it acts, or fails to act, in connection with the prevention of bullying in public schools. The defendant relies upon the following cases to support its position that it is entitled to sovereign immunity: *Wells* v. *Stoval*, Superior Court, judicial district of New Haven, Docket No. CV-10-5032978-S (June 25, 2013) (sovereign immunity protects local board of education for its failure to notify parents of bullied student, pursuant to § 10-222d, because that statute imposes state mandated activities); *Roach* v. *First Student Transportation, LLC*, Superior Court, judicial district of New Haven, Docket No. CV-10-6007924-S (August 18, 2010) (50 Conn. L. Rptr. 517) (in determining whether § 10-222d imposes duty of care upon school bus operator, court held that local board of education acts as agent of state when *creating* antibullying policy pursuant to § 10-222d and that "legislative intent was . . . not to impose punishment on the board, or its agents, for the violation of that policy"); *Antalik* v. *Board of Education*, Superior Court, judicial district of Litchfield, Docket No. CV-07-5001762-S (August 13, 2008) (46 Conn. L. Rptr. 179) (sovereign immunity protects local board of education because it was acting pursuant to state mandated activity when it failed to implement and follow antibullying policy adopted pursuant to § 10-222d); *Santoro* v. *Hamden*, Superior Court, judicial district of New Haven, Docket No. CV-04-0488583-S (August 18, 2006) (sovereign immunity protects local board of education because it acted as an agent of state when it failed to provide "equal educational opportunities" through its failure to prevent bullying in public schools, and § 10-222d does not waive sovereign immunity or create private cause of action).

specifically provided by § 10-222*l* does not waive sovereign immunity.[11] We are not persuaded.

Section 10-222d (b) provides in relevant part: "Each local and regional board of education shall develop and implement a safe school climate plan to address the existence of bullying in its schools. . . ." Subsection (b) mandates that each plan "shall" contain certain particularized requirements, each of which is designated in subdivisions (1) through (17). These requirements, generally, enable the reporting of instances of

Conversely, the plaintiffs rely upon the following cases to bolster their argument that the defendant is not entitled to sovereign immunity: *Lopez* v. *Bridgeport*, Superior Court, judicial district of Fairfield, Docket No. CV-15-6051932-S (June 27, 2016) (62 Conn. L. Rptr. 593) (sovereign immunity does not protect local board of education because it acts on behalf of municipality when it provides a "safe school setting" pursuant to § 10-220); *Rajeh* v. *Board of Education*, Superior Court, judicial district of New Haven, Docket No. CV-14-6049904-S (June 7, 2016) (62 Conn. L. Rptr. 512) (sovereign immunity does not protect local board of education because it acts as agent of the municipality, not the state, when it fails to prevent bullying); *Hernandez* v. *Board of Education*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-09-5010484-S (June 7, 2013) (56 Conn. L. Rptr. 311) (sovereign immunity does not protect local board of education for its failure to comply with antibullying policy because § 10-222d does not control or interfere with state and "[m]aintaining a safe school is done for the benefit of the municipality, not the state"); *Straiton* v. *Board of Education*, Superior Court, judicial district of Danbury, Docket No. CV-10-6003255-S (March 13, 2012) (sovereign immunity does not protect local board of education for its failure to prevent bullying because it acts as agent of municipality when it supervises and maintains control of premises for protection of students); *Esposito* v. *Bethany*, Superior Court, judicial district of New Haven, Docket No. CV-06-5002923-S (February 14, 2007) (43 Conn. L. Rptr. 7) (sovereign immunity does not protect local board of education for its failure to prevent bullying because duty to supervise students is performed for benefit of municipality).

[11] The defendant contends that the qualified statutory immunity provided by § 10-222*l* does not waive sovereign immunity. The defendant's argument misconstrues the plaintiffs' reliance on § 10-222*l*. The plaintiffs do not claim that § 10-222*l* waives sovereign immunity; instead, they argue that the existence of the limited statutory immunity in § 10-222*l* confirms that there is no sovereign immunity for the failure to execute properly or to comply with a plan developed and implemented pursuant to § 10-222d. For the reasons discussed later in this opinion, we agree with the plaintiffs.

bullying, mandate school officials to forward and investigate these reports to a specialist, who would then notify the parents of the students, and direct the adoption of a comprehensive prevention and intervention strategy. Section 10-222d (c) provides in relevant part: "[E]ach local and regional board of education shall approve the safe school climate plan developed pursuant to this section and submit such plan to the Department of Education . . . ." Section 10-222d (d) compels each board of education to require each school in the district to complete and submit an assessment of its policy to the Department of Education pursuant to General Statutes § 10-222h.

The plaintiffs do not dispute that a local board of education acts as an agent of the state when it develops and implements a policy, submits the policy to the Department of Education, or mandates that each school submit an assessment to the Department of Education, pursuant to the requirements of § 10-222d. The plaintiffs do not claim that the defendant failed to comply with any of these requirements. In fact, the plaintiffs specifically allege that the defendant complied with the development and implementation mandates of § 10-222d.[12] Instead, the gravamen of the plaintiffs' complaint is their allegation that the wrongful death of the decedent was caused by the defendant because its employees failed to comply with *the terms of the policy* that it had developed and implemented pursuant to § 10-222d. The narrow issue presented, therefore, is whether the defendant was acting as an agent of the state when its employees allegedly failed to comply with the terms of the

[12] To the extent that the defendant endeavors to characterize the plaintiffs' allegations as claiming that it directly violated the provisions of § 10-222d, we disagree. Construing the plaintiff's complaint broadly and realistically, as we must; see *Byrne* v. *Avery Center for Obstetrics & Gynecology, P.C.*, 314 Conn. 433, 462, 102 A.3d 32 (2014); their complaint clearly alleges a violation of the policy, not the statute.

policy that the defendant adopted in accordance with § 10-222d. We conclude that it was not.

The state action mandated by § 10-222d begins and ends with the development, implementation, submission, and assessment of the policy. Holding the defendant liable for its employees' alleged tortious conduct in failing to execute properly the terms of the policy it developed and implemented, however, does not operate to control or interfere with the activities of the state. Rather, the defendant acts as an agent of the municipality when it enforces and complies with the policy pursuant to its general powers of control over public schools, which is explicitly delegated to a local board of education through the municipality pursuant to § 10-240. Section 10-240 provides: "Each town shall through its board of education maintain the control of all the public schools within its limits and for this purpose shall be a school district and shall have all the powers and duties of school districts, except so far as such powers and duties are inconsistent with the provisions of this chapter." It is pursuant to this broad mandate of control, and not through § 10-222d, that a board of education polices the behavior of its students and, accordingly, enforces and complies with the policy. When the delegations of §§ 10-222d and 10-240 are read together, it becomes apparent that the mandate of § 10-222d does not go so far as to encroach upon the general powers of control delegated to the towns by § 10-240. Therefore, we conclude that the defendant was acting as an agent of the municipality, and not the state, when its employees allegedly failed to comply with the policy it had adopted.

Additionally, the defendant's position that it is entitled to sovereign immunity is undercut by the qualified statutory immunity specifically provided by § 10-222*l*

to a local board of education for actions taken in connection with a policy developed and implemented pursuant to § 10-222d. In particular, § 10-222*l* (c) provides in relevant part: "No claim for damages shall be made against a local or regional board of education that implements the safe school climate plan, described in Section 10-222d, and reports, investigates and responds to bullying . . . if such local or regional board of education was acting in good faith in the discharge of its duties. The immunity provided in this subsection does not apply to acts or omissions constituting gross, reckless, wilful or wanton misconduct." Section 10-222*l* was adopted in 2011, nine years after § 10-222d was first enacted.

The qualified statutory immunity provided by § 10-222*l* is irreconcilable with the complete protection from suit afforded by the doctrine of sovereign immunity and contradictory to the presumption of legislative uniformity. As outlined previously in this opinion, "[t]he doctrine of sovereign immunity protects the state, not only from ultimate liability for alleged wrongs, but also from being required to litigate whether it is so liable." (Internal quotation marks omitted.) *Henderson* v. *State*, supra, 151 Conn. App. 256. Moreover, "[i]t is axiomatic that the legislature is presumed to be aware of the common law when it enacts statutes. . . . [T]he legislature is always presumed to have created a harmonious and consistent body of law . . . [and] to be aware of prior judicial decisions involving common-law rules . . . ." (Citation omitted; internal quotation marks omitted.) *Pacific Ins. Co., Ltd.* v. *Champion Steel, LLC*, 323 Conn. 254, 265, 146 A.3d 975 (2016). "Furthermore, [w]e presume that laws are enacted in view of existing statutes . . . ." (Internal quotation marks omitted.) *Southington* v. *Commercial Union Ins. Co.*, 254 Conn. 348, 357, 757 A.2d 549 (2000). Accordingly, we presume

that the legislature enacted § 10-222*l* with the knowledge of the long-standing doctrine of sovereign immunity and of § 10-222d.

On the basis of the foregoing, we conclude that there would have been no need for the legislature to create a limited statutory immunity for local boards of education if those boards already were protected by sovereign immunity. This is particularly true given that § 10-222*l* was adopted in 2011, nine years after § 10-222d was first enacted, and after a number of conflicting decisions had been rendered in the Superior Court.[13] Had the legislature agreed with those cases that held that sovereign immunity barred claims like the one presented in this case, § 10-222*l* would have been unnecessary. It makes more sense that the legislature concluded instead that § 10-222*l* was necessary because local boards of education are not protected by sovereign immunity when their employees fail to comply with an antibullying policy.

Put another way, if, as the defendant contends, a board of education has sovereign immunity from suit predicated on its noncompliance with the policy mandated to be adopted by § 10-222d, then the provision of qualified statutory immunity, by virtue of § 10-222*l*, for the same noncompliance, would be superfluous. Likewise, it would be illogical to conclude that a board of education is entitled to sovereign immunity from the claims posited in the present case when § 10-222*l* makes it clear that a board of education may be subject to tortious liability in certain prescribed circumstances. Consequently, the defendant's claim that it is entitled to

[13] With one exception, all of the Superior Court decisions relied on by the defendant were decided prior to the enactment of § 10-222*l*; see footnote 10 of this opinion; the only decision cited by the defendant that was decided after 2011; *Wells* v. *Stoval*, supra, Superior Court, Docket No. CV-10-5032978-S; makes no mention of § 10-222*l*.

sovereign immunity is untenable in light of the qualified statutory immunity provided by § 10-222*l*.[14]

In sum, we conclude that the defendant is not entitled to sovereign immunity from the plaintiffs' wrongful death claim, in which the plaintiffs allege, in part, that the defendant's employees failed to comply with the antibullying policy. Accordingly, the court properly denied the defendant's motion to strike the plaintiffs' complaint.

The judgment is affirmed.

In this opinion the other judges concurred.

ROBERT E. THOMPSON *v.* COMMISSIONER OF CORRECTION
(AC 39945)

Prescott, Elgo and Blawie, Js.

Syllabus

The petitioner, who had been convicted of kidnapping in the first degree, sexual assault in the first degree, assault in the third degree and threatening in the second degree, sought a writ of habeas corpus, claiming that his trial counsel provided ineffective assistance when he failed to seek a mistrial or any curative measures following certain prejudicial testimony from the complainant. During direct examination of the complainant, she testified that the petitioner told her he had done this before. Simultaneously, the petitioner's counsel objected before the she could utter the entire statement. The trial court sustained trial counsel's objection and found that the prejudicial impact of the statement outweighed its probative value. The court further determined that the jury did not hear the prejudicial testimony. The habeas court rendered judgment denying the

[14] The defendant attempts to reconcile the language of § 10-222*l* with its claim of sovereign immunity by arguing that § 10-222*l* is intended to limit what claims a plaintiff can pursue if the Claims Commissioner waives sovereign immunity. Of course, that is not what the statute says. In fact, the statute makes no reference to the Claims Commissioner at all. We will not torture the plain wording of a statute to impart a meaning not expressed by its unambiguous language. See *State* v. *Smith*, 148 Conn. App. 684, 700–701, 86 A.3d 498 (2014), aff'd, 317 Conn. 338, 118 A.3d 49 (2015).

habeas petition, from which the petitioner, on the granting of certification, appealed to this court. *Held* that the habeas court properly determined that the petitioner failed to prove, by a preponderance of the evidence, that his trial counsel rendered deficient performance by not moving for a mistrial or requesting a curative instruction: the trial court was uniquely qualified to make the determination that the jury did not hear the testimony, and in light of that determination, trial counsel's evaluation of the attendant circumstances in not seeking any additional remedies during the trial was entirely reasonable, and this court's conclusion that trial counsel's acquiescence waived the petitioner's claim that he was deprived of his right to a fair trial as a result of the jury's potential exposure to the prejudicial testimony did not equate to a determination that counsel rendered ineffective assistance in his handling of the issue; moreover, the petitioner's claim that the jury heard the prejudicial testimony because it was reflected in the trial transcript was unpersuasive, as the ability of the recording equipment to pick up testimony had no bearing on the assessment of whether the jury heard the testimony, and the petitioner did not present any evidence to establish that the jury, in real time, was able to isolate the complainant's testimony from trial counsel's simultaneous objection, or suggesting that this court should have second-guessed the trial court's very confident finding that the jury did not hear the testimony; furthermore, because trial counsel was never questioned during the habeas trial as to why he did not move for a mistrial or seek a curative measure, the petitioner failed to present any evidence beyond speculation or conjecture to rebut the presumption that trial counsel's performance fell within the wide range of reasonable professional assistance.

Argued April 9—officially released August 14, 2018

Procedural History

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

Mary A. Beattie, assigned counsel, for the appellant (petitioner).

Linda Currie-Zeffiro, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's

attorney, and *Adrienne Russo*, deputy assistant state's attorney, for the appellee (respondent).

Opinion

BLAWIE, J. The petitioner, Robert E. Thompson, appeals from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the court improperly concluded that he failed to prove, by a preponderance of the evidence, that his trial counsel rendered deficient performance because he failed to move for a mistrial or to seek any curative measures following prejudicial testimony from the complainant. We disagree and, accordingly, affirm the judgment of the habeas court.

The following facts and procedural history are relevant to our resolution of this appeal.[1] The petitioner was charged with accosting a woman that he had approached on a New Haven street, and luring her to a residence under the guise of joining a local church group. Following a jury trial, the petitioner was convicted of kidnapping in the first degree in violation of General Statutes § 53a-92, sexual assault in the first degree in violation of General Statutes § 53a-70, assault in the third degree in violation of General Statutes § 53a-61, and threatening in the second degree in violation of General Statutes § 53a-62. Attorney Tejas Bhatt represented the petitioner at his criminal trial. Bhatt's assessment was that the outcome of the case hinged on the credibility of the complainant, whom the state called to testify at the criminal trial. During the direct examination of the complainant, the following exchange occurred:

[1] This court's opinion in the petitioner's direct appeal provides a full exposition of the facts that the jury reasonably could have found at the criminal trial. See *State* v. *Thompson*, 146 Conn. App. 249, 76 A.3d 273, cert. denied, 310 Conn. 956, 81 A.3d 1182 (2013). Much of this information is not relevant to the narrow issue in this appeal.

"[The Prosecutor]: What led him—what—what happened when he hit you? What led him to hit you?

"[The Complainant]: He told me to take my clothes off. . . .

"[The Prosecutor]: Did you—were you telling him no?

"[The Complainant]: Yes.

"[The Prosecutor]: And what did you—what else did you say to him?

"[The Complainant]: I asked him, why you doing this to me, and he said, I'm not the first person—

"[Bhatt]: Objection.

"[The Complainant]: He done this—

"The Court: Hold on. Hold on.

"[The Complainant]: To.

"The Court: Hold on. Hold on.

"[Bhatt]: Objection.

"The Court: What's the objection? She's in the middle of an answer.

"[Bhatt]: That is—if I—may the jury be excused? This is an area we discussed previously."

The jury was excused and the state made an offer of proof, during which the complainant testified that the petitioner said that she was "not the first person he ever did this to." Bhatt objected to the admission of this testimony, arguing that "[t]he only purpose for offering [the statement], is to show that the [petitioner] had a propensity to commit this crime. . . . [I]t's the [petitioner's] statement, sure, but I think there's still—the court still has to do [an analysis pursuant to § 4-3 of the Connecticut Code of Evidence] of the [probative]

value being out—outweighed by—the prejudicial impact . . . ."

The court sustained Bhatt's objection and found that the prejudicial impact of the statement outweighed its probative value.[2] Before resuming testimony, the following colloquy ensued:

"The Court: Is there anything else on this point?

"[Bhatt]: No, I believe that—I'm assuming the court would—I believe she started her response and—

"The Court: Well, no, she got maybe two words out that—

"[Bhatt]: Okay. Okay.

"The Court: *Quite frankly, I didn't even understand, and I don't mean to be—in other words, so I'm—the court is very confident, Attorney Bhatt, that the jury did not hear anything and you stood up right away* . . . .

"[Bhatt]: *Yes, Your Honor.*"[3] (Emphasis added.)

The jury subsequently returned a guilty verdict and the court, *B. Fischer, J.*, sentenced the petitioner to

[2] We express no opinion regarding the admissibility of this testimony.

[3] A copy of the audio cassette recording of the trial proceedings was prepared and submitted in connection with this appeal as court exhibit 1. Following oral argument on April 9, 2018, however, a portion of that exhibit containing the complainant's testimony was inadvertently damaged. Therefore, this court ordered, sua sponte, on April 23, 2018, that both parties' counsel and the habeas court rectify the record and take any steps necessary to provide a duplicate copy of that exhibit. The Tolland Judicial District thereafter provided another copy of court exhibit 1. By letter to this court dated May 10, 2018, counsel for the petitioner maintained that, in her opinion, the new copy of court exhibit 1 is of an inferior audio quality in terms of the complainant's testimony, as compared to the earlier version. Even if we assume, arguendo, that counsel is correct in her assessment of the recording, for the reasons set forth herein, and also as noted by the habeas court, the record is inadequate to overturn the trial court's determination that the jury never heard the statement at issue.

forty-five years of incarceration, execution suspended after thirty-five years, and ten years of probation. This court affirmed the petitioner's conviction on direct appeal. See *State* v. *Thompson*, 146 Conn. App. 249, 76 A.3d 273, cert. denied, 310 Conn. 956, 81 A.3d 1182 (2013).

On July 22, 2016, the petitioner filed an amended petition for a writ of habeas corpus claiming that Bhatt rendered ineffective assistance of counsel by (1) improperly advising the petitioner of a plea offer, (2) failing to move for a mistrial or to seek a curative instruction following prejudicial testimony from the complainant, (3) inadequately preparing a defense, (4) inadequately examining and cross-examining witnesses, (5) inadequately preparing for sentencing, and (6) failing to preserve the petitioner's access to sentence review.[4]

The case was tried to the habeas court, *Sferrazza*, *J.*, on August 22, 2016. The petitioner, Bhatt, and Gary Mastronardi, a criminal trial expert, testified during the habeas trial. Bhatt testified that the trial court sustained his objection to the complainant's testimony because the statement was "far too prejudicial to allow." Bhatt

[4] On August 22, 2016, the petitioner withdrew his claims regarding Bhatt's improper advisement of a plea offer and failure to preserve the petitioner's access to sentence review. Additionally, the petitioner's claims regarding Bhatt's inadequate preparation of a defense and examination of witnesses are not at issue in this appeal. Therefore, the remaining claims are ineffective assistance of counsel due to Bhatt's handling of prejudicial testimony, and that he failed to adequately prepare for the sentencing hearing.

The petitioner's brief, however, is devoid of any mention of the claim that Bhatt inadequately prepared for sentencing. Instead, the petitioner focused his entire argument on Bhatt's handling of the prejudicial testimony. The petitioner's claim that Bhatt inadequately prepared for sentencing is thus deemed abandoned. See *Solek* v. *Commissioner of Correction*, 107 Conn. App. 473, 480, 946 A.2d 239, cert. denied, 289 Conn. 902, 957 A.2d 873 (2008). Therefore, in this appeal, we only consider the claim that Bhatt rendered ineffective assistance of counsel by failing to move for a mistrial or to seek a curative instruction following prejudicial testimony from the complainant.

explained that when he attempted to raise with the trial court the issue that the witness had uttered the prejudicial statement, the trial court "cuts [him] off; and [the court] says, no. Nobody heard anything. . . . [The court] says, I've ruled. Nobody heard anything. There's nothing to strike." Bhatt was never questioned at the habeas trial regarding why he did not move for a mistrial or seek any curative measures in light of the court's finding that the testimony was more prejudicial than probative.

Mastronardi then offered his opinion that what Bhatt should have done following the prejudicial testimony "depends on whether or not what was said was audible" to the jury. He explained that, if the statement was audible to the jury, "after the judge said that he did not think that it was audible, what [Bhatt] should have done was insist that the transcript be played so that—to give the trial judge another opportunity to listen. . . . Once it was played and if there was—if it was clear that—that the statement was, in fact, audible, trial counsel had to move for a mistrial, without a doubt, and should have pressed that motion strenuously," especially because the trial court found that the statement was more prejudicial than probative. Mastronardi testified that, in the alternative, "if [Bhatt] was unsuccessful [in moving for a mistrial], then the second move, the fallback position, should have been a motion to strike and a request for some type of special instruction to the jury to ignore [the testimony]." Mastronardi concluded that, in his opinion, "under the *Strickland* standard, any reasonable lawyer would have definitely moved for a mistrial in that type of situation, especially after the judge . . . specifically said that it was too prejudicial."

Following the habeas trial, the court denied the petitioner's amended petition for a writ of habeas corpus. With respect to the claim that Bhatt rendered ineffective

assistance regarding his handling of the prejudicial testimony, the habeas court agreed with the trial court's finding that "the offending testimony was incomprehensible because of the prompt intervention by Attorney Bhatt." The court continued that "[a]pparently, the court monitor was, at some level, able to isolate the [complainant's] words from the other speaker's, but this court could not. Given the definitive tone of Judge Fischer's opinion on the matter, Attorney Bhatt cannot be faulted for accepting that determination without confronting the judicial authority further on that issue." The court concluded that "the petitioner has failed to prove, by a preponderance of the evidence, this allegation of defective representation." The petitioner then filed a timely petition for certification to appeal, which the court granted on November 21, 2016. This appeal followed.

On appeal, the petitioner challenges the habeas court's conclusion that he failed to prove that Bhatt rendered deficient performance by failing to move for a mistrial or to seek a curative measure following the complainant's prejudicial testimony. Specifically, the petitioner argues that any reasonable attorney would have moved for a mistrial in a similar situation, especially because the trial court found that the testimony was more prejudicial than probative. The petitioner further argues that he suffered actual prejudice as a result of Bhatt's deficient performance. We disagree with the petitioner's claim regarding deficient performance.

"Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quotation

marks omitted.) *Stanley* v. *Commissioner of Correction*, 67 Conn. App. 357, 359, 786 A.2d 1249 (2001), cert. denied, 259 Conn. 922, 792 A.2d 855, cert. denied sub nom. *Stanley* v. *Armstrong*, 537 U.S. 838, 123 S. Ct. 155, 154 L. Ed. 2d 59 (2002). "[A] finding of fact is clearly erroneous [if] there is no evidence in the record to support it . . . or [if] 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.) *Gould* v. *Commissioner of Correction*, 159 Conn. App. 860, 869, 123 A.3d 1259, cert. denied, 319 Conn. 957, 125 A.3d 1012 (2015).

"A criminal defendant's right to the effective assistance of counsel extends through the first appeal of right and is guaranteed by the sixth and fourteenth amendment to the United States constitution and by article first, § 8, of the Connecticut constitution. . . . To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . The claim will succeed only if both prongs are satisfied. . . . It is well settled that a reviewing court can find against a petitioner on *either* ground, whichever is easier." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Small* v. *Commissioner of Correction*, 286 Conn. 707,

712–13, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008). "The petitioner cannot rely on mere conjecture or speculation to satisfy either the performance or prejudice prong but must instead offer demonstrable evidence in support of his claim." (Internal quotation marks omitted.) *Cox* v. *Commissioner of Correction*, 127 Conn. App. 309, 314, 14 A.3d 421, cert. denied, 301 Conn. 902, 17 A.3d 1043 (2011). "If the facts revealed by the record are insufficient, unclear or ambiguous as to whether a constitutional violation has occurred, we will not attempt to supplement or reconstruct the record, or to make factual determinations, in order to decide the defendant's claim." *State* v. *Golding*, 213 Conn. 233, 240, 567 A.2d 823 (1989).

"Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland* v. *Washington*, supra, 466 U.S. 689. "Moreover, [t]he court must be mindful that [a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Internal quotation marks omitted.) *Robinson* v. *Commissioner of Correction*, 167

Conn. App. 809, 821–22, 144 A.3d 493, cert. denied, 323 Conn. 925, 149 A.3d 982 (2016).

The petitioner claims that Bhatt rendered deficient performance because he failed to move for a mistrial or to seek a curative instruction following the complainant's prejudicial testimony. In support of this argument, the petitioner relies on this court's conclusion from his direct appeal that because Bhatt acquiesced to the trial court's finding that the jury never heard the prejudicial statement, the petitioner waived his claim that he was deprived of his right to a fair trial as a result of the jury's potential exposure to it. See *State* v. *Thompson*, supra, 146 Conn. App. 260.

"The trial judge is the arbiter of the many circumstances which may arise during the trial in which his function is to assure a fair and just outcome." *State* v. *Rodriguez*, 210 Conn. 315, 333, 554 A.2d 1080 (1989). "The trial judge . . . is in a better position to sense the atmosphere of the trial and therefore can apprehend far better than we can the effect of certain remarks on the jury." *Pisel* v. *Stamford Hospital*, 180 Conn. 314, 322, 430 A.2d 1 (1980); see also *D'Ascanio* v. *D'Ascanio*, 237 Conn. 481, 487, 678 A.2d 469 (1996) (trial court has "unique opportunity to view the evidence presented in a totality of circumstances, i.e., including its observations of the demeanor and conduct of the witnesses and parties, which is not fully reflected in the cold, printed record which is available to us" [internal quotation marks omitted]); *Hurley* v. *Heart Physicians, P.C.*, 298 Conn. 371, 396, 3 A.3d 892 (2010) ("this court frequently has observed, a trial court is in the best position to observe the demeanor of the parties, witnesses, jurors and others who appear before it"). "A trial judge is generally in the best position to evaluate the critical question of whether the juror's or jurors' exposure to improper matter has prejudiced a defendant." *State* v.

Rodriguez, supra, 210 Conn. 326; see also *United States* v. *Wiley*, 846 F.2d 150, 157 (2d Cir. 1988).

Not only was Judge Fischer uniquely qualified to make such a determination as the presiding judge, he stated that he was "very confident" that the jury did not hear the testimony. In light of that finding, Bhatt's evaluation of the attendant circumstances in not seeking any additional remedies during the trial was entirely reasonable. Therefore, this court's conclusion that Bhatt's acquiescence waived the claim does not equate to a determination that counsel rendered ineffective assistance in his handling of the issue. See *Nieves* v. *Commissioner of Correction*, 51 Conn. App. 615, 621, 724 A.2d 508 ("[t]he burden that the petitioner must sustain for a favorable outcome on his ineffective assistance of counsel claim is a higher one than he would have to sustain had the actual merits of the same issue been raised on direct appeal"), cert. denied, 248 Conn. 905, 731 A.2d 309 (1999); see also *Gibson* v. *Commissioner of Correction*, 118 Conn. App. 863, 876 n.5, 986 A.2d 303 (noting difference in procedural posture for claims on direct appeal versus in habeas petition), cert. denied, 295 Conn. 919, 991 A.2d 565 (2010). Accordingly, this court cannot conclude that counsel rendered ineffective assistance in not moving for a mistrial or requesting a curative instruction.

Moreover, the petitioner argues that because the trial transcript reflects the complainant's testimony, we must assume that the jury heard it. This argument is not persuasive. The ability of the recording equipment to pick up the testimony, and of the court monitor to transcribe it, has no bearing on the assessment of whether the jury heard the testimony. The court monitor has the technical ability to replay a recording as many times as necessary and at different volumes. The jury, however, only heard the testimony in real time,

and the petitioner has presented no evidence to establish that the jury—in real time—was able to isolate the complainant's words from Bhatt's simultaneous objection.

The petitioner has not presented any evidence that suggests that we should second-guess the trial court's "very confident" finding to the contrary, and instead conclude that the jury did in fact hear the prejudicial statement. Nor is there a basis to rule that the habeas court erred in concluding that "[g]iven the definitive tone of Judge Fischer's opinion on the matter, Attorney Bhatt cannot be faulted for accepting [the court's finding that the jury did not hear the offending testimony] without confronting the judicial authority further on that issue." Bhatt was attuned to the prejudicial testimony, as it was the subject of a motion in limine. The transcript, as quoted previously, makes clear that before the complainant could utter the entire sentence, Bhatt objected and triggered a response from the court at the same time that the complainant was speaking. Moreover, during the habeas trial, Bhatt was never questioned as to why he did not move for a mistrial or seek a curative measure following the court's finding that the statement was more prejudicial than probative. Perhaps given the trial court's finding that the jury did not hear the offending testimony, Bhatt opted not to request a curative measure in order to avoid bringing the issue to the jury's attention. Because the petitioner never asked Bhatt to explain his reasoning, however, we are left without a definitive answer. The petitioner has thus not presented any evidence beyond speculation or conjecture to rebut the presumption that Bhatt's performance fell within the wide range of reasonable professional assistance. See *Robinson* v. *Commissioner of Correction*, supra, 167 Conn. App. 821–22.

Without such evidence, and in light of the degree of deference that *Strickland* requires in our scrutiny of

counsel's performance, we cannot conclude that Bhatt's performance fell below the standard that the United States and Connecticut constitutions require. Accordingly, we conclude that the habeas court properly determined that the petitioner failed to prove, by a preponderance of the evidence, that trial counsel rendered deficient performance, and thus has not satisfied the first prong of the *Strickland* test.[5] His ineffective assistance of counsel claim therefore fails.

The judgment is affirmed.

In this opinion the other judges concurred.

DEAN HOLLIDAY *v.* COMMISSIONER OF CORRECTION (AC 39234)

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

Syllabus

The petitioner, who had been convicted in 2002 of several crimes in connection with an attempted robbery in 2001, sought a writ of habeas corpus, alleging that a 2013 revision to the parole eligibility statute (§ 54-125a [b]) operated to delay his earliest parole eligibility date by requiring him, as a violent offender, to serve 85 percent of his definite sentence before becoming eligible for parole. The 2013 revision had revoked a portion of 2011 legislation that had revised § 54-125a (b) to permit him to earn credits toward a reduction in his sentence. The petitioner claimed that 2013 revision to § 54-125a (b) violated his rights to due process and equal protection, and the constitutional prohibition against ex post facto laws. The habeas court dismissed the petition for a writ of habeas corpus on its own motion, pursuant to the applicable rule of practice (§ 23-29 [1]), on the ground that it lacked subject matter jurisdiction. Thereafter, the habeas court granted the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

[5] Because we have decided the petitioner's claim on the basis of the performance prong, this court need not discuss the prejudice prong. See *Small* v. *Commissioner of Correction*, supra, 286 Conn. 713 ("[i]t is well settled that a reviewing court can find against a petitioner on *either* ground, whichever is easier" [emphasis in original; internal quotation marks omitted]).

1. The habeas court properly dismissed the habeas petition on the ground that it lacked subject matter jurisdiction over the petitioner's ex post facto, due process and equal protection claims: the petitioner failed to demonstrate a recognized liberty interest that was implicated by his loss of risk reduction credits toward parole eligibility, and even if he had a liberty interest in risk reduction credit, he could not assert a colorable ex post facto claim because his only complaint was that favorable legislation that was enacted in 2011, after his conviction, was later repealed in 2013, which thereby put him back in the same position as he was when he was first convicted; moreover, our Supreme Court previously has rejected a claim that due process and equal protection claims regarding risk reduction credit independently implicate the subject matter jurisdiction of the habeas court.
2. The petitioner's claim that the habeas court improperly dismissed his habeas petition without notice or a hearing was unavailing; that court was not obligated to grant the petitioner a hearing before dismissing the petition, as § 23-29 (1) authorized the court to dismiss the petition on its own motion, and although the petitioner has a right under the applicable rule of practice (§ 23-40) to be present when an evidentiary hearing is held, such hearings are not always required and the petitioner's right to a hearing before the habeas court was not absolute where, as here, he failed to allege facts sufficient to invoke the habeas court's jurisdiction.

Argued May 15—officially released August 14, 2018

Procedural History

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

Nicholas Marolda, assigned counsel, with whom, on the brief, was *Temmy Ann Miller*, assigned counsel, for the appellant (petitioner).

Michael A. Martone, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Terrence M. O'Neill*, assistant attorney general, for the appellee (respondent).

Opinion

EVELEIGH, J. The petitioner, Dean Holliday, appeals from the judgment of the habeas court dismissing his petition for a writ of habeas corpus. The petitioner claims that the habeas court erred in dismissing his petition (1) for lack of jurisdiction on the basis of *Peta-way* v. *Commissioner of Correction*, 160 Conn. App. 727, 125 A.3d 1053 (2015), appeal dismissed, 324 Conn. 912, 153 A.3d 1288 (2017), and (2) without notice or a hearing. For the reasons set forth herein, we disagree and, accordingly, affirm the judgment of the habeas court.

The following facts and procedural history are relevant to our resolution of this appeal. In April, 2002, following a jury trial, the petitioner was convicted of attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-49 and 53a-134 (a) (2), conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134 (a) (2), and attempt to commit robbery in the second degree in violation of General Statutes §§ 53a-49 and 53a-135 (a) (1). The petitioner was sentenced to a total effective term of forty years in prison.[1] This court affirmed the petitioner's conviction on direct appeal. See *State* v. *Holliday*, 85 Conn. App. 242, 243, 856 A.2d 1041, cert. denied, 271 Conn. 945, 861 A.2d 1178 (2004). The petitioner remains in the custody of the respondent, the Commissioner of Correction.

In 2001, at the time of the petitioner's criminal conduct, and in 2003, when he was convicted, no statutory provision existed that permitted inmates to earn credits toward reducing the length of their sentences. In 2011,

[1] In August, 2005, the petitioner's sentence was modified to twenty-five years in prison by the sentence review division. *State* v. *Holliday*, Superior Court, judicial district of New Britain, Docket No. CR-011-94794, 2005 WL 2358544, *3 (August 22, 2005).

while the petitioner was incarcerated, the General Assembly enacted No. 11-51, § 22, of the 2011 Public Acts, later codified in General Statutes § 18-98e. This legislation provided that certain prisoners convicted of crimes committed after October 1, 1994, "may be eligible to earn risk reduction credit toward a reduction of such person's sentence, in an amount not to exceed five days per month, at the discretion of the Commissioner of Correction" for certain positive behaviors. General Statutes § 18-98e (a). Section 18-98e (a) was enacted in conjunction with a revision to General Statutes § 54-125a (b), which provided, in relevant part, that a person convicted of a violent crime would not be eligible for parole consideration "until such person has served not less than eighty-five percent of the definite sentence imposed *less any risk reduction credit earned under the provisions of section 18-98e*." (Emphasis added.) General Statutes (Rev. to 2013) § 54-125a (b). The petitioner's crimes qualified as violent under § 54-125a (b).[2] See *State* v. *Holliday*, supra, 85 Conn. App. 247. Under the 2011 revisions of §§ 18-98e and 54-125a (b), the petitioner earned credits toward his discharge date and parole eligibility date.

In July, 2013, the General Assembly amended § 54-125a (b), striking the language that allowed credits earned under § 18-98e to reduce the time served by violent offenders before becoming eligible for parole.

[2] General Statutes (Rev. to 2013) § 54-125a (b) (1) prohibits the use of risk reduction credit toward parole eligibility by "[a] person convicted of . . . an offense . . . where the underlying facts and circumstances of the offense involve the use, attempted use or threatened use of physical force against another person . . . until such person has served not less than eighty-five per cent of the definite sentence imposed . . . ."

A jury found the petitioner guilty of, among other crimes, robbery in the first degree, which involves the "[use] or threaten[ed] . . . immediate use of physical force upon another person . . . ." (Internal quotation marks omitted.) *State* v. *Holliday*, supra, 85 Conn. App. 247.

This revision meant that violent offenders, like the petitioner, were required to serve 85 percent of their definite sentence[3] before becoming eligible for parole. Credits the petitioner had earned toward his discharge date and parole eligibility date were revoked following the revision.

On December 24, 2014, the self-represented petitioner filed a petition for a writ of habeas corpus in which he alleged that the 2013 legislative change violated the ex post facto clause of the United States constitution, article one, § 10, by revoking credits he had earned under § 18-98e. In support of his claim, the petitioner cited *Teague* v. *Quarterman*, 482 F.3d 769 (5th Cir. 2007), and *Cleburne* v. *Cleburne Living Center*, 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985), cases that address rights under the due process and equal protection clauses, respectively. On March 29, 2016, the habeas court dismissed the petition on its own motion pursuant to Practice Book § 23-29 (1) for lack of jurisdiction. The habeas court's decision did not analyze the petitioner's due process and equal protection arguments, but, citing this court's opinion in *Petaway* v. *Commissioner of Correction*, supra, 160 Conn. App. 727, concluded that the habeas court lacked subject matter jurisdiction.

The petitioner filed a petition for certification to appeal on April 15, 2016, which the habeas court granted on April 25, 2016. The petitioner, then represented by appointed counsel, filed a motion for articulation on November 7, 2016, which the court denied on November 21, 2016.[4] This appeal followed. Additional facts and procedural history will be set forth as necessary.

[3] "[D]efinite sentence is the flat maximum to which a defendant is sentenced . . . ." *State* v. *Adam H.*, 54 Conn. App. 387, 393, 735 A.2d 839, cert. denied, 251 Conn. 905, 738 A.2d 1091 (1999).

[4] The petitioner filed a motion for review of the habeas court's denial of his motion for articulation on December 5, 2016. This court granted the petitioner's motion for review but denied the relief requested therein.

I

On appeal, the petitioner claims that the habeas court erred in dismissing his habeas petition for lack of subject matter jurisdiction. Specifically, the petitioner argues the court improperly relied on *Petaway* v. *Commissioner of Correction*, supra, 160 Conn. App. 727, in dismissing not only his ex post facto claim, but also his due process and equal protection claims. The respondent argues that the habeas court's dismissal for lack of jurisdiction was proper because the habeas court lacked subject matter jurisdiction over the petition on the basis of *Petaway*, *Perez* v. *Commissioner of Correction*, 326 Conn. 357, 163 A.3d 597 (2017), and *James E.* v. *Commissioner of Correction*, 326 Conn. 388, 163 A.3d 593 (2017).[5] We agree with the respondent.

We first set forth our standard of review and applicable legal principles. "It is well settled that [a] determination regarding a trial court's subject matter jurisdiction is a question of law and, therefore, we employ the plenary standard of review and decide whether the court's conclusions are legally and logically correct and supported by the facts in the record." (Internal quotation marks omitted.) *Petaway* v. *Commissioner of Correction*, supra, 160 Conn. App. 731.

The habeas court's subject matter jurisdiction is predicated on the deprivation of a recognized liberty interest. See General Statutes § 52-466 (a) (2); *Santiago* v. *Commissioner of Correction*, 39 Conn. App. 674, 679, 667 A.2d 304 (1995). The petitioner's failure to demonstrate a liberty interest implicated by his loss of risk

[5] Our Supreme Court decided *Perez* and *James E.* v. *Commissioner of Correction*, supra, 326 Conn. 388, on the same day. In *James E.* v. *Commissioner of Correction*, supra, 394, the court stated that the "ex post facto claim raised by the petitioner in the present case is identical to [the ex post facto] claim raised in *Perez*" and that the petitioners were "identically situated." The claims and facts in these cases are also indistinguishable from those in *Petaway*.

reduction credit is dispositive of this appeal. Pursuant to Practice Book § 23-29, the habeas court "may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that . . . (1) the court lacks jurisdiction . . . ." The only interest implicated by the present petition is credit toward parole eligibility. This court and our Supreme Court have held there is no liberty interest in the application of risk reduction eligibility credit toward an inmate's parole eligibility. *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 372–73 (no vested liberty interest in risk reduction credit granted under § 18-98e); *Petaway* v. *Commissioner of Correction*, supra, 160 Conn. App. 734 (no liberty interest in parole eligibility under § 54-125a [b]).

Even if the petitioner had a liberty interest in risk reduction credit and the habeas court had been able to reach the merits of his ex post facto claim, the claim would fail in light of *Petaway*, which the petitioner recognized as dispositive at oral argument before this court.[6] In *Petaway*, this court adjudicated nearly identical factual and legal issues to those in the present case. *Petaway* v. *Commissioner of Correction*, supra, 160 Conn. App. 727. *Petaway* involved a habeas petition that alleged that the retroactive application of the 2013 amendment to § 54-125a (b) violated the ex post facto clause.[7] Id., 729–30. The petitioner in that case was convicted of a violent crime before the relevant 2011 enactments and had earned credits toward his parole eligibility, but was unable to apply those credits to his

[6] See footnote 4 of this opinion.

[7] Whereas the habeas court here dismissed the petition pursuant to Practice Book § 23-29 (1), the court in *Petaway* v. *Commissioner of Correction*, supra, 160 Conn. App. 728, declined pursuant to Practice Book § 23-24 to issue a writ of habeas corpus. This distinction does not change the applicability of *Petaway* to the present case, as both provisions stand for the proposition that a habeas court must have subject matter jurisdiction to grant a habeas petition.

parole eligibility date after the General Assembly made the statute inapplicable to inmates convicted of violent crimes. Id., 730–31. The court in *Petaway* held that the petitioner had not asserted a colorable ex post facto claim because his only complaint was that favorable legislation, enacted after his conviction, was later repealed, putting him back in the same position as when he was first convicted. Id., 734. The same is true of the petitioner here.[8] Accordingly, we conclude that the habeas court properly dismissed the petitioner's ex post facto claim for lack of subject matter jurisdiction.

The petitioner also argues that the habeas court erred in dismissing his petition in its entirety because the failure of his ex post facto claim did not deprive the habeas court of jurisdiction to hear his due process and equal protection claims. We disagree. Our Supreme Court in *Perez* rejected the argument that the due process and equal protection claims regarding risk reduction credit independently implicate the subject matter jurisdiction of the habeas court, concluding that "[a]n essential predicate to all of these claims is a cognizable liberty interest." *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 370. Accordingly, because the petitioner has not demonstrated a liberty interest in credits toward parole eligibility, we conclude that the habeas court properly dismissed his due process and equal protection claims.

II

The petitioner also argues that the habeas court erred in dismissing the petition on its own motion, without

[8] We note that two cases alleging an ex post facto violation on the basis of the 2013 amendment to § 54-125a (b) are currently on appeal before our Supreme Court. See *Breton* v. *Commissioner of Correction*, SC 19928, and *Garner* v. *Commissioner of Correction*, SC 19927. These cases, however, are factually distinguishable from the present case. While the present case involves a petitioner who was convicted before the enactment of the 2011 provisions, thereby defeating the timing requirement for an ex post facto claim, the petitioners in *Breton* and *Warden* committed their crimes between the enactment of the 2011 and 2013 amendments.

notice or a hearing. The respondent argues that the plain meaning of Practice Book § 23-29 (1) and this court's decision in *Pentland* v. *Commissioner of Correction*, 176 Conn. App. 779, 169 A.3d 851, cert. denied, 327 Conn. 978, 174 A.3d 800 (2017), show that the habeas court was not required to provide notice or a hearing before dismissing the petition. We agree with the respondent.[9]

"[I]t is the established policy of the Connecticut courts to be solicitous of pro se litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the pro se party." (Internal quotation marks omitted.) *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 549, 911 A.2d 712 (2006). Habeas petitioners generally have "the right to be present at any evidentiary hearing and at any hearing or oral argument on a question of law which may be dispositive of the case . . . ." Practice Book § 23-40. However, Practice Book § 23-40 speaks only to the petitioner's right to be present at an evidentiary hearing when such a hearing is held.[10] Such hearings are

[9] It should be noted that, on June 13, 2018, our Supreme Court granted a petition for certification to appeal this court's decision in *Gilchrist* v. *Commissioner of Correction*, 180 Conn. App. 56, 182 A.3d 690 (2018). Certification to appeal was granted only as to the following issue: "Did the Appellate Court properly affirm the habeas court's dismissal of the petition when the habeas court took no action on the petitioner's request for counsel and did not give the petitioner notice and an opportunity to be heard on the court's own motion to dismiss the petition pursuant to Practice Book § 23-29?" *Gilchrist* v. *Commissioner of Correction*, 329 Conn. 908, A.3d (2018).

[10] "[T]he rules of practice were promulgated to create one harmonious and consistent body of law. . . . If courts can by any fair interpretation find a reasonable field of operation for two [rules of practice] without destroying their evident meaning, it is the duty of the courts to do so, thus reconciling them and according to them concurrent effect." (Citation omitted; internal quotation marks omitted.) *Farmington* v. *Dowling*, 22 Conn. App. 564, 566, 577 A.2d 1128, cert. denied, 216 Conn. 816, 580 A.2d 66 (1990). To give effect to both Practice Book §§ 23-29 and 23-40, the latter section should be read to give a petitioner the right to be present at an evidentiary hearing if one is held, not to give a petitioner the absolute right to an evidentiary hearing itself.

not always required, as Practice Book § 23-29 authorizes the court to dismiss a habeas petition on its own motion. As we indicated in *Green* v. *Commissioner of Correction*, 184 Conn. App. 76, 83 n.6, A.3d (2018), "we urge the habeas court to exercise this authority [to dispose of a petition without a hearing] sparingly and limit its use to those instances in which it is plain and obvious" that the court lacks jurisdiction over the habeas petition.

Notwithstanding this policy, a petitioner's right to a hearing before a habeas court is not absolute. In *Pentland* v. *Commissioner of Correction*, supra, 176 Conn. App. 787, this court held that the habeas court acted properly in dismissing a habeas petition pursuant to Practice Book § 23-29 without first holding a hearing because it could "be determined from a review of the petition [that] the petitioner had not satisfied his obligation to allege sufficient facts in his pleading" to establish jurisdiction.[11] Here, the petitioner similarly failed to allege sufficient facts to establish jurisdiction. The present petition alleged only the deprivation of risk reduction eligibility credit, which this court and our Supreme Court have held is insufficient to invoke the habeas

[11] The petitioner argues that the habeas court erred in dismissing the petition without a hearing because, in *Boyd* v. *Commissioner of Correction*, 157 Conn. App. 122, 126, 115 A.3d 1123 (2015), this court held that dismissal without a hearing is permitted "only under narrowly defined circumstances . . . ." In *Boyd*, this court held that a petitioner was entitled to a hearing before his petition was dismissed under Practice Book § 23-29 (3), which allows the habeas court to dismiss a petition if "the petition presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition . . . ." The present case is distinguishable in that the habeas court dismissed the petition under a different subdivision of § 23-29. In *Boyd* v. *Commissioner of Correction*, supra, 126, the court found dismissal under § 23-29 (3), without a hearing, was improper because the petition "contained a new ground for habeas relief." The petition in the present case failed to implicate a liberty interest, placing it squarely within the grounds for dismissal in § 23-29 (1).

court's jurisdiction. See *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 357; see also *Petaway* v. *Commissioner of Correction*, supra 160 Conn. App. 727. In light of binding precedent establishing the habeas court's lack of subject matter jurisdiction, we find that the habeas court was not obligated to grant the petitioner a hearing before dismissing the petition and acted properly in dismissing the petition.

The judgment is affirmed.

In this opinion the other judges concurred.

JOHN DRABIK *v.* ELAINE THOMAS ET AL.
(AC 38997)

Lavine, Alvord and Keller, Js.

Syllabus

The plaintiff filed a petition for a bill of discovery, seeking to depose the defendants T and Q, who were employees of a certain Indian tribe and officers of the tribe's historic preservation office, after T and Q failed to respond to the plaintiff's repeated requests for information. In seeking the bill of discovery, the plaintiff claimed to have a potential cause of action against T, Q, and the defendant tribal council for intentional interference with a business relationship in connection with certain actions by T that allegedly caused A Co., a communications company, to abandon its plan to build a cellular communications tower on the plaintiff's property. The plaintiff specifically sought information regarding certain stone groupings located on property adjacent to the plaintiff's property. T had communicated to A Co., as A Co. was seeking governmental approval for the tower, that its planned placement of the tower on the plaintiff's property could impact the overall integrity of the local landscape such that it would have an adverse effect on properties of traditional religious and cultural significance to the tribe. The trial court granted the defendants' motion to dismiss on the ground of tribal sovereign immunity, and the plaintiff appealed to this court, claiming, inter alia, that the trial court incorrectly determined that tribal sovereign immunity applies to petitions for a bill of discovery. *Held*:

1. The trial court properly granted the defendants' motion to dismiss on the ground of tribal sovereign immunity: the plaintiff could not prevail on his claim that tribal sovereign immunity does not bar a petition for a bill of discovery because a bill of discovery seeks equitable relief and

is distinct from the filing of a lawsuit, as the act of subjecting a sovereign to prelitigation discovery in order to uncover information necessary to establish facts that ultimately could support probable cause to sustain a cause of action against the sovereign would negate one purpose of sovereign immunity, which is to prevent the interference that litigation creates; accordingly, sovereign defendants who are cloaked with immunity from suit also enjoy immunity from bills of discovery that seek to establish facts necessary to commence such a suit.

2. The trial court correctly concluded that T and Q were entitled to tribal sovereign immunity; the facts that the plaintiff alleged in his petition for a bill of discovery did not support his claim that T and Q were named in their individual capacities or that they acted beyond the scope of their authority as employees of the tribe and officers of the tribe's historic preservation office.

Argued May 30—officially released August 14, 2018

Procedural History

Petition for a bill of discovery seeking to depose the named defendant et al., brought to the Superior Court in the judicial district of New London, where the court, *Cole-Chu*, *J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Victoria S. Mueller, for the appellant (plaintiff).

Andrew L. Houlding, for the appellees (defendants).

Opinion

LAVINE, J. The plaintiff, John Drabik, appeals from the judgment of the trial court dismissing his petition for a bill of discovery against the defendants, Elaine Thomas, a deputy tribal historic preservation officer for The Mohegan Tribe of Indians of Connecticut (tribe), James Quinn, the tribal historic preservation officer for the tribe, and the Tribal Council, the governing body of the tribe, on the ground of tribal sovereign immunity. Specifically, the plaintiff claims that the trial court improperly (1) decided that the petition should be dismissed on the ground that tribal sovereign immunity

applies to petitions for a bill of discovery, and (2) determined that the defendants are entitled to tribal sovereign immunity. We affirm the judgment of the trial court.

The following facts, as gleaned from the plaintiff's petition for a bill of discovery and the court's memorandum of decision, and procedural history are relevant to this appeal. The plaintiff owns property in East Lyme that is not part of or adjacent to the reservation of the tribe. AT&T evaluated the plaintiff's property as a potential location for a new cellular communications tower. As part of the application process to the Connecticut Siting Council, the agency responsible for utility facilities' locations, AT&T submitted an electronic message with the proposed site to the Federal Communications Commission, which notified the tribe of the proposal. The tribe responded on or about July 1, 2015.

The response, written by Thomas, indicated that a site walk conducted on June 10, 2015, identified "substantial stone groupings" on the property adjacent to the plaintiff's property. According to the response, the proposed tower would "impact the view shed" of these "cultural stone features" and could "possibly cause impact to the overall integrity of the landscape." The response concluded that, in the opinion of the Mohegan Tribal Historic Preservation Office, the proposed tower would cause an adverse effect to "properties of traditional religious and cultural significance to the [tribe]." After receiving this response from the tribe, AT&T stopped considering the plaintiff's property as a potential site for the tower.

On multiple occasions, the plaintiff made requests for clarification from Thomas and Quinn about the stone groupings, seeking more information about their location, substance, and historical and cultural significance, but no representative of the tribe responded to any of his repeated requests. On September 23, 2015, the

plaintiff filed a petition for a bill of discovery, alleging that he may have a cause of action of intentional interference with a business relationship against the defendants. On October 5, 2015, the defendants filed a motion to dismiss, citing the doctrine of tribal sovereign immunity. The trial court granted the defendants' motion to dismiss the bill of discovery. The plaintiff then filed the present appeal,[1] claiming that the court improperly found that sovereign immunity applied and that sovereign immunity bars a bill of discovery.

Well established principles of law govern our standard of review. "[T]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss. . . . In an appeal from the granting of a motion to dismiss on the ground of subject matter jurisdiction, this court's review is plenary. A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record. . . . The trial court's role in considering whether to grant a motion to dismiss is to take the facts to be those alleged . . . including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction." (Citation omitted; internal quotation marks omitted.) *Davidson* v. *Mohegan Tribal Gaming Authority*, 97 Conn. App. 146, 148, 903 A.2d 228, cert. denied, 280 Conn. 941, 912 A.2d 475 (2006), cert. denied, 549 U.S. 1346, 127 S. Ct. 2043, 167 L. Ed. 2d 777 (2007).

[1] After filing the petition for a bill of discovery, the plaintiff brought two separate actions, one in the Superior Court and another in the Mohegan Tribal Court.

I

We begin with a brief discussion of the bill of discovery in light of the plaintiff's assertion that it should be exempt from tribal sovereign immunity. "The bill of discovery is an independent action in equity for discovery, and is designed to obtain evidence for use in an action other than the one in which discovery is sought. . . . [B]ecause a pure bill of discovery is favored in equity, it should be granted unless there is some well founded objection against the exercise of the court's discretion. . . .

"To sustain the bill, the [plaintiff] must demonstrate that what he seeks to discover is material and necessary for proof of, or is needed to aid in proof of or in defense of, another action already brought or about to be brought. . . .

"Discovery is confined to facts material to the plaintiff's cause of action and does not afford an open invitation to delve into the defendant's affairs. . . . A plaintiff must be able to demonstrate good faith as well as probable cause that the information sought is both material and necessary to his action. . . . A plaintiff should describe with such details as may be reasonably available the material he seeks . . . and should not be allowed to indulge a hope that a thorough ransacking of any information and material which the defendant may possess would turn up evidence helpful to [his] case." (Citations omitted; internal quotation marks omitted.) *Berger* v. *Cuomo*, 230 Conn. 1, 5–7, 644 A.2d 333 (1994).

"The plaintiff who brings a bill of discovery must demonstrate by detailed facts that there is probable cause to bring a potential cause of action. Probable cause is the knowledge of facts sufficient to justify a reasonable man in the belief that he has reasonable grounds for presenting an action. . . . Its existence or

nonexistence is determined by the court on the facts found. . . . Moreover, the plaintiff who seeks discovery in equity must demonstrate more than a mere suspicion; he must also show that there is some describable sense of wrong. . . . Whether particular facts constitute probable cause is a question of law." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Journal Publishing Co.* v. *Hartford Courant Co.*, 261 Conn. 673, 681–82, 804 A.2d 823 (2002).

The plaintiff acknowledges that "the [tribe] and its officers enjoy tribal sovereign immunity that protects them from most lawsuits in Connecticut Superior Court,"[2] but he insists, nonetheless, that tribal sovereign immunity does not bar a bill of discovery, as a bill of discovery seeks equitable relief and is distinct from the filing of a lawsuit. We are unpersuaded.

The plaintiff fails to provide legal authority or a persuasive logical argument supporting the proposition that a prelitigation tool such as a bill of discovery can be differentiated from the act of litigation itself when sovereign immunity is involved. We are unaware of any controlling authority on this issue.[3] The judges of our Superior Court who have considered this issue have dismissed petitions for bills of discovery on the ground that the tribe's sovereign would be affected by the

[2] "Absent a clear and unequivocal waiver by the [Indian] tribe or congressional abrogation, the doctrine of sovereign immunity bars suits for damages against a tribe. . . . However, such waiver may not be implied, but must be expressed unequivocally." (Citation omitted; internal quotation marks omitted.) *Kizis* v. *Morse Diesel International, Inc.*, 260 Conn. 46, 53–54, 794 A.2d 498 (2002).

[3] Neither this court nor our Supreme Court has previously decided this issue. Although one opinion from this court involved a similar set of circumstances, it is procedurally distinct and does not shed any light on the precise issue involved in the present case. See *Kelly* v. *Albertsen*, 114 Conn. App. 600, 608 and n.5, 970 A.2d 787 (2009) (plaintiff not entitled to limited discovery and evidentiary hearing to meet burden of alleging facts that demonstrate subject matter jurisdiction in civil action against state employee, but this court suggested that plaintiff could have used bill of discovery).

enforcement of such petitions.[4] We find the reasoning of those judges to be persuasive. We agree, therefore, with the trial court's conclusion that "there is no basis in logic, law, or equity" for the plaintiff's claim that "tribal sovereign immunity does not apply to a bill of discovery, even if it bars the lawsuit for which discovery is sought."

"Tribal sovereign immunity predates the birth of the Republic. . . . The immunity rests on the status of Indian tribes as autonomous political entities, retaining their original natural rights with regard to self-governance." (Citation omitted; internal quotation marks omitted.) *Ninigret Development Corp.* v. *Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 29 (1st Cir. 2000).

"The practical and logical basis of the . . . [sovereign immunity] doctrine is today recognized to rest on . . . the hazard that the subjection of the [sovereign] governments to private litigation might constitute a serious interference with the performance of their functions and with their control over their respective instrumentalities, funds, and property." (Internal quotation marks omitted.) *Horton* v. *Meskill*, 172 Conn. 615, 624, 376 A.2d 359 (1977). "Because sovereign immunity protects a sovereign from the expense, intrusiveness, and hassle of litigation, a court must be circumspect in allowing discovery before the plaintiff has established that the court has jurisdiction . . . ." (Internal quotation marks omitted.) *Arch Trading Corp.* v. *Republic of Ecuador*, 839 F.3d 193, 206 (2d Cir. 2016).

[4] See, e.g., *DatabaseUSA.com, LLC* v. *Dept. of Administrative Services*, Superior Court, judicial district of Hartford, Docket No. CV-15-6060965-S (April 7, 2016) (*Elgo, J.*) (62 Conn. L. Rptr. 103); see also *Estate of Bochicchio* v. *Quinn*, Superior Court, judicial district of Hartford, Docket No. CV-10-6011528-S (October 28, 2010) (*Domnarski, J.*) (50 Conn. L. Rptr. 848), aff'd, 136 Conn. App. 359, 46 A.3d 239 (2012).

We conclude that a bill of discovery would constitute such interference. The act of subjecting a sovereign to prelitigation discovery in order to uncover information necessary to establish facts that, ultimately, could support probable cause to sustain a cause of action against the sovereign would negate one purpose of sovereign immunity, which is to prevent the interference that litigation creates. We therefore conclude that the same overarching concern applies with equal force to a petition for a bill of discovery. Defendants cloaked with sovereign immunity are immune from suit and, therefore, immune from a bill of discovery to help establish facts necessary to commence a suit. Accordingly, the trial court properly dismissed the plaintiff's petition for a bill of discovery on the ground of sovereign immunity.

II

The plaintiff also claims that the court improperly determined that Thomas and Quinn were entitled to tribal sovereign immunity. Specifically, he argues that Thomas and Quinn were named, and also acted, in their individual capacities.[5] According to the plaintiff, the bill of discovery alleges an exception to tribal sovereign immunity, namely, that Thomas and Quinn were not acting within the scope of tribal authority. We are unpersuaded.

"[A]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity . . . and the tribe itself has consented to suit in a specific forum. . . . Absent a clear and unequivocal waiver by the tribe or congressional abrogation, the doctrine of sovereign immunity bars suits for damages against a tribe. . . .

[5] The plaintiff refers to the defendants collectively in his brief despite the fact that the defendants in his petition include the Tribal Council. We understand the plaintiff's use of the term "defendants" in the portion of his brief addressing this claim as referring only to Thomas and Quinn.

Although tribal immunity does not extend to individual members of a tribe . . . [t]he doctrine of tribal immunity . . . extends to individual tribal officials acting in their representative capacity and within the scope of their authority. . . . The doctrine does not extend to tribal officials when acting outside their authority in violation of state law. . . . Tribal immunity also extends to all tribal employees acting within their representative capacity and within the scope of their official authority." (Citations omitted; internal quotation marks omitted.) *Chayoon* v. *Sherlock*, 89 Conn. App. 821, 826–27, 877 A.2d 4, cert. denied, 276 Conn. 913, 888 A.2d 83 (2005), cert. denied, 547 U.S. 1138, 126 S. Ct. 2042, 164 L. Ed. 2d 797 (2006).

"[C]ourts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit. . . . In making this assessment, courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign. . . . [L]awsuits brought against employees in their official capacity represent only another way of pleading an action against an entity of which an officer is an agent, and they may also be barred by sovereign immunity. . . .

"The distinction between individual- and official-capacity suits is paramount here. In an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself. . . . Personal-capacity suits, on the other hand, seek to impose *individual* liability . . . . [O]fficers sued in their personal capacity come to court as individuals . . . and the real party in interest is the individual, not the sovereign.

"The identity of the real party in interest dictates what immunities may be available. Defendants in an official-capacity action may assert sovereign immunity. . . .

"There is no reason to depart from these general rules in the context of tribal sovereign immunity." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Lewis* v. *Clarke*, U.S. , 137 S. Ct. 1285, 1291–92, 197 L. Ed. 2d 631 (2017).

"In the tribal immunity context, a claim for damages against a tribal official lies outside the scope of tribal immunity only where the complaint pleads—and it is shown—that a tribal official acted beyond the scope of his authority to act on behalf of the [t]ribe. . . . Claimants may not simply describe their claims against a tribal official as in his individual capacity in order to eliminate tribal immunity. . . . [A] tribal official—even if sued in his individual capacity—is only stripped of tribal immunity when he acts manifestly or palpably beyond his authority . . . . [I]n order to overcome sovereign immunity, the [plaintiff] must do more than allege that the defendants' conduct was in excess of their . . . authority; [the plaintiff] also must allege or otherwise establish facts that reasonably support those allegations." (Citations omitted; internal quotation marks omitted.) *Chayoon* v. *Sherlock*, supra, 89 Conn. App. 828.

"It is insufficient for the plaintiff merely to allege that the defendants violated . . . law or tribal policy in order to state a claim that they acted beyond the scope of their authority. . . . Such an interpretation would eliminate tribal immunity from damages actions because a plaintiff must always allege a wrong or a violation of law in order to state a claim for relief. In order to circumvent tribal immunity, the plaintiff must have alleged and proven, apart from whether the defendants acted in violation of federal law, that the defendants acted without any colorable claim of authority . . . ." (Citation omitted; internal quotation marks omitted.) Id., 829–30.

In regard to a petition for a bill of discovery, "[our Supreme Court] previously [has] recognized that the right of a plaintiff to recover is limited by [his] allegations . . . ." (Internal quotation marks omitted.) *Journal Publishing Co.* v. *Hartford Courant Co.*, supra, 261 Conn. 686. Thus, the plaintiff's presentation of facts to establish probable cause is limited to the allegations of the petition. It necessarily follows that a plaintiff, in order to demonstrate probable cause to bring an action, must allege facts outside of the scope of sovereign immunity.

The plaintiff failed to allege that Thomas and Quinn acted beyond the scope of their authority. The allegations against Thomas and Quinn are inextricably tied to the Tribal Council and, more specifically, to the Mohegan Tribal Historic Preservation Office. Thomas and Quinn were described as officers of the Mohegan Tribal Historic Preservation Office numerous times.[6] The plaintiff alleges that the notice regarding the stone groupings originated from the tribe and that the Mohegan Tribal Historic Preservation Office conducted the site walk. Additionally, Thomas' response specifically conveyed the opinion of the Mohegan Tribal Historic Preservation Office, and she signed the notice

[6] The petition for a bill of discovery alleges in relevant part:

"2. The defendant Elaine Thomas is a Deputy Tribal Historic Preservation Officer for the Mohegan Indian Tribe . . . .

"3. The defendant James Quinn is the Tribal Historic Preservation Officer for the Mohegan Indian Tribe . . . .

* * *

"9. The Notice was sent by Deputy Tribal Historic Preservation Officer Elaine Thomas of the Mohegan Indian Tribe.

* * *

"13. Upon receipt of the Notice, [the plaintiff] . . . made several attempts to contact Elaine Thomas and James Quinn at the Mohegan Indian Tribe . . . .

* * *

"d. Phone call to James Quinn, Tribal Historic Preservation Officer . . . .

"e. Letter to Mohegan Indian Tribal Council . . . .

"f. Phone call with James Quinn, Tribal Historic Preservation Officer . . . ."

with her designation as the tribe's deputy tribal historic preservation officer. The plaintiff requested information from the Mohegan Tribal Historic Preservation Office and the Tribal Council. Furthermore, service of the petition for a bill of discovery was made on Helga Woods, the attorney general of the tribe.

There are no allegations in the bill of discovery that Thomas or Quinn conducted the site walk, identified the stone groupings, failed to respond to the plaintiff's requests while acting outside of their official capacity, or otherwise exceeded the authority given to them by the tribe. As such, the facts as alleged do not support the plaintiff's claim that Thomas and Quinn were named as defendants in their individual capacities or otherwise exceeded the scope of their authority. Thus, the court correctly concluded that the defendants were protected by sovereign immunity and, therefore, properly granted the defendants' motion to dismiss.

The judgment is affirmed.

In this opinion the other judges concurred.

ELLEN FARMER-LANCTOT *v.* MATTHEW SHAND
(AC 39817)

Prescott, Elgo and Blawie, Js.

Syllabus

The plaintiff sought to recover damages for personal injuries she sustained as a result of the alleged negligence of the defendant in his operation of a motor vehicle. At approximately 10:30 p.m., the defendant was driving his car toward the exit of a residential subdivision. At the same time, the plaintiff was walking with a group of individuals down the road. Specifically, the plaintiff was walking in the middle of the exit road when the defendant's car traveled around a curve at the bottom of a hill onto the exit, spotted the group walking in the road, and stopped prior to reaching the group. The plaintiff, upon seeing the defendant's headlights, jumped out of the road and into the grassy center island of the exit road, believing that the defendant was going to hit her. The

plaintiff suffered a broken arm and subsequently commenced the present action, alleging, inter alia, that her injuries were proximately caused by the defendant's negligence. The defendant, in his answer, denied that he was negligent in the operation of his vehicle and as a special defense, alleged that the plaintiff's own negligence was the proximate cause of her injuries. The jury returned a general verdict in favor of the defendant, but no interrogatories were submitted to it, and the trial court rendered judgment in accordance with the verdict. On appeal to this court, the plaintiff claimed that the trial court improperly denied her request for a jury charge on the sudden emergency doctrine, the standard of care for a pedestrian in a roadway, and the defendant's duty to yield to pedestrians when making a right-hand turn. *Held* that the trial court properly declined to instruct the jury in accordance with the model instructions regarding crossing at a crosswalk: there was no evidence in the record to suggest that the plaintiff was at or near a regular crossing, a crossing at an intersection of roads, or a crossing regulated by traffic signals, and, instead, there was uncontradicted evidence that the plaintiff was walking in the middle of the road coming up the street and was twenty-five feet from the corner, and, thus, the instruction sought by the plaintiff could have misled the jury because there were no facts in the record to support a finding that the plaintiff was at or near a regular crossing or that the defendant was turning into a different street; moreover, under the general verdict rule, this court, having resolved the plaintiff's sole challenge to the court's jury instructions as to negligence and concluded that there was no error, was required to presume that the jury found that the defendant was not negligent, and, thus, the general verdict rule precluded review of the plaintiff's remaining claims relating to the instructions on contributory negligence.

Argued April 9—officially released August 14, 2018

Procedural History

Action to recover damages for personal injuries sustained by the plaintiff allegedly caused by the defendant's negligent operation of a motor vehicle, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to a jury before *Dubay*, *J.*; verdict and judgment for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

Juri E. Taalman, with whom, on the brief, were *Taylor Equi* and *Timothy Brignole*, for the appellant (plaintiff).

Jude Francois, for the appellee (defendant).

Opinion

ELGO, J. In this negligence action, the plaintiff, Ellen Farmer-Lanctot, appeals from the judgment rendered on a general verdict in favor of the defendant, Matthew Shand. On appeal, the plaintiff claims that the trial court improperly denied the plaintiff's request for a jury charge on (1) the sudden emergency doctrine, (2) the standard of care for a pedestrian in a roadway, and (3) the defendant's duty to yield to pedestrians when making a right-hand turn. We disagree and, accordingly, affirm the judgment of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. On December 31, 2014, the plaintiff and her husband attended a New Year's Eve gathering hosted by Lisa Salazar and Mike Kraman at their residence in the Wynding Hills Road residential subdivision in East Granby (Wynding Hills). Attendees of the gathering also included Carol Lindberg and five others. At approximately 9 p.m. the plaintiff and other attendees of the gathering left the residence and headed out to take a hike through the woods up to a cliff. The group was equipped with headlamps and lights for the hike.

On their way back from the cliff, the group walked down Tunxis Avenue toward Wynding Hills to return to the Salazar and Kraman residence. The group walked into the exit road of the subdivision and began ascending a hill. A grassy center island of the road separated the entrance road and the exit road of the subdivision. At some point prior to walking into the exit of Wynding Hills, the group shut off their lights. At approximately 10:30 p.m., a car, driven by the defendant, was traveling downhill in Wynding Hills toward the exit. At the time, the plaintiff was in the middle of the exit road with Carol Lindberg and was walking up the road. The car traveled around a curve at the bottom

of the hill onto the Wynding Hills exit road, spotted the group walking in the road, and stopped prior to reaching the group. Upon seeing the headlights of the defendant's car approaching, the plaintiff jumped out of the road and into the grassy center island of the road approximately twenty-five feet from the curve. The plaintiff testified that she jumped out of the road and over the front corner of the defendant's vehicle because she thought that she was going to be hit by the defendant's vehicle. Consequently, the plaintiff suffered a broken arm.

The plaintiff subsequently commenced the present action, claiming that she suffered personal injuries, economic damages, and noneconomic damages of pain and suffering proximately caused by the defendant's negligence. In his answer, the defendant denied that he was negligent in the operation of his vehicle. In addition, as a special defense, the defendant alleged that the plaintiff's own negligence was the proximate cause of her injuries. The case was tried to a jury, but no interrogatories were submitted to it. Following trial, the jury returned a general verdict in favor of the defendant and the court rendered judgment accordingly. This appeal followed.

Before addressing the merits of the plaintiff's claim, we first determine whether the general verdict rule applies and precludes our review.[1] "Under the general verdict rule, if a jury renders a general verdict for one party, and no party requests interrogatories, an appellate court will presume that the jury found every issue

[1] Although the parties did not brief the issue of the general verdict rule, we raised the issue at oral argument and the parties did not seek supplemental briefing. See *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut*, 311 Conn. 123, 163 n.35, 84 A.3d 840 (2014) ("this court occasionally has raised an issue sua sponte when the parties have misconstrued or overlooked the applicable law and the failure to raise the issue would result in the creation of unsound or questionable precedent or an inconsistency in the law").

in favor of the prevailing party. . . . Thus, in a case in which the general verdict rule operates, if any ground for the verdict is proper, the verdict must stand; only if every ground is improper does the verdict fall. . . . The rule rests on the policy of the conservation of judicial resources, at both the appellate and trial levels. . . .

"On the appellate level, the rule relieves an appellate court from the necessity of adjudicating claims of error that may not arise from the actual source of the jury verdict that is under appellate review. In a typical general verdict rule case, the record is silent regarding whether the jury verdict resulted from the issue that the appellant seeks to have adjudicated. Declining in such a case to afford appellate scrutiny of the appellant's claims is consistent with the general principle of appellate jurisprudence that it is the appellant's responsibility to provide a record upon which reversible error may be predicated. . . .

"In the trial court, the rule relieves the judicial system from the necessity of affording a second trial if the result of the first trial potentially did not depend upon the trial errors claimed by the appellant. Thus, unless an appellant can provide a record to indicate that the result the appellant wishes to reverse derives from the trial errors claimed, rather than from the other, independent issues at trial, there is no reason to spend the judicial resources to provide a second trial. . . .

"Therefore, the general verdict rule is a rule of appellate jurisprudence designed to further the general principle that it is the appellant's responsibility to provide a record upon which reversible error may be predicated. . . . A party desiring to avoid the effects of the general verdict rule may elicit the specific grounds for the verdict by submitting interrogatories to the jury. . . .

"[Our Supreme Court] has held that the general verdict rule applies to the following five situations: (1) denial of separate counts of a complaint; (2) denial of separate defenses pleaded as such; (3) denial of separate legal theories of recovery or defense pleaded in one count or defense, as the case may be; (4) denial of a complaint and pleading of a special defense; and (5) denial of a specific defense, raised under a general denial, that had been asserted as the case was tried but that should have been specially pleaded." (Citations omitted; internal quotation marks omitted.) *Dowling* v. *Finley Associates, Inc.*, 248 Conn. 364, 371–72, 727 A.2d 1245 (1999).

This case falls within the fourth situation listed in *Dowling*—denial of a complaint and pleading of a special defense. In the present case, the defendant's answer denied the plaintiff's allegations of negligence as set forth in the complaint. The defendant also alleged that the plaintiff's own negligence was the proximate cause of her injuries. "[A defendant's] denial of negligence and [his] allegation of contributory negligence constitute[s] two separate and distinct defenses, either one of which could support the jury's general verdict." *Morales* v. *Moore*, 85 Conn. App. 208, 210–11, 855 A.2d 1041 (2004).

The plaintiff contests the propriety of the court's charge as to negligence and contributory negligence. With respect to the negligence charge, the plaintiff claims that the court improperly denied her request to instruct the jury on the defendant's duty to yield to pedestrians when making a right-hand turn. As to the special defense of contributory negligence, the plaintiff claims that the court improperly denied her request to instruct the jury on the sudden emergency doctrine and the standard of care for a pedestrian in a roadway. If there is no reversible error in the charge as to the defendant's negligence, the general verdict must be affirmed and the claimed errors relating to contributory

negligence need not be considered. See *Cuartas* v. *Greenwich*, 14 Conn. App. 370, 373–374 n.2, 540 A.2d 1071, cert. denied, 209 Conn. 803, 548 A.2d 436 (1988); see also *Johnson* v. *Pagano*, 184 Conn. 594, 597, 440 A.2d 244 (1981). "[I]f any of the court's instructions are shown to be proper and adequate as to any one of the defenses raised, the general verdict will stand irrespective of any error in the charge as to the others." *Colucci* v. *Pinette*, 185 Conn. 483, 490, 441 A.2d 574 (1981). Thus, we first consider the plaintiff's specific claim pertaining to the court's instructions to the jury regarding negligence.

The plaintiff's sole challenge in this regard is that the trial court improperly declined to instruct the jury in accordance with the plaintiff's request to charge on "the defendant's duty to yield to pedestrians when making a right-hand turn." We disagree.

"[O]ur standard of review concerning preserved claims of improper jury instruction is well settled. . . . A jury instruction must be considered in its entirety, read as a whole, and judged by its total effect rather than by its individual component parts. . . . [T]he test of a court's charge is not whether it is as accurate upon legal principles as the opinions of a court of last resort but whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper. . . . Therefore, [o]ur standard of review on this claim is whether it is reasonably probable that the jury was misled." (Internal quotation marks omitted.) *DeMatteo* v. *New Haven*, 90 Conn. App. 305, 307–308, 876 A.2d 1246, cert. denied, 275 Conn. 931, 883 A.2d 1242 (2005). "The instruction must be adapted to the issues and may not mislead the jury but should reasonably guide it in reaching a

verdict." (Internal quotation marks omitted.) *Opotzner* v. *Bass*, 63 Conn. App. 555, 558, 777 A.2d 718, cert. denied, 257 Conn. 910, 782 A.2d 134 (2001), cert. denied, 259 Conn. 930, 793 A.2d 1086 (2002).

"The principal function of a jury charge is to assist the jury in applying the law correctly to the facts which [it] might find to be established . . . . The purpose of a request to charge is to inform the trial court of a party's claim of the applicable principle of law. . . . In determining whether a trial court improperly declined to instruct the jury in accordance with a party's request to charge, we review the evidence presented at trial in the light most favorable to supporting the . . . proposed charge. . . . A request to charge which is relevant to the issues of [a] case and which is an accurate statement of the law must be given. . . . It follows from this principle, however, that a request to charge must be an accurate statement of the law. . . . Indeed, it is axiomatic that a trial court should not instruct the jury in accordance with a request to charge unless the proposed instruction is a correct statement of the governing legal principles." (Citations omitted; internal quotation marks omitted.) *Doe* v. *Saint Francis Hospital & Medical Center*, 309 Conn. 146, 173–74, 72 A.3d 929 (2013). "Conversely, [t]he trial court has a duty not to submit any issue to the jury upon which the evidence would not support a finding. . . . Accordingly, the right to a jury instruction is limited to those theories for which there is any foundation in the evidence." (Citation omitted; internal quotation marks omitted.) *Bostic* v. *Soucy*, 82 Conn. App. 356, 359, 844 A.2d 878, cert. denied, 269 Conn. 912, 852 A.2d 738 (2004).

The plaintiff requested that the court provide the jury with the following instructions: "It is important to note that a driver of an automobile turning from one road to another, the operator must do so with regard not

only to the pedestrian who may be on the regular crossing, but also to any person or vehicle lawfully on the highway immediately beyond and close to the highway. And a pedestrian under such circumstances has the right-of-way over a car making a turn." The plaintiff avers that the instructions provide that the defendant has a "duty to yield to pedestrians when making a right-handed turn" and such requested instructions are in accordance with Wright & Ankerman, 2 Connecticut Jury Instructions (4th Ed.) § 587, which is titled "Crossing at Crosswalk." Subsection (d) of § 587 provides: "A driver of an automobile turning into a street must do so with due regard not only to the pedestrian who may be on the regular crossing, but also to any person or vehicle lawfully on the highway immediately beyond and close to the highway. And a pedestrian under such circumstances has the right of way over a car making a turn."

We note that the plaintiff's briefing of this issue borders on inadequate as she fails to provide citations to facts in the record to establish that the plaintiff was entitled to such an instruction, and fails to cite to any appellate authority in support of her position. Nonetheless, our review of the evidence presented at trial reveals that the court properly declined to instruct the jury as requested.

The undisputed testimony and documentary evidence in the present case indicated that at approximately 10:30 p.m. the defendant was traveling around a curve as he made his way toward the exit of Wynding Hills, not executing a right-hand turn. After the defendant completed navigating the curve, he stopped approximately five feet down the road. There is no evidence in the record to suggest that the plaintiff was at or near a regular crossing, a crossing at an intersection of roads, or a crossing regulated by traffic signals. Instead, there

is uncontradicted evidence that the plaintiff was walking in the middle of the road "coming up the street" and that the plaintiff was "[twenty-five] feet from the corner." Indeed, in this case, the instruction sought by the plaintiff could have misled the jury because there are no facts in the record to support a finding that the plaintiff was at or near a regular crossing nor that the defendant was turning into a different street. As previously stated, the court has a duty not to submit any issue to the jury on which the evidence would not support a finding. Accordingly, when viewing the evidence in the light most favorable to supporting the plaintiff's charge, we conclude that the court properly declined to instruct the jury in accordance with the model instructions provided in § 587 (d).

This court having resolved the plaintiff's sole challenge to the court's jury instructions as to negligence and having concluded that there is no error, the general verdict rule requires us to presume that the jury found that the defendant was not negligent.[2] Therefore, the

[2] In her brief, the plaintiff states that the trial court's failure to give her request to charge constitutes reversible harm. "Determining that the court's charge was improper . . . does not end our inquiry. We must also determine whether the error was harmful before a new trial can be ordered. . . . [I]t is axiomatic . . . that not every error is harmful. . . . [W]e have often stated that before a party is entitled to a new trial . . . he or she has the burden of demonstrating that the error was harmful. . . . An instructional impropriety is harmful if it is likely that it affected the verdict." (Citation omitted; internal quotation marks omitted.) *DeMatteo* v. *New Haven*, 90 Conn. App. 305, 310–11, 876 A.2d 1246, cert. denied, 275 Conn. 931, 883 A.2d 1242 (2005). We note, however, that the plaintiff merely asserts that the alleged error was harmful and failed to analyze the issue of harm. "We are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than [mere] abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *Bicio* v. *Brewer*, 92 Conn. App. 158, 172, 884 A.2d 12 (2005). Assuming arguendo that any of alleged improprieties were in fact improper, the plaintiff's claims would not succeed due to her failure to brief the issue adequately and failure to demonstrate that the alleged error affected the verdict.

general verdict rule precludes our review of the plaintiff's remaining claims relating to the instructions on contributory negligence, and the verdict must stand.

The judgment is affirmed.

In this opinion the other judges concurred.

IN RE JOHELI V.*
(AC 41349)

Alvord, Sheldon and Prescott, Js.

Syllabus

The respondent father appealed to this court from the judgment of the trial court terminating his parental rights with respect to his minor daughter, J. *Held* that there was no merit to the respondent's claim that the trial court erred when it determined that he had failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time he could assume a responsible position in J's life based solely upon his current incarceration for allegedly sexually assaulting J; although that court considered the respondent's incarceration, which it was entitled to do, it did not base its determination that the respondent failed to rehabilitate solely on the ground that he was incarcerated, which was one of many factors considered by the court, as the court determined that the respondent's efforts to rehabilitate were scant even before his arrest in that he had unresolved mental health and substance abuse issues, had a demonstrated inability to provide for J's physical and emotional needs, had neglected J's medical and dental needs, and had failed to comply with the specific steps previously ordered by the court, and those findings were all amply supported in the record.

(*One judge concurring separately*)

Argued June 5—officially released August 6, 2018**

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* 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.

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

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondent's parental rights with respect to his minor child, brought to the Superior Court in the judicial district of New Britain, Juvenile Matters, and tried to the court, *Hon. Henry S. Cohn*, judge trial referee; judgment terminating the respondent's parental rights, from which the respondent appealed to this court; thereafter, the court issued an articulation of its decision. *Affirmed.*

Stein M. Helmrich, for the appellant (respondent).

Stephen G. Vitelli, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

Opinion

SHELDON, J. The respondent father, Luis V., appeals from the judgment of the trial court terminating his parental rights with respect to his minor child, Joheli V.[1] On appeal, the respondent claims that the court erred when it determined, pursuant to General Statutes § 17a-112 (j) (3) (B), that he had failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of Joheli, he could assume a responsible position in her life, based solely upon the fact that he is currently incarcerated and awaiting trial for allegedly sexually assaulting Joheli.[2] We affirm the judgment of the trial court.

[1] Joheli's mother passed away unexpectedly in January, 2015, due to a medical condition.

[2] Section 17a-112 (j) provides in relevant part: "The Superior Court, upon notice and hearing as provided in sections 45a-716 and 45a-717, may grant a petition [terminating parental rights] if it finds by clear and convincing evidence that . . . (3) . . . (B) the child . . . has been found by the Superior Court or the Probate Court to have been neglected, abused or uncared for in a prior proceeding . . . and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent

On August 6, 2015, the petitioner, the Commissioner of Children and Families, filed a neglect petition in the interest of Joheli, who has cerebral palsy and is confined to a wheelchair, alleging that she was neglected in that she was being permitted to live under conditions injurious to her well-being. On September 21, 2015, Joheli was adjudicated neglected and a six month period of protective supervision with the respondent was ordered. The court further ordered the respondent to comply with several specific steps to safely retain custody of Joheli. Those steps directed the respondent, among other things, to: develop stronger parenting skills in the areas of supervision, hygiene, educational support and medical care; increase his understanding of Joheli's developmental issues; develop a support system to assist with childcare responsibilities; maintain a safe, nurturing and sober environment for Joheli; provide consistently for Joheli's specialized medical needs; attend recommended treatment consistently and comply with all aspects of his treatment plans; and develop strategies to maintain sobriety and establish sober supports.

On November 9, 2015, Joheli reported to her school tutor that she had been sexually assaulted by the respondent. The tutor reported the incident to Joheli's teacher, who reported it to the police, who, in turn, contacted the petitioner. Joheli was temporarily placed in the custody of her maternal cousin, Rebecca Soto. The court again ordered the respondent to comply with several specific steps to regain custody of Joheli.

On January 28, 2016, Joheli was committed to the care and custody of the petitioner until further order

pursuant to section 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ."

of the court. The court again issued specific steps to the respondent.

On April 6, 2016, the respondent was arrested on charges of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2) and risk of injury to a child in violation of General Statutes § 53-21 (a) (2). He has been incarcerated, awaiting trial, since that date.

On March 15, 2017, the petitioner filed a petition to terminate the respondent's parental rights. The petitioner alleged that the Department of Children and Families (department) had made reasonable efforts to reunify Joheli with the respondent, but that the respondent was unable or unwilling to benefit from those reunification efforts. The petitioner further alleged, in accordance with § 17a-112 (j) (3) (B), that the respondent had failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of Joheli, he could assume a responsible position in her life. The petitioner set forth the following facts in support of that allegation.[3] "At the time of Joheli's removal the presenting problems were [the respondent's] unaddressed mental health and substance abuse issues, allegations of sexual abuse by him and his inability to demonstrate an ability to protect and meet Joheli's needs on a daily basis.

"[The respondent] has a history of mental health and substance abuse issues. These concerns appeared to have intensified around the death of his children's mother . . . . [The respondent] has a historic inability to provide for the physical and emotional needs of his

[3] The petitioner also alleged, pursuant to § 17a-112 (j) (3) (C), that Joheli had been denied, by reason of an act or acts of parental commission or omission including, but not limited to, sexual molestation or exploitation, severe physical abuse or a pattern of abuse, the care, guidance or control necessary for her physical, educational, moral or emotional well-being. The petitioner withdrew that allegation prior to trial.

children evidenced by leaving them unsupervised on several occasions while under the influence. [The respondent's] substance abuse is evidenced by reports to the department of him being under the influence. [The respondent] has had criminal charges, which included breach of peace, stemming from his substance abuse issue. Based on the department's records, [the respondent] has participated in a variety of treatment programs including individual and group therapy with little benefit or change achieved. A significant barrier to his ability to make progress toward rehabilitation is his incarceration based on the allegations of sexual abuse. [The respondent] has failed to benefit, gain knowledge, and make positive changes from these services as evidenced by continuing to abuse substances and failing to address his mental health. [The respondent] continues to fail to meet the demands of adulthood, let alone the demands of parenthood. Additionally, he has failed to appropriately and genuinely address his mental health [or] substance use despite access to services to assist him in doing so."

The petitioner noted that Joheli, then eight years old, has "medically complex issues and requires an adequate caregiver in order for her to appropriately grow emotionally, developmentally, medically and physically and who must meet every aspect of her basic needs."

The petitioner concluded: "[The respondent] is unable to meet his own basic needs at this time and therefore unable to properly care for Joheli, who has severe medical needs. [The respondent] has been observed to minimize his substance use and the severity of his mental health concerns. [The respondent] will not be able to fully resume [the role of] a responsible party in the life of his child within a reasonable time period."

On July 25, 2017, the petitioner moved to amend the termination petition to include an allegation, pursuant

to § 17a-112 (j) (3) (D), that there was no ongoing parent-child relationship between the respondent and Joheli, which motion was granted on August 22, 2017.

On November 9, 2017, after a trial, the court orally granted the termination petition. The court found that the department made reasonable efforts to reunify the respondent with Joheli, but that the respondent "did not really seize upon these opportunities and improve his situation." The court further found, by clear and convincing evidence: "[The respondent] had unaddressed mental health and substance abuse issues. There was an allegation, not proved yet, of sexual abuse by him of the child, [he] has a history of mental health and substance abuse issues and these concerns appear to have intensified around the death of the child's mother, [he] has a . . . historic inability to provide for the physical and emotional needs of his children.

"And . . . [the respondent] turned down in-home care services. He also neglected various health issues of the child. She's got cerebral palsy. She's clearly got to have medical attention periodically, dental attention, and that was not shown to have happened.

"And the idea is that even if he somewhat engaged in these, he did go to a therapist and he had some sessions with a therapist and was trying to work on these problems, the statute requires that . . . there be a second portion of it, that even if this is going on, that there be a reasonable time under which this reunification and resolution, rehabilitation could—the child would and the father would resolve his problems and take into account the needs of the child. We don't see that happening here.

"At the time, he was—at the time of the filing of the termination petition, he was just not meeting the standards. The child was reporting trauma due to drinking. The poor kid was trying to pick up her father [from

the floor] and couldn't do it with her . . . cerebral palsy . . . ." The court further found that the respondent was not in compliance with the specific steps that had been issued, and there was no evidence that "the [respondent has] made realistic and sustained efforts to conform . . . his conduct to even a minimally accepted parental [standard]. Giving him additional time will not likely bring his performance . . . within acceptable standards." On the basis of the foregoing, the court concluded, in accordance with § 17a-112 (j) (3) (B), that the respondent had failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of Joheli, he could assume a responsible position in her life.[4] The court further concluded that termination was in Joheli's best interest and, accordingly, terminated the respondent's parental rights.

On March 19, 2018, the trial court issued an articulation of its decision, reiterating that it "made no adjudicative finding on ground D, [that there was no ongoing relationship between the respondent and Joheli]. . . . The finding on ground B by clear and convincing evidence that father had unaddressed mental health and substance abuse issues, that he ignored his daughter's health issues, that he had declined in-house services and had an alcoholic incident involving the daughter. It further found that the father could not address these issues in a reasonable time period given the age and needs of the child. He is presently incarcerated. The child was experiencing trauma due to her relationship with her father." The court declined to "further articulate on ground D."[5]

[4] The court indicated that it would was "going to go with ground B because I think it's the simplest and clearest here."

[5] Because the trial court addressed only the petitioner's claim that the respondent failed to rehabilitate, and declined to adjudicate the petitioner's claim that the respondent's parental rights should be terminated because he had no ongoing relationship with Joheli, this court issued an order, sua sponte, instructing the parties to be prepared to address at oral argument

The respondent claims on appeal that the trial court erred in terminating his parental rights on the ground that he had failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of Joheli, he could assume a responsible position in her life, pursuant to § 17a-112 (j) (3) (B). Specifically, he claims that the court erred in basing that determination solely upon his current incarceration for allegedly sexually assaulting Joheli. We are not persuaded.

"Our Supreme Court has clarified that [a] conclusion of failure to rehabilitate is drawn from both the trial court's factual findings and from its weighing of the facts in assessing whether those findings satisfy the failure to rehabilitate ground set forth in § 17a-112 (j) (3) (B). Accordingly . . . the appropriate standard of review is one of evidentiary sufficiency, that is, whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court. . . . We will not disturb the court's subordinate factual findings unless they are clearly erroneous. . . .

the issue of whether there is an appealable final judgment in this case pursuant to *Meribear Productions., Inc.* v. *Frank*, 328 Conn. 709, 183 A.3d 1164 (2018), in which our Supreme Court held: "[W]hen the trial court disposes of one count in the plaintiff's favor, such a determination implicitly disposes of legally inconsistent, but not legally consistent, alternative theories. When a legally consistent theory of recovery has been litigated and has not been ruled on, there is no final judgment." Id., 723–24. Because the two statutory grounds alleged by the petitioner in this case, grounds B and D, are not different theories of recovery, as contemplated in *Meribear*, but, rather, are simply two alternative bases upon which the court could have based its adjudication of a single cause of action, termination of the respondent's parental rights, we conclude that *Meribear* does not apply to this case, and thus that the respondent has properly appealed from a final judgment over which we have subject matter jurisdiction.

"Personal rehabilitation as used in the statute refers to the restoration of a parent to his or her former constructive and useful role as a parent. . . . [Section 17a-112] requires the trial court to analyze the [parent's] rehabilitative status as it relates to the needs of the particular child, and further, that such rehabilitation must be foreseeable within a reasonable time. . . . [The statute] requires the court to find, by clear and convincing evidence, that the level of rehabilitation [that the parent has] achieved, if any, falls short of that which would reasonably encourage a belief that at some future date [he] can assume a responsible position in [his] child's life. . . . [I]n assessing rehabilitation, the critical issue is not whether the parent has improved [his] ability to manage [his] own life, but rather whether [he] has gained the ability to care for the particular needs of the child at issue. . . . As part of the analysis, the trial court must obtain a historical perspective of the respondent's child caring and parenting abilities, which includes prior adjudications of neglect, substance abuse and criminal activity. . . .

"The statute does not require [a parent] to prove precisely when [he] will be able to assume a responsible position in [his] child's life. Nor does it require [him] to prove that [he] will be able to assume full responsibility for [his] child, unaided by available support systems. . . . In determining whether a parent has achieved sufficient personal rehabilitation, a court may consider whether the parent has corrected the factors that led to the initial commitment, regardless of whether those factors were included in specific expectations ordered by the court or imposed by the department. . . . In the adjudicatory phase, the court may rely on events occurring after the date of the filing of the petition to terminate parental rights when considering the issue of whether the degree of rehabilitation is sufficient to foresee that the parent may resume a useful role in

the child's life within a reasonable time." (Citations omitted; internal quotation marks omitted.) *In re Damian G.*, 178 Conn. App. 220, 237–39, 174 A.3d 232 (2017), cert. denied, 328 Conn. 902, 177 A.3d 563 (2018).

In challenging the court's finding that he failed to rehabilitate, the respondent argues that the court failed "to consider [his] incarceration status and the potential [that] he could be found innocent . . . [and that his] rights were terminated based on an allegation for which he maintains his innocence and has yet to face trial . . . ." (Citation omitted.) In so arguing, the respondent misconstrues the trial court's decision. Although the court considered the respondent's incarceration, which it is entitled to do, as acknowledged by the respondent himself; see, e.g., *In re Katia M.*, 124 Conn. App. 650, 661, 6 A.3d 86 (parent's unavailability, due to incarceration, properly considered "an obstacle to reunification"), cert. denied, 299 Conn. 920, 10 A.3d 1051 (2010); it did not base its determination that the respondent failed to rehabilitate solely on the ground that he was incarcerated. The court determined that the respondent's efforts to rehabilitate were scant even before his arrest. The court noted that the respondent had unresolved mental health and substance abuse issues, and a demonstrated inability to provide for the physical and emotional needs of Joheli. The court found that the respondent had neglected Joheli's medical and dental needs and failed to comply with the specific steps previously ordered by the court. The respondent does not dispute these findings, which, we note, are amply supported in the record. It is clear from the record that the respondent's incarceration was only one factor of many upon which the court based its determination that he had failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of

Joheli, he could assume a responsible position in her life. The respondent's claim is therefore without merit.[6]

The judgment is affirmed.

In this opinion ALVORD, J. concurred.

PRESCOTT, J., concurring. Although I find it a much closer question, I agree with the majority that the respondent has appealed from a final judgment[1] and that we, therefore, have jurisdiction over this appeal. I also fully agree with and join in the majority opinion's analysis and resolution of the merits of the respondent's claim on appeal.

I write separately in order to explain why I think the final judgment question presented here is a close one and to express my concerns regarding developments in our final judgment jurisprudence, particularly in light of our Supreme Court's recent decision in *Meribear Productions, Inc.* v. *Frank*, 328 Conn. 709, 183 A.3d 1164 (2018) (*Meribear*). Indeed, the decision in *Meribear* and its potential application to this case is the most recent iteration of our long struggle "for a predictable and efficacious final judgment standard." E. Prescott, Connecticut Appellate Practice & Procedure (5th Ed. 2016) § 3-1:1.1, p. 85.

[6] The respondent also claims that the court's determination that the termination of his parental rights was in Joheli's best interest should be reversed if we determine that the court erred in finding that he failed to rehabilitate. Because we affirm the court's determination that the respondent failed to rehabilitate, and his claim to the contrary was the sole basis for his challenge to the best interest finding, his claim that the court erred in concluding that termination was in Joheli's best interest also fails.

[1] "Because our jurisdiction over appeals, both criminal and civil, is prescribed by statute, we must always determine the threshold question of whether the appeal is taken from a final judgment before considering the merits of the claim. . . . Additionally, with the exception of certain statutory rights of appeal not relevant here, our jurisdiction is restricted to appeals from final judgments." (Citation omitted; internal quotation marks omitted.) *Cheryl Terry Enterprises, Ltd.* v. *Hartford*, 262 Conn. 240, 245, 811 A.2d 1272 (2002).

In the present case, the petitioner, the Commissioner of Children and Families, initiated this proceeding seeking the termination of the parental rights of the respondent, Luis V., and filed Judicial Branch Form JD-JM-40 (Rev. 6-16) (form JD-JM-40). On that form, the petitioner alleged two statutory grounds for termination of the respondent's parental rights. First, she checked box B 1, which alleges that the "child . . . has been found in a prior proceeding to have been neglected, abused or uncared for and the father [has] failed to achieve the degree of personal rehabilitation that would encourage the belief that within a reasonable period of time, considering the age and needs of the child . . . [he] could assume a responsible position in the life of the child . . . ." Second, the petitioner checked box C, which alleges that the "child . . . has been denied, by reason of an act or acts by the . . . father of commission or omission; including but not limited to, sexual molestation or exploitation, severe physical abuse or a pattern of abuse, the care, guidance or control necessary for [her] physical, educational, moral or emotional well-being." Attached to this pleading is a summary of facts, as required by Practice Book § 33a-1, that alleges, in separately numbered paragraphs, the facts that specifically relate to each of the adjudicatory grounds alleged on the form.

The petitioner was subsequently granted permission to amend the petition to add an additional adjudicatory ground on which the petition could be granted. Specifically, the petitioner alleged, as an alternative, "ground D"[2]: "[T]here is no ongoing parent-child relationship with respect to the father . . . that ordinarily develops as a result of a parent having met on a continuous, day-to-day basis, the physical, emotional, moral or educational need of the child and to allow further time for

[2] The petitioner appears to have used this nomenclature because it corresponds to box D on form JD-JM-40. See also General Statutes § 17a-112 (j) (3) (D).

the establishment or reestablishment of the parent-child relationship would be detrimental to the best interest of the child . . . .''

At the beginning of the trial, the petitioner withdrew ground C, that is, the claim that the respondent's parental rights should be terminated because of a parental act of omission or commission. As a result, the petitioner at trial expended resources litigating and presented evidence on ground B 1 (failure to rehabilitate) and ground D (no ongoing parent-child relationship).

On November 9, 2017, in a brief oral decision from the bench, the court granted the petition and terminated the respondent's parental rights. In doing so, the court addressed only the petitioner's entitlement to relief on ground B 1, stating, ''I'm just going to go with ground B because I think it is the simplest and clearest here.'' The court did not state that the petitioner failed to establish her entitlement to relief on ground D.

On November 17, 2017, and December 21, 2017, the respondent filed motions for extension of time to file an appeal so that he could obtain and review the trial transcripts and seek the appointment of appellate counsel. These motions for extension of time were granted and the respondent subsequently was appointed appellate counsel by the court. On February 9, 2018, the respondent's counsel filed this appeal.

On March 8, 2018, the petitioner filed a motion to articulate, pursuant to Practice Book § 66-5, requesting, among other things, that the trial court make specific findings as to ground D. The petitioner essentially argued that she had presented witnesses and exhibits with respect to ground D and that she was entitled to a decision by the court on that adjudicatory ground.

On March 19, 2018, the court, *Hon. Henry S. Cohn*, judge trial referee, issued an articulation stating that

when it rendered its judgment on November 9, 2017, it "made no adjudicative findings on 'ground D' " and that because "the court has addressed ground B [1], the court declined to discuss ground D with its attendant legal and proof requirements. It continues to adhere to that position and declines to further articulate on ground D."

With this procedural history in mind, a brief discussion of *Meribear* is warranted. In that case, our Supreme Court recognized that, as general rule, "a judgment that disposes of only part of a complaint is not final, unless it disposes of all causes of action against the appellant." *Meribear*, supra, 328 Conn. 717. The court then sought to clarify "the circumstances under which there [is] an appealable final judgment [if] the trial court's decision does not dispose of counts advancing alternative theories of relief." Id., 711.

In resolving this question, the court distinguished between two possible scenarios in which a trial court has not adjudicated all of the theories of recovery advanced by a plaintiff. The first category of cases "involves counts alleging claims that are legally inconsistent . . . such that establishing the elements of one precludes liability on the other . . . ." Id., 721. "The second category involves claims that present alternative theories of recovery for the same injury, but are not legally inconsistent." Id., 722.

The court in *Meribear* then concluded that judgments in the first category of cases should be treated as final for purposes of appeal, but decisions in the second category should not be so treated. The court reasoned as follows: "Because of the different effect of the rulings in these categories, drawing a distinction between them for purposes of the final judgment rule advances the policies underlying that rule, namely, the prevention of piecemeal appeals and the conservation of judicial resources. *Niro* v. *Niro*, 314 Conn. 62, 78, 100 A.3d 801

(2014); see also *Canty* v. *Otto*, 304 Conn. 546, 554, 41 A.3d 280 (2012) (citing policy to facilitate the speedy and orderly disposition of cases at the trial court level). At trial, the parties have expended resources to fully litigate all of the claims advanced. A rule that would allow the trial court not to dispose of counts that present alternative, legally consistent theories of recovery could lead to multiple unnecessary appeals and retrials. In exceptional circumstances in which the trial court and the parties agree that litigating only some of the alternative claims for relief and proceeding to appeal on those issues before litigating alternative claims would constitute the greater efficiency, our rules provide a mechanism to address those circumstances. See Practice Book § 61-4 (a) . . . .

"In sum, we conclude that when the trial court disposes of one count in the plaintiff's favor, such a determination implicitly disposes of legally inconsistent, but not legally consistent, alternative theories. When a legally consistent theory of recovery has been litigated and has not been ruled on, there is no final judgment." (Internal quotation marks omitted.) *Meribear*, supra, 328 Conn. 723–24.

I turn then to the question of whether the decision in *Meribear* compels a conclusion in this termination of parental rights case that no final judgment yet exists. Certainly, the sound policy that *Meribear* seeks to advance, that is, the prevention of "multiple unnecessary appeals and retrials"; id., 723; would be promoted by a conclusion that, in order to render a final judgment, the trial court here was obligated to decide both of the adjudicatory grounds upon which the petitioner proceeded to trial. If this court had concluded on appeal that the trial court improperly concluded that the petitioner established adjudicatory ground B, then this case arguably would need to be remanded for a new trial on adjudicatory ground D, thereby fostering the possi-

bility of multiple appeals, and the attendant delay in securing permanency for Joheli.

Second, there is no question that, in the broad phraseology of *Meribear*, the two adjudicatory grounds are legally consistent, but alternative theories of relief (or recovery). A conclusion that no ongoing parent-child relationship exists between the respondent and Joheli would not be legally inconsistent with a concomitant conclusion that the respondent had "failed to achieve such degree of personal rehabilitation as would encourage the belief that, considering the age and needs of the child, he could assume a responsible position in her life." Proving either or both adjudicatory grounds would entitle the petitioner to a judgment terminating the respondent's parental rights, provided that the petitioner also established that termination was in Joheli's best interest.

Thus, the primary distinction between this case and *Meribear* is that the legally consistent but alternative theories of recovery in *Meribear* were alleged in separate counts of the plaintiff's complaint, whereas in this case, the alleged adjudicatory grounds are not contained in separate counts, but instead are alleged on a judicially authorized form that is expressly designed for this unique statutory action and is not divided into counts in the traditional sense.

I agree with the majority that this distinction is significant in light of the repeated references in *Meribear* to the fact that the legally consistent but alternative theories of recovery were contained in separate counts of the plaintiffs' complaint. Thus, in my view, the Supreme Court's broad statement that "[w]hen a legally consistent theory of recovery has been litigated and has not been ruled on, there is no final judgment"; *Meribear*, supra, 328 Conn. 724; should be limited to the specific procedural context in which the final judgment question arose in *Meribear*. Accordingly, *Meribear* does

not require a conclusion that there is a lack of a final judgment in this case because the alternative theories of liability alleged by the petitioner were not pleaded in separate counts.[3]

My conclusion that *Meribear* does not *control* the final judgment issue does not mean, however, that its rule should not be extended to the present case. Certainly, the policy reasons underlying *Meribear* are salutary, and arguably warrant application in a termination of parental rights case where concerns for piecemeal appeals and the attendant delays are seemingly paramount. On the other hand, the trial court's choice to refrain from deciding the question of whether the petitioner had established by clear and convincing evidence that there was no ongoing parent-child relationship between the respondent and Joheli is, perhaps, not without some justification. In the trial court's view, the closeness of the factual and legal questions related to this adjudicatory ground, and the overall strength of the petitioner's case with respect to the adjudicatory ground it did decide, may well have created in Judge Cohn's mind a disinclination to tread where it seemed unnecessary to go. Reaching adjudicatory ground D may also have delayed the trial court's resolution of adjudicatory ground B 1. Ultimately, in light of *Meribear*'s lack of vintage, and the uniqueness of the petitioner's statutory action, I am reluctant to extend

[3] If the petitioner had chosen to initiate this action by filing a traditional complaint and divided the adjudicatory grounds into different counts rather than using form JD-JM-40, the resolution of the final judgment issue in this case might be different under the holding in *Meribear* because there would be an undecided count that alleges an alternative but not inconsistent theory of recovery. I point this out only to suggest that the policies that motivated our Supreme Court in *Meribear* would militate in favor of a conclusion that there is not a final judgment regardless of whether the different adjudicatory grounds had been brought in a single count or in different counts. Nevertheless, pursuant to our reading of *Meribear*, there is a final judgment if the adjudicatory grounds are brought in a single count but no final judgment if the adjudicatory grounds are separated into different counts. Such fine distinctions in our final judgment jurisprudence simply create a trap for the unwary.

Meribear to this case without further guidance from our Supreme Court.

I turn then to an explanation regarding why I believe a final judgment exists in this case, despite a colorable argument to be made that the petitioner's claim with respect to adjudicatory ground D remains pending in the trial court.[4] In my view, the trial court's repeated refusal to decide adjudicatory ground D constitutes the functional denial of that claim.

In a related context, our Supreme Court in *Ahneman* v. *Ahneman*, 243 Conn. 471, 480, 706 A.2d 960 (1998), recognized that in certain circumstances a "trial court's decision not to consider the defendant's [postdissolution] motions was the functional equivalent of a denial of those motions. Like a formal denial, the effect of the court's decision refusing to consider the defendant's motions . . . was to foreclose the possibility of relief from the court on those issues . . . ."

In the present case, the trial court's refusal to decide adjudicatory ground D foreclosed the petitioner from obtaining a judgment terminating the respondent's parental rights on the ground that there is no ongoing parent-child relationship between the respondent and Joheli. Accordingly, in combination with the court's conclusion that the petitioner was entitled to a judgment terminating the respondent's parental rights on the adjudicatory ground of failure to rehabilitate, the effective denial of adjudicatory ground D means that there were no further claims left to be adjudicated by the trial court at the time this appeal was filed. Accordingly, there is a final judgment from which the respondent was entitled to appeal.[5]

[4] Certainly, there is no dispute that the petitioner took steps, without success, to secure a decision by the trial court on that adjudicatory ground.

[5] If my analysis is correct and a final judgment exists in this case, then the petitioner was under some obligation to take procedural steps necessary to obtain an adjudication by the trial court of ground D in the event that the respondent was successful in obtaining a reversal of the judgment terminating his parental rights, which was predicated on adjudicatory ground B.

In sum, I concur with the majority that the respondent has appealed from a final judgment in this case, and, with respect to the merits of the appeal, I agree that the judgment of the court should be affirmed for the reasons stated by the majority.

Arguably, the petitioner could have attempted to file a cross appeal from the court's judgment rendered on November 9, 2017. Such an appeal, however, would itself be on shaky jurisdictional footing because the petitioner arguably would not be aggrieved by the court's decision refusing to adjudicate ground D because the court ultimately granted the only relief the petitioner sought by terminating the respondent's parental rights.

Under these circumstances, the respondent could have sought to protect her rights pursuant to Practice Book § 63-4 (a) (1), which provides in relevant part that an appellee shall file a preliminary statement of issues if the appellee "wishes to: (A) present for review alternative grounds upon which the judgment may be affirmed; (B) present for review adverse rulings or decisions of the court which should be considered on appeal in the event the appellant is awarded a new trial; or (C) claim that a new trial rather than a directed judgment should be ordered if the appellant is successful on appeal . . . ."

Presumably, subparagraph (A) of § 63-4 (a) (1) would not apply in these circumstances because the trial court made no factual findings with respect to the existence of an ongoing parent-child relationship. In the absence of such findings, and, because this court is not in the business of finding facts, we would not have a basis for concluding whether the judgment should be affirmed because the petition should have been granted on this adjudicatory ground. Pursuant to subparagraph (B), however, the petitioner could assert that the effective denial of adjudicatory ground D constituted an adverse ruling or decision of the court that should be reversed in the event that the respondent was awarded an new trial, or, pursuant to subparagraph (C), the petitioner could assert that she was entitled to a new trial on adjudicatory ground D if this court on appeal had concluded that the respondent was entitled to a directed judgment on adjudicatory ground B.

My attempt to delineate what I believe the petitioner should have done to preserve her right to obtain a decision on adjudicatory ground D if additional proceedings were necessitated by a successful appeal by the respondent should not be construed as a criticism of the counsel for the petitioner who, in my view, diligently attempted to navigate the murky waters of our final judgment jurisprudence. In the end, *Meribear* adds an additional layer of complexity and questions regarding the finality of judgments in circumstances where not all theories of recovery or liability are adjudicated on their merits by a trial court.