SHANNON DOYLE *v.* SHANE CHAPLEN SHANE CHAPLEN *v.* SHANNON DOYLE (AC 38718)

Keller, Bright and Harper, Js.

Syllabus

In the first action, the Office of the Attorney General, on behalf of the Commissioner of Social Services, and in the name of the mother, D, filed a petition for support of a minor child against the acknowledged father, C, with the Family Support Magistrate Division of the Superior Court. Following the judgment in the support action, in which C acknowledged paternity of the child, D filed a motion to open the judgment seeking genetic testing to establish paternity, which eventually established that C was not the child's biological father. In a second action, C filed an application for custody of the minor child, and the cases were consolidated. The trial court granted D's motion to open the judgment, rendered judgment of nonpaternity in the first action and judgment in favor of D in the second action. On appeal to this court, C claimed, inter alia, that the trial court improperly found that D signed the acknowledgment of paternity on the basis of a material mistake of fact and concluded that opening the judgment was in the best interests of the minor child after making a clearly erroneous finding that he had no parent-like relationship with the minor child. *Held*:

1. The trial court's finding that D signed the acknowledgment of paternity on the basis of a material mistake of fact was not clearly erroneous; that court credited D's testimony and found that her belief that C was the biological father was reasonable because she had relied on ultrasounds and advice from medical technicians, and had formed that belief on the basis of information that she had no reason to doubt, and the court having found that D established that there had been a material mistake of fact, it had the authority, pursuant to statute (§ 46b-172 [a] [2]), to grant D's motion to open.
2. The trial court's finding that C did not have a parent-like relationship with the minor child was not clearly erroneous and was supported by ample evidence in the record: that court heard testimony that C was not a consistent presence in the child's life prior to his filing the custody action and that he had more of a friendship with the child, rather than a parent-like relationship, and although there was evidence that could have supported a finding that he had a parent-like relationship with the minor child, it was the exclusive province of the trier of fact to weigh any conflicting evidence and to determine the credibility of the witnesses; moreover, in light of that determination, the trial court's conclusion that it was in the best interests of the child to open the judgment also was not clearly erroneous.

3. The trial court properly determined that D was not equitably estopped from opening the judgment in the support action; that court found that C did not meet his burden of proving either element of equitable estoppel, as there was no evidence demonstrating that D had engaged in any misleading conduct in that both D and C mistakenly believed that C was the child's father and they both had a basis for that mistaken belief, and C failed to meet his burden to prove that he suffered prejudice as a result of his reliance on D's alleged misrepresentations, and the court also found that if C were to be removed from the minor child's life, the child would not suffer any adverse emotional effects or potential financial detriment because the child's biological father was available as a source of financial support.

Argued January 18—officially released August 21, 2018

Procedural History

Petition, in the first case, for support of a minor child, and for other relief, brought to the Superior Court in the judicial district of Litchfield, Family Support Magistrate Division, where the family support magistrate, *David A. Dee*, rendered a judgment of support, and application, in the second case, for custody of a minor child, and for other relief, brought to the Superior Court in the judicial district of Litchfield, Family Support Magistrate Division, where the family support magistrate, *Jed N. Schulman*, issued an order consolidating the two cases and that they be heard by the Superior Court; subsequently, the court, *Danaher*, *J.*, granted the motion of the plaintiff in the first case to open the judgment, and rendered judgment of nonpaternity in the first case and judgment for the defendant in the second case, from which the defendant in the first case and the plaintiff in the second case appealed to this court; thereafter, the court, *Danaher*, *J.*, granted in part the motion filed by the defendant in the first case and the plaintiff in the second case, for articulation. *Affirmed*.

John K. Miller, for the appellant (defendant in the first case, plaintiff in the second case).

Maureen E. Donahue, guardian ad litem, for the minor child.

Opinion

BRIGHT, J. This appeal arises out of two actions that were consolidated by the trial court. In the first action (support action), the Office of the Attorney General, on behalf of the Commissioner of Social Services (commissioner) and in the name of Shannon Doyle, filed a petition for support (support petition) against Shane Chaplen, the acknowledged father of Doyle's minor child. In the second action (custody action), Chaplen[1] filed an application for custody of the minor child, pursuant to General Statutes §§ 46b-56 and 46b-61. In the support action, Chaplen appeals from the judgment of nonpaternity rendered by the trial court following the granting of Doyle's motion to open the judgment of paternity by acknowledgement;[2] in the custody action, Chaplen appeals from the judgment of the trial court rendered in favor of Doyle.[3]

On appeal,[4] Chaplen claims that the trial court erred in granting Doyle's motion to open the judgment of paternity in the support action for the purpose of declaring him not to be the father of the minor child.[5] Specifically, he claims that the trial court improperly (1) found

[1] For purposes of clarity, we refer in this opinion to all individuals by name rather than by party designation.

[2] General Statutes § 46b-172 (a) (1) provides in relevant part: "[A] written acknowledgment of paternity executed and sworn to by the putative father of the child . . . shall have the same force and effect as a judgment of the Superior Court. . . ." Accordingly, although Chaplen's paternity was not adjudicated, we refer to the acknowledgment of paternity as a judgment of paternity.

[3] Although Chaplen listed both the support action and the custody action on his appeal form, he makes no specific reference to the judgment in the custody case in his brief. We also note that the relief sought by Chaplen on appeal requests only "that [Doyle's] motion to open . . . be denied or alternatively that this case be remanded for a trial de novo."

[4] Doyle did not participate in this appeal. The state of Connecticut filed a notice stating its intention not to file a brief in this appeal. The attorney for the minor child, who is also the guardian ad litem, filed a brief, pursuant to Practice Book § 67-13, in support of Chaplen's claims on appeal.

[5] The judgments in both the support action and the custody action are based on the court's findings and conclusions, which are set forth in its

that Doyle signed the acknowledgment of paternity on the basis of a material mistake of fact, (2) concluded that opening the judgment was in the best interests of the minor child after making a clearly erroneous finding that there was no parent-like relationship between Chaplen and the minor child, and (3) applied the law regarding laches and equitable estoppel. We affirm the judgments of the trial court.

The following facts and procedural history, as found by the trial court or as undisputed in the record, inform our resolution of Chaplen's appeal. On February 5, 2013, the Office of the Attorney General, on behalf of the commissioner and in the name of Doyle, filed a support petition against Chaplen, the acknowledged father of the minor child, pursuant to General Statutes § 17b-745, formerly § 17-324, and General Statutes §§ 46b-215 and 46b-172. A copy of a fully executed acknowledgment of paternity, with the mother's affirmation of paternity, was attached to the support petition, which Chaplen and Doyle both had signed two days after the minor child was born.[6]

"In the [support action], the [commissioner], in the name of . . . Doyle, asserted in [the] . . . support petition that [the minor child], born [in] [October, 2011],

memorandum of decision granting Doyle's motion to open. The judgment file for the support action provides that the trial court "issued a [m]emorandum of [d]ecision addressing both cases. The [m]emorandum of [d]ecision reopened the support petition and included the reasoning that gave rise to the [j]udgment of nonpaternity of November 30, 2015." The judgment file for the custody action provides that "[t]he reasoning presented in the [m]emorandum of [d]ecision gave rise to the [c]ourt's dismissal of this custody [action] on December 3, 2015." Although the judgment file provides that Chaplen's custody action was dismissed, the court, in its oral decision on December 3, 2015, stated that "the [custody action] is denied, judgment enters in favor of [Doyle] in the custody [action]." The court file also reflects that the disposition is a judgment after a completed trial in favor of Doyle.

[6] The acknowledgment of paternity form is one page and includes both Chaplen's acknowledgment and Doyle's affirmation.

was receiving Medicaid child support services. The petition asserted, further, that Chaplen is the acknowledged father of the minor child and that Chaplen had refused or neglected to support the minor child. . . .

"On March 25, 2013, the court [rendered a judgment of support], order[ing] that Doyle and Chaplen were equally responsible for the minor child's health care costs. On August 20, 2014, Doyle filed her appearance in the [support action] and also filed a motion to open the judgment, asserting that she 'was not present at this case' and was seeking genetic testing to establish paternity. . . . By order dated December 8, 2014, the [f]amily [s]upport [m]agistrate ordered that the motion to open be addressed in the Superior Court.

"On May 29, 2014, Chaplen initiated the custody action, seeking sole legal custody of the minor child, primary residence with him, and child support payments from Doyle. . . . Thereafter, the parties agreed to the appointment of a guardian ad litem and also agreed to supervised visitation between Chaplen and the minor child who, as of the date of that first agreement, was two years of age."

Doyle, with the assistance of her mother, had a genetic test performed in or around September, 2014, which established that Chaplen is not the biological father of the child. The court found: "On October 6, 2014, Doyle moved to modify the order of visitation . . . . Thereafter, the parties filed a series of motions regarding visitation and also reached a series of agreements allowing Chaplen visitation."

On February 5, 2015, the court held a hearing on Doyle's motion to open, and Doyle was the only witness to testify. The parties agreed to bifurcate the proceedings, agreeing that the court first would address whether there had been a material mistake of fact that would permit opening the judgment of paternity by

acknowledgment, pursuant to General Statutes § 46b-172,[7] before addressing whether equitable doctrines precluded opening the judgment.

At the hearing, Doyle testified that she began to question whether Chaplen was the biological father when the minor child was approximately six months old. She claimed that when the child was approximately one year old, in October, 2012, the Department of Children and Families (DCF) became involved with her, and she expressed her doubts as to the paternity of the child at that time. Doyle testified that she had been asking for a genetic test "since this all started," but Chaplen refused. She claimed that Chaplen had been aware of the possibility that he was not the child's father since the child was one year old because they had a meeting with DCF and discussed genetic testing at that time.

Doyle further testified that, upon receiving advice from the guardian ad litem, she contacted Raymond Osterhoudt, the man whom she believed to be the child's biological father, and she brought the child and Osterhoudt to have a genetic test performed. The results of the genetic test confirmed that Osterhoudt is the biological father, and the results were admitted into evidence.

[7] General Statutes § 46b-172 provides in relevant part: "(a) (1) . . . [A] written acknowledgment of paternity executed and sworn to by the putative father of the child when accompanied by (A) an attested waiver of the right to a blood test, the right to a trial and the right to an attorney, (B) a written affirmation of paternity executed and sworn to by the mother of the child . . . shall have the same force and effect as a judgment of the Superior Court. It shall be considered a legal finding of paternity without requiring or permitting judicial ratification, and shall be binding on the person executing the same . . . .

"(2) The mother and the acknowledged father shall have the right to rescind such affirmation or acknowledgment in writing within . . . sixty days . . . . An acknowledgment executed in accordance with subdivision (1) of this subsection may be challenged in court . . . after the rescission period only on the basis of fraud, duress or material mistake of fact which may include evidence that he is not the father, with the burden of proof upon the challenger. . . ."

The court credited Doyle's testimony that she did not believe that Osterhoudt was the father when the child was born, finding that the basis for her "belief that Chaplen, and not Osterhoudt, was the father of the minor child was that when Doyle was pregnant with the child, she had an ultrasound test that produced an indicator as to the number of weeks of the fetus' development. The technicians who performed the test explained to Doyle that the testing equipment measured the level of development of the fetus. Other technicians had given Doyle similar information with regard to one of Doyle's earlier pregnancies. Doyle took the information generated by the ultrasound equipment, counted [backward] on a calendar, and thereby concluded that she and Chaplen had had sexual relations at the time the child was conceived. Doyle had used this same method of determining the date of conception, on earlier occasions, with one or more of her other children." The court found that Doyle had established that there had been a material mistake of fact that warranted opening the judgment of paternity in the support action because Doyle "received advice from medical technicians that she accepted and that she had no reason to doubt."

Following its finding that there had been a material mistake of fact, the court held three hearings, on June 25, September 24, and October 7, 2015, in order to address whether equitable principles barred opening the judgment, and whether opening the judgment was in the best interests of the minor child. At the June 25, 2015 hearing, Doyle called several witnesses, including Ashley Brady, Doyle's relative, Brianna Chase and Kaitlyn Vach, Doyle's sisters, and Osterhoudt.

At the hearing, Brady testified that Chaplen was not a consistent presence in the child's life prior to commencing the custody action. Chase testified that Doyle

and Chaplen had a hostile relationship, and that excluding Chaplen from the child's life would not be traumatic for the child because Chaplen had not been a consistent presence in the child's life. Chase also testified that, when the child was approximately one year old, she was present at the meeting with DCF when Doyle requested genetic testing. Vach testified that Chaplen did not have a parent-like relationship with the child; she explained that the relationship was more akin to a friendship. Osterhoudt testified that he knew he was the father of the child since the child was approximately one year old, because he and Doyle had purchased a genetic test at Walgreens and the results confirmed that he was the child's father.[8] He expressed his desire to support the child; although he acknowledged that he had not provided Doyle with child support when they initially discovered that he was the child's father; he testified that he wanted to support the child going forward.

Following Doyle's witnesses, "the state introduced evidence that an employee of the Department of Social Services ([department]) [had] sent a notice, dated January 31, 2013, to Doyle advising her that there [would] be a hearing regarding child support . . . on March 25, 2013. The [department] employee then relied on a brief internal notation [in the department's file] . . . to conclude that she had spoken with Doyle by telephone on February 4, 2013, a call placed by Doyle that had been prompted by the January 31, 2013 notice. According to [the department's file], Doyle told the [department] employee that Doyle was receiving $100 per week [for]

[8] Osterhoudt's testimony was unclear as to precisely when he received the results of the genetic test he purchased from Walgreens. He initially testified that they took the test in 2012, but then he testified that, around Easter, in February or March, 2013, he learned that he was the child's father. The court did not make a finding as to when Osterhoudt and Doyle received the results confirming that Osterhoudt is the biological father of the minor child.

child support from Chaplen and that she was not seeking a support order. The [department] employee told Doyle that the state needed to obtain a support order and explained that to her. The [department's file] does not indicate whether the [department] employee told Doyle that the March hearing would be going forward, what role Doyle might play in such a hearing, or whether [the department] wanted or needed Doyle to appear at the hearing." (Footnote omitted; internal quotation marks omitted.)

Approximately three months after the June 25, 2015 hearing, on September 24, 2015, Chaplen presented his witnesses. The court heard testimony from the following witnesses: Chaplen, Cynthia Eastman, an employee at Litchfield Visitation Services; James Fournier, a department employee; Jessica LaMesa, Chaplen's former coworker; Patricia Chaplen, Chaplen's mother; JoAnn Maher, Chaplen's girlfriend; and Maureen Donahue, the guardian ad litem and attorney for the minor child. Chaplen testified that he had seen the child every week since the child was born, until May 22, 2014, when Doyle told him that he was not the father and that he would never see the child again. Chaplen submitted several exhibits, including photocopies of money orders, which had been given to Doyle for child support, several photographs of the child, and a personalized calendar that contained photographs of the child for each month in the calendar.

Chaplen also testified that he had claimed the child as a dependent on his 2013 tax return in order to obtain a larger refund. Chaplen explained that Doyle, because she had minimal taxable income in 2013, told him to claim the child as a dependent in order to maximize any tax refund. According to Chaplen, he gave Doyle half of his 2013 tax refund. The court, however, found that there was no evidence to support Chaplen's claim that Doyle told him to claim the child as a dependent.

Chaplen then called Eastman, who had supervised the court-referred visitation between Chaplen and the child. Eastman testified that she "observed a very close and affectionate relationship between" Chaplen and the child. She recalled that, at the first meeting, the child hugged Chaplen and said that he missed Chaplen. Chaplen then called LaMesa, who testified that Doyle would come to the restaurant where Chaplen worked to pick up child support or food. Chaplen's mother testified that she had known the child since he was born, that she had developed a strong bond with him, and that he calls her "grandma." Additionally, Chaplen called Maher, his girlfriend since September, 2012, who testified that she has a bedroom at her house for the child, and she many times babysits the child for Chaplen. Maher further testified that there is a parental bond between Chaplen and the child.

The last witness to testify was Donahue, whose testimony spanned two hearings, beginning on September 24, 2015, and concluding on October 7, 2015. Donahue testified that although Chaplen and Doyle disagreed as to whether Chaplen had an ongoing relationship with the child, after Chaplen provided her with photographs and videos of Chaplen and the child, she concluded that Chaplen had an ongoing relationship with the minor child until May, 2014. Donahue, however, also acknowledged that she knew "nothing about [Chaplen's relationship with the child] from the time [the child] was born until [the fall of 2014] . . . other than what [she] learned through pictures and conversations with [the] parties." Donahue further testified that it is in the child's best interests to preserve his relationship with Chaplen. Nevertheless, Donahue acknowledged that the child may require therapy in the future as a result of confusion regarding the identity of his father. Donahue also testified that if the court were to grant Doyle's motion to

open, then there would be no more controversy between Chaplen and Doyle affecting the child.

Following the hearing on October 7, 2015, the court granted Doyle's motion to open, concluding that laches and equitable estoppel did not preclude the granting of the motion and that opening the judgment was in the best interests of the child. On November 30, 2015, on the basis of its findings in its November 25, 2015 memorandum of decision, the court rendered a judgment of nonpaternity in the support action. Thereafter, on December 3, 2015, Chaplen filed a motion to amend his custody application in order to seek the right of visitation in lieu of custody, which the court denied. The court stated that "even if the request for leave to file the amended petition were not untimely, nonetheless, based on the evidence introduced, I still made the finding . . . that [Chaplen] does not have a parent-like relationship[9] [with the child]." (Footnote added.) Accordingly, the court rendered judgment in favor of Doyle in the custody action. Chaplen filed a motion to reargue on December 15, 2015, which the court denied on December 16, 2015, and Donahue, on behalf of the minor child, filed a motion to reargue, which the court denied on December 17, 2015. This appeal followed.[10]

Chaplen claims that the court erred in granting Doyle's motion to open the judgment of paternity. Specifically, he claims that the court improperly: (1) found that Doyle signed the acknowledgment of paternity on the basis of a material mistake of fact; (2) concluded

[9] "In *Roth* v. *Weston*, 259 Conn. 202, 789 A.2d 431 (2002), our Supreme Court held that . . . when a nonparent seeks visitation, that party must allege and prove, by clear and convincing evidence, a relationship with the child that is similar in nature to a parent-child relationship, and that denial of the visitation would cause real and significant harm to the child." *Fennelly* v. *Norton*, 103 Conn. App. 125, 126, 931 A.2d 269, cert. denied, 284 Conn. 918, 931 A.2d 936 (2007).

[10] Chaplen does not challenge the court's denial of his request to amend his custody application.

that opening the judgment was in the best interests of the child after making a clearly erroneous finding that there was no parent-like relationship between Chaplen and the child; and (3) applied the law regarding laches and equitable estoppel. We address each claim in turn.

We begin by setting forth our standard of review and general legal principles relevant to Chaplen's claims. "Whether proceeding under the common law or a statute, the action of a trial court in granting or refusing an application to open a judgment is, generally, within the judicial discretion of such court, and its action will not be disturbed on appeal unless it clearly appears that the trial court has abused its discretion." (Internal quotation marks omitted.) *Simmons* v. *Weiss*, 176 Conn. App. 94, 98, 168 A.3d 617 (2017). A court's authority to open, correct and modify judgments is restricted by statute and the rules of practice. See *710 Long Ridge Operating Co. II, LLC* v. *Stebbins*, 153 Conn. App. 288, 294, 101 A.3d 292 (2014); see also General Statutes § 52-212; Practice Book § 17-4.

In the present case, the trial court's authority to open the judgment of paternity is limited by § 46b-172 (a) (2), which provides in relevant part: "The mother and the acknowledged father shall have the right to rescind such affirmation or acknowledgment in writing within . . . sixty days . . . . An acknowledgment . . . may be challenged in court . . . after the rescission period only on the basis of fraud, duress or material mistake of fact which may include evidence that he is not the father, with the burden of proof upon the challenger. . . ." Doyle and Chaplen signed the acknowledgment of paternity in October, 2011, and Doyle filed her motion to open on August 20, 2014, which was well beyond the sixty day rescission period. Accordingly, Doyle first needed to establish one of the three statutory grounds for challenging the acknowledgment in order for the court to have the authority to open the judgment of

paternity. Consequently, the court was required "to make a factual determination before it [could] exercise its discretion to grant or deny the motion . . . ." (Internal quotation marks omitted.) *Cornfield Associates Ltd. Partnership* v. *Cummings*, 148 Conn. App. 70, 76, 84 A.3d 929 (2014), cert. denied, 315 Conn. 929, 110 A.3d 433 (2015).

Insofar as the court's decision results from its factual findings, those findings will not be disturbed unless they are clearly erroneous. "A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . It is axiomatic that we defer to the trial court's assessment of the credibility of witnesses and the weight to afford their testimony." (Citation omitted; internal quotation marks omitted.) *New London* v. *Picinich*, 76 Conn. App. 678, 685, 821 A.2d 782, cert. denied, 266 Conn. 901, 832 A.2d 64 (2003). "In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action. . . . The manner in which [this] discretion is exercised will not be disturbed so long as the court could reasonably conclude as it did." (Internal quotation marks omitted.) *Cornfield Associates Ltd. Partnership* v. *Cummings*, supra, 148 Conn. App. 76.

I

Chaplen first claims that the trial court improperly found that he and Doyle signed the acknowledgment of paternity on the basis of a material mistake of fact. We disagree.

Chaplen's claim challenges the court's factual finding that there had been a material mistake of fact, accordingly, our review is limited to whether the court's find-

ing was clearly erroneous.[11] See *Gordon* v. *Gordon*, 148 Conn. App. 59, 65, 84 A.3d 923 (2014) ("[a] trial court's determinations regarding the existence of a mutual mistake or the elements of fraud or duress are findings of fact that we will not disturb on appeal unless they are shown to be clearly erroneous").

In its April 6, 2015 memorandum of decision, the trial court concluded that Doyle had established that a material mistake of fact occurred that warranted opening the judgment of paternity. The court credited Doyle's testimony that on the basis of several ultrasounds, which indicated the development of the fetus in weeks by measuring the size and growth of the fetus, she had calculated the date of conception and determined that she had only had relations with Chaplen during the time of conception. The court reasoned that Doyle had "received advice from medical technicians that she accepted and that she had no reason to doubt." Therefore, the court found that Doyle, believing Chaplen was the father of the child, had signed the acknowledgment of paternity on the basis of a material mistake of fact.

Chaplen argues that the court's findings do not support its conclusion that Doyle signed the acknowledgment of paternity on the basis of a material mistake of fact. Specifically, Chaplen argues that the court credited Doyle's testimony "that she lived with Chaplen prior to the birth of the minor child, but that she had been seeing Osterhoudt around the time of the minor child's conception. She is the mother of five children. She knew, at the time the minor child was born, that it was

[11] Chaplen claims that "[i]t is appropriate to employ a de novo or plenary review . . . of the [court's] conclusions relative to the operation of . . . [§] 46b-172." We disagree. Chaplen does not challenge the court's conclusions as to the operation or applicability of § 46b-172, but rather he challenges the trial court's *finding* that there was a material mistake of fact at the time that Chaplen and Doyle signed the acknowledgment of paternity.

possible that Osterhoudt was the child's father, but she didn't think Osterhoudt was the father when the child was born [in] [October, 2011]." According to Chaplen, because Doyle knew that it was *possible* that Chaplen was not the father, she cannot claim that she signed the acknowledgment on the basis of a material mistake of fact.

In support of this claim, Chaplen relies on a Superior Court decision, *Colonghi* v. *Arcarese*, Superior Court, judicial district of Middlesex, Docket No. FA-13-4016846-S (Jan. 10, 2014) (57 Conn. L. Rptr. 444). In *Colonghi*, the defendant, the mother of the minor child, sought to open the judgment of paternity by acknowledgment after the rescission period on the basis of either a material mistake of fact or duress. Id., 444–45. The defendant had been involved with two men during the period of conception and the court found that "[o]nly [the defendant] was in a position to credibly assess the possibility and questions of paternity . . . ." Id., 446. The court reasoned that "[w]ishful thinking is not a material mistake of fact which can later be used to avoid an unpleasant obligation." Id. Relying on contract principles, the court concluded that the defendant bore the risk of the mistake, and that "it would be unconscionable . . . to permit her to take advantage of a situation she herself [had] brought about." Id., 447. Thus, the court denied the defendant's motion to open the judgment of paternity.

In the present case, unlike in *Colonghi*, the court found that Doyle's belief that Chaplen was the father of the child was reasonable because she relied on the ultrasounds and the advice she received from medical technicians. The court did not conclude that Doyle had signed the acknowledgment of paternity on the basis of "wishful thinking," but rather that Doyle, relying on information that she had "no reason to doubt," believed

Chaplen was the father of the minor child. Thus, Chaplen's reliance on *Colonghi* is misplaced.[12]

We conclude that Doyle's testimony, which the trial court credited, supports the court's finding that she signed the acknowledgment on the basis of a material mistake of fact. Accordingly, the trial court's finding was not clearly erroneous. Because the court found that Doyle established that there had been a material mistake of fact, the court, pursuant to § 46b-172 (a) (2), had the authority to grant Doyle's motion to open.

II

Chaplen next claims that the court, after making a clearly erroneous finding that there was no parent-like relationship between Chaplen and the child, incorrectly concluded that opening the judgment was in the best interests of the child. We are not persuaded.

As previously stated in this opinion, "[a] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *New London* v. *Picinich*, supra, 76 Conn. App. 685.

In its November 25, 2015 memorandum of decision, the court stated: "Important as it is to assess the application of the doctrines of laches and equitable estoppel,

[12] Donahue, as the guardian ad litem and attorney for the minor child, agrees with Chaplen and further argues that the court should not have credited Doyle's testimony because Doyle's "honesty and good faith frequently have come into question," and Doyle failed to provide any medical evidence or testimony that would corroborate her claims regarding the ultrasounds. In effect, Donahue requests that we evaluate Doyle's credibility and retry the facts. That simply is not the role of this court. "We repeat what has become a tired refrain: [W]e do not retry the facts or evaluate the credibility of witnesses." (Internal quotation marks omitted.) *Krystyna W.* v. *Janusz W.*, 127 Conn. App. 586, 591, 14 A.3d 483 (2011).

the most important analysis is the determination of the best interests of the child." The court listed the following five factors regarding the best interests of the child: genetic information, the past relationship between the acknowledged father and the child, the child's interest in knowing his parental biology, whether the biological father is available as a source of emotional and financial support for the child, and any harm that the child may suffer if the judgment of paternity is opened, including the loss of a parent-child relationship and/or any financial detriment.[13]

The court found "that Chaplen does not have a parental relationship with [the child] and has never had such a relationship during the time that [the child] has been

[13] In *Asia M.* v. *Geoffrey M.*, 182 Conn. App. 22, 35, A.3d (2018), the family support magistrate found that the acknowledged father had not established fraud, duress, or material mistake of fact. The magistrate, however, granted the motion to open on the ground that it was in the best interests of the child to do so. Id., 26. The trial court affirmed in part the magistrate's decision. Id., 26–27. On appeal, this court reversed the judgment of the trial court, holding that the magistrate did not have the authority to open the judgment of paternity under § 46b-172 (a) (2) because "the best interests of the child" is not one of the three exclusive statutory grounds for challenging an acknowledgment of paternity. Id., 34–35. This court concluded that "[a]bsent a finding of fraud, duress, or material mistake of fact, an acknowledgment of paternity may not be challenged in court." Id., 34.

In the present case, Chaplen has not claimed that the court improperly considered the best interests of the child. Because the issue has not been raised, we confine our analysis to the argument presented; we therefore assume without deciding that the court properly considered the best interests of the child *after* finding that Doyle had established one of the statutory grounds for challenging the acknowledgment of paternity. See part I of this opinion. We also note that the best interest factors identified by the court are subsumed within the court's analysis of equitable estoppel. See part III of this opinion; see also *W.* v. *W.*, 248 Conn. 487, 498, 728 A.2d 1076 (1999) ("Estopping parties from denying parentage under appropriate circumstances promotes our oft-expressed policy of supporting the integrity of the family unit and protecting the best interests of the child . . . [and the] child's right to family identification . . . . Similarly, the doctrine furthers our public policy of favoring the establishment of legal parenthood with all of its accompanying responsibilities." [Citation omitted; internal quotation marks omitted.]).

at an age when he is capable of being fully aware of who is caring for him." The court reasoned that Chaplen had moved out of Doyle's residence approximately six months after the child was born, and found that Chaplen "is a person who, from the time [the child] was approximately six months of age, has only occasionally been in [the child's] life. He is more of a friend or infrequent caretaker than a father. . . . [The guardian ad litem] agreed that if the judgment in the support [action] is opened, the controversy among Doyle, Chaplen, and [the child] will finally end. She agreed that [the child], an affectionate child, could establish with anyone the same type of relationship that he has with Chaplen."[14]

Chaplen claims that "[t]he weight of the evidence presented must result in a finding that the [t]rial [c]ourt's finding was clearly erroneous and requires reversal. The totality of the testimony should have resulted in the [c]ourt's finding that . . . Doyle and much of the testimony she elicited from her witnesses was not credible." Chaplen argues that "[t]he [guardian ad litem's] findings and the testimony of . . . Eastman of Litchfield Visitation Services were clear that a significant relationship existed between the minor child and . . . Chaplen prior to the reestablishment of visits through . . . [c]ourt order. . . . Doyle and each of her witnesses painted a picture completely at odds with what the professionals concluded from their investigation." He further argues that opening the judgment of paternity "is clearly not in the best interest[s] of the minor child . . . ."

Similarly, Donahue, on behalf of the minor child, argues that the court "gave no credit to the testimony of the . . . court appointed [g]uardian ad [l]item

[14] Although the court acknowledged that it was unclear exactly how often Chaplen saw the child, the court found that Chaplen saw the child only approximately one time each week.

. . . . The [c]ourt did not acknowledge the testimony that the child had a significant relationship with Chaplen prior to the court's involvement—with the blessing of the mother. . . . And that that relationship continued unaltered by absences caused by Doyle . . . wherein the witness as well as others testified that the child was clearly attached to Chaplen." (Citations omitted.)

On the basis of the record before us, we conclude that the trial court's finding that Chaplen does not have a parent-like relationship with the minor child is not clearly erroneous because there is ample evidence to support it. Brady, Doyle's relative, testified that Chaplen was not a consistent presence in the minor child's life prior to his filing the custody action. Doyle's sister, Vach, testified that Chaplen did not have a parent-like relationship with the minor child, that their relationship is more like "a friend type deal." To be sure, there is evidence that could have supported a finding that Chaplen did have a parent-like relationship with the minor child, including Donahue's testimony. Nevertheless, "it is the exclusive province of the trier of fact to weigh the conflicting evidence, determine the credibility of witnesses and determine whether to accept some, all or none of a witness' testimony." (Emphasis omitted; internal quotation marks omitted.) *Palkimas* v. *Fernandez*, 159 Conn. App. 129, 133, 122 A.3d 704 (2015); see also *Cavanaugh* v. *Richichi*, 100 Conn. App. 466, 469, 918 A.2d 290 (2007) ("In effect, we are being asked to substitute our judgment, as to the credibility of the witnesses, for the judgment of the trial court. It is axiomatic that we cannot do that."). Accordingly, the court's finding that Chaplen does not have a parent-like relationship with the minor child is not clearly erroneous.[15]

[15] We note that Chaplen has not claimed that the judgment of the trial court in the custody action should be reversed because the court's finding that no significant parent-like relationship existed between Chaplen and the child is clearly erroneous. In fact, in addressing the court's finding regarding a parent-like relationship, Chaplen argues only that "[t]he failure of the

Consequently, its conclusion that it was in the best interests of the child to open the judgment of paternity also was not clearly erroneous.

III

Chaplen finally claims that the court misapplied the law of laches and equitable estoppel, and improperly concluded that Doyle was not barred from opening the judgment of paternity. We disagree.

In support of his laches and equitable estoppel claims, Chaplen alleges the same resultant prejudice, an essential element of each claim. He claims that the court improperly concluded that he failed to establish that he was prejudiced by providing care and support, both emotional and financial, neither of which he would have provided if he had known that he was not the father of the child. The difference between the two claims is only the cause of that prejudice.

As to laches, Chaplen claims that the cause of his prejudice was Doyle's delay in challenging the acknowledgment of paternity. As to equitable estoppel, he claims that the cause of his prejudice was Doyle's misrepresentation that he was the child's father. Because we conclude that the court's finding that Chaplen did not meet his burden of proving either element of equitable estoppel is not clearly erroneous, our resolution of his equitable estoppel claim necessarily disposes of his claim that Doyle was guilty of laches.[16] See, e.g., *Kalinowski* v. *Kropelnicki*, 92 Conn. App. 344, 352, 885 A.2d 194 (2005) ("Even if we assume that the plaintiff delayed

[c]ourt to make the proper inferences from the facts and the testimony is clearly erroneous. The evidence dictates that the granting of . . . Doyle's [m]otion to [o]pen is clearly not in the best interest of the minor child and as such her [m]otion should have been and should be denied."

[16] Chaplen, in his posttrial brief filed in the trial court, did not present an independent analysis of laches. Instead, he argued: "The testimony and arguments applicable to the doctrine of equitable estoppel similarly apply to the . . . [principle] of laches . . . ."

in filing his claim . . . and that the delay was inexcusable, the court found that there was no prejudice to the defendant sufficient to apply the doctrine of laches. . . . We therefore conclude that the evidence is sufficient to support the court's conclusion that the defendant failed to prove laches."); *Sablosky* v. *Sablosky*, 72 Conn. App. 408, 414, 805 A.2d 745 (2002) ("[a]bsent a showing of prejudice, we conclude that the evidence is sufficient to support the court's conclusion that the defendant failed to prove laches").

We first set forth the legal principles and our standard of review applicable to claims of equitable estoppel. "The party claiming estoppel—here, [Chaplen]—has the burden of proof. . . . Whether that burden has been met is a question of fact that will not be overturned unless it is clearly erroneous. . . . The legal conclusions of the trial court will stand, however, only if they are legally and logically correct and are consistent with the facts of the case. . . . Accordingly, we will reverse the trial court's legal conclusions regarding estoppel only if they involve an erroneous application of the law. . . .

"There are two essential elements to an estoppel: the party [against whom it is asserted] must do or say something which is intended or calculated to induce another to believe in the existence of certain facts and to act upon that belief; and the other party, influenced thereby, must actually change his position or do something to his injury which he otherwise would not have done. . . . In the absence of prejudice, estoppel does not exist." (Citation omitted; internal quotation marks omitted.) *Fischer* v. *Zollino*, 303 Conn. 661, 667–69, 35 A.3d 270 (2012).

In *Ragin* v. *Lee*, 78 Conn. App. 848, 863, 829 A.2d 93 (2003), this court held "that a child who is the subject of a paternity action has a fundamental interest in an

accurate determination of paternity that is independent of the state's interest in establishing paternity for the benefit of obtaining payment for the child's care and any interest that the parents may have in the child." Consistent with that holding, our Supreme Court has recognized that "[e]stoppel cases involving parentage are anomalous in that the reliance interest at issue is not merely that of the party advocating that estoppel be imposed, typically a parent, but also that of a nonparty, namely, the child." *Fischer* v. *Zollino*, supra, 303 Conn. 669 n.6.

In the context of paternity disputes, "the party seeking to invoke estoppel must show that, if [the opposing party] is permitted to contest . . . paternity, the *child will suffer future financial detriment* as a result of the [opposing party's] past active interference with the financial support by the child's natural parent. . . . It is imperative for the [opposing party] to have taken positive steps of interference with the natural parent's support obligations . . . . Future economic detriment is established, for instance, whenever a custodial natural parent . . . (1) does not know the whereabouts of the natural parent; (2) cannot locate the other natural parent; or (3) cannot secure jurisdiction over the natural parent for valid legal reasons, and . . . the natural parent's unavailability is due to the actions of the [opposing party] . . . ." (Citation omitted; emphasis altered; internal quotation marks omitted.) Id., 671. Consequently, in order to establish prejudice or detrimental reliance in a case involving a denial of paternity, there must be a finding of financial harm to the child.[17] See

[17] In a situation such as the present case, where the child's mother, instead of the father, is denying the acknowledged or presumed father's paternity, we question, without deciding, whether a showing of future financial detriment to the child should be a necessary requirement for the application of equitable estoppel.

Our Supreme Court, in adopting the requirement of future financial detriment, reasoned that "emotional harm . . . cannot necessarily be prevented by equitable estoppel, which is naturally confined to a party's legal obliga-

id., 676 (reversing judgment of trial court "because there was insufficient evidence of financial harm, which is required to establish the element of detrimental reliance in a case involving a denial of paternity").

Chaplen argues that the court should have concluded that Doyle was equitably estopped from opening the judgment of paternity because she misrepresented to Chaplen that he was the child's father, long after she knew that was not the case, and Chaplen relied on Doyle's misrepresentations to his detriment. Essentially, Chaplen argues that he suffered financial and emotional detriment, and, by allowing Doyle to open

tions." (Citation omitted.) *W.* v. *W.*, supra, 248 Conn. 503. The court further reasoned that requiring only a showing of emotional detriment would "discourage parent-child bonding by rewarding stepparents who do not create a familial bond with their stepchildren, while punishing those who do, by requiring them to be responsible for them as a legal parent in the event of a divorce." Id. These policy concerns are not implicated, however, where the acknowledged father does not seek to relinquish his parental status and the attendant emotional and financial obligations to the child. As our Supreme Court has noted: "Every paternity action revolves around its own unique set of facts and personal relationships, and a trial court must have flexibility to weight the multiplicity of competing interests that may hang in the balance. . . . Such sensitive and personal affairs are no place for an immutable legal standard that is bordered by bright lines. . . . Not all putative fathers and not all families are similarly situated; thus their . . . interests cannot be protected by a blanket [rule of law] that treats all putative fathers alike." (Citations omitted; internal quotation marks omitted.) *Weidenbacher* v. *Duclos*, 234 Conn. 51, 76, 661 A.2d 988 (1995); see also *W.* v. *W.*, supra, 503–504 ("[I]n deciding whether to apply the doctrine of equitable estoppel, courts must act judiciously and with sensitivity to the facts particular to each case. . . . [E]quitably estopping parties from denying parenthood is an extraordinary measure because it involves a judicially created imposition of parental status and attendant responsibility." [Citation omitted.]).

In any event, this issue was not raised before the trial court or on appeal, and, accordingly, we leave it for another day. Furthermore, in light of the court's findings that Chaplen did not have a parent-like relationship with the child and that the child would not suffer significant emotional harm if the court granted Doyle's motion to open, Chaplen would not have met his burden of proving prejudice even if emotional detriment alone would be sufficient to equitably estop Doyle from challenging the acknowledgment. See part II of this opinion.

the judgment of paternity, he will continue to suffer emotional detriment.

In its memorandum of decision, the court found that Chaplen had failed to establish either element of equitable estoppel. First, the court found that there was no evidence demonstrating that Doyle had engaged in any misleading conduct because "[b]oth Doyle and Chaplen mistakenly believed that [Chaplen] was [the minor child's] father, and they both had a basis for that mistaken belief." Doyle, whose testimony the court credited, testified that she did not begin to question that belief until the child was approximately six months old. Moreover, she claimed that Chaplen had been aware of the possibility that he was not the father of the minor child since the child was approximately one year old. Doyle also testified that Chaplen was present at the meeting with DCF when Doyle expressed her doubts about the child's paternity, which occurred when the child was approximately one year old. Thus, the court's finding that Doyle did not mislead Chaplen is supported by evidence in the record that Doyle told Chaplen that he may not be the father of the minor child within months of when she first had doubts as to the child's paternity, and before the state filed the support action against Chaplen.

Second, the court concluded that "[t]o the extent that Chaplen has been prejudiced . . . that prejudice is limited to minimal payments of child support . . . ." The court further concluded that those payments were offset by the income tax refund that Chaplen received for 2013 when he claimed the child as a dependent.[18] Accordingly, the court found that Chaplen had failed to meet his burden to prove that he suffered prejudice

[18] Accepting Doyle's testimony as true, Chaplen's filing of the tax return for 2013 would have occurred more than a year after Doyle told him that he might not be the child's father.

as a result of his reliance on Doyle's alleged misrepresentations.

The court also considered whether the child would suffer emotional and financial detriment as a result of opening the judgment of paternity. The court found that if Chaplen were to be removed from the minor child's life, the child would not suffer "significant—if any—adverse emotional effects . . . as he matures." As to potential financial detriment to the child, the court reasoned that Osterhoudt, the child's biological father, was "available as a source of financial support for the minor child." Specifically, the court found that Osterhoudt "wants to meet his obligations as [the minor child's] father" and that he "has the potential to be a presence in [the minor child's] life and to provide the child with financial and emotional support." The court further found "that the current situation is profoundly confusing to the child and, if not corrected, will lead to further confusion going forward." Those factual findings are supported by the record, and therefore they are not clearly erroneous.

On the basis of our review of the record, we conclude that the court's factual findings and legal conclusions are sufficiently supported by the record. We therefore conclude that the court properly determined that Doyle was not equitably estopped from opening the judgment of paternity after finding that Chaplen failed to meet his burden of establishing each element of equitable estoppel.[19]

In sum, we conclude that the court had the authority to open the judgment of paternity under § 46b-172 (a) (2) because the court found that Doyle signed the

[19] As previously noted in this opinion, because we conclude that the court's finding that Chaplen failed to establish prejudice is not clearly erroneous, we further conclude that the court also properly determined that Doyle was not guilty of laches, as Chaplen alleged the same prejudice for both claims.

acknowledgment on the basis of a material mistake of fact.[20] We also conclude that court's findings are not clearly erroneous, and that the court's legal conclusions regarding equitable estoppel and laches are consistent with those findings and are legally and logically correct. Therefore, we conclude that the court did not abuse its discretion in granting Doyle's motion to open.

The judgments are affirmed.

In this opinion the other judges concurred.

LANDMARK DEVELOPMENT GROUP, LLC, ET AL. *v.* WATER AND SEWER COMMISSION OF THE TOWN OF EAST LYME

(AC 39804)
(AC 39806)

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

Syllabus

The plaintiff developers appealed to the trial court from the decision of the defendant Water and Sewer Commission of the Town of East Lyme granting in part an application the plaintiffs had filed for a determination of sewer capacity, in which they had requested that 118,000 gallons per day of the town's sewer treatment capacity be reserved for their proposed housing development. After a prior appeal to the trial court had twice been remanded for further proceedings before the commission, the commission had allocated 14,434 of the requested sewer treatment capacity to the plaintiffs, and the plaintiffs again appealed to the trial court. The court granted the plaintiffs' motion to supplement the record and to conduct discovery regarding a decision by the commission's

[20] Judge Keller, in her thoughtful concurring opinion in *Asia M.* v. *Geoffrey M.*, supra, 182 Conn. 38–40, encouraged the legislature to revise § 46b-172 in order to ensure accuracy in the acknowledgment of paternity process. We agree with Judge Keller's observations and reiterate her suggestion to the legislature to consider amending § 46b-172 so that an acknowledgment of paternity must be accompanied by DNA testing results that are consistent with the putative father's representation. Id., 39. Although § 46b-172 provides an inexpensive and expedient process for establishing paternity of a child born out of wedlock, that process, unfortunately, may lead to considerable future turmoil because it certainly does not ensure accuracy.

administrator to approve a sewer connection application by G, which was developing a similarly situated apartment complex where over 160,000 gallons of sewer treatment capacity was contemplated. The court also granted the petition to intervene filed by certain intervenors, which had expressed environmental concerns about the plaintiffs' development. Thereafter, the matter was tried to the court, which concluded that the commission abused its discretion in its assessment of the sewer treatment capacity available for the plaintiffs' development and rendered judgment sustaining the plaintiffs' appeal. The commission and the intervenors, on the granting of certification, filed separate appeals to this court. *Held*:

1. The commission could not prevail on its claim that the trial court abused its discretion by admitting the supplemental evidence concerning G: the statute pertaining the record in an appeal from a decision by the commission (§ 8-8 [k] [2]) allows any party to introduce evidence in addition to the contents of the record if it appears to the court that additional testimony is necessary for the equitable disposition of the appeal, and here, the evidence concerning G established that, although the commission concluded that it did not have sufficient capacity to grant the plaintiffs' application for up to 118,000 gallons per day, G had effectively been granted an allocation of approximately 166,000 gallons per day following the approval of its sewer connection permit, which was relevant evidence for the court to be able to determine whether the plaintiffs had been treated inequitably by the commission as compared to G; moreover, the plaintiffs did not have the opportunity to present the evidence concerning G to the commission during any of their prior proceedings before the commission, and given when the plaintiffs' learned of the evidence and that such evidence could have influenced the commission's decision regarding the plaintiffs' application, their motion to supplement the record was their first reasonable opportunity to bring the that evidence to the attention of the court and the commission.

2. The commission's claim that the court improperly concluded that the commission abused its discretion by allocating to the plaintiff 14,434 gallons per day of sewer treatment capacity was unavailing:

   a. The trial court, in reaching its decision to sustain the plaintiff's appeal, did not abuse its discretion by disregarding certain factors outlined by our Supreme Court in *Forest Walk, LLC* v. *Water Pollution Control Authority* (291 Conn. 271) with regard to sewage capacity; although the commission claimed that the law of the case doctrine required the application of those factors by the trial court, which previously, in a remand order, had indicated that with regard to capacity, under the substantial evidence test the commission had to consider those factors, at the time the trial court issued that remand order it was not aware of the evidence relating to G, which established new and overriding

circumstances, and, thus, the court properly exercised its discretion in disregarding those factors.

b. The trial court did not act unreasonably, illegally or in abuse of its discretion when it sustained the plaintiffs' appeal and remanded the matter to the commission; that court having properly admitted the evidence relating to G, in reaching its decision on the plaintiffs' appeal it was free to consider that evidence, which demonstrated that the record, as supplemented, did not reasonably support the conclusion of the commission to grant a 14,434 gallon daily allocation, that the commission had an available capacity of 358,000 gallons per day, less the 166,000 gallons per day that was effectively allocated to G, and that an administrator of the commission was aware of G's capacity need and the existence of the plaintiffs' then pending application and nevertheless approved G's connection application without making a determination of the impact of the grant to G on the plaintiffs' application in light of the remaining capacity available to the town and without applying the factors set forth in *Forest Walk, LLC*, to G's application, and, therefore, on the basis of the record, the court reasonably could have determined that the commission had treated the plaintiffs inequitably and that an injustice had been done.

Argued April 10—officially released August 21, 2018

Procedural History

Appeal from a decision by the defendant commission granting in part the plaintiffs' application for sewer treatment capacity determination, brought to the Superior Court in the judicial district of New London and transferred to the judicial district of Hartford, Land Use Litigation Docket, where the court, *Hon. Henry S. Cohn*, judge trial referee, granted the plaintiffs' motion to supplement the record; thereafter, the court granted the petition to intervene filed by the Friends of the Oswegatchie Hills Nature Preserve, Inc., et al.; subsequently, the matter was tried to the court; judgment sustaining the plaintiffs' appeal, from which the defendant and the intervenors, on the granting of certification, filed separate appeals to this court. *Affirmed.*

Mark S. Zamarka, with whom, on the brief, was *Edward B. O'Connell*, for the appellant in AC 39804 (defendant).

Roger F. Reynolds, with whom were *John M. Looney, Jr.*, and, on the brief, *Andrew W. Minikowski*, for the appellants in AC 39806 (intervenors).

Timothy S. Hollister, with whom was *Beth Bryan Critton*, for the appellees in both appeals (plaintiffs).

Opinion

BEAR, J. This chapter of the protracted dispute between the town of East Lyme (town), and the plaintiffs, Landmark Development Group, LLC, and Jarvis of Cheshire, LLC, involves the plaintiffs' application to the defendant,[1] the town's Water and Sewer Commission (commission), for a determination of sewer treatment capacity. The commission appeals from the judgment of the Superior Court sustaining the plaintiffs' appeal and ordering the commission to grant the plaintiffs' application.[2] On appeal, the commission argues

[1] On February 20, 2015, two entities, Friends of the Oswegatchie Hills Nature Preserve, Inc., and Save the River-Save the Hills, Inc., submitted a verified petition to intervene, pursuant to General Statutes § 22a-19, in the appeal between the plaintiffs and the commission. In the petition, the entities argued, inter alia, that the plaintiffs' "application involves conduct which is reasonably likely to have the effect of unreasonably polluting, impairing, or destroying the public trust in the air, water and other natural resources of the State of Connecticut." The petition highlighted several environmental considerations and noted that the Superior Court had found previously that the plaintiffs' development posed a risk of considerable harm to the Oswegatchie Hills. On March 18, 2015, the court granted the petition to intervene. Both the commission and the intervenors have appealed from the court's judgment sustaining the plaintiffs' appeal. The commission's appeal is assigned docket number AC 39804. The intervenors' appeal is assigned docket number AC 39806. The intervenors did not appear in the proceedings before the commission to determine the sewer treatment capacity available for the use of the plaintiffs, and did not submit any evidence in support of their claims. Because the intervenors' claims on appeal essentially are the same as the claims raised by the commission, and rely on the record of the proceedings before the commission made by the plaintiffs and the commission witnesses, we address both appeals in a single opinion.

[2] Initially, the plaintiffs contended that the judgment of the trial court was not an appealable final judgment, while the commission argued that it was. At oral argument before this court, the plaintiffs' counsel conceded that the court's July, 2016 decision was an appealable final judgment. We agree and note that "[a] judgment of remand is final if it so concludes the rights of

that the court (1) abused its discretion by allowing the plaintiffs to submit supplemental evidence to the court, and (2) improperly concluded that the commission abused its discretion by allocating to the plaintiffs 14,434 gallons per day in sewer treatment capacity. We affirm the judgment of the court.

The following facts and procedural history are relevant to our disposition of this appeal.[3] The plaintiffs own a 236 acre parcel of land in the Oswegatchie Hills area of the town, on which the plaintiffs sought to construct an 840 unit housing development. Giving rise to the present appeal is the plaintiffs' application to the commission for a determination of sewer treatment capacity, which the plaintiffs filed on June 1, 2012. In this application, the plaintiffs requested that 118,000 gallons per day of the town's sewer treatment capacity be reserved for its proposed housing development in the Oswegatchie Hills. In a December, 2012 resolution, the commission found that the plaintiffs had requested a disproportionately large amount of the town's remaining sewer treatment capacity and, therefore, denied the plaintiffs' application. The plaintiffs appealed the commission's decision to the Superior Court, which, on January 16, 2014, remanded the case to the commission for a clarification of its 2012 resolution (first remand). Specifically, the court sought clarification as to the amount of capacity the commission was willing to allocate to the plaintiffs and a justification

the parties that further proceedings cannot affect them. . . . A judgment of remand is not final, however, if it requires [the agency to make] further evidentiary determinations that are not merely ministerial." (Citations omitted; internal quotation marks omitted.) *Kaufman* v. *Zoning Commission*, 232 Conn. 122, 130, 653 A.2d 798 (1995). Here, the court's judgment so concluded the rights of the parties because it ordered that the commission *must* grant the plaintiffs' application.

[3] The dispute between the plaintiffs and the town has been ongoing for approximately eighteen years. Most of the facts and procedural history related to the protracted dispute are not relevant to the issues in this appeal.

for that amount. The court also ordered that the parties report back to court on March 17, 2014.

Pursuant to the court's January, 2014 order, the commission addressed the plaintiffs' application at its February, 2014 regular meeting. Following the meeting, the commission allocated to the plaintiffs 13,000 gallons per day in sewer treatment capacity. The parties appeared before the court in May, 2014, to resolve, inter alia, whether the commission's allocation of 13,000 gallons per day was an abuse of discretion. On June 23, 2014, the court sustained the plaintiffs' appeal and remanded the matter to the commission (second remand). In reaching this conclusion, the court relied on *Forest Walk, LLC* v. *Water Pollution Control Authority*, 291 Conn. 271, 968 A.2d 345 (2009),[4] and *Dauti Construction, LLC* v. *Water & Sewer Authority*, 125 Conn. App. 652, 10 A.3d 84 (2010), cert. denied, 300 Conn. 924, 15 A.3d 629 (2011). The court found that the commission's allocation of 13,000 gallons per day was "inappropriately low" for the following reasons: (1) the record did not indicate a specific amount of available capacity before considering the plaintiffs' application; (2) the commission made no finding regarding the area of the plaintiffs' development versus the land area of the town; (3) the commission based its decision on data that was not current; (4) none of the commission's capacity for possible future development had been requested since the reserve for future development was created in 2004; and (5) the plaintiffs requested only a small amount of the commission's remaining capacity.

[4] In its memorandum of decision, the court noted that *Forest Walk, LLC*, "indicate[s] the following to the court with regard to this appeal . . . . With regard to capacity, under the substantial evidence test, the commission must consider [1] the remaining capacity for the entire town, [2] the land area represented by the property versus the available land area in the town, [3] the safe design standards for public sewers, and [4] the percentage of allocation versus the total remaining capacity." We refer to these as the *Forest Walk* factors.

At its October 28, 2014 regular meeting, the commission again considered the plaintiffs' application. On the basis of the factors set out in *Forest Walk, LLC* v. *Water Pollution Control Authority*, supra, 291 Conn. 295–96 (*Forest Walk* factors); see footnote 4 of this opinion; the commission derived a formula to determine what it considered to be an appropriate sewer capacity allocation for the plaintiffs. The formula provided: 358,000 gallons per day of available capacity divided by 5853 total acres of the town, is equal to X divided by 236 acres owned by the plaintiffs, where X equals the appropriate capacity to allocate to the plaintiffs. Application of this formula determined that 14,434 gallons per day of sewer treatment capacity was an appropriate allocation. The plaintiffs again appealed the commission's decision to the Superior Court.

On July 6, 2016, the court issued a memorandum of decision again remanding the matter to the commission (third remand). In its memorandum of decision, the court noted the following relevant procedural history: "In the present action, which was commenced on November 24, 2014, the plaintiffs . . . ask the court to review a grant of capacity of 14,434 gallons per day to the plaintiffs by the [commission]. On February 19, 2015, the plaintiffs filed their appeal brief. On March 16, 2015, the [commission] . . . filed its appeal brief. On March 30, 2015, the plaintiffs filed a motion for permission to supplement the record in an administrative appeal. The court heard oral argument on April 2, 2015. On the same day, the court granted the plaintiffs' request, but only as to exhibit C, a letter from Mark S. Zamarka.

"On July 23, 2015, the plaintiffs filed a motion to conduct further discovery [including the taking of a] deposition and to supplement the record. Specifically, the plaintiffs asked the court for permission to take the

deposition of the [commission's] administrator, Bradford Kargl, regarding the approval of the connection application by Gateway (a similarly-situated apartment complex being developed) where over 160,000 gallons per day capacity was contemplated. The motion was granted by the court on September 8, 2015. The deposition revealed that although Kargl was aware of the Gateway capacity need . . . and had a duty to monitor this need . . . he approved the connection application without making a capacity determination . . . and without further reference to the [commission]."

Thereafter, the court stated: "In light of the supplemental evidence, the court concludes that there is at least 200,000 gallons per day capacity (358,000 gallons per day less 160,000 gallons per day to Gateway) for the entire sewer system. The [commission] had broad discretion in determining capacity, but the [commission] was obligated to consider capacity when it approved [Gateway's] connection application . . . . As to the plaintiffs, the court finds that with the large amount of capacity remaining, the capacity figure of 14,434 gallons per day is excessively low. There is an abuse of discretion that the [commission] must correct. Although the [commission] is not required to grant the plaintiffs their request for 118,000 gallons per day, the capacity figure of 14,434 gallons per day is insufficient in view of the present remaining capacity of at least 200,000 gallons per day, and in view of the 160,000 gallons per day that was approved for Gateway. In reconsidering the allocation of the sewer capacity, the [commission] must comply with applicable sewer statutes, regulations and ordinances, and the [commission] should take into account the demands of the plaintiffs' sewer project and the effect on remaining capacity. Nevertheless, the [commission] must provide the plaintiffs with sufficient capacity to further the development of their project, and, as such, the [commission] may

not settle on a figure for capacity that would completely foreclose the development of the plaintiffs' project." (Footnotes omitted.) This appeal followed.

I

The first issue that we must resolve is whether the court abused its discretion by allowing the plaintiffs to submit supplemental evidence (Gateway evidence) pursuant to General Statutes § 8-8 (k) (2). The commission argues that the Gateway evidence concerned a sewer connection permit, which does not require a determination of sewer treatment capacity and is a matter that the commission does not handle, rendering the evidence irrelevant and unnecessary for the equitable disposition of the appeal.

The abuse of discretion standard governs our review of a trial court's decision to admit supplemental evidence under § 8-8 (k). See *Parslow* v. *Zoning Board of Appeals*, 110 Conn. App. 349, 353–54, 954 A.2d 275 (2008). "When reviewing claims under an abuse of discretion standard, the unquestioned rule is that great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness. . . . We will reverse the trial court's ruling only if it could not reasonably conclude as it did. . . . Reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done. . . . We do not . . . determine whether a conclusion different from the one reached could have been reached." (Citations omitted; internal quotation marks omitted.) Id., 354.

Section 8-8 (k) provides in relevant part: "The court shall review the proceedings of the board and shall allow any party to introduce evidence in addition to the contents of the record if . . . (2) it appears to the court that additional testimony is necessary for the equitable disposition of the appeal." See also *Clifford*

v. *Planning & Zoning Commission*, 280 Conn. 434, 447, 908 A.2d 1049 (2006) ("[a]n appeal from an administrative tribunal should ordinarily be determined upon the record of that tribunal, and only when that record fails to present the hearing in a manner sufficient for the determination of the merits of the appeal, or when some extraordinary reason requires it, should the court hear evidence" [internal quotation marks omitted]). " '[A]llowance at trial of additional evidence under the concept of evidence "necessary for the equitable disposition of the appeal," under [§] 8-8 (k) [(2)], has generally received a restrictive interpretation to avoid review of the agency's decision based in part on evidence not presented to the agency initially.' " *Gevers* v. *Planning & Zoning Commission*, 94 Conn. App. 478, 489, 892 A.2d 979 (2006).

Here, the Gateway evidence was necessary for the equitable disposition of the appeal. The Gateway evidence established that, even though the commission concluded, after it applied the *Forest Walk* factors, that it did not have sufficient capacity to grant the plaintiffs' application for up to 118,000 gallons per day, Gateway had, in effect, been granted, without application of the *Forest Walk* factors,[5] an allocation of approximately 166,000 gallons per day following the approval of its connection permit. The Gateway evidence, therefore, was relevant for the court to be able to determine that the plaintiffs, when compared to Gateway, had been treated inequitably by the commission. Unlike Gateway, which had been able to build its development, the plaintiffs, because of the commission's 14,434 gallon per day allocation, did not have sufficient capacity to satisfy the estimated sewage requirements of their projected 840 unit development, despite the existence of adequate

[5] Gateway, unlike the plaintiffs, did not make an allocation application prior to constructing its development.

available capacity to grant the plaintiffs' request of up to 118,000 gallons per day.[6]

Moreover, the plaintiffs did not have the opportunity to present the Gateway evidence to the commission during the initial hearing, the first remand, or the second remand. Our review of the record shows that the events concerning Gateway occurred in 2014 and 2015, and that the plaintiffs became aware of the Gateway evidence in 2015. Therefore, when the plaintiffs filed their motion under § 8-8 (k) (2) in March, 2015, it was their first reasonable opportunity to bring the Gateway evidence to the court's and the commission's attention. Accordingly, because the Gateway evidence could have influenced the commission's decision regarding the plaintiffs' application, and the plaintiffs sought to introduce this evidence at the earliest opportunity, the court did not abuse its discretion by granting the plaintiffs' motion to supplement the record. See *Clifford* v. *Planning & Zoning Commission*, supra, 280 Conn. 449 ("[t]o penalize the plaintiff for the absence in the record of documents that could have affected the commission's decision on the site plan application, when the plaintiff had no reasonable opportunity to bring such documents to the attention of the commission, would be simply

[6] The court found "that with the large amount of capacity remaining, the capacity figure of 14,434 gallons per day is excessively low. There is an abuse of discretion that the [commission] must correct. Although the [commission] is not required to grant the plaintiffs their request for 118,000 gallons per day, the capacity figure of 14,434 gallons per day is insufficient in view of the present remaining capacity of at least 200,000 gallons per day, and in view of the 160,000 gallons per day that was approved for Gateway. . . . Nevertheless, the [commission] must provide the plaintiffs with sufficient capacity to further the development of their project, and, as such, the [commission] may not settle on a figure for capacity that would completely foreclose the development of the plaintiffs' project." From this finding, we can infer that the court also found that the grant of 14,434 gallons per day foreclosed the plaintiffs from moving forward with their development.

unfair and not in accordance with basic principles of equity").[7]

II

The commission's second claim on appeal is that the court improperly concluded that it abused its discretion by allocating to the plaintiffs 14,434 gallons per day of sewer treatment capacity. Specifically, the commission argues that the court erred because it disregarded its ruling from a prior remand concerning the application of the *Forest Walk* factors. See footnote 4 of this opinion. The commission also argues that the court erred by basing its decision, at least in part, on the supplemental evidence admitted pursuant to § 8-8 (k) (2) and by holding that the commission was obligated to consider the Gateway evidence in reaching its decision on the plaintiffs' application. We address those arguments in turn.

[7] Our Supreme Court's decision in *Clifford* v. *Planning & Zoning Commission*, supra, 280 Conn. 434, informs our resolution of this issue. In *Clifford*, the defendant commission (defendant) approved the proposal of the defendant construction company (company) to store dynamite on the company's property. Id., 437. The plaintiff, Thomas Clifford, appealed to the trial court, and moved under § 8-8 (k) (2) to introduce supplemental evidence. Id., 437–38. Specifically, Clifford sought to introduce prior site plan approvals for the property at issue, which established, inter alia, that the storage of hazardous and demolition materials on the property was expressly prohibited and that before any further development could take place on the property, the company would need the approval of the inlands wetlands commission. Id., 445–46. The trial court denied the motion. Id., 438.

On appeal, our Supreme Court concluded that the trial court's denial of Clifford's motion under § 8-8 (k) (2) was an abuse of discretion. Id., 445. The court held that the additional evidence was necessary for the equitable disposition of the appeal for two reasons. Id., 448. First, "the evidence that [Clifford] sought to introduce consisted of information that, viewed on its face, could well have affected the [defendant's] consideration of [the company's] site plan application if it had been brought to the [defendant's] attention, because the [evidence] revealed conditions that the [defendant] itself previously had imposed upon [the company] . . . ." Id. Second, the motion under § 8-8 (k) (2) was Clifford's "first reasonable opportunity to bring to the court's attention the limitations on the use of [the company's] property that may well have affected the approval of the site plan application." Id., 448–49.

A

The commission argues that the trial court's ruling regarding application of the *Forest Walk* factors "constitutes an interlocutory ruling that should have been treated as the law of the case in subsequent proceedings." We disagree.

"We consider whether a court correctly applied the law of the case doctrine under an abuse of discretion standard. The law of the case doctrine provides that [w]here a matter has previously been ruled upon interlocutorily, the court in a subsequent proceeding in the case may treat that decision as the law of the case, if it is of the opinion that the issue was correctly decided, *in the absence of some new or overriding circumstance*." (Emphasis added; internal quotation marks omitted.) *Perugini* v. *Giuliano*, 148 Conn. App. 861, 879–80, 89 A.3d 358 (2014).

Here, the court did not abuse its discretion by disregarding the *Forest Walk* factors in reaching its decision to sustain the plaintiffs' second appeal and remand the matter, for the third time, to the commission. In the court's June 23, 2014 remand order, it acknowledged that *Forest Walk, LLC*, "indicate[s]" that, "with regard to capacity, under the substantial evidence test, the commission must consider" the four factors. At the time the court issued its June, 2014 remand order, however, it was not aware of the Gateway evidence. In light of the Gateway evidence—which established new or overriding circumstances—the court properly exercised its discretion in disregarding the *Forest Walk* factors, sustaining the plaintiffs' appeal, and remanding the matter to the commission.[8]

[8] The court expressly stated that part of the Gateway evidence, specifically, the deposition of Kargl, established facts that made this case distinguishable from *Forest Walk, LLC*.

B

The commission next argues that the court improperly concluded that it abused its discretion by allocating to the plaintiffs 14,434 gallons per day of sewer capacity. Specifically, the commission argues that the court improperly (1) concluded that it was obligated to consider the Gateway evidence in deciding the plaintiffs' application, and (2) based its decision, at least in part, on the Gateway evidence.

"In considering an application for sewer service, a water pollution control authority performs an administrative function related to the exercise of its powers. . . . When a water pollution control authority performs its administrative functions, a reviewing court's standard of review of the [authority's] action is limited to whether it was illegal, arbitrary or in abuse of [its] discretion . . . . Moreover, there is a strong presumption of regularity in the proceedings of a public agency, and we give such agencies broad discretion in the performance of their administrative duties, provided that no statute or regulation is violated. . . .

"With respect to factual findings, a reviewing court is bound by the substantial evidence rule, according to which, [c]onclusions reached by [the authority] must be upheld by the trial court if they are reasonably supported by the record. The credibility of the witnesses and the determination of issues of fact are matters solely within the province of the [authority]. . . . The question is not whether the trial court would have reached the same conclusion, but whether the record before the [authority] supports the decision reached. . . . If a trial court finds that there is substantial evidence to support a [water pollution control authority's] findings, it cannot substitute its judgment as to the weight of the evidence for that of the [authority]. . . .

If there is conflicting evidence in support of the [authority's] stated rationale, the reviewing court . . . cannot substitute its judgment for that of the [authority]. . . . The [authority's] decision must be sustained if an examination of the record discloses evidence that supports any one of the reasons given. . . . Accordingly, we review the record to ascertain whether it contains such substantial evidence and whether the decision of the defendant was rendered in an arbitrary or discriminatory fashion." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Forest Walk, LLC* v. *Water Pollution Control Authority*, supra, 291 Conn. 285–87. We review the court's decision to determine if, when reviewing the decision of the administrative agency, it acted unreasonably, illegally, or in abuse of its discretion. See *Wasfi* v. *Dept. of Public Health*, 60 Conn. App. 775, 781, 761 A.2d 257 (2000), cert. denied, 255 Conn. 932, 767 A.2d 106 (2001).

On the basis of our previous conclusions in this opinion—i.e., that the court did not abuse its discretion by (1) supplementing the record with the Gateway evidence and (2) disregarding the *Forest Walk* factors—we conclude that the court did not act unreasonably, illegally, or in abuse of its discretion when it sustained the plaintiffs' appeal and remanded the matter to the commission. Because the court properly admitted the Gateway evidence, it was free to consider that evidence in reaching its decision on the plaintiffs' appeal. That evidence demonstrated that the record, as supplemented, did not reasonably support the conclusion of the commission to grant a 14,434 gallon daily allocation. The evidence in the record as supplemented established that the commission had an available capacity of 358,000 gallons per day, less the 166,000 gallons per day that was effectively allocated to Gateway. There also was evidence that an administrator of the commission, Kargl, was aware of Gateway's capacity need and

the existence of the plaintiffs' then pending application. Kargl, however, approved Gateway's application without making a determination of the impact of the grant to Gateway on the plaintiffs' application in light of the remaining capacity available to the town. On the basis of this evidence, the court properly determined that the commission abused its discretion when it granted to the plaintiffs only 14,434 gallons per day of its 118,000 gallons per day request, despite allowing, without applying the *Forest Walk* factors, Gateway's 166,000 gallons per day connection permit application. On the basis of the record as supplemented, the court, in the exercise of its discretion, could reasonably conclude that the commission treated the plaintiffs inequitably and that an injustice had been done. See *Parslow* v. *Zoning Board of Appeals*, supra, 110 Conn. App. 354.

The judgment is affirmed.

In this opinion the other judges concurred.

ELIZABETH CARSON, TRUSTEE *v.* ALLIANZ LIFE INSURANCE COMPANY OF NORTH AMERICA (AC 39217)

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

Syllabus

The plaintiff sought to recover damages for, inter alia, conversion in connection with the alleged theft of certain annuities by the defendant insurance company's agent, F. After the plaintiff's initial action was dismissed for failure to prosecute with reasonable diligence, the plaintiff filed another action, based on the same allegations, under the accidental failure of suit statute (§ 52-592). The trial court granted the defendant's motion for summary judgment and rendered judgment thereon, concluding that, because the plaintiff's original action was time barred under the applicable three year statute of limitations, it could not be revived under the accidental failure of suit statute. The plaintiff appealed to this court, claiming, inter alia, that the trial court incorrectly concluded that there was no genuine issue of material fact as to whether her action was

barred by the applicable statute of limitations. The plaintiff specifically contended that the statute of limitations should have been tolled because F fraudulently concealed certain facts that were necessary to establish the plaintiff's cause of action against the defendant. *Held*:

1. The plaintiff failed to establish a genuine issue of material fact as to whether the applicable statute of limitations was tolled on the basis of F's allegedly fraudulent concealment, and, accordingly, the trial court properly granted the defendant's motion for summary judgment; the record revealed no evidence of the defendant's alleged concealment or knowledge of any purported fraud or misconduct by F, there was no evidence in the record of a fiduciary relationship between the plaintiff and the defendant, and F's alleged acts of fraudulent concealment could not serve to toll the statute of limitations under the fraudulent concealment doctrine, as F's acts could not be imputed to the defendant.

2. The plaintiff could not prevail on her claim that the trial court improperly granted the defendant's motion for summary judgment on the ground that the continuing course of conduct doctrine tolled the applicable statute of limitations; the plaintiff failed to establish a genuine issue of material fact as to whether the defendant had a fiduciary duty to the plaintiff such that the continuing course of conduct doctrine would toll the statute of limitations, as the plaintiff failed to offer any support that her relationship with the defendant was anything more than one involving a commercial transaction, and failed to offer any evidence of a unique degree of trust and confidence between them that was akin to a fiduciary or special relationship.

Argued March 15—officially released August 21, 2018

Procedural History

Action to recover damages for, inter alia, conversion, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Peck, J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Michael J. Habib, for the appellant (plaintiff).

Michael A. Valerio, with whom, on the brief, were *Jonathan C. Sterling* and *John W. Herrington*, for the appellee (defendant).

Opinion

ELGO, J. The plaintiff, Elizabeth Carson, Trustee,[1] appeals from the summary judgment rendered by the trial court in favor of the defendant, Allianz Life Insurance Company of North America. On appeal, the plaintiff claims that the trial court improperly concluded that there was no genuine issue of material fact as to whether her action was barred by the applicable statute of limitations. Specifically, the plaintiff argues that fraudulent concealment on the part of the defendant's agent, David Faubert, and the continuing course of conduct doctrine tolled the applicable statute of limitations. We affirm the judgment of the trial court.

The following facts and procedural history, as set forth by the trial court in its memorandum of decision, are relevant to the plaintiff's claims on appeal. "In the original lawsuit, commenced on March 25, 2008, [the plaintiff] sued the [defendant] and David Faubert, [claiming] damages based on allegations of conversion, fraud, violation of the Connecticut Unfair Trade Practices Act (CUTPA), and negligence.[2] On March 21, 2011, that action, *Carson* v. *Allianz Life Ins. Co. of North America*, CV-08-5018876-S, was dismissed by the court, *Graham*, *J.*, in accordance with Practice Book § 14-3 for failure to prosecute with reasonable diligence. On

[1] The plaintiff is the trustee of the F. W. Carson and Elizabeth N. Carson charitable remainder trust and the revocable inter vivos trust of Elizabeth N. Carson.

[2] The complaint alleged that Faubert "recommended to [the plaintiff] that she surrender the [t]rusts' Allianz [l]ife annuities . . . and entrust the funds to him, and in reliance upon said recommendation, [the plaintiff] surrendered the Allianz [l]ife annuities and entrusted said funds to Faubert as he recommended, which Faubert stole and converted to his own use and purposes."

It is undisputed that the defendant transmitted funds to the plaintiff in connection with a withdrawal from an Allianz life annuity on June 3, 2004. The defendant issued two checks to the plaintiff for the total amount of $350,000. Subsequently, the checks were endorsed by the plaintiff and deposited in a bank account of Faubert's company, Faubert Financial Group, Inc. Faubert was arrested and confessed to authorities on March 22, 2005.

August 2, 2011, the [trial court] sustained the defendant's objection to the plaintiff's motion to open the judgment of dismissal. On March 21, 2012, the plaintiff served [the defendant] [in] the present [action] utilizing [General Statutes] § 52-592, the accidental failure of suit statute.[3] The allegations of the [present] action are the same as the initial action except for the exclusion of David Faubert as a defendant." (Footnotes added.)

The defendant filed a motion for summary judgment on December 18, 2014, claiming that the plaintiff's previously dismissed action could not be revived by § 52-592, because the dismissal did not fall within the remedial scope of the statute and the plaintiff's claims in the original action were time barred. In asserting that the plaintiff's action was time barred, the defendant argued that (1) any wrongful conduct of fraudulent concealment by Faubert may not be imputed to the defendant to toll the statute of limitations, (2) even if there is a basis for imputing Faubert's conduct to the defendant, the wrongful conduct concluded on March 22, 2005, and (3) the provisions of § 52-592, which limit actions to those commenced within the time limited by law, do not encompass equitable tolling. In her opposition, the plaintiff refuted these claims and argued that the applicable limitations period should be tolled until the time that she discovered Faubert's misconduct. The plaintiff cited to the "Agent Agreement" between the defendant and Faubert, submitted by the defendant, as evidence of a "special relationship" between the plaintiff and Faubert.[4] The plaintiff also argued that Faubert

[3] Counts one, two and three of the complaint allege that the defendant is "vicariously responsible" for the actions of its agent, Faubert, "under the principle of respondeat superior." In count four, the plaintiff alleges that the defendant "owed a duty to [the plaintiff] to properly oversee, monitor and supervise the sales practices of its agent Faubert, in order to ensure that Faubert complied with all state insurance laws and regulations and otherwise to protect [the plaintiff] from improper sales practices, frauds and theft."

[4] The "Agent Agreement" provides: "We recognize the special relationship you have with those to whom you have sold a policy; they are your clients."

was an agent of the defendant, rendering the defendant vicariously liable for his misconduct.[5]

On September 17, 2015, in its memorandum of decision, the court granted the defendant's motion for summary judgment and concluded that the plaintiff's original action was time barred, and therefore could not be revived by § 52-592.[6] As to whether the statute of limitations was tolled based on the theory of fraudulent concealment, the court stated, "[a]ssuming arguendo that [Faubert] fraudulently concealed the facts necessary to establish the plaintiff's cause of action delaying the complaint, and this wrongful conduct was imputed to the defendant, any fraudulent concealment by [Faubert] ended on March 22, 2005, when he confessed his actions to law enforcement."

As to the continuing course of conduct doctrine, the court stated, "[e]ven assuming for the purpose of this

[5] The defendant filed a second motion for summary judgment that addressed the merit based arguments of the plaintiff's vicarious liability claims. The trial court scheduled a hearing for the two motions for summary judgment on June 1, 2015; however, the trial court did not rule on the second motion for summary judgment.

[6] Section 52-592 provides in relevant part: "(a) If any action, commenced within the time limited by law, has failed one or more times to be tried on its merits because of insufficient service or return of the writ due to unavoidable accident or the default or neglect of the officer to whom it was committed, or because the action has been dismissed for want of jurisdiction, or the action has been otherwise avoided or defeated by the death of a party or for any matter of form; or if, in any such action after a verdict for the plaintiff, the judgment has been set aside, or if a judgment of nonsuit has been rendered or a judgment for the plaintiff reversed, the plaintiff, or, if the plaintiff is dead and the action by law survives, his executor or administrator, may commence a new action . . . for the same cause at any time within one year after the determination of the original action or after the reversal of the judgment."

The defendant also argued that dismissal of the plaintiff's 2008 action did not fall within the remedial scope of § 52-592 because the dismissal was due to inexcusable neglect of counsel. In rejecting that alternative claim, the trial court determined that the plaintiff made a factual showing that the dismissal was a "matter of form" and, thus, falls within the remedial scope of § 52-592. On appeal, the defendant does not contest the propriety of that decision.

motion for summary judgment that [Faubert] did have a fiduciary relationship with the plaintiff in a professional capacity, that relationship ended no later than March 22, 2005. [Faubert] ceased acting in any professional capacity for, or with any fiduciary relationship toward, the plaintiff as of March 22, 2005, when he confessed his wrongful conduct against the plaintiff to law enforcement and was arrested. The plaintiff has not provided evidence to create a genuine issue of material fact in relation to any wrongful acts or omissions of the defendant or [Faubert] after March 22, 2005, and thus, the statute of limitations began to run as of that date." Accordingly, the court rendered summary judgment in favor of the defendant, and this appeal followed.

As a preliminary matter, we set forth our standard of review. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is . . . entitled to judgment as a matter of law. . . . The test is whether the party moving for summary judgment would be entitled to a directed verdict on the same facts. . . .

"[A] party opposing summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue. . . . It is not enough . . . for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of [an issue of] material fact and, therefore,

cannot refute evidence properly presented to the court [in support of a motion for summary judgment]. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary." (Internal quotation marks omitted.) *Flannery* v. *Singer Asset Finance Co., LLC*, 128 Conn. App. 507, 512, 17 A.3d 509 (2011), aff'd, 312 Conn. 286, 94 A.3d 553 (2014). "[I]n the context of a motion for summary judgment based on a statute of limitations special defense, a defendant typically meets its initial burden of showing the absence of a genuine issue of material fact by demonstrating that the action had commenced outside of the statutory limitation period. . . . When the plaintiff asserts that the limitations period has been tolled by an equitable exception to the statute of limitations, the burden normally shifts to the plaintiff to establish a disputed issue of material fact in avoidance of the statute." (Internal quotation marks omitted.) *Flannery* v. *Singer Asset Finance Co., LLC*, 312 Conn. 286, 310, 94 A.3d 553 (2014).

The plaintiff does not dispute that her claims would be untimely unless the defendant's conduct amounted to fraudulent concealment or a continuing course of conduct that tolled the statute of limitations.[7] Accordingly, we address the application of each doctrine in turn.

[7] Counts one, two and four are subject to the three year statute of limitations set forth in General Statutes § 52-577. Section 52-577 provides: "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of." "Section 52-577 is a statute of repose that sets a fixed limit after which the tortfeasor will not be held liable . . . . The three year limitation period of § 52-577, therefore, begins with the date of the act or omission complained of, not the date when the plaintiff first discovers an injury. . . . The relevant date of the act or omission complained of, as that phrase is used in § 52-577, is the date when the negligent conduct of the defendant occurs and not the date when the plaintiffs first sustain damage. . . . Ignorance of his rights on the part of the person against whom the statute has begun to run, will not suspend its operation." (Citation omitted; internal quotation marks omitted.) *Kidder* v. *Read*, 150 Conn. App. 720, 726–27, 93 A.3d 599 (2014).

I

The plaintiff first claims that a genuine issue of material fact exists as to whether Faubert fraudulently concealed the plaintiff's cause of action such that the statute of limitations was tolled by the application of General Statutes § 52-595. The defendant argues that the court properly determined that any fraudulent concealment by Faubert ended on March 22, 2005, when he confessed his actions to law enforcement. In the alternative, the defendant argues that the undisputed facts do not provide a basis for imputing to the defendant potential grounds for tolling, which apply solely to Faubert.[8] We agree with the defendant on this alternative ground.

We begin our analysis by setting forth the language of § 52-595, which provides: "If any person, liable to an action by another, fraudulently conceals from him the existence of the cause of such action, such cause of action shall be deemed to accrue against such person so liable therefor at the time when the person entitled to sue thereon first discovers its existence."

Count three, the CUTPA claim, is subject to the three year statute of limitations set forth in General Statutes § 42-110g (f). See *Bellemare* v. *Wachovia Mortgage Corp.*, 94 Conn. App. 593, 606–607, 894 A.2d 335 (2006), aff'd, 284 Conn. 193, 931 A.2d 916 (2007). Section 42-110g (f) provides that an action alleging an unfair trade practice under CUTPA "may not be brought more than three years after the occurrence of a violation . . . ."

Each of the four counts is based on Faubert's criminal conduct and subject to a three year statute of limitations. The relevant date for each statute is the date that the act complained of occurred. Any criminal actions of Faubert necessarily occurred prior to his arrest on March 22, 2005. The original action was commenced on March 25, 2008, and, thus, outside of the three year limitation period for all counts.

[8] In addition, the defendant argues that § 52-592 does not provide that a plaintiff may rely on tolling of the applicable statutes of limitations in the originally filed action in order to permit refiling of the action following dismissal. Because we find there is no basis for imputing to the defendant Faubert's alleged fraudulent concealment of the plaintiff's cause of action, or Faubert's alleged "special relationship" with the plaintiff, we need not address the defendant's second alternative argument.

"[T]o prove fraudulent concealment, [a plaintiff is] required to show: (1) a defendant's actual awareness, rather than imputed knowledge, of the facts necessary to establish the [plaintiff's] cause of action; (2) that defendant's intentional concealment of these facts from the [plaintiff]; and (3) that defendant's concealment of the facts for the purpose of obtaining delay on the [plaintiff's] part in filing a complaint on [her] cause of action." *Bartone* v. *Robert L. Day Co.*, 232 Conn. 527, 533, 656 A.2d 221 (1995); accord *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, 89 Conn. App. 459, 475, 874 A.2d 266 (2005), aff'd, 281 Conn. 84, 912 A.2d 1019 (2007).

"[Additionally], the [defendant's] actions must have been directed to the very point of obtaining the delay [in filing the action] of which [the defendant] afterward [seeks] to take advantage by pleading the statute. . . . To meet this burden, it [is] not sufficient for the [plaintiff] to prove merely that it was more likely than not that the [defendant] had concealed the cause of action. Instead, the [plaintiff must] prove fraudulent concealment by the more exacting standard of clear, precise and unequivocal *evidence* . . . ." (Emphasis in original; internal quotations marks omitted.) *Stuart* v. *Snyder*, 125 Conn. App. 506, 513, 8 A.3d 1126 (2010), cert. denied, 300 Conn. 921, 14 A.3d 1005 (2011). Our Supreme Court has extended this tolling doctrine to include the defendant's failure to disclose material facts to a person toward whom it owed a fiduciary duty. See *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, 281 Conn. 84, 106–107, 912 A.2d 1019 (2007).

Although the plaintiff does not claim that the defendant itself has engaged in conduct that meets the elements of fraudulent concealment, she argues that the rules of agency operate to toll the statute of limitations. Citing to *Sheltry* v. *Unum Life Ins. Co. of America*, 247 F. Supp. 2d 169 (D. Conn. 2003), the plaintiff contends

that the acts of fraudulent concealment by Faubert may be imputed to the defendant, thereby tolling the limitations period applicable to the plaintiff's claims against the defendant. In *Sheltry*, the court addressed whether the defendant insurance companies were entitled to summary judgment because an insurance agent was acting outside the scope of his authority, and not in furtherance of the defendants' business, when the agent converted funds that the plaintiffs gave to the agent for purposes of purchasing an insurance policy from the defendants. Id., 172–73. The court in *Sheltry* determined that there was a genuine issue of material fact as to whether the agent was acting with actual or apparent authority in soliciting the insurance application and receiving the funds from the plaintiffs. Id., 177. In making that determination, the court cited to § 261 of the Restatement (Second) of Agency, which provides that "[a] principal who puts a servant or other agent in a position which enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud." 1 Restatement (Second), Agency § 261, p. 570 (1958).

The plaintiff argues that the present case falls squarely within the rationale embodied in § 261 of the Restatement (Second) because the defendant placed Faubert in a position that facilitated his ability to consummate the fraud at issue, and, therefore, a genuine issue of material fact exists as to whether the agent was acting with the apparent authority of the defendant when he committed the fraud. The plaintiff's reliance on *Sheltry* and § 261 of the Restatement (Second), however, is misplaced. While the agency discussion contained in *Sheltry* may be relevant to the merits of the plaintiff's vicarious liability theory, it provides no support for the plaintiff's assertion that the agent's conduct tolled the applicable statute of limitations.[9]

[9] The plaintiff also appears to argue that Faubert was acting as a fiduciary to the plaintiff and, thus, that Faubert's failure to disclose material facts

We reiterate that, in order to toll the statutes of limitation on the basis of fraudulent concealment, the plaintiff bore the burden of demonstrating that the defendant was actually aware of the facts necessary to establish the plaintiff's cause of action. Imputed knowledge is not enough. See *Macellaio* v. *Newington Police Dept.*, 145 Conn. App. 426, 433, 75 A.3d 78 (2013); *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, supra, 89 Conn. App. 475; see also *Cangemi* v. *Advocate South Suburban Hospital*, 364 Ill. App. 3d 446, 462, 845 N.E.2d 792 (2006) ("accountability for an agent's fraudulent concealment does not extend to a principal unless the principal is shown to have known or approved of the concealment"); 54 C.J.S., Limitations of Actions § 142 (2018) ("Generally, fraudulent concealment of a cause of action by a person other than the defendant will not toll the statute of limitations. On the other hand, if a third person is in privity with or occupies any agency relationship with the defendant, the defendant's knowledge or approval of the concealment is generally sufficient to toll the limitations period." [Footnotes omitted.]).

In addition, the fraudulent concealment doctrine's requirement that a defendant have actual knowledge, rather than imputed knowledge, as a condition for tolling is consistent with the purpose of statutes of limitations. "The purpose of [a] statute of limitation[s] . . . is . . . to (1) prevent the unexpected enforcement of stale and fraudulent claims by allowing persons after the lapse of a reasonable time, to plan their affairs with a reasonable degree of certainty, free from the disruptive burden of protracted and unknown potential liability, and (2) to aid in the search for truth that may

tolled the statute of limitations as to the action against the defendant until the plaintiff discovered the facts necessary to establish her cause of action. The plaintiff, however, has offered no evidence of a fiduciary relationship between the defendant and the plaintiff. See part II of this opinion.

be impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise." (Internal quotation marks omitted.) *Bellemare* v. *Wachovia Mortgage Corp.*, 284 Conn. 193, 199, 931 A.2d 916 (2007); see also 51 Am. Jur. 2d, Limitation of Actions § 7 (2018) ("[s]tatutes of limitation are intended to provide an adverse party a fair opportunity to defend a claim, as well as to preclude claims in which a party's ability to mount an effective defense has been lessened or defeated due to the passage of time" [footnote omitted]). Tolling the limitations period to pursue claims against an unwitting third party for the fraudulent concealment of another would frustrate the underlying purpose of the statute of limitations.

The plaintiff bore the burden of establishing a genuine issue of material fact as to the defendant's actual knowledge and concealment of Faubert's involvement in the fraud. "[I]t remains . . . incumbent upon the party opposing summary judgment to establish a factual predicate from which it can be determined, as a matter of law, that a genuine issue of material fact exists." *Connell* v. *Colwell*, 214 Conn. 242, 251, 571 A.2d 116 (1990). Our review of the summary judgment motions and the contents of the referenced affidavits reveals no evidence of the defendant's alleged concealment or knowledge of any purported fraud by Faubert. In fact, at oral argument before this court, the plaintiff conceded that the defendant had no knowledge of any criminal conduct by Faubert. Furthermore, as discussed in part II of this opinion, there is no evidence in the record of a fiduciary relationship between the plaintiff and the defendant. Accordingly, the plaintiff has failed to establish a genuine issue of material fact as to whether the applicable statute of limitations would be tolled pursuant to the fraudulent concealment doctrine.

II

The plaintiff next claims that the trial court erred in granting the motion for summary judgment by failing to find that the continuing course of conduct doctrine tolled the operation of the statute of limitations. In response, the defendant argues that the court properly determined that any tolling under the continuing course of conduct doctrine necessarily came to an end on March 22, 2005, when Faubert confessed his actions to law enforcement and ceased acting in any professional capacity for, or with any fiduciary relationship toward, the plaintiff. In the alternative, the defendant argues that there is no basis for imputing, to the defendant, Faubert's alleged fiduciary relationship with, or obligations to, the plaintiff. We agree with the defendant's alternative argument.

"The issue . . . of whether a party engaged in a continuing course of conduct that tolled the running of the statute of limitations is a mixed question of law and fact. . . . We defer to the trial court's findings of fact unless they are clearly erroneous. . . . General Statutes § 52-577 is a statute of repose in that it sets a fixed limit after which the tortfeasor will not be held liable and in some cases will serve to bar an action before it accrues. . . . Nonetheless, [w]hen the wrong sued upon consists of a continuing course of conduct, the statute does not begin to run until that course of conduct is completed. . . . [I]n order [t]o support a finding of a continuing course of conduct that may toll the statute of limitations there must be *evidence* of the breach of a duty that remained in existence after commission of the original wrong related thereto. That duty must not have terminated prior to commencement of the period allowed for bringing an action for such wrong. . . . Where [our Supreme Court has] upheld a finding that a duty continued to exist after the cessation

of the act or omission relied upon, there has been *evidence* of either a special relationship between the parties giving rise to such a continuing duty or some later wrongful conduct of a defendant related to the prior act. . . . Thus, there must be a determination that a duty existed and then a subsequent determination of whether that duty is continuing." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Stuart* v. *Snyder*, supra, 125 Conn. App. 510–11.

Our Supreme Court has stated that "a fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other. . . . [N]ot all business relationships implicate the duty of a fiduciary. . . . In particular instances, certain relationships, as a matter of law, do not impose upon either party the duty of a fiduciary." (Citations omitted; internal quotation marks omitted.) *Macomber* v. *Travelers Property & Casualty Corp.*, 261 Conn. 620, 640, 804 A.2d 180 (2002).

The plaintiff's claims hinge on the alleged fiduciary relationship between the plaintiff and Faubert. The relevant relationship, however, for purposes of the continuing course of conduct doctrine, is the relationship between the plaintiff and the defendant. It is undisputed that the plaintiff purchased an annuity product from the defendant, a life insurance company. As the defendant argued in its brief, our Supreme Court has characterized the relationship between the insurer and the insured as "commercial" in nature. (Internal quotation marks omitted.) Id., 641; accord *Harlach* v. *Metropolitan Property & Liability Ins. Co.*, 221 Conn. 185, 190, 602 A.2d 1007 (1992). The plaintiff failed to offer contrary authority that her relationship with the defendant was anything more than a commercial transaction. Nor did she

proffer evidence of a unique degree of trust and confidence between the plaintiff and the defendant akin to a fiduciary or special relationship.[10]

Accordingly, the plaintiff has failed to establish a genuine issue of material fact as to whether the defendant had a fiduciary duty to the plaintiff such that the continuing course of conduct doctrine tolls the statute of limitations applicable to her action. Thus, the trial court properly granted the defendant's motion for summary judgment.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JEFFREY COVINGTON (AC 39141)

Alvord, Keller and Bright, Js.

Syllabus

Convicted, following a jury trial, of the crime of carrying a pistol without a permit and, following a trial to the court, of the crime of criminal possession of a firearm, the defendant appealed to this court. The defendant had been charged with murder and assault in the first degree in connection with a shooting incident. He elected a jury trial as to all of the charges except for the charge of criminal possession of a firearm, for which he elected a trial to the court. After the jury was unable to reach a verdict on the charges of murder and assault in the first degree, the court declared a mistrial as to those charges and found the defendant guilty of criminal possession of a firearm. *Held*:

1. The defendant's claim that the evidence was insufficient to support his conviction of carrying a pistol without a permit was unavailing: the jury's inability to reach a unanimous verdict on the murder and assault charges did not suggest that it did not believe that the defendant was the shooter, as the jury's inability to reach a verdict could not be construed as a verdict or acquittal, the state was not required to present the testimony of an eyewitness to the shooting or forensic evidence that tied the defendant to the shooting, but could rely on circumstantial

[10] The plaintiff also failed to offer evidence of any later wrongful conduct related to a prior act.

evidence to prove that he was the shooter, and the defendant made several highly incriminating statements after the shooting, which the jury could have found to be compelling circumstantial evidence that he was the shooter, and did not argue that the evidence was insufficient to demonstrate that he lacked a permit at the time of the shooting; moreover, the jury could have found that the defendant possessed a pistol, as defined by statute (§ 29-27), at the time and place of the shooting, as evidence concerning the bullets recovered from the victims' bodies and testimony regarding the defendant's possession of a handgun immediately after the shooting reasonably and logically supported a finding that he carried out the shooting with a handgun that had a barrel of less than twelve inches in length.

2. The defendant could not prevail on his unpreserved claim that his conviction of criminal possession of a firearm should be vacated, which was based on his assertion that his rights to a trial by jury and to a fair trial were violated because the trial court's finding of guilt contravened what he claimed was the jury's verdict on the murder and assault charges; the jury's inability to reach a unanimous verdict on the murder and assault charges did not shed light on its assessment of the evidence as to those counts, there was no basis in law to equate its inability to reach a unanimous verdict with a finding or a verdict in the defendant's favor, and, thus, the defendant could not demonstrate that a constitutional violation existed and deprived him of a fair trial pursuant to *State* v. *Golding* (213 Conn. 233), that the trial court committed plain error or that its determination warranted the exercise of this court's supervisory authority over the administration of justice.

3. The defendant could not prevail on his unpreserved claim that he was entitled to a new sentencing hearing because the trial court impermissibly relied on facts that contravened the jury's determination as to the murder and assault charges; the defendant failed to demonstrate that any error existed, as his claim rested on the flawed premise that the jury made findings of fact with respect to the murder and assault charges.

Argued March 21—officially released August 21, 2018

Procedural History

Substitute information charging the defendant with the crimes of murder, assault in the first degree, carrying a pistol without a permit and criminal possession of a firearm, brought to the Superior Court in the judicial district of New Haven, where the charges of murder, assault in the first degree and carrying a pistol without a permit were tried to the jury before *Alander*, *J.*; verdict of guilty of carrying a pistol without a permit; thereafter, the court declared a mistrial as to the charges of murder

and assault in the first degree; subsequently, the defendant was tried to the court on the charge of criminal possession of a firearm; judgment of guilty of carrying a pistol without a permit and criminal possession of a firearm, from which the defendant appealed to this court. *Affirmed.*

Naomi T. Fetterman, assigned counsel, for the appellant (defendant).

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *John P. Doyle, Jr.*, and *Seth Garbarsky*, senior assistant state's attorneys, for the appellee (state).

Opinion

KELLER, J. The defendant, Jeffrey Covington, appeals from the judgment of conviction, rendered following a jury trial, of carrying a pistol without a permit in violation of General Statutes § 29-35, and the judgment of conviction, rendered following a court trial, of criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1).[1] The defendant claims that

[1] The defendant was tried before a jury with respect to two additional counts, specifically, murder in violation of General Statutes § 53a-54a (a) and assault in the first degree with a firearm in violation of General Statutes § 53a-59 (a) (5). After the jury indicated that it was unable to reach a unanimous verdict with respect to these counts, the court declared a mistrial with respect to them. The defendant waived his right to a jury trial with respect to the criminal possession of a firearm count.

For the carrying a pistol without a permit conviction, the court sentenced the defendant to a term of incarceration of five years (with one year being a mandatory minimum sentence), execution suspended after three years, followed by a period of probation of three years. For the criminal possession of a firearm conviction, the court sentenced the defendant to a term of incarceration of ten years (with two years being a mandatory minimum sentence), execution suspended after seven years, followed by a period of probation of three years. Additionally, the court required the defendant to register as a deadly weapon offender for a period of five years. The court ordered that the sentences were to run consecutively.

(1) this court should vacate his conviction of carrying a pistol without a permit because the evidence was insufficient to support his conviction for that offense; (2) this court should vacate his conviction of criminal possession of a firearm because, in finding guilt with respect to that offense, the court impermissibly contravened the jury's "verdict" with respect to murder and assault counts with which he also had been charged, thereby violating his right to a trial by jury and his right to a fair trial; and (3) this court should afford him a new sentencing hearing because, at the time of sentencing, the trial court impermissibly relied on facts that contravened the jury's "verdict" with respect to the murder and assault charges. We affirm the judgment of the trial court.

The state presented evidence of the following facts. At or about 8 p.m., on March 24, 2014, the defendant was operating an automobile that was owned by his friend, Derek Robinson. When the defendant drove Robinson's automobile away from the intersection of Whalley Avenue and Ella T. Grasso Boulevard in New Haven, Robinson was in the passenger's seat. A short time later, at approximately 8:50 p.m., Robinson's automobile was parked along Shelton Avenue in New Haven, near the intersection of Shelton Avenue and Ivy Street. At that time, the victims, Trayvon Washington and Taijhon Washington, were walking home from a friend's house. They walked past Robinson's automobile while someone was getting into it. The victims continued walking from Shelton Avenue to Butler Street. Approximately two minutes after they had passed the automobile, as they were walking along Butler Street in the vicinity of the Lincoln-Bassett School, the automobile approached them at a high rate of speed. Taijhon Washington, who was walking just behind his half brother, Trayvon Washington, stated, "watch out, bro." Then,

several gunshots emanated from the automobile. Taijhon Washington suffered fatal gunshot injuries to his chest. Trayvon Washington was shot in the head, resulting in a fractured skull. Although he survived the shooting, he endured extensive medical treatment, and a bullet from that incident remained lodged in his head at the time of trial.

Following the shooting, the defendant drove to the residence of his girlfriend's family on Poplar Street in New Haven. He was accompanied by Robinson. The defendant's girlfriend along with some of her family members, including her sister, Dajah Crenshaw, were present at the residence. The defendant arrived shortly before the shootings were reported on the evening news.[2] When the defendant entered the residence, he was holding the keys to Robinson's automobile. Crenshaw observed Robinson remove a handgun from his waistband and hand it to the defendant. Thereafter, the defendant concealed the handgun in a dresser in his girlfriend's bedroom.

The following day, Crenshaw overheard the defendant having a telephone conversation with Robinson's brother. During the conversation, the defendant referred to a gun, and he asked Robinson's brother if he had buried it. In the days that followed, the defendant made various statements that reflected his involvement in and responsibility for the shooting.[3] Significantly, the

[2] At trial, Crenshaw testified on behalf of the state concerning what she observed and overheard after the defendant and Robinson arrived at her residence. Although Crenshaw testified that, following the defendant's arrival, she and other family members were watching "the news" on television, at which time they heard news about the shooting, she did not identify which news program that she was watching. In light of the evidence that the shooting occurred at or about 8:50 p.m., the jury reasonably could have inferred that Crenshaw had been watching one of the local 10 p.m. or 11 p.m. news programs.

[3] Additionally, the state presented evidence of the defendant's conduct following his arrest that strongly suggested that he was conscious of his guilt. This evidence included recorded telephone conversations in which the defendant engaged while he was incarcerated and awaiting trial. The

defendant admitted to a longtime acquaintance, Margaret Flynn, that he happened to catch Taijhon Washington off guard and had killed him. The defendant elaborated, stating that the shooting occurred while he was in Robinson's automobile but that Robinson was not involved and was unaware that the shooting was going to happen. Moreover, the defendant told Flynn that he had retaliated against Taijhon Washington because, in February, relatives of Taijhon Washington assaulted him. Additional facts will be set forth, as necessary.

I

First, the defendant claims that this court should vacate his conviction of carrying a pistol without a permit because the evidence was insufficient to support his conviction for that offense. We disagree.

We begin our analysis of the defendant's claim by setting forth the principles that guide us when we consider claims of insufficient evidence. "The standard of review we apply to a claim of insufficient evidence is well established. In reviewing the sufficiency of the evidence to support a criminal conviction we apply a [two part] test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

evidence reflected that he took steps to prevent Robinson from testifying at his hearing in probable cause. Also, the defendant attempted to establish a false alibi for both himself and Robinson covering the time of the shooting. Moreover, the state presented evidence that, while incarcerated, the defendant and an acquaintance watched television news coverage of the shooting. The defendant flippantly acknowledged in the presence of others that he had been the shooter, and laughed at the televised interview of the victims' mother.

"We note that the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . In evaluating evidence, the [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . .

"Finally, [a]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Citations omitted; internal quotation marks

omitted.) *State* v. *Campbell*, 328 Conn. 444, 503–505, 180 A.3d 882 (2018).

Next, we examine the essential elements of the offense. Section 29-35 (a) provides in relevant part: "No person shall carry any pistol or revolver upon his or her person, except when such person is within the dwelling house or place of business of such person, without a permit to carry the same issued as provided in section 29-28. . . ." "[T]o obtain a conviction for carrying a pistol without a permit, the state was required to prove beyond a reasonable doubt that the defendant (1) carried a pistol, (2) for which he lacked a permit, (3) while outside his dwelling house or place of business." *State* v. *Douglas*, 126 Conn. App. 192, 209, 11 A.3d 699, cert. denied, 300 Conn. 926, 15 A.3d 628 (2011); see also *State* v. *Tinsley*, 181 Conn. 388, 403, 435 A.2d 1002 (1980) (explaining essential elements of § 29-35), cert. denied, 449 U.S. 1086, 101 S. Ct. 874, 66 L. Ed. 2d 811 (1981).

"This court has explained that carrying and possession are different concepts. . . . While a person can possess an item without carrying it on his person, § 29-35 is designed to prohibit the carrying of a pistol without a permit and not the [mere] possession of one. . . . Accordingly, constructive possession of a pistol or revolver will not suffice to support a conviction under § 29-35. . . . Instead, to establish that a defendant carried a pistol or revolver, the state must prove beyond a reasonable doubt that he bore a pistol or revolver upon his person . . . while exercising control or dominion of it. . . . Because there is no temporal requirement in § 29-35 . . . and no requirement that the pistol or revolver be moved from one place to another to prove that it was carried . . . a defendant can be shown to have carried a pistol or revolver upon his person, within the meaning of the statute, by evidence proving, inter alia, that he grasped or held it in his hands, arms or clothing or otherwise bore it upon

his body for any period of time while maintaining dominion or control over it." (Citations omitted; internal quotation marks omitted.) *State* v. *Crespo*, 145 Conn. App. 547, 573–74, 76 A.3d 664 (2013), aff'd, 317 Conn. 1, 115 A.3d 447 (2015).

"The term 'pistol' and the term 'revolver', as used in sections 29-28 to 29-38, inclusive, mean any firearm having a barrel less than twelve inches in length." General Statutes § 29-27. In cases in which a violation of § 29-35 is charged, "the length of the barrel is . . . an element of [the] crime and must be proven beyond a reasonable doubt." *State* v. *Hamilton*, 30 Conn. App. 68, 73, 618 A.2d 1372 (1993), aff'd, 228 Conn. 234, 636 A.2d 760 (1994); see also *State* v. *Fleming*, 111 Conn. App. 337, 346–47, 958 A.2d 1271 (2008), cert. denied, 290 Conn. 903, 962 A.2d 794 (2009). We observe, however, that, like the other essential elements of the offense, the length of the barrel of a pistol or revolver may be proven by circumstantial, rather than direct, evidence. "Direct numerical evidence is not required to establish the length of the barrel of a handgun in question." *State* v. *Miles*, 97 Conn. App. 236, 242, 903 A.2d 675 (2006).

In challenging the sufficiency of the evidence, the defendant argues that the state failed to present evidence from which the jury could have found that he possessed a pistol, as defined in § 29-27, at the time and place of the alleged shooting. In a long form information, the state alleged that the defendant committed this offense at or about 8:50 p.m., on March 24, 2014, in the area of Lilac and Butler Streets in New Haven. Moreover, with respect to the essential elements of the offense, the court instructed the jury with respect to the specific time and place the state alleged that the crime was committed and that, to convict the defendant, the state bore the burden of proving beyond a reasonable doubt, inter alia, that he carried the pistol when

he was not within his dwelling or place of business. The court stated that the state bore the burden of proving that he "possessed the pistol or revolver upon his person in a public place."

In arguing that the evidence was insufficient to convict him of carrying a pistol without a permit, the defendant relies on the undisputed fact that the state did not introduce into evidence what it believed to be the gun used in the shooting. He argues that the evidence that Robinson handed him a pistol or a revolver while he was at Crenshaw's residence shortly after the alleged shooting was insufficient to convict him of the offense. Moreover, the defendant argues, the state did not present any evidence from which the jury reasonably could have found that the barrel of the gun that he allegedly used in the shooting was less than twelve inches in length.

The defendant argues that, to the extent that the state relies on evidence that he was the shooter, it failed to present evidence to demonstrate that he was, in fact, the shooter. The defendant argues that there was "[a] lack of objective evidence . . . to independently support the conviction," and he supports this argument primarily by his belief that, "[i]n this case, the jury's verdict with respect to the murder and assault charges was 'not guilty.' " The defendant argues that "the jury's acquittal on the murder and assault charges" should compel this court to conclude that "there was insufficient evidence that [he] was in fact the shooter."

The defendant's attempt to disregard the significance of the evidence that he was the shooter lacks merit. It is belied by the unambiguous record of what transpired at trial and, specifically, the verdict actually returned by the jury. The record reflects that, during the jury's deliberations, it indicated to the court that it was unable to reach a unanimous verdict with respect to the murder

and assault counts. The court provided the jury with a Chip Smith instruction.[4] Thereafter, the jury indicated to the court that it had reached a unanimous verdict with respect to the carrying a pistol without a permit count, but was "hopelessly deadlocked" with respect to the murder and assault charges. Relying on the jury's representation, the court declared a mistrial with respect to the murder and assault charges. The jury unanimously returned a finding of guilt with respect to the carrying a pistol without a permit count.

"It is settled doctrine in Connecticut that a valid jury verdict in a criminal case must be unanimous. . . . A nonunanimous jury therefore cannot render any 'finding' of fact." (Citations omitted.) *State* v. *Daniels*, 207 Conn. 374, 388, 542 A.2d 306 (1988), cert. denied, 489 U.S. 1069, 109 S. Ct. 1349, 103 L. Ed. 2d 817 (1989); see also *State* v. *Aparo*, 223 Conn. 384, 388, 614 A.2d 401 (1992) (same), cert. denied, 507 U.S. 972, 113 S. Ct. 1414, 122 L. Ed. 2d 785 (1993). The jury's inability to reach a unanimous verdict with respect to the murder and assault charges does not shed any light on the jury's assessment of the merits of the evidence presented with respect to those counts or suggest that the jury did not believe that he was the shooter. There is absolutely no legal authority to somehow consider the jury's inability to reach a verdict with respect to these counts as a "verdict," an "acquittal," or any type of finding at all. Accordingly, in arguing that the evidence did not support a finding that he was the shooter, the defendant's reliance on the jury's inability to reach a unanimous verdict is misplaced.[5]

[4] A Chip Smith instruction provides guidance to a deadlocked jury in reaching a verdict. See *State* v. *O'Neil*, 261 Conn. 49, 74–75, 801 A.2d 730 (2002).

[5] We also observe that, in arguing that the evidence presented by the state at the present trial was insufficient to demonstrate that he carried a pistol without a permit, the defendant appears to rely, in part, on his representation that, during a retrial on the murder and assault counts, a jury found him not guilty of the murder and assault offenses. The defendant does not provide

In arguing that the evidence did not support a finding that he was the shooter, the defendant also relies on the fact that no eyewitness to the shooting identified him as the shooter, no forensic evidence tied him to the shooting, and, for a variety of reasons, the jury should have not found the state's witnesses to be credible. These arguments are not persuasive because, to demonstrate that the defendant was the shooter, it was not required that the state present the testimony of an eyewitness to the shooting or forensic evidence that tied the defendant to the shooting. The state could prove that the defendant was the shooter by relying on circumstantial evidence. Moreover, the defendant's arguments concerning the credibility of the state's witnesses were fodder for the jury's consideration. In our review of the evidence, we must evaluate the testimony of the state's witnesses in the light most favorable to sustaining the jury's verdict. This court "must defer to the finder of fact's evaluation of the credibility of the witnesses that is based on its invaluable firsthand observation of their conduct, demeanor and attitude. . . . [The fact finder] is free to juxtapose conflicting versions of events and determine which is more credible. . . . It is the [fact finder's] exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses. . . . The [fact finder] can . . . decide what—all, none, or some—of a witness' testimony to accept or reject." (Citation omitted; internal quotation marks omitted.) *State* v. *Colon*, 117 Conn. App. 150, 154, 978 A.2d 99 (2009).

The defendant acknowledges that the state presented evidence that, following the shooting, the defendant made several statements in which he incriminated himself as being the shooter. The defendant attempts to

any explanation as to why the outcome of a subsequent trial should affect our analysis of the evidence presented in the present trial. His reliance on what transpired in a separate proceeding is not in any way relevant to our analysis.

downplay the weight of these statements as proof of his guilt by arguing that the statements were "ambiguous" and "feckless . . . ." It suffices to observe that, among the many statements attributed to the defendant that reflected his consciousness of guilt, the state presented testimony from Crenshaw that, on the day after the shooting, she overheard a conversation between the defendant and Robinson's brother in which the defendant asked if a gun had been "buried." See, e.g., *State* v. *Otto*, 305 Conn. 51, 73, 43 A.3d 629 (2012) (destruction or concealment of murder weapon may reflect consciousness of guilt). Moreover, the state presented evidence that the defendant admitted to Flynn that he committed the shooting from Robinson's automobile and that he was motivated to retaliate against Taijhon Washington because of an incident that involved his family members. These statements may not reasonably be deemed to be ambiguous or feckless. Rather, they are highly incriminating and, in interpreting the evidence in the light most favorable to the jury's finding of guilt, we must presume that in its assessment of all of the evidence presented at trial, the jury found them to be compelling circumstantial evidence that the defendant was the shooter.

The defendant has not persuaded us that the evidence was insufficient to prove that he was the shooter and, thus, utilized a firearm of some type at the time and place of the shooting, which indisputably took place outside of his dwelling house or place of business. The defendant does not argue that the evidence was insufficient to demonstrate that, at the time of the shooting, he lacked a permit. Thus, we turn our attention to the defendant's argument that there was no evidence that the firearm he used was a "pistol" as defined in § 29-27. We look to additional relevant evidence presented by the state.

During the state's case-in-chief, Crenshaw testified that, when the defendant and Robinson arrived at her residence shortly after the shooting occurred, they were acting differently.[6] She observed Robinson remove what she described as "a handgun" from his waistband and hand it to the defendant. She testified that the defendant concealed the handgun in a dresser in her sister's bedroom.

During the state's case-in-chief, it also presented testimony from Susan S. Williams, an associate medical examiner employed by the Office of the Chief Medical Examiner for the state. She testified that, on March 26, 2014, she performed an autopsy on Taijhon Washington. During the autopsy, she recovered two bullets, one found in the victim's right lung and another found in soft tissue at the top of his left chest. These bullets were presented in evidence.

The state also presented testimony from Earl Williams, a firearms examiner employed by the state's forensic science laboratory. Earl Williams testified that he carefully examined the bullets that were recovered from Taijhon Washington's body. Earl Williams testified that the bullets were .32 caliber lead bullets that reflected "rifling impressions . . . ." Earl Williams testified that these impressions are "lands and grooves which are impressed [on a bullet] when the bullet travels down the barrel, as well as the direction in which they twist." According to Earl Williams, "rifling" is defined as spiraling grooves inside of a gun's barrel that are designed to make a bullet fired from that gun spin in such a manner that it becomes stable in flight. Earl

[6] Crenshaw testified that, on March 24, 2014, the defendant and her sister were dating, and that the defendant came to her residence often. Crenshaw also testified that she was friendly with Robinson, having known him for seven or eight years. Crenshaw testified that, after the defendant and Robinson arrived at her residence following the shooting, Robinson appeared to be nervous and that the two men kept looking at one another.

Williams testified that rifling is found in "rifled firearms," but not shotguns, which he described as being "smooth bore . . . ." The prosecutor asked Earl Williams if "handguns, such as pistols and revolvers" exhibit rifling, and Earl Williams testified that they did.

Earl Williams testified that the bullets recovered from the victim's body were in a badly damaged condition, meaning that they lacked individual characteristics that might have been used to identify a particular firearm from which they had been fired. Although Earl Williams testified that he was not able to identify or eliminate the bullets as having been fired from the same specific firearm, he testified that both bullets were similar in terms of the unique rifling impressions that appeared on them. Earl Williams agreed that both of the .32 caliber bullets were "consistent with bullets that would be fired out of a .32 caliber handgun or revolver . . . ."[7]

When viewed in conjunction with a finding that the defendant was the shooter, the foregoing evidence concerning the bullets recovered from Taijhon Washington's body and Crenshaw's testimony regarding the defendant's possession of a handgun immediately after the shooting reasonably and logically supported a finding that the firearm that the defendant utilized during the shooting was either a *handgun* or a *revolver*.

[7] As we observed previously, the state did not recover a murder weapon and, consequently, was unable to present any forensic evidence related directly thereto. It is not surprising that, during cross-examination, Earl Williams agreed with defense counsel that he was unable to testify with any degree of certainty what particular gun the .32 caliber bullets had been fired from. He agreed that he was not able "to ascertain" whether they had been fired from "either a revolver . . . or [a] semiautomatic . . . ."

Consistent with the lack of a suspected murder weapon in evidence and Earl Williams' testimony that the damaged condition of the bullets precluded him from opining with respect to whether the recovered bullets had been fired from the same specific firearm, this testimony on cross-examination does not detract from the weight of Earl Williams' opinion during his direct examination that the bullets were "consistent with bullets that would be fired out of a .32 caliber handgun or revolver . . . ."

Although neither Crenshaw nor Earl Williams defined the words "handgun" or "revolver" during their testimony, they did not suggest that these words had peculiar, specialized, or technical meanings. We observe that these words are commonly and frequently used in the English language. Thus, it is appropriate to presume that in its careful assessment of the witnesses' testimony, the jury afforded these terms their common meanings. "Jurors are not expected to lay aside matters of common knowledge or their own observation and experience of the affairs of life, but, on the contrary, to apply them to the evidence or facts in hand, to the end that their action may be intelligent and their conclusions correct." (Internal quotation marks omitted.) *State* v. *Padua*, 273 Conn. 138, 157, 869 A.2d 192 (2005).

In setting forth the common understanding of words and phrases, it is appropriate to rely on their dictionary definitions. "[T]he definition of words in our standard dictionaries is taken as a matter of common knowledge which the jury is supposed to possess." *State* v. *Asherman*, 193 Conn. 695, 737, 478 A.2d 227 (1984), cert. denied, 470 U.S. 1050, 105 S. Ct. 1749, 84 L. Ed. 2d 814 (1985); see also *State* v. *Lewis*, 303 Conn. 760, 781, 36 A.3d 670 (2012) (same). A "handgun" is defined as "any firearm that can be held and fired with one hand; a revolver or a pistol." Random House Webster's Unabridged Dictionary (2d Ed. 2001); see also Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) (defining "handgun" as "firearm [as a revolver or pistol] designed to be held and fired with one hand"). A "revolver" is defined as "a handgun having a revolving chambered cylinder for holding a number of cartridges, which may be discharged in succession without reloading." Random House Webster's Unabridged Dictionary (2d Ed. 2003); see also Merriam-Webster's Collegiate Dictionary, supra (defining "revolver" as "handgun with a cylinder of several chambers brought successively

into line with the barrel and discharged with the same hammer").

Because Earl Williams testified that the bullets were consistent with having been fired from a handgun or a revolver, which is a type of handgun, his testimony reasonably and logically supported a finding that the bullets had been fired from a handgun. Furthermore, Crenshaw confirmed that the gun she saw Robinson pass to the defendant shortly after the shootings was a handgun.[8] This court has held that a finder of fact reasonably may infer that a handgun—defined broadly as a type of weapon that may be held and fired with one hand—necessarily has a barrel of less than twelve inches. For example, in *State* v. *Williams*, 48 Conn. App. 361, 370, 709 A.2d 43, cert. denied, 245 Conn. 907, 718 A.2d 16 (1998), a defendant who was convicted of carrying a pistol without a permit claimed in relevant part that the state did not present sufficient evidence of the barrel length of the firearm that was utilized in the commission of the crime. Although the state presented scant evidence with respect to the issue, it nonetheless presented the testimony of an eyewitness to the crime who testified that the defendant had held the gun used in the commission of the crime in his " 'hand.' " Id., 372. This court, rejecting the claim that the evidence was insufficient to support the conviction, reasoned that "[i]f the length of the gun were longer than twelve inches, the jury could infer that the defendant might not be able to hold the weapon with only one hand." Id.

[8] Given the evidence that the defendant was both the shooter and the driver of Robinson's automobile at about the time of the shootings, it would be reasonable for the jury to infer that after firing the gun, the defendant passed it to Robinson while the defendant drove away from the scene of the shootings. Thus, the jury could reasonably conclude that the gun the defendant used during the shooting and the gun Robinson handed him shortly thereafter were one and the same.

Similarly, in *State* v. *Fleming*, supra, 111 Conn. App. 346, a defendant appealed from a conviction of carrying a pistol without a permit on the ground that the state did not present sufficient evidence of the barrel length of the firearm used in the commission of the crime. Among the evidence on which this court relied in rejecting the defendant's claim of evidentiary insufficiency was the statement of an eyewitness that the defendant had held the firearm used in the commission of the crime with one hand. Id., 348. This court reasoned that this evidence reasonably supported an inference by the jury that the barrel of the firearm was less than twelve inches in length. Id., 348–49.

Moreover, Crenshaw testified that she observed Robinson remove the handgun at issue from his waistband before handing it to the defendant. Both this court and our Supreme Court have concluded that such evidence is sufficient for a reasonable jury to conclude that the barrel of the gun must be less than twelve inches in length. See *State* v. *Williams*, 231 Conn. 235, 252, 645 A.2d 999 (1994) (evidence that defendant pulled small handgun out of his waist length jacket reasonably supported finding that handgun had barrel of less than twelve inches in length), overruled in part on other grounds, *State* v. *Murray*, 254 Conn. 472, 487, 757 A.2d 578 (2000); see also *State* v. *Trotter*, 69 Conn. App. 1, 7, 793 A.2d 1172 (2002) (evidence that defendant left crime scene with gun that he concealed in his coat pocket relied on to support finding that defendant carried firearm with barrel of less than twelve inches in length), cert. denied, 260 Conn. 932, 799 A.2d 297 (2002); *State* v. *Gonzalez*, 25 Conn. App. 433, 444, 596 A.2d 443 (1991) (evidence that defendant utilized pistol that he carried in his back pocket relied on to support finding that firearm had barrel of less than twelve inches in length), aff'd, 222 Conn. 718, 609 A.2d 1003 (1992).

The state accurately observes that it may prove the barrel length of a firearm by circumstantial evidence. In the present case, the state presented evidence that the defendant was the shooter. The state presented in evidence two .32 caliber bullets that were recovered from the body of one of the victims. The state presented Earl Williams' opinion that these bullets by their nature and markings were consistent with having been fired from a handgun. Crenshaw testified that the defendant possessed and concealed a handgun shortly after the shootings. The testimony of Earl Williams and Crenshaw, as well as other evidence and findings based thereon related to the shooting, provided the jury with a factual basis on which to find beyond a reasonable doubt that the defendant carried out the shooting with a firearm that had a barrel of less than twelve inches in length. Accordingly, we conclude that the state satisfied its burden of proving that the defendant carried a pistol, as defined in § 29-27.

II

Next, the defendant claims that this court should vacate his conviction of criminal possession of a firearm because, in finding guilt with respect to that offense, the trial court impermissibly contravened the jury's "verdict" with respect to the murder and assault charges, thereby violating his right to a trial by jury and his right to a fair trial. We conclude that the defendant is unable to obtain any type of relief on the basis of this unpreserved claim.

For the first time, on appeal, the defendant argues that the court violated his right to a trial by jury and his right to a fair trial because in its findings with respect to the criminal possession of a firearm count, which was tried to the court, the court impermissibly found that "[he] had committed the murder and assault"

offenses with which he had been charged.[9] The defendant argues that the court's finding in this regard was impermissible because, with respect to the murder and assault charges, he had elected to be tried by a jury, and "[o]nce the jury acquitted [him] of those charges, the court had no basis to contravene the jury's verdict and find that [he had] possessed a firearm." The defendant argues that the court should have "abided by the jury's determination regarding [the murder and assault charges]."[10]

[9] After the court declared a mistrial with respect to the murder and assault charges and accepted the jury's verdict with respect to the carrying a pistol without a permit charge, it afforded the parties an opportunity to make arguments with respect to the criminal possession of a firearm charge before announcing its finding of guilt with respect to that charge. The parties stipulated that the defendant previously had been convicted of a felony offense.

The court discussed the evidence presented by the state, including the evidence of his incriminatory admissions to Flynn; incriminatory statements that he made to one of his fellow inmates, William McKinney; the incriminatory statements he made to and in the presence of Crenshaw; and the incriminating statements made by the defendant while he was incarcerated following the shooting, which were reflected in recorded telephone conversations.

In relevant part, the court then stated: "The obvious question is why would anyone confess to his neighbor or admit his involvement in the day room of a jail, and why would anyone hatch a plan to tamper with a witness on prison phones that one had to know were monitored and recorded? The answer lies in the hubris, or the vain glory of a nineteen year old young man who took pride in successfully [exacting] his revenge. The glory was in the telling.

"Viewed in isolation, the [evidence presented by the state] may not convince a reasonable fact finder beyond a reasonable doubt that the defendant was the shooter; viewed together, each buttresses and confirms the other and convinces this fact finder beyond a reasonable doubt that the defendant possessed a firearm on the evening of March 24, 2014, at the corner [of] Lilac and Butler Streets. . . . After weighing and considering all the evidence in this case, I conclude that [the] state has proved beyond a reasonable doubt that the defendant committed the crime of criminal possession of a firearm."

[10] We note that at no point during the trial did the court expressly state that it believed, let alone had found, that the defendant had committed murder or assault. To the contrary, at the time of sentencing, the court appears to have expressed its belief that the defendant lacked the specific intent necessary for the commission of either of these offenses. See footnote 17 of this opinion. Instead, the court stated that it believed that the defendant shot the victims. Thus, even if we agreed with the defendant that the jury

The defendant seeks review of this unpreserved claim under the bypass doctrine set forth in *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989).[11] Alternatively, he argues that the court's error rose to the level of plain error; Practice Book § 60-5;[12] or that this court should grant him relief in the exercise of its supervisory authority over the administration of justice.[13]

made any findings with respect to the murder and assault charges, it is not at all clear that the court contradicted them in reaching its finding of guilt.

[11] "Under *Golding*, as modified in *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Mitchell*, 170 Conn. App. 317, 322, 154 A.3d 528, cert. denied, 325 Conn. 902, 157 A.3d 1146 (2017).

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

[13] "It is well settled that [a]ppellate courts possess an inherent supervisory authority over the administration of justice. . . . The exercise of our supervisory powers is an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of the particular trial but also for the perceived fairness of the judicial system as a whole. . . .

"We recognize that this court's supervisory authority is not a form of free-floating justice, untethered to legal principle. . . . Rather, the rule invoking

The defendant's claim rests on a fundamentally flawed factual premise that the jury returned a verdict of not guilty with respect to the murder and assault charges.[14] As we already have explained in part I of this opinion, the record reflects that the jury repeatedly indicated to the court that it was unable to reach a unanimous verdict with respect to the murder and assault charges.[15] Thereafter, the court declared a mistrial as to the murder and assault charges. For the reasons discussed in part I of this opinion, we conclude that the jury's inability to reach a unanimous verdict in connection with the murder and assault charges does

our use of supervisory power is one that, as a matter of policy, is relevant to the perceived fairness of the judicial system as a whole, most typically in that it lends itself to the adoption of a procedural rule that will guide lower courts in the administration of justice in all aspects of the [adjudicatory] process. . . . Indeed, the integrity of the judicial system serves as a unifying principle behind the seemingly disparate use of [this court's] supervisory powers." (Citations omitted; internal quotation marks omitted.) *In re Yasiel R.*, 317 Conn. 773, 789–90, 120 A.3d 1188 (2015).

[14] In his principal brief, the defendant repeatedly characterizes the jury's inability to reach a unanimous verdict on the murder and assault charges as a "verdict." Curiously, in his reply brief, the defendant states that the court could not "independently render a determination of guilt [with respect to the murder and assault charges] that conflicts with the jury's findings, here the failure of the jury to reach a verdict at all." Also, in his reply brief, the defendant argues for the first time that the court's findings with respect to the murder and assault charges was improper because, after the court declared a mistrial, the court was bound to presume that he was innocent of these charges. The flaw in the defendant's argument is that the court did not find the defendant guilty of murder or assault. See footnote 9 of this opinion. The defendant was presumed innocent of each and every offense with which he stood charged, including the offense on which the court found him guilty, namely, criminal possession of a firearm. The record reflects, however, that in concluding that the state satisfied its burden of proof with respect to that offense, the court properly considered all of the relevant evidence in its entirety, including the ample evidence that he was the shooter.

[15] We conclude that the defendant's claim rests on the faulty factual premise that the jury made any findings of fact. We observe that, even if the jury had reached a verdict that was contrary to the finding reached by the court, such an occurrence would not lead us to conclude that the inconsistency rendered the outcome illogical or unreasonable. See *State* v. *Knight*, 266 Conn. 658, 674, 835 A.2d 47 (2003) (inconsistency between factual determinations of *separate fact finders* as to different, albeit similar, charges does not render outcome illogical or unreasonable).

not shed any light on the its assessment of the merits of the evidence presented with respect to those counts. There is no basis in law to equate the jury's inability to reach a unanimous verdict with respect to these charges as a finding or a verdict in the defendant's favor. The events at trial reflect an inability of the jury to reach a verdict on these counts, and nothing more.

On this unambiguous record, we readily conclude that the defendant is unable to demonstrate, for purposes of *Golding*, that the alleged constitutional violation exists and deprived him of a fair trial. Also, the defendant is unable to prevail under the plain error doctrine because he cannot demonstrate that an obvious error exists that affects the fairness and integrity of and public confidence in the judicial proceedings. Finally, the defendant is unable to demonstrate that, with respect to the present claim, an issue of the utmost seriousness is present that warrants the exercise of our supervisory authority. In short, the present claim falls far short of the mark of warranting relief under any of the extraordinary avenues of review invoked by the defendant.[16]

III

Finally, the defendant argues that this court should afford him a new sentencing hearing because, at the time of sentencing, the trial court impermissibly relied

[16] Beyond arguing that the court impermissibly found that he was the shooter, the defendant also argues that the court impermissibly "found [him] guilty of criminal possession of a firearm based on its determination that [he] was in fact the shooter." This argument also is belied by the record because, in advancing the argument, the defendant does not rely on the court's statements at the time that it found him guilty of the offense, but on the court's statements at the time of sentencing, which occurred months later. Moreover, beyond arguing that the court could not make findings that contravene those made by the jury, the defendant does not demonstrate why it was improper for the court to rely on the evidence in its entirety, including the evidence that strongly supported a finding that he was the shooter, in reaching its verdict.

on facts that contravened the jury's "verdict" with respect to the murder and assault charges. We conclude that the defendant is unable to obtain any relief on the basis of this unpreserved claim.

For the first time, on appeal, the defendant argues that the court relied on an improper finding at the time of sentencing, which was that he had used a firearm to shoot the victims.[17] The defendant argues that the court's reliance on this finding was improper for the reasons we already have discussed in parts I and II of this opinion, specifically, because the finding conflicts with what he believes was the jury's "verdict" with respect to the murder and assault counts. The defendant argues in relevant part: "The court's reliance on conduct for which [he] elected to have tried to a jury and was ultimately acquitted of to justify an increased sentence is a violation of [his] due process rights to a fair sentencing and violates [his] sixth amendment right to a jury

[17] At the time of sentencing, the court stated in relevant part: "I'm not here to sentence [the defendant] for murder or . . . assault in the first degree. The jury was hung . . . on those counts. The state apparently plans to retry [the defendant], and he'll have his opportunity . . . to be tried by a jury. I'm here to sentence him for the crimes of carrying a pistol without a permit and criminal possession of a firearm, but the circumstances surrounding the possession of that gun matter, and the circumstances surrounding the possession of that gun involve a shooting.

"I found, having heard the evidence, that he possessed that gun when he was not legally entitled to do so because he was a convicted felon, and I also found that he fired that gun and killed Taijhon Washington and left Travon Washington with a bullet in his head that remains there today. So, it's incumbent upon me to factor those circumstances into an appropriate sentence here. . . .

"[Y]ou committed an extremely impulsive and rash act. I . . . don't find there was any premeditation in it. I don't think you were driving around looking for the Washington brothers, but when you came upon them, you had a gun in your possession and . . . you used it. So, if this were merely a possession case without the circumstances of the gun having been used in the fashion that it was used, this sentence would be very different than the sentence that I think is appropriate, given the seriousness of the offenses and the circumstances in which the gun . . . was used." The court subsequently imposed its sentence. See footnote 1 of this opinion.

trial." The defendant argues: "Absent a jury's finding of guilt as to the murder and assault charges . . . a sentence imposed on a judicial finding to the contrary must be vacated." The defendant repeatedly asserts that the court's reliance on its finding that he was the shooter was improper because it contravenes "the jury's verdict."

The defendant urges us to review this unpreserved claim pursuant to the bypass doctrine of *Golding*. Alternatively, he argues that the court's reliance on its finding that he was the shooter reflects plain error and that this court should afford him relief in the exercise of its supervisory authority over the administration of justice. In part II of this opinion, we discussed the parameters of these extraordinary avenues of review. For the reasons already set forth, we conclude that the defendant has not demonstrated that he is entitled to relief under any of these doctrines. Because the defendant's claim rests on the fundamentally flawed factual premise that the jury made findings of fact with respect to the murder and assault charges, he has failed to demonstrate that any error exists.

The judgment is affirmed.

In this opinion the other judges concurred.