# STATE OF CONNECTICUT *v.* JONATHAN W. CARNEY (AC 40512)

Keller, Bright and Beach, Js.

*Syllabus*

Pursuant to statute (§ 17a-566), a court, prior to sentencing a person who has been convicted of an offense for which he may be imprisoned in a certain maximum security correctional facility, and who appears to have psychiatric disabilities and to be dangerous to himself and to others, may order the Commissioner of Mental Health and Addiction Services to conduct an examination of such person and to report whether he should be committed to the diagnostic unit of Whiting Forensic Division, or should be sentenced in accordance with his conviction.

Pursuant further to statute (§ 17a-567), if the report submitted to the court pursuant to § 17a-566 recommends that the defendant should be sentenced in accordance with his conviction, the defendant shall be returned directly to the court for disposition.

Convicted, on a guilty plea, of the crime of murder, the defendant appealed to this court from the trial court's denial of his motion to correct an illegal sentence. Before the court accepted the defendant's guilty plea, pursuant to which the defendant agreed to a forty-two year prison sentence, defense counsel informed the court that the defendant had undergone a psychiatric evaluation in anticipation of asserting a possible extreme emotional disturbance defense. In canvassing the defendant, the court stated that it considered the results of that psychiatric evaluation and informed the defendant that he would be sentenced to forty-two years imprisonment, in accordance with his plea agreement. Prior to his sentencing date, the defendant attempted to commit suicide. Thereafter, defense counsel filed a motion for an evaluation pursuant to § 17a-566, and the court ordered the defendant to be sent to Whiting Forensic Division for an evaluation to determine whether he should serve his sentence at Whiting or at a correctional facility. The court adopted the recommendation of Whiting personnel and sentenced the defendant to the agreed on forty-two year sentence, to be served at a correctional facility. In denying the defendant's motion to correct an illegal sentence, the court concluded, inter alia, that there was no basis for the defendant's claim that the sentencing court had relied on inaccurate information in imposing the agreed on sentence. *Held*:

1. The trial court properly construed the applicable statutes and declined to hold that the receipt of information from Whiting personnel required the sentencing court to consider a more lenient sentence: the plain language of §§ 17a-566 and 17a-567 led this court to conclude that the purpose of those statutes is to guide a sentencing court in determining

the appropriate place of confinement, and there was no statutory authority for Whiting personnel to make any recommendation as to the length of the defendant's sentence; moreover, there was no merit to the defendant's claim that the court was bound to apply certain human rights statutes and to consider rejecting the agreed on sentence as too harsh in light of the fact that the report and testimony of Whiting personnel indicated that the defendant was severely mentally ill, as the human rights statutes were not relevant to sentencing in the criminal justice system, and the sentencing court, in sentencing the defendant, considered the results of the earlier psychiatric evaluation, the substance of which was similar to the report and testimony of Whiting personnel.

2. The defendant could not prevail on his claim that, contrary to the trial court's conclusion, the sentencing court had relied on inaccurate information in sentencing him insofar as Whiting personnel testified that the defendant would receive adequate psychiatric treatment at a correctional facility when the defendant alleged that he had not received such treatment; such a claim was more appropriately asserted in a habeas action rather than in a motion to correct an illegal sentence, the statements of Whiting personnel were predictions rather than statements of fact, there was no record, including findings of fact and conclusions, on which to review the defendant's claim, and there was nothing to indicate that the sentencing court materially relied on any information in the report or testimony of Whiting personnel in imposing the defendant's sentence.

Argued May 22—officially released September 4, 2018

*Procedural History*

Substitute information charging the defendant with the crimes of murder, felony murder, burglary in the first degree, criminal use of a weapon, carrying a pistol without a permit, burglary in the third degree, and larceny in the sixth degree, brought to the Superior Court in the judicial district of New Britain, where the defendant was presented to the court, *Handy*, *J.*, on a plea of guilty of murder; judgment in accordance with the plea; thereafter, the state entered a nolle prosequi as to the remaining charges; subsequently, the court, *D'Addabbo*, *J.*, denied the defendant's motion to correct illegal sentence, and the defendant appealed to this court. *Affirmed.*

*Jonathan W. Carney*, self-represented, the appellant (defendant).

*Lisa A. Riggione*, senior assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, and *Paul N. Rotiroti*, supervisory assistant state's attorney, for the appellee (state).

*Opinion*

BEACH, J. The defendant, Jonathan W. Carney, appeals from the judgment of the trial court denying his motion to correct an illegal sentence. The defendant claims that the court improperly (1) concluded that the sentencing court properly construed General Statutes § 17a-566 as limiting the Department of Mental Health and Addiction Services (DMHAS) to a recommendation as to the appropriate place of confinement only and, therefore, properly declined to consider information provided by Whiting Forensic Division (Whiting) at the § 17a-566 hearing when it imposed the sentence; and (2) failed to conclude that the sentencing court relied on inaccurate information provided by Whiting. We disagree and, accordingly, affirm the judgment of the trial court.

The following undisputed facts and procedural history are relevant to our resolution of the defendant's claims. They arise primarily from five separate proceedings: a plea proceeding on May 9, 2003; a June 27, 2003 hearing in which the court granted a continuance for sentencing; a July 18, 2003 hearing regarding the defendant's motion for a psychological evaluation; a September 5, 2003 hearing in which Whiting doctors testified regarding the defendant's need for further evaluation; and a January 16, 2004 sentencing hearing.

On May 9, 2003, the defendant pleaded guilty to murder in violation of General Statutes § 53a-54a. On that date, the court, *Handy, J.*, advised the defendant that the possible sentence for the crime was between twenty-five and sixty years.[1] The defendant's attorney

[1] "The Court: And the penalties under [§] 53a-54a are twenty-four years to life. That's the statute. Right, twenty-five years to sixty years, which is life."

stated that he had retained Donald Grayson, a psychiatrist, to conduct a psychiatric evaluation of the defendant in anticipation of a possible extreme emotional disturbance defense, and that he had discussed Grayson's report with the defendant. Before accepting the defendant's plea, the court canvassed the defendant on his waiver of the right to a trial, including his right to present an affirmative defense at trial. The court also indicated that it had reviewed Grayson's report and had considered the information contained therein.

Pursuant to the plea agreement, the defendant agreed to a forty-two year sentence. The court informed the defendant that he would be sentenced to forty-two years at the sentencing proceeding to be held at a later date, and the defendant affirmed that he understood. The court further informed the defendant that once the court accepted his plea, he could not take it back. The defendant again affirmed his understanding. The court found that the defendant's plea was "voluntary, made with understanding, [and] made with the assistance of competent and effective counsel." The court accepted the defendant's guilty plea, and a sentencing hearing was scheduled for June 27, 2003.

On June 26, 2003, the day before the scheduled sentencing, the defendant attempted suicide and was taken to a hospital. Sentencing was continued to July 18, 2003, because the defendant was in the hospital on June 27, 2003.

Following the defendant's attempted suicide, his attorney filed a motion for a psychiatric evaluation pursuant to § 17a-566.[2] On July 18, 2003, the court heard

[2] General Statutes § 17a-566 provides in relevant part: "(a) Except as provided in section 17a-574 any court prior to sentencing a person convicted of an offense for which the penalty may be imprisonment in the Connecticut Correctional Institution at Somers . . . may if it appears to the court that such person has psychiatric disabilities and is dangerous to himself or others, upon its own motion or upon request of any of the persons enumerated in subsection (b) of this section and a subsequent finding that such request is

both parties regarding the defendant's motion. The state did not object, and the court ordered the defendant to be sent to Whiting for a presentence psychiatric evaluation in order to determine whether the defendant should serve his sentence in Whiting or at a Department of Correction (DOC) facility. The court indicated that the evaluation would not alter the defendant's agreed upon forty-two year sentence. The defendant did not object to the court's statement that the sole purpose of the psychiatric assessment was to provide guidance regarding the place of confinement.

On September 5, 2003, the court held a hearing regarding the Whiting recommendation. At the outset of the hearing, the court reiterated that the Whiting evaluation would not alter the length of the agreed upon forty-two year sentence. The court inquired as to whether either party disagreed with the court's understanding of the purpose of the inquiry, and both parties expressly stated that they did not disagree.

Eileen McAvoy, a psychologist who evaluated the defendant pursuant to §17a-566, testified as to her findings, and her written report was admitted as a full exhibit. In her report, she concluded that the defendant was in need of further evaluation at Whiting.[3]

justified, order the commissioner to conduct an examination of the convicted defendant by qualified personnel of the division. Upon completion of such examination the examiner shall report in writing to the court. Such report shall indicate whether the convicted defendant should be committed to the diagnostic unit of the division for additional examination or should be sentenced in accordance with the conviction. . . . (b) The request for such examination may be made by the state's attorney or assistant state's attorney who prosecuted the defendant for an offense specified in this section, or by the defendant or his attorney in his behalf."

[3] Pursuant to § 17a-566 (a), "[i]f the report recommends additional examination at the diagnostic unit, the court may, after a hearing, order the convicted defendant committed to the diagnostic unit of the division for a period not to exceed sixty days, except as provided in section 17a-567 provided the hearing may be waived by the defendant."

On January 16, 2004, after the further evaluation, the court held a sentencing hearing at which Whiting personnel testified as to their recommendations. The Whiting report, including a psychiatric evaluation and Whiting "recommendations," was admitted as a full exhibit, under seal. Paul Amble, the chief forensic psychiatrist for the Connecticut Division of Forensic Services, and Sean Hart, a clinical psychologist, testified that the defendant should serve his sentence at a DOC facility. Both Amble and Hart further testified that they believed the DOC would be able to provide the defendant adequate psychiatric treatment. During summation, defense counsel raised concerns regarding the methods the Whiting personnel used in evaluating the defendant.[4] Ultimately, defense counsel argued that the defendant should serve his sentence at Whiting. The court adopted Whiting's recommendation and sentenced the defendant in accordance with the plea agreement to forty-two years imprisonment to be served at a DOC facility.

On May 4, 2016, pursuant to Practice Book § 43-22, the defendant, representing himself, filed a motion to correct an illegal sentence. The defendant claimed that his sentence was imposed in an illegal manner because the sentencing court relied on inaccurate information and improperly concluded that the purpose of the § 17a-566 hearing was to determine only the place of the defendant's confinement. After a "sound basis" hearing pursuant to *State* v. *Casiano*, 282 Conn. 614, 922 A.2d 1065 (2007), the court did not appoint counsel to represent the defendant in connection with his motion to correct, and the defendant proceeded as a self-represented party.

On December 1, 2016, the trial court, *D'Addabbo*, *J.*, held a hearing on the defendant's motion to correct.

[4] The court disagreed with defense counsel's criticisms regarding the methods Whiting personnel used in assessing the defendant.

The court concluded that the sentencing court properly had construed § 17a-566, and the court determined that there was no basis for the claim that the sentencing court had relied on inaccurate information in imposing the agreed upon sentence. Finally, the court dismissed for lack of jurisdiction the defendant's claim, as the court perceived it, that the defendant received inadequate care from the DOC. This appeal followed.

We begin with the relevant standard of review and legal principles. "We review the [trial] court's denial of [a] defendant's motion to correct [an illegal] sentence under the abuse of discretion standard of review. . . . In reviewing claims that the trial court abused its discretion, great weight is given to the trial court's decision and every reasonable presumption is given in favor of its correctness. . . . We will reverse the trial court's ruling only if it could not reasonably conclude as it did." (Citation omitted; internal quotation marks omitted.) *State* v. *Logan*, 160 Conn. App. 282, 287, 125 A.3d 581 (2015), cert. denied, 321 Conn. 906, 135 A.3d 279 (2016).

Pursuant to Connecticut law, "the jurisdiction of the sentencing court terminates once a defendant's sentence has begun, and, therefore, that court may no longer take any action affecting a defendant's sentence unless it expressly has been authorized to act." *Cobham* v. *Commissioner of Correction*, 258 Conn. 30, 37, 779 A.2d 80 (2001). Pursuant to Practice Book § 43-22, however, the sentencing court may correct an illegal sentence, illegal disposition, or a sentence imposed in an illegal manner. An illegal sentence is one that "exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory." (Internal quotation marks omitted.) *State* v. *Parker*, 295 Conn. 825, 839, 992 A.2d 1103 (2010). A sentence imposed in an illegal manner is "within the relevant statutory limits but . . . imposed in a way which violates [a] defendant's right

. . . to be addressed personally at sentencing and to speak in mitigation of punishment . . . or his right to be sentenced by a judge relying on accurate information or considerations solely in the record, or his right that the government keep its plea agreement promises . . . .'' (Internal quotation marks omitted.) Id. ''[I]f the defendant cannot demonstrate that his motion to correct falls within the purview of [Practice Book] § 43-22, the court lacks jurisdiction to entertain it.'' (Internal quotation marks omitted.) *State* v. *Saunders*, 132 Conn. App. 268, 271, 50 A.3d 321 (2011), cert. denied, 303 Conn. 924, 34 A.3d 394 (2012).

I

The defendant claims that the trial court erred in agreeing with the sentencing court's construction and application of General Statutes §§ 17a-566 and 17a-567. As related previously in this opinion, the sentencing court stated that the statutory scheme related to placement of inmates and that the Whiting referral and resulting information would not be considered in the determination of the length of the sentence to be imposed.

In construing a statute, we ''ascertain its meaning from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.'' (Internal quotation marks omitted.) *State* v. *Panek*, 328 Conn. 219, 225, 177 A.3d 1113 (2018).

Section 17a-566 (a) provides that a sentencing court may refer certain convicted persons to Whiting for evaluation, and the initial Whiting examination may result in temporary commitment to Whiting for additional evaluation. Following the evaluation, a report is to be

prepared in accordance with § 17a-566 (c). Section 17a-566 (d) provides that the report is to include "(1) [a] description of the nature of the examination; (2) a diagnosis of the mental condition of the defendant; (3) an opinion as to whether the diagnosis and prognosis demonstrate clearly that the defendant is actually dangerous to himself or others and requires custody, care and treatment at [Whiting]; and (4) a recommendation as to whether the defendant should be sentenced in accordance with the conviction, sentenced in accordance with the conviction and confined in the institute for custody, care and treatment, placed on probation by the court or placed on probation by the court with the requirement, as a condition to probation, that he receive outpatient psychiatric treatment."[5]

Section 17a-567 (a) prescribes the process to be followed after the report is filed in court. If the report recommends confinement in Whiting, a further hearing is required. If, however, "the report recommends that the defendant be sentenced in accordance with the conviction . . . the defendant shall be returned to court directly for disposition." General Statutes § 17a-567 (a).

The plain language of the statutes yields the conclusion that their direct purpose is to guide the sentencing court in the determination of the appropriate place of confinement. The statutory language provides a detailed procedure for making that determination: in the circumstances of the present case, either the convicted person ultimately is confined at Whiting or the person is returned to court for "disposition in accordance with the conviction." There is no statutory authority for Whiting to make any recommendation as

[5] Because the defendant stood convicted of murder, he was not eligible for the options that included probation. See General Statutes § 53a-29 (a).

to length of sentence, and we conclude that the court properly construed and applied the statutory authority.[6]

The defendant appears to make the further argument, however, that once the Whiting report was before the court and the Whiting personnel testified, even if a hearing was not statutorily required because the evaluators recommended a disposition not involving Whiting, the sentencing court was bound at least to consider the substance of the Whiting report and testimony in sentencing the defendant. The defendant's position apparently is twofold.

The defendant has constructed an intricate argument that, so far as we can tell, runs as follows. The Whiting report and testimony indicated that the defendant was severely mentally ill, even if not to the degree requiring confinement at Whiting, and specific diagnoses were made. In this situation, then, the court was required to apply various human rights statutes, most notably General Statutes § 46a-7,[7] and presumably was bound to consider rejecting the agreed upon sentence as too harsh in light of his mental illness.

We reject this position for two reasons. First, we are not persuaded that §§ 46a-7 et seq. have any relevance

[6] The defendant expressly waived any position to the contrary:

"The Court: I want to reiterate for the record this in no way affects the agreed [upon] sentence, which is going to be a sentence of forty-two years to serve. The only analysis that is being completed at this point in time is whether or not that sentence will be served in the general population in the [DOC] or will be served either a portion or all of at . . . Whiting . . . .

"Does either the state or defense disagree with that analysis?

"[The Prosecutor:] No, Your Honor.

"[Defense Counsel:] No, Your Honor."

[7] General Statutes § 46a-7 provides: "It is hereby found that the state of Connecticut has a special responsibility for the care, treatment, education, rehabilitation of and advocacy for its disabled citizens. Frequently the disabled are not aware of services or are unable to gain access to the appropriate facilities or services. It is hereby the declared policy of the state to provide for coordination of services for the disabled among the various agencies of the state charged with the responsibility for the care, treatment, education and rehabilitation of the disabled."

to sentencing in the criminal justice system, at least in the context of this case. The facilities expressly listed in the human rights statutes do not include correctional facilities; see General Statutes § 46a-11a (6);[8] and General Statutes §§ 18-96a and 17a-560 et seq. specifically govern the treatment of mentally ill persons within correctional facilities. Second, as noted by the trial court, prior to imposing the agreed upon sentence, the sentencing court reviewed the Grayson materials, which are consistent with and very similar to the Whiting materials. We conclude that the trial court did not err in declining to hold that the receipt of the Whiting information required consideration of a more lenient sentence.

II

Finally, the defendant claims, somewhat paradoxically in light of his first claim, that the Whiting materials contained erroneous information such that the trial court erred in concluding that the sentencing court did not rely on inaccurate information when it imposed the defendant's sentence. We disagree.

The defendant argues that the Whiting personnel testified that he would receive adequate treatment at a DOC facility, and, he suggests, he has not received adequate treatment. As the trial court recognized, insofar as this is a claim regarding the conditions of confinement, it is a claim more appropriately brought in a habeas action. See, e.g., *State* v. *Anderson*, 319 Conn. 288, 299, 127 A.3d 100 (2016) ("if [the defendant] believes that the mental health treatment he is receiving while in the custody of the Commissioner of Correction is . . . inadequate, [his remedy] is . . . an expedited

[8] General Statutes § 46a-11a (6) defines "facility" as "any public or private hospital, nursing home facility, residential care home, training school, regional facility, group home, community companion home, school or other program serving persons with intellectual disability . . . ."

petition for a writ of habeas corpus challenging the conditions of his confinement"); see also General Statutes § 52-466 (a) (2). The statements of Whiting personnel were predictions rather than statements of fact, and, in any event, there is no record, including findings of fact and conclusions, on which to review the claim.

Finally, as noted by the trial court, there is nothing to indicate that the sentencing court materially relied on any information in the Whiting report or testimony in imposing the sentence. See *State* v. *Parker*, supra, 295 Conn. 843 ("A defendant [cannot] . . . merely alleg[e] . . . factual inaccuracies or inappropriate information. . . . [He] must show that the information was materially inaccurate and that the judge relied on that information." [Citations omitted; emphasis omitted; internal quotation marks omitted.]). What is clear is that the sentencing court, having recognized the likelihood of mental illness, took appropriate statutory measures and ultimately accepted the plea agreement of the parties.

The judgment is affirmed.

In this opinion the other judges concurred.

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## ENRICO VACCARO *v.* WILLIAM D'ANGELO ET AL.
## (AC 40258)

Keller, Bright and Beach, Js.

*Syllabus*

The plaintiff stakeholder, an attorney who previously represented the defendant B in an action against a third party to recover for personal injuries, brought an action for interpleader to determine the rights of B and the defendant D, B's former chiropractic physician, to a portion of the funds from a settlement resolving B's personal injury action. B failed to pay D for certain chiropractic services provided by him during visits that exceeded the annual limit of ten chiropractic visits under B's health plan. The matter was tried to the trial court, which rendered judgment

ordering the distribution of the funds in part to D, including D's requested amount for chiropractic services provided to B, and the distribution of the remaining funds to B, from which the plaintiff appealed and B cross appealed to this court. Thereafter, the plaintiff withdrew his appeal. On the cross appeal, B claimed that the trial court improperly determined that D was entitled to a portion of the settlement funds because D failed to comply with a certain provision (§ 2.03.12) in his provider agreement, and because an authorization form provided by D at B's initial visit, which was the basis for D's claim to the settlement funds, was unenforceable. Specifically, B claimed that D's authorization form was illegal on its face and contrary to public policy because it violated the statute ([Rev. to 2011] § 20-7f [b]) that makes it an unfair billing practice for a healthcare provider to request payment, other than a co-payment or deductible, from an enrollee for medical services covered under a managed care plan, and because it violated certain other statutory provisions ([Rev. to 2011] § 36a-573 and § 42-150aa [b]). *Held*:

1. B could not prevail on his claim that, once he had exhausted his chiropractic benefit under his health plan, § 2.03.12 (b) in the provider agreement required D to provide B with an acknowledgment form, listing all noncovered services, at each and every subsequent visit prior to treating B, and, thus, that D was precluded from seeking payment for noncovered services because he failed to provide B with that form prior to rendering treatment for which B would be billed directly; D did not breach the provider agreement by failing to properly utilize the acknowledgment form, as D notified B in writing that he had exhausted his chiropractic benefit for office visits under his health plan by providing B with a verification form advising him that his insurance provided coverage for only ten chiropractic visits per calendar year, the verification form properly notified B in writing as to his financial responsibilities, covered services, and member eligibility and benefits, as required by § 2.03.12 (d) in the provider agreement, and it was readily apparent from the applicable language in both the provider agreement and the acknowledgment form that § 2.03.12 (b) applies to noncovered services, which are services that are not covered under a member's health plan, and is not applicable to services that are covered under a health plan but are subject to plan limits, such as services rendered for members who have exhausted their chiropractic benefit under their health plan.
2. This court declined to review B's claim that the authorization form violated §§ 36a-573 and 42-150aa (b), B having failed to brief that claim adequately: B provided only conclusory statements and did not provide analysis of the law, cite to case law, or explain how those statutes were applicable to the facts of the present case; moreover, B could not prevail on his claim that the authorization form was illegal and against public policy because it violated § 20-7f (b), which addresses balance billing and prohibits such billing for medical services covered under a managed care plan, as the challenged provision in the authorization form did not

establish that balance billing is the inherent purpose of the authorization form and B did not identify a single charge that would constitute balance billing, and this court rejected B's construction of the challenged provision, as there was another completely plausible interpretation that would not violate the statute and was completely consistent with D's obligations under § 2.03.12 (d) in the provider agreement, namely, that D could bill B directly for any charges that were not paid by B's insurance.

Argued May 22—officially released September 4, 2018

*Procedural History*

Action for interpleader to determine the defendants' rights to certain funds held by the plaintiff as a result of a settlement in a personal injury action commenced by the defendant Stephen Boileau, brought to the Superior Court in the judicial district of Fairfield, where the court, *Bellis*, *J.*, granted the plaintiff's motion for an interlocutory judgment of interpleader and ordered the plaintiff to deposit the funds with the clerk of the court; thereafter, the matter was tried to the court, *Radcliffe*, *J.*; judgment ordering distribution of the funds in part to the named defendant and in part to the defendant Stephen Boileau, from which the plaintiff appealed and the defendant Stephen Boileau cross appealed to this court; subsequently, the plaintiff withdrew his appeal. *Affirmed.*

*Andrew M. McPherson*, for the cross appellant (defendant Stephen Boileau).

*Sabato P. Fiano*, for the appellee (named defendant).

*Opinion*

BRIGHT, J. In this interpleader action, the plaintiff-stakeholder, Attorney Enrico Vaccaro, sought an order determining the rights of the defendant-claimant, Stephen Boileau, and the other defendant-claimant, William DeAngelo,[1] Boileau's chiropractic physician, to a

[1] DeAngelo was misidentified as "D'Angelo" on the summons, and that misspelling has been retained in the case caption. We, however, use the correct spelling of his name throughout this opinion.

portion of the proceeds from a settlement resolving Boileau's personal injury action. Boileau cross appeals[2] from the judgment of the trial court, rendered after a court trial, ordering that $5780 of the contested funds be disbursed to DeAngelo. On appeal, Boileau claims that the court improperly determined that DeAngelo is entitled to any portion of the settlement funds because: (1) DeAngelo failed to comply with the notice requirement of the provider services agreement between DeAngelo and the administrator of Boileau's health plan, and, therefore he may not bill Boileau for services rendered; and (2) the form that Boileau signed acknowledging his financial responsibility for services rendered by DeAngelo is illegal and unenforceable. We affirm the judgment of the trial court.

The record reveals the following facts, as found by the trial court or otherwise undisputed, and procedural history. Vaccaro represented Boileau in a personal injury action for injuries sustained in a motor vehicle accident that occurred on August 29, 2011. "Prior to retaining . . . Vaccaro to represent him, [Boileau] sought medical care and treatment for his injuries from . . . DeAngelo . . . d/b/a Neuro-Spinal Center of Connecticut." At that time, "Boileau was an enrollee in Cigna HealthCare [(Cigna)], a managed care health plan. Coverage under the plan was secured through his employer. . . . Boileau never received a summary of his health insurance plan from his employer, and was not familiar with the specific coverages afforded under the applicable policy."

[2] Although Vaccaro filed the present appeal on March 22, 2017, and Boileau filed a cross appeal on March 31, 2017, Vaccaro and Boileau jointly submitted a single brief. After oral argument, we sua sponte raised the issue of whether Vaccaro, as a disinterested stakeholder, had standing to pursue the claims raised in the jointly filed brief. On July 5, 2018, we issued an order granting Vaccaro permission to withdraw his appeal or file a supplemental brief giving reasons why his appeal should not be dismissed for lack of standing. Vaccaro withdrew his appeal on July 10, 2018, and, accordingly, only Boileau's cross appeal is before this court.

At all relevant times, DeAngelo was a participating provider with Cigna and American Specialty Health Networks, Inc. (American). Cigna contracted with American "to provide administrative services and a network of Contracted Chiropractors to meet the health care and customer service needs of Members . . . ." DeAngelo and American entered into a "Provider Services Agreement" (provider agreement), which defined and governed their relationship, and respective rights and obligations. Pursuant to § 2.03.12 of the provider agreement, DeAngelo agreed, inter alia, "to properly notify Members in writing prior to the provision of Chiropractic Services" of their financial responsibilities, "Member Eligibility/Benefits," and "Covered Services."

On August 31, 2011, at his initial visit and prior to receiving treatment, Boileau signed a form provided by DeAngelo's office titled "Patient Authorization for Treatment & Financial Policy" (authorization form). The authorization form provides in relevant part: "I fully understand that I am directly responsible to the Neuro-Spinal Center for all professional services submitted and agree to fully satisfy the bill for professional services rendered. I agree to pay you your regular charges for all medical services rendered to me. If so, I agree to pay those charges which are not paid by my health insurance. . . . Unpaid balances will be subject to an 18 [percent] finance charge per year or 1.5 [percent] per month."

DeAngelo's office also had Boileau sign a document titled "Notice of Physician's Lien" (letter of protection) on September 7, 2011, which provides in relevant part: "I hereby authorize and direct you, my attorney/insurance carrier, to pay directly to said doctor such sums as may be due and owing him for medical service rendered me both by reason of this accident and by reason of any other bills that are due his office and to withhold such

sums from any settlement, judgment or verdict as may be necessary to adequately protect said doctor. And I hereby further give a [l]ien on my case to said doctor against any and all proceeds of my settlement, judgment or verdict which may be paid to you, my attorney/insurance carrier, or myself, as the result of the injuries for which I have been treated [or] injuries in connection therewith. . . .

"I fully understand that I am directly and fully responsible to said doctor for all medical bills submitted by him for service rendered me and that this agreement is made solely for said doctor's additional protection and in consideration of his awaiting payment. And I further understand that such payment is not contingent on any settlement, judgment or verdict by which I may eventually recover said fee. All unpaid balance[s] will be subject to an 18 [percent] finance charge or 1.5 [percent] per month." The letter of protection was signed by Vaccaro on September 19, 2011.

Subsequently, at his thirteenth treatment with DeAngelo, Boileau received an "Insurance Verification Sheet" (verification form), which indicated that his health plan covered only ten chiropractic treatments in each calendar year. At the bottom of the verification form, which Boileau signed on September 23, 2011, is the following: "I _____, understand that I have a maximum of _____ visits per calendar year. I understand that it is my responsibility to keep record of how many visits have been used. I understand that I will be responsible for any visits over this amount. I have read and understand the above and also understand the insurance company verbal verification is not a guarantee of benefits. Regardless of insurance, I am financially responsible." Although the blank spaces on the verification form were not filled in, the body of the document reflected that Boileau's insurance covered only ten visits per calendar year, and Boileau's signature

appears below the quoted provision. Boileau, despite knowing after he signed the verification form that his insurance covered only ten chiropractic office visits, received sixteen additional treatments from DeAngelo between September 23 and November 14, 2011, for a total of twenty-nine visits in 2011. In 2012, Boileau received eleven treatments from DeAngelo. Therefore, Boileau received a total of twenty visits that were not covered by his benefit plan, nineteen in 2011, and one in 2012.[3]

In January, 2014, Vaccaro obtained a settlement in Boileau's personal injury action in the amount of $75,000. In a letter addressed to DeAngelo dated January 24, 2014, Vaccaro stated: "With respect to your claim for $6059 from [Boileau] for services rendered, Cigna, his health insurance carrier, has advised that for services rendered by you in 2011 you are only owed $240. With respect to services rendered in 2012, you failed to submit any of these expenses to Cigna for payment although he was clearly covered for [ten] visits. You are at most, therefore, entitled to payment by [Boileau] for an eleventh treatment rendered on May 2, 2012, totaling $245, and for a report fee of $450. Enclosed, therefore, please find my check in the amount of $935 in full and final payment of these expenses. I trust that this concludes this matter." DeAngelo did not accept Vaccaro's payment.

"The exchange of correspondence and communications resulted in much acrimony, and . . . DeAngelo filed a grievance against . . . Vaccaro as a result." Thereafter, in March, 2015, Vaccaro commenced the underlying interpleader action, pursuant to General

[3] Boileau does not claim that, as a result of providing the verification form on Boileau's thirteenth visit, DeAngelo is precluded from billing for the eleventh and twelfth visits in 2011.

Statutes § 52-484,[4] seeking an order determining DeAngelo's and Boileau's rights to the $6059 from Boileau's personal injury settlement, and claiming an allowance for attorney's fees and costs incurred in bringing the action. The trial court, *Bellis*, *J.*, rendered an interlocutory judgment of interpleader,[5] and Vaccaro deposited the contested funds with the clerk of the court.

Subsequently, DeAngelo and Boileau filed their respective statements of claim.[6] See Practice Book § 23-44. DeAngelo claimed entitlement to a "total amount greater than $6059 . . . for professional services rendered, interest, attorney's fees and collection costs pursuant to" the authorization form and the letter of protection. Boileau claimed that "DeAngelo's [claim] to the interpleader funds [is] invalid as a matter of law" because it is "based on a contract [that] is illegal, [and] courts cannot enforce it, nor will they enforce any right springing from such [a] contract." According to Boileau, the authorization form is "a consumer contract, as

[4] General Statutes § 52-484 provides: "Whenever any person has, or is alleged to have, any money or other property in his possession which is claimed by two or more persons, either he, or any of the persons claiming the same, may bring a complaint in equity, in the nature of a bill of interpleader, to any court which by law has equitable jurisdiction of the parties and amount in controversy, making all persons parties who claim to be entitled to or interested in such money or other property. Such court shall hear and determine all questions which may arise in the case, may tax costs at its discretion and, under the rules applicable to an action of interpleader, may allow to one or more of the parties a reasonable sum or sums for counsel fees and disbursements, payable out of such fund or property; but no such allowance shall be made unless it has been claimed by the party in his complaint or answer."

[5] "Actions pursuant to § 52-484 involve two distinct parts, the first of which is an interlocutory judgment of interpleader. . . . An interlocutory judgment of interpleader, which determines whether interpleader lies, traditionally precedes adjudication of the claims." (Internal quotation marks omitted.) *Vincent Metro, LLC* v. *YAH Realty, LLC*, 297 Conn. 489, 497, 1 A.3d 1026 (2010).

[6] Boileau filed a revised statement of claim on October 17, 2016, which the court accepted as the operative pleading.

defined by General Statutes [§] 42-151, which is patently illegal and unenforceable because it provides for the recovery of interest on unpaid balances at the rate of 18 [percent] per annum, in violation of General Statutes [§ 37-4 and General Statutes (Rev. to 2011) § 36a-573]; provides for the recovery of attorney's fees in excess of the maximum amount allowed under General Statutes [(Rev. to 2011) §] 42-150aa; provides for the recovery of sums by a health care provider for medical services covered under a managed care plan in violation of General Statutes [§] 20-7f; and provides for the recovery of report fees in violation of General Statutes [§] 20-7h,[7] all in violation of the [G]eneral [S]tatutes and public policies of this [s]tate." (Footnote added; internal quotation marks omitted.)

The court, *Radcliffe*, *J.*, held a trial on October 19, 2016.[8] At trial, Boileau, DeAngelo, and Deborah Lanci, a medical insurance specialist employed by DeAngelo, testified. During direct examination, Boileau testified that he knew that he was entitled to only ten chiropractic visits per calendar year after he signed the insurance verification form on September 23, 2011. Despite acknowledging that fact, Boileau testified that he thought his insurance would cover his treatment, and that "nobody said, oh, you're not going to be covered. Nobody came up to me and said, here, you're done on your ten visits. I didn't hear that part."

Lanci testified that DeAngelo's office submitted claims to Boileau's insurance for ten visits in 2011 and ten visits in 2012, but Boileau's insurance did not pay for four of the visits, two in 2011 and two in 2012, due

[7] The authorization form was signed by Boileau in 2011, before the legislature enacted § 20-7h; see Public Acts 2012, No. 12-14, § 1.

[8] The court held a hearing on October 18, 2016, where Cigna appeared as an interested party seeking an order to seal certain documents containing proprietary information. In addition, the parties premarked exhibits and the court provided them the opportunity to offer opening statements.

to DeAngelo's failure to submit treatment plans after Boileau's eighth visit in each year. Although Boileau's account statement, which was admitted into evidence at trial, reflected a balance of $6059, DeAngelo's statement of claim alleged that Boileau owed $5239 for treatment. Lanci further testified that DeAngelo's office credited Boileau's account for those four visits, thereby explaining the discrepancy between Boileau's account statement, which reflected a balance of $6059, and DeAngelo's statement of claim, which claimed only $5239 for chiropractic services.

On March 6, 2017, the court issued its memorandum of decision. The court found that DeAngelo was entitled to $5780, including $5239 for chiropractic services provided to Boileau, $450 for an "impair rating" report, and $95 for other reports.[9] The court further found that Boileau was entitled to $279, the remaining balance of the interpleader funds. This appeal followed.

On appeal, Boileau claims that the court improperly determined that DeAngelo is entitled to any portion of the settlement funds because (1) DeAngelo failed to comply with the provider agreement, and (2) the authorization form, which is the basis for DeAngelo's claim to the settlement funds, is unenforceable, as it is "illegal on its face and is contrary to public policy."

As a preliminary matter, we note that the court's memorandum of decision is unclear as to the legal basis for its conclusion as to its award of the settlement funds, and Boileau did not seek articulation of the court's decision. See Practice Book § 61-10. Although it would have been preferable for the trial court to provide its legal analysis in its memorandum of decision, "[w]hen

[9] The total amount awarded to DeAngelo should have been $5784. Although we note the arithmetic error, neither party has challenged it. See *Guzman* v. *Yeroz*, 167 Conn. App. 420, 422 n.3, 143 A.3d 661, cert. denied, 323 Conn. 923, 150 A.3d 1152 (2016).

the facts underlying a claim on appeal are not in dispute and that claim is subject to de novo review, the precise legal analysis undertaken by the trial court is not essential to the reviewing court's consideration of the issue on appeal." (Internal quotation marks omitted.) *State* v. *Donald*, 325 Conn. 346, 354, 157 A.3d 1134 (2017). In the present case, the court set forth the relevant factual findings, which are not challenged by the parties, in its memorandum of decision, and both of Boileau's claims are subject to de novo review. Accordingly, the record is adequate for review. See id.

I

Boileau first claims that the court improperly determined that DeAngelo is entitled to a portion of the settlement funds because DeAngelo failed to comply with the notice provision in the provider agreement. Specifically, he argues that DeAngelo, pursuant to the provider agreement, had to provide Boileau with a "Member Billing Acknowledgment" form (acknowledgment form) listing all "Non-Covered Services" prior to treating Boileau. According to Boileau, once he had exhausted his chiropractic benefit under his health plan, DeAngelo had to provide him with an acknowledgment form *at each and every subsequent visit* before treating him. Thus, he argues that "DeAngelo is precluded from seeking [payment] for [N]on-[C]overed [S]ervices (those services provided after the [tenth] treatment per calendar year) from . . . Boileau."

Both parties agree that the provider agreement is an unambiguous contract subject to plenary review on appeal. "The standard of review for contract interpretation is well established. Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact . . . [when] there is definitive contract language, the determination of what the parties intended by their . . . commitments

is a question of law [over which our review is plenary]." (Internal quotation marks omitted.) *Meeker* v. *Mahon*, 167 Conn. App. 627, 632, 143 A.3d 1193 (2016).

"In ascertaining the contractual rights and obligations of the parties, we seek to effectuate their intent, which is derived from the language employed in the contract, taking into consideration the circumstances of the parties and the transaction. . . . We accord the language employed in the contract a rational construction based on its common, natural and ordinary meaning and usage as applied to the subject matter of the contract." (Internal quotation marks omitted.) *Welch* v. *Stonybrook Gardens Cooperative, Inc.*, 158 Conn. App. 185, 197, 118 A.3d 675, cert. denied, 318 Conn. 905, 122 A.3d 634 (2015). "Furthermore, [i]n giving meaning to the language of a contract, we presume that the parties did not intend to create an absurd result." (Internal quotation marks omitted.) *South End Plaza Assn., Inc.* v. *Cote*, 52 Conn. App. 374, 378, 727 A.2d 231 (1999).

Boileau does not dispute that DeAngelo rendered the treatments; he also does not claim that the charges for those treatments are unreasonable, or that DeAngelo misrepresented Boileau's eligibility and benefits under his health plan. In fact, on appeal, Boileau does not claim that DeAngelo did not notify him that he had exhausted his chiropractic benefit under his health plan. Instead, Boileau asserts that he is a third-party beneficiary of the provider agreement between American and DeAngelo,[10] that DeAngelo breached the provider agreement by failing to provide Boileau with the contractually required acknowledgment form identifying the "Non-Covered Services" prior to rendering

[10] During oral argument before this court, counsel for DeAngelo stated that he does not dispute that Boileau is a third-party beneficiary of the provider agreement. Because DeAngelo concedes this issue, we will assume without deciding that Boileau is, in fact, a third-party beneficiary of the provider agreement.

treatment, and, as a result, he is contractually obligated to hold Boileau harmless for all charges for those visits in excess of Boileau's annual limit under his health plan. Consequently, the dispositive question is whether DeAngelo breached the provider agreement by failing to utilize the acknowledgment form after Boileau had exhausted his chiropractic benefit under his health plan. We conclude that he did not.

Boileau claims that § 2.03.12 of the provider agreement obligated DeAngelo to utilize the acknowledgment form detailing the specific "Non-Covered Services" prior to rendering treatment to Boileau after Boileau had exhausted his coverage under his health plan. Section 2.03.12 provides in relevant part: "Contracted Chiropractor Notification to Members of Their Financial Responsibilities, Member Eligibility/Benefits, and Covered Services. Members need to be notified by their Contracted Chiropractor of their financial responsibility for amounts they may owe Contracted Chiropractor for Chiropractic Services and of their [Member] Eligibility/Benefits and Covered Services prior to the provision of services. Therefore, Contracted Chiropractor agrees to properly notify Members in writing prior to the provision of Chiropractic Services as follows:

"(a) Members Determined to be Ineligible. Prior to or on the initial visit before rendering services, Contracted Chiropractor agrees to provide notification to all patients that represent themselves as Members that they must reimburse the Contracted Chiropractor for all rendered services if the Member is later determined to be ineligible with [American] or a Payor. The Initial Health Status form includes a section meeting the notification requirement.

"(b) Non-Covered Services. Contracted Chiropractor agrees to have any Member who desires to receive and

self-pay for Non-Covered [S]ervices complete and execute the Member Billing Acknowledgment form prior to rendering services to the Member. The Member Billing Acknowledgment form includes a section where the Contracted Chiropractor must identify Non-Covered [S]ervices to be rendered and the amounts for which the Member is agreeing to self-pay the Contracted Chiropractor. . . .

"(d) Accuracy of Member Eligibility/Benefits and Covered Services Information. Contracted Chiropractor agrees to provide current Member Eligibility/Benefits and Covered Services information to Members. [American] shall provide Contracted Chiropractor with Member Eligibility/Benefits and Covered Services information through its provider services department . . . . Contracted Chiropractor must verify Member Eligibility/Benefits and Covered Services initially and periodically during a Member's course of treatment.

"Contracted Chiropractor agrees to properly inform Members of their financial responsibilities, Member Eligibility/Benefits and Covered Services. Contracted Chiropractor agrees to use the appropriate written notification process as defined in this Section and the Operations Manual. Contracted Chiropractor agrees and understands that in the absence of the proper notification and appropriate written agreement, the Member shall be held harmless by Contracted Chiropractor, [American] and/or Payor and agrees to waive all charges and not seek payment from Member, [American] and/or Payor."

"Covered Services," "Non-Covered Services" and "Member Eligibility/Benefits" are all defined terms in the provider agreement. "Covered Services" is defined as "Medically Necessary Services for Covered Conditions arranged under a Member Benefit Plan and, pursuant to this Agreement, which Contracted Chiropractor

is licensed and qualified to provide and for which Contracted Chiropractor accepts payment from [American] or Payor as payment in full, except for applicable Member Payments." "Non-Covered Services" is defined as "all services other than those defined as Covered Services. Non-Covered Services are not subject to the Payor Summaries and Fee Schedule Amounts listed in Attachments D and E to this Agreement." "Member Eligibility/Benefits" is defined as "information . . . pertaining to each Member's eligibility, including initial date of eligibility and last date of eligibility and benefits including, but not limited to Member Payments such as co-payments, deductibles and/or co-insurance, annual benefit limits, such as 20, 30, or 40 visits, and remaining annual benefits."

Boileau argues that because it is undisputed that DeAngelo did not utilize the acknowledgment form prior to rendering the treatments for which Boileau would be billed directly, as allegedly required by § 2.03.12 (b) of the provider agreement, DeAngelo breached the provider agreement. DeAngelo, however, argues that he complied with § 2.03.12 (d) by providing Boileau with the verification form advising him that his insurance provided coverage for only ten chiropractic visits per calendar year. DeAngelo further argues that § 2.03.12 (b) does not apply once a member has exhausted the benefits under the member's health plan, and "the purpose of the [acknowledgment] form was to avoid confusion in the event that the medical provider rendered specific, individual types of [N]on-[C]overed [S]ervices while simultaneously providing [C]overed [S]ervices within the scope of the subject plan (i.e., within the [ten] covered visits)." We conclude, on the basis of the evidence admitted at trial,[11] that § 2.03.12 (b)

[11] Section 1.04 of the provider agreement provides in relevant part: "This [provider agreement] between Contracted Chiropractor and [American] includes this Agreement, the Operations Manual, the attachments listed [in this Agreement], and any amendments to such documents. . . . The attachments . . . are incorporated by reference herein. Any reference to the

applies only to "Non-Covered Services," not to services rendered for members who have exhausted their chiropractic benefit under their health plan.

It is readily apparent from the language in both the provider agreement and the acknowledgment form that there is a distinction between services that are not covered under a member's health plan and services that are covered under a health plan, but are subject to plan limits. In particular, the language makes clear the different obligations a contracted chiropractor has depending on whether the provider is supplying information to the member regarding "Non-Covered Services" or supplying information regarding "Member Eligibility/Benefits" and "Covered Services."

Section 2.03.12 (b) requires DeAngelo to have a member sign an acknowledgment form before rendering "Non-Covered Services." The definitions of "Covered Services" and "Non-Covered Services" are clear in that they apply to the type of services being provided. Medically necessary services for covered conditions are "Covered Services." By definition, services that are not medically necessary are "Non-Covered Services." Significantly, § 2.03.12 (b) imposes no obligation on the contracted chiropractor regarding "Member Eligibility/Benefits," which, by definition, includes information regarding the number of visits for which a member has coverage in a given year. Instead, § 2.03.12 (d) sets forth the contracted chiropractor's obligation regarding "Member Eligibility/Benefits" and "Covered Services," which simply requires that the contracted chiropractor provide such information using "the appropriate written notification process as defined in this Section and the Operations Manual." It does not require use of the

'Agreement' shall include the [American] Operations Manual . . . and each of the attachments . . . as amended, unless otherwise specified." The operations manual was not admitted into evidence.

acknowledgement form, which is required for "Non-Covered Services" in accordance with § 2.03.12 (b).[12] Consequently, the notification requirement in § 2.03.12 (b) would not apply because visits exceeding the member's maximum benefit under the health plan are not "Non-Covered Services" under the provider agreement.

This interpretation is consistent with the language in the acknowledgment form providing that "Non-Covered [S]ervices include services such as supplements that are not covered by the member's health plan. Non-Covered [S]ervices may also include services determined by [American] to be maintenance-type services." Those examples of "Non-Covered Services" are not related to a member's eligibility or benefits, and there is no indication that the form would apply to the number of services, in addition to particular types of services that always are not covered under the member's health plan. In addition, the acknowledgment form provides: "I . . . do hereby acknowledge that *a certain portion of my care will not be covered* by my . . . health plan under the terms of my Benefit Plan . . . ." (Emphasis added.) If a member has exhausted coverage under the health plan, then there is no portion of the member's care that will be covered, and it would be illogical to have the member acknowledge that "a certain portion" of the member's care will not be covered.

Furthermore, the acknowledgment form provides that DeAngelo may not bill a member "*during the*

[12] The acknowledgement form is not the only written notification process described in § 2.03.12. Section 2.03.12 (a) requires written notification as to the member's financial responsibility for services that are ineligible for reimbursement before any services are provided. It provides that "the Initial Health Status form includes a section meeting the notice requirement." That form was not admitted into evidence. In addition, as noted previously in this opinion, § 2.03.12 (d) refers to the operations manual, also not admitted into evidence, as setting forth the appropriate notification process. The fact that there are different types of notification for different situations further confirms that the acknowledgement form is not intended for any purpose aside from "Non-Covered Services," pursuant to § 2.03.12 (b).

*course of*" a treatment plan approved by American, except for copays, deductibles, or charges for "Non-Covered Services." (Emphasis added.) This further supports our construction of the provider agreement because if a member is not covered for any office visits under the health plan, the member would not be receiving services "during the course of" an approved treatment plan. Thus, the acknowledgment form is required when a member is receiving services that are covered under the health plan, but has elected to receive additional services that are not covered under the health plan.[13]

Finally, our conclusion is supported by additional language in the provider agreement. Section 1.07 of the provider agreement provides in relevant part: "Claims Payment Amount. The Claims Payment Amount is the actual amount paid directly and solely by [American] to Contracted Chiropractor and shall be calculated by first deducting from billed charges submitted on a claim any amounts including but not limited to Non-Covered Services, duplicate billed amounts for services, *amounts exceeding benefit maximums or limitations of Member Benefit Plans* . . . ." (Emphasis added.) Accordingly, "amounts exceeding benefit maximums or limitations" is a distinct category from, and not the same as, "Non-Covered Services," although both types of services are services for which American will not pay the contracted chiropractor. In other words, if a member has exhausted the member's benefit for chiropractic visits, then American will not pay any charges for visits exceeding the member's maximum benefit

[13] Boileau also claims that DeAngelo billed him for massages, which are not covered under his health plan, without having Boileau sign an acknowledgment form. DeAngelo, however, did not bill Boileau for massages that were provided during visits that were covered by Boileau's health plan. DeAngelo only billed Boileau for all services provided during visits that exceeded Boileau's annual limit of ten chiropractic visits.

under the health plan. The provider agreement, however, does not identify such services as "Non-Covered Services" and, therefore, a contracted chiropractor is not obligated to use an acknowledgment form when rendering services that exceed the member's chiropractic benefit limit.

Here, after DeAngelo informed Boileau that he had exhausted his chiropractic benefit under his health plan, Boileau was notified in writing as to his financial responsibilities, "Member Eligibility/Benefits" and "Covered Services," as required by § 2.03.12 (d) of the provider agreement. Once DeAngelo notified Boileau that he had exhausted his chiropractic benefit for office visits, DeAngelo satisfied the applicable notification requirement in § 2.03.12 (d), and § 2.03.12 (b) simply does not apply. Any other construction of the provider agreement and the acknowledgment form would lead to the absurd result of having Boileau sign an acknowledgment form for every visit, acknowledging that he will be financially responsible for "*a certain portion of*" his care, when, in fact, he has already acknowledged that there is no portion of his care that will be covered by his health plan because he exhausted his health plan's chiropractic benefit. We conclude that the parties to the provider agreement did not intend such a result. See *South End Plaza Assn., Inc.* v. *Cote*, supra, 52 Conn. App. 378 ("[i]n giving meaning to the language of a contract, we presume that the parties did not intend to create an absurd result" [internal quotation marks omitted]).

Consequently, the court properly concluded that DeAngelo is not precluded from billing Boileau for those visits that exceeded Boileau's maximum benefit under his health plan because DeAngelo was not required to have Boileau sign an acknowledgment form prior to each and every one of those visits.

II

Boileau also claims that the court improperly awarded a portion of the settlement funds to DeAngelo because the authorization form, which is the basis for DeAngelo's claim to the $5780 of the settlement funds, is "illegal on its face and is contrary to public policy." Specifically, Boileau claims that the authorization form violates General Statutes (Rev. to 2011) § 20-7f (b),[14] General Statutes (Rev. to 2011) § 36a-573,[15] and § 42-150aa (b),[16] and, therefore, it is illegal and unenforceable. We disagree.

We begin by setting forth our standard of review. "A trial court's decision as to whether a contract is illegal

[14] General Statutes (Rev. to 2011) § 20-7f (b) provides: "It shall be an unfair trade practice in violation of [General Statutes § 42-110a et seq.] for any health care provider to request payment from an enrollee, other than a copayment or deductible, for medical services covered under a managed care plan." Hereinafter, unless otherwise indicated, all references to § 20-7f in this opinion are to the 2011 revision of the statute.

[15] General Statutes (Rev. to 2011) § 36a-573 (a) provides in relevant part: "No person, except as authorized by the provisions of sections 36a-555 to 36a-573, inclusive, shall, directly or indirectly, charge, contract for or receive any interest, charge or consideration greater than twelve per cent per annum upon the loan, use or forbearance of money or credit of the amount or value of . . . (2) fifteen thousand dollars or less for any such transaction entered into on and after October 1, 1997. The provisions of this section shall apply to any person who, as security for any such loan, use or forbearance of money or credit, makes a pretended purchase of property from any person and permits the owner or pledgor to retain the possession thereof, or who, by any device or pretense of charging for the person's services or otherwise, seeks to obtain a greater compensation than twelve per cent per annum. No loan for which a greater rate of interest or charge than is allowed by the provisions of sections 36a-555 to 36a-573, inclusive, has been contracted for or received, wherever made, shall be enforced in this state, and any person in any way participating therein in this state shall be subject to the provisions of said sections . . . ." Hereinafter, unless otherwise indicated, all references to § 36a-573 in this opinion are to the 2011 revision of the statute.

[16] General Statutes § 42-150aa (b) provides: "If a lawsuit in which money damages are claimed is commenced by an attorney who is not a salaried employee of the holder of a contract or lease subject to the provisions of this section, such holder may receive or collect attorney's fees, if not otherwise

and unenforceable involves a question of law which entails our application of plenary review. . . . Similarly . . . the question [of] whether a contract is against public policy is [a] question of law dependent on the circumstances of the particular case . . . ." (Citations omitted; internal quotation marks omitted.) *Carriage House I-Enfield Assn., Inc.* v. *Johnston*, 160 Conn. App. 226, 245–46, 124 A.3d 952 (2015).

The entirety of Boileau's argument is as follows: "In the present action . . . § 20-7f (b) provides that it is an unfair billing practice for a healthcare provider to request payment from an enrollee, other than a copayment or deductible, for medical services covered under a 'managed care plan.' . . . DeAngelo is a healthcare provider as defined in the . . . General Statutes. The [authorization] form unequivocally establishes that it makes . . . Boileau responsible for 'all professional services submitted,' that . . . Boileau agrees 'to fully satisfy the bill for professional services rendered,' that . . . Boileau agrees to 'pay those charges [that] are not paid by my health insurance.' As a result, the [authorization form] on its face negates . . . § 20-7f (b), thereby making the [authorization form] illegal and unenforceable.

"Furthermore, as previously stated . . . Lanci, who is . . . DeAngelo's billing specialist, testified that . . . DeAngelo, as a practice, never uses the [acknowledgment form] because . . . DeAngelo never bills for [N]on-[C]overed [S]ervices, thereby further showing that the intent of the [authorization form] is to violate . . . § 20-7f (b).

"As previously stated, the express terms of the [acknowledgment form], which is a consumer contract,

prohibited by law, of not more than fifteen per cent of the amount of any judgment which is entered."

[provide] that . . . Boileau is responsible for all professional services submitted, to fully satisfy the bill for professional services rendered and to pay those charges not paid by health insurance. The [acknowledgment form] on its face violates . . . § 36a-573 by making . . . Boileau responsible for an 18 [percent] interest charge. The [authorization form] on its face also violates . . . § 42-150aa (b), which limits attorney's fees to 15 [percent] of the amount of any judgment [rendered]. . . . DeAngelo claimed 18 [percent] interest per year in the present action." (Footnotes omitted.)

We conclude that Boileau has abandoned his claims that the authorization form violates §§ 36a-573 and 42-150aa (b) as a result of an inadequate brief. "It is well settled that [w]e are not required to review claims that are inadequately briefed. . . . We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited. . . . [A]ssignments of error which are merely mentioned but not briefed beyond a statement of the claim will be deemed abandoned and will not be reviewed by this court." (Internal quotation marks omitted.) *Nowacki* v. *Nowacki*, 129 Conn. App. 157, 163–64, 20 A.3d 702 (2011).

Boileau provides no analysis of the law and does not cite a single case in support of either one of his claims. Specifically, he fails to explain the applicability of § 36a-573 to the facts of this case, which involve a medical

services provider imposing a default interest rate on an unpaid bill for services rendered. Furthermore, Boileau fails to explain how a bill for services rendered constitutes a loan within the ambit of the usury statutes,[17] or how a contractual provision providing for the collection of attorney's fees, which are permitted by statute, renders the entire contract illegal or unenforceable. Boileau's conclusory statements are insufficient to avoid abandoning these claims. Accordingly, we decline to

[17] In *Stelco Industries, Inc.* v. *Zander*, 3 Conn. App. 306, 308–309, 487 A.2d 574 (1985), this court adopted the rationale of the United States District Court for the District of Connecticut in *Scientific Products* v. *Cyto Medical Laboratory, Inc.*, 457 F. Supp. 1373, 1377–78, 1380 (D. Conn. 1978), "wherein the court, after a thorough analysis of this state's usury statute, concluded that 'Connecticut's courts have never expanded the usury statute to include any transaction which was not a loan of money, and, on the basis of what has been considered above, I do not believe that they would do so in this case if it was before them for decision. Furthermore, the fact that the Connecticut statute provides a particularly severe penalty—lenders who violate the statute shall forfeit not only all interest but also all the principal . . .—is an additional reason for not reading the usury statute more broadly than it is written.' . . .

" 'Both the judicial and legislative treatment of debts arising from the sale of goods on credit clearly indicate that Connecticut adheres to the traditional, historical and analytical views that sales on credit are not equated with loans and that the prohibition of usurious interest applies only to loans of money.' " (Citation omitted.)

In the present case, we fail to see how there could be any claim that DeAngelo loaned Boileau money. DeAngelo provided chiropractic services for which Boileau failed to pay. Boileau does not explain how the failure to pay a bill in a timely fashion converts the provision of professional services into a loan of money. Moreover, DeAngelo, in accordance with the letter of protection, agreed to forgo any payment from Boileau until Boileau had settled his personal injury action. Boileau's treatment with DeAngelo concluded on May 3, 2012, and Boileau settled his personal injury action in January, 2014. Neither the authorization form, nor the letter of protection permitted DeAngelo to charge Boileau *any amount of interest* during that time. Pursuant to the authorization form, Boileau would be charged interest only if he failed to pay his bill on time. Consequently, the 18 percent interest charge appears to be simply a late fee agreed to by the parties. We need not consider whether the late fee is an unenforceable penalty because that issue has not been raised, and, in any event, the court did not award DeAngelo any interest. The salient point though is that Boileau addresses none of these issues in his brief.

review Boileau's claim as it relates to §§ 36a-573 and 42-150aa (b).

We now address Boileau's claim that the authorization form is illegal and against public policy because it violates § 20-7f (b) by providing that Boileau agrees to fully satisfy DeAngelo's bill for professional services rendered.

The following legal principles are relevant to our resolution of Boileau's claim. "Although it is well established that parties are free to contract for whatever terms on which they may agree . . . it is equally well established that contracts that violate public policy are unenforceable." (Internal quotation marks omitted.) *Dougan* v. *Dougan*, 301 Conn. 361, 369, 21 A.3d 791 (2011). "As a general rule, a court will [not] lend its assistance in any way toward carrying out the terms of a contract, the *inherent purpose* of which is to violate the law . . . ." (Emphasis in original; internal quotation marks omitted.) *Carriage House I-Enfield Assn., Inc.* v. *Johnston*, supra, 160 Conn. App. 246. Nevertheless, "[t]he principle that agreements contrary to public policy are void should be applied with caution and only in cases plainly within the reasons on which that doctrine rests . . . ." (Internal quotation marks omitted.) *Dougan* v. *Dougan*, 114 Conn. App. 379, 389, 970 A.2d 131 (2009), aff'd, 301 Conn. 361, 21 A.3d 791 (2011).

"Section 20-7f addresses balance billing. Typically, [b]alance billing [occurs] when a provider seeks to collect from [a managed care organization] member the difference between the provider's billed charges for a service and the amount the [managed care organization] paid on that claim. . . . [M]ost privately insured people are covered by [a managed care organization], which contracts with a network of providers to offer medical services to members. In return, providers agree to deliver services at a negotiated rate that is generally

below their usual charges. Providers also agree to hold harmless (i.e., not to balance bill) members for the difference between the contracted rate and their typical billed charge." (Citations omitted; internal quotation marks omitted.) *Gianetti* v. *Rutkin*, 142 Conn. App. 641, 650–51, 70 A.3d 104 (2013). Accordingly, § 20-7f (b) "prohibits balance billing for medical services *covered under a managed care plan*. . . . In a typical balance billing case, the dispute arises after the insurance company has paid less than the full amount billed by the provider." (Emphasis added; internal quotation marks omitted.) Id., 654–55.

Boileau focuses on the following provision in the authorization form: "I fully understand that I am directly responsible to the Neuro-Spinal Center for all professional services submitted and agree to fully satisfy the bill for professional services rendered. I agree to pay you your regular charges for all medical services rendered to me. If so, I agree to pay those charges which are not paid by my health insurance." According to Boileau, this provision "negates . . . § 20-7f (b), thereby making the [authorization form] illegal and unenforceable." This claim is meritless.

First, the inclusion of the referenced provision does not establish that balance billing is the inherent purpose of the authorization form; see *Carriage House I-Enfield Assn., Inc.* v. *Johnston*, supra, 160 Conn. App. 246; and, Boileau has not identified a single charge billed by DeAngelo that would constitute balance billing. DeAngelo permissibly billed Boileau for his co-payments for each visit that was covered by Boileau's health plan, and DeAngelo's regular and customary charges for each visit that occurred after Boileau's benefits had been exhausted. Second, although Boileau argues that the provision, in accordance with his interpretation, violates § 20-7f, there is another completely

plausible interpretation that would not violate the statute and is completely consistent with DeAngelo's obligations under § 2.03.12 (d), namely, that DeAngelo could bill Boileau directly for any charges that are not paid by Boileau's insurance, including copays, deductibles, and charges for services rendered after his benefits were exhausted or that were not covered by the health plan. "[I]f a contract provision has two possible constructions, by one of which the agreement could be held valid and by the other void or illegal, the former is to be preferred." (Internal quotation marks omitted.) *Marlborough* v. *AFSCME, Council 4, Local 818-052*, 309 Conn. 790, 808 n.15, 75 A.3d 15 (2013). Consequently, we reject Boileau's construction of the challenged provision, and we conclude that the authorization form is not illegal on its face.

The judgment is affirmed.

In this opinion the other judges concurred.

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## STATE OF CONNECTICUT *v.* STEVEN ROBERT DURDEK
## (AC 40995)

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

*Syllabus*

Convicted, following a jury trial, of the crimes of murder, burglary in the first degree, sexual assault in the first degree, arson in the first degree, and tampering with physical evidence, the defendant appealed. During trial, the state's witness, T, testified that the defendant had confessed the crimes to him. During the state's case-in-chief, T admitted that he previously had been convicted, as an adult, of larceny and burglary. In order to impeach T's credibility on cross-examination, defense counsel sought to introduce evidence that T allegedly had committed certain other misconduct as a juvenile. The trial court precluded defense counsel from asking questions about T's juvenile conduct. On appeal, the defendant claimed that the trial court improperly restricted his cross-examination of T. *Held* that the record was inadequate to review the defendant's claim that the trial court improperly restricted his cross-examination

of T, the defendant having failed to make an offer of proof regarding how T would have responded to any question about the alleged misconduct: the defendant had the burden to ensure that the record on appeal was adequate to review any claim of error raised and, regardless of whether the defendant's claim was evidentiary or an unpreserved claim implicating his constitutional rights under the confrontation clause subject to review under the standard set forth in *State* v. *Golding* (213 Conn. 233), the defendant neither asked the court to permit him to create a record by questioning T about his alleged juvenile conduct outside the presence of the jury nor proffered a good faith belief that, if T were asked whether he broke into his father's house and stole keys to a vehicle, T would have answered that question affirmatively, and because this court could not determine on the basis of the record provided whether allowing the defendant to question T would have resulted in the admission of any testimony that could have affected T's credibility, the record was inadequate to evaluate whether the defendant suffered any harm from the trial court's ruling; moreover, the defendant impeached T's credibility on cross-examination in a number of other ways, including highlighting that T originally had been untruthful to the police by telling them in his initial interview that he had no information about the crimes, which was in direct conflict with his trial testimony that the defendant had confessed to T prior to T's police interview, and that T had not reported the defendant's confession until after the police began to make inquiries about several stolen watches that they had connected to T and the defendant.

Argued March 12—officially released September 4, 2018

*Procedural History*

Substitute information charging the defendant with the crimes of murder, felony murder, burglary in the first degree, sexual assault in the first degree, arson in the first degree and tampering with physical evidence, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Kwak*, *J.*; verdict and judgment of guilty; thereafter, the court vacated the conviction of felony murder, and the defendant appealed. *Affirmed*.

*Daniel J. Krisch*, assigned counsel, for the appellant (defendant).

*Timothy J. Sugrue*, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *David L. Zagaja*, senior assistant state's attorney, for the appellee (state).

*Opinion*

PRESCOTT, J. The defendant, Steven Robert Durdek, appeals from the judgment of conviction, rendered after a jury trial, of murder in violation of General Statutes § 53a-54a, felony murder in violation of General Statutes § 53a-54c, burglary in the first degree in violation of General Statutes § 53a-101 (a) (2), sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1), arson in the first degree in violation of General Statutes § 53a-111 (a) (1), and tampering with physical evidence in violation of General Statutes § 53a-155 (a) (1).[1] The defendant's sole claim on appeal is that the trial court improperly restricted his cross-examination of a state's witness by preventing him, for purposes of impeachment, from asking the witness about misconduct that he allegedly had committed as a juvenile. Because the defendant failed to make an offer of proof regarding how the witness would have responded to any question about the alleged misconduct, we conclude that the record is inadequate to review that claim and, accordingly, affirm the judgment of conviction.

The jury reasonably could have found the following facts. The victim[2] resided in the third floor apartment of a multifamily home on Park Street in Manchester. The victim's apartment had two entrances. One was located on the exterior of the house and could be reached by a fire escape. That entrance opened into the apartment's living room. The second entrance was through an interior door that opened into a hallway

[1] In accordance with our policy of protecting the privacy interests of a victim of sexual assault, we decline to identify the victim. See General Statutes § 54-86e.

[2] At sentencing, the court vacated the felony murder conviction in accordance with *State* v. *Polanco*, 308 Conn. 242, 61 A.3d 1084 (2013), and *State* v. *Miranda*, 317 Conn. 741, 120 A.3d 490 (2015). The court then imposed consecutively the maximum term of incarceration for each charge for which the defendant was convicted. The total effective sentence imposed was 115 years of incarceration.

near the bedroom and could be reached by a common interior staircase. The defendant lived near the victim, and had walked past the victim's residence on occasion, but never previously had been on or inside the premises or met the victim.

On January 18, 2014, sometime during the early morning hours, the defendant entered the victim's apartment.[3] The defendant found the victim in her bedroom where she lay sleeping and he forced her to engage in vaginal intercourse. He then repeatedly and fatally struck the victim in the head with a ceramic ashtray, causing her to suffer multiple skull fractures. After she died, the defendant poured lighter fluid on her and ignited it in an attempt to destroy evidence of his crimes. The fire caused significant burns to the victim's genital region and face, and destroyed her mattress.

Shortly thereafter, the victim's landlord, who lived in one of the other apartments in the residence, was awoken by a smoke detector alarm. She looked up the interior staircase and saw smoke coming from underneath the victim's interior door. After placing an emergency call, she entered the victim's apartment through the exterior door, which was unlocked, but she was forced to retreat to the exterior staircase landing because of heavy smoke.

First responders began arriving at the residence shortly after 5 a.m. After the fire was extinguished, investigators discovered the victim's badly burned corpse on her bed. The victim was wearing only a single sock and a long sleeve garment that had been bunched up around her shoulders. Between the victim's legs, investigators discovered a partially melted plastic container that was consistent with packaging used to hold igniter fluid for cigarette lighters. A police dog trained to detect accelerants alerted to evidentiary materials

[3] Neither door showed signs of forced entry.

taken from the victim's shoulder and groin areas, as well as the victim's bed.

The police collected a number of items of evidence from the crime scene, including a heavy ceramic ashtray, on which it later was determined there were traces of the victim's hair and blood, and two DNA swabs taken from the interior doorknob of the living room door that exited onto the fire escape. During the autopsy of the body, a biological sample was collected from inside the victim's vaginal cavity.

The defendant concedes that the DNA sample collected from the doorknob swabs came from him.[4] The state laboratory tested the doorknob DNA sample and determined that it contained a mixture of DNA from two or more individuals. After comparison with a known DNA sample of the victim's blood collected during the autopsy, the victim was identified as a contributor of some of the DNA. Another contributor was determined to be male and, after comparing the DNA profile of that contributor with those contained in a state database of other unidentified DNA profiles and known DNA profiles from convicted offenders, it was found to match a known profile of the defendant. The known DNA sample of the defendant was then submitted to the state laboratory for additional testing and comparison with the DNA evidence collected in the present case.

The state laboratory determined that the doorknob DNA was consistent with that of the defendant or

[4] During closing argument, in discussing the doorknob DNA evidence, defense counsel stated as follows: "At the end of January in 2014, the lab got a DNA hit from their data, which included Steven Durdek as a contributor, his DNA on the interior door handle, that was a match, one in seven billion, it was him. Why did they use the number seven billion? It was explained. That's the rough estimate of the population of the planet. DNA is considered unique with the possibility of identical twins. So one in seven billion says yep, it's your DNA. It's your DNA. My DNA, one in seven billion, that's it. Not a lot of arguing there. That was on the door handle."

another male member of his paternal lineage. The expected frequency of individuals other than the defendant who could have been a contributor to the doorknob DNA was less than one in seven billion in the African American, Caucasian and Hispanic populations.

The laboratory also identified the defendant as a contributor to the DNA obtained from the swab of the victim's vaginal cavity, albeit with far less statistical certainty than that attributed to the doorknob DNA. More specifically, the DNA that was detected on the vaginal swab was determined to contain male DNA that consisted of a mixture of sperm-rich cells and epithelial skin-rich cells. That DNA was determined to be consistent with that of the defendant or another member of his male paternal lineage. The random probability that an individual other than the defendant (or another member of his male paternal lineage) was a source of the DNA material extracted from the skin rich cells was 1 in 1900 in the Caucasian population, 1 in 1100 in the African American population and 1 in 870 in the Hispanic population. The random probability that an individual other than the defendant (or another member of his male paternal lineage) was a source of the DNA material extracted from the sperm rich cells was 1 in 8 in the Caucasian population, 1 in 3 in the African American population, and 1 in 10 in the Hispanic population.

As a result of having obtained the defendant's name in connection with the DNA evidence collected, the police began an investigation of the defendant to determine whether he had any connection to the victim, her family or the location of the murder. No connections were found. The police later obtained a warrant to search the defendant's Facebook records. Those records included a message that the defendant sent at 4:26 on the morning of the murder to a close friend, John Paul Torres, stating, "[y]o, we need to talk, asap."

The police also interviewed Torres. Although he provided no useful information during the initial interview, he contacted the police at a later date and disclosed that the defendant had confessed to him that he had killed the victim and set her on fire.

The defendant was arrested and charged by information with murder, felony murder, burglary in the first degree, sexual assault in the first degree, arson in the first degree and tampering with physical evidence. He was tried before a jury, which returned a guilty verdict on all counts. See footnote 1 of this opinion. This appeal followed.

The defendant's sole claim on appeal is that the trial court improperly restricted his cross-examination of Torres by barring the defendant from questioning Torres for impeachment purposes about misconduct that Torres allegedly committed as a juvenile. Although, at its core, the defendant's claim is evidentiary in nature, he also asserts a consequent constitutional violation. Specifically, he argues first that the court abused its discretion by precluding inquiry into Torres' juvenile misconduct on the ground that the evidence was cumulative of his adult convictions of larceny and burglary. He next asserts that the court's improper ruling amounted to an impermissible limitation on his right to confront witnesses as guaranteed by the sixth amendment to the United States constitution, which right necessarily includes an opportunity to expose a witness' motive, interest, bias, or prejudice, and to test the witness' veracity and credibility.[5] See *State* v. *Barnes*, 232

[5] "It is fundamental that the defendant's rights to confront the witnesses against him and to present a defense are guaranteed by the sixth amendment to the United States constitution. . . . A defendant's right to present a defense is rooted in the compulsory process and confrontation clauses of the sixth amendment . . . . Furthermore, the sixth amendment rights to confrontation and to compulsory process are made applicable to state prosecutions through the due process clause of the fourteenth amendment. . . .

"In plain terms, the defendant's right to present a defense is the right to present the defendant's version of the facts as well as the prosecution's to

Conn. 740, 746, 657 A.2d 611 (1995); see also *State* v. *Holley*, 327 Conn. 576, 593–94, 175 A.3d 514 (2018) (linking confrontation clause of sixth amendment to defendant's right to present defense); *State* v. *Leconte*, 320 Conn. 500, 510, 131 A.3d 1132 (2016) (same). The state argues that the defendant's constitutional claim is unpreserved, but that, regardless of whether the defendant's claim is evidentiary in nature or of constitutional magnitude and therefore amenable to review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), the record is inadequate to review the claim. More particularly, the state argues that because the defendant never made an offer of proof regarding how Torres would have responded if the defendant had been permitted to question him regarding his alleged misconduct as a juvenile, this court is left to speculate whether the court's ruling excluded potentially admissible impeachment evidence that harmed the defendant. We agree that the record is inadequate to review the defendant's claim.

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the jury so that it may decide where the truth lies. . . . It guarantees the right to offer the testimony of witnesses, and to compel their attendance, if necessary . . . . Therefore, exclusion of evidence offered by the defense may result in the denial of the defendant's right to present a defense. . . .

"Although it is within the trial court's discretion to determine the extent of cross-examination and the admissibility of evidence, the preclusion of sufficient inquiry into a particular matter tending to show motive, bias and interest may result in a violation of the constitutional requirements [of the confrontation clause] of the sixth amendment. . . .

"These sixth amendment rights, although substantial, do not suspend the rules of evidence . . . . A court is not required to admit all evidence presented by a defendant; nor is a court required to allow a defendant to engage in unrestricted cross-examination. . . . Instead, [a] defendant is . . . bound by the rules of evidence in presenting a defense . . . . Nevertheless, exclusionary rules of evidence cannot be applied mechanistically to deprive a defendant of his rights . . . . Thus, [i]f the proffered evidence is not relevant [or constitutes inadmissible hearsay], the defendant's right[s] to confrontation [and to present a defense are] not affected, and the evidence was properly excluded." (Citation omitted; internal quotation marks omitted.) *State* v. *Holley*, 327 Conn. 576, 593–94, 175 A.3d 514 (2018).

The following additional facts are relevant to our discussion. Prior to the commencement of evidence, the court, *Kwak*, *J.*, authorized the disclosure of Torres' subpoenaed juvenile arrest records pursuant to General Statutes § 46b-124 (e), and copies were provided to the defendant and the state. The parties were ordered by the court not to disseminate further any information in the juvenile records without the approval of the court. Immediately before Torres was called to testify for the state, the court inquired of the defendant whether he intended to offer any information from Torres' juvenile records. The following colloquy ensued:

"[Defense Counsel]: Basically, Your Honor, it wasn't so much for the record as for the acts themselves that I wanted to question.

"The Court: Which acts?

"[Defense Counsel]: The act of breaking into his father's house in Waterbury stealing keys.

"The Court: So burglary and the theft basically?

"[Defense Counsel]: Burglary and theft.

"The Court: Okay.

"[The Prosecutor]: My objection is to the particulars. First off, on the juvenile records that were received by subpoena and disclosed to us, we don't even have an adjudication. But the specific act, I would indicate that the character of the witness, again, this is admissible for impeachment purposes.

"The Court: Right.

"[The Prosecutor]: And counsel's request again into the particulars, I would claim is not for impeachment purposes but to suggest third-party culpability for which there's not a basis. I would ask the court to consider [Connecticut Code of Evidence §] 6-6 as it speaks to

his character and then in the commentary under [§ 6-6 (c)] it gives great discretion in the court to actually consider whether this extrinsic evidence is something that would actually confuse the jury, have them consider things that are both prejudicial, confusing, and cumulative and it reverts back to the criteria to be considered under [Connecticut Code of Evidence §] 4-3, excluding evidence on those grounds. I would specifically indicate that for that purpose, it just clearly flies afield of what its purpose is. It's not to impeach this defendant for his credibility, but to get into a specific act of misconduct, which has nothing to do with his credibility. His credibility is already established as called into question by two convictions closer in time to his testimony today here. We have a larceny six, which goes to veracity, and a burglary three. The specific acts of conduct I think are misplaced.

"The Court: [Defense counsel].

"[Defense Counsel]: Thank you, Your Honor. We have two recent ones and we have more removed ones by time, but they're consistent in his dishonesty and his dishonesty certainly goes to—

"The Court: Well isn't that cumulative. You can introduce the adult records regarding burglary and larceny which are the same acts that you want to introduce.

"[Defense Counsel]: Not the effect. The cumulative has the effect of showing a continuous pattern of dishonesty as opposed to one mistake or two mistakes.

"The Court: No. I don't think that's—to introduce impeachment purposes, you can show evidence of dishonesty or crimes or felonies and you already have that with the adult records, so I don't see the relevance of the juvenile record[s], which show the exact same thing, it's very cumulative.

"[Defense Counsel]: Again, I wasn't going to ask him specifically about his record, *I was going to ask him had he committed the act* [*of*] *burglarizing his father's house or entering his father's house without permission to steal his father's keys.* And certainly what we have here is a bare record which says, okay, maybe the guy stole something, but what we have back, and I believe it was 2009, not only did he steal something, he steals it from his own father, which really indicates—

"The Court: Well I think a lot of people [steal from] their own families because they believe that they're not going to report them, and, you know, that's the truth, so I don't see the relevance with whether or not he stole from his father. [Prosecutor], anything else?

"[The Prosecutor]: Only that those further questions would really just bear to general character and not character of the truthfulness and for that reason, it shouldn't be allowed.

"The Court: Okay. I'm not going to allow the juvenile records to come in because I believe it is cumulative, you have the adult records, which are more serious, so you can certainly ask him about those, but not the juvenile records.

"[Defense Counsel]: Very good, Your Honor.

"The Court: All right. Thank you."[6] (Emphasis added.)

[6] On appeal, the defendant is not always precise about the nature of the evidence that was excluded by the trial court. Although the court stated at the end of the colloquy that it was "not going to allow the juvenile records to come in," that statement must be considered in context. The defendant began the colloquy by indicating unequivocally that he was not seeking to admit the juvenile records into evidence either in whole or in part. Rather he only sought to ask Torres about the conduct that was alleged in those records. The court concluded its ruling by clarifying that it was not going to permit the defendant to ask Torres about his juvenile records. Thus, rather than barring the admission of the records themselves, we construe the trial court's ruling as having barred the defendant's right to question the witness about whether he had engaged in the acts described in the records. Nevertheless, even if the defendant had sought to admit the juvenile arrest records into evidence, they could not have been properly admitted

The defendant never asked the court to permit him to create a record by questioning Torres about his juvenile records outside the presence of the jury. The defendant also never proffered a good faith belief that, if asked whether he broke into his father's house and stole his keys, Torres would answer that question affirmatively.

The state then called Torres to testify as the final witness in its case in chief. At the beginning of his direct examination, Torres acknowledged in response to the state's inquiry that he previously had been convicted in 2013 of both larceny and burglary. He then subsequently testified about two occasions on which the defendant confessed to having killed the victim. According to Torres, on the first occasion the defendant stated that "he heard some people talking, he went inside through the window, when the door closed the lady came from around the corner and struck him, they got into it, whatever [she] struck him with, he then struck her with and he said there was a wheezing sound and a gurgling and that's when he knew it was finished." The defendant did not mention at that time that he had set a fire or had any sexual contact with the victim.

After Torres was interviewed by the police and learned more details of the murder, Torres confronted the defendant about the murder and the fact that the police were now investigating the defendant. At that time, the defendant indicated that "he went to the window, him and the lady had it out, he beat the lady up, and then he wrapped her in a blanket, threw on the bed and lit her on fire." The defendant again did not describe any sexual contact with the victim. After this second confession, in which the defendant confirmed to Torres that he had set fire to the victim's body, Torres

by the court for impeachment purposes because "evidence of an arrest in the absence of a conviction is generally not admissible even to attack credibility." *State* v. *Milner*, 206 Conn. 512, 518, 539 A.2d 80 (1988).

decided to contact the police because "it could have been some lady off the street, it could have been my daughter, it could have been anybody."

Although the court's ruling barred him from questioning Torres regarding the acts set forth in his juvenile records, the defendant nevertheless impeached Torres' credibility on cross-examination in a number of other ways. For example, he highlighted the fact that Torres originally had been untruthful to the police by telling them in his initial interview that he had no information about the murder, which was in direct conflict with his trial testimony that the defendant had confessed to him about the murder prior to his interview. The defendant also forced Torres to admit that he had not reported the defendant's confession until after the police began to make inquiries about several stolen watches that they had connected to Torres and the defendant.

The defendant further highlighted a number of factual inconsistencies between Torres' trial testimony and his prior statements to police. Finally, the defendant was not precluded from revisiting Torres' adult criminal convictions that he disclosed on direct examination, and, although he was not asked about those convictions on cross-examination, the defendant raised them during his closing argument.[7]

"In determining the relevancy and admissibility of evidence, trial courts have broad discretion. . . . Our standard of review of an evidentiary ruling is dependent on whether the claim is of constitutional magnitude. If the claim is of constitutional magnitude, the state has the burden of proving the constitutional error was harmless beyond a reasonable doubt. . . . Otherwise, in order to establish reversible error on an evidentiary

[7] We recite the facts in the previous two paragraphs because they are relevant to whether the defendant's claim on appeal is evidentiary or constitutional in nature, which we address in footnote 10 of this opinion.

impropriety, the defendant must prove both an abuse of discretion and a harm that resulted from such abuse." (Citations omitted.) *State* v. *Swinton*, 268 Conn. 781, 797–98, 847 A.2d 921 (2004). As the appellant, the defendant also has the burden to ensure that the record on appeal is adequate to review any claim of error raised. See Practice Book § 61-10; *State* v. *James L.*, 26 Conn. App. 81, 84, 598 A.2d 663 (1991). If a constitutional claim was not preserved at trial, a party may be afforded appellate review only if "(1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40; see *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying *Golding*'s third prong).

Accordingly, regardless of whether the defendant is attempting to raise a properly preserved claim or seeks review under *Golding*, he undisputedly has the burden of providing this court with an adequate record to review his claim. It is axiomatic that this court will not resort to speculation and conjecture in avoidance of an inadequate record. See *State* v. *Raffone*, 163 Conn. App. 410, 415, 136 A.3d 647 (2016).

In the present case, the defendant claims that the court improperly restricted his cross-examination of Torres by not allowing him to ask Torres whether he had broken into his father's house as a juvenile and stolen his keys. Pursuant to Connecticut Code of Evidence § 6-6 (b) (1), "[a] witness may be asked, in good faith, about specific instances of conduct of the witness,

if probative of the witness' character for untruthfulness."[8] Our courts have held that larceny and burglary are acts that demonstrate a person's character for untruthfulness. See *State* v. *Crumpton*, 202 Conn. 224, 229, 520 A.2d 226 (1987) ("crimes involving larcenous intent imply a general disposition toward dishonesty or a tendency to make false statements"); *State* v. *Bailey*, 32 Conn. App. 773, 783, 631 A.2d 333 (1993) (no doubt prior conviction of burglary with larcenous intent bears on credibility of witness). Accordingly, if Torres had admitted to engaging in larceny or burglary as a juvenile, this could have aided the defendant in impeaching his credibility in the eyes of the jury.

Significantly, however, the defendant's questions to Torres about the juvenile misconduct would not themselves have constituted impeachment evidence because "questions are not evidence." (Internal quotation marks omitted.) *State* v. *Grant*, 154 Conn. App. 293, 317, 112 A.3d 175 (2014), cert. denied, 315 Conn. 928, 109 A.3d 923 (2015). Thus, if Torres had denied engaging in the

[8] Section 6-6 of the Connecticut Code of Evidence provides in relevant part: "(a) Opinion and reputation evidence of character. The credibility of a witness may be impeached or supported by evidence of character for truthfulness or untruthfulness in the form of opinion or reputation. Evidence of truthful character is admissible only after the character of the witness for truthfulness has been impeached.

"(b) Specific instances of conduct.

"(1) General rule. A witness may be asked, in good faith, about specific instances of conduct of the witness, if probative of the witness' character for untruthfulness.

"(2) Extrinsic evidence. Specific instances of the conduct of a witness, for the purpose of impeaching the witness' credibility under subdivision (1), may not be proved by extrinsic evidence. . . ."

As indicated in the commentary to subsection (b) of § 6-6, the admission of specific instance evidence for impeachment purposes remains subject to the court's discretionary authority regarding the relevancy of evidence, and, therefore, the court must always consider whether the probative value of such evidence is outweighed by undue prejudice, confusion or waste of time, including the "needless presentation of cumulative evidence." Conn. Code Evid. § 4-3.

juvenile misconduct or claimed he could not remember doing so, the defendant would have had to accept that answer. See *Demers* v. *State*, 209 Conn. 143, 157, 547 A.2d 28 (1988) ("if on cross-examination a witness denies having engaged in . . . prior acts of misconduct, the examiner must accept the answer and is prohibited from offering extrinsic evidence to prove such acts"). He would not have been entitled to admit the juvenile records or other evidence to prove that Torres engaged in the misconduct because extrinsic evidence to prove specific instances of conduct is inadmissible pursuant to the Connecticut Code of Evidence § 6-6 (b) (2). Accordingly, the only way to evaluate whether the trial court's ruling barred admissible impeachment evidence is to know how Torres would have responded if questioned.

As our Supreme Court recently observed, "the absence or inadequacy of an offer of proof may prevent a criminal defendant from proving on appeal that the trial court's preclusion of certain evidence violated his right to present a defense." (Footnote omitted.) *State* v. *Holley*, supra, 327 Conn. 595–96. The right to confrontation of witness is a component of a defendant's right to present a defense, and, thus, the court's observation in *Holley* is no less applicable in the context of the present appeal.

Moreover, this court previously has rejected for lack of an adequate record a defendant's claim that his right to confront a state's witness was violated where the court is left to speculate how a witness would have answered a question. See *State* v. *Papineau*, 182 Conn. App. 756, 770–72, A.3d (2018); see also *State* v. *James L.*, supra, 26 Conn. App. 81.[9] Specifically, in *Papineau*, this court rejected for lack of an adequate record a defendant's argument that the court improperly

[9] In *State* v. *James L.*, supra, 26 Conn. App. 81, this court concluded that the record was inadequate to review whether the court properly had precluded the defendant from questioning a sexual abuse victim's mother

excluded testimony offered for impeachment purposes. This court observed that the defendant's claim depended on a record that reflected the substance of the excluded testimony and that the record was "necessary not merely to determine whether the court properly excluded the testimony, *but whether the court's ruling was harmful to the defense*." (Emphasis added.) *State* v. *Papineau*, supra, 772. The court further explained that "the record does not provide an adequate foundation to support [the defendant's claim]. The defendant easily could have created an adequate record by asking the court to hear [the proposed witness'] responses to the questions outside the presence of the jury. This, however, did not occur." Id. The court concluded that the defendant could not prevail on his claim because it required "speculation as to how a witness might have testified at trial" and "speculation and conjecture . . . have no place in appellate review." (Internal quotation marks omitted.) Id.

In response to the state's argument that the record is inadequate to review the defendant's claim, the defendant makes two arguments, neither of which we find persuasive. First, the defendant argues that if Torres denied engaging in the juvenile larceny and burglary, the juvenile records could have been used to refresh his recollection. Just as we cannot speculate about Torres' response to questions he was never asked, however, we cannot presume that his recollection would have been refreshed by looking at his juvenile records or whether that procedure would have resulted in a change in his testimony.

Second, the defendant argues that under our Supreme Court's decision in *Demers* v. *State*, supra, 209 Conn.

in an effort to show her bias against the defendant, and that that bias had transferred to the victim, because the defendant had failed to make a sufficient offer of proof regarding whether the defendant previously had threatened to initiate a criminal action against her for the theft of various tools from behind his house. Id., 84–86.

143, he would not have been forced to accept Torres' denial to questions about Torres' alleged juvenile misconduct, but was entitled to have admitted extrinsic evidence regarding the misconduct because Torres' testimony was relevant to a "substantive or material issue in the case." *Demers*, however, is factually and legally distinguishable from the present situation and, thus, not controlling.

*Demers* involved a sexual assault prosecution in which the consent of the victim was at issue. Id., 147–48. Testimony related to consent, therefore, could have aided the jury in deciding an issue directly related to the substantive crime charged. Our Supreme Court in *Demers* held that evidence of a rape victim's prior acts of prostitution should have been disclosed by the state pursuant to *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) because that evidence was relevant to the issue of the victim's consent and, thus, would have been admissible under a statutory exception contained in our rape shield statute, General Statutes § 54-86f. The court in *Demers* expressly recognized the rule reflected in § 6-6 of the Connecticut Code of Evidence that extrinsic evidence to prove prior misconduct of a witness for purposes of impeachment is inadmissible. *Demers* v. *State*, supra, 209 Conn. 156–57. The court stated, however, that if "prior acts of misconduct are relevant to a substantive or material issue in the case, the prior acts can be proven by extrinsic evidence, despite the fact that admission of that evidence directly contradicts the testimony of the state's witness, thereby also raising questions as to his or her credibility." Id., 157. In other words, if evidence is otherwise admissible because it directly relates to a jury's ability to evaluate an element of the crime charged or a properly asserted defense, it will not be rendered inadmissible pursuant to the prohibition in § 6-6 against extrinsic evidence simply because it also happens to impeach the credibility of the witness.

The present case does not involve application of the rape shield statute, which was central to the decision in *Demers*. Furthermore, Torres' juvenile misconduct is only relevant to his credibility, not to the jury's consideration of a substantive element of a charged offense or defense. The holding in *Demers* is limited to the unique situation at issue in that case and, to our knowledge, has never been relied upon by an appellate court as a basis for disregarding the clear rule set forth in our Code of Evidence that extrinsic evidence is inadmissible to prove a witness' specific acts of misconduct evidencing a character for untruthfulness. Accordingly, we find no merit in the defendant's reliance on *Demers*.

Returning to the present case, the record reflects that the court precluded the defendant from questioning Torres about specific acts referenced in his juvenile record on the ground that any relevant impeachment evidence would be cumulative of other admissible evidence. At no point during the colloquy with the court on this issue did the defendant ask to make a record by questioning Torres outside the presence of the jury. After the court issued its ruling, the defendant did not press the matter, but simply responded, "[v]ery good, Your Honor." Because the defendant never made an offer of proof by seeking to question Torres on the record outside the presence of the jury as to the answers Torres would have given in response to any questions, the record simply contains no basis for us to evaluate whether Torres would have admitted any of the conduct about which the defendant sought to question him. Because this court cannot determine on the basis of the record provided whether allowing the defendant to question Torres would have resulted in the admission of any testimony that could affect Torre's credibility, the record is inadequate for us to evaluate whether the defendant suffered any harm from the trial court's

evidentiary ruling.[10] Accordingly, the defendant's claim necessarily fails.

The judgment is affirmed.

In this opinion the other judges concurred.

[10] Even if we agreed with the defendant that the record before us is sufficient to review his claim and also that the court improperly prevented him from questioning Torres about the actions described in his juvenile records, the defendant's claim on appeal would nonetheless fail because, given the strength of the state's other evidence independent of Torres' testimony regarding the defendant's confession, he cannot meet his burden of showing that the court's alleged evidentiary error was harmful.

In assessing harmful error, we begin by determining which party has the burden on this question. The answer depends on whether we conclude that the error is of constitutional magnitude, in which case the state has the burden of demonstrating harmlessness beyond a reasonable doubt, or whether the error is merely evidentiary, in which case the defendant has the burden to demonstrate harm. See *State* v. *Peeler*, 271 Conn. 338, 384, 857 A.2d 808 (2004), cert. denied, 546 U.S. 845, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005). Although the defendant attempts to frame his claim as one of constitutional magnitude, we are unconvinced that the defendant's claim is more than evidentiary in nature. It is true that a court's decision unreasonably to restrict a defendant's cross-examination of a witness can implicate sixth amendment rights of confrontation if, for instance, the court fails to allow a defendant sufficient latitude to impeach the credibility of an important state witness. In the present case, however, the record shows that the defendant was able to explore multiple avenues of impeachment with Torres, including the opportunity to raise before the jury his prior adult criminal convictions, which, as indicated by the trial court, were more recent and of a similar nature to the excluded alleged juvenile acts. Dressing an evidentiary claim in constitutional garb will not transform its nature. See *State* v. *Rodriguez-Roman*, 297 Conn. 66, 93, 3 A.3d 783 (2010); see also *State* v. *Vitale*, 197 Conn. 396, 403, 497 A.2d 956 (1985) ("[e]very evidentiary ruling which denies a defendant a line of inquiry to which he thinks he is entitled is not constitutional error").

Because we would construe the defendant's claim as evidentiary in nature, he has the burden on appeal of demonstrating not only an evidentiary error but also that the error was harmful. Here, there was compelling and otherwise unexplained DNA evidence that placed the defendant at the scene and in sexual contact with the victim. Furthermore, Torres' testimony regarding the defendant's multiple confessions were independently corroborated by other evidence that would have lessened the impact of any additional impeachment value obtained through an admission of his actions as a juvenile. For example, other witnesses testified that the defendant and Torres were alone together at the times that Torres claimed the defendant confessed to him. There was also testimony that the defendant wanted to speak with Torres alone as well as the Facebook message that the defendant sent to Torres around the time of the murder seeking to discuss something "asap." Torres' testimony that the defendant told him that he entered the victim's apartment through a window was consistent with testimony by first responders that there was no sign of forced entry with respect to the apartment

# LINDA MERK-GOULD *v.* ROBERT F. GOULD, JR.
## (AC 40172)

Lavine, Alvord and Keller, Js.

*Syllabus*

The defendant appealed to this court from the judgment of the trial court dissolving his marriage to the plaintiff and making certain financial and property orders. He claimed, inter alia, that the court erroneously found that he had an annual earning capacity of $200,000. *Held*:

1. The trial court's finding that the defendant had an earning capacity of $200,000 per year was clearly erroneous and not supported by the evidence: although the defendant testified that since leaving employment in 2003, he had earned sufficient money to pay his expenses by investing in various securities, the trial court awarded 60 percent of those investment assets to the plaintiff, its finding of an earning capacity was made in consideration of the defendant's investment income, and the record lacked evidence to support a finding that the defendant could return to work after having been out of the workforce since 2003, or that $200,000 was a net amount that he could realistically be expected to earn after being left with only 40 percent of his investment assets; accordingly, because the alimony award was necessarily interwoven with the court's remaining financial and property orders, a new hearing was necessary at which the court had to reconsider all of the financial and property orders.
2. The trial court abused its discretion in valuing the defendant's interests in private equity companies on the basis of the cost of the assets at the time of their purchase rather than as of the date of the marital dissolution; pursuant to statute (§ 46b-81 [a]), the court may assign to either spouse all or any part of the estate of the other spouse at the time of entering a dissolution decree, which demonstrated that the date of the granting of the divorce was the proper time by which to determine the value of the estate of the parties on which to base the division of property, and the plaintiff's claim that the court's order was a precise means of providing a remedy for the defendant's dissipation of marital assets was unavailing, as she made no claim of dissipation before the trial court, which made no findings related to dissipation or that the defendant had violated any court order.

Argued May 30—officially released September 4, 2018

doors. In other words, given the relative strength of the state's case against him, the defendant simply cannot demonstrate that it is more probable than not that the allegedly erroneous action of the court affected the result of the trial.

*Procedural History*

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Tindill, J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the court denied the defendant's motion to reargue, and the defendant appealed to this court. *Reversed in part*; *further proceedings*.

*Campbell D. Barrett*, with whom were *Johanna S. Katz* and, on the brief, *Jon T. Kukucka*, for the appellant (defendant).

*Kenneth J. Bartschi*, with whom were *Dana M. Hrelic* and, on the brief, *Wayne Effron*, for the appellee (plaintiff).

*Opinion*

ALVORD, J. The defendant, Robert F. Gould, Jr., appeals from the judgment of the trial court dissolving his marriage to the plaintiff, Linda Merk-Gould, and entering certain financial and property orders. On appeal, the defendant claims that the court: (1) improperly ordered tax-free alimony to the plaintiff; (2) erroneously found that the defendant had an annual earning capacity of $200,000; (3) improperly awarded the plaintiff 60 percent of the pretax amount of the defendant's pension; (4) abused its discretion in valuing the defendant's interests in several private equity companies on the basis of the cost of the assets at the time of purchase, rather than the value of the assets as of the date of the dissolution; (5) abused its discretion in awarding the plaintiff attorney's fees; and (6) abused its discretion in denying his motion for a mistrial. Because we agree with the defendant's second and fourth claims, we reverse in part the judgment of the trial court and

remand the case for a new trial on the financial and property orders.[1]

The following facts, as found by the trial court, and procedural history are relevant to this appeal. The parties were married on May 25, 1987, and have two adult children. Both parties entered the marriage with assets, and both inherited money from family members during the marriage. The parties kept the majority of their income and assets separate during the marriage, and the defendant has significantly greater assets than the plaintiff. The plaintiff, who was sixty-four at the time of trial, had ended her career at age forty-eight because of health reasons. The defendant was sixty-five years old at the time of trial, in good health, and well educated, having received an undergraduate degree and a master of business administration degree. The defendant left full-time employment fourteen years prior to trial, at age fifty-one, and "has subsisted on passive income from investments and [distributions from] his [PricewaterhouseCoopers LLP] Partner Retirement Plan [(pension)]." Specifically, the defendant "has earned income as a 'self-directed' investor since 1980 such that he did not have to seek gainful employment after 2002 to meet monthly expenses (which now total $11,709)."

On May 1, 2013, the plaintiff commenced this dissolution action. The defendant filed an answer and a cross-complaint. The matter was tried to the court over eight days. On January 31, 2017, the court rendered judgment

[1] Because we agree with the defendant's second and fourth claims, and we conclude that the defendant is entitled to a new hearing on all financial and property orders because the improper orders are inextricably interwoven with the mosaic of other financial and property orders that were entered at the time of the final decree, we need not decide the defendant's remaining claims. See *Kovalsick* v. *Kovalsick*, 125 Conn. App. 265, 276, 7 A.3d 924 (2010) (declining to decide plaintiff's claim concerning property distribution after determining that court's order denying alimony award reflected an abuse of discretion).

dissolving the parties' marriage, finding that the defendant was at fault for the breakdown of the marriage. In its memorandum of decision, the court made orders regarding property distribution, alimony, and attorney's fees. The court awarded alimony on the basis of the defendant's earning capacity, finding that "[t]he credible evidence before the court shows that the defendant can reasonably be expected to earn $200,000 (net) annually." Utilizing that finding of fact, the court ordered alimony to the plaintiff in the amount of $7500 per month beginning February, 2017, until the death of either party or the remarriage of the plaintiff, whichever should occur first. The court ordered that the alimony payments "will not be taxable to the plaintiff nor deductible by the defendant."

With respect to property distribution, the plaintiff, in her proposed orders, requested that the court divide all bank accounts, publicly-traded securities, private equity, business annuities, and frequent flier miles listed on the defendant's financial affidavit and award 60 percent of such assets to the plaintiff. She further requested that "the defendant shall receive each of the private equity companies valued at cost, i.e., the amount paid by the defendant . . . for his interest in the company in question, and the plaintiff shall receive a corresponding amount in cash." In its memorandum of decision, the court adopted the plaintiff's proposed order and incorporated it as an order of the court.

The court also awarded the plaintiff attorney's fees in the amount of $220,346.85[2] and 60 percent of the

[2] As stated in footnote 1 of this opinion, we do not reach the defendant's claim that the court abused its discretion in awarding the plaintiff attorney's fees because "the plaintiff has ample liquid assets and there has been no egregious litigation misconduct." Because the issue may arise on remand, we note the principles of law applicable to a determination of whether attorney's fees should be awarded.

General Statutes § 46b-62 (a) "authorizes the trial court to award attorney's fees in a dissolution action when appropriate in light of the 'respective financial abilities' of the parties and the equitable factors listed in [General

pretax amount of each payment the defendant receives from his pension. The court ordered that the pension payments were not taxable to the plaintiff nor deductible by the defendant, and further that such payments shall continue regardless of the plaintiff's cohabitation or marriage. The defendant filed a motion to reargue, which the court denied on February 24, 2017. This appeal followed.

We begin by setting forth the standard of review. "An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Furthermore, [t]he trial court's findings [of fact] are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . A finding of fact is clearly erroneous when there is no

Statutes] § 46b-82." *Hornung* v. *Hornung*, 323 Conn. 144, 169, 146 A.3d 912 (2016). Our Supreme Court has stated "three broad principles by which these statutory criteria are to be applied. First, such awards should not be made merely because the obligor has demonstrated an ability to pay. Second, where both parties are financially able to pay their own fees and expenses, they should be permitted to do so. Third, where, because of other orders, the potential obligee has ample liquid funds, an allowance of [attorney's] fees is not justified. . . . A determination of what constitutes ample liquid funds . . . requires . . . an examination of the total assets of the parties at the time the award is made." (Citation omitted; internal quotation marks omitted.) Id., 169–70. "[T]he availability of sufficient cash to pay one's attorney's fees, [however], is not an absolute litmus test . . . . [A] trial court's discretion should be guided so that its decision regarding attorney's fees does not undermine its purpose in making any other financial award." (Internal quotation marks omitted.) Id., 170; see also id., 172 (holding that "[t]he trial court abused its discretion in making the attorney's fees awards because the plaintiff received ample liquid funds as a result of the trial court's judgment, and the trial court's determination that not awarding attorney's fees to the plaintiff would undermine its other awards was unreasonable").

evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citation omitted; internal quotation marks omitted.) *Steller* v. *Steller*, 181 Conn. App. 581, 587–88, A.3d (2018).

I

The defendant claims on appeal that the court's finding that he had an earning capacity of $200,000 per year is clearly erroneous. Specifically, he claims that "[t]here was no evidence presented at trial that could reasonably lead the court to conclude that [the defendant] has the capacity to earn income from employment in the amount of $200,000 per year in after tax income. Rather, the undisputed evidence established that [the defendant] was sixty-five . . . years old at the time of the dissolution and had been out of the workforce for approximately thirteen . . . years." We disagree that the trial court's finding was limited to earning capacity from employment, but nevertheless agree that the court's finding of earning capacity from investment income was clearly erroneous.

General Statutes § 46b-82 provides in relevant part: "In determining whether alimony shall be awarded, and the duration and amount of the award, the court shall consider the evidence presented by each party and shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage . . . the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties . . . ." "It is well established that the trial court may under appropriate circumstances in a marital dissolution proceeding base financial awards on the earning capacity of the parties rather than on actual earned

income. . . . Earning capacity, in this context, is not an amount which a person can theoretically earn, nor is it confined to actual income, but rather it is an amount which a person can realistically be expected to earn considering such things as his vocational skills, employability, age and health. . . . [I]t also is especially appropriate for the court to consider whether the defendant has wilfully restricted his earning capacity to avoid support obligations . . . . Moreover, [l]ifestyle and personal expenses may serve as the basis for imputing income where conventional methods for determining income are inadequate." (Internal quotation marks omitted.) *Steller* v. *Steller*, supra, 181 Conn. App. 590. "[A] court properly may impute earning capacity from employment . . . [and] [w]e can perceive no reason to adopt a different standard for the ascertainment of investment income than the one we employ for the ascertainment of earning capacity." (Internal quotation marks omitted.) *Fox* v. *Fox*, 152 Conn. App. 611, 634, 99 A.3d 1206, cert. denied, 314 Conn. 945, 103 A.3d 977 (2014), quoting *Weinstein* v. *Weinstein*, 280 Conn. 764, 772, 911 A.2d 1077 (2007).

We first note that the defendant's argument rests upon the premise that the court found that he could realistically be expected to earn $200,000 net by returning to employment. That premise is mistaken. The court's earning capacity determination immediately followed the court's finding that the defendant earns income as a "self-directed" investor, and that he had not needed to return to work to cover his monthly expenses, which totaled $11,709. (Internal quotation marks omitted.) Accordingly, we conclude that the court's finding of an earning capacity was made in consideration of his investment income, rather than potential employment income.

Indeed, the record entirely lacks evidence to support any finding that the defendant successfully could return

to work after having been out of the workforce since approximately 2003, whether the court credited the plaintiff's or the defendant's testimony. The defendant testified that after leaving full-time employment, he had spoken with headhunters and had some interviews, but that nothing "panned out." The defendant further testified that "[a]fter a while I got to the point where it seemed like I was just running into the age ceiling. I was too old by then, fifty-five or whatever, and people were not willing to really consider it. They thought I was overqualified or whatever else. So I figured I'd focus in on the investments and do investing and . . . I thought between the pension and the investment returns, we'd be fine and we were." The defendant also testified that he was subject to a noncompete clause, which prevented him from obtaining employment with competitors. The plaintiff testified that between 2002 and 2013, to her knowledge, the defendant had not accepted any interviews, engaged any headhunters, or otherwise attempted to seek employment. Similarly, the plaintiff testified that she had not sought out work since 2002, but had worked on two occasions for a few days each time. Accordingly, there is nothing in the record that would support a finding that the defendant realistically could be expected to return to employment earning $200,000 net annually.

We conclude that the court's finding that the defendant has a net earning capacity of $200,000 from investment income is not supported by the evidence.[3] Although the defendant testified that since leaving employment in 2003, he has earned sufficient money

[3] To the extent the defendant argues that the court erred in using his earning capacity rather than his actual earnings because he has not intentionally depressed his earnings, we note that "although financial orders often arise in that context, the court need not find that the [party] wilfully diminished his income in order to consider earning capacity." *Rozsa* v. *Rozsa*, 117 Conn. App. 1, 8, 977 A.2d 722 (2009); see also *Weinstein* v. *Weinstein*, 280 Conn. 764, 772, 911 A.2d 1077 (2007).

to pay his expenses by investing in various securities, the court awarded 60 percent of those investment assets to the plaintiff. Specifically, the court divided the defendant's bank accounts, publicly-traded securities, private equity assets, business annuities, and frequent flier miles, and awarded 60 percent to the plaintiff and 40 percent to the defendant. Thus, to the extent the court found a net earning capacity of $200,000 on the basis of the defendant's investment income, the court would have to have evidence that the defendant remained capable of earning that net amount with only 40 percent of his investment assets. See *Cleary* v. *Cleary*, 103 Conn. App. 798, 806–808, 930 A.2d 811 (2007) (considering that plaintiff had been awarded half of defendant's retirement benefits and half of his pension benefits upon retirement in reversing financial orders after concluding that evidence did not reveal income sufficient to support an alimony award of $1000 per week). Our review of the record reveals no evidence supporting a finding that $200,000 was a net amount that the defendant could realistically be expected to earn after being left with only 40 percent of his investment assets. See *Prial* v. *Prial*, 67 Conn. App. 7, 14, 787 A.2d 50 (2001) (trial court's basis for finding plaintiff's earning capacity was clearly erroneous where "[t]he record is devoid of any testimony, even by the plaintiff, that comparable employment would yield the plaintiff $62,000 per year, the figure adopted by the court for his earning capacity").

The plaintiff argues that the court's earning capacity finding is supported by the defendant's testimony as to the increase in value of his investment assets. On December 18, 2015, the defendant testified that as of August 16, 2013, when he filed his first financial affidavit, his investment assets were worth $5 million, and that his investment portfolio had since grown by 10 percent, or $500,000. The defendant attributed the

growth to "[i]mprovements in the market, good investment choices, [and] knowing when to buy and sell." Notwithstanding that the court found that "[t]he vast majority of the defendant's testimony was not credible," even if the court were to credit this particular testimony, it still would not provide the basis for finding a $200,000 net earning capacity in light of the court's award of 60 percent of those assets to the plaintiff.

Because § 46b-82 (a) requires the court, when determining alimony, to consider each party's "amount and sources of income [and] earning capacity"; [internal quotation marks omitted] *Steller* v. *Steller*, supra, 181 Conn. App. 598; the court's clearly erroneous finding as to the defendant's earning capacity requires that we reverse the court's order setting the defendant's alimony obligation.

II

The defendant next claims that the court erred in valuing certain marital assets available for distribution. Specifically, he claims that the court improperly valued his interests in several private equity companies on the basis of the cost of the assets at the time of his purchase, rather than the value of the assets as of the date of the dissolution. The plaintiff responds that although she did not assert a claim of dissipation as to the assets at issue, the court did not abuse its discretion in fashioning this order, which "was a precise means of providing a remedy for the defendant's dissipation of marital assets . . . ." We agree with the defendant that the court abused its discretion in valuing the assets.

The division of property in dissolution proceedings is governed by General Statutes § 46b-81 (a), which provides in relevant part: "*At the time of entering a decree* . . . dissolving a marriage . . . the Superior Court may assign to either spouse all or any part of the estate of the other spouse." (Emphasis added.) Our

Supreme Court has recognized that "[t]he only temporal reference in the enabling legislation refers us to the time of the decree as controlling the entry of financial orders. It is neither unreasonable nor illogical, therefore, to conclude that the same date is to be used in determining the value of the marital assets assigned by the trial court to the parties." *Sunbury* v. *Sunbury*, 216 Conn. 673, 676, 583 A.2d 636 (1990). Accordingly, "[i]n the absence of any exceptional intervening circumstances occurring in the meantime, [the] date of the granting of the divorce is the proper time by which to determine the value of the estate of the parties upon which to base the division of property." (Internal quotation marks omitted.) *Bruno* v. *Bruno*, 132 Conn. App. 339, 354, 31 A.3d 860 (2011); see also *Kremenitzer* v. *Kremenitzer*, 81 Conn. App. 135, 139, 838 A.2d 1026 (2004).

We reject the plaintiff's argument that the court's order "was a precise means of providing a remedy for the defendant's dissipation of marital assets . . . ." The plaintiff acknowledges that she made no claim of dissipation before the trial court. Moreover, the court in the present case made no findings related to dissipation. See *Gershman* v. *Gershman*, 286 Conn. 341, 351, 943 A.2d 1091 (2008) (trial court erred in considering "dissipation of family assets" in overall asset division where trial court had made no finding of "financial misconduct, e.g., intentional waste or a selfish financial transaction, or that the defendant had used marital assets for a nonmarital purpose with regard to either of [the] transactions" [internal quotation marks omitted]). Nor did the court find that the defendant had violated any court order. Cf. *O'Brien* v. *O'Brien*, 326 Conn. 81, 103, 161 A.3d 1236 (2017) (trial court had discretion to remedy plaintiff's violations of court order through distribution of marital property).

Accordingly, we conclude that the court abused its discretion in valuing the defendant's interests in private equity companies on the basis of the cost of the assets at the time of their purchase, rather than the value of the assets as of the date of the dissolution.

III

We turn now to the appropriate relief, if any, to be ordered based on the conclusions that we have reached. The defendant seeks "a new hearing on the financial matters of this case," and the plaintiff responds that the challenged orders are "severable from the mosaic of financial orders." We agree with the defendant.

"We previously have characterized the financial orders in dissolution proceedings as resembling a mosaic, in which all the various financial components are carefully interwoven with one another. . . . Accordingly, when an appellate court reverses a trial court judgment based on an improper alimony, property distribution, or child support award, the appellate court's remand typically authorizes the trial court to reconsider all of the financial orders. . . . We also have stated, however, that [e]very improper order . . . does not necessarily merit a reconsideration of all of the trial court's financial orders. A financial order is severable when it is not in any way interdependent with other orders and is not improperly based on a factor that is linked to other factors. . . . In other words, an order is severable if its impropriety does not place the correctness of the other orders in question. . . . Determining whether an order is severable from the other financial orders in a dissolution case is a highly fact bound inquiry." (Citations omitted; internal quotation marks omitted.) *Tuckman* v. *Tuckman*, 308 Conn. 194, 214, 61 A.3d 449 (2013).

In the present case, we have concluded that the court abused its discretion in fashioning its alimony award

upon a clearly erroneous finding that the defendant had a net earning capacity of $200,000. This order is necessarily interwoven with the court's remaining financial and property orders. Accordingly, we conclude that the court on remand must reconsider all of the financial and property orders. See *Wiegand* v. *Wiegand*, 129 Conn. App. 526, 540, 21 A.3d 489 (2011) (reversing financial and property orders after concluding that court abused discretion by failing to award some form of alimony to plaintiff); *Pellow* v. *Pellow*, 113 Conn. App. 122, 129, 964 A.2d 1252 (2009) (reversing financial and property orders after concluding that court abused discretion in rendering judgment under §§ 46b-81 and 46b-82 in excess of defendant's income and without finding as to parties' earning capacity).

The judgment is reversed with respect to all financial orders, including the distribution of marital property, and the case is remanded for further proceedings on those issues. The judgment is affirmed in all other respects.

In this opinion the other judges concurred.

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## NOEL CHANCE *v.* COMMISSIONER OF CORRECTION (AC 39952)

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

*Syllabus*

The petitioner, who had been convicted of, inter alia, kidnapping in the second degree, sought a writ of habeas corpus, claiming that his trial counsel had provided ineffective assistance by failing to present accurate jury instructions to the trial court, in accordance with *State* v. *Salamon* (287 Conn. 509). The petitioner also claimed that trial counsel provided ineffective assistance by failing to file a motion to suppress certain incriminating statements that the petitioner had made to the police at his home. The habeas court rendered judgment denying the habeas petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The habeas court did not abuse its discretion in denying the petition for certification to appeal; the resolution of the petitioner's underlying claim of ineffective assistance of trial counsel involved issues that were not debatable among jurists of reason, could not have been resolved by a court in a different manner and were not adequate to deserve encouragement to proceed further.

2. The habeas court properly determined that the petitioner failed to demonstrate that his trial counsel rendered ineffective assistance:

a. The petitioner failed to present a sound basis on which this court could conclude that his trial counsel's conduct fell outside the wide range of reasonable professional assistance with respect to the kidnapping instruction; the habeas court found that trial counsel's decision to accept the jury instruction on kidnapping, as given by the court, was the product of much thought and discussion among the trial judge, prosecutor and trial counsel, and, therefore, was not outside of reasonably acceptable professional conduct, and the petitioner offered no expert testimony or sound legal theory to support his claim that because trial counsel was applying new law, he was uncertain if *Salamon* was going to remain good law and should not have allowed the proposed instruction.

b. The petitioner failed to demonstrate that his trial counsel rendered ineffective assistance by failing to file a motion to suppress the incriminating statements made by the petitioner to law enforcement prior to *Miranda* warnings; the evidence that was adduced at the criminal trial and the habeas hearing indicated that there was not a sufficient show of police force that would have led a reasonable person, in his home, to believe that he was in custody for the purposes of *Miranda*.

Argued April 11—officially released September 4, 2018

*Procedural History*

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Sferrazza*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

*Kinga A. Kostaniak*, assigned counsel, for the appellant (petitioner).

*Sarah Hanna*, assistant state's attorney, with whom, on the brief, were *David S. Shepack*, state's attorney, and *Kelly A. Masi*, senior assistant state's attorney, for the appellee (respondent).

*Opinion*

MIHALAKOS, J. The petitioner, Noel Chance, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his second amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court (1) abused its discretion in denying his petition for certification to appeal from the denial of his second amended petition, and (2) improperly concluded that he failed to establish that his trial counsel rendered ineffective assistance. We conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal and, accordingly, dismiss the petitioner's appeal.

The following facts and procedural history are relevant to our disposition of the petitioner's appeal. This court's decision in the petitioner's direct appeal in *State* v. *Chance*, 147 Conn. App. 598, 83 A.3d 703, cert. denied, 311 Conn. 932, 87 A.3d 580 (2014), sets forth the following facts. "From the spring of 2006 through the summer of 2007, the [petitioner] regularly drove around rural areas of Litchfield County in his pickup truck with his black Labrador retrievers and followed female joggers. . . . After receiving complaints, police officers talked to the [petitioner] on three separate occasions and warned him that his conduct was alarming female joggers. On March 30, 2007, after receiving one witness' complaint and determining that the license plate number the witness provided was registered to the [petitioner], Troopers Jason Uliano and Cono D'Elia contacted the [petitioner]. When the troopers informed the [petitioner] that his actions were alarming female joggers, the [petitioner] indicated that he understood and said that 'he would drive somewhere else, he wouldn't do that anymore.' . . .

"On August 11, 2007, the five foot tall, ninety pound, fourteen year old victim in this case was jogging on a

secluded road in Litchfield.[1] The [petitioner], who was driving in his truck with his dog, started following the victim. The [petitioner] slowed down and asked her if she wanted a ride. When she refused, the [petitioner] stopped his truck on the side of the road, exited his truck, and chased her. The [petitioner] grabbed her by her ponytail causing her to fall face down on the side of the road. The [petitioner] then engaged in a struggle with the victim that, according to testimony, lasted approximately five minutes. The [petitioner] wrapped his arms around her, touching her breasts, and tried to pick her up. The victim fought back and screamed. The [petitioner] covered her mouth to suppress her screams, told her to shut up, and attempted to pick her up. The victim began 'heaving,' unable to catch her breath. The [petitioner] released the victim, backed away, and asked her if she was okay. The victim responded, 'just leave,' and, 'please leave.' When the [petitioner] turned and walked toward his truck, the victim ran into a wooded area and hid. The victim attempted to call her mother from her cell phone, but was unable to reach her. She then called 911. State troopers arrived at the scene and aided the victim."[2] (Footnote in original.) Id., 601–604.

The state charged the petitioner with kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (A); kidnapping in the second degree in violation of General Statutes § 53a-94; attempt to commit

[1] "In accordance with our policy of protecting the privacy interests of the victims of the crime of risk of injury to a child, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e." *State* v. *Chance*, supra, 147 Conn. App. 603.

[2] After the petitioner's arrest, Troopers "D'Elia and [Steven] Caltica took the [petitioner] to the Troop L state police barracks. . . . [Troopers] D'Elia and Uliano spoke to the [petitioner] at the police barracks and asked him if he would to give a statement. The [petitioner] said, '[W]hatever she said is true,' and then said, 'My life is over.' . . . The troopers asked the [petitioner] what his intentions had been, and he repeated several times, 'I don't know, my life is over.' At one point, the [petitioner] told the troopers, 'I have a problem.' " *State* v. *Chance*, supra, 147 Conn. App. 611.

kidnapping in the second degree in violation of General Statutes §§ 53a-94 and 53a-49 (a) (2); unlawful restraint in the first degree in violation of General Statutes § 53a-95; and two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (1) and (2), respectively. See id., 604. The petitioner was not charged with assaulting the victim.

A four day jury trial began on August 5, 2008. Following the close of evidence, the trial judge met with the petitioner's trial counsel, Walter D. Hussey, and the prosecutor for the purpose of crafting an appropriate kidnapping instruction that incorporated *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008),[3] which had been decided by our Supreme Court one month prior to the petitioner's criminal trial. The petitioner's trial counsel and the prosecutor agreed to a kidnapping instruction comprised of language taken directly from *Salamon*. See id., 546, 548, 550. That instruction provided in relevant part: "If you find that the [petitioner's] restraint of the victim was merely incidental to the [petitioner's] commission of another crime against the victim, that is, assault, then you must find the [petitioner] not guilty of the crime of kidnapping. . . . The determination of whether an assault took place is for you, the jury, to decide. . . . If you find that an assault took place, then you must determine whether the restraint was incidental to that assault. In making that

[3] In *Salamon*, our Supreme Court "reconsidered and reversed our long-standing jurisprudence holding that the crime of kidnapping encompasses restraints that are necessary or incidental to the commission of a separate underlying crime . . . concluding that [o]ur legislature, in replacing a single, broadly worded kidnapping provision with a gradated scheme that distinguishes kidnappings from unlawful restraints by the presence of an intent to prevent a victim's liberation, intended to exclude from the scope of the more serious crime of kidnapping and its accompanying severe penalties those confinements or movements of a victim that are merely incidental to and necessary for the commission of another crime against that victim." (Citation omitted; internal quotation marks omitted.) *State* v. *DeJesus*, 288 Conn. 418, 429, 953 A.2d 45 (2008).

determination, you must consider the various relevant [*Salamon*] factors. . . ."

"The jury found the [petitioner] guilty of kidnapping in the second degree, attempted kidnapping in the second degree, unlawful restraint in the first degree, and risk of injury to a child [in violation of § 53-21 (a) (1)].[4] The trial court merged the [petitioner]'s conviction . . . [of] attempted kidnapping in the second degree, with his conviction . . . [of] kidnapping in the second degree. On October 17, 2008, the court imposed a total effective sentence of twenty years of incarceration, execution suspended after eight and one-half years, followed by five years of probation with special conditions." (Footnote added.) *State* v. *Chance*, supra, 147 Conn. App. 604. This court affirmed in part and reversed in part the judgment of the trial court on direct appeal.[5] See id., 601.

On May 16, 2013, the self-represented petitioner filed a petition for a writ of habeas corpus alleging that his trial counsel had rendered ineffective assistance in several respects. On August 26, 2016, the petitioner, represented by appointed counsel, filed the operative second amended petition, claiming that trial counsel rendered ineffective assistance in that he (1) "acquiesced to improper jury instructions regarding kidnapping, in accordance with the relatively new law as stated in [*Salamon*]"; (2) failed to file a motion to suppress

[4] The jury found the petitioner not guilty of kidnapping in the first degree, and risk of injury to a child, in violation of § 53-21 (a) (2). The court accepted the jury verdict, and a judgment of acquittal was rendered by the court as to these two counts.

[5] This court reversed the judgment and remanded the case to the trial court to vacate the conviction of attempted kidnapping in the second degree on the grounds that it was cumulative and violated constitutional prohibitions against double jeopardy. See *State* v. *Chance*, supra, 147 Conn. App. 619–20; see also *State* v. *Polanco*, 308 Conn. 242, 61 A.3d 1084 (2013). This court affirmed the judgment in all other respects. See *State* v. *Chance*, supra, 622.

incriminating statements that the petitioner made to law enforcement prior to receiving a *Miranda*[6] warning; and (3) failed to file a motion to suppress evidence obtained from the seizure of his pickup truck.

The habeas trial was held on September 9, 2016. The habeas court heard testimony from the petitioner, Attorney Hussey and Trooper D'Elia. The petitioner did not present any expert testimony in support of his claims. In a memorandum of decision filed on November 10, 2016, the habeas court denied the petitioner's second amended petition, determining that the petitioner had failed to establish deficient performance or prejudice as to each of his claims. On November 21, 2016, the habeas court denied the petitioner certification to appeal, and this appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The petitioner claims that the habeas court abused its discretion in denying his petition for certification to appeal from the denial of his second amended petition for a writ of habeas corpus. We disagree.

As a preliminary matter, we set forth the standard of review that governs our disposition of the petitioner's appeal. "Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, [the petitioner] must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an

[6] See *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . . To prove that the denial of his petition for certification to appeal constituted an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification." (Citations omitted; internal quotation marks omitted.) *Sanders* v. *Commissioner of Correction*, 169 Conn. App. 813, 821–22, 153 A.3d 8 (2016), cert. denied, 325 Conn. 904, 156 A.3d 536 (2017).

As we discuss more fully in part II of this opinion, because the resolution of the petitioner's underlying claim that trial counsel rendered ineffective assistance involves issues that are not debatable among jurists of reason, could not have been resolved by a court in a different manner, and are not adequate to deserve encouragement to proceed further, we conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal from the denial of the petition for a writ of habeas corpus.

II

We now turn to the petitioner's substantive claims that the habeas court improperly concluded that the petitioner failed to establish that his trial counsel rendered ineffective assistance. The petitioner claims that his trial counsel rendered deficient performance by failing (1) to present accurate jury instructions that were consistent with *Salamon*, and (2) to file a motion to suppress incriminating statements that the petitioner made to law enforcement.[7] The petitioner further claims that he was prejudiced by this deficient performance.[8] We disagree.

We first set forth our standard of review and the legal principles that govern ineffective assistance of counsel

[7] The petitioner also claims that the habeas court improperly concluded that he failed to establish that his trial counsel rendered ineffective assistance by failing to file a motion to suppress evidence resulting from the seizure of the petitioner's truck. This claim has no merit. No tangible evidence was admitted at trial as a result of the seizure. Instead, the only evidence related to the petitioner's truck was testimony regarding the appearance of the truck itself, which served to identify the petitioner as the perpetrator and did not flow from its seizure. The habeas court concluded that, because the seizure of the petitioner's truck was supported by the plain view doctrine, any challenge by trial counsel would have been meritless. The petitioner has presented this court with no basis from which we could conclude that his trial counsel's conduct in failing to move to suppress evidence that was not admitted at trial fell outside the wide range of reasonable professional assistance. Accordingly, the habeas court properly concluded that trial counsel did not render deficient performance in failing to raise a meritless challenge to the seizure of the petitioner's truck.

[8] Because we conclude that the petitioner failed to satisfy his burden of overcoming the strong presumption that his trial counsel provided effective assistance in this matter, we need not reach the petitioner's claim that he was prejudiced by trial counsel's alleged deficient performance. See *Johnson* v. *Commissioner of Correction*, 218 Conn. 403, 419, 589 A.2d 1214 (1991) (reviewing court can find against petitioner on either prong of *Strickland*); see also *Martin* v. *Commissioner of Correction*, 141 Conn. App. 99, 102–103, 60 A.3d 997 ("[i]f . . . the petitioner fail[s] to satisfy the performance prong of the *Strickland* standard, that determination is dispositive of the petitioner's habeas claims, and it is unnecessary for the court to reach the prejudice prong"), cert. denied, 308 Conn. 923, 94 A.3d 638 (2013).

claims. "The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . Historical facts constitute a recital of external events and the credibility of their narrators. . . . Accordingly, [t]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review. . . .

"[I]t is well established that [a] criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. *Strickland* v. *Washington*, [466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution." (Internal quotation marks omitted.) *Thomas* v. *Commissioner of Correction*, 141 Conn. App. 465, 470–71, 62 A.3d 534, cert. denied, 308 Conn. 939, 66 A.3d 881 (2013).

"As enunciated in *Strickland* v. *Washington*, supra, 466 U.S. 687, this court has stated: It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: [1] a performance prong and [2] a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . To satisfy the prejudice prong, [the petitioner] must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . The [petitioner's] claim will succeed

only if both prongs are satisfied. . . . The court, however, can find against a petitioner . . . on either the performance prong or the prejudice prong, whichever is easier." (Citation omitted; internal quotation marks omitted.) *Salmon* v. *Commissioner of Correction*, 178 Conn. App. 695, 703–704, 177 A.3d 566 (2017).

A

With the foregoing legal framework in mind, we address the petitioner's claim that the habeas court improperly concluded that he failed to establish that his trial counsel rendered ineffective assistance by failing to "present accurate jury instruction[s] consistent with . . . [*Salamon*]." At oral argument before this court, the petitioner conceded that he does not actually challenge the language of the jury instruction, stating that it conforms to *Salamon* verbatim. He argues, however, that it was improper for the court to instruct the jury regarding the underlying uncharged assault. The petitioner's basis for this claim is that, because trial counsel was applying new law, he was uncertain if *Salamon* was going to remain good law and should not have allowed the proposed instruction.[9] We disagree.

The habeas court found that the "decision by [trial counsel] to accept the jury instruction on kidnapping, as given by the trial judge, was intentional and the product of much thought and discussion among the trial judge, prosecutor, and [trial counsel]," and, therefore, was not outside of reasonably acceptable professional conduct.[10] The petitioner has offered no expert

[9] At oral argument before this court, the petitioner supported this claim by asserting, "[*Salamon*] itself was then on appeal, and it was not confirmed to be 'proper and accurate' until after these instructions were . . . used in [the petitioner's] case." Contrary to this assertion, however, *Salamon* was binding precedent at the time of the petitioner's criminal trial.

[10] As the habeas court concluded, when trial counsel advocated for the uncharged assault to be included in the instruction, he provided the jury with an avenue for acquittal from the more serious charge of kidnapping in the first degree and, conceivably, benefited the petitioner.

testimony or sound legal theory to support his claim. On the contrary, our case law firmly establishes that "[s]tare decisis . . . allows for predictability in the ordering of conduct, it promotes the necessary perception that the law is relatively unchanging, it saves resources and it promotes judicial efficiency. . . . It is the most important application of a theory of decisionmaking consistency in our legal culture and . . . is an obvious manifestation of the notion that decisionmaking consistency itself has normative value." (Internal quotation marks omitted.) *Spiotti* v. *Wolcott*, 326 Conn. 190, 201, 163 A.3d 46 (2017); see also *State* v. *Salamon*, supra, 287 Conn. 519.

In this case, the petitioner has presented this court with no sound basis to conclude that trial counsel's conduct fell outside the wide range of reasonable professional assistance with respect to the kidnapping instruction. See *Strickland* v. *Washington*, supra, 466 U.S. 689. We conclude, therefore, that the habeas court properly determined that the petitioner failed to demonstrate that trial counsel rendered ineffective assistance with respect to this claim.

B

Last, the petitioner claims that the habeas court improperly concluded that the petitioner failed to establish that his trial counsel rendered ineffective assistance by failing to file a motion to suppress incriminating statements made to law enforcement. Specifically, the petitioner claims that because he was in custody for the purpose of *Miranda* when he made incriminating statements to law enforcement, counsel's failure to pursue a motion to suppress was deficient performance. We disagree.

The following additional facts and procedural history are relevant to our analysis. Prior to the petitioner's

criminal trial, trial counsel moved to adopt the suppression motions of the petitioner's previous defense attorney. Trial counsel subsequently withdrew the motion with respect to those statements made by the petitioner during his pretrial suppression hearing. At the criminal trial, law enforcement officers testified that they visited the petitioner's home on August 11, 2007, at approximately 4 p.m., to interview him regarding the complaint. En route to the petitioner's residence they did not use sirens or emergency lights. Trooper Theresa Freeman testified that "[they] parked . . . on the opposite side of the street back from the house. . . . [T]wo troopers [were directed] to go around the back . . . . [They] walked up . . . to the front door [where] there was a female sitting on a chair . . . [they] could see through the window. [They] knocked, [and] she came to the door . . . . [Trooper Freeman asked] 'Is [the petitioner] home?' " The woman then called to the petitioner, who then came to the door. "Trooper Uliano asked him to step outside on the porch . . . which he did. . . . [Then Trooper Freeman] looked right at him [and] said, '[d]id you put your hands on a fifteen year old girl?'. . . [At which point], [h]e looked at [Trooper Freeman], turned his head to the side and said, 'I didn't know she was fifteen,' and dropped his head."

"In order to establish that he was entitled to *Miranda* warnings [the petitioner] must show that he was in custody when he made the statements and that he made the statements in response to police questioning. . . . In assessing whether a person is in custody for purposes of *Miranda*, the ultimate inquiry is whether a reasonable person in the [petitioner's] position would believe that there was a restraint on [his] freedom of movement of the degree associated with a formal arrest. . . . Any lesser restriction on a person's freedom of action is not significant enough to implicate the core . . . concerns

[of the fifth amendment to the United States constitution] that *Miranda* sought to address." (Citation omitted; internal quotation marks omitted.) *State* v. *Edwards*, 325 Conn. 97, 110, 156 A.3d 506 (2017).

With these facts and principles in mind, we review the habeas court's conclusion that trial counsel did not render ineffective assistance with respect to the suppression of the statements made to law enforcement prior to the *Miranda* warnings. The habeas court found that "[trial counsel] well knew that the petitioner . . . had personal interaction and experience with state troopers regarding such inquires in the past that never resulted in a loss of his freedom of movement. Under these circumstances, [trial counsel] correctly assessed that any attempt to suppress admission of these statements would be meritless and futile, and he was within professional competence for declining to make that attempt." The habeas court explained that "[u]nder this scenario . . . a reasonable person would not believe that his freedom of movement was restrained by [the] display of police authority [encountered]." (Internal quotation marks omitted.)

Evidence adduced at the underlying criminal trial and at the habeas hearing indicates there was not a sufficient show of police force that would lead a reasonable person, in his own home, to feel that he was in custody for the purposes of *Miranda*. Accordingly, we conclude that the habeas court properly determined that the petitioner failed to demonstrate that trial counsel rendered deficient performance with respect to this claim.

In light of the foregoing, we conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

# ANGELA DIAZ *v.* DEPARTMENT OF SOCIAL SERVICES ET AL.
## (AC 39993)

Lavine, Alvord and Keller, Js.

*Syllabus*

The plaintiff appealed to this court from the decision of the Compensation Review Board affirming the decision of the Workers' Compensation Commissioner denying and dismissing her claim for certain medical and indemnity benefits. The plaintiff claimed, inter alia, that the commissioner improperly failed to credit the allegedly uncontested expert testimony from her primary care physician, D, that the permanent partial disability of the plaintiff's cervical spine and lumbar spine, as stated in agreements that had been approved by the commissioner, were substantial factors in causing the plaintiff to be disabled from her work. The plaintiff had been involved in two motor vehicle accidents that were not related to her employment. The second accident exacerbated her preexisting spinal pain and caused her to miss work. The defendant thereafter rearranged the plaintiff's workstation to fit her in an ergonomic fashion. A and M, two physicians who treated the plaintiff, recommended that she undergo surgery to address the issues with her spine, but she did not undergo that surgery. The commissioner determined, inter alia, that the plaintiff had failed to establish that the aggravation of her cervical and lumbar spine injuries was a substantial contributing factor to the need for surgery that had been recommended for several years before she filed her claim for benefits. The plaintiff thereafter appealed to the board and filed a motion with the board to submit additional evidence. The board denied the motion to submit additional evidence and affirmed the commissioner's decision. *Held*:

1. The board properly affirmed the commissioner's denial and dismissal of the plaintiff's claim for benefits, as the commissioner's determination that the plaintiff's claimed injuries were not a substantial factor in her medical conditions and need for surgery was supported by the evidence and was not inconsistent with the law: D's opinion that the plaintiff was totally disabled as a result of her compensable injury was not undisputed, as the commissioner credited and relied, instead, on testimony and statements from M that there was no evidence to suggest that the lack of ergonomics at the plaintiff's workplace played any role in her need for surgery, and from A, who was reluctant to state that the plaintiff's failure to use an ergonomic workstation directly caused her cervical spine condition; moreover, although D opined that the plaintiff's need for surgery was attributable to the lack of proper ergonomics at the workplace, cervical fusion surgery had been recommended long before the plaintiff filed her claim for benefits and before the voluntary

agreements were issued, and was continually delayed by the plaintiff because of her fear of undergoing the surgery, and although portions of the record could cast doubt on the conclusions of A and M, the commissioner was entitled to credit all or any portion of the evidence in reaching his conclusion.

2. The board properly affirmed the commissioner's denial of the plaintiff's motion to correct the commissioner's findings; the findings of the commissioner were supported by the evidence and included all material facts as determined by the commissioner, and the plaintiff merely sought to have the commissioner conform his findings to the plaintiff's view of the facts.

3. The board did not abuse its discretion in denying the plaintiff's motion to submit additional evidence; the board reasonably could have concluded that the plaintiff did not demonstrate that she had good reason for not presenting that evidence to the commissioner, as the documents that the plaintiff sought to submit were in existence approximately four years before the formal hearing on her workers' compensation claim commenced, and her motion merely sought to relitigate the issue of a witness' credibility.

Argued March 12—officially released September 4, 2018

*Procedural History*

Appeal from the decision by the Workers' Compensation Commissioner for the Third District denying and dismissing the plaintiff's claim for certain medical and indemnity benefits, brought to the Compensation Review Board, which denied the plaintiff's motion to submit certain evidence; thereafter, the Compensation Review Board affirmed the commissioner's decision, and the plaintiff appealed to this court. *Affirmed.*

*Richard L. Jacobs*, for the appellant (plaintiff).

*Lisa Guttenberg Weiss*, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Philip M. Schulz*, assistant attorney general, for the appellees (named defendant et al.).

*Opinion*

ALVORD, J. The plaintiff, Angela Diaz, appeals from the decision of the Workers' Compensation Review Board (board) affirming the finding and dismissal of

her claim for medical and indemnity benefits against the defendant, the Department of Social Services,[1] by the Workers' Compensation Commissioner for the Third District (commissioner). On appeal, the plaintiff claims that the board improperly: (1) affirmed the commissioner's finding and dismissal; (2) affirmed the commissioner's denial of the plaintiff's motion to correct the finding; and (3) denied the plaintiff's motion to submit additional evidence. We affirm the decision of the board.

The following facts, found by the commissioner or otherwise undisputed in the record, and procedural history are relevant to the plaintiff's appeal. The plaintiff worked as an eligibility service specialist for the defendant from October, 1986 through December 9, 2010. The plaintiff worked in the defendant's New Haven office. During her period of employment, she worked eight hours a day, five days a week. Her responsibilities included determining a client's eligibility for cash assistance, food stamps, and medical benefits. Her position required a "great deal of walking back and forth on the [intake] line where she met applicants." Although work on the intake line consumed half of her workday, it did not constitute a significant portion of her job duties.

In 1990, the plaintiff was involved in a motor vehicle accident that was not related to her work. As a result of this accident, she sustained disc herniations to her cervical spine and lumbar spine. In 2006, the plaintiff began treatment with Dr. Craig D. O'Connell, a chiropractor. In October, 2008, the plaintiff was involved in a second motor vehicle accident that was not related to her work, which exacerbated her preexisting cervical and lumbar spinal pain and caused her to miss work

[1] Gallagher Bassett Services and Meridian Resource Co., LLC, the workers' compensation insurance carriers for the Department of Social Services, also were named as defendants. In the interest of simplicity, we refer in this opinion to the Department of Social Services as the defendant.

until March, 2009. In December, 2008, the plaintiff began treatment with Dr. Michael E. Opalak, a neurosurgeon, on referral from her primary care physician, Dr. Sudipta Dey, regarding her injuries stemming from both motor vehicle accidents. Dr. Opalak noted that the recent accident seemed to have worsened some of her lumbar symptoms and increased her neck discomfort.

On January 5, 2009, Dr. Opalak reviewed the plaintiff's imaging and noted that she had some element of disc disease at the lower three levels of the lumbar spine, but most of her symptoms were related to her cervical complaints. Dr. Opalak recommended conservative measures and epidural injections before considering surgery. The next day, Dr. O'Connell drafted a letter from the plaintiff on his letterhead, stating: "I have a history of cervical disc degeneration and herniations dating back to 1990. I felt at that time and still feel that cervical disc surgery is [too] risky. I have advised neurosurgeon, Michael Opalak that I am not going to have cervical surgery and I would like to continue with conservative chiropractic care which has always helped me in the past.

"Dr. O'Connell has informed me of the possible complications of my cervical spinal herniations and canal stenosis. Among these are possible drop foot, paralysis, and bowel/bladder dysfunction. He also advised if I experienced any of these complications or any other questionable symptoms to contact Dr. [Opalak] (neurosurgeon) or go to the emergency room. (Immediately)." The plaintiff signed the letter.

On September 4, 2009, the plaintiff filed a request with the defendant pursuant to the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq., to be taken off the intake line permanently and for an ergonomic workstation. She requested, inter alia, a new desk and headset. On December 31, Ray Primini of the

Department of Administrative Services conducted an evaluation of the plaintiff's workstation. Primini recommended that the defendant provide the plaintiff with an adjustable high-back chair with arms and lumbar support to accommodate someone of her height.[2] Primini also recommended that the defendant provide the plaintiff with a document holder to reduce the need for her to look down. He did not recommend that the defendant provide a new headset, as the defendant had already provided the plaintiff with one.

Primini determined that rather than providing the plaintiff a new desk, the plaintiff's workstation could be rearranged by placing her computer tower and monitor on already existing surfaces, and her keyboard on the existing desk surface. Primini rearranged a table and desk and placed the computer equipment in a way that fit the plaintiff in an ergonomic fashion. On March 10, 2010, a new high-back desk chair was delivered to and signed for by the plaintiff. The defendant also provided the plaintiff with a document holder, which could be adjusted from the back to accommodate vertical and horizontal documents.

On December 9, 2010,[3] the plaintiff filed a first report of injury,[4] complaining of extreme discomfort in the cervical and lumbar spinal regions beginning approximately six months earlier. She attributed her injury to lack of proper ergonomics at her workstation. On January 11, 2011, the plaintiff returned to Dr. Opalak after not having seen him for two years. Dr. Opalak was concerned by how the plaintiff's condition had progressed, as she presented with much more neck and

[2] The plaintiff is five feet, eleven inches tall.

[3] The plaintiff's last day of work for the defendant was also on December 9, 2010.

[4] See General Statutes § 31-294b (a) ("[a]ny employee who has sustained an injury in the course of his employment shall immediately report the injury to his employer, or some person representing his employer").

back pain, had difficulty rising from a sitting position, and had difficultly feeling her feet. The plaintiff expressed fear of surgery. Dr. Opalak recommended that, for safety's sake, the plaintiff have a discectomy. On April 1, 2011, Dr. O'Connell disabled the plaintiff from work due to the absence of a proper ergonomic work environment for her chronic spinal condition.

On May 24, 2011, the plaintiff consulted Dr. Khalid Abbed for a second opinion about the need for surgery. He recommended a cervical decompression surgery prior to addressing the issues with the plaintiff's lumbar spine. On August 3, Dr. Abbed again recommended the surgery, but at the plaintiff's request, agreed to wait six months and reassess. On December 20, Dr. Abbed again recommended surgery, but agreed to wait for approval because a workers' compensation hearing was scheduled.

On September 26, 2011, the commissioner approved a jurisdictional voluntary agreement.[5] The injury was identified as a December 9, 2010 lumbar neuropathy and cervical myelopathy injury due to sitting, which caused an aggravation of prior injuries. Drs. O'Connell and Opalak were listed as treating physicians. Also on September 26, the commissioner approved a voluntary agreement in which Dr. Opalak awarded the plaintiff a 30 percent permanent partial disability rating[6] (PPD) for the December 9 cervical myelopathy.

[5] See General Statutes § 31-296 (a) ("If an employer and an injured employee, or in case of fatal injury the employee's legal representative or dependent, at a date not earlier than the expiration of the waiting period, reach an agreement in regard to compensation, such agreement shall be submitted in writing to the commissioner by the employer with a statement of the time, place and nature of the injury upon which it is based; and, if such commissioner finds such agreement to conform to the provisions of this chapter in every regard, the commissioner shall so approve it. A copy of the agreement, with a statement of the commissioner's approval, shall be delivered to each of the parties and thereafter it shall be as binding upon both parties as an award by the commissioner. . . .").

[6] See General Statutes § 31-308 (a) ("[i]f any injury for which compensation is provided under the provisions of this chapter results in partial incapacity,

The plaintiff then requested a change in physician because she believed that Dr. Opalak was rude to her after she indicated that she did not want surgery on her cervical spine because she feared paralysis. On January 26, 2012, Commissioner Scott A. Barton appointed Dr. Abbed as the authorized treating physician. On March 26, a voluntary agreement was approved, in which Dr. Opalak awarded the plaintiff a 5 percent PPD rating for the December 9, 2010 lumbar neuropathy. At a July 23, 2012 informal hearing, Commissioner Barton noted that the plaintiff could put the surgery through her group health insurance and that the defendant would issue a form 43 to disclaim responsibility for it.

On October 19, 2012, Dr. Jacob Mushaweh, a neurosurgeon, performed a medical examination of the plaintiff for the defendant. In his opinion, surgery at the C5-C6 level was reasonable, while surgery at the C6-C7 level amounted to a judgment call. He concluded that there was no evidence to suggest that the lack of ergonomics at work played any role in the plaintiff's need for surgery.

On March 23, 2013, Dr. Abbed performed an anterior cervical discectomy and fusion surgery on the plaintiff. Subsequently, Dr. John Reilly, a plastic surgeon, performed a bilateral trigger thumb release on both of the plaintiff's hands.[7]

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the injured employee shall be paid a weekly compensation equal to seventy-five per cent of the difference between the wages currently earned by an employee in a position comparable to the position held by the injured employee before his injury . . . and the amount he is able to earn after the injury").

[7] Dr. Mark Melendez, a plastic surgeon of the same office as Dr. Reilly, recommended the bilateral trigger thumb release on January 27, 2014. On March 17, Dr. Reilly noted that the sutures on both thumbs were removed. The medical reports do not contain the date of the procedure, but it is reasonable to assume that it occurred between January 27 and March 17, 2014.

Formal hearings were held before the commissioner on September 22, 2014, October 23, 2014, November 18, 2014, January 12, 2015, April 7, 2015, and June 29, 2015. At the beginning of the September 22 hearing, the parties agreed that the issues involved compensability of the plaintiff's cervical spine fusion surgery, total disability benefits,[8] form 36,[9] form 43,[10] the plaintiff's motion to preclude,[11] and, if the commissioner found compensability, lien reimbursement.[12] The record was closed on November 9, 2015.

On January 5, 2016, the commissioner issued a finding and dismissal. He found that the plaintiff "suffered spinal injuries in separate non-work-related motor vehicle accidents in 1990 and 2008." He found that Dr. Opalak and Dr. Abbed recommended surgery "long before" the plaintiff filed her workers' compensation claim and the

[8] See General Statutes § 31-307 (a) ("[i]f any injury for which compensation is provided under the provisions of this chapter results in total incapacity to work, the injured employee shall be paid a weekly compensation equal to seventy-five per cent of the injured employee's average weekly earnings as of the date of the injury").

[9] "A [f]orm 36 is a notice to the compensation commissioner and the [plaintiff] of the intention of the employer and its insurer to discontinue compensation payments. The filing of this notice and its approval by the commissioner are required by statute in order properly to discontinue payments." (Internal quotation marks omitted.) *Brinson* v. *Finlay Bros. Printing Co.*, 77 Conn. App. 319, 320 n.1, 823 A.2d 1223 (2003).

[10] "A form 43 is a disclaimer that notifies a [plaintiff] who seeks workers' compensation benefits that the employer intends to contest liability to pay compensation. If an employer fails timely to file a form 43, a [plaintiff] may file a motion to preclude the employer from contesting the compensability of his claim." (Internal quotation marks omitted.) *Dubrosky* v. *Boehringer Ingelheim Corp.*, 145 Conn. App. 261, 265 n.6, 76 A.3d 657, cert. denied, 310 Conn. 935, 78 A.3d 859 (2013).

[11] On September 9, 2014, the plaintiff filed a motion titled "Motion to Preclude Defense." In it, the plaintiff argued that, because the commissioner approved three voluntary agreements in this case, which "conclusively established" that the need for cervical surgery was causally related to the plaintiff's work injury, the defendant should be precluded from "relitigat[ing] the issue of compensability."

[12] The amount of the lien was $61,046.21.

formal hearing on that claim, and that her "fear of undergoing surgery was well documented" by her treating physicians and her own testimony. He further found that the plaintiff was not credible, and concluded that she failed to establish that "the aggravation of her cervical and lumbar spine injuries was a substantial contributing factor to the need for surgery that had been recommended for several years." He concluded that the defendant "did not unreasonably contest the [plaintiff's] request for cervical fusion surgery," and that the plaintiff failed "in her burden of persuasion to establish [that] the cervical spine fusion surgery is compensable." He also concluded that the plaintiff failed to establish causation as to her bilateral thumb surgery. The commissioner denied and dismissed the plaintiff's claim for medical and indemnity benefits.[13]

The plaintiff appealed to the board, arguing that the commissioner "failed to credit what she considers to be uncontested expert testimony supporting her claim, and this constitutes reversible error." The board rejected this argument and affirmed the commissioner's finding and dismissal. The board concluded: "We are not persuaded by this argument and find that the trial commissioner's decision is supported by probative evidence that he found persuasive and credible, and a determination by the commissioner that the [plaintiff's] expert witnesses were not persuasive." The board further concluded: "It was the [plaintiff's] burden to persuade the trial commissioner that her workplace conditions were a substantial contributing factor in her need for surgery and resultant medical conditions. We believe that on the record herein a reasonable fact

[13] Because the commissioner did not find compensability, he did not reach the issue of lien reimbursement. The commissioner also denied the plaintiff's motion to preclude, and concluded that "[a]lthough [the] parties initially agreed the issues included form 36, no evidence or testimony was given regarding form 36 approval or denial, and the issue is deemed to be abandoned."

finder could be left unpersuaded." This appeal followed. Additional facts will be set forth as necessary.

I

The plaintiff first claims that the board improperly affirmed the commissioner's finding and dismissal. Specifically, she argues that the commissioner failed to accept "undisputed testimony" of the plaintiff's primary care physician, Dr. Dey,[14] which conclusively established that: (1) the plaintiff has been disabled from work since December 10, 2010; (2) the PPD of 30 percent of her cervical spine, as stated in the January 6, 2012 voluntary agreement, was a substantial factor in causing the plaintiff to be disabled from work; (3) the PPD of 5 percent of her lumbar spine, as stated in the March 26, 2012 voluntary agreement, was a substantial factor in causing the plaintiff to be disabled from work; (4) the combination of the 30 percent disability of the cervical spine and 5 percent disability of the lumbar spine was a substantial factor in causing the plaintiff to be disabled from work; and (5) the PPD of 30 percent of the cervical spine was a substantial factor in causing the plaintiff to undergo cervical spine surgery. We are not persuaded.

The following additional facts and procedural history are relevant to our resolution of this claim. At the April 7, 2015 formal hearing before Commissioner Jack R. Goldberg, the plaintiff entered into evidence the complete transcript of the deposition testimony of Dr. Dey. Dr. Dey, who is board certified in internal medicine, testified about his treatment of the plaintiff, which began in 2002. Dr. Dey testified that he treated the plaintiff for cervical myelopathy, cervical disc herniation, lumbar disc herniation, and lumbar neuropathy.

[14] At the formal hearings, Dr. O'Connell also testified about his treatment of the plaintiff. On appeal to this court, however, the plaintiff does not make any argument with respect to the testimony of Dr. O'Connell, but rather only argues that the commissioner failed to accept the "undisputed evidence" presented through the testimony of Dr. Dey.

He testified that as early as 2003, he noted when he examined the plaintiff that "she had all the signs and symptoms of cervical myelopathy, and I actually recorded in my notes, she had hyperreflexia, both sides. And I wrote it down, 'Cervical disc herniation with probable cervical myelopathy. Needs intermittent traction. Neuropathic pain. Patient does not want neurosurgical intervention.' "

He testified that, in his opinion, the plaintiff is totally disabled from gainful employment. He testified that "there is a probable relationship with a reasonable degree of medical probability the 30 percent impairment was a substantial factor . . . [i]n being totally disabled from gainful employment." When questioned as to whether the 5 percent PPD of the plaintiff's lumbar spine was a substantial factor in "bringing about" the plaintiff's disability, Dr. Dey responded, "[p]robably, yes." He further testified that the combination of the disabilities of the lumbar and cervical spine "made her completely disabled." With respect to whether the 30 percent PPD of the plaintiff's cervical spine was a substantial factor in causing her to undergo cervical spine surgery, Dr. Dey testified that the plaintiff "had some degree of neck pain as well as cervical disc herniation, for a long time, which got exacerbated over a period of time. She also sustained a motor vehicle accident in between, and subsequently her condition progressed so much that she needed surgical intervention. . . . It was related. . . . It is related, probably related. I cannot—probably related, yes." When questioned about a prior opinion that he gave attributing the plaintiff's permanent disability to her work-related injury,[15] Dr. Dey testified that it was not based on his own certainty. Rather, it was based on the opinion of Dr. O'Connell

[15] Dr. Dey's opinion was contained in a December 18, 2013 letter, stating: "I believe that [the plaintiff's] permanent disability is directly contributed to her work-related injury . . . ."

"[t]o some degree." In Dr. Dey's opinion, however, the lack of an ergonomic workstation was more likely to have exacerbated the plaintiff's preexisting injuries than not.

The commissioner, in his finding and dismissal, credited Dr. Dey's "opinion . . . that the [plaintiff] in 2003 exhibited the symptoms of cervical myelopathy and displayed neuropathic pain, cervical disc herniation, and did not want neurosurgical intervention." He found, however, that Dr. Dey's opinion "attributing the [plaintiff's] need for surgery to the lack of proper ergonomics at the workplace" was not credible, as it was grounded in speculation or conjecture. He credited the opinion of Dr. Opalak that the plaintiff required cervical fusion surgery in 2008. He also found Dr. Mushaweh's testimony "credible and persuasive that the recommended cervical fusion surgery was reasonable but not attributable to the lack of an ergonomic workstation." He also credited Dr. Abbed's opinion regarding the plaintiff's need for cervical fusion surgery. He also credited and found persuasive Dr. Abbed's statement that he could not "say that [a] failure to use an ergonomic workstation directly caused the [plaintiff's] cervical spine condition," but found his statement that it "probably aggravated a preexisting condition and increased her level of discomfort" to be grounded in speculation and conjecture.

On appeal to the board, the plaintiff argued that "the trial commissioner failed to credit what she considers to be uncontested expert testimony supporting her claim, and this constitutes reversible error." She argued that, pursuant to this court's opinion in *Bode* v. *Connecticut Mason Contractors*, *The Learning Corridor*, 130 Conn. App. 672, 25 A.3d 687, cert. denied, 302 Conn. 942, 29 A.3d 467 (2011), "the trial commissioner was obligated to adopt Dr. Dey's opinion and find that she was totally disabled as a result of her compensable injury." The

board rejected the plaintiff's argument, concluding that *Bode* did not stand for the proposition put forth by the plaintiff. The board concluded that "[a]fter reviewing the totality of Dr. Dey's testimony, we are satisfied that a reasonable fact finder could have reached a conclusion that it was insufficiently reliable to support the [plaintiff's] position," and noted that a commissioner is not obligated to find a plaintiff's expert persuasive and reliable and, therefore, could have "considered all [of the relevant evidence of her treaters] and found it less persuasive than the evidence presented by the [defendant]." The board noted the commissioner's conclusion that Dr. Dey's opinions were "substantially influenced and derivative of" Dr. O'Connell's opinions, which the commissioner declined to credit and found unpersuasive. The board further concluded that although the plaintiff characterized Dr. Dey's opinions as "uncontroverted," both Dr. Abbed and Dr. Mushaweh offered differing opinions, and the commissioner "found Dr. Mushaweh in particular credible and persuasive on the issue of workplace causation."

We begin by setting forth the applicable standard of review and legal principles. "A party aggrieved by a commissioner's decision to grant or deny an award may appeal to the board pursuant to General Statutes § 31-301. . . . The appropriate standard applicable to the board when reviewing a decision of a commissioner is well established. [T]he review [board's] hearing of an appeal from the commissioner is not a de novo hearing of the facts. . . . [I]t is oblig[ated] to hear the appeal on the record and not retry the facts. . . .

"Similarly, on appeal to this court, [o]ur role is to determine whether the review [board's] decision results from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them . . . . [Therefore, we ask] whether

the commissioner's conclusion can be sustained by the underlying facts. . . .

"The [commissioner] alone is charged with the duty of initially selecting the inference [that] seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court." (Citation omitted; internal quotation marks omitted.) *Jodlowski* v. *Stanley Works*, 169 Conn. App. 103, 108–109, 147 A.3d 741 (2016).

On appeal, the plaintiff challenges the commissioner's failure to find that her claimed December 9, 2010 injuries[16] were substantial factors in her medical conditions and need for surgery. "[I]n Connecticut traditional concepts of proximate cause constitute the rule for determining . . . causation [in workers' compensation cases]. . . . [T]he test of proximate cause is whether the [employer's] conduct is a substantial factor in bringing about the [employee's] injuries. . . . [Our Supreme Court] has defined proximate cause as [a]n actual cause that is a substantial factor in the resulting harm . . . . The question of proximate causation . . . belongs to the trier of fact because causation is essentially a factual issue. . . . It becomes a conclusion of law only when the mind of a fair and reasonable [person] could reach only one conclusion; if there is room for a reasonable disagreement the question is one to be determined by the trier as a matter of fact. . . . [W]hether a sufficient causal connection exists between the employment and a subsequent injury is . . . a question of fact for the commissioner. It is axiomatic that, in reaching that determination, the commissioner often is required to draw an inference from what he has found to be the

[16] Throughout this opinion, we refer to the plaintiff's cervical myelopathy and lumbar neuropathy, as described in the voluntary agreements, as the plaintiff's December 9, 2010 injuries. The defendant does not contest that the injuries, which the plaintiff first reported to the defendant on December 9, 2010, were compensable work-related injuries.

basic facts. [As (our Supreme Court) previously (has) explained] [t]he propriety of that inference . . . is vital to the validity of the order subsequently entered. But the scope of judicial review of that inference is sharply limited . . . . If supported by evidence and not inconsistent with the law, the . . . [c]ommissioner's inference that an injury did or did not arise out of and in the course of employment is conclusive. No reviewing court can then set aside that inference because the opposite one is thought to be more reasonable; nor can the opposite inference be substituted by the court because of a belief that the one chosen by the . . . [c]ommissioner is factually questionable. . . . Only if no reasonable fact finder could have resolved the proximate cause issue as the commissioner resolved it will the commissioner's decision be reversed by a reviewing court." (Citation omitted; internal quotation marks omitted.) *Turrell* v. *Dept. of Mental Health & Addiction Services*, 144 Conn. App. 834, 844–45, 73 A.3d 872, cert. denied, 310 Conn. 930, 78 A.3d 857 (2013).

We have thoroughly reviewed the record and the decisions of both the commissioner and the board. We agree with the board that it was bound to accept the commissioner's decision as to which medical evidence he found more persuasive. Although the plaintiff characterizes Dr. Dey's testimony as "undisputed," we note, as did the board, that both Dr. Abbed and Dr. Mushaweh offered differing opinions from those of Dr. Dey. The commissioner specifically credited and relied on portions of Dr. Abbed's and Dr. Mushaweh's testimony, and statements that differed from the opinions of Dr. Dey in determining that the plaintiff's claimed December 9, 2010 injuries were not a substantial factor in her medical conditions and need for surgery.[17] That

[17] The board also noted that Dr. Dey "had difficulty delineating his rationale for finding the [plaintiff] totally disabled as '[t]he reason for [the] opinion is that I can't tell you because I am not [a] medical disability examiner, the 30 percent impairment has been established before.' " The board also noted that in drafting letters on behalf of the plaintiff, Dr. Dey relied on medical

evidence included Dr. Mushaweh's opinion, after examining the plaintiff, that "there was simply no evidence to suggest that the lack of ergonomics at work played any role in the need for surgery," and Dr. Abbed's "reluctance to state that failure to use an ergonomic workstation directly caused the [plaintiff's] cervical spine condition . . . ." Although Dr. Dey opined that the plaintiff's need for surgery was attributable to the lack of proper ergonomics at the workplace, as the commissioner found and the board noted, "cervical fusion surgery was recommended by Dr. Opalak and Dr. Abbed long before the [plaintiff] filed the present claim and before the voluntary agreements were issued, and was continually delayed by her because of fear of undergoing the surgery. . . . [T]he [plaintiff's] fear of undergoing surgery was well documented by Dr. O'Connell, Dr. Opalak, and Dr. Abbed and by the [plaintiff's] testimony."[18]

reports and opinions provided by Dr. O'Connell. Furthermore, "[w]hen asked if the prior motor vehicle accidents the [plaintiff] had sustained could have required her to undergo surgery in the absence of workplace exposure he said that [t]here's a big if in there. . . . He agreed with counsel that his theory of workplace causation of the [plaintiff]'s condition was based on the [Dr. O'Connell's] theory of causation to some degree." (Citation omitted; internal quotation marks omitted.)

We agree with the board's conclusion that, on the basis of these observations, "[a]fter reviewing the totality of Dr. Dey's testimony, we are satisfied that a reasonable fact finder could have reached a conclusion that [the testimony] was insufficiently reliable to support the [plaintiff's] position. We also find evidence in the record supporting the trial commissioner's conclusion that Dr. Dey's opinions were substantially influenced and derivative of the opinions of Dr. O'Connell, which the commissioner found unpersuasive in [paragraph 1 of his conclusion]. We note that Dr. O'Connell offered live testimony before the trial commissioner, and the commissioner's assessment of the persuasive value of this witness is essentially inviolate on appeal." See *Ayna* v. *Graebel/CT Movers, Inc.*, 133 Conn. App. 65, 71, 33 A.3d 832 ("[i]t is within the discretion of the commissioner alone to determine the credibility of witnesses and the weighing of the evidence"), cert. denied, 304 Conn. 905, 38 A.3d 1201 (2012).

[18] In her brief to this court, the plaintiff argues that "the trial commissioner did not rule on whether the plaintiff was disabled from work. His opinion touched only on the need for surgery." We conclude that the plaintiff's observation is immaterial to our analysis. Although the commissioner did not explicitly find that the plaintiff was not totally disabled from work, logic dictates that by finding that the claimed December 9, 2010 injury was not a substantial factor in causing the plaintiff's need for surgery, he implicitly found that the plaintiff was not totally disabled as the result of a compensa-

Although there are portions of the record that may cast doubt on Dr. Abbed's and Dr. Mushaweh's conclusions, the commissioner was entitled to credit all or any portion of the evidence submitted by the parties in reaching his conclusion. See *Turrell* v. *Dept. of Mental Health & Addiction Services*, supra, 144 Conn. App. 846. "It is well within the authority of the commissioner to choose which evidence he found persuasive and which evidence he found unpersuasive, and adjudicate the claim accordingly. As the fact finder, the commissioner may reject or accept evidence . . . . It is not the province of this court to second-guess the commissioner's factual determinations. [T]he trier of fact—the commissioner—was free to determine the weight to be afforded to [the] evidence. . . . This court, like the board, is precluded from substituting its judgment for that of the commissioner with respect to factual determinations." *Jodlowski* v. *Stanley Works*, supra, 169 Conn. App. 109. Because the commissioner's determination is supported by the evidence and not inconsistent with the law,[19] we cannot conclude that he erred in

ble, work-related injury. Put another way, the December 9 injury, if not a substantial factor in causing the plaintiff's need for surgery, also could not be a substantial factor in causing her to be totally disabled.

[19] The plaintiff argues, as she did on appeal to the board, that this court's decision in *Bode* v. *Connecticut Mason Contractors, The Learning Corridor*, supra, 130 Conn. App. 672, supports her claim that "[t]here was no basis in the record in the present case for rejecting the testimony of Dr. Dey." According to the plaintiff, *Bode* held, inter alia, that "the trier of fact may not ignore undisputed probative evidence."

In *Bode*, the issue was whether the plaintiff was employable during a three and one-half year period following a work injury. Id., 674, 676. In his finding and dismissal, the commissioner failed to make findings with respect to the reliability of the vocational evidence offered by the plaintiff. Id., 684. Specifically, the commissioner did not discuss two vocational reports, both of which stated that the plaintiff was unemployable, and both of which were conducted closer in time than the others to his claim and the hearings. Id., 683. This court concluded: "The record reflects that there was no evidence that the plaintiff *was* employable, at any time, after February 5, 2004. There were two vocational reports dated August, 2004, and July, 2008, both of which stated that the plaintiff *was not* employable. The commissioner also had before him the job search forms showing the plaintiff's failed attempts to secure employment. Despite this evidence, he (1) made no conclusions as to the reliability of the vocational reports or regarding the plaintiff's employability, (2) ignored the August, 2004 vocational report and the job

determining that the plaintiff's December 9, 2010 injury was not a substantial factor in her medical conditions and need for surgery.[20]

Accordingly, the board did not err in affirming the commissioner's dismissal of the plaintiff's workers' compensation claim.

search forms and (3) concluded that the plaintiff was not entitled to total temporary disability benefits." (Emphasis in original.) Id., 686.

Although we agree with the plaintiff that this court in *Bode* concluded that the commissioner erred in discounting documentary evidence which showed that the plaintiff was temporarily disabled from work, *Bode* is distinguishable from the present case. Here, as we have concluded, Dr. Dey's testimony was not "undisputed . . . ." Dr. Abbed disputed Dr. Dey's testimony, and Dr. Mushaweh disputed Dr. Dey's testimony. This was not a case where there was "no evidence" from which the commissioner could conclude that the plaintiff's claimed December 9, 2010 injury was not a substantial factor in her medical conditions and need for surgery. This is also not like *Bode*, where the commissioner failed to make findings with respect to material pieces of evidence. The finding and dismissal contained an abundance of well reasoned findings, which are supported by the record. We therefore conclude that the plaintiff's reliance on *Bode* is misplaced.

[20] The plaintiff also argues that the voluntary agreements awarding 30 percent PPD to the plaintiff for an injury to her cervical spine, and 5 percent PPD to the plaintiff for an injury to her lumbar spine, "negates the trial commissioner's finding that the disabilities were caused by discrete events, the motor vehicle accidents." Essentially, the plaintiff argues that the voluntary agreements established that she suffered from "disabilities . . . as a result of her compensable injuries of December 9, 2010." In the plaintiff's view, "[t]he trial commissioner was not at liberty to conclude that the plaintiff had not suffered 30 percent PPD of the cervical spine and 5 percent of the lumbar spine as the result of her injuries of December 9, 2010. Those PPDs existed notwithstanding that the plaintiff had been injured in two motor vehicle accidents." We are not persuaded.

The commissioner found that the plaintiff suffered spinal injuries in motor vehicle accidents in 1990 and 2008 that were not related to her work, and that the voluntary agreements regarding the plaintiff's cervical spine and lumbar spine injuries "attributed the December 9, 2010 injuries to sitting that caused an aggravation of previous injuries." Despite the voluntary agreements, the commissioner went on to find that the plaintiff had not "established the aggravation of her cervical and lumbar spine injuries was a substantial contributing factor to the need for surgery that had been recommended for several years." He did not, as the plaintiff contends, "conclude that the plaintiff had not suffered 30 percent PPD of the cervical spine and 5 percent of the lumbar spine as the result of her injuries of December 9, 2010." With respect to the commissioner's finding that "the disabilities were caused by discrete events, the motor vehicle accidents," we note that a commissioner's conclusion as to causation of an injury "is afforded deference similar in degree to that afforded a conclusion by a trial judge or jury on an issue of proximate cause." *Funaioli* v. *New London*, 61 Conn. App. 131, 136, 763 A.2d 22 (2000). Because, as we have concluded, the commissioner's conclusion is supported by competent evidence and is

II

The plaintiff next claims that the board improperly affirmed the commissioner's denial of her motion to correct the finding. Specifically, the plaintiff argues that the commissioner incorrectly denied certain paragraphs of her motion, "which were based on undisputed evidence."

The following additional facts and procedural history are relevant to our resolution of this claim. On February 3, 2016, the plaintiff filed a motion to correct the finding. In her motion, the plaintiff requested that the commissioner amend his findings by adding forty-two findings to the commissioner's findings of fact. On appeal to this court, the plaintiff claims only that the commissioner erred in denying seven of her forty-two proposed corrections, specifically, those set forth in paragraphs thirteen through sixteen and eighteen through twenty of her motion. Those paragraphs proposed the addition of the following findings: (13) "[a]s the result of the aforementioned compensable injuries to the [plaintiff's] cervical spine and lumbar spine, the [plaintiff] has been disabled from work from [December 10, 2010] through the present time"; (14) "[the 30 percent PPD] of the cervical spine was a substantial factor in causing the [plaintiff's] disability from work"; (15) "[the 5 percent PPD] of the lumbar spine was a substantial factor in causing the [plaintiff's] disability from work"; (16) "[t]he combination of the permanent disability of the cervical spine and the permanent disability of the lumbar spine was a substantial factor in causing the [plaintiff's] disability from work"; (18) "[t]he 30 [percent] impairment of the cervical spine was a substantial factor in causing the cervical anterior [discectomy] and

otherwise consistent with the law, we reject the plaintiff's argument that, in light of the voluntary agreements, the commissioner was not entitled to find that the plaintiff failed to meet her burden of proof with respect to the issue of causation.

fusion surgery"; (19) "[a]s the result of that surgery the [plaintiff] incurred medical bills"; and (20) "[t]he [plaintiff] had no change in her spinal condition after the surgery."

The plaintiff also requested the modification or deletion of four additional findings.[21] On February 9, 2016, the commissioner denied the motion to correct in its entirety. On appeal to the board, the board characterized the plaintiff's motion as an effort to "substitute findings supportive of compensability for the findings reached by Commissioner Goldberg" and concluded that the commissioner properly denied the motion.

We begin by setting forth the applicable standard of review and legal principles that guide our analysis. "The finding of the commissioner cannot be changed unless the record discloses that the finding includes facts found without evidence or fails to include material facts which are admitted or undisputed. . . . It [is] the commissioner's function to find the facts and determine the credibility of witnesses . . . and a fact is not admitted or undisputed merely because it is uncontradicted. . . . A material fact is one that will affect the outcome of the case. . . . Thus, a motion to correct is properly

[21] The requested modifications included replacing "Finding and Dismissal" with "Finding and Award," replacing the statement, "I Find that the [plaintiff] has failed in her burden of persuasion to establish the cervical spine fusion surgery is compensable," with, "I find that the [plaintiff] has proved by a preponderance of the evidence that the cervical spine fusion surgery is compensable," and finally, replacing, "WHEREFORE, it is Ordered, Adjudged, Decreed and Awarded that: The claim for medical and indemnity benefits pursuant to the claimed injury of December 9, 2010, under the Workers' Compensation Act [General Statutes § 31-275 et seq.] is denied and dismissed," with, "WHEREFORE, it is Ordered, Adjudicated, Decreed and Awarded that the claim for medical and indemnity benefits pursuant to the injuries of December 9, 2010, under the Workers' Compensation Act is granted." As support for her requests, the plaintiff attached to her motion portions of the testimony of Dr. O'Connell, the plaintiff, and Dr. Dey.

denied when the additional findings sought by the movant would not change the outcome of the case. . . . It is the commissioner . . . who has the discretion to determine the facts. . . . Once the commissioner makes a factual finding, [we are] bound by that finding if there is evidence in the record to support it." (Citations omitted; internal quotation marks omitted.) *Ayna* v. *Graebel/CT Movers, Inc.*, supra, 133 Conn. App. 72–73.

The plaintiff asserts that the commissioner erred in declining to include in his findings these facts, "which were based on undisputed evidence." The plaintiff merely seeks to have the commissioner conform his findings to the plaintiff's view of the facts. It is the commissioner, however, who must determine which portions of a witness' statement or what medical opinions were credible and therefore, formed the basis of the commissioner's conclusion. See *Testone* v. *C. R. Gibson Co.*, 114 Conn. App. 210, 222, 969 A.2d 179, cert. denied, 292 Conn. 914, 973 A.2d 663 (2009). "Once the commissioner makes a factual finding, [we are] bound by that finding if there is evidence in the record to support it." (Internal quotation marks omitted.) *Ayna* v. *Graebel/CT Movers, Inc.*, supra, 133 Conn. App. 73. The plaintiff cannot expect the commissioner to substitute the plaintiff's conclusions for his own. Furthermore, this claim amounts to little more than a restatement of her previous claim, which we already have rejected, in part I of this opinion.

Because the findings of the commissioner were supported by the evidence and included all material facts as determined by him, we conclude that the board properly affirmed the commissioner's denial of the plaintiff's motion to correct.

III

The plaintiff finally claims that the board improperly denied her motion to submit additional evidence. Spe-

cifically, she argues that this evidence, which was "discovered in response to a freedom of information request that [she] made . . . more than nine months after the evidence was closed," would have "cast [a] new light upon the credibility" of a witness.

The following additional facts and procedural history are relevant to this claim. After the plaintiff's September 4, 2009 ADA request for an ergonomic workstation, Primini recommended that the defendant provide the plaintiff with an adjustable high-back chair with arms and lumbar support. The defendant's employee, Haysteen Nickelson, who was responsible for the purchase of the new chair, arranged for a new high-back desk chair to be delivered to the plaintiff. The new high-back desk chair was delivered to and signed for by the plaintiff on March 10, 2010.

At the January 12, 2015 hearing, the plaintiff testified that the chair was broken when delivered to her. She testified that the chair was not a "[brand new high-back] chair . . . . It was a broken chair they brought from another district office." She further testified that Nickelson "came down and they removed the chair. . . . They took and told me they were going to order me a brand new chair. Which I waited from March until I left in December, and it never came, I never got anything." She testified that when the broken chair was provided, she "was given a blank piece of paper to sign that was matched separately to the purchase order to make it appear as if she approved the delivery of the chair." She further testified that after the broken chair was delivered, Nickelson procured another chair for her from a different district office of the defendant. On November 9, 2015, the commissioner closed the record. On January 5, 2016, the commissioner issued his finding

and dismissal. The commissioner found that the plaintiff was not credible, and found the testimony of both Primini and Nickelson to be "credible and persuasive."

On April 28, 2016 the plaintiff filed a motion requesting that the board hear additional evidence or testimony. In her motion, the plaintiff contended that the additional evidence would "[raise] questions about the accuracy of Ms. Nickelson's testimony." The additional evidence consisted of: (1) a December 17, 2010 invoice for a new desk chair from Insalco Corporation, which she obtained through a April 6, 2016 freedom of information request, which showed a "due date" of January 16, 2011; (2) e-mails between employees of the defendant concerning her ergonomic accommodations; and (3) an April, 2016 correspondence from the plaintiff's counsel to the defendant's counsel concerning the plaintiff's chair.

The plaintiff also attached to her motion an affidavit, in which she averred that she did not receive a high-back chair. In support of this, she noted that: (1) the invoice stated that the high-back office chair was delivered on December 17, 2010, eight days after her last day of work on December 9, (2) e-mails, attached to the motion as exhibit C, showed a department employee, Deborah A. McMullen, writing, "I was verbally informed that the chair brought down on [March 10, 2010] was not a high-back chair," and (3) on April 27, 2016, counsel sent a letter to the defendant's counsel concerning the plaintiff's chair.

The defendant subsequently filed an objection to the plaintiff's motion. It argued, inter alia, that because the documents which the plaintiff sought to offer as additional evidence predated the formal hearings, the plaintiff could have offered them in the proceedings before the commissioner before resting her case. The

defendant contended that the plaintiff did not "provide any reason why the additional evidence is material or why it was not presented to the commissioner." The defendant further argued that even if the proposed additional evidence were considered by the board, that because the majority of the commissioner's findings were based on medical records and testimony, and only a small majority of those findings related to the plaintiff's desk chair, "it does not negate or alter the medical evidence upon which the commissioner relied."

In addressing the motion in its memorandum of decision, the board observed: "The [plaintiff] argues that additional evidence is warranted on the issue of the ergonomic chair provided to her because contradictory evidence was presented by Ms. [Nickelson] at the June 29, 2015 hearing which she wishes to challenge. We note that the [plaintiff] did not object to this witness' testimony at that hearing or advise the trial commissioner at the conclusion of her testimony that rebuttal evidence would be proffered to refute her narrative and documentation. Instead, counsel for the [plaintiff] agreed with the trial commissioner [that] the record was complete and the parties would proceed to brief the case." The board agreed with the defendant that the plaintiff lacked sufficient justification for the admission of additional evidence, and also concluded that, because it found in the record "no discussion to the effect that the evidence the [plaintiff] presented at that time was incomplete, we believe admission of this evidence at this juncture would be an effort to try the case in an inappropriate piecemeal fashion." (Internal quotation marks omitted.) The board sustained the defendant's objection and denied the motion to submit additional evidence.

We begin by setting forth the applicable standard of review and legal principles that guide our analysis. "The

board is statutorily authorized to review additional evidence, not submitted to the commissioner, in limited circumstances. General Statutes § 31-301 (b) provides: The appeal [from the commissioner] shall be heard by the . . . [b]oard as provided in [General Statutes §] 31-280b. The . . . [b]oard shall hear the appeal on the record of the hearing before the commissioner, provided, if it is shown to the satisfaction of the board that additional evidence or testimony is material and that there were good reasons for failure to present it in the proceedings before the commissioner, the . . . [b]oard may hear additional evidence or testimony. The procedure that parties must employ in order to request the board to review additional evidence is provided in § 31-301-9 of the Regulations of Connecticut State Agencies, which provides: If any party to an appeal shall allege that there were good reasons for failure to present it in the proceedings before the commissioner, he shall by written motion request an opportunity to present such evidence or testimony to the compensation review division, indicating in such motion the nature of such evidence or testimony, the basis of the claim of materiality, and the reasons why it was not presented in the proceedings before the commissioner. The compensation review division may act on such motion with or without a hearing, and if justice so requires may order a certified copy of the evidence for the use of the employer, the employee or both, and such certified copy shall be made a part of the record on such appeal.

"Thus, in order to request the board to review additional evidence, the movant must include in the motion (1) the nature of the evidence, (2) the basis of the claim that the evidence is material and (3) the reason why it was not presented to the commissioner. . . . The question whether additional evidence should be taken calls for an exercise of discretion by the board, which we

review under the abuse of discretion standard." (Citation omitted; internal quotation marks omitted.) *Diaz* v. *Pineda*, 117 Conn. App. 619, 627–28, 980 A.2d 347 (2009).

In its memorandum of decision, the board noted that the plaintiff sought to submit additional evidence "because contradictory evidence was presented by [Nickelson] at the June 29, 2015 hearing which she wishes to challenge," but noted that the plaintiff did not object to the witness' testimony at the hearing, nor advise the commissioner that she would offer rebuttal evidence to refute her testimony. The board concluded that the plaintiff lacked sufficient justification for the admission of the additional evidence and that "admission of this evidence at this juncture would be an effort to try the case in an inappropriate piecemeal fashion." (Internal quotation marks omitted.) We agree with the board's conclusion. The plaintiff's motion merely sought, without justification, to relitigate the issue of a witness' credibility through the submission of additional evidence.

We conclude that this court's decision in *Diaz* v. *Pineda*, supra, 117 Conn. App. 619, is instructive on this issue. In *Diaz*, the plaintiff sought, after the commissioner issued his finding and award on July 5, 2007, to submit additional evidence to the board. Id., 627. The additional evidence consisted of a medical report dated October 29, 2007. Id. The plaintiff argued before the board that "he had good reason to submit [the doctor's] medical report after the close of the formal hearing before the commissioner because he could not afford to be examined at the time of the hearing . . . ." Id., 628. This court, in concluding that the board reasonably could have concluded that the plaintiff had not demonstrated that he had good reasons for not presenting such evidence to the commissioner, noted the board's finding that "the plaintiff had not established

that the evidence could not have been obtained at the time of the original hearing." Id. Here, the plaintiff submitted her freedom of information request in April, 2016, five months after the commissioner closed the record in November, 2015. In her motion, she offers no reason why the additional evidence was not presented to the commissioner during the formal hearing.[22] Furthermore, we note that in *Diaz*, the additional evidence was not in existence at the time of the formal hearing, and this court still concluded that the board did not abuse its discretion in finding that the plaintiff had not demonstrated good reason for not presenting such evidence to the commissioner. Here, although the plaintiff characterizes this evidence as "new evidence," the documents that the plaintiff sought to submit as additional evidence were in existence in 2010, approximately four years before the formal hearing on her workers' compensation claim commenced in 2014. In light of this, we conclude that the board reasonably could have concluded that the plaintiff did not demonstrate that she had good reason for not presenting such evidence to the commissioner. The board did not abuse its discretion in denying the plaintiff's motion to submit additional evidence.

The decision of the Compensation Review Board is affirmed.

In this opinion the other judges concurred.

[22] In her brief to this court, the plaintiff cites *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), for the proposition that "the defendant was required to disclose that evidence to the plaintiff before the trial evidence was completed, since that evidence from its records was contrary to the position that the defendant took before the trial commissioner." *Brady* is a criminal case, in which the United States Supreme Court held: "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. *Brady* is plainly inapposite to the present case, and as such, does not warrant further discussion.