REAL ESTATE MORTGAGE NETWORK, INC. *v.* LAURA SQUILLANTE ET AL.
(AC 39229)

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

Syllabus

The plaintiff sought to foreclose a mortgage on certain real property owned by the named defendant, S. The trial court rendered a judgment of strict foreclosure and subsequently granted S's motion to open and vacate the judgment, and extended the law day. Prior to the new law day, S filed a motion to reopen, which the court denied, but the court extended

the law day again so that it fell on the same day as the final day in which S could have filed a timely appeal from denial of the motion to reopen. That law day passed without any appeal or the filing of any additional motions. Approximately nine months after the law day, S filed a second motion to reopen, which the trial court denied as moot on the ground that title had vested in the plaintiff after the law day passed. Thereafter, S appealed to this court, claiming that the trial court improperly had denied her second motion to reopen because, although it was filed nine months after the law day, title had not vested in the plaintiff, and the court had jurisdiction to reopen the judgment. S specifically claimed that, irrespective of whether an appeal was actually filed on or before the law day, a law day that is set to fall within an applicable appeal period is invalid because it impermissibly shortens that appeal period. *Held* that the trial court correctly concluded that S's second motion to reopen was moot, as S's right to appeal from the trial court's denial of her first motion to reopen ended on the law day at 5 p.m., in accordance with the applicable rule of practice ([2015] § 7-17), whereas her right to redeem did not end until midnight on that law day, and, accordingly, because the setting of the law day did not shorten the time period within which to appeal, the law day was valid, and title vested in the plaintiff when S failed to redeem on that day; moreover, because titled vested in the plaintiff and the trial court thus lacked subject matter jurisdiction over S's second motion to reopen, the court should have dismissed rather than have denied the second motion to reopen.

Argued April 16—officially released August 28, 2018

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the defendants were defaulted for failure to plead; thereafter, the court, *Wahla*, *J.*, granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon; subsequently, the court, *Scholl*, *J.*, granted the named defendant's motion to open and vacate the judgment; thereafter, the court, *Scholl*, *J.*, denied the named defendant's motion to reopen and vacate the judgment; subsequently, the court, *Wahla*, *J.*, denied the named defendant's motion to reopen the judgment and extend the law day, from which the named defendant appealed to this court. *Improper form of judgment*; *judgment directed.*

Matthew S. Carlone, for the appellant (named defendant).

Joseph R. Dunaj, with whom, on the brief, was *S. Bruce Fair*, for the appellee (plaintiff).

Opinion

DiPENTIMA, C. J. The defendant Laura Squillante[1] appeals from an order of the trial court denying her motion to reopen a judgment of strict foreclosure. On appeal, the defendant claims that the trial court erred in denying her motion because, although it was filed approximately nine months after the applicable law day, title had not vested in the plaintiff, Real Estate Mortgage Network, Inc., and, thus, the court had jurisdiction to reopen the judgment of strict foreclosure. We do not agree.

The following uncontroverted facts are relevant to this appeal. On March 7, 2013, the plaintiff commenced an action for strict foreclosure against the defendant. In its complaint, the plaintiff alleged that the defendant had executed a promissory note with a principal amount of $447,700, secured by a mortgage on real property located at 32 Frazer Fir Road in South Windsor. The plaintiff alleged that the defendant was in default, and, as holder of the mortgage and note, the plaintiff was electing to accelerate the balance of the note and foreclose on the mortgage.

On January 7, 2015, following the expiration of the foreclosure mediation period, the defendant was defaulted for failure to plead. Five days later, on January 12, 2015, the trial court rendered a judgment of strict foreclosure and scheduled the law day for April 27,

[1] The complaint also named Sharafl, LLC, a junior lienholder, as a defendant. On January 7, 2015, Sharafl, LLC, was defaulted for failure to plead. It has not participated in this appeal. We refer to Squillante as the defendant in this opinion.

2015. Prior to the law day, on April 22, 2015, the defendant filed a motion to open and vacate the judgment of foreclosure.[2] The court granted the defendant's motion on April 27, 2015, and extended the law day until June 8, 2015. Prior to the new law day, on June 3, 2015, the defendant filed a motion to reopen, citing similar grounds as those pleaded in her prior motion to open. The court denied her motion on June 8, 2015, but extended the law day to June 29, 2015. The law day passed without any appeal or additional motions being filed.

Approximately nine months after the June 29, 2015 law day, on March 24, 2016, the defendant filed a second motion to reopen the judgment of strict foreclosure. In her motion, the defendant claimed that the court had jurisdiction to open the judgment because title had not vested in the plaintiff. Specifically, the defendant argued that the June 29, 2015 law day was invalid because it fell within the appeal period following the court's denial of the defendant's first motion to reopen.[3] Because the law day was purportedly invalid, the defendant contended that title could not vest even though no appeal was filed. The trial court disagreed and concluded that title had vested in the plaintiff following the June 29, 2015 law day. Accordingly, the trial court denied the defendant's motion as moot.

[2] In her motion to open, the defendant argued a change in financial circumstances and a renewed willingness to participate in foreclosure mediation and pursue available financing options.

[3] "Unless a different time period is provided by statute, an appeal must be filed within twenty days of the date notice of the judgment or decision is given." Practice Book § 63-1 (a). Here, the defendant was given notice of the decision in open court on June 8, 2015. Because June 28, 2015, was a Sunday, it would have been permissible for the defendant to file an appeal on Monday, June 29, 2015. See Practice Book (2015) § 7-17 ("[i]f the last day for filing any matter in the clerk's office falls on a day on which such office is not open . . . then the last day for filing shall be the next business day upon which such office is open").

In her appeal, the defendant claims that the trial court erroneously denied her most recent motion to reopen because a law day set within an applicable appeal period is invalid. The defendant argues that, irrespective of whether an appeal is filed, title cannot vest following a law day that impermissibly shortens the period in which to appeal a court's ruling. For the reasons set forth in this opinion, we conclude that the June 29, 2015 law day did not shorten the defendant's appeal period and was therefore valid. Because the law day was valid, title vested in the plaintiff, and the defendant's second motion to reopen was moot.

We begin by setting forth the applicable standard of review for a claim that the trial court lacked subject matter jurisdiction. "When the court draws conclusions of law, our review is plenary and we must decide whether those conclusions are legally and logically correct." *Continental Capital Corp.* v. *Lazarte*, 57 Conn. App. 271, 273, 749 A.2d 646 (2000).

Whether the trial court has jurisdiction to open a judgment of strict foreclosure is generally dependent on whether title has vested in the encumbrancer.[4] See General Statutes § 49-15 (a) (1) (upon written motion

[4] We note that pursuant to an agreement by all appearing parties, a judgment of strict foreclosure may be opened after title has vested with the encumbrancer, provided (1) no judgment may be opened more than four months from the date the judgment was rendered or more than thirty days after title became absolute in any encumbrancer, whichever is later, and (2) the rights and interests of all parties are restored to their original status as they existed on the date judgment was rendered. See General Statutes § 49-15 (a) (2). There also are rare circumstances where a trial court will have jurisdiction to open a judgment of strict foreclosure, after title has vested with the encumbrancer, without the consent of all appearing parties. See, e.g., *New Milford Savings Bank* v. *Jajer*, 244 Conn. 251, 258–60, 708 A.2d 1378 (1998) (trial court had jurisdiction to open judgment of strict foreclosure to correct scrivener's error in foreclosure complaint); *Wells Fargo Bank, N.A.* v. *Melahn*, 148 Conn. App. 1, 12, 85 A.3d 1 (2014) (trial court had jurisdiction to open judgment where encumbrancer falsely certified compliance with court's judgment of strict foreclosure).

by interested person, court may open and modify any judgment of strict foreclosure as it deems reasonable, "provided no such judgment shall be opened *after the title has become absolute in any encumbrancer*" [emphasis added]). "When a motion to open and a subsequent appeal from the denial of the motion to open are filed after title has vested in an encumbrancer, no practical relief can be granted and so the appeal becomes moot." *First National Bank of Chicago* v. *Luecken*, 66 Conn. App. 606, 612, 785 A.2d 1148 (2001), cert. denied, 259 Conn. 915, 792 A.2d 851 (2002).

Normally, in an action for strict foreclosure, the running of the law day vests title in the encumbrancer. See *Ocwen Federal Bank, FSB* v. *Charles*, 95 Conn. App. 315, 324, 898 A.2d 197 (noting that passing of law day extinguishes right of equitable redemption and vests title absolutely in mortgagee), cert. denied, 279 Conn. 909, 902 A.2d 1069 (2006); *Barclays Bank of New York* v. *Ivler*, 20 Conn. App. 163, 166, 565 A.2d 252 ("[u]nder our law, an action for strict foreclosure is brought by a mortgagee who, holding legal title, seeks not to enforce a forfeiture but rather to foreclose an equity of redemption unless the mortgagor satisfies the debt on or before his law day"), cert. denied, 213 Conn. 809, 568 A.2d 792 (1989). In order to be a valid law day, however, the date cannot shorten any applicable period of appeal. See *Continental Capital Corp.* v. *Lazarte*, supra, 57 Conn. App. 273–74. To permit otherwise would deprive a party the opportunity for judicial review and thus violate her right to due process of law. Id.

Here, the defendant claims that the law day was invalid because it fell on the same day as the final day in which she could have timely appealed from the court's denial of her first motion to reopen. The defendant argues that the concurrent expiration of the period to appeal and the period for equitable redemption is

tantamount to shortening the period to appeal. Accordingly, the defendant argues that the June 29, 2015 law day was invalid and that title could not have vested in the plaintiff when she failed to redeem on that day. We are not persuaded.

In *First Federal Savings & Loan Assn. of Rochester* v. *Pellechia*, 37 Conn. App. 423, 425–26, 656 A.2d 688, cert. granted, 234 Conn. 905, 659 A.2d 1206 (1995) (appeal withdrawn February 5, 1996), for the purpose of determining whether a motion for deficiency judgment was timely, we held that the period for equitable redemption ends at midnight on the law day. Prior to then, the mortgagor can seek to satisfy the debt and redeem equitable title in the property. See id. Thus, this right, although likely to be affected by the practical limitations of normal business hours, is not actually extinguished until the law day has ended at midnight.

Conversely, with respect to the applicable period in which to appeal, Practice Book (2015) § 7-17 provided that the Superior Court clerk's office[5] shall be open until 5 p.m. Accordingly, any filing received by the clerk's office after 5 p.m. "shall be deemed filed on the next business day upon which such office is open." Practice Book (2015) § 7-17. Thus, if a party wishes to file an appeal on the last available day, she must ensure that her filing is received by the clerk's office no later than 5 p.m. that day. Otherwise, the appeal shall be deemed to have been filed on the next business day and will be untimely.

In light of the separate constraints governing the deadline to appeal and the deadline to redeem, we conclude that, with respect to the June 29, 2015 law day, the defendant's right to appeal ended at 5 p.m., while her

[5] Practice Book (2015) § 63-3 provides in relevant part that "[a]ny appeal may be filed in the original trial court or the court to which the case was transferred or in any judicial district court in the state . . . ."

right to redeem did not end until midnight. Therefore, because the setting of the law day did not shorten the time period in which to appeal, the date was valid and title vested in the plaintiff when the defendant failed to redeem on that day. We must note, however, that because we conclude that title vested in the plaintiff, the court lacked jurisdiction and should not have denied, but rather should have dismissed, the defendant's second motion to reopen.

The form of the judgment is improper, the judgment is reversed and the case is remanded with direction to dismiss the motion to reopen the judgment of strict foreclosure as moot.

In this opinion the other judges concurred.

DAWN TEODORO *v.* CITY OF BRISTOL ET AL.
(AC 39185)

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

Syllabus

The plaintiff, as parent and next friend of her daughter, B, who had sustained injuries during a high school cheerleading practice, sought to recover damages for negligence from the defendants, the city of Bristol, the city's board of education and the coach who had supervised the practice at the time of B's injuries. The defendants filed a motion for summary judgment on the ground of governmental immunity, and the plaintiff filed an opposition to the defendants' motion with attached exhibits that included, inter alia, excerpts from the original certified transcripts of the depositions of B and the coach. The defendants thereafter filed an additional excerpt from the transcript of B's deposition. The plaintiff, without permission of the court, then filed a surreply brief, and the defendant, with the permission of the court, filed a surreply brief. The trial court stated during oral argument on the motion for summary judgment that it would not consider the deposition excerpts because it considered them to be unauthenticated and, thus, inadmissible as evidence. The court stated that the excerpts were not separately certified as true and accurate excerpts from the original certified deposition transcripts, and were not accompanied by affidavits from persons with personal knowledge of the contents of the original certified transcripts

averring that the excerpts were true and accurate excerpts of the original certified transcripts. The trial court granted the motion for summary judgment, concluding, inter alia, that the defendants were entitled to governmental immunity. The court thereafter rendered judgment for the defendants, from which the plaintiff appealed to this court. *Held*:

1. The trial court, in deciding the motion for summary judgment, improperly failed to consider the excerpts that the plaintiff submitted from the certified deposition transcripts of B and the coach, both of whom were fully available, and did not object to them until prompted to do so by the court; because the applicable rule of practice (§ 17-46) expressly allows for the use of such excerpts, which were submitted with pages from the original deposition transcripts that established that the original transcripts were accurate transcriptions of the testimony under oath by B and the coach, the excerpts were properly authenticated under the applicable rule of practice (§ 17-45) that governs admissible evidence as to issues raised in summary judgment motions, and, thus, the trial court erred by refusing to consider them in deciding the motion.
2. The trial court did not abuse its discretion in not considering the parties' surreply memoranda of law; the applicable rule of practice ([2016] § 11-10) provided that no surreply memoranda can be filed without the permission of the judicial authority, and the court, thus, had the discretion not to consider that additional briefing.

Argued October 16, 2017—officially released August 28, 2018

Procedural History

Action to recover damages for the defendants' alleged negligence, and for other relief, brought to the Superior Court in judicial district of New Britain, where the court, *Young, J.*, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed; further proceedings.*

Daniel P. Scholfield, with whom, on the brief, was *Steven J. Errante*, for the appellant (plaintiff).

Thomas R. Gerarde, with whom was *Ondi A. Smith*, for the appellees (defendants).

Opinion

SHELDON, J. The plaintiff, Dawn Teodoro, as parent and next friend of her minor daughter, Brianna Teodoro, appeals from the summary judgment rendered by the

trial court in favor of the defendants, the city of Bristol (city), the Bristol Board of Education (board) and board employee Sophia Bayne, in this action to recover damages for injuries suffered by Brianna due to the alleged negligence of the defendants in conducting and supervising a high school cheerleading practice. On appeal, the plaintiff challenges the court's decision to grant the defendants' motion for summary judgment without considering either (1) excerpts from the certified transcripts of two depositions taken in this case, one of Brianna and the other of Bayne, which the plaintiff had filed in opposition to the motion, or (2) the surreply brief with attached exhibits which she later filed, without the court's permission, in further opposition to the motion.

The amended complaint and record demonstrated the following. The plaintiff alleged that the defendants negligently caused Brianna's injuries and resulting damages as follows. On the evening of January 7, 2013, while Brianna was practicing as a member of the junior varsity cheerleading squad of Bristol Eastern High School under the supervision of Bayne, her coach, she attempted, for the first time ever, to perform a cheerleading stunt known as the "ladder stunt." To perform that stunt, two cheerleaders acting as "bases," flanked by front and back spotters to protect the participants' safety, lift a third cheerleader acting as the "flyer" into the air, where they hold her as she transitions from half to full extension. Practicing as the "flyer" with her stunt group on that evening, Brianna had difficulty performing the ladder stunt, twice attempting but failing to complete it. Although Bayne was aware of Brianna's difficulty in performing the stunt and of her resulting apprehensiveness about trying to perform it again, she instructed Brianna to "try it one more time," but then walked away to assist other cheerleaders without assisting Brianna to perform the stunt a third time or

giving her further instruction as to how to do so correctly. When Brianna thereafter complied with Bayne's instructions by trying to perform the stunt again, she fell to the floor after being lifted into the air and transitioning from half to full extension, causing her to break several bones in her arm. The plaintiff alleged that Bayne's conduct in supervising Brianna was negligent because, inter alia, she encouraged Brianna to perform the stunt again despite Brianna's uncertainty and apprehensiveness, when she knew or should have known that it was unsafe and unreasonable to do so; failed to give Brianna hands-on assistance in performing the stunt again or proper instruction as to how to perform it correctly when it should have been apparent that her failure to do so would likely subject Brianna to imminent harm; and failed to provide sufficient spotters to catch Brianna if she fell. The defendants answered the plaintiff's amended complaint by denying all allegations of negligence against them and interposing the special defense of qualified governmental immunity.

On October 9, 2015, the defendants filed a motion for summary judgment on the ground of qualified governmental immunity, together with a supporting memorandum of law and several exhibits, including an affidavit from Christopher Cassin, the board's supervisor of athletics, physical education and health; an affidavit from Bayne; and a memorandum of decision granting a defense motion for summary judgment on the ground of qualified governmental immunity in another Superior Court action in which the plaintiff, an injured cheerleader, sought to recover damages from municipal defendants for injuries she claimed to have suffered due to their negligence in conducting a high school cheerleading practice. On the basis of those submissions, the defendants argued that there was no genuine issue of material fact that they were entitled to prevail on their special defense of qualified governmental

immunity, and thus to the entry of judgment in their favor on the plaintiff's claims of negligence, because the conduct and supervision of cheerleading practices is a governmental activity that requires the exercise of discretion. They further argued that there was no evidence that their alleged negligence in exercising such discretion in this case came within an exception to qualified governmental immunity by subjecting Brianna, as an identifiable member of a narrowly defined class of foreseeable victims, to a risk of imminent harm.

On December 11, 2015, the plaintiff filed a memorandum of law in opposition to the defendants' motion along with several attached exhibits, including her second amended complaint; excerpts from the original certified transcripts of Brianna's and Bayne's depositions in this case; the plaintiff's disclosure of Dr. Gerald S. George as an expert witness on the subjects of biomechanics and cheerleading safety; an excerpt from the National Federation of State High School Associations 2012–13 Spirit Rules Book; and an excerpt from the Bristol Public Schools Coaching Handbook.[1] On the basis of those materials, the plaintiff claimed that the defendants' motion should be denied because the evidence she had submitted raised two genuine issues of material fact as to the viability of the defendants' special defense of qualified governmental immunity: first, whether the conduct and supervision of cheerleading practices involves the performance of ministerial, rather than discretionary, duties, as to which the special defense of qualified governmental immunity is unavailable as a matter of law; and second, even if the conduct and supervision of cheerleading practices involves the performance of discretionary duties, whether Bayne's alleged negligence in performing such duties in this

[1] Of all of the exhibits attached to the plaintiff's memorandum of law, only the excerpts from the certified deposition transcripts are at issue in this appeal.

case, as evidenced by Brianna's and Bayne's deposition testimony, fell within an exception to qualified governmental immunity because Brianna was subjected to a risk of imminent harm.

Thereafter, on March 2, 2016, the defendants filed a reply memorandum in further support of their motion. Attached to the reply memorandum were two additional exhibits: a supplemental affidavit from Cassin, and an additional excerpt from the original certified transcript of Brianna's deposition. On the basis of Brianna's deposition testimony, so supplemented, the defendants argued, inter alia, that before Brianna fell, she did not object to performing the ladder stunt again or tell Bayne of her fear of so doing, and thus Bayne had no notice that by instructing Brianna to try the stunt one more time, she was subjecting her to a risk of imminent harm. Both the plaintiff and the defendants included, as parts of each deposition excerpt they filed in connection with the defendants' motion, the cover page of the original deposition transcript from which the excerpt in question was taken, the page of the transcript on which the court reporter certified the truth and accuracy of the entire deposition, as he transcribed it, and the page of the transcript on which the deponent swore before the court reporter, who took her oath in his capacity as a notary public, that she had read the entire transcript of the deposition and certified to its truth and accuracy, as transcribed or as later corrected on the attached errata sheet.[2] Neither party objected in writing to the other party's submission of or reliance upon any such deposition excerpt, so authenticated, as evidence in support of or in opposition to the motion, or suggested that any corrections had ever been made to the transcript on an errata sheet.

[2] Neither party included such errata sheets.

On March 4, 2017, after the previously described memoranda and materials were filed, the plaintiff, without the permission of the trial court, filed a surreply brief in further opposition to the motion. Attached to that brief were several additional exhibits, including an affidavit from her expert, Dr. George; a document listing the "highlights" of Dr. George's professional resume; and a copy of the bylaws of the Connecticut Student Activities Conference. These additional exhibits bore only upon the plaintiff's claim that the defendants were not entitled to governmental immunity because their duties in conducting and supervising cheerleading practices were ministerial, rather than discretionary, in nature.

The court heard oral argument on the defendants' motion on March 7, 2016. During the argument, when the defendants' counsel began to present argument in support of the motion based upon Brianna's certified deposition testimony, the court advised the parties that it considered the deposition excerpts they had submitted to be unauthenticated, and thus to be inadmissible as evidence on the motion unless all parties consented, because such excerpts were neither separately certified as true and accurate excerpts from the original certified deposition transcripts, nor accompanied by affidavits from persons with personal knowledge of the contents of such original certified transcripts, averring that the excerpts were true and accurate excerpts from those transcripts. When the defendants' counsel was informed by the court that she could, but need not, consent to the use of the deposition excerpts as evidence in support of or in opposition to the motion, she promptly reversed course, declining to offer her consent, although the deposition excerpt she had submitted and relied upon was presented and authenticated in the same manner as the excerpts submitted by the plaintiff. It would be "fair," she suggested, if no such

deposition excerpt from either party was considered in deciding the motion. Accordingly, the court announced that, in the absence of an agreement among the parties, none of the deposition excerpts they had filed would be considered in deciding the motion.

When counsel for the plaintiff was so informed of the court's decision not to consider the deposition excerpts she had filed in opposition to the defendants' motion, she promptly asked the court for permission to supply it with a sworn affidavit averring that the excerpts she had submitted were true and accurate excerpts from Brianna's and Bayne's original certified deposition transcripts. The court twice refused this request despite observing that no party had suggested that any such excerpt was inaccurate in any way.

The court also advised the parties during the argument that the plaintiff's surreply brief and attached exhibits had been filed improperly, without the court's permission, in violation of Practice Book § 11-10 (c). Even so, it granted the defendants permission to file their own surreply brief in response to the plaintiff's surreply brief in case it should ultimately decide to consider such briefs and exhibits in deciding the motion. One week later, on March 14, 2016, the defendants filed their own surreply brief without additional exhibits.

By an order dated April 18, 2016, the court granted the defendants' motion for summary judgment. The court ruled, on the basis of the evidence it found to be admissible, that the defendants were entitled to governmental immunity because there was no genuine issue of material fact that (1) cheerleading is a student athletic activity authorized by the board, and thus Bayne's conduct in supervising that activity was public in nature;[3] (2)

[3] See *Jahn* v. *Board of Education*, 152 Conn. App. 652, 658–59, 99 A.3d 1230 (2014); *Sevigny* v. *Daviau*, Superior Court, judicial district of Windham, Docket No. CV-12-6005018, 2013 WL 4504831 (July 31, 2013).

Bayne's duties while engaging in such supervisory activity were discretionary, rather than ministerial, in nature; and (3) Bayne's alleged negligence in performing such discretionary duties on the evening of Brianna's fall did not come within an exception to qualified governmental immunity by subjecting Brianna, as an identifiable member of a narrowly defined class of foreseeable victims, to a risk of imminent harm.[4] In rendering summary judgment in favor of the defendants as aforesaid, the court did not consider any of the deposition excerpts that the parties had filed in connection with the defendants' motion on the previously stated ground that they were not authenticated properly. Nor did the court consider either party's surreply brief or the exhibits attached to the plaintiff's surreply brief because, as it had noted during the argument, the plaintiff's surreply brief and exhibits had been filed without the court's permission.

On appeal, the plaintiff claims that the trial court erred in granting the defendants' motion for summary judgment (1) without considering the deposition transcript excerpts she had filed in opposition to the motion, and (2) without considering her surreply brief and attached exhibits. We agree with the plaintiff that the trial court erred in not considering the deposition excerpts she offered in opposition to the motion on the ground that they were not authenticated properly. We disagree, however, that the trial court abused its discretion in not considering the plaintiff's surreply brief and

[4] On the basis of the information it did consider, the court concluded that this was not a case in which a specific plaintiff was an identifiable victim because such cases, primarily *Sestito* v. *Groton*, 178 Conn. 520, 423 A.2d 165 (1979), are limited to their facts. See, e.g., *Edgerton* v. *Clinton*, 311 Conn. 217, 240, 86 A.3d 437 (2014). Instead, the court determined that only the identifiable class of victims exception to governmental immunity could potentially apply, and pursuant to *Grady* v. *Somers*, 294 Conn. 324, 984 A.2d 684 (2009), the identifiable class of foreseeable victims is limited to schoolchildren attending public school during school hours.

attached exhibits. We therefore reverse the summary judgment rendered by the trial court in favor of the defendants, and remand this case for further consideration of the defendants' motion in accordance with this opinion, and for such other proceedings as may thereafter be appropriate, according to law.

"Before addressing the plaintiff's claims in greater detail, we note that . . . [b]ecause the present case was disposed of by way of summary judgment, we first address the appropriate framework for appellate review of a summary judgment determination." (Internal quotation marks omitted.) *Grady* v. *Somers*, 294 Conn. 324, 331, 984 A.2d 684 (2009). The purpose of summary judgment procedure is to provide a vehicle for ending litigation short of trial where the admissible evidence available to the parties, as presented to the court, establishes that the moving party is entitled to judgment as a matter of law because there is no genuine issue as to one or more material facts upon which his right to judgment depends. See Practice Book § 17-49 (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").

The ultimate facts upon which a party's right to a judgment in his favor depends are determined by the pleadings, which not only identify the claims and defenses upon which the parties have joined issue, but the factual theories upon which they have committed themselves to proving those claims and defenses. Although the sufficiency of such pleaded allegations to state viable claims and defenses can be determined by comparing the pleaded claims and defenses to the pleaded allegations, the availability to the pleader of evidence to prove such allegations cannot be inferred

from the mere fact that they have been pleaded. Accordingly, our rules of court require any party moving for summary judgment to prove to the court that admissible evidence available to him not only tends to prove the material facts upon which his right to judgment depends, but eliminates any genuine issue as to the existence of such material facts, thereby establishing his right to prevail on his claim or defense as a matter of law. A party opposing summary judgment, by contrast, need only demonstrate that the admissible evidence available to the moving party is insufficient to eliminate any genuine issue as to the material facts upon which the movant's right to judgment depends, or that admissible evidence available to her is sufficient to raise a genuine issue as to the existence of one or more such material facts. "In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law." (Internal quotation marks omitted.) *Grady* v. *Somers*, supra, 294 Conn. 331.

Because a motion for summary judgment must be adjudicated without conducting trial, our rules of practice have established an alternative procedure for establishing the availability of admissible evidence in support of or in opposition to a motion for summary judgment. Under that procedure, the party seeking summary judgment must first support his motion by filing certain designated types of materials with the court that constitute, contain or demonstrate the availability to the party of admissible evidence. Such materials, pursuant to Practice Book § 17-45, include sworn affidavits, certified transcripts of testimony given under oath, disclosures and pleadings. If such materials establish the availability of admissible evidence tending to prove the

material facts upon which the movant's right to judgment depends, the burden shifts to the nonmovant to file similar materials tending to raise a genuine issue as to any such material fact. The court's task in reviewing the parties' submissions is *not* to decide any factual issues they raise, but only to decide if, in fact, they raise any such factual issues, as by demonstrating a potential inconsistency or conflict in the admissible evidence concerning one or more facts upon which the movant's right to judgment depends. In the event the court determines that there is such a genuine issue of material fact, it must deny the motion for summary judgment and leave resolution of the issue to the trier of fact at trial, who will hear and evaluate the evidence on both sides of that issue firsthand before deciding it. "On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court. . . . Our review of the trial court's decision to grant the [defendants'] motion for summary judgment is plenary." (Internal quotation marks omitted.) Id.

I

The first issue raised in this appeal concerns the process by which one form of evidence routinely submitted in connection with motions for summary judgment must be authenticated before the court can consider it in deciding such a motion. The evidence in question consists of excerpts from certified transcripts of testimony given under oath. Because the purpose of authentication, as established in our case law, is to make a preliminary showing that the proffered evidence is what the party offering it claims it to be, it is important at the outset to understand the reason why such transcripts, if authenticated, are admissible on a motion for summary judgment. Importantly, certified transcripts

of testimony given under oath are *not* admitted in connection with such motions because they *constitute* admissible evidence at trial. This is because, under our rules of evidence, the admissibility of prior sworn testimony depends upon both the unavailability of the witness to testify at trial and the prior availability to all other parties of an opportunity to cross-examine the witness when he gave his prior sworn testimony. Conn. Code Evid. § 8-6 (1). Instead, the reason why such certified transcripts are admissible in connection with summary judgment motions is to demonstrate the availability to the party submitting them of live testimony from the witnesses, consistent with their prior sworn testimony, as it appears in the certified transcripts. The purpose of authentication of such certified transcripts is thus to make a preliminary showing that they accurately record testimony that the witnesses in question gave under oath.

In this case, the trial court sua sponte refused to consider two deposition excerpts filed by the plaintiff and one deposition excerpt filed by the defendants in connection with the defendants' motion for summary judgment because they failed to submit either full certified transcripts of the witnesses' depositions or to file affidavits from knowledgeable witnesses separately establishing that the excerpts in question were true and accurate excerpts from such full certified transcripts. The plaintiff complains that the trial court's ruling to this effect constituted an overly strict application of the authentication requirement and deprived her improperly of actual, reliable proof as to the availability of admissible evidence in opposition to the defendants' motion. For the following reasons, we agree with the plaintiff and reverse the trial court's ruling rendering summary judgment in favor of the defendants in this case.

The plaintiff asserts that our standard of review over her first claim is plenary. The defendants argue, to the contrary, that we must review the plaintiff's claim under the abuse of discretion standard. Because, however, the claim involves the interpretation of a rule of practice, we agree with the plaintiff.[5] See *Wiseman* v. *Armstrong*, 295 Conn. 94, 99, 989 A.2d 1027 (2010) ("[t]he interpretation and application of a statute, and thus a Practice Book provision, involves a question of law over which our review is plenary").

"Practice Book § 17-45 provides in relevant part that [a] motion for summary judgment shall be supported by such documents as may be appropriate, including but not limited to affidavits, *certified transcripts of testimony under oath*, disclosures, written admissions and the like. . . . That section does not mandate that those documents be attached in all cases, but we note that [o]nly evidence that would be admissible at trial may be used to support or oppose a motion for summary judgment. . . . Practice Book § [17-45], although containing the phrase including but not limited to, contemplates that supporting documents to a motion for summary judgment be made under oath or otherwise reliable. . . . [The] rules would be meaningless if they could be circumvented by filing [unauthenticated documents] in support of or in opposition to summary judgment. . . .

"Therefore, before a document may be considered by the court [in connection with] a motion for summary

[5] Even if we assume arguendo that the trial court's decision to accept or reject the deposition transcript excerpts should be reviewed under the abuse of discretion standard; see *Barlow* v. *Palmer*, 96 Conn. App. 88, 91, 898 A.2d 835 (2006); the court's denial of the plaintiff's request to cure the defect would constitute an abuse of discretion. See, e.g., *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 433, 484–85, 970 A.2d 592 (2009) (court should allow requested supplementation "if it will promote the economic and speedy disposition of the controversy between the parties, will not cause undue delay or trial inconvenience, and will not prejudice the rights of any other party" [internal quotation marks omitted]).

judgment, there must be a preliminary showing of [the document's] genuineness, i.e., that the proffered item of evidence is what its proponent claims it to be. The requirement of authentication applies to all types of evidence, including writings . . . . Conn. Code Evid. § 9-1 (a), commentary. Documents in support of or in opposition to a motion for summary judgment may be authenticated in a variety of ways, including, but not limited to, a certified copy of a document or the addition of an affidavit by a person with personal knowledge that the offered evidence is a true and accurate representation of what its proponent claims it to be." (Emphasis altered; internal quotation marks omitted.) *Gianetti* v. *Anthem Blue Cross & Blue Shield of Connecticut*, 111 Conn. App. 68, 72–73, 957 A.2d 541 (2008), cert. denied, 290 Conn. 915, 965 A.2d 553 (2009).

This court has never directly addressed the issue of whether an excerpt from a certified deposition transcript must be separately certified as such, apart from the certification of the original transcript from which it was excerpted, in order to make it admissible in support of or in opposition to a motion for summary judgment under Practice Book § 17-45. Our Superior Courts are divided as to what type of certification is required for that purpose.[6] Because our review is plenary, we consider, but are not bound by, these decisions.

[6] There is no consensus among Superior Court judges as to whether and under what circumstances excerpts from deposition transcripts are sufficiently authenticated such that they can be considered in support of or in opposition to motions for summary judgment. One court held that deposition transcript excerpts, with cover pages and court reporter certifications, may properly be considered under Practice Book § 17-45. See *Clark* v. *Norwalk*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-93-0146667, 1998 WL 886599, *3 (December 10, 1998). Other courts have considered excerpts from deposition transcripts when a copy of the court reporter's certification of the entire original transcript is submitted with it. See *Mangels* v. *Yale*, Superior Court, judicial district of Fairfield, Docket No. 02-0389790-S, 2006 WL 438593, *3 (February 15, 2006); *Jensen* v. *DePaolo*, Superior Court, judicial district of New Haven, Docket No. CV-01-0277460-S, 2004 WL

Where no party objects, a court may, but is not required to, review uncertified deposition transcripts. *Barlow* v. *Palmer*, 96 Conn. App. 88, 92, 898 A.2d 835 (2006). There is no indication in the record that the present defendants objected to the deposition excerpts until the court, sua sponte, invited them to do so at oral argument.[7] In their reply memorandum, by contrast, the defendants did object to the plaintiff's exhibit D, an

166486, *1 n.4 (June 30, 2004). Other courts have held that providing the title page but not the certification page with an excerpt from a deposition; see *Marsala* v. *Yale-New Haven Hospital, Inc.*, Superior Court, judicial district of Ansonia-Milford, Docket No. 12-6010861 (March 19, 2015) (60 Conn. L. Rptr. 196, 197 nn.4–8), aff'd, 166 Conn. App. 432, 142 A.3d 316 (2016); or a certification page from a full deposition with an excerpt from that deposition; see *Colon* v. *New Haven*, Superior Court, judicial district of New Haven, Docket No. CV-09-6004291-S, 2011 WL 4953436, *2 n.1 (September 28, 2011); will not adequately authenticate such deposition excerpts for consideration in support of or in opposition to a motion for summary judgment.

[7] The following colloquy occurred:

"The Court: . . . [M]y general practice for as long as I've been doing this has been that I follow the rules of practice unless there is consent by both sides to look away from the requirements of the Practice Book, and I don't have that here, mainly because [the defendants'] exhibits mostly are authenticated, with the exception of one, which is exhibit E. [The defendants do not] have that problem. Although, if I were to allow you to submit an affidavit that, what is there—and *I don't think there's any claim that the excerpts are inaccurate*, but to authenticate that that is the testimony, that there is no errata that changes any of the substantive testimony, then I would consider [the defendants'] exhibit E as well because there would be some sort of agreement of counsel on that. [The defendants' counsel], back to you, briefly. Is there an agreement on that as to the deposition excerpts?

"[The Defendants' Counsel]: Uh—

"The Court: It's up to you. You don't have to.

"[The Defendants' Counsel]: Your Honor, I don't want to concede that the entirety of the plaintiff's submissions are appropriate for a motion for summary judgment at this point. I mean, exhibit E was attached to point out portions of the transcript that weren't included in the plaintiff's submission because there were only certain pages here and there. So, if Your Honor is not considering transcripts on both sides, I think that would be fair.

"The Court: Okay. So, we don't have an agreement. So, I'm just letting you know that, and it can't come as any surprise that I won't consider things that are not properly authenticated unless there's agreement of counsel, and, here, we don't have." (Emphasis added.)

uncertified disclosure of the plaintiff's expert witness. At oral argument, moreover, the defendants also objected to the uncertified coaching handbook as improperly before the court because it was not authenticated. However, far from objecting to the plaintiff's submission of the subject excerpts from the certified deposition transcripts of Brianna and Bayne, the defendants themselves submitted, as an attachment to their reply memorandum, an overlapping excerpt from Brianna's certified deposition transcript, which was authenticated in precisely the same manner as the plaintiff had authenticated the excerpt from that same deposition that she had submitted.[8] By so doing, without correcting the plaintiff's submission in any way, then expressly relying upon such excerpts in their own summary judgment argument, the defendants effectively stipulated to the authenticity of both excerpts from Brianna's deposition, which the parties had submitted as true and accurate excerpts from the original certified transcript of that deposition. "Stipulations or admissions prior to or during a trial provide two other means of authentication." Conn. Code Evid. § 9-1 (a), commentary.

The plaintiff claims that the trial court's reading of Practice Book § 17-45 was overly narrow, and that that section allows a court to consider more than merely entire certified deposition transcripts or excerpts from deposition transcripts that have been separately certified for their truth and accuracy as such by an affidavit from the court reporter or the submitting party's attorney. She contends that because the phrase "certified transcripts of testimony under oath" is not defined in Practice Book § 17-45 or elsewhere, and the deposition transcript excerpts she submitted along with her opposition memorandum of law included the deposition

[8] The defendants' exhibit E was an excerpt from the transcript of Brianna's deposition that included the first page, a portion of the deponent's testimony, the page on which the court reporter certified the entire deposition, and the page with the certificate of the deponent.

cover page, the page on which the court reporter certified the accuracy of the entire deposition transcript as he transcribed it, and the page on which the deponent swore that she had read the entire deposition transcript and certified to its truth and accuracy, so transcribed, it fully satisfied the requirements of the rules of practice. At oral argument, the trial court disagreed with the plaintiff's contention.[9] We, however, agree with the plaintiff.

Because all that is required for a court to consider a document in support of or in opposition to a motion for summary judgment is "a preliminary showing of [the

[9] The following colloquy occurred:

"[The Plaintiff's Counsel]: With respect to the deposition excerpts, it was my understanding under the rule that a certification page would certify those excerpt transcripts were accurate and authenticate them.

"The Court: If the entire transcript was there, I wouldn't have a problem with it. But when you're taking page 3 and then page 5 and then page 8 and then page 27, the normal practice would be to, either you, yourself, saying that or whoever took the deposition, that this is what transpired and these are from the original—I don't even think you have to be there, but somebody needs to authenticate it, even if it's counsel. If it's not counsel, it should properly be the court reporter that does that, and I can tell you from my own practice way back when, I would go to the court reporter with copies of the transcript and say, give me a certification page, and they would do that; then you don't have problems with it. But you open yourself up to having them excluded by the manner that you've chosen to do these things.

"[The Plaintiff's Counsel]: I will state in full disclosure, Your Honor, that I—we actually, when we had these depositions, initially, did not even have the certification page from the court reporter, and so I went so far as to get that, thinking that it would be enough. Now, seeing that—

"The Court: How could you not have the certification page if you're getting a sealed transcript?

"[The Plaintiff's Counsel]: We didn't have the signed certification page.

"The Court: Okay. And it may be a question of a missing errata page. I don't know if your client changed any of her answers substantively because I don't know whether there was an errata page, and I don't know whether any of the testimony changed because those excerpts haven't been certified. That's the problem I have."

The plaintiff's counsel then twice requested judicial permission to provide an affidavit authenticating and certifying the deposition transcript excerpts, which the court denied.

document's] genuineness"; (internal quotation marks omitted) *New Haven* v. *Pantani*, 89 Conn. App. 675, 679, 874 A.2d 849 (2005); we hold that the certification page from the original certified deposition transcript from which an excerpt was taken is sufficient to authenticate the excerpt as an accurate transcription of testimony given under oath, and thus to establish its admissibility for summary judgment purposes, at least where, as here, it is accompanied by other portions of the original deposition transcript tending to establish that the testimony set forth in it was given under oath and that it was accurately transcribed. Such proof of genuineness is fully consistent with the purpose for which certified transcripts of depositions are admitted in support of or in opposition to summary judgment motions, which is to prove that the submitting party has available to her, for presentation at trial, admissible evidence consistent with the witness' prior recorded testimony under oath. If the court reporter has duly certified that the entire deposition was given under oath and that it was accurately transcribed, he has thereby, necessarily, certified that the excerpt in question was accurately transcribed as part of that sworn testimony, a fact that was confirmed in this case by the defendants' own submission of and reliance upon excerpts from the same original deposition transcript in support of their motion, and by the deponent's certification under oath that she had read her entire testimony, so transcribed, and found it to be truthful and accurate.

Our rules of practice, in fact, expressly allow for the use of such excerpts. See Practice Book § 17-46, which provides in relevant part: "Sworn or certified copies of all papers *or parts* thereof referred to in an affidavit shall be attached thereto." (Emphasis added.) There is therefore no requirement that the entire document be attached to make an excerpt therefrom admissible in support of a summary judgment motion.

We acknowledge concerns that a trial court may have in considering an excerpt from a deposition transcript; see footnote 9 of this opinion; however, we find that those concerns are easily addressed. In cases such as this one, where both parties have access to full copies of the original deposition transcripts from which the excerpts in question were taken, if a party includes the cover page of the transcript, the page on which the court reporter certifies the accuracy of his transcription, and the page on which the deponent certifies under oath that, upon reading the entire deposition, the testimony in it is truthful and accurate, nothing more can be required of the submitting party to make her "preliminary showing of [the document's] genuineness . . . ." (Internal quotation marks omitted.) *New Haven* v. *Pantani*, supra, 89 Conn. App. 679. A party must, of course, include enough of the full deposition transcript in the submitted excerpt to put the testimony upon which she wishes to rely in its proper context, so that its meaning can be understood and its true significance can be properly evaluated by the court, but she has no need—indeed, no right—to file other portions of the deposition that contain testimony that is irrelevant to the issues raised on summary judgment, or that contain answers that are beyond the personal knowledge or competency of the deponent or are otherwise inadmissible in evidence. If, however, an opposing party wishes to object to a proffered deposition excerpt, in whole or in part, on any basis, he has ample means at his disposal to protect his rights. If he feels that the chosen excerpt is inadmissible in evidence on the issues raised on the pending motion, he can move to strike the entire excerpt or object to particular portions of it. If the court agrees with his position, it can grant him relief after both parties have been heard on the issue. If, by contrast, he feels that the excerpt, though admissible as submitted, is nonetheless misleading because it does not

include portions of the original deposition transcript that shed important light on issues which the excerpt concerns, he can seek the court's permission, under § 1-5 (b) of the Connecticut Code of Evidence, to introduce any other part of the deposition that "ought in fairness to be considered contemporaneously with" it. That, in fact, is what the defendants in this case did by attaching additional excerpts from Brianna's deposition to their reply memorandum. Where, moreover, a party proffers excerpts from a certified deposition transcript that has not already been made available to all counsel, Practice Book § 17-47 entitles his opponent to request a postponement of all summary judgment proceedings to enable him to conduct further investigation, pursue additional discovery or obtain additional affidavits in order to respond effectively to the motion.[10]

Here, the plaintiff submitted excerpts from the certified depositions of Brianna and Bayne, both of which were fully available to the defendants, who did not object to them until prompted to do so by the court. Because such excerpts were submitted along with pages from the original deposition transcripts establishing that such original transcripts were accurate transcriptions of the deponents' truthful testimony under oath, such excerpts were properly authenticated for the purpose of Practice Book § 17-45, which is to establish the availability of admissible evidence bearing upon the issues raised on the defendants' summary judgment motion. For that reason we conclude that the court erred by refusing to consider such deposition excerpts in deciding the motion. Thus, we reverse the court's

[10] Practice Book § 17-47 provides in relevant part: "Should it appear from the affidavits of a party opposing the motion that such party cannot, for reasons stated, present facts essential to justify opposition, the judicial authority . . . may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just."

granting of summary judgment in favor of the defendants and remand this case for further proceedings on that motion.

II

The plaintiff also claims that the trial court erred in not considering the parties' reply memoranda. We review this claim under the abuse the discretion standard. "An abuse of discretion standard would be consistent with the general rule that [t]he trial court has wide discretion in granting or denying amendments [to pleadings] before, during, or after trial." (Internal quotation marks omitted.) *Dimmock* v. *Lawrence & Memorial Hospital, Inc.*, 286 Conn. 789, 799, 945 A.2d 955 (2008).

The plaintiff claims that the court agreed at oral argument to consider the parties' reply memoranda. It is undisputed that the court granted the defendants one week from oral argument to file a surreply memorandum in response to the plaintiff's surreply. It is further undisputed that the court did not consider either party's surreply briefs in deciding the motion for summary judgment.

Practice Book § 11-10 was amended on June 12, 2015, with an effective date of January 1, 2016, to add current subsections (b) and (c) to the rule. According to commentary accompanying the amendment, "[t]his change . . . [clarified that] [n]o surreply memoranda can be filed without the permission of the judicial authority." Practice Book (2016) § 11-10, commentary. The court therefore had discretion under the rules of practice not to consider this additional briefing. We conclude that the court did not abuse its discretion in not considering the parties' surreply memoranda.

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

In this opinion the other judges concurred.

TOWN OF GLASTONBURY *v.* JOHN ALAN SAKON ET AL.
(AC 39907)

Bright, Moll and Sullivan, Js.

Syllabus

The plaintiff town of Glastonbury sought to foreclose municipal tax liens on certain real property owned by the defendant S. The trial court rendered judgment of foreclosure by sale and awarded attorney's fees to the town. Following a hearing on S's motion for reconsideration as to the issue of attorney's fees, the court found that although the fees requested were unusually high for an action to foreclose tax liens, the fees here were reasonable given the number of nearly frivolous filings by S, which caused the present action to remain pending for years. The court entered an order confirming the initial amount of attorney's fees it had previously awarded, and S appealed to this court, claiming that the total award of attorney's fees was unreasonable when compared to the amount of the tax liens at issue in the present case and to attorney's fees awarded in similar tax lien foreclosure cases. *Held* that the trial court did not abuse its discretion in determining the amount of attorney's fees awarded to the town; the town was authorized by statute (§ 12-193) to recover reasonable attorney's fees incurred in this foreclosure action, the trial court conducted a full evidentiary hearing at which S had the opportunity to testify on his own behalf and to elicit testimony from W, the town's attorney, challenging the fees charged, and it properly considered the evidence before it and the circumstances of the underlying foreclosure action, including W's affidavit, the billing records from W's law firm, and the high number of filings and extensive history of the case, and this court would not disturb the trial court's determination that W testified credibly.

Argued May 17—officially released August 28, 2018

Procedural History

Action to foreclose municipal tax liens on certain real property owned by the named defendant, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Robaina*, *J.*, granted the plaintiff's motion for summary judgment as to liability only; thereafter, the court, *Dubay*, *J.*, rendered judgment of foreclosure by sale and awarded attorney's fees to the plaintiff; subsequently, the court,

Dubay, J., granted the named defendant's motion to reconsider only as to the issue of attorney's fees; thereafter, the court, *Dubay, J.*, entered an order confirming the initial amount of attorney's fees awarded, and the named defendant appealed to this court. *Affirmed.*

John Sakon, self-represented, the appellant (named defendant).

Latonia C. Williams, with whom was *Patrick M. Fahey*, for the appellee (plaintiff).

Opinion

SULLIVAN, J. In this tax lien foreclosure action,[1] the defendant John Alan Sakon[2] appeals from the judgment of the trial court granting the plaintiff's request for attorney's fees and costs. On appeal, the defendant claims that the attorney's fees awarded by the court were excessive and unreasonable. We conclude that the amount of attorney's fees awarded to the plaintiff did not constitute an abuse of discretion and, accordingly, affirm the judgment of the trial court.

This court's recent decision in the same matter, *Glastonbury* v. *Sakon*, 172 Conn. App. 646, 161 A.3d 657 (2017) (per curiam), sets forth the following facts: "The defendant is the record owner of two properties [described in the complaint as the Griswold Street property and the Main Street property, respectively,] in Glastonbury. The defendant failed to pay the property taxes on his properties for the years 2009, 2010, 2011, 2012, and 2013. As a result, the plaintiff, the town of Glastonbury, assessed tax liens against the defendant's properties for the unpaid real property taxes (tax liens).

[1] Since this action commenced over five years ago in November, 2012, there have been approximately 335 filings in this case. See *Glastonbury* v. *Sakon*, 172 Conn. App. 646, 161 A.3d 657 (2017) (per curiam).

[2] Several additional parties were named as defendants in this action, but they have not participated in this appeal. For the purposes of this opinion, any reference to the defendant is to John Alan Sakon only.

"On November 6, 2012, the plaintiff commenced this action to foreclose on the 2009, 2010, and 2011 tax liens for the defendant's two properties by filing a two count complaint, in which each count pertained to one of the defendant's two properties. On August 27, 2013, the plaintiff filed a motion for default for failure to plead, which was granted on September 4, 2013. On December 10, 2013, the plaintiff filed a motion for judgment of foreclosure by sale. On December 18, 2013, the defendant filed his answer to the plaintiff's complaint, which contained six special defenses and seven counterclaims (original special defenses and counterclaims). On January 29, 2014, the defendant filed a motion to open the default, which was granted on February 10, 2014. On March 12, 2014, the plaintiff filed a motion to strike the original special defenses and counterclaims (first motion to strike).

"On August 13, 2014, the plaintiff filed an amended two count complaint, in which it additionally sought to foreclose on the 2012 and 2013 tax liens for the defendant's two properties and clarified its description of the defendant's properties (operative complaint).

"On November 21, 2014, the court, *Robaina*, *J.*, granted the plaintiff's first motion to strike. On December 10, 2014, the defendant filed a revised motion for reconsideration of the court's order granting the plaintiff's first motion to strike. On December 11, 2014, the defendant filed an amended answer in response to the operative complaint, which contained special defenses and counterclaims that were substantially similar to those raised in his original answer (amended special defenses and counterclaims). On December 24, 2014, the plaintiff filed a motion to strike the defendant's amended special defenses and counterclaims (second motion to strike).

"On December 29, 2014, the court denied the defendant's revised motion for reconsideration of the court's

order granting the plaintiff's first motion to strike. On January 5 and 6, 2015, and February 4, 2015, the defendant filed motions for extension of time to file a substitute pleading pursuant to Practice Book § 10-44. On February 11, 2015, the defendant filed a substitute answer, in which he raised four special defenses and two counterclaims (substitute special defenses and counterclaims). On March 16, 2015, the court concluded that the second motion to strike [filed on December 24, 2014] was moot because '[t]he operative substitute special defenses and counterclaims are those filed on February 11, 2015.'

"On March 31, 2015, the plaintiff filed a motion to strike the substitute special defenses and counterclaims (third motion to strike) and a motion for judgment of nonsuit as to the counterclaims. On July 9, 2015, the court, *Vacchelli*, *J.*, applying the law of the case doctrine, granted the third motion to strike because the substitute special defenses and counterclaims 'all attempt the exact same challenges previously ruled to be legally insufficient' by the court on November 11, 2014. The court also entered default against the defendant as to his special defenses and a judgment of nonsuit against the defendant and in favor of the plaintiff with respect to the defendant's counterclaims.

"On July 24, 2015, the plaintiff moved for summary judgment as to liability on both counts of the operative complaint. On July 27, 2015, the defendant filed a motion for reconsideration of the court's order granting the plaintiff's third motion to strike, which was denied on August 12, 2015." (Footnote omitted.) Id., 648–50. The defendant subsequently filed an appeal from the court's ruling on the third motion to strike, and this court dismissed the appeal as to the special defenses and affirmed the trial court's ruling striking the counterclaims. See id., 659.

On January 4, 2016, Judge Robaina granted the plaintiff's motion for summary judgment as to liability only. On July 13, 2016, the plaintiff filed a motion for judgment of foreclosure by sale. The court, *Dubay*, *J.*, ordered a hearing for August 1, 2016, and, on that date, the defendant requested a continuance to allow him to subpoena the town's appraiser and the town's counsel, Latonia Williams, and additional time to hire an expert witness. The court continued the matter for one week to August 8, 2016.[3]

At the August 8, 2016 hearing, the court only heard argument on the motion for judgment of foreclosure by sale scheduled for that day. The plaintiff presented the most current appraisal of the subject properties and an updated affidavit of attorney's fees requesting an award of counsel fees and costs of $68,982.22 for the first property and $65,997.21 for the second property. On the basis of the fair market values of the subject properties, the amount of debt due, and subsequent encumbrances on the properties, the court rendered judgment of foreclosure by sale and ordered attorney's fees in the amounts requested by the plaintiff. The defendant vigorously contested both the entry of the judgment of foreclosure by sale and the award of attorney's fees.

On August 26, 2016, the defendant filed a motion to reconsider the judgment of foreclosure by sale. On September 9, 2016, the court granted the defendant's motion to reconsider only as to the issue of attorney's

[3] The court subsequently denied the application for issuance of subpoena as to the town's appraiser, but authorized the issuance of a subpoena compelling Attorney Williams' appearance and requesting all records and documents relating to the foreclosure actions. The clerk issued a subpoena to Attorney Williams on August 3, 2016. The plaintiff unsuccessfully moved to quash the subpoena, but the court limited the scope of the subpoena and allowed the plaintiff to redact the portions of the billing records that were protected by the attorney work product doctrine or the attorney-client privilege.

fees. At the hearing on the motion to reconsider on October 7, 2016, the defendant called Attorney Williams to testify regarding the reasonableness of the attorney's fees requested and, in response to the defendant's subpoena, Attorney Williams produced the billing records of the law firm of Shipman & Goodwin, LLP, related to the present case. The defendant then testified on his own behalf, and the court took the matter under consideration.[4] On October 24, 2016, in a written memorandum of decision, the court entered an order finding the attorney's fees awarded to the plaintiff in the foreclosure action reasonable. The court made the following findings:

"1. The time records/billable hours were entered contemporaneously with the services rendered by counsel.

"2. [The] defendant produced no credible evidence to call into question the hours claimed.

"3. The attorney's fees, though unusually high for an action to foreclose tax liens, are reasonable given the number of nearly frivolous filings by the defendant, which caused this action to remain pending for years.

"4. [The] defendant had the opportunity to, but did not, file timely objection to the affidavit of attorney's fees submitted during the initial/underlying action.

"5. [The] defendant had a full opportunity to be heard and to examine and/or present witnesses.

"6. The court fully credits the testimony of Attorney Williams.

[4] While the issue of attorney's fees was pending, the defendant filed a motion to open the judgment of foreclosure on October 14, 2016. The court denied the motion on December 12, 2016. Additionally, on November 14, 2016, the committee of sale filed a motion to award interim committee's fees and expenses in connection with the cancelled foreclosure sale, totaling $3962.85, which the court granted on December 2, 2016.

"Attorney's fees and costs in the amount of $68,982.22 are awarded in connection with the Griswold Street property and $65,997.21 for the Main Street property."

On appeal, the defendant claims that the court abused its discretion as to the amount of the attorney's fees that it awarded.[5] Specifically, the defendant argues that

[5] The defendant spends the majority of his principal appellate brief attempting to challenge the judgment of foreclosure by sale. We briefly review the procedural posture of this appeal to clarify those issues that are not properly before this court on appeal. The defendant filed his initial appeal (AC 38413) on September 15, 2015, challenging the court's order of default judgment as to his special defenses and a judgment of nonsuit as to his counterclaims. Thereafter, on August 8, 2016, the trial court rendered a judgment of foreclosure by sale on the two properties at issue in this case. On October 14, 2016, the defendant amended his appeal to include the August 8, 2016 foreclosure judgment. The plaintiff filed a motion with this court to dismiss the first amended appeal as untimely. The defendant then amended his appeal a second time to include the October 24, 2016 granting of attorney's fees. The plaintiff did not file a motion to dismiss the second amended appeal. On December 7, 2016, this court dismissed the defendant's first amended appeal as untimely and ordered, sua sponte, that the second amended appeal be briefed and considered separately.

The second amended appeal was assigned a new docket number (AC 39907) and stayed pending the trial court's ruling on the defendant's motion to open, which was denied on December 12, 2016. See footnote 4 of this opinion. Subsequently, the defendant amended AC 39907 on two separate occasions, indicating that he again intended to challenge the August 8, 2016 judgment of foreclosure by sale, as well as the December 12, 2016 denial of his motion to open and the award of interim fees to the committee of sale. The plaintiff filed a motion to dismiss the portions of AC 39907 challenging the August 8, 2016 judgment. On February 8, 2017, this court granted the motion to dismiss that portion of the defendant's amended appeal in AC 39907 challenging the August 8, 2016 judgment of foreclosure by sale as untimely. This court also ordered, sua sponte, that the portions of the subsequent amendments to AC 39907 challenging the August 8, 2016 judgment be dismissed. Accordingly, the only issues properly before this court are the October 24, 2016 award of attorney's fees, the court's denial of the defendant's motion to open on December 12, 2016, and the court's award of interim fees to the committee of sale.

Additionally, we determine that the defendant has abandoned the issues of whether the trial court abused its discretion in denying his motion to open on December 12, 2016, and awarding interim fees to the committee of sale. "We are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . Where a claim is asserted in the statement of issues but thereafter receives only cursory attention in the

the total award of $140,479.43 in attorney's fees is unreasonable when compared to the amount of the tax liens at issue in the present case and to attorney's fees awarded in similar tax lien foreclosure cases. The plaintiff counters that the award of attorney's fees was reasonable because the trial court record is replete with motions and pleadings filed by the defendant to delay the instant proceedings. We agree with the plaintiff and conclude that the court did not abuse its discretion in determining the amount of attorney's fees it awarded.

We set forth the standard of review and applicable legal principles. "We review the reasonableness of the court's award of attorney's fees under the abuse of discretion standard. . . . Under the abuse of discretion standard of review, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of [the amount of attorney's fees awarded] is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion it did. . . . A court has few duties of a more delicate nature than that of fixing counsel fees. The issue grows even more delicate on appeal . . . for the trial court is in the best position to evaluate the circumstances of each case." (Internal quotation marks omitted.) *East Windsor* v. *East Windsor Housing, Ltd., LLC*, 150 Conn. App. 268, 275, 92 A.3d 955 (2014).

"Connecticut adheres to the American rule regarding attorney's fees under which successful parties are not entitled to recover attorney's fees in the absence of

brief without substantive discussion or citation of authorities, it is deemed to be abandoned." (Internal quotation marks omitted.) *Kelib* v. *Connecticut Housing Finance Authority*, 100 Conn. App. 351, 353, 918 A.2d 288 (2007). Here, the defendant's brief is bereft of any meaningful legal analysis of these issues and, therefore, provides this court with an insufficient basis for appellate review.

statutory or contractual authority to the contrary. . . . Thus, a specific contractual term may provide for the recovery of attorney's fees and costs . . . or a *statute* may confer such rights." (Emphasis in original; internal quotation marks omitted.) Id., 274. The plaintiff correctly argues that its right to recover attorney's fees in this case is statutory, rather than contractual, in nature. General Statutes § 12-181 et seq. authorizes a municipality to foreclose on outstanding municipal tax liens. See also Practice Book § 10-70 (setting forth elements municipality must allege and prove in tax lien foreclosure action). Additionally, General Statutes § 12-193 provides in relevant part: "Court costs, reasonable appraiser's fees, and reasonable attorney's fees incurred by a municipality as a result of any foreclosure action brought pursuant to [§] 12-181 or [§] 12-182 and directly related thereto shall be taxed in any such proceeding against any person or persons having title to any property so foreclosed and may be collected by the municipality once a foreclosure action has been brought pursuant to [§] 12-181 or [§] 12-182. . . ."

Because we conclude that § 12-193 authorizes the recovery of attorney's fees by the plaintiff, we next turn to the question of whether the court's award was reasonable. "The factors a court normally applies in determining a reasonable attorney's fee include (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee for similar work in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship

with the client; and (12) awards in similar cases. . . . That list of factors is not, however, exclusive. The court may assess the reasonableness of the fees requested using any number of factors . . . .'' (Internal quotation marks omitted.) *East Windsor* v. *East Windsor Housing, Ltd., LLC*, supra, 150 Conn. App. 275–76; see also Rules of Professional Conduct 1.5.

In the present case, the court conducted a full evidentiary hearing to reconsider the issue of attorney's fees; the defendant had the opportunity to elicit testimony from Attorney Williams challenging the fees and he also testified on his own behalf as to why he believed the fees were unreasonable.[6] The court properly considered the evidence before it and the circumstances of the underlying foreclosure action, including an updated affidavit from Attorney Williams detailing the fees requested, the billing records from Shipman & Goodwin, LLP, and the high number of filings and extensive history of the case. Additionally, the court credited the testimony of Attorney Williams, and we will not disturb the trial court's credibility determinations on appeal.

[6] Additionally, the defendant's argument that the court should have allowed him an ''accommodation to arrange [an expert witness'] testimony'' is without merit. Our case law is clear that expert testimony is not required for a court's assessment of the reasonableness of attorney's fees. ''[Trial] courts have a general knowledge of what would be reasonable compensation for services which are fairly stated and described. . . . Because of this general knowledge, [t]he court [is] in a position to evaluate the complexity of the issues presented and the skill with which counsel had dealt with these issues. . . . Therefore, [n]ot only is expert testimony not required, but such evidence, if offered, is not binding on the court.'' (Citations omitted; footnote omitted; internal quotation marks omitted.) *St. Onge, Stewart, Johnson & Reens, LLC* v. *Media Group, Inc.*, 84 Conn. App. 88, 93–94, 851 A.2d 1242, cert. denied, 271 Conn. 918, 859 A.2d 570 (2004). The trial court expressly found that the defendant ''had a full opportunity to be heard and/or present testimony'' where he had notice of the hearing and was able to present his own testimony and the testimony of Attorney Williams at that hearing. Accordingly, we conclude that the court did not abuse its discretion in denying the defendant's request for an accommodation for an expert witness.

See *LPP Mortgage, Ltd.* v. *Lynch*, 122 Conn. App. 686, 692, 1 A.3d 157 (2010) ("[a reviewing court] cannot retry the facts or pass upon the credibility of the witnesses" [internal quotation marks omitted]); see also *State* v. *Franklin*, 115 Conn. App. 290, 292, 972 A.2d 741 ("[b]ecause it is the sole province of the trier of fact to assess the credibility of witnesses, it is not our role to second-guess such credibility determinations"), cert. denied, 293 Conn. 929, 980 A.2d 915 (2009). In light of the foregoing, we cannot conclude that the court abused its discretion in awarding the attorney's fees requested by the plaintiff.

The judgment is affirmed.

In this opinion the other judges concurred.

GOVERNMENT EMPLOYEES INSURANCE COMPANY *v.* ARLY BARROS ET AL.
(AC 40643)

DiPentima, C. J., and Bright and Moll, Js.

Syllabus

The plaintiff insurance company sought, by way of an equitable subrogation action, to recover uninsured motorist benefits it had paid to its insured for personal injuries sustained by her in a motor vehicle collision allegedly caused by the negligence of the named defendant. In their answer, the defendants raised the special defense that the plaintiff's claim was barred by two statutes of limitations allegedly applicable to the underlying claims of negligent operation of a motor vehicle. The trial court rendered judgment in favor of the plaintiff, from which the defendants appealed to this court. *Held* that the defendants' claim that the plaintiff's equitable subrogation action was subject to the same limitations period as the underlying tort claims was unavailing; the plaintiff's equitable subrogation claim, as pleaded, sounded in equity only and, therefore, the claim was not subject to any statute of limitations and the proper inquiry was whether the plaintiff's claim was precluded under the doctrine of laches, and this court declined to address whether the plaintiff's equitable subrogation claim was precluded under the doctrine of laches, as the defendants failed to raise that issue before the trial court, and

the issue involved questions of fact, which an appellate court could not resolve.

Argued May 21—officially released August 28, 2018

Procedural History

Action to recover uninsured motorist benefits paid by the plaintiff to one of its insureds for injuries sustained as a result of the named defendant's alleged negligence, brought to the Superior Court in the judicial district of Danbury and tried to the court, *Truglia*, *J.*; judgment for the plaintiff, from which the defendants appealed to this court. *Affirmed.*

Peter N. Buzaid, for the appellants (defendants).

Joseph M. Busher, *Jr.*, for the appellee (plaintiff).

Opinion

DiPENTIMA, C. J. The defendants, Arly Barros and Anthony's Services, LLC, appeal from the judgment of the trial court in favor of the plaintiff, Government Employees Insurance Company, on its claim for equitable subrogation.[1] On appeal, the defendants claim that the court erred by concluding that the statute of limitations set forth in General Statutes § 52-577 or General Statutes § 52-584 does not apply to bar the plaintiff's claim for equitable subrogation. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of the defendants' claim. On September 30, 2012, on Federal Road in Danbury, a vehicle operated by the plaintiff's insured and subrogor, Dawn Williams, was stopped at a traffic light when it was struck by an uninsured vehicle operated by Barros and owned by Anthony's Services, LLC.[2] As a result of the

[1] The plaintiff is the subrogee of Dawn Williams, who testified at trial but is not participating in this appeal.

[2] The defendants do not dispute that the vehicle Barros operated was uninsured at the time of the accident.

collision, Williams sustained serious physical injuries for which she received extensive medical treatment, including several surgical procedures. The total cost of her medical care was approximately $189,000. On or about November 12, 2015, the plaintiff resolved Williams' claim in the amount of $100,000, the limit of her bodily injury coverage under the uninsured motorist provisions of her policy.

On February 8, 2016, the plaintiff commenced the present action for equitable subrogation. In their answer, the defendants raised the special defense that the claim was barred by two statutes of limitations applicable to the underlying claims of negligent operation of a motor vehicle: §§ 52-577[3] and 52-584.[4]

On June 14, 2017, the matter was tried to the court, *Truglia*, *J.* The defendants presented no evidence; in their summation, they iterated their special defense. Specifically, the defendants indicated that the accident occurred on September 30, 2012, but the plaintiff did not effect service of process until February 8, 2016. Accordingly, the defendants contended, the action was not commenced within three years of the "act or omission complained of" and was time barred pursuant either to § 52-577 or § 52-584. The defendants further argued that the plaintiff, as subrogee to Williams, succeeded to no greater rights than those of its insured,

[3] General Statutes § 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."

[4] General Statutes § 52-584 provides in relevant part: "No action to recover damages for injury to the person, or to real or personal property, caused by negligence, or by reckless or wanton misconduct . . . shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of, except that a counterclaim may be interposed in any such action any time before the pleadings in such action are finally closed."

and therefore could not bring what essentially is a tort claim on her behalf.

The court rendered judgment in favor of the plaintiff in the amount of $100,000, concluding, inter alia, that "[t]he law is well settled in this state that statutes of limitations do not strictly apply to equitable claims. . . . Although courts in equitable proceedings often look by analogy to the statute of limitations to determine whether, in the interests of justice, a particular action should be heard, they are by no means obliged to adhere to those limitations. . . . The accident that gave rise to the plaintiff's claims occurred on September 30, 2012; Williams received extensive and continuing medical treatment well into 2015; the plaintiff paid her uninsured motorist claim in November of 2015 and brought suit against the defendants in February of 2016. As a matter of law, the court disagrees with the defendants' argument that the plaintiff's claim is barred by [§ 52-577 or § 52-584]." (Citations omitted; internal quotation marks omitted.) This appeal followed.

We begin our analysis with the relevant legal principles. The determination of which, if any, statute of limitations applies to a given action is a question of law over which our review is plenary. See *Vaccaro* v. *Shell Beach Condominium, Inc.*, 169 Conn. App. 21, 29, 148 A.3d 1123 (2016), cert. denied, 324 Conn. 917, 154 A.3d 1008 (2017).

The doctrine of equitable subrogation is a creature of common law. *Pacific Ins. Co., Ltd.* v. *Champion Steel, LLC*, 323 Conn. 254, 262, 146 A.3d 975 (2016). Its purpose is well established: "[T]he object of [equitable] subrogation is the prevention of injustice. It is designed to promote and to accomplish justice, and is the mode which equity adopts to compel the ultimate payment of a debt by one who, in justice, equity, and good conscience, should pay it." (Internal quotation marks omitted.) *Westchester Fire Ins. Co.* v. *Allstate Ins. Co.*, 236

Conn. 362, 371, 672 A.2d 939 (1996), superseded in part by statute as stated in *Pacific Ins. Co., Ltd.* v. *Champion Steel, LLC*, supra, 268.[5] "[T]he doctrine of equitable subrogation is broad enough to include every instance in which one person, not acting as a mere volunteer or intruder, pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter." (Internal quotation marks omitted.) *Pacific Ins. Co., Ltd.* v. *Champion Steel, LLC*, supra, 262. Consequently, equitable subrogation prevents a tortfeasor from being "unjustly enriched by virtue of having its debt paid by the insurance company of a party who had the foresight to obtain insurance coverage, and thus to escape all liability for its wrongdoing, simply because the insurance company was not permitted to participate in a suit against the tortfeasor in order to recover the money that it had paid to its insured but which was properly payable by the tortfeasor." *Westchester Fire Ins. Co.* v. *Allstate Ins. Co.*, supra, 372–73.

Statutes of limitations do not apply in a strict fashion to causes of action arising in equity: "[I]n an equitable

[5] See General Statutes § 38a-336b ("[n]o insurer providing underinsured motorist coverage as required under this title shall have any right of subrogation against the owner or operator of the underinsured motor vehicle for underinsured motorist benefits paid or payable by the insurer"). The legislature enacted this statute following our Supreme Court's decision in *Westchester Fire Ins. Co.* v. *Allstate Ins. Co.*, supra, 236 Conn. 363–64 (plaintiff insurance company was entitled to maintain action for equitable subrogation to recover underinsured motorist benefits).

In *Pacific Ins. Co., Ltd.* v. *Champion Steel, LLC*, supra, 323 Conn. 256, 268, our Supreme Court concluded that § 38a-336b does not prohibit a workers' compensation insurer from maintaining a common-law equitable subrogation action against a third-party tortfeasor who is liable for injuries sustained by an employee. In doing so, however, our Supreme Court stated in dicta that "[w]e read the relevant part of the [statute] as merely abrogating the common-law subrogation rights of uninsured motorist insurance carriers." Id., 268. Because neither party has briefed or argued the question of whether § 38a-336b precludes an insurer from seeking indemnification against both *underinsured* and *uninsured* motorists, we do not address that question.

proceeding, a court may provide a remedy even though the governing statute of limitations has expired, just as it has discretion to dismiss for laches an action initiated within the period of the statute."[6] *Dunham* v. *Dunham*, 204 Conn. 303, 326, 528 A.2d 1123 (1987), overruled in part on other grounds by *Santopietro* v. *New Haven*, 239 Conn. 207, 213 n.8, 682 A.2d 106 (1996). This is true except where an applicable statute of limitations in clear derogation of the common law creates a jurisdictional limitation. See *Turner* v. *State*, 172 Conn. App. 352, 368, 160 A.3d 398 (2017) ("[T]he court in *Dunham* was not considering whether to follow a statute of limitations that was directly applicable to the equitable proceeding before it, but whether it should import and adhere to an analogous statute of limitations applicable to a related action at law. . . . [*Dunham*] merely recognizes the discretion of the trial court in equitable proceedings not directly governed by a limitations period to import and apply an analogous statute of limitations."). Instead, where no such derogation exists, a party asserting a claim sounding in equity may "be

[6] As the court noted, decisions from the Superior Court have concluded that claims for equitable subrogation against an uninsured motorist are not necessarily barred by the statutes of limitations governing claims sounding in negligence or other torts. See *Government Employees Ins. Co.* v. *Duhamel*, Superior Court, judicial district of New Haven, Docket No. CV-17-6071406-S (August 28, 2017) (denying motion for summary judgment because statute of limitations is not applicable to actions in equity, and laches was not asserted); *Government Employees Ins. Co.* v. *Delarosa*, Superior Court, judicial district of Hartford, Docket No. CV-15-6055985-S (December 7, 2016) (63 Conn. L. Rptr. 514, 516) (acknowledging that in equitable actions courts may provide remedy despite running of statute of limitations, but finding that plaintiff failed to meet burden of proving that balance of equities was in its favor); *Great American Ins. Cos.* v. *Hartford Accident & Indemnity Co.*, Superior Court, judicial district of Hartford, Docket No. CV-98-0581252-S (March 12, 1999) (24 Conn. L. Rptr. 273, 275) (equitable subrogation is not subject to statute of limitations); but see *Castanada* v. *State Farm Mutual Automobile Ins. Co.*, Superior Court, judicial district of New Britain, Docket No. CV-11-6010957-S (August 6, 2013) (statute of limitations applied to bar claim for equitable subrogation where no equitable reason existed for tolling).

barred from seeking equitable relief by the defense of laches, which applies only if there has been an unreasonable, inexcusable and prejudicial delay in bringing suit." *Dunham* v. *Dunham*, supra, 327.

In the present case, the defendants contend that the statutes of limitations for the underlying tort claims should control because the plaintiff "stands in the shoes" of its subrogor and, therefore, the plaintiff succeeded to no greater rights than those of its insured. Accordingly, the defendants surmised that the plaintiff's claim for equitable subrogation is subject to the same limitations period as the underlying tort claims. We disagree.

As pleaded, the plaintiff's claim sounds only in equity, not in law or in both law and equity.[7] Consequently, the plaintiff's claim is not subject to any statute of limitations, let alone the same statutes of limitations applicable to the underlying claims.[8] *Dunham* v. *Dunham*, supra, 204 Conn. 326–27. The proper inquiry is whether the plaintiff's claim is precluded under the doctrine of laches. Id.

Here, however, the court noted that "the defendants did not assert a special defense of laches. But even if they had, the court sees no unreasonable delay by the plaintiff in bringing its claim and, in any event, the defendants presented no evidence as to how the plaintiff's delay caused them harm or in some way prevented them from defending themselves against the plaintiff's

[7] This court has recognized that a statute of limitations might apply to an equitable claim. When a plaintiff raises both a legal and equitable claim under the same set of facts, the running of the statute of limitations can bar both claims. *Vaccaro* v. *Shell Beach Condominium, Inc.*, supra, 169 Conn. App. 31–33.

[8] In its brief, the plaintiff argued that even if a statute of limitations applies, the applicable statute of limitations is that governing indemnification claims, General Statutes § 52-598a. Because we conclude that no particular statute of limitations strictly applies, we do not reach this argument.

claim." Because the defendants did not raise a claim of laches, and because "[a] conclusion that a plaintiff has [not] been guilty of laches is one of fact for the trier and not one that can be made by [an appellate court], unless the subordinate facts found make such a conclusion inevitable as a matter of law"; (internal quotation marks omitted) *Dunham* v. *Dunham*, supra, 204 Conn. 327; we decline to address laches.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* LIN QI SI
(AC 39852)

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

Syllabus

Convicted of the crime of negligent homicide with a commercial motor vehicle in connection with an accident that occurred when the bus he was driving struck and killed the decedent, a pedestrian crossing a road at an intersection, the defendant appealed to this court. On appeal, he claimed, inter alia, that the trial court erred by failing to instruct the jury properly on the essential element of causation. Specifically, he claimed that the jury charge was materially misleading because the jury instructions on proximate causation could have led the jury to disregard the conduct of the decedent entirely and, thus, to ignore the possibility that she was the sole proximate cause of her own death. *Held*:

1. The defendant could not prevail on his claim that the trial court improperly instructed the jury because it failed to instruct the jurors that it would be a complete defense to the charge of negligent homicide with a commercial motor vehicle that the decedent's negligence was the sole proximate cause of her own death: although the trial court did not provide the jury with the requested instruction verbatim, it included the substance of the requested charge in its instructions, which correctly charged the jury that proximate cause is an essential element of negligent homicide with a commercial motor vehicle that the state must prove beyond a reasonable doubt and, thus, effectively instructed the jury that the state must disprove the defense of sole proximate cause, as proof that the defendant's negligence proximately caused the decedent's death is necessarily inconsistent with any claim that some other, concurrent cause was the sole proximate cause of the death; moreover, the jury charge

was not materially misleading because, although certain portions of the jury instructions misstated the applicable law with respect to the element of proximate causation, namely, that it was the state's obligation to prove that it was not the negligence of the decedent that led directly to her death, that instruction actually heightened the state's burden of proof to the benefit of the defendant so that no harm or injustice to the defendant resulted, and there was no evidence in the record supporting a finding that the instructions guided the jury to discount any fact or set of facts inconsistent with the defendant's guilt, as the evidence presented did not establish that the decedent's negligent conduct contributed so substantially and materially to her own death that the defendant could not have been a proximate cause of the death, and the jury's finding that the defendant's negligence was a proximate cause of the decedent's death was supported by overwhelming evidence.

2. The trial court did not err when it provided the jury with a copy of the jury charge during deliberations, as that was a permissible practice and within the discretion of the court.

Argued April 16—officially released August 28, 2018

Procedural History

Information charging the defendant with the crime of negligent homicide with a commercial motor vehicle, brought to the Superior Court in the judicial district of New London at Norwich, geographical area number twenty-one, and tried to the jury before *A. Hadden, J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

John F. Geida, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Michael L. Regan*, state's attorney, and *Thomas M. DeLillo*, senior assistant state's attorney, for the appellee (state).

Opinion

SHELDON, J. The defendant, Lin Qi Si, appeals from the judgment of conviction, rendered against him after a jury trial, on the charge of negligent homicide with

a commercial motor vehicle in violation of General Statutes § 14-222a (b).[1] The defendant was tried on that charge under a long form information dated August 16, 2016, in which the state alleged that on December 5, 2012, he negligently operated a commercial motor vehicle at the intersection of Sandy Desert Road and Trading Cove Road on the premises of the Mohegan Sun Casino (casino) in Montville, and thereby caused the death of the decedent, Pui Ying Tam Li. On appeal, the defendant claims that the trial court erred by (1) failing to instruct the jury properly on the essential element of causation and (2) providing the jury with a copy of the jury charge during deliberations.[2] We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On December 5, 2012, the defendant was working as a bus driver for the Travel Sun Bus Company. At approximately 12:15 p.m. on that day, he departed from

[1] General Statutes § 14-222a (b) provides: "Any person who, in consequence of the negligent operation of a commercial motor vehicle, causes the death of another person shall be fined not more than two thousand five hundred dollars or imprisoned not more than six months, or both."

[2] The defendant also claims that a decedent's contributory negligence should be considered by the jury when the basis for the prosecution is common-law negligence. We conclude that this claim was abandoned and do not reach the claim on the merits. "The court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial." Practice Book § 60-5. "We are not required to review issues that have been improperly presented to this court through an inadequate brief . . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *State* v. *Fowler*, 178 Conn. App. 332, 345, 175 A.3d 76 (2017), cert. denied, 327 Conn. 999, 176 A.3d 556 (2018).

In our review of the record, this court could find only one reference to contributory negligence by defense counsel, as he noted, "that's an issue for another day." In his brief, the defendant's argument on the issue is two paragraphs long with no references to the law or facts in the record. Because defense counsel did not request that the trial court give an instruction on contributory negligence, did not take exception to the lack of such instruction and did not brief the issue beyond a bare assertion, we conclude that he has abandoned this claim.

Boston, Massachusetts with at least forty passengers and traveled to the casino in Montville, Connecticut. At or about 2:52 p.m., after dropping his passengers off at the casino and driving out of the bus parking lot, he stopped in the southbound lane of Trading Cove Road at a traffic light controlling its intersection with Sandy Desert Road. As Sandy Desert Road enters the intersection from the east, it has three westbound lanes and one large eastbound lane. The intersection is situated between the casino employee parking lot to the northwest and the Eagleview Employment Center to the southeast, where shuttle buses transport employees to and from the casino. While he was stopped at the light, the defendant saw the decedent and her coworker, Tung Lun Hom, cross Trading Cove Road in an easterly direction in the crosswalk directly in front of his bus. The two continued walking to the sidewalk on the corner to the defendant's left, then turned right toward the start of the southbound crosswalk across Sandy Desert Road. Before entering the crosswalk, Hom looked at the traffic light to his right, which controlled westbound traffic stopped on Sandy Desert Road, and saw that it was red. He did not look, however, at the signal on the southeast corner of the intersection controlling pedestrian traffic on the crosswalk itself. When he did not see any vehicles coming, he entered the crosswalk and began to cross Sandy Desert Road with the decedent close behind him.

Meanwhile, the defendant's traffic light on Trading Cove Road turned green. He looked left, right, and then back at the traffic light before him, and began to make a legal left turn into the eastbound lane of Sandy Desert Road. At the same time, Hom and the decedent had walked southbound in the crosswalk, almost all the way across Sandy Desert Road, when Hom noticed the bus suddenly approaching them from behind. He immediately ran but fell down, and thus did not see what

happened to the decedent. While making his turn, the defendant hit the decedent with his bus; she later died of "multiple blunt traumatic injuries." The defendant did not see the decedent until the moment the bus struck her.

A second eyewitness, Charles Trolan, was stopped at the traffic light at the same intersection on Sandy Desert Road, facing westbound in the lane closest to the center of the road. The decedent and Hom walked in front of his car as they crossed Sandy Desert Road in a southerly direction. Trolan saw the decedent fall to the ground but did not see what happened to her before she fell because he was looking past her, down the street to his left, for a parking spot. Because the decedent fell to Trolan's left, he reasoned that she was more than halfway across the street when the bus hit her.

A surveillance camera at the Eagleview Employment Center, on the southeast corner of the intersection, captured part of the incident on video. Hom and the decedent can be seen in the video crossing in front of the defendant's bus as it stood at the light on Trading Cove Road just seconds before the impact. No vehicles, other than the defendant's bus, drove through the intersection after they began to cross Trading Cove Road. A "brown patch" obscured part of the camera's view, so the video does not clearly show where they were located in the roadway when the defendant's bus began to turn, nor does it show where they were when the decedent was struck by the bus. Photographs of the scene reveal that after the impact, the bus came to a stop straddling the crosswalk in the eastbound lane of Sandy Desert Road. The beginning of a skid mark just behind the bus is also visible in the photographs.

Retired State Trooper James Foley, an expert in accident reconstruction, went to the scene at about 4:30

p.m. on the day of the accident to gather physical evidence, create a diagram of the scene, and ascertain the timing sequence of the pedestrian crosswalk signal. Based on the video, the location of the bus when it stopped, and the skid mark, he opined that the decedent was hit while she was in the crosswalk on the far side of Sandy Desert Road from where she had begun to cross it. The photographs also show the decedent's clothing, which had been cut away to facilitate emergency medical treatment at the place where she fell, lying in the roadway in front and to the right of the bus where it came to rest. Foley's original diagram of the scene was drawn to scale; however, the key on the diagram that indicates distances was enlarged after the diagram was created, so he could not be sure that using the diagram to calculate distances would lead to accurate results.

State Trooper Jeffrey Rogers, the lead investigator on the case, determined that the pedestrian crosswalk signal controlling the crosswalk on the east side of the intersection was either flashing red or solid red when the decedent began to cross Sandy Desert Road at that location; either signal would have indicated to a pedestrian in the decedent's location that it was unsafe to cross the road at that time and place. An inspection of the bus revealed that it had no mechanical problems that could have contributed to the accident. December 5, 2012, was a cold, clear day.

The trial court held a charging conference in chambers and later summarized the contents of the conference on the record. The court then noted that defense counsel had requested that the jury be instructed that, "if the negligence of the decedent was the sole proximate cause, that that is, in fact, a defense . . . ." The court went on to say, "I did, in fact, point out [that] this sentence is a sentence that is in compliance with the law and is contained within the segment of my

charge that describes the obligation of the state to prove beyond a reasonable doubt that the defendant was the proximate cause of the death. And I will, in fact, emphasize that by repeating that at the end of that paragraph."

In its charge, the court identified the four elements of negligence and gave the following instructions on the element of causation: "The third element is that the defendant's negligent operation of the motor vehicle was the proximate cause of . . . the death . . . . Proximate cause does not necessarily mean the last act [of] cause, or the act in point of time nearest to the death . . . . An act or omission to act is a proximate cause of death when it substantially and materially contributes, in a natural and continuous sequence, unbroken by an efficient, intervening cause, to the death . . . . When the result is a foreseeable and natural result of the defendant's conduct, the law considers the chain of legal causation unbroken and holds the defendant criminally responsible."

The court concluded its instructions on proximate causation by saying: "Keep in mind that any negligence on the part of the decedent . . . is irrelevant to your determination of the defendant's guilt or nonguilt of this charge. [The decedent's] reasonable or unreasonable conduct does not relieve the defendant from his duty to operate his motor vehicle in a careful and cautious manner. Remember that it is the state's obligation to prove the element that it was the defendant's negligent operation of a motor vehicle which caused the death of the decedent and not the negligence of the [decedent] which led directly to the death." The defendant challenges these last three sentences of the charge in this appeal.

After concluding its deliberations, the jury returned a verdict of guilty on the charge of negligent homicide with a commercial motor vehicle. The defendant was

sentenced thereafter to six months' incarceration, with the execution of that sentence suspended, and two years of probation. This appeal followed.

As an initial matter, we note that defense counsel failed to submit a written request to charge on the element of causation pursuant to Practice Book § 42-16. "An appellate court shall not be bound to consider error as to the giving of, or the failure to give, an instruction unless the matter is covered by a written request to charge or exception has been taken by the party appealing immediately after the charge is delivered. Counsel taking the exception shall state distinctly the matter objected to and the ground of exception." Practice Book § 42-16. Even so, we conclude that counsel adequately stated his objection on the record before the jury charge and properly excepted to the charge after it was given. Furthermore, the state has not argued on appeal that the defendant failed to properly preserve this claim. We will, therefore, address the merits of the defendant's claim of instructional error.

I

The defendant claims that the court improperly instructed the jury because (1) it failed to instruct the jurors that it would be a complete defense to the charge of negligent homicide with a commercial motor vehicle that the decedent's negligence was the sole proximate cause of her own death, and (2) the jury charge was materially misleading with respect to the element of proximate causation. We conclude that the substance of the requested instruction was addressed in the charge. We further conclude that, although certain portions of the instructions misstated the applicable law, the charge as a whole actually heightened the state's burden of proof on the element of causation to the benefit of the defendant. Therefore, any instructional error was harmless.

"We begin with the well established standard of review governing claims of instructional impropriety. [I]ndividual jury instructions should not be judged in artificial isolation, but must be viewed in the context of the overall charge. . . . The pertinent test is whether the charge, read in its entirety, fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . Thus, [t]he whole charge must be considered from the standpoint of its effect on the [jurors] in guiding them to the proper verdict . . . and not critically dissected in a microscopic search for possible error. . . . Accordingly, [i]n reviewing a constitutional challenge to the trial court's instruction, we must consider the jury charge as a whole to determine whether it is reasonably possible that the instruction misled the jury. . . . In other words, we must consider whether the instructions [as a whole] are sufficiently correct in law, adapted to the issues and ample for the guidance of the jury." (Internal quotation marks omitted.) *State* v. *Hampton*, 293 Conn. 435, 452–53, 988 A.2d 167 (2009).

"A jury instruction that improperly omits an essential element from the charge constitutes harmless error if a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Davis*, 255 Conn. 782, 794, 772 A.2d 559 (2001).

"[N]egligent homicide with a motor vehicle is a motor vehicle violation and not an offense within the meaning of General Statutes § 53a-24. We first note that the degree of negligence prohibited by this statute is equivalent to the ordinary civil standard of negligence, namely, the failure to use due care." (Internal quotation marks omitted.) *State* v. *Kluttz*, 9 Conn. App. 686, 694–95, 521 A.2d 178 (1987).

"The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury . . . ." (Internal quotation marks omitted.) *Giacalone* v. *Housing Authority*, 306 Conn. 399, 418, 51 A.3d 352 (2012) (*Zarella*, *J.*, concurring). In a criminal case, "the state must prove every fact necessary to constitute the crime with which [the defendant] is charged beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Salz*, 226 Conn. 20, 28, 627 A.2d 862 (1993).

The first two elements of negligent homicide with a commercial motor vehicle are that the defendant had a duty to use due care in operating a commercial motor vehicle and breached that duty. See *Giacalone* v. *Housing Authority*, supra, 306 Conn. 419 (*Zarella*, *J.*, concurring). "The ultimate test of the existence of the duty to use care is found in the foreseeability that harm may result if it is not exercised. . . . [T]he test is, would the ordinary [person] in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result . . . ." (Internal quotation marks omitted.) Id. "A defendant's duty and breach of duty is measured by a reasonable care standard, which is the care [that] a reasonably prudent person would use under the circumstances." (Internal quotation marks omitted.) *Kumah* v. *Brown*, 160 Conn. App. 798, 804, 126 A.3d 598, cert. denied, 320 Conn. 908, 128 A.3d 953 (2015).

The state must next prove that the defendant's breach of his duty of care caused the decedent's death. "[I]n order for legal causation to exist in a criminal prosecution, the state must prove beyond a reasonable doubt that the defendant was both the cause in fact, or actual cause, as well as the proximate cause of the victim's [death]." (Internal quotation marks omitted.) *State* v. *Collins*, 100 Conn. App. 833, 843, 919 A.2d 1087, cert. denied, 284 Conn. 916, 931 A.2d 937 (2007). "Proximate

cause in the criminal law does not necessarily mean the last act of cause, or the act in point of time nearest to death. The concept of proximate cause incorporates the notion that an accused may be charged with a criminal offense even though his acts were not the immediate cause of death. An act or omission to act is the proximate cause of death when it substantially and materially contributes, in a natural and continuous sequence, unbroken by an efficient, intervening cause, to the resulting death."[3] (Internal quotation marks omitted.) *State* v. *Spates*, 176 Conn. 227, 233–34, 405 A.2d 656 (1978), cert. denied, 440 U.S. 922, 99 S. Ct. 1248, 59 L. Ed. 2d 475 (1979).

"[A] jury instruction with respect to proximate cause must contain, at a minimum, the following elements: (1) an indication that the defendant's conduct must contribute substantially and materially, in a direct manner, to the victim's injuries; and (2) an indication that the defendant's conduct cannot have been superseded by an efficient, intervening cause that produced the injuries." *State* v. *Leroy*, 232 Conn. 1, 13, 653 A.2d 161 (1995).

"[C]ontributory negligence is not a defense in a . . . [prosecution for] negligent homicide [with a motor vehicle] . . . unless such negligence on the part of the decedent is found to be the sole proximate cause of [the] death." *State* v. *Scribner*, 72 Conn. App. 736, 741, 805 A.2d 812 (2002). "If it is shown that the sole proximate cause of death is the decedent's own negligence

[3] A useful, alternative way of characterizing conduct that is an actual cause of the result but is not a proximate cause, is to say that the conduct has been reduced to the point of triviality or inconsequence. "Remote or trivial [actual] causes are generally rejected because the determination of the responsibility for another's injury is much too important to be distracted by explorations for obscure consequences or inconsequential causes." (Internal quotation marks omitted.) *Doe* v. *Manheimer*, 212 Conn. 748, 758, 563 A.2d 699 (1989), overruled in part on other grounds by *Stewart* v. *Federated Dept. Stores, Inc.*, 234 Conn. 597, 608, 662 A.2d 753 (1995).

rather than that of the defendant, there can be no conviction . . . . If, however, the defendant's negligence was the cause of the decedent's death, the defendant would be responsible under the statute whether or not the decedent's failure to use due care contributed to his injuries, since contributory negligence is no defense in such a case." (Citation omitted.) *State* v. *Pope*, 6 Conn. Cir. Ct. 712, 714, 313 A.2d 84 (1972).

The complete defense of sole proximate cause to the charge of negligent homicide with a commercial motor vehicle is available only in circumstances where some act or omission, other than the defendant's negligence, is shown to have been the only conduct that contributed substantially and materially to the decedent's death. Proof that the decedent was the sole proximate cause of her own death is necessarily inconsistent with the proof required for conviction, that the defendant's negligence was a proximate cause of the death. In the event such a sole proximate cause is proved, the state will have failed to prove an essential element of the charge and the defendant must be found not guilty. Where, by the same token, a defendant's negligence is proved to have been a proximate cause of the decedent's death notwithstanding the causative contribution of other concurrent causes to that death, then proof of such proximate causation necessarily disproves that any other cause was the sole proximate cause of the death. With these principles in mind, we turn to the charge as given in the present case.

The defendant first claims that the court improperly instructed the jury because it failed to give an instruction that it would be a complete defense to the charge of negligent homicide with a commercial motor vehicle that the decedent's negligence was the sole proximate cause of her own death. We conclude that the trial court did not err because, although it did not give the

requested instruction verbatim, it included the substance of such a charge in its instruction. Before the court gave the challenged instructions, it correctly charged the jury that proximate cause is an essential element of negligent homicide with a commercial motor vehicle that the state must prove beyond a reasonable doubt by including the required language for an adequate instruction on proximate causation from *State* v. *Leroy*, supra, 232 Conn. 13. In doing so, the court effectively instructed the jury that the state must disprove the defense of sole proximate cause because proof that the defendant's negligence proximately caused the decedent's death is necessarily inconsistent with any claim that some other, concurrent cause was the sole proximate cause of the death.

The defendant also claims that the jury charge was misleading. Specifically, the defendant argues that the instructions on proximate causation could have led the jury to disregard the conduct of the decedent entirely and, thus, to ignore the possibility that she was the sole proximate cause of her own death. Although a portion of the instructions misstated the applicable law, we conclude that the instructions actually heightened the state's burden of proof to the benefit of the defendant so that no injustice to the defendant resulted. We further conclude that the charge as a whole did not lead the jury to disregard any fact or set of facts that might have been found to raise reasonable doubt as to the defendant's guilt.

The first challenged sentence at the end of the court's instructions on proximate causation was as follows: "Keep in mind that any negligence on the part of the decedent . . . is irrelevant to your determination of the defendant's guilt or nonguilt of this charge." This instruction is correct if read literally; the defendant is, in fact, legally responsible for his own negligence regardless of whether the decedent's conduct was also

negligent. The concern raised by this instruction, however, is that the jury might interpret the word "negligence" to mean conduct and, thus, might be led to disregard facts suggesting that the decedent's negligent conduct was the sole proximate cause of her own death. The conduct of the decedent is entirely relevant to the defendant's guilt in the sense that it is a critical part of the circumstances surrounding the defendant's alleged negligence, which are obviously necessary for the jury to consider in determining whether the state has proved the essential elements of its case against him. If the decedent's negligent conduct contributed so substantially and materially to her own death as to reduce the causative contribution of the defendant's negligence to the point that it was not substantial or material, then the defendant could not be convicted of negligent homicide with a commercial motor vehicle because his negligence could not be found to have been a proximate cause of the decedent's death.

The second challenged sentence in the causation instructions reads as follows: "[The decedent's] reasonable or unreasonable conduct does not relieve the defendant from his duty to operate his motor vehicle in a careful and cautious manner." This instruction is a correct statement of law. See *Wagner* v. *Clark Equipment Co.*, 243 Conn. 168, 183, 700 A.2d 38 (1997).

The final challenged sentence in the causation instructions reads as follows: "Remember that it is the state's obligation to prove the element that it was the defendant's negligent operation of a motor vehicle which caused the death of the decedent and not the negligence of the [decedent] which led directly to the death." If the court had instructed the jury that it was the state's obligation to prove that the defendant's negligent operation of a commercial motor vehicle proximately caused the death of the decedent and stopped there, its instruction would have been completely correct.

Instead, however, the court erred when it went on to state that it was also the state's obligation to prove that it was "not the negligence of the [decedent] which led directly to the death."

Although the court's stated purpose in so instructing the jury was to emphasize the complete defense of sole proximate cause, this language overstated the state's burden of proof in two ways. First, the court's instruction suggested that the state must prove that the defendant's negligence was the only proximate cause of the decedent's death. Second, it suggested, more particularly, that the state must disprove that the decedent's negligence was a proximate cause of her own death. Neither proposition is legally correct.

To begin with, it is well established that a cause can be a proximate cause of a result or consequence even if it is not the only cause of that result or consequence. See *Coburn* v. *Lenox Homes*, *Inc.*, 186 Conn. 370, 383, 441 A.2d 620 (1982). Each of several concurrent causes of a death can thus be a proximate cause of the death if it contributed substantially and materially to producing that result. As long as a particular act of negligence by a defendant is proved to have been a substantial factor in causing a death by contributing materially to producing it, the state can meet its burden of proof as to proximate causation without disproving that any other cause was also a proximate cause of the death. See *Rawls* v. *Progressive Northern Ins. Co.*, 310 Conn. 768, 777, 83 A.3d 576 (2014). There is, moreover, no specific rule requiring the state to disprove that the decedent's own negligence was a proximate cause of her own death, for even if such negligence was a proximate cause, that fact, as previously noted, would not affect the defendant's guilt unless such negligence was shown to have been the sole proximate cause of the death. Here, then, by requiring the state to disprove that the decedent's negligence was a proximate cause of her

own death, the court required the state to prove more than the law required of it to establish the element of causation. The state's burden of proof was in no way diminished by these instructions; instead, the charge doubly enhanced the burden that the state had to meet to establish proximate causation and, therefore, caused the defendant no harm or resulting injustice.

Furthermore, we must observe that there is no evidence in the record supporting a finding that the instructions guided the jury to discount any fact or set of facts inconsistent with the defendant's guilt. The evidence presented did not establish that the decedent's negligent conduct contributed so substantially and materially to her own death that the defendant could not have been a proximate cause of the death. There was, for example, no evidence that the decedent darted into the street from a place where she could not have been seen or her actions could not have been anticipated by a reasonably prudent bus driver exercising due care under the circumstances. Instead, overwhelming evidence was presented that the decedent was established in the roadway, having walked in the crosswalk, in front of at least three lanes of westbound traffic, while the defendant was turning his bus in her direction. Two eyewitnesses testified that she was more than halfway across Sandy Desert Road when the bus struck her. An expert opined that she was in the crosswalk at the time of impact and was closer to her destination across the roadway than to the point where she had entered the crosswalk. Photographs of the scene supported his opinion. There were, moreover, no external factors documented in the record, such as other vehicles, inclement weather, or mechanical problems with the bus that might have been found to negate the defendant's negligence or to reduce its causative contribution to the decedent's death to the point that it was not a proximate cause of the death. It was a clear day and the defendant's

vision was unobstructed. The defendant admitted that he looked at the light in front of him, not at the crosswalk to his left, as he began to make his fatal left turn.

The most persuasive fact in favor of the defendant's trial theory was the uncontested evidence that the decedent crossed the street against the pedestrian crosswalk signal. However, this fact alone was not so powerful as to reduce the defendant's causative contribution to the decedent's death to the point that it was no longer substantial or material. Even if the jury found that the decedent crossed the street unlawfully, that would at most have suggested that her negligence contributed substantially and materially to, and thus proximately caused her death, not that it was the sole proximate cause of her death. The defendant failed to see the decedent in the roadway with no evidence in the record as to why, in the exercise of reasonable care, he could not have done so in time to avoid striking her when he made his turn. Therefore, we conclude that the jury's finding that the defendant's negligence was a proximate cause of the decedent's death was supported by overwhelming evidence. For that reason as well, the court's instructional errors that increased the state's burden of proof as to causation had no prejudicial impact on the jury's verdict.

II

The defendant's next claim on appeal is that the trial court erred by providing the jury with a copy of the jury charge during deliberations. We conclude that this is a permissible practice and within the discretion of the trial court. "[T]he practice of submitting written instructions to the jury is permissible . . . ." *State* v. *Jennings*, 216 Conn. 647, 665, 583 A.2d 915 (1990). Moreover, Practice Book § 42-23 (b) states in relevant part: "The judicial authority may, in its discretion, submit to

the jury . . . (2) [a] copy or tape recording of the judicial authority's instructions to the jury . . . ." Therefore, we conclude that the court's decision to provide the jury with a copy of the jury charge during deliberations was within the discretion of the trial court, and there was no error.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JALENN JACKSON (AC 39522)

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

Syllabus

Convicted of the crime of sexual assault in the first degree, the defendant appealed to this court. The defendant was originally charged with, inter alia, the crime of unlawful restraint in the first degree and found not guilty of that charge by a jury. When the jury deadlocked on three charges of sexual assault in the first degree, the state elected to retry the defendant on those charges and the defendant waived his right to a jury trial. Following a trial to the court, the court rendered a judgment of guilty of one count of sexual assault in the first degree. On appeal, the defendant claimed that the trial court improperly and in violation of the collateral estoppel component of the double jeopardy clause of the United States constitution admitted into evidence a portion of a witness' statement to the police, which concerned the defendant's alleged use of a sweater that was wrapped around the victim's face to restrain the victim during the sexual assault, that the jury in his first trial necessarily had rejected when it found the defendant not guilty of the unlawful restraint charge. The state claimed that the defendant's double jeopardy claim was not preserved and, thus, not reviewable. *Held* that the admission of the evidence regarding the use of the sweater did not violate the defendant's fifth amendment guarantee against double jeopardy: although the issue was not brought to the attention of the trial court in the precise manner in which it was raised on appeal, defense counsel's repeated argument that the defendant had been found not guilty of unlawful restraint and that any facts from the first trial that were related to that charge should not be admitted to prove restraint related to the sexual assault charges in the second trial sufficiently apprised the court of the nature of the issue so as to preserve it for appellate review; moreover, a finding of not guilty on the charge of

unlawful restraint and a finding that the witness made a credible statement about the defendant's use of the sweater were not mutually exclusive findings, or in any way inconsistent, in that the jury reasonably could have believed the witness' statement regarding the sweater but found that the statement did not establish or demonstrate that the defendant had the intent to unlawfully restrain the victim, and the defendant failed to demonstrate that the jury, in finding him not guilty of unlawful restraint in the first trial, necessarily rejected the witness' statement and necessarily concluded that the sweater was not used during the sexual assault, as the witness did not tell the police that the defendant used the sweater to restrict the victim's movements with the intent to interfere substantially with her liberty, but rather stated that the defendant used the sweater for the purpose of quieting the victim's screams after the defendant already had been engaging in sexual intercourse with her.

Argued April 11—officially released August 28, 2018

Procedural History

Information charging the defendant with three counts of the crime of sexual assault in the first degree, brought to the Superior Court in the judicial district of Danbury and tried to the court, *Russo*, *J.*; judgment of guilty of one count of sexual assault in the first degree, from which the defendant appealed to this court. *Affirmed.*

Erica A. Barber, assigned counsel, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Stephen J. Sedensky, III*, state's attorney, and *Colleen P. Zingaro*, assistant state's attorney, for the appellee (state).

Opinion

BRIGHT, J. The defendant, Jalenn Jackson, appeals from the judgment of conviction, rendered after a trial to the court, of one count of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1).[1] The defendant claims that the trial court improperly

[1] The court rendered a judgment of acquittal on two additional charges of sexual assault in the first degree in violation of § 53a-70 (a) (1).

and in violation of the collateral estoppel component of the double jeopardy clause of the United States constitution[2] admitted into evidence a portion of a witness' statement that the jury in his previous trial necessarily had rejected when it found the defendant not guilty on the charge of unlawful restraint. We affirm the judgment of the trial court.

The defendant originally was charged, via long form information dated March 10, 2015, with: three counts of sexual assault in the first degree in violation of § 53a-70 for digital, oral, and penile penetration of the victim without her consent and with the use of force; one count of sexual assault in the first degree as an accessory in violation of General Statutes §§ 53a-8 and 53a-70; one count of unlawful restraint in the first degree in violation of General Statutes § 53a-95, which was based on the state's theory that the defendant had restrained the victim with a sweater during the act of penile-vaginal intercourse; and one count of burglary in the third degree in violation of General Statutes § 53a-103. Following a trial, the jury deadlocked on the three charges of sexual assault in the first degree, and it found the defendant not guilty of the remaining three charges. The state elected to retry the defendant on the three charges of sexual assault in the first degree. The defendant waived his right to be tried by a jury and his case, instead, was tried to the court, *Russo*, *J.*

[2] The parties use the term "collateral estoppel" throughout their appellate briefs. Previous case law also has employed this term when addressing claims similar to the one being made by the defendant. We observe, however, that the United States Supreme Court recently determined that " 'issue preclusion' is the more descriptive term" for such claims. *Bravo-Fernandez* v. *United States*, U.S. , 137 S. Ct. 352, 356 n.1, 196 L. Ed. 2d 242 (2016), citing *Yeager* v. *United States*, 557 U.S. 110, 120, n.4, 129 S. Ct. 2360, 174 L. Ed. 2d 78 (2009), and 1 Restatement (Second), Judgments § 27, comment (b), pp. 251–52 (1980). Nevertheless, although we recognize that "issue preclusion" is now the preferred term of the United States Supreme Court, because of our prior precedent and the parties' arguments, we use the term "collateral estoppel" in this opinion.

The following facts, as set forth by the trial court in its oral decision or as reasonably revealed by the evidence in the record, inform our review. Beginning in March, 2013, the victim,[3] who was from New York, began staying with her friend, A, in Danbury. On the evening of April 25, 2013, the victim and A went to a club in Danbury, where the victim became intoxicated. When the club closed, the victim went to look for A, but could not find her. She waited by the door to the club and began to cry. The defendant, Dylan Kennedy and two other men were riding in a vehicle in the area of the club looking for women with whom they could talk. The men saw the victim and parked alongside the sidewalk near where she was standing. One of the men began speaking to the victim. The victim told them that she could not find A. Soon thereafter, the victim got into the vehicle and went with the men with the intention of finding A, who the men said had gone to a party. The men drove the victim to the party, but by the time they arrived at the purported location of the party on Chestnut Street, the party had broken up. The other two men drove away in the car, so the defendant, Kennedy and the victim walked to the Harambee Center (center), where the defendant and Kennedy sometimes slept. The victim thought the men were being helpful, and she was not concerned about her safety because she thought they were gay. The building was dark when they went inside. The men and the victim played basketball for a while. The defendant was complimenting the victim and "hitting on [her]." The three then went to a room on the second floor of the center, where they sat on two couches.

The defendant caressed the victim's leg, unzipped her pants and aggressively put his hands down her

[3] In accordance with our policy of protecting the privacy interests of the victims of sexual abuse, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

pants and digitally penetrated her vagina. The victim attempted to rebuff the defendant's advances and told him that she felt sick. Nevertheless, the defendant removed the victim's pants and performed oral sex on her, pulling her legs open. Kennedy then approached the defendant and the victim, and he began kissing the victim. The defendant, while positioned face to face on top of the victim, inserted his penis into her vagina. The victim told the defendant "no, I don't want to do this, I don't want to do this, I don't want to do this, no, I shouldn't do this, I don't want to do this." She also told him "it [is] hurting, please stop . . . ." The victim then told the defendant she was going to "puke," and the defendant responded by telling the victim to turn around so he could position himself behind her while vaginally penetrating her. Although the victim complied, she was crying and screaming for him to stop, to no avail. She lost consciousness or awareness soon thereafter.

Despite the victim's testimony that she lost consciousness, Kennedy stated to the police[4] that the victim continued to scream and cry when the defendant took her from behind, and that, to help muffle the victim's screams and to try to keep her quiet, the defendant then wrapped a sweater around her face and pulled tightly, jerking her head back, as she was struggling while the defendant continued to penetrate her. Kennedy also told the police that he did not "want to throw [the defendant] under the bus. . . . He's my good friend." Nevertheless, he stated that the defendant "like, you know, force[d] his way. . . . He pretty much made [the victim] have sex with him. . . . [H]e got on top

[4] Kennedy's statement to the police was admitted into evidence for substantive purposes at both trials pursuant to *State* v. *Whelan*, 200 Conn. 743, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986). Although the defendant objected to the admission of the statement at his second trial, he does not challenge on appeal the trial court's decision overruling his objection and admitting the statement.

of her and stuff, started kissing her, and she was . . . saying no. . . . No. No. No. . . . [He] started kissing her neck and stuff and then she was saying no, no, and then he proceeded to take off her pants." When the police asked Kennedy about marks on the victim, he told them that the defendant "gave her a hickey," and that "he was biting her." Kennedy also conceded that the victim was telling the defendant to stop because it hurt.

In the morning, the victim awoke in the center, naked, with the sweater still wrapped around her face. She scrambled to find her clothes and got dressed, putting the sweater over her clothes. She ran down the stairs of the center and found her way to A's apartment, where she reported to A what had occurred. The victim went to the hospital and reported that she had been sexually assaulted. Thereafter, Kennedy and the defendant were arrested.[5]

At the conclusion of his first trial, the jury had deadlocked on the three charges of sexual assault in the first degree, and it had found the defendant not guilty of the remaining three charges. The state then elected to retry the defendant on the three charges of sexual assault in the first degree. Following a trial to the court, the court, relying in significant part on the similarity it found between this case and *State* v. *Rothenberg*, 195 Conn. 253, 487 A.2d 545 (1985), rendered a judgment of conviction on one count of sexual assault in the first degree based on the defendant's use of force to compel the victim to engage in penile-vaginal intercourse. The court rendered a judgment of acquittal on the charges of sexual assault in the first degree that were based on the defendant's digital and oral penetration of the victim. This appeal followed.

[5] The record reveals that Kennedy pleaded guilty to sexual assault in the first degree and received a sentence of twenty years incarceration, execution suspended after ten years, with ten years of probation.

In his appellate brief, the defendant sets forth, as the "sole issue presented on appeal . . . whether the doctrine of collateral estoppel, as embodied in the fifth amendment [to the United States constitution] guarantee against double jeopardy, and as set forth in *State* v. *Aparo*, 223 Conn. 384, [614 A.2d 401] (1992), [cert. denied, 507 U.S. 972, 113 S. Ct. 1414, 1415, 122 L. Ed. 2d 785 (1993)], barred the trial court from considering and relying upon certain allegations of fact that the state failed to establish in the first trial to find [the defendant] guilty in the second trial, namely that the defendant had restrained [the victim] with a sweater during the alleged sexual assaults." He claims: "When a jury [found] the defendant [not guilty] of unlawful restraint, but failed to reach a verdict on other counts, and it is clear from the record that the jury had a reasonable doubt about certain ultimate facts relating to the [unlawful restraint] count, the doctrine of collateral estoppel prohibits the trial court from considering and relying on those facts to find the defendant guilty on one of the hung counts in a subsequent trial."[6] Additionally, the defendant argues: "The trial court's reliance on the restraint evidence rejected by the defendant's

[6] The crime of unlawful restraint in the first degree is set forth in § 53a-95, which provides: "(a) A person is guilty of unlawful restraint in the first degree when he restrains another person under circumstances which expose such other person to a substantial risk of physical injury.

"(b) Unlawful restraint in the first degree is a class D felony."

The definition of restrain is set forth in General Statutes § 53a-91 (1), which provides: " 'Restrain' means to restrict a person's movements intentionally and unlawfully in such a manner as to interfere substantially with his liberty by moving him from one place to another, or by confining him either in the place where the restriction commences or in a place to which he has been moved, without consent. As used herein 'without consent' means, but is not limited to, (A) deception and (B) any means whatever, including acquiescence of the victim, if he is a child less than sixteen years old or an incompetent person and the parent, guardian or other person or institution having lawful control or custody of him has not acquiesced in the movement or confinement."

jury in the first trial to find him guilty of sexual assault in the second trial constitutes reversible legal error."[7]

The state argues that the defendant's double jeopardy claim is waived and unreviewable.[8] It contends that defense counsel never argued double jeopardy, collateral estoppel, or the principles articulated in *Aparo* before the trial court, and that counsel and the court all considered the defendant's motion as an objection to certain testimony that was based on evidentiary principles related to relevance and prejudice. Furthermore, the state argues that it would amount to ambuscade to consider this claim under the double jeopardy clause when the trial court never had the opportunity to do so. In the alternative, the state argues that, even if the claim is reviewable, there was no double jeopardy violation in this case. We conclude that the defendant's claim is reviewable, and, after reviewing the merits of the claim, we further conclude that there was no double jeopardy violation in this case.

The following additional facts are relevant to our consideration of the state's waiver argument. In the defendant's first trial, the prosecutor, in relevant part, argued that the defendant "used the sweater to . . . restrain [the victim] and also sexually assault her [as] . . . she was struggling with it, trying to get it off her

[7] This statement reflects the underlying assumption of the defendant's argument that evidence of the sweater's use during the sexual assault can have no purpose other than to prove restraint. As set forth more fully in this opinion, that assumption takes too narrow a view of the evidence. In fact, the trial court's oral decision reflects that the court considered the sweater as evidence that the defendant was trying to muffle the victim's cries and screams. The court also found, on the basis of the evidence, that the victim was crying before the defendant employed the sweater. Thus, contrary to the defendant's suggestion, the trial court did not rely on the sweater as "restraint evidence" to find the defendant guilty of sexual assault in the first degree.

[8] The defendant asserts that his claim is preserved, and, in the event that we determine otherwise, he requests review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989).

face, trying to escape from that situation . . . .'' The prosecutor asked the jury: ''Was that restraining her? . . . Did that create a substantial risk of injury to her at that time? Did it restrain her movement?'' To counter this argument, during closing, defense counsel argued in relevant part that the defendant had used the sweater only ''to keep [the victim] quiet, not to restrain her.'' Ultimately, the jury found the defendant not guilty of unlawful restraint. It deadlocked, however, on the forcible sexual assault charges.

In the second trial, the defendant filed a motion in limine objecting, inter alia, to the introduction of evidence suggesting unlawful restraint on the ground that the jury had found him not guilty of that charge, and evidence thereof could confuse or prejudice the trier of fact in the second trial. The state objected on the ground that evidence of restraint was relevant to the charges of sexual assault in the first degree and that the defendant's motion was overbroad. During oral argument on the motion, defense counsel argued, in relevant part, that any evidence that the defendant used the sweater to unlawfully restrain the victim should be excluded. The court asked defense counsel why this would not be just a matter of relevance, and counsel responded that it would depend on the questions asked. The court stated that it would not be inclined to issue a blanket order and that it would need to hear the questions, as would defense counsel, before ruling on the admissibility of the evidence. Defense counsel responded: ''That's right.'' After further discussion between the court and the prosecutor, defense counsel stated: ''Your Honor, my main concern is the restraining somebody. If the defendant had not been specifically charged with unlawful restraint and found not guilty of that charge . . . I might feel a little bit different about evidence of restraining somebody during a sexual assault, but he—that evidence . . . was presented, and

he was specifically found not guilty of unlawful restraint, and I would have a strong objection . . . an absolute objection to any evidence of restraint coming in." The prosecutor responded that the issue of restraint was relevant to the sexual assault and to the force used in committing the assault. The court asked defense counsel if she had discussed with the prosecutor the overbroadness and lack of specificity in the defendant's written motion, and counsel replied in the negative. The court stated, "as presently written, I'll deny the motion in limine filed by the defendant . . . ." The court further stated that it would use a relevancy test when the defendant voiced an objection to questions regarding restraint.

Then, during Kennedy's testimony, the prosecutor asked him what he had told the police regarding whether the sweater had been used during the sexual encounter, and defense counsel objected by arguing, "it goes directly to the issues I raised in my motion in limine. . . . [It] [s]hows unlawful restraint, and he was found not guilty." The prosecutor responded that the information went to the issue of force used in the sexual assault. The court stated that the prosecutor was asking what role the sweater played in the assault, and that there already had been testimony regarding the sweater.[9] The following brief colloquy then immediately took place:

"[Defense Counsel]: About a . . . sweater being over her face.

"The Court: Yes, well, or in general.

"[Defense Counsel]: That's something different.

[9] The victim already had testified, without objection, that when she awoke in the morning, the sweater was wrapped around her face. The sweater also had been admitted into evidence, without objection.

"The Court: There's been testimony on several levels, even exhibits that were taken out of their bags . . . . So—

"[Defense Counsel]: Right.

"The Court: —I'm going to allow the question if Mr. Kennedy can answer it." No further relevant objections related to this issue were offered.

Although we acknowledge that this issue was not brought to the attention of the trial court in the precise manner in which it is raised on appeal, we conclude that defense counsel's repeated argument that the defendant had been found not guilty of unlawful restraint and that any facts from the first trial that were related to that charge should not be admitted to prove restraint related to the sexual assault charges in the defendant's second trial sufficiently apprised the trial court of the nature of the issue so as to preserve the issue for appellate review. Accordingly, we next consider the merits of the defendant's claim.

On appeal, the defendant contends that in his second trial, "the court concluded that the restraint evidence established the element of 'forced sexual intercourse' to find [the defendant] guilty of sexual assault." He argues that because the state's theory at the first trial was that the defendant used the sweater to commit the act of unlawful restraint, "when it is clear from the record and the jury's verdict that [the jury] had a reasonable doubt about the acquitted act of restraint, the doctrine of collateral estoppel prohibits the court from considering and relying on the restraint evidence to find him guilty [of forcible sexual assault] in the second trial." We are not persuaded by the defendant's argument.

In *State* v. *Hope*, 215 Conn. 570, 577 A.2d 1000 (1990), cert. denied, 498 U.S. 1089, 111 S. Ct. 968, 112 L. Ed.

2d 1054 (1991), our Supreme Court discussed in some detail the relationship between double jeopardy and collateral estoppel. "In a criminal case, collateral estoppel is a protection included in the fifth amendment guarantee against double jeopardy. *Ashe* v. *Swenson*, 397 U.S. 436, 445, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). ' "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.' Id., 443. 'Collateral estoppel applies in two ways: (1) it may bar prosecution or argumentation of facts necessarily established in a prior proceeding; or (2) it may completely bar subsequent prosecution where one of the facts necessarily determined in the former trial is an essential element of the conviction the government seeks. *United States* v. *Griggs*, 735 F.2d 1318 (11th Cir. 1984).' *United States* v. *DeMarco*, 791 F.2d 833, 836 (11th Cir. 1986).

"To establish whether collateral estoppel applies, the court must determine what facts were necessarily determined in the first trial, and must then assess whether the government is attempting to relitigate those facts in the second proceeding. *De La Rosa* v. *Lynaugh*, 817 F.2d 259, 263 (5th Cir. 1987); *United States* v. *Irvin*, 787 F.2d 1506, 1515 (11th Cir. 1986). 'A defendant who argues that *Ashe* is applicable to his case carries the burden of establishing that the issue he seeks to foreclose from consideration in the second case was "necessarily" resolved in his favor in the prior proceeding. *United States* v. *Seijo*, 537 F.2d 694, 697 (2d Cir. 1976), cert. denied, 429 U.S. 1043, 97 S. Ct. 745, 50 L. Ed. 2d 756 (1977).' *United States* v. *Castro*, 629 F.2d 456, 465 (7th Cir. 1980). . . .

" 'The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Sealfon* v. *United States*, 332 U.S. 575, 579 [68 S. Ct. 237, 98 L. Ed. 180 (1948)]. Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal.' *Ashe* v. *Swenson*, supra, [397 U.S.] 444.

" 'Moreover, in reviewing the earlier trial to determine the jury's basis for the acquittal, a court "should not strain to dream up hypertechnical and unrealistic grounds on which the previous verdict might conceivably have rested." *United States* v. *Jacobson*, 547 F.2d 21, 23 (2d Cir. 1976), cert. denied, 430 U.S. 946, 97 S. Ct. 1581, 51 L. Ed. 2d 793 (1977). See also *United States* v. *Mespoulede*, [597 F.2d 329, 333 (2d Cir. 1979)]. " '[U]nrealistic and artificial speculation about some far-fetched theory upon which the jury might have based its verdict of acquittal' is foreclosed." *State* v. *Edwards*, 310 N.C. 142, 145, 310 S.E.2d 610, 613 (1984), quoting *United States* v. *Sousley*, 453 F. Supp. 754, 762 (W.D. Mo. 1978).' *Ferrell* v. *State*, 318 Md. 235, 245–46, 567 A.2d 937 (1990); see *United States* v. *Mespoulede*, supra. Limited ambiguity that exists in a jury's verdict

should be 'resolved, in accordance with the protections of the Double Jeopardy Clause, in favor of the defendant.' *United States* v. *Hans*, 548 F. [Supp.] 1119, 1126 (S.D. Ohio 1982)." (Citation omitted.) *State* v. *Hope*, supra, 215 Conn. 584–86; accord *State* v. *Aparo*, supra, 223 Conn. 389–90.

Stated more directly: "Collateral estoppel means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. . . . In a criminal context, the doctrine prohibits the government from forcing a defendant to defend against charges or allegations which he overcame in an earlier trial. . . . For estoppel to apply, the fact sought to be foreclosed by [the] defendant must *necessarily* have been determined in his favor in the prior trial; it is not enough that the fact *may* have been determined in the former trial. . . . The defendant has the burden of showing that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." (Citations omitted; emphasis altered; internal quotation marks omitted.) *State* v. *Aparo*, supra, 223 Conn. 406.

Here, at the defendant's first trial, he, in part, was charged with and acquitted of unlawful restraint in the first degree. To prove that crime beyond a reasonable doubt, the state was required to establish that the defendant restrained the victim under circumstances that exposed her to a substantial risk of physical injury. See General Statutes § 53a-95; *State* v. *Ciullo*, 140 Conn. App. 393, 400, 59 A.3d 293 (2013), aff'd, 314 Conn. 28, 100 A.3d 779 (2014). "[N]o actual physical harm must be demonstrated; the state need only prove that the defendant exposed the victim to a substantial risk of physical injury." (Internal quotation marks omitted.) *State* v. *Ciullo*, supra, 400.

The defendant argues that whether he "actually restrained" the victim "was the central issue in dispute at [his first] trial." He contends: "If the jury had believed that the defendant wrapped a sweater around [the victim's] face, 'pulled [it] tight' and jerked her head back, and used the sweater to muffle her screams as he engaged in sexual intercourse with her for five to ten minutes as she struggled to pull him off of her, then, under the court's instructions, it would have been required to convict the defendant of unlawful restraint." We disagree with this contention.

The crime of unlawful restraint in the first degree is set forth in § 53a-95, which provides in relevant part: "(a) A person is guilty of unlawful restraint in the first degree when he restrains another person under circumstances which expose such other person to a substantial risk of physical injury. . . ." The definition of restrain is set forth in General Statutes § 53a-91 (1), which provides in relevant part: " 'Restrain' means to restrict a person's movements intentionally and unlawfully in such a manner as to interfere substantially with his liberty by . . . confining him either in the place where the restriction commences or in a place to which he has been moved, without consent. . . ."

Unlawful restraint in the first degree is a specific intent crime. See *State* v. *Salamon*, 287 Conn. 509, 542 n.28, 570, 949 A.2d 1092 (2008); *State* v. *Youngs*, 97 Conn. App. 348, 363, 904 A.2d 1240, cert. denied, 280 Conn. 930, 909 A.2d 959 (2006). A jury cannot find a "defendant guilty of unlawful restraint unless it first [finds] that he . . . restricted the victim's movements with the intent to interfere substantially with her liberty." *State* v. *Salamon*, supra, 573. "[A] restraint is unlawful *if, and only if*, a defendant's *conscious objective in . . . confining the victim is* to achieve that prohibited result, namely, *to restrict the victim's movements in such a manner as to interfere substantially*

with his or her liberty." (Emphasis added.) Id., 543 n.28.

The only evidence presented by the state at the defendant's trials regarding the use of the sweater during the penile-vaginal sexual assault was Kennedy's statement to the police. The jury at the first trial reasonably could have believed the whole of that statement and, yet, found that the defendant's *specific intent* in using the sweater was to keep the victim quiet and to muffle her cries, rather than to confine the victim in an effort to interfere substantially with her liberty. Kennedy admitted to the police that the victim was screaming, that she "obviously" was scared, and that likely she did not want the situation to escalate. Kennedy told the police that the defendant engaged in penile-vaginal intercourse with the victim from behind her; specifically, Kennedy told the police that, while the defendant was positioned behind the victim, "he was penetrating her . . . [v]aginally." Kennedy then stated that the defendant *then* "grabbed the sweater [that was on] the couch, put it around her face and pulled tight," in an effort to muffle her screams and keep her quiet.

Kennedy's statement indicated that the forced sexual assault already was in progress, as illustrated by his statement to the police that the victim was crying and screaming, *before* the defendant took the sweater from the couch and wrapped it around the victim's face in an effort to muffle those screams and cries. There is no indication that the jury *necessarily* decided that Kennedy's statement was not credible regarding the use of the sweater simply because it concluded that the state failed to establish one or more of the elements of unlawful restraint. Kennedy did not tell the police that the defendant used the sweater to restrict her movements with the intent to interfere substantially with her liberty; rather, he told the police that the defendant used the sweater for the purpose of quieting and muffling

the victim's screams, *after* the defendant already had been engaging in intercourse with the victim, while the victim was screaming and crying.

In fact, defense counsel seized upon this very detail of Kennedy's statement in arguing for acquittal. During closing argument at the defendant's first trial, defense counsel, herself, argued in relevant part that if the defendant had used the sweater as described by Kennedy, he did so only "to keep [the victim] quiet, not to restrain her." The jury certainly could have agreed with defense counsel's argument even if it also fully credited Kennedy's statement to the police regarding the defendant's use of the sweater.

In sum, a finding of not guilty on the charge of unlawful restraint and a finding that Kennedy made a credible statement to the police about the defendant's use of the sweater were not mutually exclusive findings, or in any way inconsistent. The jury reasonably could have believed Kennedy's statement regarding the sweater, but found that the statement did not establish or demonstrate that the defendant had the intent to unlawfully restrain the victim. Therefore, the defendant's argument that the jury would have been required to convict the defendant of unlawful restraint if it believed Kennedy's statement to the police regarding the defendant's use of the sweater is without merit, and this claim fails the first prong of the *Aparo* test.[10] The defendant has failed to demonstrate that the jury, in finding the defendant not guilty of unlawful restraint in the first trial, *necessarily* rejected Kennedy's statement to the police, and necessarily concluded that the sweater was not used during the sexual assault. See *State* v. *Aparo*, supra, 223 Conn. 406 ("For estoppel to apply, the fact sought to be foreclosed by [the] defendant must necessarily

[10] Having concluded that the defendant failed to establish the first prong of *Aparo*, we need not consider the second prong.

have been determined in his favor in the prior trial . . . . The defendant has the burden of showing that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." [Citation omitted; internal quotation marks omitted.]); see also *Dowling* v. *Finley Associates, Inc.*, 248 Conn. 364, 377, 727 A.2d 1245 (1999) ("[w]here there is more than one possible reason for the jury's verdict, and the court . . . cannot say that any one is necessarily inherent in the verdict, the doctrine of collateral estoppel is inapplicable . . . ." [internal quotation marks omitted]). Consequently, we conclude that the admission of evidence regarding the use of the sweater did not violate the defendant's fifth amendment guarantee against double jeopardy.

The judgment is affirmed.

In this opinion the other judges concurred.

SOVEREIGN BANK *v.* ANGELA HARRISON
(AC 38937)

Alvord, Sheldon and Bear, Js.

Syllabus

The plaintiff sought to foreclose a mortgage on certain real property of the defendant, who filed an answer and three special defenses. Thereafter, the plaintiff unilaterally withdrew its action and shortly thereafter commenced a foreclosure action against the defendant in federal court. Subsequently, the trial court granted the defendant's motion to restore the case to the docket. In her motion to restore, the defendant claimed that her third special defense, which alleged that the plaintiff did not properly account for payments made by the defendant, was more properly construed as a counterclaim and therefore, survived the withdrawal of the plaintiff's action. On appeal, the plaintiff claimed that the trial court erred in interpreting the defendant's special defense as a counterclaim and, therefore, lacked the authority to restore the case to the docket. *Held* that the trial court lacked authority to restore the case to the docket because there was no pending counterclaim as of the date of the withdrawal: that court, in deciding whether the allegation in the defendant's third special defense constituted a counterclaim, incorrectly

focused its analysis on the question of whether the defendant's allegation arose out of the same transaction as that described in the plaintiff's complaint, and failed to determine whether the third defense asserted an independent cause of action, and after the correct standard was applied for determining whether the defendant pleaded a counterclaim or a special defense, it was clear that the allegation in the defendant's third special defense could not properly be construed as a counterclaim, as nothing in the defendant's allegation could reasonably be interpreted as a claim of entitlement to affirmative relief because she neither explicitly requested any judicial redress or relief nor alleged any facts from which it could be inferred that she was entitled to such relief, and although pleadings must be construed broadly and realistically, rather than narrowly and technically, this court could not read into the defendant's answer a prayer for relief or factual allegations that simply were not there; moreover, because the allegation that the plaintiff did not properly account for the defendant's payments challenged the amount of the debt owed the plaintiff, which may be raised by way of special defense, and in the absence of any suggestion that she made payments in excess of the amount of the debt, the defendant would not be entitled to any affirmative relief under that allegation, the defendant's third special defense could not reasonably be construed as stating an independent cause of action, and, therefore, the trial court erred in construing it as a counterclaim.

Argued May 23—officially released August 28, 2018

Procedural History

Action to foreclose a mortgage on certain real property owned by the defendant, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk; thereafter, the plaintiff unilaterally withdrew the action; subsequently, the trial court, *Mintz, J.*, granted the defendant's motion to restore the case to the docket, and the plaintiff appealed to this court. *Reversed; judgment directed.*

Peter A. Ventre, with whom, on the brief, was *Lindsey A. Goergen*, for the appellant (plaintiff).

Opinion

BEAR, J. In this foreclosure action, the plaintiff, Sovereign Bank,[1] appeals from the order of the trial court

[1] On October 17, 2013, subsequent to the commencement of the present action, the plaintiff changed its name to Santander Bank. Although the plaintiff's filings subsequent to that date reflected that it now was known as Santander Bank, it did not file a motion to substitute Santander Bank as

granting the motion of the defendant, Angela Harrison,[2] to restore her third special defense to the docket following the plaintiff's voluntary withdrawal of its action.[3] The plaintiff's principal claim on appeal is that the trial court erred in interpreting the defendant's special defense as a counterclaim and, therefore, lacked the authority to restore it to the docket.[4] We agree and, accordingly, reverse the order of the trial court.

The following facts and procedural history are relevant to this appeal. The plaintiff commenced the present

plaintiff, and, thus, the trial court file continues to identify the plaintiff as Sovereign Bank. Therefore, we likewise identify the plaintiff as Sovereign Bank.

[2] The defendant did not file a brief in this appeal. Accordingly, on January 18, 2018, this court issued an order indicating that the appeal would be considered solely on the basis of the plaintiff's brief and the record as defined by Practice Book § 60-4.

[3] "[F]or final judgment purposes, an order restoring a withdrawn case to the docket is identical in all material respects to an order opening a final judgment . . . ." *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 276 Conn. 168, 195, 884 A.2d 981 (2005). "Ordinarily, the granting of a motion to open a prior judgment is not a final judgment, and, therefore, not immediately appealable. . . . Our Supreme Court, however, has carved out an exception to that rule where a colorable claim is made that the trial court lacked the power to open a judgment." (Internal quotation marks omitted.) *Simmons* v. *Weiss*, 176 Conn. App. 94, 98, 168 A.3d 617 (2017). Thus, "an order restoring a case to the docket . . . [is likewise] immediately appealable when that order is challenged on the basis of the court's authority to restore the case to the docket . . . ." (Emphasis omitted.) *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, supra, 197. In the present case, the plaintiff's principal claim, which is dispositive of its appeal, concerns the authority of the trial court to restore the defendant's special defense to the docket. Accordingly, this court has subject matter jurisdiction to decide the plaintiff's appeal. See General Statutes § 52-263.

[4] The plaintiff also claims on appeal that: (1) the trial court erred in determining that the defendant had a vested right that was prejudiced by the withdrawal of the plaintiff's action and, therefore, abused its discretion in restoring the case to the docket; and (2) no practical relief can be afforded to the defendant by upholding the trial court's decision to restore the case for adjudication of her special defense because the defendant waived her right to assert it by failing to do so in the federal foreclosure action subsequently brought by the plaintiff. Because the issue of the court's authority to restore the defendant's special defense to the docket is dispositive, we do not address the plaintiff's other claims.

action on September 9, 2010, seeking to foreclose a mortgage on certain real property in Norwalk that the defendant had executed in 2005 as security for a note in the principal amount of $200,000. The plaintiff alleged in its complaint that it was the holder of the note and mortgage and that the defendant was in default under the note and mortgage for failing to make payment as agreed.

On June 24, 2011, the defendant filed an answer and three special defenses. The defendant alleged in the first two special defenses that the plaintiff's predecessor in interest had (1) misrepresented the terms and conditions of the loan and (2) fraudulently entered false information on the defendant's loan application and sold the defendant a loan that she could not possibly afford. As to her third special defense—the only one at issue in the present appeal—the defendant alleged that "[t]he plaintiff did not properly account for payments made by the defendant." The plaintiff filed a reply denying the defendant's special defenses on December 2, 2014.

On November 23, 2015—prior to the scheduled trial date—the plaintiff unilaterally withdrew its action pursuant to General Statutes § 52-80,[5] and shortly thereafter the plaintiff commenced a foreclosure action against the same defendant in federal court.[6] As of the date of the withdrawal, the defendant had not effectively filed

[5] General Statutes § 52-80 provides in relevant part: "The plaintiff may withdraw any action . . . returned to and entered in the docket of any court, before the commencement of a hearing on the merits thereof. After the commencement of a hearing on an issue of fact in any such action, the plaintiff may withdraw such action, or any other party thereto may withdraw any cross complaint or counterclaim filed therein by him, only by leave of court for cause shown."

[6] On September 26, 2016, the plaintiff filed a motion requesting that this court take judicial notice and supplement the record. On December 6, 2017, we granted the motion for the purpose of taking judicial notice of the file and decisions rendered in the plaintiff's federal foreclosure action against the defendant in *Santander Bank, N.A.* v. *Harrison*, United States District Court, Docket No. 3:15CV01730 (AVC) (D. Conn.).

a counterclaim.[7] On November 30, 2015, the defendant filed a request for leave to amend her answer to assert a counterclaim, to which the plaintiff objected. At the conclusion of the December 22, 2015 oral argument on the objection, the court ruled from the bench that it did not have jurisdiction to consider the defendant's request because no counterclaim had been pending when the plaintiff withdrew its action. The court suggested, however, that it might have the ability to consider the request for leave to amend if the defendant first filed a motion to restore the case to the docket.

Pursuant to the court's suggestion, on January 28, 2016, the defendant filed a motion and an accompanying memorandum of law to restore her special defenses and counterclaim to the docket or, alternatively, to restore the case to the docket (motion to restore).[8] In her memorandum of law, the defendant argued, inter alia, that her third special defense[9] was more properly construed as a counterclaim and that, as such, it survived the withdrawal of the plaintiff's action pursuant to Practice Book § 10-55.[10] After hearing oral argument

[7] Although the defendant had filed a four count counterclaim prior to the withdrawal of the plaintiff's action, the trial court ruled during an October 21, 2015 trial management conference that the counterclaim was ineffective and "not part of this case" because the defendant had not filed it in conjunction with a request for leave to amend her answer. The defendant failed to file such a request in the intervening month before the plaintiff withdrew its action.

[8] Because the defendant previously had filed a motion to restore on January 14, 2016, she titled her January 28, 2016 filing as a "revised" motion to restore. Because only the revised motion is relevant to this appeal, for the sake of simplicity, we refer to it as the defendant's motion to restore.

[9] Although the defendant suggested that the trial court could construe *all* of her special defenses as counterclaims, her specific argument focused solely on the third special defense.

[10] Practice Book § 10-55 provides: "The withdrawal of an action after a counterclaim, whether for legal or equitable relief, has been filed therein shall not impair the right of the defendant to prosecute such counterclaim as fully as if said action had not been withdrawn, provided that the defendant shall, if required by the judicial authority, give bond to pay costs as in civil actions."

on the motion on February 8, 2016, the court issued an oral decision granting the motion to restore.[11]

As set forth in its ruling and subsequent articulation,[12] the court, relying on *225 Associates* v. *Connecticut Housing Finance Authority*, 65 Conn. App. 112, 121, 782 A.2d 189 (2001), determined that, because the defendant's third special defense arose out of the same transaction as that underlying the plaintiff's action, it was more properly construed as a counterclaim. Consequently, the court concluded that the plaintiff's withdrawal of its action did not affect the pendency of such counterclaim and that the defendant thus had a right to have the counterclaim adjudicated. The court therefore held that it "had jurisdiction to restore the case to the docket, even though the plaintiff withdrew the case." Accordingly, the court ordered that "the case [be] restored to the docket for the sole purpose of the trial on the counterclaim." This appeal followed.

On appeal, the plaintiff claims that the trial court acted in excess of its authority in restoring the defendant's third special defense to the docket. Specifically, the plaintiff argues that the defendant's special defense could not properly be construed as a counterclaim because it failed to allege any facts that would entitle the defendant to seek judicial relief through an independent cause of action against the plaintiff. The plaintiff further

[11] In accordance with Practice Book § 64-1 (a), the trial court created a memorandum of decision for use in this appeal by signing a transcript of the portion of the proceedings in which it stated its oral decision and filing it with the clerk of the trial court.

[12] After the plaintiff filed this appeal, it filed a motion for articulation requesting, inter alia, that the trial court clarify the basis for its determination that the third special defense constituted a counterclaim and that it articulate "the basis for its determination that the court had jurisdiction to review the [d]efendant's special defenses when the matter had been withdrawn as of right under . . . § 52-80 and a counterclaim had not been alleged in the [d]efendant's operable [a]nswer prior to the withdrawal."

contends that, because the special defense did not constitute a counterclaim and thus did not survive the withdrawal of the plaintiff's action as provided in Practice Book § 10-55, the court had no "continuing subject matter jurisdiction over the matter" after the plaintiff withdrew its action. Therefore, the plaintiff claims that the court "had no authority to restore [the] case for the purpose of a counterclaim when, in fact, no counterclaim existed" prior to the withdrawal of the action.

We first set forth our standard of review. "Any determination regarding the scope of a court's subject matter jurisdiction or its authority to act presents a question of law over which our review is plenary." *Tarro* v. *Mastriani Realty, LLC*, 142 Conn. App. 419, 431, 69 A.3d 956, cert. denied, 309 Conn. 912, 69 A.3d 308, 309 (2013). To the extent that the plaintiff's claim involves a question as to the proper interpretation of pleadings, our review likewise is plenary. See *Chase Home Finance, LLC* v. *Scroggin*, 178 Conn. App. 727, 743, 176 A.3d 1210 (2017) ("Construction of pleadings is a question of law. Our review of a trial court's interpretation of the pleadings therefore is plenary." [Internal quotation marks omitted.]). "[W]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts . . . ." (Internal quotation marks omitted.) *American First Federal, Inc.* v. *Gordon*, 173 Conn. App. 573, 583, 164 A.3d 776, cert. denied, 327 Conn. 909, 170 A.3d 681 (2017).

By statute, a "plaintiff may withdraw any action . . . before the commencement of a hearing on the merits thereof." General Statutes § 52-80. Although the plaintiff's "right . . . to withdraw *his action* before a hearing on the merits . . . is absolute and unconditional"; (emphasis added; internal quotation marks omitted) *Sicaras* v. *Hartford*, 44 Conn. App. 771, 775–76, 692 A.2d 1290, cert. denied, 241 Conn. 916, 696 A.2d 340

(1997); such withdrawal in no way impairs the right of the defendant to prosecute a previously filed counterclaim. See Practice Book § 10-55; see also *Boothe* v. *Armstrong*, 80 Conn. 218, 224, 67 A. 484 (1907) (where case involves causes of action both in favor of plaintiff and in favor of defendant, plaintiff "has the right to withdraw from the cognizance of the court *his own* cause of action as stated in the complaint, and this is the *only* effect that can be given to his attempt to withdraw the civil action" [emphasis added; internal quotation marks omitted]).

Consequently, a defendant with a pending counterclaim should not, in theory, need to move to have the counterclaim restored to the docket following the withdrawal of the plaintiff's action because the counterclaim survives the withdrawal as a matter of law. If, however, the counterclaim is not identified as such in the defendant's answer, it may be erased from the docket along with the plaintiff's action. In such circumstances, the court has the authority to grant a motion to restore the case to the docket to permit the defendant to prosecute the counterclaim because, where a defendant's counterclaim is wrongfully stricken from the docket following the withdrawal of the plaintiff's action, the defendant "is *entitled* to have [the case] restored for the purpose [of pursuing the defendant's counterclaim]." (Emphasis added.) *Boothe* v. *Armstrong*, 76 Conn. 530, 533, 57 A. 173 (1904). The court's authority, however, necessarily depends on the existence of an effective counterclaim. Indeed, it would be anomalous to conclude that the court has the authority to restore a counterclaim to the docket where the defendant had not effectively pleaded a counterclaim. Consequently, whether the court in the present case had the authority to restore the defendant's third special defense to the docket depends on whether the special defense was, in effect, a counterclaim.

Although a counterclaim is similar to a special defense in that both are employed by a defendant to diminish or defeat a plaintiff's claim, they nonetheless are separate and distinct types of pleadings. See *Chief Information Officer* v. *Computers Plus Center, Inc.*, 310 Conn. 60, 94, 74 A.3d 1242 (2013) (counterclaim is pleaded, in part, "to diminish, defeat or otherwise affect a plaintiff's claim" [internal quotation marks omitted]); *Valentine* v. *LaBow*, 95 Conn. App. 436, 447 n.10, 897 A.2d 624 (special defense "is an attempt to plead facts that are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action" [internal quotation marks omitted]), cert. denied, 280 Conn. 933, 909 A.2d 963 (2006). The heart of the distinction is that a counterclaim is an independent cause of action, and a special defense is not. See *Historic District Commission* v. *Sciame*, 152 Conn. App. 161, 176, 99 A.3d 207 ("[a] counterclaim is a cause of action . . . on which the defendant might have secured affirmative relief had he sued the plaintiff in a separate action" [internal quotation marks omitted]), cert. denied, 314 Conn. 933, 102 A.3d 84 (2014); *Valentine* v. *LaBow*, supra, 447 n.10 ("a special defense is not an independent action"). Rather, a special defense is a purely defensive pleading that does not seek any affirmative relief. See *Bank of America, N.A.* v. *Aubut*, 167 Conn. App. 347, 374, 143 A.3d 638 (2016) ("a special defense operates as a shield, to defeat a cause of action, and not as a sword, to seek a judicial remedy for a wrong"). Thus, in determining whether a defendant's answer asserts a counterclaim as opposed to a special defense, the court must determine whether the defendant could have maintained the claim as an independent cause of action. Broadly defined, "[a] cause of action, brought by means of a complaint or a counterclaim, is a means of seeking *redress* for having suffered harm. See, e.g., Black's Law Dictionary (6th Ed. 1990) (defining 'cause of action' in part as '[t]he fact or facts which

give a person a right to judicial redress or relief against another. . . . A situation or state of facts which would entitle [a] party to sustain [an] action and give him [the] right to seek a judicial remedy in his behalf.')." (Emphasis added.) *Bank of America, N.A.* v. *Aubut*, supra, 372. Consequently, this court has previously considered the existence of a prayer for relief in the defendant's answer to be "of critical importance in construing [the] answer as a counterclaim . . . ." *98 Lords Highway, LLC* v. *One Hundred Lords Highway, LLC*, 138 Conn. App. 776, 802, 54 A.3d 232 (2012).

In the present case, the court, in deciding whether the allegation in the defendant's third special defense constituted a counterclaim, made no determination as to whether it asserted an independent cause of action. Relying on *225 Associates* v. *Connecticut Housing Finance Authority*, supra, 65 Conn. App. 121, the court instead focused its analysis on the question of whether the defendant's allegation arose out of the same transaction as that described in the plaintiff's complaint. In that case, this court stated that "[i]f the [defendant's] claim arises out of the same transaction described in the complaint, it is characterized as a counterclaim." Id., 121. This statement, however, was made in the context of explaining the distinction between a counterclaim and a *setoff*. Id. A claim of setoff is similar to a counterclaim in that it "involve[s] the existence, in favor of the defendant, of an *independent cause of action* which he might pursue in a separate action."[13] (Empha-

[13] More specifically, "[a] set-off is made where the defendant has a debt against the plaintiff . . . and desires to avail himself of that debt, in the existing suit, either to reduce the plaintiff's recovery, or to defeat it altogether, and, as the case may be, to recover a judgment in his own favor for a balance." (Internal quotation marks omitted.) *Mariculture Products Ltd.* v. *Certain Underwriters at Lloyd's of London*, 84 Conn. App. 688, 703, 854 A.2d 1100, cert. denied, 272 Conn. 905, 863 A.2d 698 (2004).

sis added.) *Boothe* v. *Armstrong*, supra, 76 Conn. 531–32. The two types of claims differ only in that "[a] counterclaim arises out of the same transaction described in the complaint"; *Savings Bank of New London* v. *Santaniello*, 130 Conn. 206, 210, 33 A.2d 126 (1943); whereas "[a] set-off is independent thereof." Id. Thus, this court observed in *225 Associates* that, "[t]raditionally, the distinction between a setoff and a counterclaim centers around whether the claim arises from the same transaction described in the complaint." (Internal quotation marks omitted.) *225 Associates* v. *Connecticut Housing Finance Authority*, supra, 221. In contrast, the issue in the present case requires us to distinguish between a counterclaim and a special defense. Consequently, the court's reliance on the standard enunciated in *225 Associates* was misplaced. Evaluating the defendant's answer against the correct standard, it is clear that the allegation in the defendant's third special defense cannot properly be construed as a counterclaim.

The defendant's third special defense consisted of a single allegation: "The plaintiff did not properly account for payments made by the defendant." Nothing in this allegation can reasonably be interpreted as a claim of entitlement to affirmative relief. She neither explicitly requested any judicial redress or relief nor alleged any facts from which it could be inferred that she was entitled to such relief. Although pleadings must be construed "broadly and realistically, rather than narrowly and technically"; (internal quotation marks omitted) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 536, 51 A.3d 367 (2012); this does not mean that we may read into the defendant's answer a prayer for relief or factual allegations that simply are not there. See *Pane* v. *Danbury*, 267 Conn. 669, 677, 841 A.2d 684

(2004) (rule that courts should read pleadings broadly and realistically "does not mean . . . that the trial court is obligated to read into pleadings factual allegations that simply are not there or to substitute a cognizable legal theory that the facts, as pleaded, might conceivably support for the noncognizable theory that was actually pleaded"); see also *Grenier* v. *Commissioner of Transportation*, supra, 536 ("[o]ur reading of pleadings in a manner that advances substantial justice means that a pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension" [internal quotation marks omitted]). Reading it broadly and realistically, the allegation that the plaintiff did not properly account for the defendant's payments merely challenges the amount of the debt owed to the plaintiff, which may be raised by way of special defense or by objecting to the plaintiff's attempted introduction of the affidavit of debt in court. *Bank of America, N.A.* v. *Chainani*, 174 Conn. App. 476, 486, 166 A.3d 670 (2017). In the absence of any suggestion that she made payments *in excess* of the amount of the debt, the defendant would not be entitled to any affirmative relief under this allegation. Consequently, the defendant's third special defense cannot reasonably be construed as stating an independent cause of action, and, therefore, the trial court erred in construing it as a counterclaim. Because there was no pending counterclaim as of the date of the withdrawal, the court lacked the authority to restore the case to the docket.

The judgment is reversed and the case is remanded with direction to deny the motion to restore.

In this opinion the other judges concurred.

BLOSSOM'S ESCORT, LLC *v.* ADMINISTRATOR, UNEMPLOYMENT COMPENSATION ACT, ET AL.
(AC 40041)

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

Syllabus

The plaintiff appealed to the trial court from the decision of the Employment Security Board of Review affirming the decision of an appeals referee, which affirmed the decision of the defendant Administrator of the Unemployment Compensation Act that the plaintiff was liable for certain unpaid unemployment compensation contributions under the Unemployment Compensation Act (§ 31-222 et seq.). The plaintiff provided flag escort services for oversized vehicles and assigned requests for such services to various contractors. In March, 2008, P, who had performed as an escort vehicle operator for the plaintiff, filed a complaint with the administrator claiming that the plaintiff had failed to pay him appropriate unemployment compensation benefits. Because the plaintiff had not reported wages for P, the administrator conducted an audit for the applicable period from January 1, 2006 through December 31, 2007. In 2008, an amendment (Public Acts 2008, No. 08-150) to the statute ([Rev. to 2007] § 31-222 (a) (5) (O)] that sets forth the types of services that are exempt from the definition of employment under § 31-222 took effect, which, under certain circumstances, exempted services performed by operators of escort vehicles. The amendment became effective June 12, 2008. By a determination letter dated July 7, 2008, the administrator concluded that the plaintiff employed P and several others during the audit period within the terms of § 31-222 and, thus, that the plaintiff potentially owed $ 26,812.05 plus interest for unpaid unemployment compensation contributions. After the trial court remanded the matter to the board to make factual findings concerning the applicability of the amendment to the statute and further proceedings before the administrator and board were held consistent with the remand order, the trial court rendered judgment dismissing the plaintiff's appeal, from which the plaintiff appealed to this court. The plaintiff claimed that the trial court improperly concluded that the amendment to § 31-222 (a) (5) (O) was inapplicable to the present case. *Held* that the trial court properly dismissed the plaintiff's appeal from the board's decision; because the audit period predated the June 12, 2008 effective date of the amendment, the exemption contained in P.A. 08-150 could not be applied to the plaintiff's drivers during the audit period, and although the administrator informed the plaintiff of its liability for unemployment compensation benefits following the effective date of P.A. 08-150, the date of the determination letter did not trigger the application of the amendment, as the audit period referenced in the determination letter was the time

frame during which the named individuals provided services and was therefore the time period during which the plaintiff's obligation to make unemployment compensation contributions arose, and that obligation under § 31-222 existed until the legislature amended it.

Argued March 14—officially released August 28, 2018

Procedural History

Appeal from the decision of the Employment Security Board of Review affirming the named defendant's decision that the plaintiff was liable for unpaid unemployment compensation contributions, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Hon. Henry S. Cohn*, judge trial referee; judgment dismissing the appeal, from which the plaintiff appealed to this court. *Affirmed.*

Jeffrey J. Holley, for the appellant (plaintiff).

Richard T. Sponzo, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Philip M. Schulz*, assistant attorney general, for the appellee (named defendant).

Opinion

PER CURIAM. The plaintiff, Blossom's Escort, LLC, appeals from the judgment of the trial court, rendered in favor of the defendant, the Administrator of the Unemployment Compensation Act (administrator), dismissing the plaintiff's appeal from the decision of the Employment Security Appeals Division, Board of Review (board), affirming the decision of the appeals referee, which affirmed the decision of the administrator that the plaintiff was liable for unpaid unemployment compensation contributions under the Unemployment Compensation Act (act), General Statutes § 31-222 et seq. On appeal, the plaintiff claims that the court improperly affirmed the decision of the board because a then recent statutory amendment, General Statutes (Rev. to 2007) § 31-222 (a) (5) (O), as amended by No. 08-150 of the 2008 Public Acts, exempted the

claimant, Richard Peck,[1] and certain other individuals from the definition of "employee" under the act. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. The plaintiff provided flag escort services for oversized vehicles traveling within or through Connecticut. The plaintiff would assign requests for such services to various contractors. In March, 2008, Peck, who had performed services for the plaintiff as an escort vehicle operator, filed a complaint with the administrator claiming that the plaintiff had failed to pay him appropriate unemployment compensation benefits. The plaintiff had not reported wages for Peck and, as a result, the administrator's field unit conducted an audit for the applicable time period, from January 1, 2006 through December 31, 2007.

In 2008, the legislature enacted Number 08-150 of the 2008 Public Acts (P.A. 08-150) which, in § 43 (O), exempted services performed by operators of escort vehicles, under certain circumstances, from the definition of "employee" for purposes of § 31-222.[2] See General Statutes (Rev. to 2007) § 31-222 (a) (5) (O), as

[1] Peck was a nonappearing defendant at trial and is not involved in this appeal. We refer in this opinion to the administrator only as the defendant.

[2] General Statutes § 31-222 (a) (1) (B) defines "employment" in relevant part as any service performed by "(ii) any individual who, under either common law rules applicable in determining the employer-employee relationship or under the provisions of this subsection, has the status of an employee. Service performed by an individual shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists, unless and until it is shown to the satisfaction of the administrator that (I) such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under his contract for the performance of service and in fact; and (II) such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and (III) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed. . . ." "This statutory provision is commonly referred to as the ABC test, with parts A, B and C corresponding to clauses I, II and III, respectively. . . . [U]nless the party

amended by No. 08-150 of the 2008 Public Acts.[3] This amendment became effective June 12, 2008.

By a determination letter dated July 7, 2008, the administrator concluded that the plaintiff had employed Peck and other individuals within the terms of § 31-222 (a) (1) (B) (ii),[4] during the audit period from January 1, 2006 to December 31, 2007, and that the "potential amount" the plaintiff owed for unpaid unemployment compensation contributions was $26,812.05 plus interest.[5] The plaintiff appealed to the appeals referee from the administrator's July 7, 2008 determination. In a February 2, 2009 decision, the appeals referee affirmed the July 7, 2008 determination of the administrator. The appeals referee noted that the parties requested only that he address the issue of whether the amendment codified in P.A. 08-150 was the controlling law to be

claiming the exception to the rule that service is employment shows that all three prongs of the test have been met, an employment relationship will be found." (Citations omitted; internal quotation marks omitted.) *Southwest Appraisal Group, LLC* v. *Administrator, Unemployment Compensation Act*, 324 Conn. 822, 832, 155 A.3d 738 (2017).

[3] General Statutes (Rev. to 2007) § 31-222 (a) (5) (O), as amended by P.A. 08-150, sets forth the following exemption: "No provision of this chapter, except section 31-254, shall apply to any of the following types of service or employment, except when voluntarily assumed, as provided in section 31-223. . . . Service performed by the operator of an escort motor vehicle, for an oversize vehicle, overweight vehicle or a vehicle with a load traveling upon any Connecticut highway pursuant to a permit required by section 14-270, and the regulations adopted pursuant to said section, provided the following conditions are met: (i) The service is provided by an individual operator who is engaged in the business or trade of providing such escort motor vehicle; (ii) The operator is, and has been, free from control and direction by any other business or other person in connection with the actual performance of such services; (iii) The operator owns his or her own vehicle, and statutorily required equipment, and exclusively employs this equipment in providing such services; and (iv) The operator is treated as an independent contractor for all purposes, including, but not limited to, federal and state taxation, workers' compensation, choice of hours worked and choice to accept referrals from multiple entities without consequence. . . ."

[4] See footnote 2 of this opinion.

[5] In 2009, the parties agreed that the total amount due to the administrator was $33,640.91.

applied to the July 7, 2008 determination of the administrator. The appeals referee concluded that the amendment did not apply retroactively to the named individuals who worked for the plaintiff between January 1, 2006 and December 31, 2007. The plaintiff appealed that conclusion to the board. On November 12, 2010, the board affirmed the referee's decision and dismissed the appeal.

On November 23, 2010, the plaintiff appealed the board's dismissal to the trial court. On January 8, 2015, the court remanded the matter back to the board "to institute factual findings regarding the applicability of the amendment to the claims against [the plaintiff]." (Footnote omitted.) The court stated: "The board argues that the court should simply decide that the amendment does not apply and affirm the board. [The plaintiff] states that if the amendment is not in effect, then it will not pursue the matter further, but if it does apply, then it stands ready to prove that the amendment as a factual matter exempts it. . . . The court, however, would prefer to have the agency provide its factual findings to the court in advance of its determination of the applicability of the amendment." (Footnotes omitted.) In its remand order, the trial court retained jurisdiction to review the matter in full at the conclusion of the administrative appeals process.

On January 28, 2015, the board remanded the matter to the administrator "to conduct further proceedings and to issue a new decision." The board noted that it did not retain jurisdiction. By letter dated April 24, 2015, the administrator concluded on remand "that none of the escort drivers providing services to [the plaintiff] during the time period covered in the original determination [January 1, 2006 through December 31, 2007] would be exempted from covered employment by the application of Public Act No. 08-150." The plaintiff appealed the administrator's decision regarding the applicability of the amendment to the appeals referee.

The appeals referee framed the issue before him as "whether the [plaintiff] would still be liable for contributions if the administrator applied the test set forth in . . . § 31-222 (a) (5) (O), as amended by Section 43 (O) of Public Act No. 08-150." In a memorandum of decision dated May 31, 2016, the appeals referee sustained the plaintiff's appeal and reversed the April 24, 2015 decision of the administrator. The appeals referee held that the escort drivers who had provided services for the plaintiff during the relevant time period would be exempt from the definition of "employee" under the relevant amendment to the act, § 31-222 (a) (5) (O), if it were applied. The appeals referee ordered the administrator "to reimburse the [plaintiff] from contributions already paid in an amount required by law."

On June 9, 2016, the administrator appealed to the board from the decision of the appeals referee. The administrator argued that § 31-222 (a) (5) (O), as amended, did not apply to the drivers in this case. The board affirmed the decision of the appeals referee that the escort drivers who provided services for the plaintiff during the relevant time period would be exempt from the definition of "employee" if the amendment were applied. The board certified to the trial court the record of the proceedings following the court's December 31, 2014 remand order.

Following the board's decision on remand, the trial court rendered a decision on January 9, 2017, dismissing the plaintiff's November 23, 2010 appeal. The court held that "the issue on this appeal is . . . a legal one: the right, not of a claimant, but the administrator for contributions when the determination letter was sent after the amendment. Regardless of the date of the determination letter, the general rule is that where an employer incurred liability for unemployment insurance taxes under a statute, a subsequent amendment of the statute to exempt the employer from payment of further taxes does not operate retroactively to relieve the employer

of liability incurred before the effective date of the amendment." This appeal followed.

The plaintiff claims that the court improperly concluded that the amendment to § 31-222 (a) (5) (O) in P.A. 08-150 was inapplicable to the facts of this case. The plaintiff emphasizes that it does not claim that the amendment should be applied retroactively, but rather argues that the triggering event for purposes of applying the new statutory amendment was the issuance of the July 7, 2008 determination letter. The plaintiff contends that, prior to the issuance of the determination letter, there had been no formal finding that the named individuals were employees rather than independent contractors. It argues that the determination letter triggered legal proceedings and triggered the plaintiff's payment obligations. The amendment should apply in this case, the plaintiff argues, because the amendment was in effect at the time the determination letter was issued. The administrator argues that the amendment cannot be applied retroactively to the plaintiff's liability for unemployment compensation contributions for a time period of January 1, 2006 through December 31, 2007, which occurred before the effective date of the amendment. We agree with the administrator.

"If . . . the issue is one of law, the court has the broader responsibility of determining whether the administrative action resulted from an incorrect application of the law to the facts found or could not reasonably or logically have followed from such facts. Although the court may not substitute its own conclusions for those of the administrative board, it retains the ultimate obligation to determine whether the administrative action was unreasonable, arbitrary, illegal or an abuse of discretion." (Internal quotation marks omitted.) *Mattatuck Museum–Mattatuck Historical Society* v. *Administrator*, 238 Conn. 273, 276, 679 A.2d 347 (1996).

The issue raised by the plaintiff is whether the July 7, 2008 determination letter was the event that triggered the application of the amendment. In that determination letter, the administrator informed the plaintiff that its employment of certain individuals within the terms of § 31-222 (a) (1) (B) (ii) during the audit period triggered its obligation for unpaid unemployment compensation contributions. Although the administrator informed the plaintiff of its liability for unemployment contributions following the effective date of P.A. 08-150, which exempted the plaintiff's escort drivers from the act, the date of the determination letter did not trigger the application of the amendment. The audit period referenced in the determination letter, January 1, 2006 through December 31, 2007, was the time frame during which the named individuals provided services and is, therefore, the time frame during which the plaintiff's obligation to make unemployment compensation contributions arose. This obligation under § 31-222 existed until the legislature amended it. Because the audit period predated the June 12, 2008 effective date of the amendment, the exemption contained in P.A. 08-150 would not apply.[6] Accordingly, we conclude that the court properly dismissed the plaintiff's appeal from the board's decision.

The judgment is affirmed.

[6] The plaintiff does not argue that the amendment should be applied retroactively and we agree that it is not subject to retroactive application. "General Statutes § 55-3 . . . states: No provision of the general statutes, not previously contained in the statutes of the state, which imposes any new obligation on any person or corporation, shall be construed to have retrospective effect. . . . [W]e have uniformly interpreted § 55-3 as a rule of presumed legislative intent that statutes affecting substantive rights shall apply prospectively only. . . . [S]ee also *Reid* v. *Zoning Board of Appeals*, 235 Conn. 850, 859 n.6, 670 A.2d 1271 (1996) ([i]t is a rule of construction that legislation is to be applied prospectively, unless the legislature clearly expresses an intention to the contrary)." (Citations omitted; footnote omitted; internal quotation marks omitted.) *D'Eramo* v. *Smith*, 273 Conn. 610, 620–21, 872 A.2d 408 (2005). "[T]he retroactive application of a law occurs only if the new or revised law was not yet in effect on the date that the relevant events underlying its application occurred." *State* v. *Faraday*, 268 Conn. 174, 197, 842 A.2d 567 (2004).