MARY BETH FARRELL ET AL. *v.* JOHNSON AND JOHNSON ET AL.
(AC 39472)

Lavine, Keller and Bishop, Js.

Syllabus

The plaintiffs, M and V, sought to recover damages from the defendants, various medical providers, for, inter alia, innocent misrepresentation in connection with a surgery performed by the defendant surgeon, H, on M in which H implanted a transvaginal mesh product in M for the purpose

of alleviating pain. M experienced pain after the surgery and despite several procedures to treat the pain and remove the product, M continued to experience pain and was eventually diagnosed with nerve damage from the procedure. The plaintiffs thereafter commenced the present action, alleging, inter alia, innocent misrepresentation. Prior to trial, several defendants withdrew from the case, leaving only H and G Co. as defendants. The trial court directed a verdict in favor of the defendants on the plaintiffs' innocent misrepresentation claim. Subsequently, the jury returned a verdict in favor of the defendants on the remaining counts. From the judgment rendered thereon, the plaintiffs appealed to this court. *Held:*

1. The trial court did not abuse its discretion in permitting reference to the former defendants and determining that the plaintiffs' counsel had opened the door to those references; the plaintiffs' claim that reference to the former defendants was extremely prejudicial and served to improperly inform the jury that the plaintiffs received money from a former defendant was unavailing, as the questions that the defendants' counsel asked did not seek to elicit any details about the circumstances regarding the removal of the other parties, did not mention a settlement, and did not state an amount of damages that the plaintiffs may have received from the former defendants, and the court allowed the defendants' counsel to give context to the questions that the plaintiffs' counsel had asked regarding the fee arrangement.
2. The trial court did not abuse its discretion in excluding from evidence two journal articles that discussed the experimental and risky nature of transvaginal mesh products, that court having properly determined that the articles were inadmissible hearsay and did not fall within a hearsay exception; although the plaintiffs claimed that portions of the journal articles were admissible to establish that H knew or should have known of the experimental and risky nature of the product, and that the articles were therefore being offered to prove notice, the trial court properly determined that the portions of the articles that the plaintiffs sought to admit were being offered to prove the facts asserted within them, as the crux of the plaintiffs' claim was that H knew or should have known of the experimental and risky nature of transvaginal mesh products and the contents of the articles asserted precisely that claim, and the plaintiff could not establish that H knew or should have known of the experimental and risky nature of the products without offering the contents of the articles for their truth.
3. The trial court properly directed a verdict in favor of the defendants on the plaintiffs' claim for innocent misrepresentation; innocent misrepresentation claims primarily apply to business transactions, typically between a buyer and seller, and concern principles of warranty, the plaintiffs and the defendants in this case were not parties to a commercial transaction, as the plaintiffs did not allege breach of warranty claims against the defendants or that the defendants received some benefit as

a result of M's reliance on H's alleged misrepresentation, and although case law has acknowledged that claims for innocent misrepresentation are not limited to contracts for the sale of goods, it was unclear whether such claims are applicable to cases such as this, where the plaintiffs were claiming a lack of informed consent and were not involved in a commercial transaction, and the Restatement suggests that there must be a form of business transaction involved when making a claim for innocent misrepresentation.

4. The plaintiffs could not prevail on their claim that the trial court improperly declined to instruct the jury on the concept of misrepresentation due to H's lack of sufficient knowledge in accordance with their request to charge; the court's charge sufficiently conveyed the substance of the plaintiffs' requested charge, even though the court did not use the precise language requested by the plaintiffs, and, thus, the substance of the requested instructions was fairly and substantially included in the court's jury charge, as the court instructed that if H did not disclose all the information he knew about the product and conveyed a false impression, on which the plaintiffs relied to their detriment, then the jury could hold the defendants liable for negligent or intentional misrepresentation.

Argued April 16—officially released September 18, 2018

Procedural History

Action to recover damages for, inter alia, the defendants' alleged negligent misrepresentation, and for other relief, brought to the Superior Court in the judicial district of Waterbury and tried to the jury before the court, *Zemetis*, *J.*; thereafter, the court directed a verdict in favor of the defendants on the plaintiffs' innocent misrepresentation claim; subsequently, the jury returned a verdict in favor of the defendant Brian J. Hines et al. on the remaining counts; thereafter, the trial court rendered judgment thereon; subsequently, the court denied the plaintiffs' motion to set aside the verdict, and the plaintiffs appealed to this court. *Affirmed.*

Brenden P. Leydon, with whom, on the brief, was *Jacqueline E. Fusco*, for the appellants (plaintiffs).

David J. Robertson, with whom, on the brief, were *Madonna A. Sacco*, *Heidi M. Cilano*, *Nancy M. Marini*,

and *Christopher H. Blau*, for the appellees (defendants).

Opinion

BISHOP, J. The plaintiffs, Mary Beth Farrell and Vincent Farrell,[1] appeal from the judgment of the trial court, rendered following a jury trial, in favor of the defendants Brian J. Hines, M.D., and Urogynecology and Pelvic Surgery, LLC (Urogynecology).[2] On appeal, the plaintiffs claim that the court (1) abused its discretion by allowing the defendants to refer during trial to prior defendants, the claims against whom had been withdrawn; (2) abused its discretion by excluding from evidence as hearsay two journal articles; (3) improperly directed a verdict in favor of the defendants on the plaintiffs' claim of innocent misrepresentation; and (4) improperly failed to instruct the jury on the concept of misrepresentation due to Hines' lack of sufficient knowledge.[3] We affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to our consideration of this appeal. At some point in 2007, Mary Beth's gynecologist diagnosed her with pelvic

[1] We refer to Mary Beth Farrell and Vincent Farrell collectively as the plaintiffs and individually by first name.

[2] The plaintiffs brought this action against the following defendants: Johnson & Johnson; Ethicon, Inc.; Ethicon Women's Health and Urology, a Division of Ethicon, Inc.; Gynecare, a Division of Ethicon, Inc.; American Medical Systems, Inc.; Stamford Hospital System, Inc.; Hines; and Urogynecology. On July 10, 2015, the plaintiffs withdrew their claims against American Medical Systems. On January 6, 2016, the plaintiffs withdrew their claims against Johnson & Johnson, Ethicon, Inc., Ethicon Women's Health and Urology, and Stamford Hospital. On January 11, 2016, the plaintiffs withdrew their claim against Gynecare, a division of Ethicon, Inc. The remaining defendants for trial were Hines and Urogynecology, and they are likewise the only defendants on appeal. We refer to Hines and Urogynecology collectively as the defendants and individually by name where appropriate.

[3] The plaintiffs claimed also that the court abused its discretion by excluding the testimony of two patients whom Hines had treated. The plaintiffs withdrew this claim at oral argument before this court.

organ prolapse.[4] As her condition worsened, her gynecologist recommended that she see Hines, a surgeon, with whom she consulted in late October, 2008. Hines explained that implanting a mesh product into Mary Beth would be the best surgery to treat her condition. Mary Beth agreed to the surgery, and Hines performed the procedure on November 19, 2008.

Approximately four days after Mary Beth had returned home from the surgery, she experienced excessive bleeding and abdominal pain. Hines initially diagnosed her with two large pelvic hematomas. Mary Beth continued to follow up with Hines; however, she continued experiencing pain. In February, 2009, Mary Beth underwent another surgery during which Hines attempted to remove the mesh product that he had implanted in her. Hines removed as much of the mesh as possible; however, some of the mesh could not be removed because it was embedded in tissue. After a second surgery to remove the mesh in the summer of 2009, Mary Beth still experienced pain and was diagnosed with damage to the pudendal and obturator nerves.

Mary Beth underwent several additional procedures, such as nerve blocks and mesh removal, but these procedures did not eliminate the pain. The pain that she experienced eventually caused her to resign her position as a teacher so she could focus on her health. At the time of trial in January, 2016, Mary Beth was considering additional surgery, which she described as "major."

[4] According to the American College of Obstetricians and Gynecologists, pelvic organ prolapse is defined as "a disorder in which one or more of the pelvic organs drop from their normal position . . . ." American College of Obstetricians and Gynecologists, "Surgery for Pelvic Organ Prolapse," (last modified December, 2013), available at https://www.acog.org/Patients/FAQs/Surgery-for-Pelvic-Organ-Prolapse#what (last visited July 16, 2018).

The plaintiffs served their original complaint on November 15, 2011. The plaintiffs filed the operative, third amended complaint on December 4, 2015, alleging the following claims against the defendants: (1) lack of informed consent; (2) innocent misrepresentation; (3) negligent misrepresentation; (4) intentional misrepresentation; and (5) loss of consortium.

The plaintiffs' case was tried to a jury in January, 2016. On January 19, 2016, the court directed a verdict in favor of the defendants on the plaintiffs' innocent misrepresentation claim. On January 20, 2016, the jury returned a verdict for the defendants on the remaining counts, and the court entered judgment on July 13, 2016. The plaintiffs' motion to reargue was denied and this appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The plaintiffs' first claim is that the court abused its discretion by allowing the defendants to refer to parties that had been removed from the case. The plaintiffs argue that reference to the former defendants was "extremely prejudicial and served solely to seek to improperly inform the jury [that the] [p]laintiff[s] received money from a former defendant." In response, the defendants argue that the plaintiffs opened the door to the admission of this evidence and, alternatively, that any error was harmless.

The following additional facts and procedural history are relevant to the resolution of this claim. The plaintiffs commenced this action against several entities, in addition to Hines and Urogynecology, alleging products liability claims and violations of the Connecticut Unfair Trade Practices Act. See footnote 2 of this opinion. Before trial commenced, the plaintiffs withdrew their claims against all defendants except Hines and Urogynecology. Prior to the start of evidence, the plaintiffs

filed a motion in limine in which they sought to exclude from evidence any testimony regarding the resolution of the claims against the former defendants. The court granted the motion and, prior to the start of evidence, instructed the jury not to consider the absence of the former defendants.[5] During the direct examination of Mary Beth, the following exchange occurred:

"[The Plaintiffs' Counsel]: [Mary Beth], do you have an agreement with my firm for the attorney's fees in this case?

"[The Witness]: Yes, we do.

"[The Plaintiffs' Counsel]: What is that agreement?

"[The Witness]: To pay you a third of any fees that occurred in the case.

"[The Plaintiffs' Counsel]: One third of any recovery?

"[The Witness]: Yes. One third of any recovery that we receive."

Subsequently, on cross-examination, the following exchange occurred:

"[The Defendants' Counsel]: You're paying your attorneys one third of any recovery you receive from any defendant, correct?

[5] The court's instruction provided in relevant part: "At the time that some of you or maybe all of you were selected to sit as jurors in the case, the list of the defendants included Johnson & Johnson, Ethicon, Stamford Hospital, as well as [Hines]. Now, Johnson & Johnson, Ethicon, and Stamford Hospital are no longer defendants in the case. Therefore, the lawyers that you saw in connection with those [defendants] . . . will not be here . . . representing a party in the case. You will not be asked to decide any claims of legal liability with respect to [the former defendants]. The fact that [the former defendants] are no longer defendants must have no bearing on your consideration of the claims which are to be tried. You should not guess or speculate as to circumstances through which [the former defendants] were removed from the case. Do not draw any inferences favorable or unfavorable as to any party as a result of their removal from this case. Simply put it out of your mind and do not even discuss it with each other. To the extent necessary, I will deal with any legal issue arising out of their departure from this case. You will simply decide the case that is presented to you. You will not consider the absence of those parties from the case."

"[The Witness]: Correct.

"[The Defendants' Counsel]: That would include any prior defendants, correct?

"[The Plaintiffs' Counsel]: Objection. Relevance, your Honor?

"The Court: No. You've managed to open the door with regard to this. No further evidence will be received on that particular point. You may inquire.

"[The Defendants' Counsel]: I can ask my last question?

"The Court: You can ask.

"[The Defendants' Counsel]: And that is one third of any recovery that you receive from any defendant, whether it be Stamford Hospital, Ethicon, Johnson & Johnson?

"[The Plaintiffs' Counsel]: Objection. Your Honor just said no further evidence on that subject.

"The Court: . . . I'm going to allow that question. There will be no evidence as to whether the previous defendants, who are now removed from the case, have been removed from the case for any reason at all other than that they are no longer parties to the case, whether there were settlements, what the amount, if any, or whether there were other reasons that they were removed from the case, whether they be legal or tactical or otherwise is not for this jury. As we started, [the former defendants] were here when we picked this jury. So [the jury is] well aware other parties were once participants in this case, and they are no longer participants in this case. And the reason and the nature of their exit is none of [the jury's] concern. We are only concerned with the case that we have at hand."

At the close of evidence, the plaintiffs requested that the court again issue the instruction that it issued at the beginning of the case, in which it instructed the jury not to consider the absence of the former defendants. The court denied this request.

General Statutes § 52-216a provides in relevant part: "An agreement with any tortfeasor not to bring legal action or a release of a tortfeasor in any cause of action shall not be read to a jury or in any other way introduced in evidence by either party at any time during the trial of the cause of action against any other joint tortfeasors, nor shall any other agreement not to sue or release of claim among any plaintiffs or defendants in the action be read or in any other way introduced to a jury." "It is readily apparent from a common sense reading of § 52-216a that its legislative objective was to prohibit in a trial to a jury [the jury's] knowledge of any agreement or release involving a tortfeasor at any time during the trial of the cause of action . . . against another tortfeasor." (Internal quotation marks omitted.) *Peck* v. *Jacquemin*, 196 Conn. 53, 58–59, 491 A.2d 1043 (1985).

"Generally, a party who delves into a particular subject during the examination of a witness cannot object if the opposing party later questions the witness on the same subject. . . . The party who initiates discussion on the issue is said to have opened the door to rebuttal by the opposing party. Even though the rebuttal evidence would ordinarily be inadmissible on other grounds, the court may, in its discretion, allow it where the party initiating the inquiry has made unfair use of the evidence. . . . This rule operates to prevent a [party] from successfully excluding inadmissible . . . evidence and then selectively introducing pieces of this evidence for his own advantage, without allowing the [other party] to place the evidence in its proper context. . . . The doctrine of opening the door cannot, of

course, be subverted into a rule for injection of prejudice. . . . The trial court must carefully consider whether the circumstances of the case warrant further inquiry into the subject matter, and should permit it only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence. . . . Thus, in making this determination, the trial court should balance the harm to [one party] in restricting the inquiry with the prejudice suffered by the [other party] in allowing the rebuttal. . . . We review for [an] abuse of discretion the trial court's determination that a party has opened the door to otherwise inadmissible rebuttal evidence." (Citations omitted; internal quotation marks omitted.) *State* v. *Brown*, 309 Conn. 469, 479–80, 72 A.3d 48 (2013).

As previously set forth, the plaintiffs' counsel asked Mary Beth about the plaintiffs' fee agreement with counsel. On cross-examination, the defendants' counsel elicited more details about the fee agreement; specifically, whether it applied to the former defendants. As the court noted, the plaintiffs' counsel had opened the door to this line of questioning. The questions that the defendants' counsel asked did not seek to elicit any details about the circumstances regarding the removal of the other parties, did not mention a settlement, and did not state an amount of damages that the plaintiffs may have received from the former defendants. Instead, the court allowed the defendants' counsel to give context to the questions that the plaintiffs' counsel asked regarding the fee agreement. Therefore, the court did not abuse its discretion by determining that the plaintiffs' counsel had opened the door and permitting reference to the former defendants.[6]

[6] Even assuming, arguendo, that the court did abuse its discretion by determining that the plaintiffs' counsel opened the door to referencing the former defendants, we conclude that such error was harmless. See *Prentice* v. *Dalco Electric, Inc.*, 280 Conn. 336, 358, 907 A.2d 1204 (2006) ("[E]ven when a trial court's evidentiary ruling is deemed to be improper . . . we [still] must determine whether that ruling was so harmful as to require a

II

The plaintiff's next claim on appeal is that the court abused its discretion by excluding from evidence two journal articles that discussed the experimental and risky nature of transvaginal mesh products. The plaintiffs argue that the journal articles were admissible to show notice—i.e., that Hines knew or should have known of the experimental and risky nature of transvaginal mesh products—and, therefore, were not hearsay because they were not being offered to prove the truth of the matters asserted therein. The defendants respond that the court properly excluded the articles because the experimental and risky nature of the mesh products was exactly what the contents of the articles discussed. We agree with the defendants.

The following additional facts and procedural history are relevant to this claim. The plaintiffs attempted to admit into evidence two journal articles: (1) American College of Obstetricians and Gynecologists Practice Bulletin 79 Re: Pelvic Organ Prolapse, 79 Obstetrics

new trial. . . . In other words, an evidentiary ruling will result in a new trial only if the ruling was both wrong *and* harmful. . . . [T]he standard in a civil case for determining whether an improper ruling was harmful is whether the . . . ruling [likely] would [have] affect[ed] the result." [Emphasis in original; internal quotation marks omitted.]), cert. denied, 549 U.S. 1266, 127 S. Ct. 1494, 167 L. Ed. 2d 230 (2007). The court instructed the jury prior to the start of evidence that the absence of the former defendants was not to have any bearing on their decision and that it could not speculate about why the former defendants had been removed. See footnote 4 of this opinion. Additionally, after the plaintiffs' counsel had objected to the defendants' counsel's question regarding the fee agreement, the court again instructed the jury that it was not to concern itself with the absence of the former defendants. "[I]t is well established that, [i]n the absence of a showing that the jury failed or declined to follow the court's instructions, we presume that it heeded them." (Internal quotation marks omitted.) *Hurley* v. *Heart Physicians, P.C.*, 298 Conn. 371, 402, 3 A.3d 892 (2010). There has been no showing that the jury failed or declined to follow the court's instructions not to speculate about or to consider the absence of the former defendants. Therefore, even if we assume, arguendo, that the court abused its discretion, any error was harmless.

and Gynecology (Feb. 2007, Vol. 109, No. 2, pt.1), p. 468 (ACOG Bulletin), and (2) Donald Ostergard, *Lessons from the Past: Directions for the Future*, International Urogynecology Journal 18:591–598 (2007) (Ostergard article). The defendants objected to the admission of these articles on hearsay grounds.

The portion of the ACOG Bulletin that the plaintiffs sought to admit provided: "Given the limited data and frequent changes in the marketed products (particularly with regard to type of mesh material itself, which is most closely associated with several of the postoperative risks, especially mesh erosion), the procedures should be considered experimental and patients should consent to surgery with that understanding." In addition, there were three portions of the Ostergard article that the plaintiffs sought to admit, specifically: (1) "a physician can inform the patient of its experimental nature."; (2) "[t]here is a need for more information with specific graft materials to clarify success and adverse event rates"; and (3) "[w]ithout an adequate evidence base, practitioners cannot determine whether an innovative technique is the most safe and effective method for treating a patient." The plaintiffs argued that these portions of the articles established that Hines knew or should have known of the experimental and risky nature of the mesh products, and that the articles were therefore being offered to prove notice and not to prove the truth of the matters asserted therein.

The court sustained the defendants' objection to the admission of these articles. In doing so, the court stated that the articles are "being offered on the issue of notice and, therefore . . . they are not being offered for the truth of the matter contained. That's an argument I don't understand in this particular case. Whether these articles exist[ed] prior to the date of [Mary Beth's] surgery is not the issue in this case. The issues in the case

are the adequacy and appropriateness of the explanation of risk, benefit and alternatives that [Hines] gave to [Mary Beth] on the various dates she went to see him so she could give informed consent to this surgery. The existence of these articles doesn't bear on that.

"So the problem I have is, I think that these are hearsay documents. . . . And the fact they're being described as being offered for notice, I think that [the defendants'] most recent brief is exactly on point with my thinking; that is, that these are actually being offered for the truth of the matter contained."

The court continued that it thought that the plaintiffs "want[ed] the truth of the matter contained in these articles to be offered to the jury. The fact a medical controversy exists, the fact that in these various authors' opinions inadequate study has been done, that physicians have an obligation to advise their patients that inadequate study has been done, that there's not a scientific basis for the use of this mesh product and implantation of this product into patients absent such scientific basis and study. I'm understanding that's the thrust of the case, but that's the truth of the matter contained in each of these three articles. That's why I think they are hearsay."

We first set forth our standard of review for evidentiary issues. "When presented with an evidentiary issue . . . our standard of review depends on the specific nature of the claim presented. . . . Thus, [t]o the extent a trial court's admission of evidence is based on an interpretation of the [law], our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. . . .

"A trial court's decision to admit evidence, *if premised on a correct view of the law*, however, calls for

the abuse of discretion standard of review. . . . In other words, only after a trial court has made a legal determination that a particular statement is or is not hearsay, or is subject to a hearsay exception, is it vested with the discretion to admit or to bar the evidence based upon relevancy, prejudice, or other legally appropriate grounds related to the rule of evidence under which admission is being sought. . . . A paradigmatic example of this distinction would be a trial court's conclusion that a hearsay statement bears the requisite indicia of trustworthiness and reliability necessary for admission under the residual exception to the hearsay rule, which would be reviewed for an abuse of discretion. . . . By contrast, the question of whether the trial court properly could have admitted that statement under the residual exception if the admission of that type of statement expressly was barred under another hearsay exception would present a question of law over which the appellate courts exercise plenary review." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Midland Funding, LLC* v. *Mitchell-James*, 163 Conn. App. 648, 653–54, 137 A.3d 1 (2016).

"The hearsay rule forbids evidence of out-of-court assertions to prove the facts asserted in them. If the statement is not an assertion or is not offered to prove the facts asserted, it is not hearsay. . . . This exclusion from hearsay includes utterances admitted to show their effect on the hearer." (Internal quotation marks omitted.) *State* v. *Carpenter*, 275 Conn. 785, 837–38, 882 A.2d 604 (2005), cert. denied, 547 U.S. 1025, 126 S. Ct. 1578, 164 L. Ed. 2d 309 (2006). "The proffering party bears the burden of establishing the relevance of the offered testimony. Unless a proper foundation is established, the evidence is irrelevant." (Internal quotation marks omitted.) Id., 838. "Statements of others that show the effect on the hearer or reader are not hearsay on issues such as notice, intent, reasonableness or good

faith on the part of the hearer or reader. Before being admitted for such a purpose, the state of mind of the hearer or reader must be shown to be relevant to a material issue in the case." C. Tait & E. Prescott, Connecticut Evidence (5th Ed., 2014) § 8.8.1, p. 518. "A statement is not hearsay if it is offered to prove notice to the hearer." Id., 519; see also *Rogers* v. *Board of Education*, 252 Conn. 753, 766–67, 749 A.2d 1173 (2000).

In the present case, the court properly determined that the portions of the ACOG Bulletin and the Ostergard article that the plaintiffs sought to admit were being offered to prove the facts asserted within them. The crux of the plaintiffs' claim was that Hines knew or should have known of the experimental and risky nature of transvaginal mesh products and, therefore, he should have so informed Mary Beth. The contents of the ACOG Bulletin and the Ostergard article asserted precisely that—the risky and experimental nature of transvaginal mesh products, and the need for physicians to explain the risks of implanting such devices in patients. The plaintiffs simply could not establish that Hines knew or should have known of the experimental and risky nature of the products without offering the contents of the articles for their truth. The court properly determined that the articles were inadmissible hearsay and did not fall within a hearsay exception and, accordingly, did not abuse its discretion in excluding the articles from evidence.[7]

III

The plaintiffs' third claim on appeal is that the court improperly directed a verdict in favor of the defendants

[7] Because we believe that the court did not abuse its discretion in excluding the two journal articles in question, we need not reach the defendants' alternate argument that the exclusion of the two articles, if erroneous, was nevertheless harmless. In this regard, we note that the record reflects that the plaintiffs were successful in admitting, through their medical expert, other documentation regarding the mesh graft including: a brochure titled "Pelvic Organ Prolapse: Get the Facts, Be Informed"; and a journal article

and refused to instruct the jury on their claim of innocent misrepresentation. The plaintiffs argue that the court erroneously concluded that innocent misrepresentation claims are not applicable in personal injury actions.[8] The defendants respond that claims of innocent misrepresentation are based on commercial relationships between the parties and, because the plaintiffs did not allege products liability claims against Hines or Urogynecology, the court properly directed a verdict in their favor. We agree with the defendants.

The following additional facts and procedural history are relevant to our resolution of this issue. In the operative complaint, the plaintiffs alleged against the defendants, inter alia, counts of innocent misrepresentation, negligent misrepresentation, and intentional misrepresentation. In court on January 15, 2016, the defendants argued their motion for judgment and directed verdict. The defendants' counsel argued, inter alia, that "I will be candid with the [c]ourt and everyone, I don't know what an innocent misrepresentation claim is. I . . .

titled "Occurrence of Postoperative Hematomas After Prolapse Repair Using a Mesh Augmentation System."

[8] The plaintiffs also argue that it was "procedurally improper" for the court to direct a verdict in favor of the defendants on their innocent misrepresentation claim. Specifically, the plaintiffs argue that "[d]espite filing three summary judgment motions, the [d]efendant[s] never presented a dispositive motion claiming that innocent misrepresentation can never apply to a plaintiff who has suffered physical injuries in addition to economic loss. This issue ended up being raised sua sponte and [the] [p]laintiffs were given less than one day to come up with a case specifically allowing such a claim. This was clearly procedurally improper." We are not persuaded. A review of the trial transcript reflects that the court heard argument on the defendants' motion for judgment and directed verdict, during which the defendants argued, inter alia, that "there has been no testimony, whatsoever, on any misrepresentation that was made." The defendants also filed a written memorandum of law in support of their motion for judgment and directed verdict regarding the plaintiffs' claim of innocent misrepresentation. The plaintiffs' claim of a procedural impropriety, therefore, is without merit. We thus address only whether the court's directing a verdict was proper substantively.

don't even really understand how you can innocently misrepresent something." During this argument, the court stated that "I have been unable to find any case law that would indicate that this is a doctrine that's applicable to personal injury cases. The only cases I've been able to find deal with nonpersonal injury cases, a sinking house, a sale of various products, boundary line disputes, that sort of thing, not anything to do with personal injuries. I . . . may be missing them, but I was unable to find any . . . ."

The defendants also filed with the court a memorandum of law in support of their motion for judgment/directed verdict asserting that the plaintiffs could not make a claim for innocent misrepresentation in a personal injury action, and argued the following: (1) there can be no claim for innocent misrepresentation for personal injury; (2) cases cited by the plaintiffs in their request to charge do not support a theory for innocent misrepresentation in personal injury actions; and (3) the plaintiffs cannot request economic and noneconomic damages for innocent misrepresentation. The plaintiffs did not produce any authority to establish that claims of innocent misrepresentation are applicable in personal injury cases. Thus, the court granted the defendants' motion for judgment and directed verdict on the plaintiffs' claim of innocent misrepresentation.

"Whether the evidence presented by the plaintiff was sufficient to withstand a motion for a directed verdict is a question of law, over which our review is plenary. . . . Directed verdicts are not favored. . . . A trial court should direct a verdict only when a jury could not reasonably and legally have reached any other conclusion. . . . In reviewing the trial court's decision to direct a verdict in favor of a defendant we must consider the evidence in the light most favorable to the plaintiff. . . . Although it is the jury's right to draw logical deductions and make reasonable inferences from the facts

proven . . . it may not resort to mere conjecture and speculation. . . . A directed verdict is justified if . . . the evidence is so weak that it would be proper for the court to set aside a verdict rendered for the other party." (Internal quotation marks omitted.) *Demiraj* v. *Uljaj*, 137 Conn. App. 800, 804, 50 A.3d 333 (2012).

"This court has long recognized liability for innocent misrepresentation. The elements of this cause of action are (1) a representation of material fact, (2) made for the purpose of inducing the purchase, (3) the representation is untrue, and (4) there is justifiable reliance by the plaintiff on the representation [made] by the defendant and (5) damages." (Internal quotation marks omitted.) *Matyas* v. *Minck*, 37 Conn. App. 321, 333, 655 A.2d 1155 (1995). "In Connecticut, a claim of innocent misrepresentation . . . is based on principles of warranty, and . . . is not confined to contracts for the sale of goods. . . . A person is subject to liability for an innocent misrepresentation if in a sale, rental or exchange transaction with another, [he or she] makes a representation of material fact for the purpose of inducing another to act or to refrain from acting in reliance upon it . . . even though it is not made fraudulently or negligently. . . . We have held that an innocent misrepresentation is actionable, even though there [is] no allegation of fraud or bad faith, because it [is] false and misleading, in analogy to the right of a vendee to elect to retain goods which are not as warranted, and to recover damages for the breach of warranty. . . ." (Citations omitted; internal quotation marks omitted.) *Gibson* v. *Capano*, 241 Conn. 725, 730, 699 A.2d 68 (1997).

"In Connecticut law, strict liability for innocent misrepresentation in the sale of goods is well established." *Johnson* v. *Healy*, 176 Conn. 97, 101, 405 A.2d 54 (1978). "[L]iability in tort, even for misrepresentations which are innocent, has come to be the emergent rule for

transactions that involve a commercial exchange." Id., 100–101. The tort of innocent misrepresentation, separate and distinct from the tort of negligent misrepresentation, is predicated on principles of warranty. See *Kramer* v. *Petisi*, 285 Conn. 674, 686 n.10, 940 A.2d 800 (2008). Our case law has established that "liability for innocent misrepresentation is not a novelty in this state, that such liability is based on principles of warranty, and that such warranty law is not confined to contracts for the sale of goods." *Johnson* v. *Healy*, supra, 102.

Section 552C of the Restatement (Second) of Torts provides: "(1) One who, in a sale, rental or exchange transaction with another, makes a misrepresentation of a material fact for the purpose of inducing the other to act or to refrain from acting in reliance upon it, is subject to liability to the other for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation, even though [the representation] is not made fraudulently or negligently. (2) Damages recoverable under the rule stated in this section are limited to the difference between the value of what the other has parted with and the value of what he has received in the transaction."

On the basis of the stated authority, it is apparent that innocent misrepresentation claims primarily apply to business transactions, typically between a buyer and seller, and that the theory is based on principles of warranty.[9] Additionally, secondary sources explain that

[9] The facts of *Johnson* v. *Healy*, supra, 176 Conn. 97, are useful in detailing a scenario in which innocent misrepresentation is applicable. The plaintiff (buyer), inquired with the defendant (builder), about the quality of construction of a home that the builder had built. Id., 98. The builder explained that the home was constructed using the best materials, that he himself had built the home, and that nothing was wrong with the home's construction. Id., 98–99. The buyer reasonably relied on the builder's representations, which induced the buyer to purchase the home. Id., 99, 102–103. The home then sustained damage because of its uneven settlement, which occurred as a result of improper fill being placed on the lot on which the home was built some time before the builder bought the lot. Id., 99. On the basis of these facts, our Supreme Court determined that the builder could be held

liability for an innocent misrepresentation is likely when "the representer stands to gain by a misrepresentation at the expense of the other party to the transaction [who was] induced by the misrepresentation." 2 Harper, James, & Gray on Torts (3d Ed. 2006) § 7.7 p. 494. In the present case, the plaintiffs and the defendants are not parties to a commercial transaction. The plaintiffs did not allege breach of warranty claims against the defendants, nor did the plaintiffs allege that the defendants received some benefit as a result of Mary Beth's reliance on Hines' alleged misrepresentation. Moreover, it is not clear what the measure of damages would be were the plaintiffs able to recover on their innocent misrepresentation claim. See *Johnson* v. *Healy*, supra, 176 Conn. 106 ("[t]he proper test for damages [is] the difference in value between the property had it been as represented and the property as it actually was"); see also 3 Restatement (Second), Torts § 552C (2) (1976) ("[d]amages recoverable under the rule stated in this section are limited to the difference between the value of what the other has parted with and the value of what he has received in the transaction").

Although our decisional law has acknowledged that claims for innocent misrepresentation are not limited to contracts for the sale of goods; see, e.g., *Johnson* v. *Healy*, supra, 176 Conn. 102; it is unclear whether such claims are applicable to cases such as this, where the plaintiffs are claiming a lack of informed consent and are not involved in a commercial transaction. The Restatement suggests that there must be a form of business transaction involved when making a claim for innocent misrepresentation.[10] Accordingly, although we are

liable for the damage to the home on a theory of innocent misrepresentation, even though the builder had no actual or constructive knowledge of the condition that caused the damage to the home. See id., 99, 102–103. The court determined that the proper measure of damages was the difference in value between the house as the builder represented and the house as it actually was. Id., 106.

[10] There is a caveat noted in Section 552C of the Restatement (Second) of Torts, which provides: "The Institute expresses no opinion as to whether

mindful that this specific issue has not been subjected to appellate review in this context, we conclude that the theory of innocent misrepresentation is not applicable in the present case, and that the court properly directed a verdict in favor of the defendants on this claim.

IV

The plaintiffs' final claim on appeal is that the court improperly declined to instruct the jury on the concept of misrepresentation[11] due to Hines' lack of sufficient knowledge. The plaintiffs argue that, because their request to charge was relevant to the issues in the case and contained an accurate statement of the law, the court had to issue the instruction. The defendants respond that the issue is not preserved and, alternatively, that the substance of the request was given to the jury through the court's charge. We agree that the court's charge adequately conveyed the substance of the plaintiffs' requested charge.

The following additional facts and procedural history are relevant to this claim. On January 15, 2016, the plaintiffs filed with the court a supplemental request to charge. The plaintiffs requested that the court instruct the jury that "[r]epresentations made by one who is conscious that he has no sufficient basis of

there may be other types of *business transactions*, in addition to those of sale, rental and exchange, in which strict liability may be imposed for innocent misrepresentation under the conditions stated in this Section." (Emphasis added.)

[11] Because we have determined that innocent misrepresentation is not applicable in the present case and that the court properly directed a verdict on that claim, we need not consider whether the court improperly failed to instruct the jury on the concept of innocent misrepresentation due to Hines' lack of sufficient knowledge. The plaintiffs' counsel conceded this point at oral argument. Therefore, this section addresses only whether the court properly instructed the jury on the concepts of negligent and intentional misrepresentation due to Hines' lack of sufficient knowledge.

information to justify them are actionable as representations made with positive knowledge of their falsity, because in making them the speaker misrepresents not only the external facts but also the extent of his own information." In an e-mail exchange between the court and the parties, the court indicated that, although the plaintiffs' request was "not specifically adopted, [the court] feel[s] the issues are adequately covered in [its] draft [jury charge]." The plaintiffs did not take exception to the charge or otherwise object to the absence of their requested instruction.

"It is well settled . . . that a party may preserve for appeal a claim that an instruction . . . was . . . defective either by: (1) submitting a written request to charge covering the matter; *or* (2) taking an exception to the charge as given . . . . [T]he purpose of the [preservation requirement] is to alert the court to any claims of error while there is still an opportunity for correction in order to avoid the economic waste and increased court congestion caused by unnecessary retrials. . . . Thus, the essence of the preservation requirement is that *fair notice* be given to the trial court of the party's view of the governing law and of any disagreement that the party may have had with the charge actually given." (Citations omitted; emphasis altered; footnote omitted; internal quotation marks omitted.) *Ulbrich* v. *Groth*, 310 Conn. 375, 424–25, 78 A.3d 76 (2013). In the present case, the plaintiffs submitted a written request to charge, thereby giving the court fair notice of their view of the governing law. Accordingly, the plaintiffs' failure to object or take exception to the charge as given does not preclude our review of this claim. We therefore turn to the merits of this claim.

"The primary purpose of the charge to the jury is to assist [it] in applying the law correctly to the facts which [it] find[s] to be established. . . . [A] charge to the jury is to be considered in its entirety, read as a whole, and

judged by its total effect rather than by its individual component parts. . . . [T]he test of a court's charge is not whether it is as accurate upon legal principles as the opinions of a court of last resort but whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . Although [a] request to charge which is relevant to the issues of [a] case and which is an accurate statement of the law must be given . . . a refusal to charge in the exact words of a request . . . will not constitute error if the requested charge is given in substance. . . . Thus, when the substance of the requested instructions is fairly and substantially included in the trial court's jury charge, the trial court may properly refuse to give such instructions." (Internal quotation marks omitted.) *State* v. *Gonzalez*, 137 Conn. App. 696, 701, 49 A.3d 1025, cert. denied, 307 Conn. 920, 54 A.3d 563 (2012).

Regarding negligent misrepresentation, the court instructed, inter alia, that "[o]ne whose business or profession it is to give information upon which the bodily security of others depends and who in his business or professional capacity gives false information to another, is subject to legal liability for bodily harm caused by the action taken in reliance upon such information by the recipient, if although believing the information is accurate, he failed to exercise reasonable care, to ascertain its accuracy, or in his choice of the language in which it was given."

Additionally, when charging the jury regarding intentional misrepresentation, the court stated: "In general, a person who undertakes to speak, that person assumes a duty to tell the whole truth and to make a full . . . and fair disclosure as to the matters about which the person assumes to speak. There is a duty to provide accurate information once one undertakes to speak.

Under the law of fraudulent concealment . . . and suppression, a duty to disclose may exist where one voluntarily undertakes to speak, but fails to prevent his or her words from being misleading or conveys only partial information. Thus . . . when a party makes a partial disclosure then . . . the party then has the duty to tell the whole truth. A party is under a duty to disclose in order to prevent a partial statement of the facts from being misleading or conveying a false impression. There is no basis for making a distinction between an oral half-truth and a written one, and when a party makes a partial disclosure, the party then has a duty to tell the whole truth."

In the case at hand, the court's charge sufficiently conveyed the substance of the plaintiffs' requested charge, even though the court did not use the precise language that the plaintiffs requested. The substance of the plaintiffs' request, in summary, was that if Hines knew he did not have a sufficient basis of information for the representations he made to the plaintiffs at the time he made them, it is the equivalent of Hines making a knowing misrepresentation to the plaintiffs. As the cited portions of the jury instructions show, the court instructed the jury as such, albeit in different terms. The court instructed that if Hines did not disclose all the information he knew about the product and conveyed a false impression, on which the plaintiffs relied to their detriment, then the jury could hold the defendants liable for negligent and/or intentional misrepresentation. Accordingly, we conclude that the substance of the requested instructions was fairly and substantially included in the court's jury charge and, therefore, that it did not improperly decline to instruct the jury as the plaintiffs had requested.

The judgment is affirmed.

In this opinion the other judges concurred.

CHARLES MARSHALL *v.* COMMISSIONER OF CORRECTION (AC 38861)

Sheldon, Bright and Harper, Js.

Syllabus

The petitioner, who had been convicted of the crimes of burglary in the second degree, burglary in the first degree and assault in the first degree, and of violation of probation, sought a writ of habeas corpus, claiming that his trial counsel rendered ineffective assistance. The habeas court rendered judgment denying the habeas petition, from which the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The habeas court properly determined that the petitioner's trial counsel did not provide ineffective assistance due to an actual conflict of interest as a result of his prior representation of a witness in an unrelated criminal case: the petitioner failed to demonstrate that his trial counsel had actively represented a conflicting interest and that it adversely affected his trial counsel's performance, as the petitioner did not produce any evidence that his trial counsel received confidential information during his representation of the witness that would have affected the petitioner's defense or limited trial counsel's ability to effectively cross-examine the witness, and a mere theoretical division of loyalties was not enough to establish a conflict of interest; moreover, even if trial counsel had confidential information, that did not adversely affect his performance because the information necessary to cross-examine the witness as to his pending criminal charges was available as a matter of public record to trial counsel, who was not precluded from questioning the witness about those pending charges; furthermore, given that the witness' testimony at the petitioner's criminal trial was substantially similar to the statement he had given to the police shortly after witnessing the assault, and that the petitioner's own written statement to the police demonstrated that he did not act in self-defense, there was a sound tactical reason for trial counsel not to cross-examine the witness with the pending charges.
2. The petitioner's claim that his trial counsel rendered ineffective assistance in failing to object to the trial court's exclusion of the petitioner from participating in an in-chambers conference concerning counsel's alleged conflict of interest was not reviewable; on the basis of trial counsel's testimony at the habeas trial that he recalled an in-chambers conference about the potential conflict of interest but was not sure if a detailed discussion with the trial judge had occurred, and the insufficient record, this court was unable to determine the scope of the discussion that transpired during the in-chambers conference, which precluded review of the claim.

3. The habeas court properly determined that the petitioner's trial counsel did not provide ineffective assistance by failing to move to suppress a witness' identification of the petitioner from a photographic array, which the petitioner claimed was unduly suggestive because he was the only person wearing a striped shirt in the array and the witness previously had told the police that the perpetrator was wearing a striped shirt; the habeas court properly determined that trial counsel had a reasonable basis to conclude that a motion to suppress one or more of the photographic identifications would not have been granted given that there were a total of six photographic identifications against the petitioner, and the petitioner failed to demonstrate that his trial counsel's performance was deficient or how he was prejudiced in light of the fact that he was positively identified by five other witnesses.
4. The habeas court properly determined that the petitioner's trial counsel did not provide ineffective assistance in failing to challenge the consolidation of the petitioner's two criminal cases for trial; that court concluded that trial counsel's decision to not oppose the state's motion to consolidate was reasonable and founded on reasonable strategic grounds, and although the petitioner claimed that because his charges stemming from one burglary included a violent crime, the consolidation of his trial on those charges with the charges arising from a second burglary not involving any violent crime caused him undue prejudice, that claim was based on speculation and was insufficient to overcome the strong presumption of correctness afforded to the strategic decision made by trial counsel.

Argued April 11—officially released September 18, 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, *Prats*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Gwendolyn S. Bishop, assigned counsel, for the appellant (petitioner).

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney and *Eva Lenczewski*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

HARPER, J. The petitioner, Charles Marshall, appeals from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the court erroneously determined that his trial counsel did not provide ineffective assistance by (1) having an actual conflict of interest as a result of his prior representation of a witness in an unrelated criminal case; (2) failing to object to the trial court's exclusion of the petitioner from participation in an in-chambers conference; (3) failing to move to suppress one witness' identification of him from a photographic array; and (4) failing to challenge the consolidation of his two criminal cases for trial.[1] We disagree and, accordingly, affirm the judgment of the habeas court.

The following facts and procedural history, as summarized by this court in the petitioner's direct appeal, are relevant: "On the morning of July 26, 2007, the [petitioner] entered the premises located at 29 Waterville Street in Waterbury with the intent to steal. The [petitioner] proceeded to enter 103 Waterville Street with the intent to steal in the afternoon of July 26, 2007. The [petitioner] entered the premises at both locations by prying open the doors with a screwdriver. The [petitioner] also was armed with a tire iron, a dangerous instrument, during the commission of both of the burglaries." *State* v. *Marshall*, 132 Conn. App. 718, 721, 33 A.3d 297 (2011), cert. denied, 303 Conn. 933, 36 A.3d 693 (2012).

Two witnesses, Kevin Chamberland and Lourdes Hernandez, separately encountered the petitioner while he

[1] In his amended petition, the petitioner also alleged a violation of due process. We note that "[a] habeas court need not . . . separately address due process claims subsumed by claims of ineffective assistance of counsel." *Evans* v. *Commissioner of Correction*, 37 Conn. App. 672, 693, 657 A.2d 1115, cert. denied, 234 Conn. 912, 660 A.2d 354 (1995).

was burglarizing 29 Waterville Street. Id., 730. Chamberland escorted the petitioner out of the second floor landing at approximately 10:30 a.m.; Hernandez found the petitioner in her second floor living room at approximately 11:20 a.m. Id. Another witness, Miguel Rios, confronted the petitioner in his third floor apartment at 103 Waterville Street at approximately 1 p.m. and informed the landlord of the burglary. Id., 731. "[The victim], the son of the landlord of 103 Waterville Street, chased the [petitioner] from the premises with a baseball bat. [The victim], however, did not swing the bat at the [petitioner] during the chase. While in flight from the burglary, the [petitioner] hit [the victim] in the head with the tire iron, causing severe injury." (Footnote omitted.) Id., 721.

"[T]here was evidence that officers found the [petitioner] . . . on the front porch of a nearby house breathing heavily and sweating profusely. Six witnesses; Chamberland, Hernandez, Rios, [the victim], [Brian] Levin and [Jamal] Trammell; viewed photographic arrays of possible suspects. Each of these witnesses positively identified the [petitioner]." Id., 731.

The petitioner waived his right to a jury trial and subsequently was convicted of two counts of burglary in the second degree in violation of General Statutes (Rev. to 2007) § 53a-102 (a) (2), two counts of burglary in the first degree in violation of General Statutes (Rev. to 2007) § 53a-101 (a) (1) and (a) (2), assault in the first degree in violation of General Statutes § 53a-59 (a) (1), and two counts of violation of probation, resulting in a sentence of sixty-two and one-half years of incarceration. This court affirmed the judgment. Id., 721–22.

In an amended petition for a writ of habeas corpus dated September 4, 2015, the petitioner asserted, inter alia, that his trial counsel, Attorney Dennis Harrigan, provided ineffective assistance on the basis of (1) an

actual conflict of interest due to his prior representation of Brian Levin, a state's witness, in an unrelated criminal matter, (2) failing to object to the petitioner's exclusion from an in-chambers conference to discuss the possible conflict of interest, (3) failing to move to suppress a witness' identification of him from a photographic array, and (4) failing to object to the consolidation of his two criminal cases for trial. Following a trial, the habeas court denied the petition but granted the petition for certification to appeal. This appeal followed.

Our standard of review for the habeas court's findings of fact and conclusions of law on a claim of ineffective assistance of counsel is well established. "In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quotation marks omitted.) *David P.* v. *Commissioner of Correction*, 167 Conn. App. 455, 468, 143 A.3d 1158, cert. denied, 323 Conn. 921, 150 A.3d 1150 (2016).

"Under the sixth amendment to the United States constitution, a criminal defendant is guaranteed the right to the effective assistance of counsel." *Skakel* v. *Commissioner of Correction*, 329 Conn. 1, 29, A.3d (2018). "To determine whether a defendant is entitled to a new trial due to a breakdown in the adversarial process caused by counsel's inadequate representation, we apply the familiar two part test adopted by the court in *Strickland* [v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires [a] showing that counsel made errors so serious that counsel was

not functioning as the counsel guaranteed the defendant by the [s]ixth [a]mendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires [a] showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . The sixth amendment, therefore, does not guarantee perfect representation, only a reasonably competent attorney. . . . Representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial." (Citation omitted; internal quotation marks omitted.) Id., 30–31. It also is well settled that a reviewing court can find against a petitioner on either *Strickland* prong, whichever is easier. *Small* v. *Commissioner of Correction*, 286 Conn. 707, 713, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008).

"With respect to the actual prejudice prong, [t]he habeas petitioner must show not merely that the errors at . . . trial created the *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions. . . . Such a showing of pervasive actual prejudice can hardly be thought to constitute anything other than a showing that the [petitioner] was denied fundamental fairness at trial." (Emphasis in original; internal quotation marks omitted.) *Wilcox* v. *Commissioner of Correction*, 162 Conn. App. 730, 741, 129 A.3d 796 (2016).

I

We first address the petitioner's claim that Harrigan rendered ineffective assistance on the basis of an actual

conflict of interest. The gravamen of the petitioner's claim is that Harrigan previously represented Levin in an unrelated criminal matter prior to the petitioner's trial. According to the petitioner, this representation resulted in an actual conflict of interest, which, had the petitioner known, he would not have waived, but instead would have sought to avoid by requesting the appointment of different counsel. Due to this alleged conflict, the petitioner claims that (1) Harrigan failed to impeach Levin with his pending criminal charges during cross-examination and (2) because he was not advised that Harrigan would not impeach Levin with his pending criminal charges on cross-examination, the petitioner did not knowingly, intelligently, and voluntarily waive the conflict of interest despite having been canvassed by the court.[2]

"Our Supreme Court has established the proof requirements where a habeas corpus petitioner claims ineffective assistance of counsel because of a claimed conflict of interest. Where . . . the defendant claims that his counsel was burdened by an actual conflict of interest . . . the defendant need not establish actual prejudice. . . . Where there is an actual conflict of interest, prejudice is presumed because counsel [has] breach[ed] the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. . . . In a case of a claimed conflict of interest, therefore, in order to establish a violation of the sixth amendment the defendant

[2] Because we conclude that there was no actual conflict of interest, we do not need to address the petitioner's waiver claim. See, e.g., *Hedge* v. *Commissioner of Correction*, 152 Conn. App. 44, 60, 97 A.3d 45 (2014) ("[i]t would be incongruous to vacate the petitioner's conviction due to the trial court's allegedly inadequate canvass and failure to inquire into a potential conflict of interest following our conclusion that there was no conflict of interest in this case"), cert. denied, 321 Conn. 921, 138 A.3d 282 (2016).

has a two-pronged task. He must establish (1) that counsel actively represented conflicting interests and (2) that an actual conflict of interest adversely affected his lawyer's performance. . . .

"The [United States Court of Appeals for the Second Circuit] has honed this test further. Once a [petitioner] has established that there is an actual conflict, he must show that a lapse of representation . . . resulted from the conflict. . . . To prove a lapse of representation, a [petitioner] must demonstrate that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests. . . .

"An actual conflict of interest is more than a theoretical conflict. The United States Supreme Court has cautioned that the possibility of conflict is insufficient to impugn a criminal conviction. . . . A conflict is merely a *potential* conflict of interest if the interests of the defendant may place the attorney under inconsistent duties at some time in the future. . . . To demonstrate an actual conflict of interest, the petitioner must be able to point to *specific instances* in the record which suggest impairment or compromise of his interests for the benefit of another party. . . . A mere theoretical division of loyalties is not enough. . . . If a petitioner fails to meet that standard, for example, where only a potential conflict of interest has been established, prejudice will not be presumed, and the familiar *Strickland* prongs will apply." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Burgos-Torres* v. *Commissioner of Correction*, 142 Conn. App. 627, 634–35, 64 A.3d 1259, cert. denied, 309 Conn. 909, 68 A.3d 663 (2013); see also *Walker* v. *Commissioner of Correction*, 176 Conn. App. 843, 852, 171 A.3d 525 (2017); *Santiago* v. *Commissioner of Correction*, 87

Conn. App. 568, 584–85, 867 A.2d 70, cert. denied, 273 Conn. 930, 873 A.2d 997 (2005).

Furthermore, as a general duty to former clients, rule 1.9 (c) of the Rules of Professional Conduct states in relevant part: "A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or *when the information has become generally known*; or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client." (Emphasis added.)

The following additional facts and procedural history are relevant to our consideration of this claim. On October 18, 2007, Harrigan filed an appearance in the petitioner's criminal case for the burglary and assault at 103 Waterville Street, and on February 28, 2008, was appointed as counsel in his criminal case for the burglary at 29 Waterville Street. Approximately nine months later, on November 26, 2008, Harrigan filed an appearance for Levin in three unrelated criminal cases.[3] Less than four months later, thereafter, on March 6, 2009, he filed a motion to withdraw as counsel in Levin's cases, which the court granted on March 20, 2009. Levin testified as an eyewitness in the petitioner's trial on November 17, 2009. In sum, Harrigan's representation of

[3] Evidence in the record shows that although Levin's criminal acts occurred on or about August 1, 2001, March 30, 2007, and April 23, 2008, he was not arrested on these charges until sometime in May, 2008. On July 19, 2010, Levin pleaded guilty under the *Alford* doctrine; see *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); to two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (1) and criminal violation of a restraining order in violation of General Statutes § 53a-223b, and was sentenced to seven years of incarceration, execution suspended, and three years of probation.

the petitioner and Levin overlapped for approximately four months.

At the petitioner's criminal trial on November 17, 2009, Levin, an eyewitness to the assault, testified that he saw a young Hispanic male, carrying a baseball bat, chasing an older black male, whom he later identified in a photographic array as the petitioner, as they ran past his driveway. Levin stated that as the Hispanic male got close to the petitioner, the petitioner hit the Hispanic male once with a tire iron causing him to fall to the ground. Levin testified that he did not see the Hispanic male hit the petitioner with the baseball bat or swing the bat.[4] *State* v. *Marshall*, supra, 132 Conn. App. 724–25. Our review of the record reveals that Levin's testimony at the petitioner's November 17, 2009 criminal trial is substantially similar to the statement that he gave to the police shortly after witnessing the assault on July 26, 2007. We note that his police statement was given prior to his arrest on his own criminal charges in May, 2008. See footnote 3 of this opinion.

At the habeas trial, in response to the respondent Commissioner of Correction's question as to whether Harrigan felt that there was a conflict at the time of the petitioner's trial due to his past representation of Levin, Harrigan testified: "No. . . . I think I represented Mr. Levin probably three months. The case that

[4] In contrast, another eyewitness to the assault, Jamal Trammell, testified that the victim swung a baseball bat at the petitioner before the petitioner hit him. *State* v. *Marshall*, supra, 132 Conn. App. 725. The petitioner hypothesizes that had Levin's pending criminal matters been introduced during cross-examination, "it would have served to impeach his credibility," and "[a]s a result, there is a reasonable probability that the [s]tate would have been unable to prove, beyond a reasonable doubt, that the petitioner had not acted in self-defense when striking the victim." In other words, the petitioner argues that the trial court could have credited Trammell's testimony that the petitioner assaulted the victim in self-defense, rather than believing Levin's impeached testimony that the victim did not swing at the petitioner prior to the petitioner's assault with the tire iron.

. . . I had was basically paired to his other cases that [another public defender] had. We were kind of tagging along. So there really wasn't a lot of things going on with the case while I represented him other than getting pretrials and [the other public defender] trying to work out his situation. When I realized that he was a witness in [the petitioner's] case, I made the motion to withdraw. So I really didn't have a lot of contact with Mr. Levin."

Nevertheless, the petitioner claims that Harrigan's conflict of interest adversely affected his representation of the petitioner because he failed to introduce evidence of Levin's pending criminal charges during cross-examination. The petitioner argues that "[b]y not impeaching Levin with his pending charges, trial counsel allowed a crippling blow to the claim of self-defense that could have been countered."[5]

[5] The respondent posits two arguments in response: (1) that the trial judge already knew of Levin's pending criminal charges, and (2) that Levin's pending criminal charges would not have been admissible because they did not affect his credibility. Both arguments are misplaced.

First, as a general principle, "[i]t is well established that consideration of extrinsic evidence is jury misconduct sufficient to violate the constitutional right to trial by an impartial jury." *State* v. *Kamel*, 115 Conn. App. 338, 344, 972 A.2d 780 (2009). In a bench trial, the court sits as a trier of fact; *Knock* v. *Knock*, 224 Conn. 776, 793, 621 A.2d 267 (1993); therefore, the court would not have considered its outside knowledge of the witness' pending criminal charges unless such evidence was admitted.

Second, we further note to clarify the misstatement by the respondent regarding whether Levin's pending criminal charges could have been introduced to impeach his credibility. "Although evidence of an arrest without conviction is inadmissible to attack the credibility of a witness, such evidence is admissible where it would reasonably tend to indicate motive, interest, bias or prejudice on the part of the witness." *State* v. *Cruz*, 212 Conn. 351, 359, 562 A.2d 1071 (1989). Accordingly, because "pending criminal charges are widely recognized for their particular relevance to a witness' *interest* in testifying . . . it is violative of the confrontation clause when a court completely refuses to allow any inquiry for the purpose of exposing such areas." (Citations omitted; emphasis in original.) *State* v. *Cosby*, 6 Conn. App. 164, 169–70, 504 A.2d 1071 (1986).

It is important to note that the petitioner's claim of ineffective assistance is premised on his trial counsel's failure to impeach Levin with his pending criminal charges on cross-examination because of an actual conflict of interest. The petitioner is not claiming a violation of the confrontation clause under the sixth amendment to the United States constitution or a *Brady*[6] violation. Thus, the petitioner is required to demonstrate that Harrigan actively represented conflicting interests and that the actual conflict of interest adversely affected Harrigan's performance. *Burgos-Torres* v. *Commissioner of Correction*, supra, 142 Conn. App. 634.

Both the trial court and the habeas court concluded, and we agree, that the petitioner failed to demonstrate that Harrigan had actively represented conflicting interests and that a conflict of interest adversely affected Harrigan's performance. For example, the petitioner has not provided any evidence, at all, that Harrigan received confidential information during his representation of Levin, a former client, which would have affected the petitioner's defense or limited Harrigan's ability to effectively cross-examine Levin. We reiterate that a mere theoretical division of loyalties is not enough. See id., 635. In addition, even if Harrigan had confidential information, maintaining Levin's confidences did not adversely affect Harrigan's performance because the information necessary to cross-examine Levin, as the petitioner suggests, was otherwise available to Harrigan. Generally, pending criminal charges are a matter of public record, and thus Harrigan was not precluded from questioning Levin about his pending charges during cross-examination because that information had become generally known. See General Statutes § 1-215; Rules of Professional Conduct 1.9; see also *Commissioner of Public Safety* v. *Freedom of Information Commission*, 312 Conn. 513, 93 A.3d 1142 (2014).

[6] *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

Furthermore, we reiterate that Levin's testimony at the petitioner's criminal trial was substantially similar to the statement that he gave to the police shortly after witnessing the assault on July 26, 2007, meaning that there was a sound tactical reason, apart from the alleged conflict, for Harrigan not to cross-examine Levin with the pending charges. Lastly, as this court previously stated in his direct appeal, the petitioner's own written statement to the police demonstrated that he did not act in self-defense. *State* v. *Marshall*, supra, 132 Conn. App. 729.

II

The petitioner next claims that Harrigan provided ineffective assistance by failing to object to the court's exclusion of the petitioner from participating in an in-chambers conference discussing Harrigan's prior representation of Levin.[7] According to the petitioner, the in-chambers conference "was more extensive than the on-the-record canvass," and therefore, his exclusion from the in-chambers conference violated "his right to be present at all critical stages of the proceedings against him."

Prior to Levin's testimony on November 17, 2009, the following exchange occurred on the record:

"[Attorney Harrigan]: Your Honor, we discussed in chambers with yourself and Judge Damiani of a situation that has arisen, although it wasn't aware to all parties prior to this date. But we thought it was prudent to at least make mention of it on the record.

[7] In his amended petition, the petitioner also alleges a violation of his due process rights as a result of his exclusion from the in-chambers conference. As explained in footnote 1 of this opinion, this allegation is subsumed into his ineffective assistance of counsel claim because "where the petitioner's claim of a violation of due process is so inextricably bound up in the issue of the effectiveness of his trial [or appellate] counsel . . . a separate claim of a violation of the right to due process is not required." (Internal quotation marks omitted.) *Evans* v. *Commissioner of Correction*, 37 Conn. App. 672, 693, 657 A.2d 1115, cert. denied, 234 Conn. 912, 660 A.2d 354 (1995).

"That being the fact that the next witness to testify is [Levin]. There was a period of time that I know he has pending cases and at one point I was appointed to represent [Levin] and I did have discussions with him regarding his pending cases.

"Although it was learned fairly soon after my beginning to represent him that he was indeed the same [Levin] as a witness in this case. When I became aware, I informed [Levin] and also informed [the petitioner] of the situation, and [Levin] was appointed a special public defender who has represented him from then until this period of time.

"I did discuss it again with [the petitioner] and indicated the court was going to ask him some questions regarding waiver of [a potential] conflict that may arise based on my brief representation of [Levin]. And [the petitioner] indicates he's willing to stipulate or waive any potential conflict that may arise because of that. I really don't see one in this case but—

"The Court: As you said in chambers, [Levin's] cases are unrelated to the current—

"[Attorney Harrigan]: [Levin's] cases are unrelated to this case and it's not my intention to get into anything regarding any knowledge that I have of this case is based on my representation of [the petitioner]."

Following this colloquy, the court canvassed the petitioner for a waiver on the conflict of interest.

A fundamental tenet of criminal jurisprudence is that a criminal defendant has a constitutional right to be present at all critical stages of his or her prosecution. *State* v. *Walker*, 147 Conn. App. 1, 13, 82 A.3d 630 (2013), aff'd, 319 Conn. 668, 126 A.3d 1087 (2015). "[A]n in camera inquiry regarding a potential conflict of interest *may* constitute a critical stage of a prosecution at which . . . a defendant has a constitutional right to be present. . . . Nevertheless, it does not follow that all in-chambers discussions constitute a critical stage of the

prosecution. In *State* v. *Lopez*, [271 Conn. 724, 859 A.2d 898 (2004)], our Supreme Court stated that [i]n judging whether a particular segment of a criminal proceeding constitutes a critical stage of a defendant's prosecution, courts have evaluated the extent to which a fair and just hearing would be thwarted by [the defendant's] absence or whether his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge. . . . It further noted that a defendant may be afforded the right either to object or to waive an objection to his absence from a conference held in chambers if the existence of such a conference subsequently is placed on the record. . . . Applying the test set forth in *Lopez* to determine whether a particular in camera proceeding qualifies as a critical stage of the prosecution is a necessarily fact intensive inquiry. Thus, it is imperative that the record reveal the scope of discussion that transpired." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 14.

Importantly, "[w]hen we are left to speculate as to whether the [in camera] conversation[s] consisted of the [trial] court and counsel conducting an extensive discussion as to [the] potential conflict[s] of interest at one end of the spectrum or, at the opposite end, a brief comment to the court that there was a matter that needed to be placed on the record, or . . . dialogue that fell somewhere in between . . . we cannot determine the extent to which a fair and just hearing would have been thwarted by the defendant's absence or whether his presence has a reasonably substantial relation to the fullness of his opportunity to defend against the criminal charges." (Internal quotation marks omitted.) *State* v. *Walker*, 319 Conn. 668, 677, 126 A.3d 1087 (2015).

In the present case, Harrigan recalled during the habeas trial that an in-chambers conference with Judge

Schuman, who oversaw the petitioner's criminal trial, occurred regarding the potential conflict of interest with Levin, but he was "not sure if there was a detailed conversation with him at all other than I represented [Levin]. [Levin] had pending cases. That was probably it." Harrigan also stated that he had a one-time meeting about his representation of Levin with Judge Damiani. On the basis of these statements and the insufficient record, we are unable to determine the scope of the discussion that transpired during the in-chambers conference; accordingly, such deficiencies preclude appellate review. See id., 677–78; see also *Lederle* v. *Spivey*, 151 Conn. App. 813, 818, 96 A.3d 1259 ("[a]s we are left to speculate as to the existence and nature of these alleged in-chambers discussions, we decline to review the defendant's claim"), cert. denied, 314 Conn. 932, 102 A.3d 84 (2014).

III

The petitioner also claims that Harrigan provided ineffective assistance by failing to move to suppress the identification of the petitioner from a photographic array by Lourdes Hernandez, a witness to the 29 Waterville Street burglary. Specifically, he claims that the photographic array shown to Hernandez was unreliable and unduly suggestive because he was the only person wearing a striped shirt in the array and Hernandez had previously told the police that the perpetrator was wearing a yellow striped shirt at the scene of the crime.

"To prevail on a motion to suppress a pretrial identification, a defendant must prevail on a two-pronged inquiry. [F]irst, it must be determined whether the identification procedure was unnecessarily suggestive; and second, if it is found to have been so, it must be determined whether the identification was nevertheless reliable based on an examination of the totality of the circumstances. . . . An identification procedure is

unnecessarily suggestive only if it gives rise to a very substantial likelihood of irreparable misidentification. . . . The defendant bears the burden of proving both that the identification procedures were unnecessarily suggestive and that the resulting identification was unreliable." (Internal quotation marks omitted.) *Velasco* v. *Commissioner of Correction*, 119 Conn. App. 164, 170–71, 987 A.2d 1031, cert. denied, 297 Conn. 901, 994 A.2d 1289 (2010).

The habeas court ruled as follows in its memorandum of decision: "Harrigan did not think that the motion to suppress would be granted, in large part because there were a total of six [photographic] identifications in both criminal cases. Suppressing one [photographic] identification would not impact the other five, especially given other considerations, such as . . . Hernandez . . . also recognizing the petitioner from having seen him several times on her street." The court concluded that "Harrigan had a reasonable basis to conclude that a motion to suppress one or more of the [photographic] identifications, in particular because of the striped shirt being overly suggestive, would not [have been] granted." We agree with the habeas court's determination. The petitioner has failed to demonstrate that his counsel's performance was deficient. Moreover, he also has failed to demonstrate how he was prejudiced, given the fact that the petitioner was positively identified by five other witnesses; see *State* v. *Marshall*, supra, 132 Conn. App. 731; accordingly, the petitioner is unable to satisfy either *Strickland* prong.

IV

Lastly, the petitioner claims that Harrigan provided ineffective assistance by failing to challenge the joinder for trial of his two criminal cases stemming from the burglaries at 29 Waterville Street and 103 Waterville Street. The petitioner hypothesizes that because his

criminal charges stemming from the burglary at 103 Waterville Street included a violent crime, i.e., assault in the first degree, the consolidation of his trial on those charges with the trial of all charges arising from the burglary at 29 Waterville Street, which did not involve any violent crime, caused him undue prejudice. The petitioner contends that "[h]ad trial counsel opposed consolidation of the charges against the petitioner, there is a reasonable likelihood that the matters would have been tried separately," and, as a result, "the outcome of the petitioner's criminal trials would have been more favorable to [him]."

"[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . [C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." (Internal quotation marks omitted.) *Santos* v. *Commissioner of Correction*, 151 Conn. App. 776, 782–83, 96 A.3d 616 (2014). Furthermore, "[a]s a general rule, a habeas petitioner will be able to demonstrate that trial counsel's decisions were objectively unreasonable only if there [was] no . . . tactical justification for the course taken." (Internal quotation marks omitted.) *Lynn* v. *Bliden*, 443 F.3d 238, 247 (2d Cir. 2006), cert. denied, 549 U.S. 1257, 127 S. Ct. 1383, 167 L. Ed. 2d 168 (2007).

During the habeas trial, in response to a question as to why he had not opposed the consolidation, Harrigan testified that, "given the facts, I don't think it probably would necessarily have been successful to oppose a consolidation; but beyond that, I thought that the first case—the evidence in the first case was such that it really [did lend] itself to having both together. The clothing that [the petitioner] was wearing when he got

arrested a few hours later was totally different than what was described by [Lourdes] Hernandez." He additionally stated that, although the petitioner's criminal acts at 103 Waterville Street were violent, it was also "part of the reason why we decided to go with a court trial rather than a jury [trial]." Harrigan further opined that "given the facts of what [the petitioner] was wearing at the time he was arrested just a few hours later . . . I thought there would be enough reasonable doubt created in that to basically clear him of the first [burglary at 29 Waterville Street]."

The habeas court concluded that "Harrigan's decision to not oppose the state's motion to consolidate was reasonable and founded on reasonable strategic grounds." We agree. The petitioner's argument is nothing beyond mere speculation and is insufficient "to overcome the strong presumption of correctness afforded to the strategic decision made by trial counsel." *Brown* v. *Commissioner of Correction*, 131 Conn. App. 497, 507, 27 A.3d 33, cert. denied, 303 Conn. 905, 31 A.3d 1181 (2011).

The judgment is affirmed.

In this opinion the other judges concurred.

U.S. BANK NATIONAL ASSOCIATION, TRUSTEE *v.* KARIN C. EICHTEN ET AL.
(AC 39679)

Alvord, Keller and Bright, Js.

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendant homeowner, E. The trial court granted the plaintiff's motion for summary judgment as to liability on the complaint and on a counterclaim that E had filed. Thereafter, the court rendered judgment of strict foreclosure, from which E appealed to this court. After E had defaulted on her mortgage loan, she applied with the plaintiff's

loan servicer, C Co., for a modification of her mortgage loan under the federal Home Affordable Modification Program (HAMP). Under the HAMP program and a directive issued by the United States Department of the Treasury, borrowers who participated in a certain trial period plan, and who timely made three monthly payments in place of their normal monthly mortgage payments and met all other program eligibility requirements, would have their mortgage loans permanently modified. The Treasury Department directive also required loan servicers to send borrowers notice if their documentation for a loan modification was incomplete and a list of additional required documents. C Co. approved E for entry into the trial period plan and sent her a letter, which stated, inter alia, that after she timely made all trial period payments and continued to meet all other program eligibility requirements, C Co. would send her a modification agreement. The letter further stated that E's credit score could be affected if she accepted entry into the trial period plan. Thereafter, C Co. informed E in a letter that her "housing ratio," or housing expense as a percentage of her household income, exceeded the maximum allowed for C Co.'s lending program. C Co. stated that under applicable HAMP guidelines, E's monthly mortgage payment could not be less than 31 percent of her household monthly gross income in order to qualify for a loan modification. C Co. informed E that her housing ratio at that time was 24.76 percent. C Co. subsequently sent E two more letters, the first of which stated that she had been denied a permanent loan modification because her housing ratio exceeded the maximum allowed for the modification program, and the second of which explained that her housing expense was not a large enough percentage of her household income to qualify for a loan modification. E objected to the plaintiff's motion for summary judgment and claimed, inter alia, that she had contacted C Co. to discuss mortgage assistance options but was told that C Co. would not speak to her unless or until she stopped making her mortgage payments. E claimed that she relied on that information and stopped making payments, but that C Co. did not follow through with its promise to help her with mortgage assistance. E further claimed that she had timely made the monthly payments under the trial plan period and remained eligible under the HAMP guidelines for a loan modification. E also claimed that certain of C Co.'s internal documents showed that approximately nine months after she had completed the trial period plan, C Co. approved her application for a loan modification, but did not inform her of that approval, and did not offer her a loan modification or send her notice that her documentation was incomplete. The trial court concluded that no genuine issue of material fact existed as to any of the special defenses that E had filed. The court determined, as to the counterclaim, that E and the plaintiff did not enter into a new contract when she accepted entry into and complied with the terms of the trial period plan, that the allegations in the counterclaim did not satisfy the transaction test set forth in the applicable rule of

practice (§ 10-10) and that the counterclaim was barred by the statute of frauds (§ 52-550 [a]). On appeal to this court, E claimed, inter alia, that the trial court improperly rendered summary judgment as to liability on the plaintiff's complaint and on her counterclaim, and improperly concluded that a genuine issue of material fact did not exist with respect to her special defenses. *Held*:

1. The trial court improperly rendered summary judgment as to liability on the plaintiff's complaint, as genuine issues of material fact existed as to E's special defense of unclean hands:

   a. The trial court improperly concluded that there was no genuine issue of material fact as to whether E could prevail on her special defense of unclean hands, the plaintiff having failed to establish that it adhered to the requirements of the Treasury Department directive; the plaintiff produced no evidence that it made a determination as to E's eligibility for a loan modification at the end of the trial period plan, the plaintiff failed to explain its apparent internal approval of a loan modification for E or to produce evidence as to why it failed to offer her a loan modification, the unexplained length of time it took C Co. to deny E an offer of a permanent loan modification raised a question as to whether C Co. treated her in a fair, equitable and honest manner, and there was no evidence that C Co. sent E notice that her documentation was incomplete and a list of additional required documentation.

   b. The trial court improperly concluded that E's special defense of unclean hands was invalid because it did not relate to the making, validity or enforcement of the mortgage note; E's allegations raised a genuine issue of material fact as to whether deceitful or unfair practices on the part of the plaintiff led to its filing of the foreclosure action, the plaintiff's submissions did not defeat the evidence set forth in E's objection that the procedures required by HAMP may not have been followed during the trial period plan process, and the defense of unclean hands does not necessarily need to relate to the making, enforcement or validity of a mortgage loan.

2. E could not prevail on her unpreserved claim that the trial court erred in concluding that her special defense of equitable estoppel failed to raise a genuine issue of material fact as to whether C Co. induced her to default: E's claim on appeal that C Co. knew or should have known that telling her she had to stop payments as a requirement to be considered for a loan modification was misleading differed from her argument to the trial court that C Co. had a practice of instructing mortgagors to stop making payments under the false pretense that doing so would not hurt their credit scores, E never directed the trial court to any authority that supported her claim that C Co. knew or should have known that it was misleading to tell her that she had to stop making mortgage payments to be considered for a loan modification, and E failed to present evidence that she reasonably relied on any promise by C Co. that her credit score would be unaffected or that a loan modification

would take place if she defaulted, as the maintenance of a favorable credit score or a loan modification were never certainties at the time she elected to default; moreover, even if E had preserved her equitable estoppel claim, she could not prevail, as she did not claim that C Co. directed her to default or promised her a loan modification if she were to default, the only detriment E alleged was the negative impact on her credit score, and C Co. followed through on its promise to discuss mortgage assistance with her after she defaulted.

3. E could not prevail on her claim that a genuine issue of material fact existed as to her breach of contract special defense, which was based on her assertion that C Co.'s letter in which it offered her entry into the trial period plan created an offer that if she timely made all of the trial period payments, her mortgage would be permanently modified; E failed to allege that she had maintained her eligibility for the HAMP program, which was a condition precedent in the letter, and, thus, her conduct never triggered the plaintiff's duty to perform its obligations under the contract.

4. The trial court did not err in concluding that there was no genuine issue of material fact as to E's special defense of breach of the covenant of good faith and fair dealing in the note and mortgage agreements: C Co.'s failure to offer E a loan modification under the trial period program could not violate the covenant of good faith and fair dealing, as there was no evidence that C Co. impeded E's rights under the note or mortgage agreements, or that it acted in bad faith by misleading her into defaulting, and once E defaulted, C Co. discussed mortgage assistance with her and gave her a trial period plan; moreover, the note and mortgage agreements, and the plaintiff's notices to E that she had defaulted, made clear the consequences of default, the note and mortgage did not require the plaintiff to notify E that her credit rating may be affected if she were to default, neither the note nor the mortgage addressed the situation where E might need relief from the payment provisions or promised to offer E a loan modification, and there was no evidence that C Co. was motivated to induce E to default for greater fees.

5. The trial court properly concluded that E's special defense of promissory estoppel did not raise a genuine issue of material fact; the plaintiff did not break any promise to E when it declined to modify her loan after she made the three trial period payments, which were not the only contingency under the trial period plan, and E failed to allege that she fulfilled the condition precedent in the trial period plan that required that her housing expense be greater than 31 percent of her household income.

6. The trial court improperly rendered summary judgment in favor of the plaintiff on E's counterclaim sounding in breach of contract:

   a. The trial court erred in determining that the counterclaim did not satisfy the transaction test in Practice Book § 10-10, which requires that a counterclaim have a sufficient relationship to the making, validity or enforcement of the note or mortgage; the counterclaim was intertwined

sufficiently with the subject of the foreclosure complaint, as the counterclaim alleged the formation and breach of a contractual agreement that was intended to lead to an offer of a permanent modification of E's mortgage loan, E sought relief that was directly connected to the relief sought in the plaintiff's complaint, and the note, mortgage and trial period plan involved the same lender, the same borrower and the same property.

b. On the basis of the record, there was a genuine issue of material fact as to whether a contract was formed and whether there was a breach by the plaintiff; genuine issues of material fact existed as to whether the plaintiff and E formed a contract when E complied with the conditions of the trial period plan and as to whether C Co. was permitted to continue to review E's financial eligibility for the HAMP program after the end of her trial period plan, as the HAMP guidelines suggested an intention not to leave E without notice of a final determination for months after the conclusion of her trial period plan, although a HAMP handbook may have contemplated a trial period plan that lasted more than three months, there was no definite indication in the record that the plaintiff and E ever agreed to a prolonged trial period plan, and it was unquestionable that E suffered some detriment in addition to any preexisting duties that she owed to the plaintiff, as the trial period plan imposed new obligations on her.

c. The trial court improperly determined that the contract that E claimed was created by the trial period plan did not satisfy the statute of frauds, § 52-550 (a), which requires, inter alia, that an agreement for a loan in excess of $50,000 must be in writing; the trial period plan was not an agreement for the sale of real property or any interest in or concerning real property within the meaning of § 52-550 (a), and because the trial period plan, which was supposed to be performed within one year, was not an agreement for a loan in excess of $50,000, it was not a purported contract that fell within the statute frauds, and even if § 52-550 (a) were applicable, the trial period plan was in writing on C Co.'s letterhead and provided proof of the contract.

(*One judge concurring in part and dissenting in part*)

Argued January 25—officially released September 18, 2018

Procedural History

Action to foreclose a mortgage on certain of the named defendant's real property, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the named defendant filed a counterclaim; thereafter, the court, *Avallone*, *J.*, granted the plaintiff's motion for summary judgment as to liability on the complaint and the counterclaim; subsequently, the court rendered judgment of strict foreclosure, from

which the named defendant appealed to this court; thereafter, the court, *Avallone*, *J.*, issued an articulation of its decision. *Reversed; new trial.*

Loraine Martinez, with whom were *David F. Lavery* and, on the brief, *Sarah E. White*, for the appellant (named defendant).

Pierre-Yves Kolakowski, with whom, on the brief, was *Zachary Grendi*, for the appellee (plaintiff).

Opinion

KELLER, J. In this foreclosure action, the defendant Karin C. Eichten[1] appeals from the judgment of strict foreclosure rendered by the trial court in favor of the plaintiff, U.S. Bank National Association, as trustee, successor in interest to Bank of America, National Association as trustee as successor by merger to LaSalle Bank, National Association as trustee for Washington Mutual Mortgage Pass-Through Certificates WMALT 2007-HY2. The defendant claims that, in rendering summary judgment as to liability in the plaintiff's favor with respect to the plaintiff's foreclosure complaint, the court erred in concluding that a genuine issue of material fact did not exist with respect to her special defenses of equitable estoppel, breach of the covenant of good faith and fair dealing, promissory estoppel, unclean hands, and breach of contract, all of which pertain to the conduct of the plaintiff's loan servicer, Chase Home Finance, LLC (Chase), in denying the defendant's application for a loan modification under the federal Home Affordable Modification Program (HAMP).[2] Additionally, the defendant claims that the

[1] The complaint also named as defendants American Fuel Corporation and the town of Cheshire. Neither of these defendants filed an appearance in the trial court or is a party to this appeal. We will refer to Eichten only as the defendant.

[2] For simplicity, the actions of the plaintiff's loan servicer, Chase, will be referred to as the plaintiff's actions. The plaintiff indicated in its brief, and we agree, that "there is no principled reason to draw a distinction between the alleged actions of Chase and/or [the] plaintiff."

court improperly rendered summary judgment in the plaintiff's favor on her counterclaim sounding in breach of contract. We reverse the judgment of the trial court.

"In February, 2009, faced with a nationwide foreclosure crisis, the Secretary of the Treasury and the Director of the Federal Housing Finance Agency exercised their authority under the Emergency Economic Stabilization Act, the American Recovery and Reinvestment Act, and the Troubled Asset Relief Program, 12 U.S.C. §§ 5201—5253, and created [HAMP]." *Belyea* v. *Litton Loan Servicing, LLP*, United States District Court, Civil Action No. 10-10931-(DJC), 2011 WL 2884964, *2 (D. Mass. July 15, 2011). HAMP was a national home mortgage modification program aimed at helping at-risk homeowners who were in default or at imminent risk of default by reducing monthly payments to sustainable levels through the restructuring of their mortgages without discharging any of the underlying debt. Id. It was designed to create a uniform loan modification process governed by federal standards that could be used by any loan servicer that chose to participate. Id. "As an incentive for servicers to participate in HAMP, the federal government awards servicers three annual $1,000 payments for each permanent mortgage loan that [was] successfully modified . . . ." Id.

On August 28, 2013, the plaintiff commenced this action against the defendant to foreclose on its mortgage on the defendant's property at 630 Cook Hill Road in Cheshire. The defendant filed a substitute answer and special defenses. The defendant alleged in her special defenses that (1) the plaintiff is equitably estopped from proceeding with the foreclosure action because the plaintiff instructed her to default on her note and mortgage obligations, resulting in her credit rating being negatively impacted; (2) the plaintiff breached the covenant of good faith and fair dealing by instructing her to default on her note and mortgage obligations without

informing her that a default would result in adverse consequences such as acceleration of the debt; (3) the plaintiff is precluded by promissory estoppel from pursuing a foreclosure action because the plaintiff induced the defendant to default and promised her the offer of a loan modification if she made three trial period payments,[3] and the defendant relied on that promise to her detriment because she never received the promised offer; (4) the plaintiff is guilty of unclean hands because, although she qualified for a loan modification upon completion of her trial period payments, the plaintiff did not offer her a loan modification, but instead, placed her in a forbearance program without her consent; and (5) the plaintiff breached a contract between the parties by failing to offer the defendant a loan modification after she performed her part of the bargain by making the three agreed upon trial period payments.[4]

In her substitute counterclaim, the defendant alleged that the plaintiff breached a contract between the parties when it failed to offer her a loan modification after the defendant performed her obligations under the contract by making her three trial period payments and continued to meet all program eligibility requirements during the trial period. The plaintiff filed an answer to the defendant's counterclaim on September 29, 2015, in which it posited that the alleged contract did not comply with the statute of frauds, and that the counterclaim is legally insufficient and barred by the doctrines

[3] As a condition precedent to qualifying for a HAMP loan modification, borrowers are required to make reduced payments on the note and mortgage during a trial period plan.

[4] In her special defenses, the defendant also alleged payment and claimed attorney's fees. In its memorandum of decision, the court addressed the issue of attorney's fees but did not address the issue of payment. The defendant does not raise an issue on appeal regarding the sufficiency of her special defense of payment or her claim for attorney's fees. We therefore consider these claims abandoned. See, e.g., *Grimm* v. *Grimm*, 276 Conn. 377, 393–94, 886 A.2d 391 (2005), cert. denied, 547 U.S. 1148, 126 S. Ct. 2296, 164 L. Ed. 2d 815 (2006).

of waiver and estoppel. On November 12, 2015, the plaintiff moved for summary judgment as to liability on its complaint, claiming that the defendant's special defenses are insufficient because they are not supported by any evidence and cannot defeat the plaintiff's prima facie showing that it is entitled to foreclose on the subject property. The plaintiff also argued that the defendant's counterclaim is barred by the statute of frauds and has no factual basis.

In support of its motion for summary judgment, the plaintiff provided the court with the affidavit of Michael Piz, a document control officer with the plaintiff's subsequent loan servicer, Select Portfolio Servicing, Inc.,[5] the contents of which are summarized as follows. On December 15, 2006, the defendant executed an adjustable rate note to pay Washington Mutual Bank, FA (Washington Mutual), the principal sum of $480,000, payable with interest, including late charges, costs, and expenses. The indebtedness evidenced by the note was secured by a mortgage, which also is dated December 15, 2006, on the defendant's property at 630 Cook Hill Road in Cheshire. Washington Mutual endorsed the note in blank and on or about September 9, 2009, the Federal Deposit Insurance Corporation, as receiver of Washington Mutual, executed an assignment of the mortgage to the plaintiff. The assignment later was corrected due to a clerical error in the name of the plaintiff in the original assignment. Copies of the note, mortgage, assignment, and corrected assignment were annexed to the plaintiff's motion for summary judgment as exhibits.

In 2009, the defendant defaulted pursuant to the terms of the note and mortgage, and the plaintiff notified her of the default. The notice of default advised

[5] The record does not reflect how Select Portfolio Servicing, Inc., succeeded Chase as servicer of the loan in question for the plaintiff, but Chase was the servicer at the time the events alleged in the special defenses and counterclaim took place.

that if the amount required to cure the default was not received within sixty days, immediate acceleration of all moneys due under the note and mortgage could be declared without further notice or demand. Piz further avers that the defendant failed to cure her default and, as a result, the plaintiff elected to accelerate the total amount of the indebtedness due and owing by commencing this action. No part of the outstanding indebtedness has been paid by the defendant. Subsequently, the defendant received multiple notices of her default, including notices on November 30, 2009, January 21, 2010, and May 10, 2010.

Piz further alleges that the plaintiff is in physical possession of the original loan documents, including, without limitation, the original note endorsed in blank, and was in possession of the same at the time this action was commenced.[6]

Piz also addresses in his affidavit what transpired regarding the defendant's application for a HAMP loan modification. On July 15, 2010, the plaintiff sent the defendant a letter offering her a trial period plan (TPP). A copy of this letter is annexed to the motion for summary judgment. It reads, in pertinent part: "You are approved to enter into a [TPP] under [HAMP]. This is the first step toward qualifying for more affordable mortgage payments. . . . To accept this offer, you must make new monthly 'trial period payments' in place of your normal monthly mortgage payment. . . . After all trial period payments are timely made and you continue to meet all program eligibility requirements, your mortgage would then be permanently modified. You

[6] The plaintiff, in its complaint, alleges that it was the party entitled to collect the debt evidenced by the note and to enforce the mortgage. Although the defendant denied these allegations in her answer, she did not object to the rendering of summary judgment as to liability or make any claim on appeal that was based on an alleged lack of standing by the plaintiff to bring this foreclosure action.

will be required to execute a permanent mortgage modification agreement that we will send you before your modification becomes effective. Until then, your existing loan and loan requirements remain in effect and unchanged during the trial period. If each trial payment is not received by us in the month in which [it] is due, this offer will end and your loan will not be modified under [HAMP]." (Emphasis omitted.) The letter also includes answers to "frequently asked questions," one of which advised the borrower that "[y]our credit score may be affected by accepting a [TPP] or modification." In response to a question, "[w]hen will I know if my loan can be modified permanently and how will the modified loan balance be determined?" the letter provided, "[o]nce we confirm you are still eligible for [HAMP] and you make all of your trial period payments on time, we will send you a modification agreement detailing the terms of the modified loan."[7]

Piz further avers in his affidavit that in or about May and June, 2011, the defendant sent the plaintiff evidence of her combined income with her then "spouse,"[8] and that, on the basis of the defendant's profit and loss statement and pay stubs, the plaintiff calculated that the defendant and her "spouse" had a combined monthly income of $13,826.35 and a total housing expense of $3423.94. Thus, the defendant's "housing ratio," or housing expense as a percentage of household income, was 24.76 percent. Under the then applicable HAMP guidelines, the borrower's current monthly mortgage payment could not be less than 31 percent of the borrower's

[7] This letter, which the defendant purports to be the contract between the parties, does not contain any place for a signature by either the plaintiff or the defendant, and it does not contain a time is of the essence clause or any particular date by which a determination on her application for a loan modification would be made.

[8] The defendant alleges that the other person residing in the home was her fiancé, not her spouse, but does not challenge the propriety of the inclusion of her fiancé's income in calculating monthly gross income for purposes of determining eligibility for the HAMP program.

household monthly gross income to qualify for a loan modification.

Consequently, the plaintiff concluded that "[b]orrower [h]ousing [r]atio exceeds the maximum for our lending program." In addition, the plaintiff submitted a handbook for the HAMP program, version 3.2, which indicated that one of the requirements under the program was that "verified income documentation must confirm that the borrower's monthly mortgage payment ratio prior to the modification is greater than 31 percent." On July 15, 2011, the plaintiff sent the defendant a letter explaining that the defendant had been denied a permanent modification because her "housing ratio[9] exceeds the maximum allowed for the modification program." The plaintiff sent another letter to the defendant on July 28, 2011, explaining in greater detail why the defendant's housing ratio made her ineligible for a loan modification under HAMP. Although the reference in the July 15, 2011 letter to a "housing ratio that exceeds the maximum allowed" is confusing, the July 28, 2011 letter clearly explains why the defendant's housing expense was not a large enough percentage of her household income to qualify for a loan modification.

The defendant filed her objection to the motion for summary judgment on January 11, 2016, essentially asserting that the evidence relevant to her special defenses and counterclaim, which involve the plaintiff's course of conduct in considering and ultimately denying her loan modification application, creates a genuine issue of material fact as to whether the plaintiff should be permitted to proceed to foreclosure.

[9] The housing ratio or monthly mortgage payment ratio, is defined in the HAMP program handbook for servicers submitted by the defendant, as "the ratio of the borrower's current monthly mortgage payment to the monthly gross income of all borrowers on the mortgage note, whether or not those borrowers reside in the property." To qualify for HAMP, verified income documentation must confirm that the borrower's monthly mortgage payment ratio prior to modification is greater than 31 percent.

The defendant attached her own affidavit to her objection to the motion for summary judgment, summarized as follows. She faithfully submitted her mortgage payments in a timely fashion and without incident until late 2009. In the beginning of 2009, she was laid off from her job and forced to use her cash reserves and savings to make her payments. She became concerned about her continued ability to make her payments. In the fall of 2009, she contacted her loan servicer, Chase, to discuss mortgage assistance options and was told by a representative that Chase would not speak to her unless or until she stopped making her payments. As a result of her reliance on this information, she stopped making any payments commencing on October 1, 2009. The plaintiff did not follow through with its promise to help her with mortgage assistance, and she had to retain a law firm to help her. Starting in March, 2010, and continuing until July, 2010, she supplied the plaintiff with all of the financial information it requested of her.

The defendant attached additional documentation to her objection to the plaintiff's summary judgment motion, focusing on her participation in the TPP and the plaintiff's denial of her application for a loan modification. After the defendant retained counsel, the plaintiff finally sent the defendant a letter dated July 15, 2010, congratulating her and stating that she was "approved to enter into a [TPP] under the [HAMP] (program)," and explaining that "[t]his is the first step toward qualifying for more affordable mortgage payments. . . . After all trial period payments are timely made and you continue to meet all program eligibility requirements, your mortgage would then be permanently modified. You will be required to execute a permanent mortgage modification agreement that we will send you before your modification becomes effective. Until then, your existing loan and loan requirements remain in effect and unchanged during the trial period."

Under the plan, the defendant was to make three consecutive monthly payments of $3373.86 on August 1, September 1, and October 1, 2010.

In her affidavit, the defendant avers that she timely made all three payments under the TPP and some additional trial payments into 2011.[10] The plaintiff continued to send her letters on different letterhead and from different locations, asking her for the same financial information and thanking her for her interest in a HAMP modification. According to the defendant, to be safe, she kept resending the requested information to the plaintiff. She also avers that she received two notices that her request for unemployment forbearance had been received even though she had never made any such request. Finally, the defendant avers that the plaintiff, approximately nine months after the TPP had ended, sent her a letter dated July 15, 2011, which stated that "[w]e received your request for a permanent loan modification . . . . We are unable to offer you a modification through the federal [program] . . . . This decision was confirmed through a second level of review. . . . We are unable to offer you a modification because your housing ratio exceeds the maximum allowed for the modification program." The letter also recommended other possible options for the defendant to avoid foreclosure.

As part of her objection to the plaintiff's motion for summary judgment, the defendant also submitted internal documents of the plaintiff and a number of other letters sent to her by the plaintiff. The plaintiff does not dispute the existence or accuracy of these documents or letters, which reveal the following. In or about June and July, 2010, the defendant submitted to the plaintiff

[10] Internal records of the plaintiff, submitted by the defendant with her objection, reveal that she made six payments of $3373.86 between August, 2010, and January, 2011

a loan modification application with supporting documents. The plaintiff reviewed these submissions, which included bank statements from the defendant's business from February through May, 2010, and a contribution letter and pay stubs from the defendant's fiancé from May and June, 2010.[11] The analysis, called an "MOD Summary Report," revealed that the defendant's housing ratio was 37.892 percent, which was within HAMP's limits for approval of a loan modification. As a result, the plaintiff forwarded the defendant a letter offering her a TPP. In August, 2010, the plaintiff sent the defendant a letter requesting a packet of financial information regarding her loan modification request. In September, 2010, the plaintiff sent the defendant another letter stating that it was still waiting for the requested package of information to be returned. In and about February and March, 2011, according to an updated MOD Summary Report, the plaintiff again reviewed the defendant's application, determined that her housing ratio was 31.208 percent, which was still within HAMP limits, and, the defendant claims, approved her pending application for a loan modification. On March 10, 2011, the plaintiff entered the following messages into its Loss Mitigation Tracking Steps system: "Final Review Complete," "Order/Prepare Mod Docs," and "QA Final Approved," which corresponded to a charge of $2838.92 to the defendant's bank account. There is no dispute that the plaintiff never sent the defendant any permanent loan modification documents. The Loss Mitigation Tracking Steps later reflect that on July 11, 2011, the defendant was found ineligible for a loan modification.[12]

[11] The HAMP guidelines provide that "[s]ervicers should include non-borrower household income in monthly gross income if it is voluntarily provided to the borrower and if, in the servicer's business judgment, that income reasonably can continue to be relied upon to support the mortgage payment."

[12] As of July, 2011, the $12,578.85 monthly income of the defendant's fiancé, when combined with her monthly income, was too high a sum for the defendant to qualify for HAMP assistance.

In its reply to the defendant's opposition to the motion for summary judgment, the plaintiff claimed that despite the defendant's allegations of the plaintiff's internal generation of alleged final loan modification documents, the defendant admits she never received or accepted the final loan modification documents. The plaintiff also argued that the defendant's special defenses do not relate to the making, validity or enforcement of the note, and that her counterclaim does not have a sufficient connection to the making, validity or enforcement of the note and mortgage to satisfy the "transaction test" in Practice Book § 10-10.[13]

On May 23, 2016, the court held a hearing on the plaintiff's motion for summary judgment. After oral argument, the defendant filed a supplemental brief in opposition to the motion for summary judgment on May 23, 2016. Following the hearing, the court summarily granted the plaintiff's motion for summary judgment. On July 8, 2016, the defendant filed a motion for clarification of whether the court's order granting the summary judgment motion pertained to her counterclaim. The court issued an order on September 8, 2016, stating that its ruling included rendering summary judgment on the defendant's counterclaim. On September 12, 2016, the court rendered judgment of strict foreclosure with a law day of December 5, 2016. This appeal followed.

Thereafter, on October 27, 2016, the defendant filed a motion for articulation of the court's granting of the plaintiff's motion for summary judgment. The defendant requested that the court articulate its "findings of fact and conclusions of law upon which the trial court relied

[13] Practice Book § 10-10 provides in relevant part: "In any action for legal or equitable relief, any defendant may file counterclaims against any plaintiff . . . provided that each such counterclaim . . . arises out of the transaction or one of the transactions which is the subject of the plaintiff's complaint . . . ."

in granting the motion for summary judgment as to the special defenses and counterclaim of the defendant . . . .'' (Emphasis omitted.) On February 15, 2017, the court issued an articulation. In its articulation, the court determined that ''the plaintiff has established the absence of a genuine issue of material fact regarding the prima facie case for foreclosure,'' and that none of the defendant's special defenses raised a genuine issue of material fact that might defeat the plaintiff's cause of action. The court also concluded that summary judgment was appropriate on the defendant's breach of contract counterclaim. The court determined that the undisputed facts show that the parties did not enter into a new contract and that the defendant's counterclaim regarding the denial of her application for a loan modification did not present an issue that satisfied the transaction test in Practice Book § 10-10. Finally, the court ruled that even if the transaction test were satisfied, the counterclaim was barred by the statute of frauds, General Statutes § 52-550, because the amount due on the note was $480,000, which exceeds the threshold amount of $50,000 for loan agreements in the statute, and thus any contract for a modification needed to be in writing.

We first set forth the applicable standard of review. ''In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. . . . Although the party seeking summary judgment has the burden of showing the nonexistence of any material fact . . . a party opposing summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue.'' (Internal quotation marks omitted.) *Rosenfield* v. *I. David Marder & Associates, LLC*, 110 Conn. App. 679, 684, 956 A.2d 581 (2008). A material fact is one

that makes a difference in the outcome of a case. *Catz* v. *Rubenstein*, 201 Conn. 39, 48, 513 A.2d 98 (1986).

"Summary judgment shall be granted if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . The trial court must view the evidence in the light most favorable to the nonmoving party. . . .

"Appellate review of the trial court's decision to grant summary judgment is plenary. . . . [W]e must [therefore] decide whether [the trial court's] conclusions are legally and logically correct and find support in the facts that appear in the record." (Citations omitted; internal quotation marks omitted.) *McFarline* v. *Mickens*, 177 Conn. App. 83, 90, 173 A.3d 417 (2017), cert. denied, 327 Conn. 997, 176 A.3d 557 (2018).

"In order to establish a prima facie case in a mortgage foreclosure action, the plaintiff must prove by a preponderance of the evidence that it is the owner of the note and mortgage, that the defendant mortgagor has defaulted on the note and that any conditions precedent to foreclosure, as established by the note and mortgage, have been satisfied. . . . Thus, a court may properly grant summary judgment as to liability in a foreclosure action if the complaint and supporting affidavits establish an undisputed prima facie case and the defendant fails to assert any legally sufficient special defense." (Internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Strong*, 149 Conn. App. 384, 392, 89 A.3d 392, cert. denied, 312 Conn. 923, 94 A.3d 1202 (2014).

"[A] holder of a note is presumed to be the owner of the debt, and unless the presumption is rebutted, may foreclose the mortgage under [General Statutes § 49-17]. . . . It [is] for the defendant to set up and prove the facts which limit or change the plaintiff's rights." (Internal quotation marks omitted.) *Equity*

One, *Inc.* v. *Shivers*, 310 Conn. 119, 135, 74 A.3d 1225 (2013).

"[T]he party raising a special defense has the burden of proving the facts alleged therein." *Wyatt Energy*, *Inc.* v. *Motiva Enterprises*, *LLC*, 308 Conn. 719, 736, 66 A.3d 848 (2013). "If the plaintiff in a foreclosure action has shown that it is entitled to foreclose, then the burden is on the defendant to produce evidence supporting its special defenses in order to create a genuine issue of material fact . . . ." *WM Specialty Mortgage*, *LLC* v. *Brandt*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-09-5001157-S, 2009 WL 567040, *4 (February 10, 2009); see *Union Trust Co.* v. *Jackson*, 42 Conn. App. 413, 417–20, 679 A.2d 421 (1996). Legally sufficient special defenses alone do not meet the defendant's burden. "The purpose of a special defense is to plead facts that are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action. . . . Further . . . [t]he applicable rule regarding the material facts to be considered on a motion for summary judgment is that the facts at issue are those alleged in the pleadings." (Citation omitted; internal quotation marks omitted.) *Fidelity Bank* v. *Krenisky*, 72 Conn. App. 700, 718, 807 A.2d 968, cert. denied, 262 Conn. 915, 811 A.2d 1291 (2002). "[B]ecause any valid special defense raised by the defendant ultimately would prevent the court from rendering judgment for the plaintiff, a motion for summary judgment should be denied when any [special] defense presents significant fact issues that should be tried." (Internal quotation marks omitted.) *Ulster Savings Bank* v. *28 Brynwood Lane*, *Ltd.*, 134 Conn. App. 699, 704, 41 A.3d 1077 (2012).

I

First, the defendant claims that the court improperly rendered summary judgment against her as to liability

on the foreclosure complaint because genuine issues of material fact exist with respect to her special defenses of equitable estoppel, breach of the covenant of good faith and fair dealing, promissory estoppel, unclean hands, and breach of contract. We agree with the defendant that her special defense of unclean hands raises a genuine issue of material fact, and therefore, summary judgment in favor of the plaintiff should not have been rendered. We disagree, however, that the remainder of the defendant's special defenses precluded summary judgment in the plaintiff's favor.

A

The defendant claims in her fifth special defense that the plaintiff violated the doctrine of unclean hands and should be precluded from proceeding with the foreclosure action because the plaintiff did not offer her a permanent loan modification under the program despite the fact that, pursuant to regulations published by the United States Department of the Treasury, she was entitled to a permanent modification upon the completion of her three trial payments. She argues that instead, the plaintiff placed her into a mortgage forbearance program for which she did not apply. She contends that the plaintiff's internal records indicate that it approved her for a loan modification under the program in March, 2011, months before it mailed her the denial letter. She argues that a number of documents in evidence suggest that the plaintiff approved the defendant for a loan modification in March, 2011, when she had a housing ratio of 31.2 percent. She notes that the plaintiff only appended evidence to its motion for summary judgment that supported its version of the narrative while failing to make any argument or even reference to its own internal processes, evidence of which raises more questions than answers. We agree with the defendant.

Because an action to foreclose a mortgage is an equitable proceeding, the doctrine of unclean hands may

be applicable. "It is a fundamental principle of equity jurisprudence that for a complainant to show that he is entitled to the benefit of equity he must establish that he comes into court with clean hands. . . . The clean hands doctrine is applied not for the protection of the parties but for the protection of the court. . . . It is applied not by way of punishment but on considerations that make for the advancement of right and justice. . . . The doctrine of unclean hands expresses the principle that where a plaintiff seeks equitable relief, he must show that his conduct has been fair, equitable and honest as to the particular controversy in issue. . . . Unless the plaintiff's conduct is of such a character as to be condemned and pronounced wrongful by honest and fair-minded people, the doctrine of unclean hands does not apply." (Citation omitted; internal quotation marks omitted.) *Thompson* v. *Orcutt*, 257 Conn. 301, 310, 777 A.2d 670 (2001). "The party seeking to invoke the clean hands doctrine to bar equitable relief must show that his opponent engaged in wilful misconduct with regard to the matter in litigation. . . . The trial court enjoys broad discretion in determining whether the promotion of public policy and the preservation of the courts' integrity dictate that the clean hands doctrine be invoked." (Internal quotation marks omitted.) *Monetary Funding Group, Inc.* v. *Pluchino*, 87 Conn. App. 401, 407, 867 A.2d 841 (2005). "Wilful misconduct has been defined as intentional conduct designed to injure for which there is no just cause or excuse. . . . [Its] characteristic element is the design to injure either actually entertained or to be implied from the conduct and circumstances. . . . Not only the action producing the injury but the resulting injury also must be intentional." (Internal quotation marks omitted.) *19 Perry Street, LLC* v. *Unionville Water Co.*, 294 Conn. 611, 630–31 n.10, 987 A.3d 1009 (2010).

This special defense questions the legitimacy of the plaintiff's processing of the defendant's application for

a loan modification. It raises a question as to why the plaintiff failed to send the defendant a permanent loan modification agreement if she was approved for a loan modification in March, 2011. The court rejected the defendant's special defense of unclean hands and characterized it as another "inducement to default" special defense, similar to the defendant's equitable estoppel special defense. We, however, conclude that the nature of the allegations in this special defense are distinguishable.

The defendant submitted as evidence a copy of a supplemental directive issued on January 28, 2010, by the Treasury Department to provide guidance to loan servicers in making HAMP eligibility determinations for borrowers currently participating in a TTP. This directive notes a change from a prior directive issued in 2009, which gave loan servicers the option of placing a borrower into a TPP on the basis of verbal financial information obtained from the borrower, subject to later verification during the TPP. Effective on or after June 1, 2010, a loan servicer was instructed to evaluate a borrower for HAMP only after the servicer received an initial package that included a request for modification and an "affidavit (RMA) form," an Internal Revenue Service form 4506-T or 4506T-EZ to request transcripts of tax returns, and documentation of income that may not be more than ninety days old as of the date the initial package is received by the servicer. If the loan servicer received an incomplete initial package or needed additional documentation to verify the borrower's eligibility and income, the servicer had to send the borrower an "Incomplete Information Notice" that lists the additional required verification documentation. Loan servicers were required to use a two step process for HAMP modifications. In referencing conversion from trial to permanent modification, the directive stated: "Following underwriting and a determination

that the borrower qualifies for a HAMP trial modification, servicers will place qualified borrowers in a trial period plan by preparing and sending a [TPP] [n]otice to the borrower describing the terms of the trial modification and the payment due dates. Borrowers who make all trial period payments timely and who satisfy all other trial period requirements will be offered a permanent HAMP modification."

In this case, the plaintiff produced no evidence that it made a determination as to the defendant's eligibility for a HAMP modification at the end of her TPP, which was at the end of the month in which she made her third payment, October, 2010. Furthermore, there is evidence in the defendant's submissions that the defendant's application was approved by the plaintiff in March, 2011, and the plaintiff has produced no evidence to explain why it failed, at that time, to complete the process and forward to the defendant an offer of a permanent loan modification. In addition, there is no evidence that the plaintiff ever sent the defendant the required "Incomplete Information Notice" that her documentation was incomplete, as required by the directive.

The plaintiff's failure to establish that it adhered to the Treasury Department's directives, which appear to encourage that final determinations on whether to offer the borrower a loan modification be made before the end of the TPP, and the plaintiff's failure to provide an explanation as to its apparent internal approval of the loan modification in March, 2011, which was not communicated to the defendant, create a genuine issue of material fact as to whether the defendant can prevail on her special defense of unclean hands. When viewing the evidence in the light most favorable to the defendant, the unexplained length of time it took the plaintiff to deny the defendant an offer of a permanent modification, almost twenty months, commencing with the date

it told her that the only way to explore modification of her loan was to stop paying in November, 2009, and ending with the date it denied her a modification, July 15, 2011, raises the question of whether the plaintiff treated the defendant in a fair, equitable and honest manner knowing that prolonged delay would place the defendant in an untenable financial situation, such that she could not possibly extricate herself to prevent foreclosure. We have no evidentiary basis to determine if wilful misconduct or simple negligence occurred in the plaintiff's handling of her application.

We, therefore, conclude that the court erred in determining that there was no genuine issue of material fact as to whether the defendant can prevail on her special defense of unclean hands.

B

Having concluded that there is a genuine issue of material fact raised in the allegations in the defendant's unclean hands special defense, we next address the plaintiff's argument that this special defense is invalid because it does not relate to the making, validity, or enforcement of the note and mortgage.[14] The court did not expressly address or rely on this rationale, but we address it because it presents a question of law that is subject to plenary review. See, e.g., *TD Bank, N.A.* v. *M.J. Holdings, LLC*, 143 Conn. App. 340, 343, 70 A.3d 156 (2013) (issues concerning legal sufficiency of pleading subject to plenary review). In mortgage foreclosure cases, "courts require that a viable legal defense directly attack the making, validity or enforcement [of the note and mortgage]." (Internal quotation marks omitted.)

[14] The plaintiff argues on appeal that the court properly granted the motion for summary judgment because the defendant's special defenses do not relate to the making, validity or enforcement of the note and mortgage. Without objection from the defendant, the plaintiff raised this issue at the hearing on the motion for summary judgment and in its reply memorandum of law in support of the motion for summary judgment.

CitiMortgage, Inc. v. *Rey*, 150 Conn. App. 595, 603, 92 A.3d 278, cert. denied, 314 Conn. 905, 99 A.3d 635 (2014). "[S]pecial defenses which are not limited to the making, validity or enforcement of the note or mortgage fail to assert any connection with the subject matter of the foreclosure action and as such do not arise out of the same transaction as the foreclosure action." (Internal quotation marks omitted.) Id., 600.

In *U.S. Bank National Assn.* v. *Sorrentino*, 158 Conn. App. 84, 97, 118 A.3d 607, cert. denied, 319 Conn. 951, 125 A.3d 530 (2015), this court concluded that counterclaims that addressed the plaintiff's alleged improper conduct concerning the defendants' qualification for a possible loan modification during a foreclosure mediation program that began after the execution of the note and mortgage did "not reasonably relate to the making, validity or enforcement of the note or mortgage," and, thus, could not be joined properly with the complaint. Recently, in *U.S. Bank National Assn.* v. *Blowers*, 177 Conn. App. 622, 625–26, 172 A.3d 837, cert. granted, 328 Conn. 904, 177 A.3d 1160 (2018), an appeal from a judgment of strict foreclosure, this court held that the trial court properly granted the plaintiff's motion to strike the defendants' special defenses and counterclaims. The counterclaims sounded in negligence; violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq.; and unjust enrichment. *U.S. Bank National Assn.* v. *Blowers*, supra, 626. The special defenses sounded in equitable estoppel, unjust enrichment and unclean hands. Id. The defendants in *Blowers* claimed that shortly after they had defaulted on their mortgage payments, a servicing agent for the plaintiff reached out to the defendants, offering a rate reduction. Id., 628. After the defendants successfully completed a three month trial modification period, however, the plaintiff withdrew its offer to modify the loan and ultimately commenced a foreclosure action.

Id. The defendants essentially claimed that the plaintiff and its servicing agent failed to conduct themselves in a manner that was fair, equitable and honest during the court mediation and loan modification negotiation period. Id. Relying on *U.S. Bank National Assn.* v. *Sorrentino*, supra, 96, this court held that the alleged improper conduct occurring during mediation and modification negotiations lacked "a reasonable nexus to the making, validity, or enforcement of the note or mortgage." *U.S. Bank National Assn.* v. *Blowers*, supra, 632. By contrast, if "the modification negotiations ultimately result in a final, binding, loan modification, and the mortgagee subsequently breaches the terms of that new modification, then any special defenses asserted by the mortgagor in regard to that breach would relate to the enforcement of the mortgage."[15] Id., 630.

The court in *Blowers* further noted that "our courts have allowed exceptions to the making, validity, or enforcement requirement where traditional notions of equity would not be served by its strict application. For example, in *Thompson* v. *Orcutt*, [supra, 257 Conn. 301], our Supreme Court reversed this court's determination that a special defense of unclean hands did not apply where the plaintiff's fraudulent conduct occurred in a separate bankruptcy proceeding that was not strictly related to the making, validity, or enforcement of the note or mortgage. In reversing this court's decision, the Supreme Court observed that the plaintiff would not

[15] The dissenting opinion in *Blowers* did not agree that a special defense that is based on loan modification negotiations can be viable only if the parties actually reach a modification agreement because it "would unnecessarily shield mortgagees or their agents from judicial scrutiny of potentially unscrupulous behavior that may have directly resulted in the foreclosure action. Courts have not always strictly applied the making, validity, or enforcement requirement in evaluating the sufficiency of equitable special defenses such as those raised here, particularly if a strict application would offend traditional notions of equity." *U.S. Bank National Assn.* v. *Blowers*, supra, 177 Conn. App. 648 (*Prescott*, *J.*, dissenting).

have had the legal authority to bring the foreclosure action against the defendants but for its fraudulent conduct during the bankruptcy proceeding. . . . The court [in *Thompson*] noted, [b]ecause the doctrine of unclean hands exists to safeguard the integrity of the court . . . [w]here a plaintiff's claim grows out of or depends upon or is inseparably connected with his own prior fraud, a court of equity will, in general, deny him any relief, and will leave him to whatever remedies and defenses at law he may have." (Citation omitted; internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Blowers*, supra, 177 Conn. App. 633–34. Our Supreme Court further clarified that an equitable defense of unclean hands need not strictly relate to the making, validity, or enforcement of the note or mortgage, provided the allegations set forth were "directly and inseparably connected" to the foreclosure action. (Internal quotation marks omitted.) *Thompson* v. *Orcutt*, supra, 313. Thus, we are not persuaded by the plaintiff's argument that the defendant's unclean hands defense is invalid because it does not relate to the making, validity, or enforcement of the note. First, the defense of unclean hands, as our Supreme Court recognized, does not necessarily need to relate to the making, enforcement, or validity of the loan. Second, if the plaintiff did engage in fraudulent conduct by deliberately failing to communicate its internal approval of the loan modification, then that raises questions as to whether, but for this conduct, the plaintiff would have had the legal authority to bring this action.

We conclude that the allegations in the defendant's special defense of unclean hands raise a genuine issue of material fact as to whether deceitful or unfair practices on the part of the plaintiff led to the filing of a foreclosure action that could have been avoided by the timely processing of the defendant's application for a permanent loan modification in accordance with the

HAMP guidelines. The plaintiff's submissions do not satisfactorily defeat the evidence set forth in the defendant's objection that HAMP's required procedures may not have been followed during the TPP process. Thus, the court erred in rendering summary judgment in favor of the plaintiff in light of the defendant's unclean hands special defense.

C

Because we conclude that the case is to be remanded for further proceedings, it is appropriate for us to address certain issues raised by the defendant that are likely to recur on remand. See *Sullivan* v. *Metro-North Commuter Railroad Co.*, 292 Conn. 150, 164, 971 A.2d 676 (2009). The defendant claims that the court erred in concluding that her equitable estoppel special defense failed to raise a genuine issue of material fact as to whether the plaintiff induced her default. In this special defense, the defendant alleges that the plaintiff advised her that she had to stop making her mortgage payments, as this was the only way to explore a modification. She claims that the plaintiff should be equitably estopped from foreclosing on her mortgage because "the event of default was contrived by [the plaintiff]," who "reported the default to various credit reporting agencies . . . which substantially interfered with her ability to . . . pursue refinancing options with other financial institutions." We are not persuaded.

"The doctrine of equitable estoppel is well established. [W]here one, by his words or actions, intentionally causes another to believe in the existence of a certain state of things, and thereby induces him to act on that belief, so as injuriously to affect his previous position, he is [precluded] from averring a different state of things as existing at the time. . . . Our Supreme Court . . . stated, in the context of an equitable estoppel claim, that [t]here are two essential elements to an estoppel: the party must do or say

something which is intended or calculated to induce another to believe in the existence of certain facts and to act upon that belief; and the other party, influenced thereby, must actually change his position or do something to his injury which he otherwise would not have done. Estoppel rests on the misleading conduct of one party to the prejudice of the other. . . . Broadly speaking, the essential elements of an equitable estoppel . . . as related to the party to be estopped, are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts." (Internal quotation marks omitted.) *TD Bank, N.A.* v. *M.J. Holdings, LLC*, 143 Conn. App. 322, 337–38, 71 A.3d 541 (2013). "Estoppel rests on the misleading conduct of one party to the prejudice of the other." (Internal quotation marks omitted.) *Fischer* v. *Zollino*, 303 Conn. 661, 668, 35 A.3d 270 (2012).

In opposing summary judgment, the defendant argued that the plaintiff should be equitably estopped from bringing the foreclosure action because she withheld mortgage payments beginning in October, 2009, only after the plaintiff advised her "that in order to discuss modification options, she would have to default on her mortgage by withholding payment." In her affidavit that was submitted to the court in support of her opposition to the plaintiff's motion for summary judgment, the defendant averred that she had called the plaintiff in the fall of 2009, and further averred: "I was told by the representative with whom I spoke that [the plaintiff] would not speak to me about mortgage assistance unless or until I stopped making my payments."

On appeal, the defendant claims as grounds for equitable estoppel that she was not in default and had not missed any mortgage payments in the past but that when she reached out to the plaintiff to inquire about modifying her monthly payments, it instructed her to stop making her payments, as this was the only way to explore a modification. She claims, for the first time on appeal, that this was a misleading statement by the plaintiff because, under the HAMP program standards, she only needed to be at imminent risk of default and did not have to be in default in order to be considered for a modification. She also claims that her default, contrived by the plaintiff, negatively impacted her credit score, and thus her ability to pursue refinancing with other financial institutions.

A major problem with the defendant's claim that the plaintiff *misled* her by telling her she first had to stop making payments to be considered for a loan modification, rather than merely be at imminent risk of default, is that she raises this argument for the first time on appeal.[16] "Our appellate courts, as a general practice, will not review claims made for the first time on appeal. We repeatedly have held that [a] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . ." (Internal quotation marks omitted.) *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 619, 99 A.3d 1079 (2014). We also do not consider evidence not presented to the trial court. See *O'Hara* v. *State*, 218 Conn. 628, 639–40

[16] A fair reading of the HAMP guidelines, Supplemental Directive 09-01, dated April 6, 2009, reveals that, in order to qualify for relief, a borrower must be in default, or, in very limited circumstances, must claim a hardship and be determined to be at imminent risk of default, or "reasonably foreseeable" default. Courts have recognized, however, that servicers are permitted to give priority to borrowers on the basis of their payment or default status. *Lindsay* v. *Bank of America, N.A.*, United States District Court, Civ. No. 12-00277 LEK-BMK, 2012 WL 5198160, *12 (D. Haw. October 19, 2012).

n.8, 590 A.2d 948 (1991). In the present case, the argument that the defendant made in her opposition to summary judgment was that the plaintiff's servicer had a widespread practice of instructing mortgagors to stop making mortgage payments under the false pretense that doing so would not hurt their credit scores. In the portion of her memorandum of law in opposition to the motion for summary judgment where she discusses her equitable estoppel special defense, the defendant never directs the court's attention to any authority that supports her appellate contention that the plaintiff knew or should have known that telling her she had to stop payments as a requirement to be considered for a loan modification was misleading. Accordingly, the claim as framed on appeal is unpreserved.

Assuming, arguendo, that the defendant had preserved her equitable estoppel claim, we would conclude that she cannot prevail on the merits of the defense as currently pleaded and argued. The following additional facts pertaining to the defendant's decision to default are relevant to this claim. In her affidavit, the defendant states that after she was laid off from her job, she used cash reserves and savings to make her mortgage payments, but soon became concerned about her ability to continue making the payments. In her affidavit, the defendant avers that the plaintiff's loan servicer did not direct her to default, but rather informed her that it could not speak with her regarding loan assistance until she was in default. Thereafter, the defendant elected to default and was not coerced or forced to do so by the plaintiff.

This special defense fails to allege that the plaintiff promised her that her credit score would be unaffected by her default, and the only detriment she alleges was the negative impact on her credit score. In her equitable estoppel special defense, the defendant also does not claim that the plaintiff promised her a loan modification

when it instructed her that the only way to explore modifying her payment was for her to default.

After the defendant defaulted, the plaintiff followed through on its promise to discuss mortgage assistance with the defendant, and engaged in documented communications, internal calculations and correspondence with the defendant in an effort to conclude a mortgage modification.

Because the allegations in this special defense in no way set forth a claimed promise from the plaintiff that her credit score would be unaffected or that a future loan modification would take place if she defaulted and there is no evidence of any such promises, the defendant cannot claim that she relied to her detriment on promises she fails to allege or prove existed. At the time the defendant elected to default, the maintenance of a favorable credit score or a loan modification were never certainties, and she chose to default at her own peril. The defendant has failed to plead or present evidence of a promise or reasonable reliance on any promise.

Carlson v. *Bank of America, N.A.*, United States District Court, Civ. No. 12-1440 (DSD/AJB), 2012 WL 5519733 (D. Minn. November 14, 2012), is factually analogous and provides further justification for why the defendant's "induced to default" special defense is insufficient for lack of proof of detrimental reliance on her part. The court in *Carlson* stated: "The homeowners argue that Bank of America fail[ed] to properly communicate with plaintiffs and encourag[ed] plaintiffs to default on their loan. . . . Absent from the verified complaint, however, is any allegation that Bank of America hindered performance by refusing payment. . . . In other words, the homeowners never alleged that the lender's actions prevented them from performing their responsibilities under the mortgage

agreement. . . . For this reason, the homeowners' claim fails. . . .

"Here, the homeowners did not plead plausible factual allegations indicating that they would have been able to pay the mortgage absent their reliance on the instructions to default. . . . The homeowners allege that they would have continued to make payments had they not been instructed to default on the loan; however, they also allege financial concerns beginning in fall 2009 and do not allege an ability to pay." (Citations omitted; internal quotation marks omitted.) Id., *2.

Carlson is instructive. In rejecting the defendant's "instruction to default" defense therein, the court found that the defendant's own admitted financial problems were the undisputed overriding impetus for the defendant's decision to default on the note and mortgage. Similarly, the defendant in the present case has not presented evidence that she could have or would have remained current on the mortgage had she not been instructed to default to take advantage of the opportunity for a modification. The fact that she claims she was current on certain other financial obligations while she was in default does not equate to an ability to pay her mortgage. As the plaintiff points out, the defendant's argument is "self-contradictory and illogical." On the one hand, the defendant claims that she defaulted only because she was wrongfully induced to default by the plaintiff and would not have defaulted but for plaintiff's supposedly inequitable conduct. On the other hand, she claims she should have been considered for a modification before defaulting, but the HAMP guidelines only permit predefault modification consideration if the borrower's default is imminent. If, in 2009, the defendant was about to default in the near future, how can she argue that the plaintiff's actions were the wrongful cause of her default? If she was able to continue to afford her mortgage payments and only was induced

by the plaintiff to default, then her default was not imminent, and presumably she could have afforded the existing terms of her mortgage and would not have been eligible for HAMP. See *Pennington* v. *HSBC Bank USA, N.A.*, 493 Fed. Appx. 548, 553 (5th Cir. 2012) (noting borrower could not have possibly qualified for HAMP if her claim that she would not have missed payment but for servicer's "demand that she quit making her regular monthly payments" were true [internal quotation marks omitted]), cert. denied, 568 U.S. 1161, 133 S. Ct. 1272, 185 L. Ed. 2d 185 (2013).

D

We next address the defendant's claim that a genuine issue of material fact exists with respect to her breach of contract special defense. She argues that her submissions give rise to a genuine issue of material fact as to whether the plaintiff breached its contract with her by failing to offer her a permanent loan modification. She alleges in this special defense that the July 15, 2010 TPP created an offer from the plaintiff that if all trial period payments were timely made, her mortgage would be permanently modified.[17]

"[D]ue to the adversarial nature of our judicial system, [t]he court's function is generally limited to adjudicating the issues *raised by the parties* on the proof they have presented . . . . Connecticut is a fact pleading jurisdiction. . . . Pleadings have an essential purpose in the judicial process. . . . The purpose of pleading is to apprise the court and opposing counsel of the issues to be tried . . . . For that reason, [i]t is imperative that the court and opposing counsel be able to rely on the statement of issues as set forth in the pleadings.

[17] In her special defense of breach of contract, the defendant does not allege, as she does in her counterclaim, that she was promised a permanent loan modification if she made all trial payments on a timely basis *and* continued to meet all program eligibility requirements.

. . . Fairness is a double-edged sword and both sides are entitled to its benefits throughout the trial." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Somers* v. *Chan*, 110 Conn. App. 511, 528–29, 955 A.2d 667 (2008); see also 71 C.J.S. 33, Pleading § 2 (2011) ("purpose of pleadings is to frame, present, define, and narrow the issues and to form the foundation of, and to limit, the proof to be submitted").

"The elements of a breach of contract action are the formation of an agreement, performance by one party, breach of the agreement by the other party and damages." (Internal quotation marks omitted.) *Pelletier* v. *Galske*, 105 Conn. App. 77, 81, 936 A.2d 689 (2007), cert. denied, 285 Conn. 921, 943 A.2d 1100 (2008). The promise of an offer of a loan modification must be pleaded as enforceable by the terms of the agreement. See *Everbank* v. *Engelhard*, Superior Court, judicial district of Waterbury, Docket No. CV-13-6019881, 2016 WL 4507540, *4 (July 28, 2016).

The defendant avers that the plaintiff breached the terms of the TPP letter. The plaintiff argues that it was the defendant's failure to perform a condition precedent—maintaining her financial eligibility for HAMP—that resulted in the rejection of her application for a permanent loan modification. There is no dispute that maintaining eligibility for HAMP was a condition precedent in the TPP letter, and, because the defendant failed to allege her compliance with this condition precedent in her breach of contract special defense, her argument necessarily fails because she failed to allege full performance on her part.[18] Thus, by her own allegations, her conduct never triggered the plaintiff's duty to perform

[18] The fact that the defendant avers in her affidavit that she continued to comply with all guidelines during the trial period does not cure the pleading deficiency in her special defense, as the allegations necessarily frame the party's claim.

its obligations under the contract, rendering this defense as currently pleaded legally insufficient.

E

We next address whether the court erred in concluding that there was no genuine issue of material fact as to the defendant's special defense of breach of the covenant of good faith and fair dealing. We are not persuaded by the defendant's arguments.

The defendant claims that the plaintiff violated its duty of good faith and fair dealing by instructing her to default on her mortgage, on which she then was current, as a precondition to discussing a loan modification; and by failing to advise her of the risks that would result from her failure to make her monthly mortgage payments—the acceleration of the debt, the application of default interest, the assessment of penalties and late fees, and unfavorable reports to credit agencies. She further alleges that the instruction to default delivered to her by the plaintiff was made in bad faith and motivated by financial gain on behalf of the plaintiff, to wit, the promise of financial incentives from the Treasury Department, to modify the loan.[19]

"[I]t is axiomatic that the . . . duty of good faith and fair dealing is a covenant implied into a contract or a contractual relationship. . . . In other words, every contract carries an implied duty requiring that neither party do anything that will injure the right of the other to receive the benefits of the agreement. . . . The covenant of good faith and fair dealing presupposes that the terms and purpose of the contract are agreed upon by the parties and that what is in dispute is a party's discretionary application or interpretation of a contract

[19] Actually, such financial incentives would have been paid to the servicer, not directly to the plaintiff, and only would have been paid if and when the loan was modified.

term. . . . To constitute a breach of [the implied covenant of good faith and fair dealing], the acts by which a defendant allegedly impedes the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract must have been taken in bad faith. . . .

"Bad faith has been defined in our jurisprudence in various ways. Bad faith in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. . . . Bad faith means more than mere negligence; it involves a dishonest purpose." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Landry* v. *Spitz*, 102 Conn. App. 34, 42–43, 925 A.2d 334 (2007). In general, bad faith "implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." (Internal quotation marks omitted.) *TD Bank, N.A.* v. *J & M Holdings, LLC*, supra, 143 Conn. App. 348.

The defendant argues that a genuine issue of material fact exists as to whether the plaintiff violated the covenant of good faith and fair dealing. Specifically, she argues that the plaintiff acted in bad faith when it instructed her to default on her mortgage as a precondition to discussing loan modification.[20]

[20] The defendant also argues that the court erred in determining, on the basis of the language in the note and mortgage, that there was no genuine issue of material fact as to whether the defendant was aware of the consequences of default. She contends that a reasonable fact finder could determine that the defendant was unaware that the plaintiff would treat her loan as delinquent, given that the plaintiff instructed her to default, the program did not exist at the time of the execution of the note and mortgage, the defendant may not have understood the intricacies of her mortgage contract and was relying on the plaintiff's superior knowledge, and the note and

Viewing this special defense in the light most favorable to the defendant, we will presume that she is claiming that the plaintiff breached the implied covenant of good faith and fair dealing in the note and mortgage agreements because there must be an existing contract in order for there to be a breach of the implied covenant, and the defendant does not allege the existence of any other contract in this special defense. "[T]he existence of a contract between the parties is a necessary antecedent to any claim of breach of the duty of good faith and fair dealing. . . . [N]o claim of breach of the duty of good faith and fair dealing will lie for conduct that is outside of a contractual relationship." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Carford* v. *Empire Fire & Marine Ins. Co.*, 94 Conn. App. 41, 45–46, 891 A.2d 55 (2006). Because a special defense admits the facts pleaded in the complaint, and the complaint alleges the existence of note and mortgage agreements, we fairly can make this presumption.[21]

We agree with the plaintiff that there is no evidence that it impeded the defendant's rights under the note or mortgage or that it acted in bad faith. As detailed in part I C of this opinion, there is no evidence that the plaintiff misled the defendant into defaulting; rather, she elected to default. See part I C of this opinion. The note and mortgage, which the defendant signed, made clear the consequences of default. Commencing on November 30, 2009, the first month in which the defendant stopped making her mortgage payments, the plaintiff sent the defendant numerous notices of default,

mortgage do not discuss adverse credit reporting. For the reasons set for previously, we are unpersuaded.

[21] To the extent that the defendant is attempting to claim in her second special defense that the plaintiff violated the covenant of good faith and fair dealing pursuant to a purported agreement to provide her with an offer for a permanent loan modification, she cannot prevail because she fails to allege the formation of such a contract in this special defense.

including several notices that predated her application for a loan modification. These letters advised the defendant of the consequences of her default, as required by the terms of the note and mortgage. The note and mortgage, however, do not require the plaintiff to notify her that her credit rating may be affected were she to be in default. Once the defendant defaulted, the plaintiff discussed mortgage assistance and gave the defendant a TPP, as promised. Although the defendant makes the sweeping generalization that many mortgage servicers are motivated to induce defaults for greater fees, there is no evidence that any employee of Chase, acting on behalf of the plaintiff, was so motivated in this case. Moreover, neither the note nor the mortgage contemplate addressing a situation where the defendant might need relief from the payment provisions, nor does either of these documents promise to offer the defendant a loan modification. Accordingly, a failure to provide the defendant with an offer for a loan modification under the program cannot be a violation of the covenant of good faith and fair dealing under the note or mortgage agreements.

F

The defendant also claims that the court erred in determining that there was no genuine issue of material fact regarding her promissory estoppel special defense.[22] She contends that submissions presented to

[22] We note that promissory estoppel is usually pleaded as a cause of action as an alternative to a breach of contract claim. "Promissory estoppel is asserted when there is an absence of consideration to support a contract. . . . [T]he doctrine of promissory estoppel serves as an alternative basis to enforce a contract in the absence of competing common-law considerations . . . ." (Citation omitted; internal quotation marks omitted.) *Glazer* v. *Dress Barn, Inc.*, 274 Conn. 33, 88–89, 873 A.2d 929 (2005)." Although the promise must be clear and definite, it need not be the equivalent of an offer to enter into a contract because [t]he prerequisite for . . . application [of the doctrine of promissory estoppel] is a *promise* and not a bargain and *not* an offer." (Emphasis in original; internal quotation marks omitted.) *Stewart* v. *Cendant Mobility Services Corp.*, 267 Conn. 96, 105, 837 A.2d 736 (2003).

the court show that the plaintiff promised to offer to permanently modify her loan if she made three trial period payments and met the eligibility requirements of the TPP, but that the plaintiff did not fulfill its promise to modify her mortgage after she made the payments and met the requirements. We are not persuaded because the allegations in this special defense, which state that the defendant was promised a permanent modification of her mortgage so long as she made three consecutive trial payments in a specified amount, are contradicted by the undisputed evidence. In reviewing the language of this particular special defense, it is not asserted that the defendant met all the terms of the purported offer she submitted as evidence.

"[U]nder the doctrine of promissory estoppel [a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. . . . A fundamental element of promissory estoppel, therefore, is the existence of a clear and definite promise which a promisor could reasonably have expected to induce reliance. Thus, a promisor is not liable to a promisee who has relied on a promise if, judged by an objective standard, he had no reason to expect any reliance at all. . . .

"Additionally, the promise must reflect a present intent to commit as distinguished from a mere statement of intent to contract in the future. . . . [A] mere expression of intention, hope, desire, or opinion, which shows no real commitment, cannot be expected to induce reliance . . . and, therefore, is not sufficiently promissory. The requirements of clarity and definiteness are the determinative factors in deciding whether the statements are indeed expressions of commitment as opposed to expressions of intention, hope, desire or opinion. . . . Finally, whether a representation rises

to the level of a promise is generally a question of fact, to be determined in light of the circumstances under which the representation was made." (Citations omitted; internal quotation marks omitted.) *Stewart* v. *Cendant Mobility Services Corp.*, 267 Conn. 96, 104–106, 837 A.2d 736 (2003). "[A] promisor is not liable to a promisee who has relied on a promise if, judged by an objective standard, he had no reason to expect any reliance at all." *D'Ulisse-Cupo* v. *Board of Directors of Notre Dame High School*, 202 Conn. 206, 213, 520 A.2d 217 (1987).

Again, the defendant's claim is limited to the allegations she made in her promissory estoppel defense. See *Somers* v. *Chan*, supra, 110 Conn. App. 528–29. It is undisputed that the defendant made all of the trial period payments on time. According to the July 15, 2010 letter, however, the defendant also was required to continue to meet the eligibility requirements of the program. Both parties submitted a letter dated July 15, 2010, addressed to the defendant from the plaintiff, in which the plaintiff states that the defendant was approved to enter into a trial period plan, and explained that "[a]fter all trial period payments are timely made *and you continue to meet all program eligibility requirements*, your mortgage would then be permanently modified." (Emphasis added.) The plaintiff further explained in the letter that "[o]nce we confirm you are still eligible for a Home Affordable Modification and you make all of your trial period payments on time, we will send you a modification agreement detailing the terms of the modified loan."

The undisputed evidence reveals that the defendant was required to continue to meet the requirements of the program in order to qualify for a permanent modification. The plaintiff contends that she did not satisfy the requirement that her housing ratio be greater than

31 percent.[23] In her claim of promissory estoppel, the defendant does not allege that she fulfilled that condition and, thus, did not satisfy all the conditions precedent in the TPP to receive an offer of a permanent loan modification. Accordingly, the plaintiff did not break any promise to the defendant by declining to modify her loan under the program. As such, the party against whom estoppel is claimed, the plaintiff, indisputably never promised to form a binding modification agreement once the defendant made her three consecutive trial period payments because those payments were not the only contingency.

The court properly concluded that the defendant's promissory estoppel special defense as currently pleaded did not raise a genuine issue of material fact that would preclude the rendering of summary judgment on the plaintiff's complaint.

II

Finally, the defendant claims that the court improperly rendered summary judgment in the plaintiff's favor on her counterclaim sounding in breach of contract. Specifically, she argues that the court improperly concluded that the counterclaim (1) failed to allege the formation of a contract, (2) failed to meet the transaction test set forth in Practice Book § 10-10, and (3) was barred by the statute of frauds. We agree with the defendant.

In her counterclaim, the defendant alleged that the plaintiff breached its contract with her when it failed to offer her a permanent loan modification within a reasonable period of time after she made the trial period payments and continued to meet all HAMP program

[23] The defendant does not dispute that by May, 2011, when she provided the plaintiff with additional requested documentation she no longer qualified under the program.

eligibility requirements.[24] The court concluded: "[T]he undisputed facts show that the plaintiff and [the] defendant did not enter into a new contract or agreement," ruling that "[t]he defendant was obligated to make payments on her mortgage as demonstrated by the note, and therefore, the undisputed facts show that the defendant would be obligated to pay the monthly trial plan amount at a minimum. . . . Therefore, the offer of a trial modification, even with a promise of a future alteration to the original mortgage, did not form a new contract." (Citation omitted.) The court further concluded that the purported contract would be unenforceable due to its noncompliance with the statute of frauds, and that the counterclaim, which alleged the failure to execute a loan modification agreement, did not meet the transaction test set forth in Practice Book § 10-10 because it did not satisfy the same transaction standard.

A

Initially, we discuss whether the court erred in determining that the defendant's counterclaim failed to satisfy the transaction test set forth in Practice Book § 10-10. In its reply to the defendant's objection to the motion for summary judgment, the plaintiff raised the procedural issue that the counterclaim was improper because it did not arise out of the "transaction or one of the transactions which is the subject of the plaintiff's complaint . . . ." Practice Book § 10-10.[25] The defendant claims that the court erred in its application of the transaction test. This is a question of law subject to plenary review. *U.S. Bank National Assn.* v. *Sorrentino*, supra, 158 Conn. App. 94.

[24] We note that the counterclaim, unlike the defendant's breach of contract and promissory estoppel special defenses, sufficiently alleges that she fully performed her part of the bargain pursuant to the alleged contract.

[25] See footnote 21 of this opinion regarding the defendant's claim that the court improperly addressed this issue because it was first raised by the plaintiff in its memorandum of law in reply to the defendant's objection to the motion for summary judgment.

"Although, ordinarily, a challenge to the legal sufficiency of a pleading should be raised by way of a motion to strike; see Practice Book § 10-39 (a); our Supreme Court has held that a motion for summary judgment also may be used to challenge a pleading's legal sufficiency provided that the party seeking summary judgment can establish as a matter of law both that the cause of action alleged is legally insufficient and, more importantly, that any defect in the pleading could not be cured by repleading, which the nonmoving party would have had an opportunity to do if the alleged insufficiency had been raised by way of a motion to strike. See *Larobina* v. *McDonald*, 274 Conn. 394, 401, 876 A.2d 522 (2005) . . . . If both prongs are met, the court may properly grant summary judgment as a matter of law. The court in *Larobina* further explained that we will not reverse the trial court's ruling on a motion for summary judgment that was used to challenge the legal sufficiency of [a pleading] when it is clear that the motion was being used for that purpose and the nonmoving party, by failing to object to the procedure before the trial court, cannot demonstrate prejudice. . . .

"A counterclaim that has been filed in contravention of our rules of practice is legally insufficient. Section 10-10 of the Practice Book provides in relevant part that [i]n any action for legal or equitable relief, any defendant may file counterclaims against any plaintiff . . . provided that each such counterclaim . . . arises out of the transaction or one of the transactions which is the subject of the plaintiff's complaint . . . ." (Citations omitted; footnote omitted; internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Sorrentino*, supra, 158 Conn. App. 94–95.

"[A] proper application of Practice Book § 10-10 in a foreclosure context requires consideration of whether a counterclaim has some reasonable nexus to, rather

than directly attacks, the making, validity or enforcement of the mortgage or note." (Internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Blowers*, supra, 177 Conn. App. 631–32.[26] Essentially, a counterclaim must have a sufficient relationship to the making, validity or enforcement of the subject note or mortgage in order to meet the transaction test as set forth in Practice Book § 10-10 and the policy consideration it reflects, judicial economy. With respect to that policy consideration, which is one of practicality, the interest of efficiency and judicial economy are served by allowing the complaint and counterclaim to be adjudicated in the same action when the competing claims are closely related. See, e.g., *Jackson* v. *Conland*, 171 Conn. 161, 166, 368 A.2d 3 (1976).

The court, relying on *Sorrentino*, found that the defendant's counterclaim failed to satisfy the transaction test because it did not bear some reasonable nexus to the making, validity or enforcement of the note. We conclude, however, that the subject counterclaim in the present case sufficiently meets the transaction test of Practice Book § 10-10 because it is intertwined sufficiently with the subject of the foreclosure complaint. The defendant's counterclaim alleges the formation and breach of a contractual agreement, prior to the commencement of this action, intended to lead to an offer from the plaintiff for a permanent modification of the defendant's note and mortgage, which, if accepted, would avoid a foreclosure. In her prayer for relief, the defendant is seeking specific performance of that

[26] In *Blowers*, this court determined that counterclaims arising from factual allegations pertaining to the mortgagee's "conduct during postdefault mediation and loan modification negotiations" did not relate to the making, validity or enforcement of the note, and, thus, failed the transaction test. *U.S. Bank National Assn.* v. *Blowers*, supra, 177 Conn. App. 632. The present case is factually distinguishable because the defendant claims that the plaintiff was required to offer her a modification under the terms of their TPP agreement. Cf. id., 630.

agreement, or other equitable relief, which is directly and inseparably connected to the relief sought in the plaintiff's complaint because, were the defendant to prevail, the result may be a modification of her obligations under the note and mortgage sought to be enforced in the foreclosure action. "[B]ecause a mortgage foreclosure action is an equitable proceeding, the trial court may consider all relevant circumstances to ensure that complete justice is done." (Internal quotation marks omitted.) *TD Bank, N.A.* v. *M.J. Holdings, LLC*, supra, 143 Conn. App. 326. The connection between the note, the mortgage and the TPP involves the same lender, the same borrower and the same property. Moreover, this interrelationship involves the same constellation of facts underlying the defendant's surviving special defense, and all of these same facts will be part of this case with or without the counterclaim.[27]

Accordingly, the court erred in concluding that the defendant's counterclaim did not satisfy the transaction test.

B

Having concluded that the defendant's counterclaim satisfied the transaction test, we turn to whether the counterclaim was legally sufficient. We address whether there is a genuine issue of material fact as to whether the parties formed a contract. An essential issue for this analysis on which the parties differ is whether, under the HAMP guidelines, the plaintiff was permitted to continue to require additional documentation to verify the defendant's eligibility for a loan modification months after the conclusion of the TPP, or whether the defendant, who made all her trial period payments and remained eligible during the TPP, should

[27] We also note that we have concluded in part I of this opinion that the defendant's special defense of unclean hands meets the making, validity or enforcement test.

have been tendered a permanent modification offer after she successfully completed the trial period. The defendant makes it clear that she is not claiming that the TPP was itself a contract for a permanent loan modification. Rather, a contract governed the terms of the TPP that, if fully performed, required the plaintiff to tender her offer to permanently modify her loan.

The defendant claims that on July 15, 2010, the plaintiff made a definite offer to enter into a contractual relationship that, when accepted by the defendant, created a contract binding on both parties.[28] See *Auto Glass Express, Inc.* v. *Hanover Ins. Co.*, 293 Conn. 218, 227, 975 A.2d 1266 (2009); see also 1 Restatement (Second), Contracts § 24 (1981) (offer defined as "manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it"). The defendant argues that her acceptance of the contract was evidenced through her performance of the two conditions precedent in the offer: timely payment of all amounts due during the trial period, a fact which is not disputed, and her continued eligibility, a primary source

[28] "Whether the TPP is an enforceable contract for a loan modification has been the subject of extensive litigation [in federal circuit courts] . . . with courts reaching mixed results. The [United States Court of Appeals for the] Second Circuit has not weighed in on the issue, but the First, Ninth, and Seventh Circuits have held that the TPP is an enforceable contract. See *Corvello* [v. *Wells Fargo Bank, N.A.*, 728 F.3d 878, 885 (9th Cir. 2013)]; *Young* v. *Wells Fargo Bank, N.A.*, 717 F.3d 224, 235 (1st Cir. 2013); *Wigod* [v. *Wells Fargo Bank, N.A.*, 673 F.3d 547, 566 (7th Cir. 2012)]. Those courts reasoned that the most natural and fair interpretation of the TPP is that the servicer must send a signed Modification Agreement offering to modify the loan once borrowers meet their end of the bargain. . . . [T]here could be no actual mortgage modification until all the requirements were met, but the servicer could not unilaterally and without justification refuse to send the offer." (Internal quotation marks omitted.) *Henderson* v. *Wells Fargo Bank, NA*, United States District Court, Civ. No. 3:13-cv-378 (JBA), 2016 WL 324939, *4 n.5 (D. Conn. January 27, 2016); see also *Markey* v. *Ditech Financial LLC*, United States District Court, Docket No. 3:15-cv-1711 (MPS), 2016 WL 5339572, *3 (D. Conn. September 22, 2016).

of contention in this case. She maintains that these conditions precedent were solely in her control and did not hinge on the "whims of the plaintiff." She notes that the plaintiff concedes that the terms of the TPP were supplemented by the HAMP guidelines issued by the Treasury Department and that the HAMP guidelines in effect at the time she received the offer from the plaintiff, effective June 1, 2010, namely, HAMP Supplemental Directive 10-01, dated January 28, 2010, required "full verification of borrower eligibility prior to offering a trial period plan." She claims that the record supports her assertion that she submitted extensive income documentation to the plaintiff at its request prior to receiving the TPP offer, and that the plaintiff's underwriting department reviewed her income documentation, verified she was eligible for HAMP and then determined her modified loan terms on July 8, 2010, prior to offering her the July 15, 2010 TPP. She further claims that she submitted more information to the plaintiff at its request during the trial period to verify her continuing eligibility. She maintains that her compliance with these two conditions precedent constituted acceptance of the plaintiff's definite offer, and consideration to induce and bargain for the plaintiff's promise to tender her an offer of a permanent HAMP loan modification, as the acts she promised to perform under the TPP encompassed acts that were not preexisting legal duties. See *Turbeville* v. *JPMorgan Chase Bank*, United States District Court, Docket No. SA CV 10-01464 DOC (JCG), 2011 WL 7163111, *4 (C.D. Cal. April 4, 2011) (plaintiff's submission of TPP financial documents not previously required constituted consideration).

The defendant notes, with regard to further consideration, that any permanent loan modification would have required her to pay interest on a higher principal balance and that the modified loan would have matured

with a two month balloon payment that did not previously exist. While she participated in the TPP, her original obligations on the note and mortgage remained unchanged and in effect, and continued to accrue. By delaying in making her full monthly payments, the defendant committed herself to paying a greater amount in the long run because during the months she made reduced payments, interest accrued on a larger sum of principal than it otherwise would have. Thus, it is unfair to categorize the defendant's promise to pay reduced monthly payments solely as a preexisting duty, as she actually suffered some detriment by agreeing to pay less than the full amount she owed. See *Henderson* v. *Wells Fargo Bank, NA*, United States District Court, Civ. No. 3:13-cv-378 (JBA), 2016 WL 324939, *6 (D. Conn. January 27, 2016) (although plaintiff did have preexisting duty to pay reduced monthly payments, she actually suffered some detriment by agreeing to pay less than full amount owed, committing herself to pay greater amount in long run).

The plaintiff concedes that the defendant made all of her trial period payments on time, but argues that she failed to comply with the second condition precedent in its offer, which is that she continue to meet all HAMP program eligibility requirements, because eventually the plaintiff confirmed, on the basis of updated documents that the defendant sent at its request in May, 2011, six months after the TPP ended, that she no longer qualified. The plaintiff asks this court to reject the defendant's argument that the HAMP guidelines forbid a loan servicer from requesting additional documents to confirm a borrower's continuing eligibility under the program, as HAMP Supplemental Directive 10-01 specifically states that "[b]orrowers who make all trial period payments timely and who satisfy all other trial period requirements will be offered a permanent HAMP modification." Moreover, HAMP guidelines state that when

"evaluating a borrower's eligibility for HAMP, servicers should use good business judgment consistent with the judgment employed when modifying mortgage loans held in their own portfolio."

Our review of the HAMP guidelines leads us to conclude that there is a genuine issue of material fact as to whether the plaintiff was permitted to continue to review the defendant's financial eligibility for the HAMP program after the end of her trial period. The plaintiff's own contention, which is that HAMP Supplemental Directive 10-01 specifically states that "[b]orrowers who make all trial period payments timely and who satisfy all other *trial period* requirements will be offered a permanent HAMP modification"; (emphasis added); may be interpreted as indicating that all other requirements have to be met only during the trial period, suggesting an intention not to leave the borrower without notice of a final determination for months afterward, as took place in this case. Although the HAMP handbook may contemplate a prolonged TPP, lasting more than three months, there is no definite indication in the record before us that the plaintiff and the defendant ever agreed to a prolonged TPP.

The plaintiff also claims that the trial court correctly held that the defendant provided no consideration to the plaintiff because she paid less than she already was obligated to pay under the terms of the existing note and mortgage. "Consideration consists of a benefit to the party promising, or a loss or detriment to the party to whom the promise is made. . . . Although an exchange of promises usually will satisfy the consideration requirement . . . a promise to do that which one is already bound by his contract to do is not sufficient consideration to support an additional promise by the other party to the contract." (Citations omitted; internal quotation marks omitted.) *Christian* v. *Gouldin*, 72 Conn. App. 14, 23, 804 A.2d 865 (2001). "A modification

of an agreement must be supported by valid consideration and requires a party to do, or promise to do, something further than, or different from, that which he is already bound to do." (Internal quotation marks omitted.) *Thomas* v. *Oxford Performance Materials, Inc.*, 153 Conn. App. 50, 56, 100 A.3d 917 (2014).

In this case, the TPP imposed new obligations on the defendant. The July 15, 2010 letter from the plaintiff that offered the defendant a TPP informed her that in addition to making monthly trial period payments in place of her normal monthly mortgage payments, she had to continue to meet all program eligibility requirements. Attached to this letter was a list of frequently asked questions, which informed the defendant that her credit score may be affected, she may be required to attend credit counseling, that she would be required to have an escrow account for payment of property taxes, insurance premiums and other required charges, and that she was required to provide income and expenses documentation. By not making her full monthly mortgage payments, the plaintiff committed herself to paying a greater amount in the long run, as during the months she made reduced payments, interest accrued on a larger sum of principal than it otherwise would have. In addition, the defendant's account was assessed a charge of $2838.92 when her loan modification was "approved." It is unquestionable that the defendant suffered some detriment additional to any preexisting duties she owed to the plaintiff.

The documents submitted by the defendant and her arguments lead us to conclude that there is a genuine issue of material fact as to whether a contract was formed when she accepted the TPP and complied with its conditions, including remaining financially eligible for the HAMP program throughout the trial time period. There also is a genuine issue of fact as to whether the plaintiff failed to meet its obligations under the TPP,

particularly as to the timing of when it made its relevant determinations. Thus, on the existing record, there is a genuine issue as to whether a contract was formed and whether there was a breach by the plaintiff. We therefore conclude that the trial court should not have rendered summary judgment on the counterclaim due to the nonexistence of a contract.

C

We next address whether the contract that the defendant claims was created would be unenforceable under our statute of frauds, § 52-550 (a).[29] The court, after noting that the defendant in her affidavit is alleging an oral agreement, relied on relevant language from *Deutsche Bank Trust Co. Americas* v. *DeGennaro*, 149 Conn. App. 784, 788, 89 A.3d 969 (2014), which held that an oral agreement would be ineffective because "[a] modification of a written agreement [for a loan exceeding $50,000] must be in writing to satisfy the statute of frauds." (Internal quotation marks omitted.)

As the defendant argues, the TPP was not a modification of the note and mortgage, but rather, it was a promise by the plaintiff to tender an offer of a permanent loan modification if the defendant successfully completed the requirements during the three month trial period. Because the TPP was not an agreement for the sale of real property or any interest in or concerning real property, and, arguably was supposed to be performed within one year, and because it was not an agreement for a loan in an amount that exceeded $50,000, it was not a purported contract that falls within the statute of frauds. The TPP is unlike the oral modification agreement that the court in *DeGennaro* found

[29] General Statutes § 52-550 provides in relevant part: "(a) No civil action may be maintained in the following cases unless the agreement, or a memorandum of the agreement, is made in writing and signed by the party, or the agent of the party, to be charged . . . (6) upon any agreement for a loan in an amount which exceeds fifty thousand dollars . . . ."

was barred by the statute of frauds, as it is not a modification agreement.

Even if the statute of frauds were applicable to the agreement at issue here, the TPP was in writing, on the letterhead of the plaintiff's mortgage servicer, Chase, included a salutation, stating, "Sincerely, Chase Home Finance, LLC," contained the electronic signature of a Chase representative, and satisfied the evidentiary function of the statute of frauds by providing proof of the contract itself. The defendant further claims that she performed her part of the contract after being induced to do so by the plaintiff. She relies on *Red Buff Rita, Inc.* v. *Moutinho*, 151 Conn. App. 549, 96 A.3d 581 (2014), wherein this court held that "[t]he doctrine of part performance . . . is an exception to the statute of frauds. . . . This doctrine originated to prevent the statute of frauds from becoming an engine of fraud." (Citation omitted; internal quotation marks omitted.) Id., 554–55. In explaining this exception, this court cited *Glazer* v. *Dress Barn, Inc.*, 274 Conn. 33, 873 A.2d 929 (2005), when stating in *Red Buff Rita, Inc.* v. *Moutinho*, supra, 549, that "our Supreme Court clarified and explained the circumstances in which a contract may be enforced despite its noncompliance with the statute of frauds. It also concluded that part performance and equitable estoppel are not separate and independent exceptions to the statute of frauds, but rather, that part performance is an essential element of the estoppel exception to the statute of frauds. . . . [T]he elements required for part performance are: (1) statements, acts or omissions that lead a party to act to his detriment in reliance on the contract; (2) knowledge or assent to the party's actions in reliance on the contract; and (3) acts that unmistakably point to the contract. . . . Under this test, two separate but related criteria are met that warrant precluding a party from asserting the statute of frauds. . . . First, part performance satisfied

the evidentiary function of the statute of frauds by providing proof of the contract itself. . . . Second, the inducement of reliance on the oral agreement implicates the equitable principle underlying estoppel because repudiation of the contract by the other party would amount to the perpetration of a fraud." (Citations omitted; internal quotation marks omitted.) Id., 555.

There remain genuine issues of material fact as to (1) whether the statute of frauds would be applicable to the nature of the contract the defendant has alleged, and (2) whether, even if the statute applies, the defendant could prove that the facts in this case entitle her to the application of an exception to it.[30] We therefore conclude that the court erred in rendering summary judgment in favor of the plaintiff on the defendant's counterclaim on the ground that it was legally unenforceable under § 52-550.

The judgment is reversed and the case is remanded for further proceedings according to law.

In this opinion BRIGHT, J., concurred.

ALVORD, J., concurring in part and dissenting in part. I join part II of the majority opinion. With respect to part I, I agree with the majority that the trial court improperly rendered summary judgment against the defendant Karin C. Eichten as to liability on the foreclosure complaint. I write separately, however, because I disagree with the majority's analysis and conclusions regarding the defendant's fifth and sixth special

[30] See *Everbank* v. *Engelhard*, Superior Court, judicial district of Waterbury, Docket No. CV-13-6019881, 2016 WL 4507450, *2 (July 28, 2016) (late payments accepted by lender under TPP constituted part performance, preventing application of statute of frauds); *Corvello* v. *Wells Fargo Bank, N.A.*, 728 F.3d 878, 885 (9th Cir. 2013) (finding part performance exception to statute of frauds under California law applicable to HAMP TPP because borrowers fully performed under TPP).

defenses, asserting unclean hands and breach of contract, respectively.[1] I would conclude that the defendant has demonstrated a genuine issue of material fact with respect to her breach of contract special defense, but has failed to demonstrate a genuine issue of material fact with respect to her unclean hands special defense.

I

With respect to the defendant's special defense of unclean hands, I disagree with the majority that the trial "court erred in concluding that there was no genuine issue of material fact as to whether the defendant can prevail on her special defense of unclean hands." The principle on which the case is decided is important, and will operate widely, so I feel that it is my duty to show the grounds upon which I differ. I would conclude that the defendant failed to meet her evidentiary burden to demonstrate a genuine issue of material fact that the doctrine of unclean hands should be invoked.

I first note that "[a]pplication of the doctrine of unclean hands rests within the sound discretion of the trial court. . . . The exercise of [such] equitable authority . . . is subject only to limited review on appeal. . . . The only issue on appeal is whether the trial court has acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of [the trial court's] action. . . . Whether the trial court properly interpreted the doctrine of unclean hands, however, is a legal

[1] Because we determine that the trial court improperly rendered summary judgment, I would decline to address the defendant's claims regarding her remaining special defenses. See *Wykeham Rise, LLC* v. *Federer*, 305 Conn. 448, 479 n.30, 52 A.3d 702 (2012) (reversing summary judgment and declining to reach defendants' claim that trial court improperly rejected their special defenses of waiver and unclean hands, noting that summary judgment decision, having been reversed, "presents no jurisdictional bar to the defendants' assertion of these special defenses on remand").

question distinct from the trial court's discretionary decision whether to apply it." (Internal quotation marks omitted.) *Ulster Savings Bank* v. *28 Brynwood Lane, Ltd.*, 134 Conn. App. 699, 711, 41 A.3d 1077 (2012); see also *American Heritage Agency, Inc.* v. *Gelinas*, 62 Conn. App. 711, 722, 774 A.2d 220 ("[t]he trial court enjoys broad discretion in determining whether the promotion of public policy and the preservation of the courts' integrity dictate that the clean hands doctrine be invoked" [internal quotation marks omitted]), cert. denied, 257 Conn. 903, 777 A.2d 192 (2001).

As the majority sets forth, it is the party seeking to invoke the doctrine of unclean hands who has the burden of demonstrating that "his opponent engaged in wilful misconduct with regard to the matter in litigation." (Internal quotation marks omitted.) *American Heritage Agency, Inc.* v. *Gelinas*, supra, 62 Conn. App. 722. The majority further acknowledges that "[w]ilful misconduct has been defined as intentional conduct designed to injure for which there is no just cause or excuse. . . . [Its] characteristic element is the design to injure either actually entertained or to be implied from the conduct and circumstances. . . . Not only the action producing the injury but the resulting injury also must be intentional." (Internal quotation marks omitted.) *19 Perry Street, LLC* v. *Unionville Water Co.*, 294 Conn. 611, 630–31 n.10, 987 A.3d 1009 (2010). Our appellate courts previously have recognized that "as a general matter, summary judgment is considered inappropriate when an individual's intent and state of mind are implicated. . . . At the same time, even with respect to questions of . . . intent . . . the party opposing summary judgment must present a factual predicate for his argument in order to raise a genuine issue of fact. . . . When a party opposing a motion for summary judgment has failed to provide an evidentiary foundation to demonstrate the existence of a genuine

issue of material fact concerning intent, summary judgment is appropriate." (Citations omitted; internal quotation marks omitted.) *Tuccio Development, Inc.* v. *Neumann*, 114 Conn. App. 123, 130, 968 A.2d 956 (2009); see also *Wadia Enterprises, Inc.* v. *Hirschfeld*, 224 Conn. 240, 250, 618 A.2d 506 (1992). "The summary judgment rule would be rendered sterile . . . if the mere incantation of intent or state of mind would operate as a talisman to defeat an otherwise valid motion." (Internal quotation marks omitted.) *Voris* v. *Middlesex Mutual Assurance Co.*, 297 Conn. 589, 603, 999 A.2d 741 (2010).

Applying these legal principles, I would conclude that the defendant has failed to provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact that the plaintiff, U.S. Bank National Association, as trustee, "engaged in willful misconduct with regard to the matter in litigation"; *American Heritage Agency, Inc.* v. *Gelinas*, supra, 62 Conn. App. 722; such that "the promotion of public policy and the preservation of the courts' integrity dictate that the clean hands doctrine be invoked." (Internal quotation marks omitted.) *Monetary Funding Group, Inc.* v. *Pluchino*, 87 Conn. App. 401, 407, 867 A.2d 841 (2005). In support of its conclusion that the defendant raised a genuine issue of material fact as to whether the plaintiff engaged in wilful misconduct, the majority relies on (1) the "plaintiff's failure to establish that it adhered to the [United States] Treasury Department's directives, which appear to encourage that final determinations on whether to offer the borrower a loan modification be made before the end of the [trial period plan (TPP)]" and (2) an unexplained notation in the plaintiff's records that would appear to show that the defendant's loan modification was internally approved. The evidence submitted, however, is devoid of any basis from which a fact finder could infer that the plaintiff engaged in

intentional conduct designed to injure the defendant. I do not believe that the identification of an inconsistent notation of the status of the defendant's application is sufficient to demonstrate a genuine issue of material fact as to wilful misconduct, particularly where wilful misconduct requires that the action producing the injury and the resulting injury be intentional. I would therefore conclude that the trial court properly rejected the defendant's unclean hands special defense.

II

I further disagree with the majority that the defendant's breach of contract special defense is legally insufficient. The majority rests this conclusion on its determination that the defendant failed to allege that she maintained her financial eligibility for a loan modification under the federal Home Affordable Modification Program (HAMP). Thus, according to the majority, the defendant failed to allege full performance, rendering the special defense legally insufficient. I begin by noting that I do not believe this court should analyze the sufficiency of the defendant's pleading for the first time on appeal because the parties have not briefed the sufficiency of the pleadings, but instead argue only as to whether a genuine issue of material fact exists. I would decide the defendant's appellate claim as briefed by the parties and would conclude that the defendant has raised a genuine issue of material fact as to her breach of contract special defense.

A review of the record reveals that the plaintiff was fully apprised of the issues implicated by the defendant's breach of contract special defense, including the defendant's continued eligibility for HAMP. "The fundamental purpose of a special defense, like other pleadings, is to apprise the court and opposing counsel of the issues to be tried, so that basic issues are not concealed . . . ." (Internal quotation marks omitted.)

Noonan v. *Noonan*, 122 Conn. App. 184, 190, 998 A.2d 231, cert. denied, 298 Conn. 928, 5 A.3d 490 (2010). Indeed, in its memorandum of law in support of its motion for summary judgment, the plaintiff argued, on the basis of the documentary evidence before the court, that the defendant "did not qualify for the permanent HAMP modification offered in the trial plan."[2] The trial court concluded that the undisputed facts showed that the defendant was obligated to pay the monthly TPP amount at a minimum and, consequently, there was no new consideration to support the modification of an agreement. We expressly reject that finding in part II of the majority opinion. In its appellate brief, the plaintiff argues, as it did before the trial court, that the defendant's failure to maintain her eligibility for HAMP "resulted in the nonissuance of a permanent modification." The plaintiff's arguments before this court and the trial court demonstrate that it was apprised that the defendant's continued eligibility for HAMP was an issue raised by the defendant's breach of contract special defense.

Moreover, the plaintiff, briefing the breach of contract special defense together with the breach of contract counterclaim, does not argue that the special defense is legally insufficient in contrast to the counterclaim. The majority sua sponte conducts an independent review of the sufficiency of the allegations contained in her special defense and finds such allegations legally insufficient due to a failure to allege "full

[2] In its memorandum of law in reply to the defendant's opposition to the summary judgment motion, the plaintiff argued, in a combined section addressing the defendant's breach of contract special defense and breach of contract counterclaim, that the defendant's breach of contract claims failed on two grounds. First, the plaintiff argued that "[b]ecause the alleged final loan modification documents were never offered or delivered to [the] defendant or mutually assented to, they cannot form the basis of a binding, enforceable contract." Second, the plaintiff argued that the defendant provided no consideration to the plaintiff in exchange for the alleged modification agreement.

performance . . . .'' I would address, instead, the issue as briefed, i.e., whether the defendant has carried her burden of demonstrating a genuine issue of material fact as to whether she continued to meet HAMP eligibility requirements. I would reach the conclusion that we ultimately reach in part II of the majority opinion, which is that she has demonstrated such a genuine issue of material fact.

For these reasons, I respectfully concur in part and dissent in part.

SHARA ROCCO ET AL. *v.* ABDULHAMID D. SHAIKH ET AL.
(AC 39774)

Keller, Elgo and Bright, Js.

Syllabus

The plaintiff homeowners, S and P, brought an action, seeking, inter alia, to quiet title to certain real property owned by S pursuant to statute (§ 47-31) and to discharge an allegedly invalid lien pursuant to statute (§§ 49-13 and 49-92e). The plaintiffs and the defendants had executed a contract for the sale of the property, but disagreements arose and the defendants refused to complete the purchase. The plaintiffs then executed a contract with a different buyer for the purchase and sale of the property. Before the plaintiffs could close on that sale, the defendants filed in the land records a copy of their sales contract with the plaintiffs, which the new buyers claimed constituted a cloud on the title of the property and precluded them from purchasing the property. After the defendants were defaulted for failing to comply with an order of the court to file an answer, a hearing in damages was held. Thereafter, the trial court rendered judgment in favor of the plaintiffs, from which the defendants appealed to this court. The trial court then granted the plaintiffs' motion to lift the appellate stay in part so that the plaintiffs could market and sell the property free and clear of the defendants' claims or encumbrances. Subsequently, the court denied the defendants' motion to open and vacate the judgment, in which they had claimed that the plaintiffs lacked standing to bring the statutory causes of action because S had transferred her interest in the property to herself as the trustee of a trust before the trial court rendered judgment. On appeal to this court, the defendants claimed, inter alia, that the plaintiffs' lack

of standing deprived the trial court of subject matter jurisdiction over the plaintiffs' statutory causes of action. *Held*:

1. The defendants' claim that the plaintiffs lacked standing to maintain their statutory causes of action sounding in quiet title and discharge of a lien was moot, as there was no practical relief that this court could afford the defendants; the parties conceded that the property has been sold and title has vested in a third party, there was no indication that the court awarded attorney's fees under either of those counts of the complaint, the defendants conceded that they have no legal or equitable right or interest in the property, and the defendants did not explain how the transfer of the property affected the plaintiffs' standing to pursue their other causes of action for slander to title, tortious interference and breach of contract, all of which had accrued prior to the plaintiffs' transfer of title.

2. This court declined to exercise its supervisory authority over the administration of justice to reverse the trial court's judgment, which the defendants claimed was procured by fraud; the traditional protections available to the defendants through constitutional, statutory and procedural limitations were not inadequate so as to warrant the exercise of this court's supervisory powers.

Argued March 19—officially released September 18, 2018

Procedural History

Action, inter alia, to quiet title to certain real property, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the action was withdrawn in part; thereafter, the court, *Young*, *J.*, issued an order requiring the defendants to file an answer; subsequently, the court defaulted the defendants; thereafter, the court, *Abrams*, *J.*, denied the defendants' motion to set aside the default; subsequently, the defendants filed a counterclaim; thereafter, the court, *Wiese*, *J.*, granted the plaintiffs' motion to strike the counterclaim; subsequently, following a hearing in damages, the court, *Hon. William M. Shaughnessy*, *Jr.*, judge trial referee, rendered judgment for the plaintiffs; thereafter, the court, *Hon. William M. Shaughnessy*, *Jr.*, judge trial referee, issued an amended judgment, from which the defendants appealed to this court; subsequently, the court, *Hon. William M. Shaughnessy*, *Jr.*, judge trial referee,

granted the plaintiffs' motion to partially terminate the appellate stay, issued a clarification of the judgment, and denied the defendants' motion to open and vacate the judgment. *Affirmed*.

Jon L. Schoenhorn, with whom, on the brief, were *Kathryn A. Mallach* and *Magdalena Narozniak*, law student intern, for the appellants (defendants).

Garrett S. Flynn, for the appellees (plaintiffs).

Opinion

KELLER, J. The defendants, Abdulhamid D. Shaikh and Rukaiyabanu A. Shaikh, appeal from the judgment of the trial court rendered in favor of the plaintiffs, Shara Rocco and Patrick Rocco. On appeal, the defendants claim that (1) the plaintiffs lacked standing to maintain their causes of action because Shara Rocco transferred her interest in the subject property to a trust before the court rendered judgment; (2) the court lacked subject matter jurisdiction over count two of the plaintiffs' complaint because the statutory grounds on which the plaintiffs relied did not apply to the type of lien at issue in the present case;[1] and (3) we should exercise our supervisory authority over the administration of justice to reverse the judgment because it was procured by fraud, both by the plaintiffs and by the defendants' former attorney. We affirm the judgment of the trial court.

The following procedural history is relevant to the present appeal. In November, 2015, the plaintiffs commenced the underlying action against the defendants. In their six count complaint, dated October 29, 2015, the plaintiffs alleged that, prior to the dissolution of

[1] Because we conclude that the defendants' claim that the plaintiffs lacked standing to maintain their causes of action under counts one and two of the complaint is moot, we need not reach the merits of the second claim on appeal, which also addresses count two of the complaint.

their marriage, they resided at 124 Steeple View Drive in the Kensington section of Berlin (property), and that Shara Rocco was the record owner of the property. The plaintiffs further alleged: "As part of the divorce process, the [plaintiffs] agreed to sell the [property] and divide the net proceeds of the sale. The [plaintiffs] agreed that until the [property] was sold, [Patrick Rocco] would be responsible for certain expenses associated with the [property], including real estate taxes, utilities, maintenance fees and insurance. . . .

"The [plaintiffs] were motivated to sell the [property], not only to obtain the sale proceeds, but also to stop having to incur further carrying costs. The [plaintiffs] were eager to show the [property] in the spring and summer, which is customarily regarded as the best time to sell [property] in Connecticut. . . . [They] listed for sale the property through a real estate agent. Numerous potential buyers expressed interest in purchasing the property. . . .

"On or about April 6, [2015], the [plaintiffs'] real estate agent showed the property to the [defendants]. On the same day, the [defendants] made an offer to purchase the property at a price lower than the asking price. The [defendants] expressly said that their offer was to purchase the [property] 'as is,' which is understood in the real estate business to mean that the sellers would not offer reductions in the selling price based on conditions with the house or property. . . .

"In the weeks following April 6, [2015], the [plaintiffs] and the [defendants] negotiated the price for the property. During those discussions the [defendants] repeated their offer to purchase the [property] 'as is.' . . .

"On or about April 15, 2015, the [plaintiffs] and the [defendants] agreed upon a purchase price of $577,500. . . . The [plaintiffs] agreed to accept the [defendants']

offer not only because of the price, but also because the [defendants'] offer lacked many contingencies often found in real estate contracts. . . . As memorialized in the contract for the purchase and sale of the property . . . the [defendants] agreed to purchase the [property] for cash . . . the [defendants] did not condition their purchase . . . on the sale of their existing house . . . and, as discussed repeatedly during the discussions leading up to the execution of the . . . contract, the [defendants] agreed to purchase the [property] 'as is.' "

The plaintiffs further alleged that the parties' contract, executed on April 15, 2015, conspicuously included language that the property was being sold "as is" and that the contract permitted the defendants to terminate the contract in the event that an inspection revealed any serious issues with the property. That provision of the contract, however, provided that the defendants' right to terminate expired if it was not exercised within twenty-four days of the signing of the parties' contract.

Additionally, the plaintiffs asserted: "On or before May 5, 2015, the [defendants] forwarded to the [plaintiffs'] real estate agent a copy of a home inspection report. The [defendants] asked for a price reduction based on issues purportedly found by the inspector and set forth in the report. . . . The real estate agent reminded the [defendants] that they agreed to purchase the [property] on an 'as is' basis and that there would be no reduction in the price based on issues set forth in the report. The [defendants] responded and said that they understood. . . .

"On May 11, 2015, after a week of the [defendants'] repeated requests for credits (which the real estate agent rejected), the [defendants] agreed that their deposits [with the real estate agent totaling $10,000] became firm (i.e., nonrefundable) because the May 9

termination deadline had passed. The [defendants] said that they were moving forward with the purchase."

Prior to the closing on June 2, 2015, "historically significant rainstorms" moved through the area where the property was located, thereby resulting in the accumulation of water on the property. "Members of the [defendants'] family visited the property for a walk-through on the morning of June 2. Just hours after the walk-through, the defendants told the real estate agent that they would not close on the property on that day and that the [defendants] would not purchase the property unless the plaintiffs reduced the purchase price of the [property] based on purported 'drainage issues.' Later in the day, the [defendants] demanded that the price of the [property] be reduced by $17,500 on account of the purported drainage issues. . . .

"The [defendants] persisted in this demand even though they were reminded that the property was being sold 'as is' and that even if drainage issues were relevant to the sale price (which they were not), no water entered the house and the wet area drained within twenty-four hours of the historically significant rainstorm . . . ."

Relying on the "as is" provision of the contract, the plaintiffs declined to deviate from the contract's terms, and the defendants have refused to purchase the property "as is" for the agreed upon purchase price memorialized in the contract. The plaintiffs also contended that, until the defendants repudiated the contract, they were ready, willing, and able to convey the property to the defendants for the agreed upon price of $577,500, less deposits already received.

In addition to suffering damages in the form of lost proceeds from the sale of the property for the purchase price set forth in the contract, the plaintiffs alleged that they continued to bear the expenses associated with

owning the property, including expenses related to taxes, utilities, insurance, maintenance, attorney's fees, and mortgage charges. The plaintiffs attempted to mitigate their damages by relisting the property for sale. In this regard, they alleged: "New buyers . . . offered to purchase the property, and on August 25, 2015, the [plaintiffs] and the new buyers executed a contract for sale for the property . . . . [The contract with the new buyers] obligated the [plaintiffs] to convey title in fee simple to the new buyers, free of any liens. . . . Before the [plaintiffs could close on the sale of the property to the new buyers, the [defendants] caused a copy of [the contract entered into by the plaintiffs and the defendants] to be recorded in the Berlin land records . . . . When the new buyers' counsel performed a title search on the property . . . counsel discovered the [defendants'] filing. On or about September 29, 2015, the new buyers' counsel told the [plaintiffs'] agent that the [defendants'] filing constituted a cloud on the title of the property that precluded the new buyers from purchasing the property. Among other things, the new buyers' title insurance company refused to insure the property because of the [defendants'] land records filing. . . .

"The [plaintiffs], through counsel, made diligent, good faith efforts to attempt to have the [defendants] remove the [defendants'] land records filing from the Berlin land records. These included repeated communications to the [defendants'] counsel and offering additional inducements that the [plaintiffs] were not obligated to make. On or about September 11, 2015, the [plaintiffs'] counsel notified the [defendants] in writing that the [defendants'] land records filing constituted an improper cloud on the title to the property and sent to the [defendants'] counsel a document for the [defendants'] execution that would release the [defendants'] land record filing from the Berlin land records."

The plaintiffs further alleged that the defendants consistently have refused to remove the filing from the land records and have indicated that they intend to encumber the plaintiffs' property. As a result of the filing, the plaintiffs asserted that they have suffered damages, "including the lost opportunity to sell the property to the new buyers," as well as the varied expenses related to their continued ownership of the property.

Relying on the foregoing factual allegations, the plaintiffs set forth six causes of action. In count one, the plaintiffs sought to quiet title under General Statutes § 47-31. They alleged that Shara Rocco acquired fee simple title to the subject property on November 14, 2013, and that she held title to the property. In relevant part, the plaintiffs asserted: "Shara Rocco seeks a declaration that her ownership interest in the property is unaffected by the [defendants'] land records filing and that the [defendants'] land records filing fails to establish any estate, interest, or encumbrance on the property."

In count two, the plaintiffs sought to discharge an invalid lien under General Statutes §§ 49-13 and 49-92e. They alleged that the defendants' land records filing "is an improper and invalid encumbrance on the property," and that the defendants wrongfully have refused to release the filing. The plaintiffs sought "a judicial declaration that the [defendants'] land records [filing] is invalid, plus an award of costs, attorney's fees, statutory and actual damages, and other damages as to which the [plaintiffs] are entitled."

In count three, sounding in "slander to title," the plaintiffs alleged in relevant part that the defendants' land records filing "is a false statement" that is meant to convey that the defendants have a legal or equitable interest in the property and that it has prevented the

plaintiffs from selling the property. The plaintiffs alleged in relevant part that the defendants are acting in a "wilful, wanton, and malicious" manner by not removing the land records filing, and that they are doing so in an effort to coerce the plaintiffs to submit to "unjustified demands for inspection related adjustments" to which they are not entitled under the contract. The plaintiffs alleged that the defendants' conduct toward them was not the result of an innocent mistake.

In count four, which sounds in tortious interference, the plaintiffs incorporated the previous allegations and further alleged in relevant part that after the plaintiffs and the new buyer entered into a valid contract on August 25, 2015, the defendants, on that same date, made the filing on the land records "for the malicious purpose of causing [Shara Rocco's] contract with the new buyers to terminate, which it in fact did as a direct and proximate result of the [defendants'] wrongful conduct." Moreover, the plaintiffs alleged that "[t]he [defendants] know that Shara Rocco wants to sell the property . . . but cannot do so because of the [defendants'] land record[s] filing." They allege that these facts establish that the defendants tortiously interfered with their actual and prospective contractual rights.

In count five, the plaintiffs alleged that the defendants' actions were in violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. The plaintiffs, however, subsequently withdrew this count of their complaint.

In count six, which sounds in breach of contract, the plaintiffs alleged in relevant part that the defendants repudiated the parties' contract, the plaintiffs appropriately treated the repudiation as a default, and the plaintiffs are entitled under the contract to retain deposits made by the defendants as liquidated damages to compensate them for the defendants' conduct in breaching the contract.

In their prayer for relief, the plaintiffs requested compensatory damages, consequential damages, common-law punitive damages, common-law attorney's fees, prejudgment and postjudgment interest, and any further relief that the court deemed just and proper. They also sought statutory damages under § 42-110a et seq., but they later withdrew that request.

On November 13, 2015, pursuant to Practice Book § 17-20, the plaintiffs filed a motion requesting that the defendants be defaulted for failing to appear. On November 20, 2015, the motion for default was granted. Represented by counsel, the defendants did not file an appearance until January 11, 2016. At that time, they also filed a motion to dismiss the action. On March 24, 2016, the court denied the defendants' motion to dismiss.

On April 26, 2016, pursuant to Practice Book § 17-32, the plaintiffs filed a motion for default for failure to plead. Thereafter, on May 3, 2016, the defendants filed a motion for an extension of time in which to plead. The court motion for default was denied, and the court ordered that any answer or responsive pleading be filed on or before May 12, 2016, and that the trial would be held on June 1, 2016. On June 2, 2016, the court ordered that the defendants had to file an answer prior to noon on June 6, 2016, and that the trial in the matter was rescheduled to June 30, 2016. Thereafter, over the plaintiffs' objection, the court granted the defendants additional time in which to file their answer. Upon motion of the defendants, the court granted the defendants a "final extension" of time in which to plead, until 4 p.m., on June 24, 2016. On June 24, 2016, the defendants filed a request to revise totaling eighty-five pages. The court rejected the filing under Practice Book § 10-7 and ordered the defendants to file an answer by 5 p.m., on June 28, 2016.

The defendants did not file a responsive pleading. On June 29, 2016, the plaintiffs filed a motion requesting that the defendants be defaulted for their failure to plead and that the trial, scheduled for June 30, 2016, be converted into a hearing in damages. The court held a hearing on the plaintiffs' motion, following which it entered a default against the defendants for failing to comply with its order. The court scheduled a hearing in damages for July 6, 2016. On June 30, 2016, the plaintiffs filed a certificate of closed pleadings. On July 5, 2016, the defendants moved to set aside the default. The court denied the motion and sustained the plaintiffs' objection.

The hearing in damages took place on July 20, 2016. On that day, the defendants filed a three count counterclaim against the plaintiffs, sounding in breach of contract, misrepresentation, and specific performance. On July 28, 2016, the plaintiffs moved to strike all counts of the counterclaim. On September 13, 2016, the court granted the motion to strike.

On September 28, 2016, the court rendered judgment in favor of the plaintiffs. The court subsequently amended and clarified its judgment to reflect that, as against both defendants, the court awarded monetary damages in favor of the plaintiffs in the amount of $30,996.22, plus attorney's fees in the amount of $60,862. It also awarded postjudgment interest at 5 percent. The court found that Shara Rocco was the record owner of the property at issue as of July 20, 2016, and that neither defendant had any right, title, or interest in the property or any portion thereof. Further, in addition to its $91,858.22 award of monetary damages in favor of the plaintiffs, the court ruled that the defendants' $10,000 deposit, which had been given to the real estate agency that represented the parties in connection with the sale of the property, was to be delivered to the plaintiffs. The defendants filed the present appeal on November 1, 2016.

On November 30, 2016, the plaintiffs filed a motion for a partial termination of the appellate stay, which, on December 7, 2016, the trial court granted in order to permit the plaintiffs to market and sell the subject property free and clear of any claims or encumbrances by the defendants. The defendants sought review of that order, which this court granted, but we denied the relief requested.[2]

On December 28, 2016, the defendants filed a motion to open and vacate the judgment of the trial court.[3] In the motion, which was opposed by the plaintiffs, the defendants raised claims of lack of standing and fraud. Specifically, the defendants alleged that Shara Rocco falsely had represented to the court that, during the pendency of the litigation, she was the record owner of the subject property despite the fact that, on March 14, 2016, she transferred all of her interest in the property to a trust. The defendants contended that Shara Rocco committed fraud by her false representations and that the plaintiffs lacked standing once Shara Rocco transferred her interest in the subject property to herself as trustee of the trust. The plaintiffs opposed the motion and submitted an affidavit from Shara Rocco in which she averred in relevant part that she had executed the transfer purely on the basis of advice from an estate planning attorney and that she was unaware that this transfer constituted "a sale" of the property to anyone other than herself. She further averred that she had since conveyed the property back to herself.

[2] There is no dispute that the property, thereafter, was sold to a third party.

[3] Alternatively, the defendants asked the court to consider the motion as a writ of audita querela because the defense arose postjudgment and, therefore, could only be raised postjudgment. "A writ of audita querela affords a remedy to a defendant against whom judgment has already been rendered." *TD Banknorth, N.A.* v. *White Water Mountain Resorts of Connecticut, Inc.*, 133 Conn. App. 536, 547 n.10, 37 A.3d 766 (2012). The court considered and denied the defendants' motion to open and vacate judgment on its merits and, therefore, did not explicitly address this request.

On March 8, 2017, following a hearing and argument on the motion, the court denied the defendants' motion in a one sentence memorandum of decision.[4] Additional facts will be set forth as necessary.

I

SUBJECT MATTER JURISDICTION

First, we address the defendants' claim that the trial court lacked subject matter jurisdiction over one or more of the plaintiffs' causes of action due to the plaintiffs' alleged lack of standing. In their first claim on appeal, the defendants argue that because Shara Rocco transferred her interest in the subject property before the court rendered judgment, the plaintiffs had no standing to maintain their causes of action.

The defendants argue in relevant part: "Prior to the entry of default against the defendants, trial in damages, and for many months after entry of judgment, until its discovery by defense counsel, the plaintiffs withheld the fact that [the] plaintiff Shara Rocco executed a quitclaim deed in March, 2016, transferring all interest in the [subject] property to a living trust. The plaintiffs did not record the deed in the Berlin land records until after the July 20, 2016 trial, and just before judgment entered in September, 2016. Shara Rocco falsely stated under oath at the trial and in an affidavit that she personally was the 'sole owner' of the property when, in fact, she was not.

"The defendants submit that because neither plaintiff possessed title to the property at the time of the trial or entry of judgment, they lacked standing to adjudicate most of their claims, thereby depriving the court of

[4] The defendants did not ask the court for a detailed decision setting forth its analysis regarding the court's denial of the motion to open. See Practice Book § 64-1. They also did not amend their appeal to include the trial court's denial of their motion to open.

jurisdiction to adjudicate them in their favor." (Emphasis omitted.) We conclude that this claim is moot, and, therefore, we do not have subject matter jurisdiction to adjudicate it; there is no practical relief we can afford to the defendants in relation to counts one and two of the plaintiffs' complaint because the property has been sold to a third party.

The following additional facts are relevant to the present claim. The plaintiffs presented evidence, in the form of a deed signed by Patrick Rocco, that Shara Rocco acquired title to the subject property after Patrick Rocco transferred his interest in the property to her by means of a quitclaim deed on November 7, 2013. Moreover, just prior to the trial on July 20, 2016, the plaintiffs submitted "affidavits of damages" to the court, including an affidavit in which Shara Rocco averred that she was the sole owner of the subject property and had "not deeded the property to anyone else." During the hearing in damages, Shara Rocco testified that she currently owned the subject property and that she wanted the court to quiet title in her favor.

As the defendants correctly observe, after the court rendered judgment in the plaintiffs' favor, the plaintiffs asked the court to clarify that Shara Rocco was the "sole record owner" of the subject property. The court amended its judgment to reflect that Shara Rocco was "the record owner" of the subject property and that neither defendant had any right, title, or interest in the subject property.[5]

After the defendants filed the present appeal, the plaintiffs filed a motion to terminate the appellate stay in part, which the trial court granted by partially lifting the stay to permit the plaintiffs to market and sell the subject property free and clear of any claims from the

[5] The defendants concede that they "possess no current legal or equitable interest or right to the property . . . ."

defendants. The parties agree that the plaintiffs, thereafter, sold the property to a third party and that the defendants have neither a legal nor equitable interest or right in the property.

In their December 28, 2016 motion to open and vacate the judgment, filed after the defendants brought the present appeal, the defendants relied on the fact that, on March 14, 2016, prior to the hearing, Shara Rocco transferred her interest in the subject property, did not apprise the court or the defendants of this fact, and did not record the transfer on the land records until September 22, 2016. Attached to the defendants' motion was a March 14, 2016 quitclaim deed executed by "Shara C. Rocco also known as Sharon C. Rocco" in favor of "Sharon C. Rocco, Trustee of the Sharon C. Rocco Living Trust Agreement . . . ." The defendants argued that because Shara Rocco no longer had a personal interest in the property after March 14, 2016, and because neither the Shara C. Rocco trust nor its trustee have ever been parties to the present case, the plaintiffs' controversy had become moot due to the plaintiffs' lack of standing, and, thus, the court lacked subject matter jurisdiction.

In opposing the defendants' motion, the plaintiffs argued in relevant part that the defendants engaged in misconduct that caused the plaintiffs to incur substantial damages, not only in terms of their lost opportunity to sell the subject property, but in the carrying costs they continued to incur until and through the hearing in damages. The plaintiffs argued: "When the plaintiffs filed suit in this action (in November, 2015), it is undisputed that Shara Rocco had both legal and record title to the [subject] property. It is also undisputed that well before this action was filed, the plaintiffs had agreed in their divorce court filing to sell the property and to absorb the carrying costs associated with the property until it could be sold. Thus, both plaintiffs had a direct pecuniary interest in seeing the false lien removed so the property could be sold.

"It is also undisputed that as of the date of the hearing in damages (July 20, 2016), [Shara] Rocco was the record title owner of the property. At the hearing, [Shara] Rocco authenticated and introduced the deed from the Berlin land records, which showed how she acquired title to the property."

The plaintiffs argued that they demonstrated their entitlement to the monetary damages, as well as the liquidated damages to which they were entitled under the purchase and sale agreement, specifically, the $10,000 deposited with the real estate agency. The plaintiffs argued that the court properly determined that the defendants had no interest in the property or any portion thereof. They further argued in relevant part: "The defendants' motion is based on a single document—a deed in which [Shara] Rocco conveyed the property to herself as trustee for a revocable trust (for which she was both trustee and beneficiary) for no consideration. The [defendants'] motion confirms that the deed was not recorded until September, 2016—long after the hearing in damages. At the time she testified, [Shara] Rocco did not have the deed in mind. . . . What [Shara] Rocco did recall was that the malicious lien filed by the defendants was preventing her from selling the property as required by the filed settlement agreement in her divorce case."[6] (Citation omitted.)

Additionally, the plaintiffs argued: "Here, it is undisputed that at the time of the bringing [of the] action and through the hearing in damages, plaintiff Shara

[6] Attached to their opposition to the defendants' motion, the plaintiffs presented an affidavit of Shara Rocco in which she averred in relevant part that she transferred her interest in the property to the trust as part of her estate planning, that she did not understand this action to constitute "a sale" of the property or a conveyance to anyone other than herself, and that she did not receive any consideration for this conveyance. Moreover, she averred that during the foregoing proceedings in this matter, she was motivated to sell the property and believed that she owned the property. She also averred that the property subsequently was transferred back to her.

Rocco was the legal and record owner of the property. It is also undisputed that at all material times both plaintiffs were contractually and judicially obligated to sell the property and were incurring carrying costs until they could do so. Both plaintiffs had a direct pecuniary interest in seeing that the lien was removed so that the property could be sold and carrying costs could stop running. Ownership of property at the time of the initiation of the action, plus a contractual obligation to clear title, is sufficient to establish standing to maintain a quiet title action, even if the plaintiff [Shara Rocco] conveys the property during the pendency of the action."[7] The plaintiffs argued that they, therefore, had a direct pecuniary interest in bringing the action and in maintaining the action, which interest continued until and through the date of judgment. The plaintiffs argued that Shara Rocco's unrecorded deed was not relevant to the issues before the court.

Further, the plaintiffs also argued that the defendants failed to demonstrate how the unrecorded deed executed by Shara Rocco in any way deprived the plaintiffs of standing to pursue claims related to breach of contract, tortious interference, and slander to title, which claims were based on the defendants' repudiation of the contract that formed the basis of their invalid lien and which clearly accrued prior to the execution of the deed to the trust. The plaintiffs argued that the defendants had failed to bring to the court's attention any facts that would have changed its ruling on the central decision in the case related to the defendants' interest in the property. Following the hearing on the motion, the court, on March 8, 2017, issued a one sentence memorandum of decision stating that the motion to open and vacate the judgment was denied.

[7] On appeal, the plaintiffs argue that this sufficiently establishes that they were classically aggrieved, despite the fact that Shara Rocco temporarily had transferred the property to the trust.

Initially, we observe that the defendants' claim regarding the plaintiffs' lack of standing is unclear with respect to a key issue. Specifically, in their principal appellate brief, the defendants argue that the plaintiffs "lacked standing to adjudicate *most of their claims* . . . ." (Emphasis added.) They then go on to further limit the scope of their claim to the plaintiffs' causes of action "to quiet title and remove liens" on the subject property, as set forth in counts one and two of the plaintiffs' complaint. They also argue that "[a]t the date of the transfer, the trust became the owner of the property, and only the trust, acting through a trustee, had the right to assert its interest in clear title." In their reply brief, however, the defendants argue that it is "abundantly clear that the plaintiffs maintained no personal financial interest in the property, and therefore no standing to pursue *any* of their claims, both at the time default entered and at the hearing in damages." (Emphasis in original.) The defendants do not explain, however, how the transfer of the subject property in March, 2016, would affect the plaintiffs' standing to pursue the causes of action for slander of title, tortious interference, and breach of contract, all of which had accrued prior to the transfer of title. Rather, they present argument only with respect to the counts to quiet title and to discharge the defendants' lien.

In their appellate brief, the plaintiffs respond that the defendants' claim that they lack standing involves only counts one and two of their complaint, and that the defendants' claim is moot because there is no practical relief that can be afforded to them because the property now has been sold and title vested in a third party. During oral argument before this court, the defendants' attorney was asked whether the lack of standing claim also involved other counts of the complaint, and counsel stated that the claim did not implicate other counts. Shortly thereafter, the panel asked counsel why this

issue was not moot, and counsel responded that attorney's fees may have been awarded under these counts. Pressed further, the panel then commented that it appeared that the plaintiffs sought attorney's fees only under the contract and common law, rather than under statutory law. The defendants' counsel responded: "That is correct, Your Honor."

Although we are mindful that the plaintiffs requested "costs, attorney's fees, statutory and actual damages" in the second count of their complaint, a request for statutory damages is not included in the prayer for relief except a request pursuant to § 42-110a, which later was withdrawn.

The plaintiffs also submitted their own affidavits, and the affidavits of their attorneys, in support of their claims for damages and attorney's fees. Additionally, the plaintiffs submitted a proposed judgment in which they requested that the court render judgment in their favor against the defendants with the following damages (plus interest):

"Monetary Damages other than Attorney's Fees:	$30,996.22
"Attorney's Fees (authorized by contract, and as common-law punitive damages, and in the case of Attorneys [Robert A.] Feiner and [Dara P.] Goings, on the foregoing bases and as damages proximately caused by the recording of the purported lien):	$60,862
"Costs of Suit:	$1782.24"

The plaintiffs did not allege a right to attorney's fees under any statute or under counts one and two of their complaint. The defendants did not file a motion or a memorandum in opposition.

The court, thereafter, awarded the plaintiffs $30,996.22 in damages and $60,862 in attorney's fees, with no award of costs, with postjudgment interest at a rate of 5 percent.

Having thoroughly examined the record, and having taken into consideration counsels' appellate briefs and arguments, we conclude that the defendants' claim that the plaintiffs lacked standing to maintain their statutory causes of action under counts one and two of their complaint, sounding in quiet title and discharge of a lien, are moot; there is no practical relief we could afford the defendants because title to the subject property already has vested in a third party. Further, there is no indication in the record that the court awarded attorney's fees under either the first or second count of the plaintiffs' complaint.

"Mootness is a threshold issue that implicates subject matter jurisdiction, which imposes a duty on the court to dismiss a case if the court can no longer grant practical relief to the parties. . . . Mootness presents a circumstance wherein the issue before the court has been resolved or had lost its significance because of a change in the condition of affairs between the parties. . . . [T]he existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way." (Internal quotation marks omitted.) *Pryor* v. *Pryor*, 162 Conn. App. 451, 455, 133 A.3d 463 (2016); see also *Morgan* v. *Morgan*, 139 Conn. App. 808, 811–12, 57 A.3d 790 (2012) (plaintiff's sale of real property to nonparty during pendency of appeal rendered moot her challenge to order requiring sale of property because sale could not be undone). Here, the parties concede that the property has been sold to a third party, and the defendants concede that they have no legal or equitable right or interest in the property. This court, therefore, lacks jurisdiction to entertain the

defendants' claims concerning the causes of action to quiet title and to discharge the lien. There is no practical relief we could afford the defendants, as a third party now has legal title to the property.

II

FRAUD

The defendants next claim that this court should exercise its supervisory authority over the administration of justice and reverse the trial court's judgment because the judgment was procured by fraud, both by the plaintiffs and by the defendants' former attorney. The defendants argue that the trial court failed to address their fraud allegations, and, therefore, we should address these allegations under our supervisory authority. They argue that because the "fraud impacts at least count one (action to quiet title), count two (action to discharge invalid liens), and count three (slander to title), remand is necessary to determine whether and to what extent the misconduct tainted the entire judgment, requiring reversal."[8] They also argue that the fraud committed by their former attorney resulted in the default that was rendered against them in this case.[9]

The plaintiffs respond that we have no record to ascertain whether the trial court fully considered and then rejected the defendants' allegations of fraud by the plaintiffs and on what ground the court may have rejected the allegations that fraud affected the judgment. They contend that the defendants specifically raised a claim of fraud against the plaintiffs in their motion to open the judgment, and the court denied

[8] We already have concluded that any claim regarding counts one and two is moot for the reasons set forth in part I of this opinion.

[9] The allegation that the fraudulent acts committed by the defendants' former attorney was the cause the default judgment against them and a judgment in favor of the plaintiffs was not raised by the defendants in their motion to open the judgment.

that motion, in a one sentence written opinion, *after a hearing*. They argue that, at most, we should review the court's denial of the defendants' motion to open the judgment, using the abuse of discretion standard, but maintain, nonetheless, that the defendants have failed to provide an adequate record for review of the denial of the motion to open.[10] We decline the defendants' invitation to exercise our supervisory powers in this instance.

"It is well settled that [a]ppellate courts possess an inherent supervisory authority over the administration of justice. . . . Generally, cases in which we have invoked our supervisory authority for rule making have fallen into two categories. . . . In the first category are cases wherein we have utilized our supervisory power to articulate a procedural rule as a matter of policy, either as [a] holding or dictum, but without reversing [the underlying judgment] or portions thereof. . . . In the second category are cases wherein we have utilized our supervisory powers to articulate a rule or otherwise take measures necessary to remedy a perceived injustice with respect to a preserved or unpreserved claim on appeal. . . . In other words, in the first category of cases we employ only the rule-making power of our supervisory authority; in the second category we employ our rule-making power and our power to reverse a judgment. . . .

"[T]he salient distinction between these two categories of cases is that in one category we afford a remedy and in the other we do not. . . . In the second category of cases, where we exercise both powers under our supervisory authority, the party must establish that the

[10] We do not review the merits of the court's denial of the defendants' motion to open the judgment on the basis of fraud because the plaintiffs did not appeal from that judgment, which was rendered *after* the filing of the present appeal. See footnote 4 of this opinion.

invocation of our supervisory authority is truly necessary because [o]ur supervisory powers are not a last bastion of hope for every untenable appeal. . . . In almost all cases, [c]onstitutional, statutory and procedural limitations are generally adequate to protect the rights of the [appellant] and the integrity of the judicial system. . . . [O]nly in the rare circumstance [in which] these traditional protections are inadequate to ensure the fair and just administration of the courts will we exercise our supervisory authority to reverse a judgment. . . . In such a circumstance, the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of [the] utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *In re Daniel N.*, 323 Conn. 640, 645–48, 150 A.3d 657 (2016).

In this case, we are unable to conclude that traditional protections available to the defendants were not and are not adequate, thereby warranting the rare and extreme exercise of our supervisory powers.

The judgment is affirmed.

In this opinion the other judges concurred.

RICHELLE KAYE *v.* DOUGLAS HOUSMAN
(AC 40187)

Lavine, Keller and Bishop, Js.

Syllabus

The plaintiff landlord sought to recover damages from the defendant tenant for, inter alia, breach of contract in connection with the defendant's failure to pay rent. Thereafter, the defendant filed an answer, twelve special defenses and right of recoupment, and the plaintiff filed a request to revise eight of the defendant's special defenses and right of recoupment. Subsequently, the plaintiff filed a motion for default for failure

to plead, claiming that thirty days had passed since she filed the request to revise and that the defendant had not responded. The trial court granted the plaintiff's motion for default and the plaintiff filed a certificate of closed pleadings and claimed the matter for a hearing in damages. Thereafter, the defendant filed a motion to strike the matter from the hearing in damages that was denied by the court, which held a hearing in damages and rendered judgment for the plaintiff. On appeal to this court, the defendant claimed that the trial court improperly denied his motion to strike the case from the hearing in damages because he timely filed an answer and four special defenses. Specifically, he claimed that the trial court, by denying his motion to strike, deprived him of the opportunity to contest liability that timely was put in issue by virtue of his answer and special defenses, which thereby denied him the right to due process. *Held* that the trial court was without authority to grant the motion for default against the defendant and, thus, should have granted his motion to strike the matter from the hearing in damages list: the defendant filed an answer and four special defenses, which the plaintiff did not ask him to revise, before the court granted the plaintiff's motion for default, and the plaintiff's claim that, under the applicable rule of practice (§ 10-6 [5]), the special defenses were part of the answer and, therefore, that the defendant was in default on the entire complaint for failing to revise eight of his special defenses and recoupment was unavailing, as § 10-6 (5) does not define a special defense as part of an answer and merely provides that when a defendant responds to a complaint, the answer and special defenses are to be filed at the same time in the order of pleadings, other rules of practice make clear that an answer and a special defense have legally distinct functions, and, in the order of pleadings, a plaintiff is required to file a reply to any special defense and no rule of practice requires a plaintiff to file any response to a defendant's answer; moreover, pursuant to the relevant statute (§ 52-119) and rule of practice (§ 10-18), which govern the penalty for failing to plead, a party failing to plead according to the rules may be nonsuited or defaulted, there is support for the proposition that a trial court commits plain error if, prior to rendering a judgment upon default, the court fails to accept for filing a defaulted party's pleading solely on the ground that the pleading was untimely, and our Supreme Court has expressed a policy to bring about a trial on the merits of a dispute whenever possible to secure a litigant's day in court.

Argued April 16—officially released September 18, 2018

Procedural History

Action to recover unpaid rent, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the matter was transferred to the

Housing Session at Bridgeport; thereafter, the defendant was defaulted for failure to plead; subsequently, the trial court, *Rodriguez, J.*, denied the defendant's motion to strike the matter from the hearing in damages list; thereafter, the court, after a hearing in damages, rendered judgment in favor of the plaintiff, from which the defendant appealed to this court. *Reversed; further proceedings.*

Sabato P. Fiano, with whom, on the brief, was *Carolyn A. Trotta*, for the appellant (defendant).

Anthony Musto, for the appellee (plaintiff).

Opinion

LAVINE, J. In this housing court matter, the defendant, Douglas Housman, appeals from the judgment of the trial court rendered in favor of the plaintiff, Richelle Kaye, following a hearing in damages. On appeal, the defendant claims that the trial court (1) improperly held a hearing in damages in view of his operative answer and four special defenses and (2) denied him the right to due process because the court did not adjudicate fully his timely filed answer and four special defenses.[1] We reverse the judgment of the trial court.

The record reveals the following procedural history. In April, 2016, the plaintiff served the defendant with a four count complaint alleging breach of contract, anticipatory breach of contract, quantum meruit, and unjust enrichment. The plaintiff alleged in part that she is the owner of property at 100 Stone Ridge Way in Fairfield and that she had leased the premises to the defendant pursuant to a written agreement from August 1, 2012 through July 31, 2016. She also alleged that the defendant was to pay her rent of $3400 per month, but

[1] Because we conclude that it was improper for the trial court to deny the defendant's motion to strike the case from the hearing in damages list, we do not reach his due process claim.

he failed to pay rent for the months of August, 2015 through April, 2016. The plaintiff evicted the defendant from the premises. The plaintiff further alleged that she incurred expenses related to the eviction and will continue to incur expenses as a result of the defendant's default.

The complaint was returnable to court on May 24, 2016. Counsel for the defendant filed an appearance on the return day. On June 24, 2016, the plaintiff filed a motion for default for failure to plead. On July 5, 2016, the court, *Bellis*, *J.*, transferred the case from the Fairfield civil docket to the Bridgeport housing docket. On July 22, 2015, the plaintiff filed a second motion for default for failure to plead claiming that more than thirty days had passed since the complaint was filed and the defendant had not filed a responsive pleading. On August 18, 2016, the defendant filed an answer, *twelve* special defenses and right of recoupment. On August 22, 2016, the plaintiff filed a request to revise asking the defendant to revise *eight* of his special defenses and right of recoupment. On September 22, 2016, the plaintiff filed a motion for default claiming that thirty days had passed since she filed a request to revise and that the defendant had not responded.[2] On October 3, 2014, the court, *Rodriguez*, *J.*, granted the motion for default for failure to plead. On October 25, 2016, the plaintiff filed a certificate of closed pleadings and claimed the matter for a hearing in damages.

On November 17, 2016, the defendant filed a motion to set aside the default.[3] On that same day, the defendant

[2] The defendant did not object to the plaintiff's requests to revise or otherwise timely respond to the plaintiff's request to revise.

[3] In the motion to set aside the default, counsel for the defendant represented that he had made diligent efforts to communicate with the defendant in order to obtain information needed to respond to the plaintiff's request to revise. He argued that the case was in its "infancy," discovery had not yet been conducted, and that the plaintiff would not be prejudiced by setting aside the default.

also filed a request to amend his special defenses, and revised and amended special defenses and recoupment. On November 23, 2016, the plaintiff filed objections to the defendant's request to amend and his motion to open the default. She also filed a motion for a continuance to enable the court to rule on the defendant's pending motion to open the default. Judge Rodriguez granted the plaintiff's request for a continuance on November 28, 2016. On December 29, 2016, the court denied the defendant's motion to open the default and sustained the plaintiff's objection.

On January 4, 2017, the plaintiff filed a motion for continuance because her counsel was unavailable until February 10, 2017. The court granted the motion for continuance. On January 31, 2017, the defendant filed a motion to strike the matter from the hearing in damages list. In the motion to strike, the defendant represented that he had filed an answer, twelve special defenses, and right of recoupment on August 18, 2016, and that the plaintiff had filed requests to revise eight of his special defenses and right of recoupment. The defendant specifically pointed out that the plaintiff had not filed a request to revise the answer or his first, second, tenth or twelfth special defenses. He argued that the default affected only the eight special defenses and right of recoupment which he did not revise. In support of his motion to strike, the defendant cited *Connecticut Light & Power Co.* v. *St. John*, 80 Conn. App. 767, 837 A.2d 841 (2004), noting that the entry of a default was improper with respect to the complaint because "[t]he court had *no authority* to default the defendants for failure to plead on a complaint that they had properly answered." (Emphasis added.) Id., 775.

The plaintiff filed an objection to the motion to strike on February 2, 2017, and attempted to distinguish *Connecticut Light & Power Co.* procedurally because the

request to revise in that case was directed to a counterclaim, not special defenses, which are part of an answer. The plaintiff, however, stated that if the court agreed with the defendant's argument pursuant to *Connecticut Light & Power Co.*, it should nonetheless find the defendant in default on those portions of his answer that he did not revise.

The parties appeared in court on February 15, 2017. The court heard argument on the defendant's motion to strike the case from the hearing in damages list. The court denied the motion to strike, held a hearing in damages, and rendered judgment in favor of the plaintiff in the amount of $43,696.30.

The defendant appealed and filed a motion for articulation. See Practice Book § 66-5. The defendant asked the court to articulate the reason it denied his motion to strike the case from the hearing in damages list. The trial court denied the motion for articulation, and the defendant filed a motion for review in this court. See Practice Book § 66-7. This court granted the motion for review, but denied the relief requested.

On appeal, the defendant claims that the court improperly denied his motion to strike the case from the hearing in damages list because he timely filed an answer and his first, second, tenth, and twelfth special defenses.[4] The defendant claims that the court, by denying his motion to strike, deprived him of the opportunity

[4] The defendant's relevant special defenses alleged:

"First special defense: plaintiff's action is barred, in whole or in part, in that the plaintiff, as landlord, failed to deliver to the defendant tenant a habitable and safe premises in accordance with the lease and Connecticut law;

"Second special defense: plaintiff's action is barred, in whole or in part, in that the plaintiff unlawfully interfered with the defendant's tenancy by unlawfully entering the premises without permission or notice in violation of [General Statutes §§] 47a-16 and 47a-18a. . . .

"Tenth special defense: The plaintiff's action is barred, in whole or in part, by virtue of payment. . . .

"Twelfth special defense: plaintiff['s] action is barred, in whole or in part, by virtue of plaintiff['s] failure to mitigate [her] damages."

to contest liability that timely was put in issue by virtue of his answer and special defenses. The defendant also argues that Practice Book § 10-37 (a) contains no provision for granting a default or nonsuit for failure to comply with a request to revise.[5]

The plaintiff counters the defendant's claim on the basis of Practice Book § 10-6 (5), arguing that special defenses are part of an answer and therefore the defendant was in default on the entire complaint for failing to revise eight of his special defenses and recoupment. She also argues that the defendant's motion to strike merely was a second bite at the apple after the court denied the defendant's motion to set aside the default. In his reply brief, the defendant disagrees that he was seeking a second bite at the apple. He states that the relief he was seeking from his motion to set aside the default was resurrection of eight of his special defenses. The relief he sought in his motion to strike the case from the hearing in damages list was a trial on the merits of the case in view of his answer and four special defenses that the plaintiff did not request that he revise.

Our statutes and rules of practice provide penalties for failing to comply with the timely pleading requirements of Practice Book § 10-8. "General Statutes § 52-119 provides that [p]arties failing to plead according to the rules and orders of the court *may* be . . . defaulted . . . . Section 10-18 of our rules of practice essentially mirrors that language. We read the plain and unambiguous language of both § 52-119 and Practice Book § 10-18 as empowering the court with the discretionary authority to impose a default as a penalty whenever a defendant has failed to comply with our rules regarding

[5] Practice Book § 10-37 (a) provides in relevant part: "Any such request . . . shall be filed with the clerk of the court . . . and such request shall be deemed to have been automatically granted by the judicial authority on the date of filing . . . unless within thirty days of such filing the party to whom it is directed shall file objection thereto."

pleadings, including the timely advancement of such pleadings. Such authority is in accord with the court's broad, general authority to act to maintain the orderly procedure of the court docket, and to prevent any interference with the fair administration of justice." (Emphasis added; internal quotation marks omitted.) *People's United Bank* v. *Bok*, 143 Conn. App. 263, 268, 70 A.3d 1074 (2013).

"A default is an interlocutory ruling that establishes that a plaintiff is entitled to judgment, but requires further proceedings to determine the amount of money due to the plaintiff if the action is one for monetary damages." *CAS Construction Co.* v. *Dainty Rubbish Service, Inc.*, 60 Conn. App. 294, 299, 759 A.2d 555 (2000), cert. denied, 255 Conn. 928, 767 A.2d 101 (2001). "[A] default admits the material facts that constitute a cause of action . . . and entry of a default, *when appropriately made*, conclusively determines the liability of a defendant." (Emphasis in original; internal quotation marks omitted.) *Connecticut Light & Power Co.* v. *St. John*, supra, 80 Conn. App. 775.

The parties' positions with respect to what constitutes an answer require us to construe the relevant rules of practice. "We interpret provisions of the Practice Book according to the same well settled principles of construction that we apply to the General Statutes. . . . In determining the meaning of a statute, [it] must be considered as a whole, with a view toward reconciling its separate parts in order to render a reasonable overall interpretation." (Citations omitted; internal quotation marks omitted.) *Wilson* v. *Troxler*, 91 Conn. App. 864, 871, 883 A.2d 18, cert. denied, 276 Conn. 928, 929, 889 A.2d 819, 820 (2005). "Statutory construction . . . presents a question of law over which our review is plenary." (Internal quotation marks omitted.) *Byars* v. *FedEx Ground Package System, Inc.*, 101 Conn. App. 44, 48, 920 A.2d 352 (2007).

The rules of practice regarding pleading are found in Chapter 10 of the Practice Book. Practice Book § 10-8, titled "Time to Plead," provides in relevant part: "Commencing on the return day of the writ, summons and complaint in civil actions, pleadings . . . shall advance within thirty days from the return day, and any subsequent pleadings . . . shall advance at least one step within each successive period of thirty days from the preceding pleading . . . ." The steps referred to in § 10-8 are set forth in Practice Book § 10-6, titled "Pleadings Allowed and Their Order," which provides in relevant part: "The order of pleading shall be as follows:

"(1) The plaintiff's complaint.

"(2) The defendant's motion to dismiss the complaint.

"(3) The defendant's request to revise the complaint.

"(4) The defendant's motion to strike the complaint.

"(5) The defendant's answer (including any special defenses) to the complaint.

"(6) The plaintiff's request to revise the defendant's answer.

"(7) The plaintiff's motion to strike the defendant's answer.

"(8) The plaintiff's reply to any special defenses."

The plaintiff relies on the language of Practice Book § 10-6 (5) to support her contention that special defenses are defined as part of an answer. We do not construe § 10-6 (5) as defining a special defense as part of an answer. Section 10-6 (5) does no more than state that when a defendant responds to a complaint, the answer and special defenses are to be filed at the same time in the order of pleadings.[6] An answer and a special

[6] A defendant, however, may file a request to amend and add special defenses pursuant Practice Book § 10-60.

defense have legally distinct functions as other rules of practice make clear.

Practice Book § 10-46 titled "The Answer; General and Special Denial," prescribes the manner in which a defendant shall answer the allegations of a complaint and provides in relevant part: "The defendant in an answer shall specially deny such allegations of the complaint as the defendant intends to controvert, admitting the truth of the other allegations . . . ."

Practice Book § 10-50 defines the purpose of a special defense. That section, titled, "Denials; Special Defenses," provides in relevant part: "No facts may be proved under either a general or special denial except such as show that the plaintiff's statement of facts are untrue. Facts which are consistent with such statements but show, notwithstanding, that the plaintiff has no cause of action, must be specially alleged." Practice Book § 10-50. "Where several matters of defense are pleaded, each must refer to the cause of action which it is intended to answer, and be separately stated and designated as a separate defense . . . . Where the complaint or counterclaim is for more than one cause of action, set forth in several counts, each separate matter of defense should be preceded by a designation of the cause of action which it is designed to meet . . . ." Practice Book § 10-51. Section 10-50 highlights the interrelationship between a cause of action and a special defense. In that regard, it is important to point out that a plaintiff bears the burden of proof on his or her complaint; see *Rivera* v. *Meriden*, 72 Conn. App. 766, 772, 806 A.2d 585 (2002); and the defendant bears the burden of proof on his or her special defense(s). See *Lumbermens Mutual Casualty Co.* v. *Scully*, 3 Conn. App. 240, 245 n.5, 486 A.2d 1141 (1985).

The final step in the order of pleadings requires a plaintiff to file a reply to any special defense. See Practice Book § 10-6 (8). No rule of practice requires the plaintiff to file any response to the defendant's answer.

Our courts repeatedly have pointed out the purpose of a special defense. "The purpose of a special defense is to plead facts that are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action." (Internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Blowers*, 177 Conn. App. 622, 631, 172 A.3d 837 (2017), cert. granted on other grounds, 328 Conn. 904, 177 A.3d 1160 (2018); accord *Danbury* v. *Dana Investment Corp.*, 249 Conn. 1, 17, 730 A.2d 1128 (1999) (purpose of special defense); *Grant* v. *Bassman*, 221 Conn. 465, 472–73, 604 A.2d 814 (1992) (same); see also *Coughlin* v. *Anderson*, 270 Conn. 487, 501, 853 A.2d 460 (2004); *Moran* v. *Morneau*, 100 Conn. App. 169, 173, 917 A.2d 1003 (2007), cert. denied, 289 Conn. 953, 961 A.2d 420 (2008).

In the present case, the defendant claims that he timely filed an answer and four special defenses, which the plaintiff did not ask him to revise, and, therefore, the default entered by the court on the plaintiff's complaint was improper. In support of his claim, the defendant relies on *Connecticut Light & Power Co.* v. *St. John*, supra, 80 Conn. App. 767. In *Connecticut Light & Power Co.*, "this court concluded that a trial court was required to set aside a default judgment as a matter of law when the default had been rendered improperly." *People's United Bank* v. *Bok*, supra, 143 Conn. App. 269–70.

In *Connecticut Light & Power Co.*, after the defendants had filed answers and counterclaims in response to the plaintiff's complaint, the plaintiff filed a request to revise the defendants' counterclaim. *Connecticut Light & Power Co.* v. *St. John*, supra, 80 Conn. App. 769–70. Thereafter the plaintiff filed a motion for default for failure to plead when the defendants did not respond to its request to revise the counterclaim. Id., 770. The clerk of the court granted the motion, defaulting the

defendants on both the complaint and their counterclaim. Id., 770, 773. The defendants filed a motion to open the default, but the trial court denied it. Id., 770. When this court reversed the trial court's denial of the defendant's motion to open the default judgment on the plaintiff's complaint, it concluded that the entry of default by the clerk was improper with respect to the plaintiff's complaint because "[t]he court had no authority to default the defendants for failure to plead on a complaint that they had properly answered." Id., 775.

The plaintiff rejects the teaching of *Connecticut Light & Power Co.* and contends that *Connecticut National Bank* v. *Marland*, 45 Conn. App. 354, 696 A.2d 374, cert. denied, 243 Conn. 907, 701 A.2d 328 (1997), is squarely on point with the procedural posture of the present case. We do not agree. Although this court agreed that the trial court in *Connecticut National Bank* properly nonsuited the defendant on his special defenses and counterclaim, it did not conclude that the defendant was in in default on his answer. The defendant in *Connecticut National Bank* filed a motion to strike the case from the trial list, which the trial court denied and this court affirmed. The important distinction between *Connecticut National Bank* and the present case is that in *Connecticut National Bank* the defendant had filed a timely answer, but was nonsuited for failure to revise his special defenses and counterclaim. Id., 354. Because the defendant was not defaulted, the case was claimed to the *trial list*, not the hearing in damages list. In the present case, the defendant, despite having filed a timely answer and four special defenses, was defaulted and his liability was conclusively determined. See *Connecticut Light & Power Co.* v. *St. John*, supra, 80 Conn. App. 775. The case was placed on the hearing in damages list where only the amount of money the defendant allegedly owed the plaintiff was to be decided. In fact, a close reading

of *Connecticut National Bank* demonstrates support for the defendant's position that the court improperly denied his motion to strike the case from the hearing in damages list and thus denied him the opportunity to contest liability.

Regardless of whether special defenses are an intricate part of an answer, this case turns not on the technical definitions of an answer but on what the sound principles of procedure require. At various times in the trial court and on appeal, each of the parties suggested an alternative to the defendant's default, i.e., that the defendant should not be permitted to rely on the special defenses that he did not revise, but that the case proceed to trial on his answer and four remaining special defenses. There is legal precedent for such a solution. See *McCarthy* v. *Thames Dyeing & Bleaching Co.*, 130 Conn. 652, 36 A.2d 739 (1944). In *McCarthy*, the plaintiff was nonsuited on "the ground that [he] had failed to comply in certain respects with an order for a more specific statement." Id., 653. In his complaint, the plaintiff alleged, among other things, that he had lent the plaintiff, his employer, many thousands of dollars for materials, wages, and other things in order to continue operations. Id. "The defendant made a motion for a more particular statement as to the items [the plaintiff had paid for], which was granted in part." Id. The plaintiff filed "a bill of particulars"; id.; that complied in part with the court's order. Because the plaintiff failed to file a specific statement as to certain items as required by the court, he was nonsuited. Id.

Our Supreme Court stated that "[o]n the face of the record, the situation is that, because the plaintiff has failed to file a specific statement as to certain general claims in his complaint, and has not fully complied with the order for the more specific statement as to another general claim, his action is thrown out of court, although he as well pleaded claimed items of indebtedness by

the defendant amounting to almost $7000. The mere statement of this proposition is enough to suggest that the action of the trial court was wrong. It is axiomatic in modern pleading that, because a plaintiff cannot substantiate a separable part of the claim in his complaint, he is not to be barred of recovery as regards that portion of it he can establish. Where the failure to file a bill of particulars as ordered goes to the entire cause of action, a judgment of nonsuit may be proper. . . . Even when the failure to file the bill goes only to a part of the cause of action, it may be that the circumstances would justify such an order. . . . In the situation before us, the proper remedy of the defendant was not a motion for a nonsuit but one to expunge from the complaint the general allegations as to which specific statements as ordered by the court were not filed, or objection at the trial to any evidence offered in support of those allegations." (Citations omitted.) Id., 653–54.

Our Supreme Court noted that the General Statutes and rules of practice "provide only that, where a party fails to comply with a rule or order of the court as to pleadings, the court 'may' grant a nonsuit; they do not require that one be granted where to do so would run counter to sound principles of procedure." Id., 654. Although *McCarthy* was decided approximately seventy years ago, the present day statute and rule governing the penalty for failing to plead state that a party failing to plead according to the rules "*may* be nonsuited or defaulted, as the case may be." (Emphasis added.) General Statutes § 52-119; Practice Book § 10-18.

In the present case, the defendant filed an answer and four special defenses, which the plaintiff did not ask him to revise, before the court granted the plaintiff's motion for default. "[T]here is . . . support for the proposition that a court commits plain error if, prior to rendering a judgment upon default, the court fails

to accept for filing a defaulted party's pleading solely on the ground that the pleading is untimely. . . . General Statutes § 52-121 (a) provides in relevant part: Any pleading in any civil action may be filed after the expiration of the time fixed by statute or by any rule of the court until the court has heard any motion for judgment by default . . . for failure to plead which has been filed in writing with the court in which the action is pending." (Internal quotation marks omitted.) *People's United Bank* v. *Bok*, supra, 143 Conn. App. 268. "Moreover, '[o]ur Supreme Court has expressed a policy to bring about a trial on the merits of a dispute whenever possible to secure for the litigant his day in court.' " Id., quoting *Connecticut Light & Power Co.* v. *St. John*, supra, 80 Conn. App. 775. The court, therefore, was without authority to grant the motion for default against the defendant and, thus, should have granted his motion to strike the matter from the hearing in damages list.

The judgment is reversed and the case is remanded for further proceedings according to law.

In this opinion the other judges concurred.

LISA KEUSCH *v.* KENNETH KEUSCH
(AC 39395)

Sheldon, Elgo and Stevens, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court dissolving his marriage to the plaintiff and awarding the plaintiff alimony and child support. *Held*:

1. The trial court erroneously computed the defendant's presumptive minimum child support obligation: that court erred in calculating child support on the basis of the defendant's earning capacity, which may be used as a deviation criterion but should not be used to determine the presumptive support amount itself, without first determining the defendant's actual income and using that determination to state the presumptive support amount under the child support guidelines, and that court also erred by failing to make a finding that application of the guidelines

would be inequitable or inappropriate, as required by the relevant state regulation (§ 46b-215a-5c [a]); moreover, although the error pertained only to the trial court's determination of child support, the proper remedy for the trial court's errors with respect to its financial orders was to remand the matter to that court for reconsideration of all of its financial orders.

2. The trial court abused its discretion by ordering the defendant to pay nonmodifiable unallocated alimony and child support; that court's order provided that the duration and the amount of alimony and support to be paid by the defendant were nonmodifiable by either party, which improperly precluded reductions based on each child attaining the age of majority, as the parties had three children and the result of that order was that the defendant would be unable to seek modification as each child attained the age of majority, even though the obligation of a parent to support a child terminates when a child attains that age.

Argued January 2—officially released September 18, 2018

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Tindill*, *J.*; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to this court; thereafter, the court, *Tindill*, *J.*, denied the defendant's motion for articulation; subsequently, this court granted the defendant's motion for review but denied the relief requested; thereafter, the court, *Tindill*, *J.*, issued an articulation of its decision. *Reversed in part*; *further proceedings*.

Gaetano Ferro, with whom, on the brief, was *Olivia M. Hebenstreit*, for the appellant (defendant).

Yakov Pyetranker, for the appellee (plaintiff).

Opinion

STEVENS, J. The defendant, Kenneth Keusch, appeals from the judgment of the trial court dissolving his marriage to the plaintiff, Lisa Keusch, and entering related financial orders. On appeal, the defendant claims that the trial court (1) erroneously computed

his presumptive minimum child support obligation and (2) abused its discretion by ordering the defendant to pay nonmodifiable unallocated alimony and support.[1] We agree with the defendant and, accordingly, we reverse in part the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to our consideration of the issues raised on appeal. The plaintiff and the defendant were married on July 19, 1997. They are the parents of three minor children. By complaint dated February 26, 2014, the plaintiff sought, inter alia, dissolution of the parties' marriage, custody of the minor children, and temporary and permanent alimony and child support. On June 21, 2016, following a trial over several days on financial and property issues, the court dissolved the parties' marriage. In its memorandum of decision, the court ordered, inter alia, that the defendant pay unallocated alimony and support to the plaintiff in the amount of $12,500 per month "until the death of either party, the [p]laintiff's remarriage, or November

[1] In his initial brief, the defendant argued that (1) the court's determination of his gross and net income was clearly erroneous, (2) the court abused its discretion in ordering that the defendant pay 70 percent of his gross income and more than 100 percent of his net income to the plaintiff and (3) the court abused its discretion by ordering the defendant to pay nonmodifiable unallocated alimony and support. Following an articulation by the trial court and supplemental briefing by the parties, the defendant argued that the court erroneously computed his presumptive child support obligation and that the factual basis articulated by the trial court does not support its findings as to the defendant's gross and net annual earning capacity. Because we conclude that the trial court erroneously computed the defendant's presumptive child support obligation by relying on his earning capacity rather than his actual earnings, we reverse the judgment and remand the case to the trial court for reconsideration of all of its financial orders. We, therefore, need not consider the defendant's additional claims pertaining to the calculation of the financial orders. We will, however, consider the defendant's claim that the court abused its discretion by ordering the defendant to pay nonmodifiable unallocated alimony and support, as this issue is likely to arise on remand.

3, 2025, whichever shall occur first."[2] The duration and the amount to be paid were nonmodifiable by either party. The court indicated that it was deviating from the child support guidelines' (guidelines) presumptive support amount of $752 per week "based on the extraordinary disparity in income and the provision of alimony." The defendant then filed the present appeal.

Before addressing the merits of the defendant's claims, we first set forth the applicable standard of review in domestic relations matters. "[T]his court will not disturb trial court orders unless the trial court has abused its legal discretion or its findings have no reasonable basis in the facts. . . . As has often been explained, the foundation for this standard is that the trial court is in a clearly advantageous position to assess the personal factors significant to a domestic relations case. . . . 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. . . . Notwithstanding the great deference accorded the trial court in dissolution proceedings, a trial court's ruling . . . may be reversed if, in the exercise of its discretion, the trial court applies the wrong standard of law." (Internal quotation marks omitted.) *LeSueur* v. *LeSueur*, 172 Conn. App. 767, 774, 162 A.3d 32 (2017).

"Individual financial orders in a dissolution action are part of the carefully crafted mosaic that comprises the entire asset reallocation plan. . . . Under the mosaic doctrine, financial orders should not be viewed as a collection of single disconnected occurrences, but rather as a seamless collection of interdependent elements. Consistent with that approach, our courts have utilized the mosaic doctrine as a remedial device that

[2] November 3, 2025, is the eighteenth birthday of the parties' youngest child.

allows reviewing courts to remand cases for reconsideration of all financial orders even though the review process might reveal a flaw only in the alimony, property distribution or child support awards." (Internal quotation marks omitted.) *Barcelo* v. *Barcelo*, 158 Conn. App. 201, 226, 118 A.3d 657, cert. denied, 319 Conn. 910, 123 A.3d 882 (2015).

Guided by these principles, we will address the defendant's claims on appeal.

I

We first consider the defendant's claim that the court erroneously computed his minimum child support obligation. Specifically, the defendant argues that the court erred in calculating his presumptive child support obligation on the basis of his earning capacity rather than his actual earnings. He contends that the court did not calculate the amount of child support that would have been required based upon actual income, nor did it make a finding that application of the guidelines would be inequitable. We agree.

The following additional facts are necessary for the resolution of this issue. In its initial memorandum of decision, the court ordered the defendant to pay $12,500 to the plaintiff each month as unallocated alimony and support.[3] The court did not indicate whether this award was based on the defendant's actual earnings or earning capacity. The court attached a worksheet for the Connecticut Child Support and Arrearage Guidelines (worksheet), prepared by the Connecticut Judicial Branch, to its memorandum of decision. The worksheet indicated that the defendant's gross weekly income was $5288,

[3] "Even though an unallocated order incorporates alimony and child support without delineating specific amounts for each component, the unallocated order, along with other financial orders, necessarily includes a portion attributable to child support in an amount sufficient to satisfy the guidelines." *Tomlinson* v. *Tomlinson*, 305 Conn. 539, 558, 46 A.3d 112 (2012).

or approximately $275,000 per year, and his net weekly income was $3392, or $176,384 per year. On December 6, 2016, the defendant filed a motion for articulation asking the court to articulate, inter alia, the bases on which the court completed the worksheet. Specifically, the defendant asked the court to articulate the factual basis on which it determined that his gross weekly income was $5288, the factual basis for each deduction from gross weekly income and the factual basis for its determination that his net weekly income was $3392. The court denied the motion, and the defendant filed a motion for review. This court thereafter granted review but denied the requested relief.

In his principal appellate brief, the defendant argued that the court's erroneous calculation of his gross and net income lacked evidentiary support. In response, the plaintiff argued that the court's income findings were not based on the defendant's actual income, but were based on his earning capacity, and that these findings were supported by the record. At oral argument before this court, we questioned both sides regarding whether the trial court's financial award was based on the defendant's actual earnings or earning capacity. Following oral argument, we ordered the court to articulate whether the finding of weekly gross income of $5288, as recorded on the worksheet, represented a finding as to the defendant's actual income or the earning capacity and the factual basis for that finding.[4] In its articulation, the court indicated that the gross weekly income amount of $5288 reflected on the worksheet represented the defendant's earning capacity.[5]

[4] This court's order stated: "Pursuant to Practice Book [§§] 61-10 and 60-5, [this] court hereby orders the trial court, *Tindill, J.* . . . to articulate: (1) whether the finding of weekly gross income of $5288, as recorded on court exhibit B (worksheet for the Connecticut Child Support and Arrearage Guidelines), represented a finding as to the actual income or the earning capacity of the defendant . . . and (2) the factual basis for that finding."

[5] The court further stated that review and consideration of the following factors formed the factual basis for its finding that the defendant could

Section 46b-215a-5c (a) of the Regulations of Connecticut State Agencies provides in relevant part that "[t]he current support . . . amounts calculated under [the regulations] . . . are presumed to be the correct amounts to be ordered. The presumption regarding each such amount may be rebutted by a specific finding on the record that such amount would be inequitable or inappropriate in a particular case. . . . Any such finding shall state the amount that would have been required under such sections and include a factual finding to justify the variance. Only the deviation criteria stated in . . . this section, and indicated by the check boxes in section VIII of the worksheet, shall establish sufficient bases for such findings." "Earning capacity is . . . found among the criteria for deviation from presumptive support amounts, as a type of financial [resource] that [is] not included in the definition of net income, but could be used by such parent for the benefit of the child or for meeting the needs of the parent." (Internal quotation marks omitted.) *Battistotti* v. *Suzanne A.*, 182 Conn. App. 40, 52 n.8, A.3d (2018).

In *Fox* v. *Fox*, 152 Conn. App. 611, 632, 99 A.3d 1206, cert. denied, 314 Conn. 945, 103 A.3d 977 (2014), this court held that the trial court erred in determining the defendant's modified child support obligation because it based its calculations on the defendant's imputed

realistically be expected to earn the gross and net income amounts on the worksheet: the defendant's age, the defendant's testimony that he was in good health, the parties' testimony that the defendant graduated from Pace University with degrees in math and physics, the defendant's testimony that he has insurance licenses in property, casualty, life and health and that he has passed some actuary exams, the defendant's testimony regarding his work history, purchase and ownership of insurance businesses, and formation of insurance businesses, the defendant's financial affidavits, the parties' worksheets, certain exhibits filed by the defendant and the testimony from both parties and Robert Pintucci, the defendant's accountant, regarding the parties' finances.

income and not on his actual income and the minor children's demonstrated needs. "Under the guidelines, the child support obligation first is determined without reference to earning capacity, and earning capacity becomes relevant only if a deviation from the guidelines is sought" under § 46b-215a-5c (b) (1) (B) of the Regulations of Connecticut State Agencies. (Internal quotation marks omitted.) Id., 635. "[T]he amount of support determined without reference to the deviation criteria is presumed to be the correct amount of support, and that presumption may only be rebutted by a specific finding on the record that the application of the guidelines would be inequitable or inappropriate under the circumstances of a particular case. When the latter is true, § 46b-215a-3 (b) (1) (B) [of the Regulations of Connecticut State Agencies, now § 46b-215a-5c (b) (1) (B)] allows deviation from the guidelines on the basis of a parent's earning capacity." (Internal quotation marks omitted.) Id.

"Given this regulatory framework, a court errs in calculating child support on the basis of a parent's earning capacity without first stating the presumptive support amount at which it arrived by applying the guidelines and using the parent's actual income *and* second finding application of the guidelines to be inequitable or inappropriate." (Emphasis in original.) *Battistotti* v. *Suzanne A.*, supra, 182 Conn. App. 52 n.8; see also *Barcelo* v. *Barcelo*, supra, 158 Conn. App. 215; *Fox* v. *Fox*, supra, 152 Conn. App. 635.

In the present case, the trial court did not determine the defendant's actual income and then calculate the presumptive child support amount. The record does not reflect a finding by the court about the defendant's actual income. As in *Fox*, the trial court erroneously calculated the defendant's child support obligation on the basis of his earning capacity without determining

the defendant's actual income and using this determination to state the presumptive support amount under the guidelines. As explained in *Fox*, under the guidelines, earning capacity may be used as a deviation criterion but should not be used to determine the presumptive support amount itself. *Fox* v. *Fox*, supra, 152 Conn. App. 635. Additionally, the trial court did not make a finding that application of the guidelines would be inequitable or inappropriate, as required by § 46b-215a-5c (a) of the Regulations of Connecticut State Agencies.

"Although a trial court's discretion in a domestic relations matter may be broad, it is not so expansive that it encompasses clear omissions of required procedures for setting child support obligations in high income, high asset familial situations . . . . " Id., 640; see also *Barcelo* v. *Barcelo*, supra, 158 Conn. App. 217. Consistent with the mosaic doctrine, although this error only pertains to the court's determination of child support, the proper remedy is to remand this matter for reconsideration of all of its financial orders.[6] *Barcelo* v. *Barcelo*, supra, 217, 226–27; *Fox* v. *Fox*, supra, 640–41; *O'Brien*

[6] The plaintiff concedes that, pursuant to *Fox* v. *Fox*, supra, 152 Conn. App. 632, the court erroneously computed the defendant's presumptive minimum child support obligation on the basis of the defendant's earning capacity rather than his actual earnings. She argues, however, that the defendant has waived this issue because he argued, in his initial brief, that the evidence was insufficient regarding his income while in his supplemental brief, he argues that the court did not properly apply the guidelines pursuant to *Fox*. We disagree.

It was not until the trial court issued its articulation in response to this court's order, subsequent to oral argument before this court, that the trial court indicated that the gross income amount of $5288 reflected on the worksheet represented the defendant's earning capacity. The court's initial memorandum of decision did not reference the defendant's earning capacity and the box for "earning capacity" was not checked by the court in the worksheet attached to its decision. Following the court's articulation, we ordered the parties to file supplemental briefs. Under these circumstances, we cannot agree that the defendant has waived his right to argue that the court erroneously computed his presumptive minimum child support amount by relying on his earning capacity rather than his actual earnings.

v. *O'Brien*, 138 Conn. App. 544, 555, 53 A.3d 1039 (2012), cert. denied, 308 Conn. 937, 66 A.3d 500 (2013).

II

The defendant next claims that the court abused its discretion by ordering him to pay nonmodifiable unallocated alimony and child support.[7] Specifically, he argues, inter alia, that the court's order improperly precludes reductions based on each child attaining the age of majority. We agree.

"As a general matter, [t]he obligation of a parent to support a child terminates when the child attains the age of majority, which, in this state, is eighteen. General Statutes § 1-1d . . . ." (Citation omitted; internal quotation marks omitted.) *Malpeso* v. *Malpeso*, 165 Conn. App. 151, 176, 138 A.3d 1069 (2016). In *Hughes* v. *Hughes*, 95 Conn. App. 200, 895 A.2d 274, cert. denied, 280 Conn. 902, 907 A.2d 90 (2006), after the court issued an unallocated order of alimony and child support, the plaintiff claimed that, because the order provided for no reduction as each child attained the age of majority, a portion of the support order would necessarily be attributable to the support of a child who had surpassed the age of majority. Id., 209. In rejecting the plaintiff's claim, we stated: "The plaintiff fails to acknowledge . . . the fact that he may move to modify the combined alimony and support order at any time, including the date on which each child reaches the age of majority. This court has held that [w]hen, as part of a divorce decree, a parent is ordered to pay a specified amount

[7] General Statutes § 46b-86 (a) provides, in relevant part: "Unless and to the extent that the decree precludes modification, any final order for the periodic payment of permanent alimony or support . . . may, at any time thereafter, be continued, set aside, altered or modified by the court upon a showing of a substantial change in the circumstances of either party or upon a showing that the final order for child support substantially deviates from the child support guidelines established pursuant to section 46b-215a . . . ."

periodically for the benefit of more than one child, the emancipation of one child does not automatically affect the liability of the parent for the full amount. . . . The proper remedy . . . is to seek a modification of the decree. . . . Thus, although the attainment of majority by each child may not automatically entitle the plaintiff to a reduction in his alimony and support obligation, it provides a basis for the plaintiff to seek a modification. Because the order as framed by the court does not, by its own terms, require a payment of combined alimony and support beyond the dates on which the children reach the age of majority, and *because the order is subject to modification as each child reaches the age of majority*, it does not violate the proscription against orders for the payment of support beyond the permissible age." (Citation omitted; emphasis added; footnote omitted; internal quotation marks omitted.) Id., 209–10; see also *Matles* v. *Matles*, 8 Conn. App. 76, 81, 511 A.2d 363 (1986) ("when an order for unallocated alimony and support is entered and when that order does not contain a provision for specific reduction or reallocation upon the child's majority, there is implicit in such order the contemplation that when the child attains majority the trial court, upon motion of either party, must conduct a hearing to ascertain what part, if any, of the order is then attributable to child support and it must modify the order to reflect the same").

In the present case, the court ordered the defendant to pay $12,500 to the plaintiff each month as unallocated alimony and support. The court further ordered that the duration and amount of the payment were to be nonmodifiable by either party. Because the parties have three children, the result of this order is that the defendant will be unable to seek modification as each child attains the age of majority; the defendant, rather, will be required to pay the same amount of child support for three minor children, two minor children and one minor child. We, therefore, conclude that the court abused its discretion in making the unallocated alimony

and child support order nonmodifiable as to term or amount.[8]

The judgment is reversed only as to the financial orders and the case is remanded for further proceedings consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

[8] Because on remand the trial court may again entertain the issuance of a nonmodifiable support order, this court notes the following. Although General Statutes § 46b-86 (a) authorizes the court to modify support orders "[u]nless and to the extent that the decree precludes modification," the manner in which the trial court should exercise its discretion under the statute to issue nonmodifiable child support orders is not articulated and remains unclear. The need for adequate financial support of minor children from their parents is an established public policy. See *Sablosky* v. *Sablosky*, 258 Conn. 713, 721, 784 A.2d 890 (2001). In light of this public policy, a question remains as to what extent a trial court may issue a child support order that remains nonmodifiable even in the event of a substantial, or, for example, a catastrophic, change in the circumstances of a parent, a child or both. Stated differently, a question continues to exist as to whether the trial court, having the authority under § 46b-86 (a) to issue a nonmodifiable child support order, reasonably exercises its authority under the statute by issuing a child support order that precludes modification even in the event of a substantial change of circumstances adversely affecting the adequacy of financial support for the child. Compare *Amodio* v. *Amodio*, 56 Conn. App. 459, 472, 743 A.2d 1135 ("[t]he plain language of § 46b-86 [a] . . . makes clear that if a decree precludes modification . . . no modification may be had"), cert. granted, 253 Conn. 910, 754 A.2d 160 (2000) (appeal withdrawn September 27, 2000), with *Guille* v. *Guille*, 196 Conn. 260, 265, 492 A.2d 175 (1985) (observing that minor children of marriage have right to support, which parents cannot contractually limit, and concluding that "neither the general language of . . . § 46b-86 [a] . . . nor the decree's broadly phrased nonmodifiability provision, was effective to restrict permanently the court's power to modify the terms of child support under the circumstances of [that] case"); and *Rempt* v. *Rempt*, 5 Conn. App. 85, 88, 496 A.2d 988 (1985) (following *Guille* v. *Guille*, supra, 265). In *Tomlinson* v. *Tomlinson*, 305 Conn. 539, 548 n.4, 46 A.3d 112 (2012), our Supreme Court acknowledged that existing jurisprudence on this issue "does not contain an easily discernible thread." The court "invite[d] the legislature to clarify the circumstances, if any, under which child support may be made nonmodifiable, as well as the circumstances in which public policy would dictate that child support orders remain modifiable, notwithstanding language in the decree to the contrary." Id., 549 n.6.

57 BROAD STREET STAMFORD, LLC, ET AL. *v.* SUMMER HOUSE OWNERS, LLC (AC 39912)

Lavine, Prescott and Harper, Js.

Syllabus

The plaintiffs sought, inter alia, an injunction restraining the defendant from interfering with their alleged rights under a certain easement contained in a declaration establishing an entity described therein as a six unit, air rights condominium. The plaintiffs purchased and jointly owned unit 1 of the condominium. Unit 2, which was the beneficiary of most of the air rights, included a 6900 square foot easement area that benefited unit 1. The easement granted to unit 1 the right to pass and repass over the easement area for purposes of access to the building and improvements on unit 1, the recycling and refuse area on unit 2 and eighteen parking spaces in the parking garage. As part of the construction of the condominium, the defendant built a 1500 square foot service access structure in the center of the easement area. After the defendant refused the plaintiffs' demand that it cease and desist from building further structures in the easement area and that it demolish the service access structure, the plaintiffs commenced the present action claiming that their easement rights encompassed the entirety of the easement area and that the construction of the service access structure interfered with those rights. Following a trial to the court, the court rendered judgment in favor of the defendant, concluding that the defendant's construction of the service access structure did not materially interfere with the plaintiffs' reasonable use and enjoyment of the easement. On the plaintiffs' appeal to this court, *held*:

1. The trial court properly concluded that the defendant's construction of the service access structure did not materially interfere with the plaintiffs' reasonable use and enjoyment of the easement: although the plaintiffs claimed that construction of the service access structure interfered with their rights under the easement to access the building and improvements on unit 1 and the recycling and refuse area on unit 2 because large vehicles are prevented from entering the area fully, there may be traffic congestion if tenants are moving into the apartments in unit 2 at the same time deliveries are being made to the other units, and hand trucks must be used to remove refuse from the area, the claim that there may be congestion if a certain number of vehicles are present in the area at once was mere conjecture, especially given that the plaintiffs had yet to occupy unit 1, the evidence admitted at trial established that the plaintiffs would be able to access the recycling and refuse area, as the occupants of other units currently do without issue, and nothing in the language of the easement provided for full and unlimited access by large

vehicles or prohibited the construction of permanent structures within the easement area; moreover, the record supported the court's conclusion that, despite the existence of the service access structure, the plaintiffs are able to access their unit and to make improvements, as they are entitled to do under the easement, by way of a ten foot wide passage, a seven foot wide sidewalk and a certain loading area, and, therefore, the plaintiffs did not demonstrate that, in order to make reasonable use and enjoyment of their easement rights, large vehicles must be able to get directly to the rear door of their unit.

2. The plaintiffs could not prevail on their claim that the trial court modified their easement rights in concluding that the defendant had the unilateral right to determine the method, timing and location by which the plaintiffs might use the easement area, that court having properly construed the relevant language of the easement; in interpreting the language of the easement, the court rejected the plaintiffs' assertion that the entirety of the easement area must be available to them because their position did not comport with the stricture of *Stefanoni* v. *Duncan* (282 Conn. 686), that the use of an easement be reasonable and as little burdensome to the servient estate as possible, and, therefore, the court correctly concluded that the plaintiffs' interpretation of their rights under the easement did not comport with the language of the easement, which provided the plaintiffs with the right to pass and repass for the purposes of accessing their unit and the improvements thereon, the recycling and refuse area and parking in the parking garage, and that the plaintiffs' interpretation that the easement provided them with unlimited access was unreasonable under the clear language of the easement.

Argued February 5—officially released September 18, 2018

Procedural History

Action for an injunction restraining the defendant from interfering with the plaintiffs' alleged rights under certain easements, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Hon. Taggart D. Adams*, judge trial referee; judgment for the defendant, from which the plaintiffs appealed to this court. *Affirmed.*

Matthew B. Woods, for the appellants (plaintiffs).

James R. Fogarty, for the appellee (defendant).

Opinion

HARPER, J. In this easement dispute, the plaintiffs, 57 Broad Street Stamford, LLC, and 59 Broad Street

Stamford, LLC, appeal from the judgment rendered by the trial court, following a trial to the court, in favor of the defendant, Summer House Owners, LLC. On appeal, the plaintiffs claim that the court erred in concluding that (1) the defendant's construction of a 1500 square foot service access structure within a 6900 square foot easement area did not materially interfere with the plaintiffs' reasonable use and enjoyment of the easement area, and (2) the defendant had the unilateral right to determine the method, timing, and location by which the plaintiffs might use the easement area. We affirm the judgment of the trial court.

The following facts, as set forth in the court's memorandum of decision or otherwise in the record and undisputed, and procedural history are relevant to our resolution of this appeal. In a complaint dated January 11, 2016, the plaintiffs claimed that the defendant materially and substantially had interfered with their use and enjoyment of an easement, titled "Easement A" (easement).[1] The plaintiffs sought both compensatory damages and injunctive relief. The easement is "contained in the recorded documents [declaration] establishing the entity known as the Broad Summer Condominium [condominium] located in downtown Stamford . . . . The [c]ondominium is described as an 'air rights condominium,' and consists of six units. Unit 1 contains what is described as an almost forty year old, 30,000 square foot three story building with full basement fronting on Broad Street . . . . The building has been vacant for several years. Unit 1 is jointly owned by the plaintiffs . . . . Unit 2 . . . is the beneficiary of most of the air rights and the present site of a recently constructed [twenty-one] story residential apartment

[1] The plaintiffs also alleged in their complaint that the defendant violated a light and air easement. On appeal, the plaintiffs do not challenge the court's conclusion as to the light and air easement.

building that includes four parking levels, owned by the defendant and known as Summer House. . . .[2]

"The area of [u]nit 2, which has an undivided interest in the [c]ondominium of 25.97 percent, includes an easement area . . . for the benefit of [u]nits 1, 3 and 4. . . . The [easement] area consists of a little less than 6900 square feet. . . .

"The [d]eclarant of the [c]ondominium is Tolari, LLC [Tolari]. Thomas Rich, the chief executive officer of F. D. Rich Co[mpany], a long time real estate developer in Stamford, is Tolari's managing member, and also an owner of Summer House [condominium]. F. D. Rich Co[mpany] is described as the primary developer of Summer House. . . . Tolari and the principals of the plaintiffs, Kostas Alafoyiannis (principal of 57 Broad [Street Stamford, LLC]) and Alexander Todorovic (principal of 59 Broad [Street Stamford, LLC]) signed a contract, dated June 19, 2012, for [the plaintiffs'] purchase of [u]nit 1. . . . Because the [c]ondominium [d]eclaration and the plans for the apartment building were not complete at that time, the contract contained an 'out' clause allowing the [u]nit 1 purchasers a period of time to rescind the purchase for 'any reason or no reason.' There followed negotiations between attorneys for the [u]nit 1 purchasers . . . and the attorney for the seller-declarant . . . ."[3] (Footnote added.) These negotiations concerned the easement language that is at issue

[2] "Units 3 and 4 are older buildings fronting the west side of lower Summer Street . . . . Unit 5 is the location of the Majestic Theater at 118 Summer Street. Unit 6 is a roadway. The locations of the [c]ondominium units are depicted on a property survey . . . ."

[3] Initially, the plaintiffs were granted eighteen parking spaces within the easement area. Following negotiations in and around August, 2012, the eighteen parking spaces were moved from the easement area to a new parking garage—Summer House garage. It is undisputed that the plaintiffs do not have the right to eighteen parking spaces within a portion of the 6900 square foot easement area at issue in this appeal.

in the present case. The language as negotiated is contained in [§] 12.2 of the declaration, which is dated October 24, 2012.[4]

Approximately one year later, the construction plans were finalized. "The construction contract for Summer House was dated August 28, 2013. . . . The plaintiffs were notified that construction would commence by letter dated January 7, 2014. . . . The progress of construction is shown by dated photographs . . . taken between February, 2014 [and] October, 2015. The . . . plaintiffs occasionally visited their building during the construction period." (Citations omitted; footnote omitted.) During this time, construction began on the service access structure at issue in this appeal. "[T]he service access structure is approximately [seventy-five] feet long running east to west and [twenty] feet wide. The structure effectively leaves three means of access to the south side of the plaintiffs' building on [u]nit 1. These means of access . . . are: (1) a [ten] foot wide passage way between the Target Store and [u]nit 1 extending south from Broad Street to the light and air easement area south of [u]nit 1; (2) a seven foot wide sidewalk running east-west between the 'service access structure' and the Target Store garage; and (3) an entryway under the Summer House varying in width from [twenty to twenty-six] feet beginning at what is labeled 'Loading Area' . . . and running east from the Target access way and turning north toward the back, or south side, of the plaintiffs' building on [u]nit 1."

Thereafter, "[i]n December, 2015, . . . [the plaintiffs' attorney], on behalf of the plaintiffs in a letter to

[4] The limited warranty deed for unit 1, dated October 26, 2012, was recorded in the Stamford land records on October 31, 2012. The plaintiffs' deed references "the terms, conditions, restrictions and provisions of . . . [the] Declaration of Broad Summer Condominium recorded October 24, 2012, in . . . the Stamford Land Records."

. . . [the defendant's attorney], demanded the defendant cease and desist from building further structures located on [the easement] and demolish what had been built there. . . . [The defendant's attorney] responded a little over a week later, noting that the plaintiffs had information for over two years of the planned construction on [the easement] and in any event, the plaintiffs would have the access and parking called for in [§] 12.2 of the [d]eclaration."

The plaintiffs commenced the underlying action the following month, claiming that their easement rights encompassed the entirety of the easement area and that the construction of a service access structure in the center of the easement interfered with those rights. A five day trial to the court took place between June 15 and July 21, 2016.[5] On November 30, 2016, the court issued its memorandum of decision. It concluded that the defendant had not interfered with the plaintiffs' use and enjoyment of the easement and rendered judgment in favor of the defendant.[6] This appeal followed.

I

The plaintiffs first claim that the court improperly concluded that the defendant did not interfere with their reasonable use and enjoyment of the easement. Specifically, the plaintiffs argue that the court erred in

[5] The court bifurcated the proceedings. The court first addressed the threshold issue of whether the defendant had violated the easement. Only if the court had found that the defendant had violated the easement would it hold further proceedings to determine the appropriate legal and equitable relief. Because the court found that the defendant did not violate the easement, it rendered judgment in favor of the defendant.

[6] The court further stated in its memorandum of decision that, "[h]aving found that the defendant has not violated the plaintiffs' easement rights, [the] court is not required to decide the merits of the defendant's special defense that the institution of this case in January, 2016, constituted an unreasonable and inexcusable delay that was prejudicial to the defendant. Nevertheless, the court observes the defense has merit. . . . At the very least, the plaintiffs' delay would preclude any equitable relief."

concluding that the defendant's construction of the 1500 square foot service access structure within the 6900 square foot easement area did not violate their easement rights. We disagree.

We first set forth our standard of review.[7] "[T]he determination of the intent behind language in a deed, considered in the light of all the surrounding circumstances, presents a question of law on which our scope of review is . . . plenary. . . . Thus, when faced with a question regarding the construction of language in deeds, the reviewing court does not give the customary deference to the trial court's factual inferences." (Internal quotation marks omitted.) *Avery* v. *Medina*, 151 Conn. App. 433, 440–41, 94 A.3d 1241 (2014). In contrast, "[t]he determination of [the] reasonableness [of the use of an easement] is for the trier of fact." (Citations omitted; internal quotation marks omitted.) *Stefanoni* v. *Duncan*, 282 Conn. 686, 701, 923 A.2d 737 (2007). "This court [has] observed that review of the court's conclusion that [certain] plantings violated . . . easement rights involves a mixed question of fact and law. [S]o-called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations, are not facts in this sense. . . . [Such questions require] plenary review by this court unfettered by the clearly erroneous standard." (Internal quotation marks omitted.) *Zirinsky* v. *Carnegie Hill Capital Asset Management, LLC*, 139 Conn. App. 706, 714–15, 58 A.3d 284 (2012); see also *D'Appollonio* v. *Griffo-Brandao*, 138 Conn. App. 304, 323, 53 A.3d 1013 (2012). "When legal conclusions of the trial court are

[7] The plaintiffs challenge on appeal the court's determination that the defendant did not interfere with their easement rights. The plaintiffs' attorney conceded at oral argument before this court that the plaintiffs' claim does not challenge the scope of the easement, which is a finding of fact. See *Stefanoni* v. *Duncan*, 282 Conn. 686, 699, 923 A.2d 737 (2007) ("[t]he determination of the scope of an easement is a question of fact" [internal quotation marks omitted]).

challenged on appeal, we must decide whether [those] . . . conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Zirinsky* v. *Carnegie Hill Capital Asset Management, LLC*, supra, 715.

"It is well settled that [a]n easement creates a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the rules authorized by the easement. . . . [T]he benefit of an easement . . . is considered a nonpossessory interest in land because it generally authorizes limited uses of the burdened property for a particular purpose. . . . [E]asements are not ownership interests but rather privileges to use [the] land of another in [a] certain manner for [a] certain purpose . . . ." (Internal quotation marks omitted.) *Cheshire Land Trust, LLC* v. *Casey*, 156 Conn. App. 833, 844, 115 A.3d 497 (2015). "In determining the character and extent of an easement created by deed, the ordinary import of the language will be accepted as indicative of the intention of the parties, unless there is something in the situation of the property or the surrounding circumstances that calls for a different interpretation." (Internal quotation marks omitted.) *Stefanoni* v. *Duncan*, supra, 282 Conn. 700. "Except as limited by the terms of the servitude . . . the holder of an easement . . . is entitled to use the servient estate in a manner that is reasonably necessary for the convenient enjoyment of the servitude. . . . Likewise, [e]xcept as limited by the terms of the servitude . . . the holder of the servient estate is entitled to make any use of the servient estate that does not unreasonably interfere with enjoyment of the servitude." (Citations omitted; internal quotation marks omitted.) *Zirinsky* v. *Carnegie Hill Capital Asset Management, LLC*, supra, 139 Conn. App. 713.

We begin our analysis by identifying the plaintiffs' rights under the easement. Section 12.2 of the declaration provides in relevant part: "(i) A perpetual right and

easement is granted to Unit No. 1 and to the Association to pass and repass over those portions of Unit No. 2 shown as 'Easement A' on the Survey including all walkways, drives, roads and parking areas shown on the Survey, for the purposes of: (a) accessing the building and Improvements now or hereafter located upon Unit No. 1; (b) accessing the recycling and refuse area located on Unit No. 2; and (c) accessing eighteen (18) parking spaces located within Unit No. 2 in the area shown on the Survey, and parking vehicles within said parking spaces ('Parking Area'). The easement granted herein for the benefit of Unit No. 1 shall be shared with others to whom the Owner of Unit No. 2 has granted, or shall hereafter grant, rights to enter and pass over and upon Unit No. 2 . . . ."[8] The easement thus sets forth the right to pass and repass over the easement for three particular purposes. See *Zirinsky* v. *Carnegie Hill Capital Asset Management, LLC*, supra, 139 Conn. App. 716–17 ("an easement generally authorizes limited uses of the burdened property for a particular purpose" [emphasis omitted; internal quotation marks omitted]). Those purposes include access to (1) the building and

[8] Section 12.2 of the declaration further provides: "[T]he Owner of Unit No. 1 shall have the right ('Parking Easement') to access and park vehicles within the eighteen (18) parking spaces on an exclusive basis located within the area on Unit No. 2 shown as 'Easement A' on the Survey and numbered as parking spaces one (1) to eighteen (18). Subject to the provisions of subparagraph (ii) of this Section 12.2, the Owner of Unit No. 2, in order to commence construction activities on Unit No. 2, shall have the right, from time to time, to relocate the eighteen (18) parking spaces within the Perimeter Boundaries of Unit No. 2, provided further that, simultaneously upon any such relocation, the Owner of Unit No. 2 shall provide the Owner of Unit No. 1 with any additional access rights over and upon Unit No. 2 as shall be reasonably necessary to access such relocated parking spaces. All costs and expenses incurred by the Owner of Unit No. 2 in operating, maintaining, repairing, and replacing (i) the Improvements on Unit No. 2 used to operate as a common parking area; and (ii) the recycling and refuse area located upon Unit No. 2 or upon any property adjacent to Unit No. 2 (whether owned by Declarant or an affiliate of Declarant) shall be the sole obligation of Unit No. 2."

improvements on unit 1, (2) the recycling and refuse area on unit 2, and (3) eighteen parking spaces in the parking garage.

On appeal, the plaintiffs claim that the construction of the service access structure interferes with the first two rights set forth in the easement—accessing the building and improvements on unit 1 and accessing the recycling and refuse area on unit 2. Specifically, the plaintiffs claim that, as a result of the service access structure, large trucks are prevented from entering the area fully, there may be traffic congestion if tenants are moving into the apartments in unit 2 at the same time deliveries are being made to the other units, and hand trucks must be used to remove refuse from the area.

Despite the plaintiffs' contention to the contrary, the trial court concluded that the construction of the service access structure does not interfere with or impair their rights under the easement. The claim that there *may be* congestion if a certain number of vehicles are present in the area at once is mere conjecture, especially given that the plaintiffs have yet to occupy unit 1. Additionally, the evidence admitted at trial established that the plaintiffs still will be able to access the recycling and refuse area, as the other units currently do without issue. Thus, the only remaining argument is that the service access structure unreasonably interferes with the plaintiffs' use and enjoyment of the easement because large vehicles, such as box trucks and tractor trailer trucks, can make it no closer than approximately 100 feet of unit 1.[9]

[9] As the court noted in its memorandum of decision: "There is no question that the service access building on the [easement] area restricts the plaintiffs' use of that area to an extent, but the plaintiffs must show by a preponderance of the evidence, that their claim to use of the 'entirety' of the [easement] area for all types of vehicles is a reasonable use of their easement rights and as 'little burdensome' to the defendant 'as the nature of the easement and [its] purpose will permit.' *Stefanoni* v. *Duncan*, supra, 282 Conn. 701.

As an initial matter, we note that nothing in the language of the declaration provides for full and unlimited access by large vehicles. The plaintiffs' attorney conceded at oral argument before this court that the plaintiffs intended for the easement to permit access for large vehicles but that it was never discussed with the defendant.[10] Additionally, nothing in the language of the declaration prohibits the construction of permanent structures within the easement area.[11] Cf. *Avery* v. *Medina*, supra, 151 Conn. App. 442 (easement language placed restriction on permanent structures); *Zirinsky* v. *Carnegie Hill Capital Asset Management, LLC*, supra, 139 Conn. App. 716 (easement language explicitly stated that "no construction of any permanent structure may be erected on the [e]asement [p]roperty" [internal quotation marks omitted]).

More importantly, as the court concluded and the record supports, the plaintiffs still are able to access their unit and make improvements, as they are entitled to do under the easement. The court noted in its memorandum of decision that, even with the structure, three means of access to the rear of the plaintiffs' unit remain—a ten foot wide passage, a seven foot wide sidewalk, and a loading area under the Summer House. Evidence presented at trial established that large trucks make deliveries to the other units with which the plaintiffs share the easement rights without issue. These

They must also prove by that standard that they are not receiving the benefits assured by [§] 12.2 of the [d]eclaration."

[10] The plaintiffs argue that the language "pass and repass" in the easement requires pass and repass of vehicles of *all sizes*. At oral argument before this court, the plaintiffs conceded that there was no discussion between the parties regarding vehicular access to the easement area and clarified that it was the plaintiffs who intended that the area include vehicular access.

[11] We note that the easement was drafted jointly by the parties' attorneys. If the plaintiffs wanted to include language that permitted access by vehicles of all sizes, or that prohibited the construction of any permanent structures, they could have proposed that such language be included. They did not.

trucks can get as close as 100 feet to the building, and then deliveries are made via hand trucks. The court also noted that "vehicles sufficient to allow service of the HVAC equipment on the roof of the [u]nit 1 building and to access other exterior building repairs could [occur]" even with the existence of the structure.

The plaintiffs have not demonstrated that, in order to make reasonable use and enjoyment of their easement rights, large trucks must be able to get directly to the rear door of their unit. See *Zhang* v. *Omnipoint Communications Enterprises, Inc.*, 272 Conn. 627, 637, 866 A.2d 588 (2005) ("the beneficiary of an easement [may] make any use of the servient estate that is *reasonably necessary* for the convenient enjoyment of the servitude for its intended purpose" [emphasis added]). The plaintiffs are not prevented from accessing their unit and making improvements to it, or accessing the recycling and refuse area. The plaintiffs have failed to establish that the defendant's construction of the service access structure impairs their reasonable use of the easement, or that it otherwise interferes with their easement rights. See *Kelly* v. *Ivler*, 187 Conn. 31, 48–49, 450 A.2d 817 (1982) ("[T]he sole purpose of [the] easement was to provide the owners of Lots 1 and 2 with a means by which they could walk to the beach. We cannot say, after viewing the photographs included as exhibits and in light of the use of the easement, that the fence materially or substantially interferes with pedestrian passage over the easement.").[12] We are guided further by the

[12] We note that the plaintiffs were aware of the construction of the structure well before they complained of it to the defendant. In March, 2013, the plaintiffs and their counsel received information of the planned location for the service access structure. In September, 2013, the plaintiffs suggested an alternative plan, which the defendant rejected. The plaintiffs did not object further during the two year period before the construction of the structure commenced. In December, 2015, after construction had commenced, the plaintiffs contacted the defendant and demanded that it cease construction.

principle that "[t]he use of an easement must be reasonable and as little burdensome to the servient estate as the nature of the easement and the purpose will permit." (Internal quotation marks omitted.) *Stefanoni* v. *Duncan*, supra, 282 Conn. 701. On the basis of the foregoing, we cannot conclude that the court erred in concluding that the structure did not materially and substantially interfere with the plaintiffs' use and enjoyment of the easement.

II

The plaintiffs next claim that the court's decision has given the defendant the "unilateral right to determine the method, timing, and location by which the plaintiffs . . . might use the easement area." In support of their claim, the plaintiffs cite to the following language from the court's memorandum of decision: "The court does not agree with the plaintiffs' contention that the whole of the [easement] area must be available to allow access to [u]nit 1. This position does not comport with the stricture of *Stefanoni* v. *Duncan*, [supra, 282 Conn. 699], that the use of an easement [by the dominant estate] be reasonable and as little burdensome [to the servient estate] as possible." The plaintiffs argue that the court "adopted the defendant's unilateral determination of what was reasonable vehicular access to unit 1" and, as a result, "modified the plaintiffs' right and easement as to its spatial parameters . . . ."[13] We disagree.

[13] The plaintiffs also argue that the defendant should have consulted with them prior to construction because it did not have the unilateral right to determine the scope of the easement. We note, however, that the defendant did inform the plaintiffs of the construction plans in 2013—two years prior to construction commencing. See footnote 12 of this opinion. Although the plaintiffs proposed an alternative plan at that time, which the defendant rejected, the plaintiff failed to take further action to contest the construction or to involve themselves in the planning, until construction commenced in 2015. See id. Thus, to the extent that the plaintiffs suggest that the defendant acted unilaterally without their knowledge or consent, we reject that argument.

"The owner of land over which an easement has been granted has, by law, all the rights and benefits of ownership consistent with the existence of the easement. . . . Of necessity, the interests of the owner of the easement often conflict with the interests of the owner of the burdened estate. By law, however, each of the parties owes certain duties to the other." (Citations omitted; internal quotation marks omitted.) *Kelly* v. *Ivler*, supra, 187 Conn. 48. "The use of an easement must be reasonable and as little burdensome to the servient estate as the nature of the easement and the purpose will permit. . . . The determination of [the] reasonableness [of the use of an easement] is for the trier of fact . . . ." (Citation omitted; internal quotation marks omitted.) *Stefanoni* v. *Duncan*, supra, 282 Conn. 701. "The principles guiding our construction of land conveyance instruments, [however] are well established. The construction of a deed . . . presents a question of law which we have plenary power to resolve." (Internal quotation marks omitted.) Id., 704.

Contrary to the plaintiffs' contention on appeal, the court did not hold that the "defendant . . . had the unilateral right to determine the method, timing and location by which the plaintiffs might use the easement area." Instead, the court merely rejected the plaintiffs' claim that the entirety of the easement area must be available to them because their "position does not comport with the stricture of *Stefanoni* v. *Duncan*, [supra, 282 Conn. 699], that the use of an easement be reasonable and as little burdensome as possible." Furthermore, the plaintiffs' position ignores the fact that the easement rights must be shared with several other units—thereby negating the argument they made to the court that "the whole of the [easement] area must be available to allow access to [u]nit 1." Thus, the court correctly concluded that the plaintiffs' interpretation of their rights under the easement did not comport

with the language of the easement, which provides the plaintiffs with the right to pass and repass for the purposes of accessing their unit and the improvements thereon, the recycling and refuse area, and parking in the parking garage. We agree with the court that the plaintiffs' interpretation that the easement provides them with unlimited access is unreasonable under the clear language of the easement.

Additionally, as we conclude in part I of this opinion, the defendant did not unreasonably interfere with or impair the plaintiffs' easement rights by constructing the service access structure. See *Schwartz* v. *Murphy*, 74 Conn. App. 286, 297 n.7, 812 A.2d 87 (2002) ("[e]xcept as limited by the terms of the servitude . . . the holder of the servient estate is entitled to make any use of the servient estate that does not unreasonably interfere with enjoyment of the servitude" [internal quotation marks omitted]), cert. denied, 263 Conn. App. 908, 819 A.2d 841 (2003), cert. denied, 546 U.S. 820, 126 S. Ct. 352, 163 L. Ed. 2d 61 (2005). Therefore, it necessarily follows that the court did not modify the plaintiffs' easement rights. Accordingly, we conclude that the court properly construed the language of the easement.

The judgment is affirmed.

In this opinion the other judges concurred.

RUSSELL JORDAN ET AL. *v.*
JON D. BILLER ET AL.
(AC 40314)

Keller, Prescott and Bright, Js.

Syllabus

The plaintiffs sought to recover damages for, inter alia, trespass, in connection with an incident in which the defendants removed approximately eighty trees from the plaintiffs' property in an area of a direct sight line from the defendants' house to the water. Pursuant to a previously

executed license and view easement that had been granted to previous owners of the defendants' property, permission from the plaintiffs was required before any trees could be thinned or cut down. The defendants, who did not request permission form the plaintiff before cutting down the trees, claimed that they enjoyed the benefits of an appurtenant view easement over the plaintiffs' property, which gave them the right to cut down the trees. Following a trial to the court, the trial court rendered judgment in favor of the plaintiffs, concluding that the view easement granted to previous owners of the defendants' property was a right personal to them and did not run with the land, such that the defendants did not enjoy a view easement over the plaintiffs' property. On the defendants' appeal to this court, *held*:

1. The trial court properly determined that the view easement granted to the previous owners of the defendants' property was a right personal to them and did not run with the land; the view easement does not expressly convey rights to heirs and assigns of the grantee, which created a presumption that the easement was personal to the previous owners to which it was granted and not appurtenant to the subject property, and given that the defendants did not provide a basis to conclude that the view easement had such sufficient value to demonstrate that it was intended to run with the land, as it was not shown that the view easement enhanced the value of the defendants' property by adding any monetary value, that there was a lack of historical usage of the easement, and that the intent of the parties expressed in the language of a bond for deed and license and view easement evidenced only a personal right instead of an appurtenant easement that was intended to run with the land, the defendants did not overcome the presumption that the view easement was not appurtenant.
2. Because the defendants' claim that the trial court erred in awarding the plaintiffs damages was predicated on their claim that they enjoyed the rights to the view easement, and because this court determined that the view easement was not appurtenant, the defendants' claim failed; moreover, even if the defendants enjoyed the rights of an easement appurtenant, they needed to obtain the plaintiffs' permission before cutting down or trimming any trees, which they failed to do, and, thus, their failure to obtain such permission provided further support for the court's award of damages.

Argued May 16—officially released September 18, 2018

Procedural History

Action to recover damages for, inter alia, trespass, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the court, *Brazzel-Massaro, J.*, granted the plaintiffs' motion to transfer to the judicial district of Middlesex; thereafter, the court,

Aurigemma, *J.*, granted the defendants' motion for nonsuit for failure to plead; subsequently, the court, *Aurigemma*, *J.*, set aside the entry of nonsuit; thereafter, the defendants filed a counterclaim for, inter alia, injunctive relief; subsequently, the matter was tried to the court, *Aurigemma*, *J.*; judgment for the plaintiffs, from which the defendants appealed to this court; thereafter, the court, *Aurigemma*, *J.*, denied the plaintiffs' motion for reconsideration as to damages, and the plaintiffs cross appealed to this court; subsequently, the plaintiffs withdrew their cross appeal. *Affirmed*.

Karen L. Dowd, with whom were *Brendon P. Levesque* and, on the brief, *Joseph Musco*, for the appellants (defendants).

David S. Doyle, for the appellees (plaintiffs).

Opinion

KELLER, J. The defendants, Jon and Jacqueline Biller, appeal from the judgment of the trial court in favor of the plaintiffs, Russell Jordan and Lorraine Jorsey. The defendants claim that the court improperly determined that a view easement granted to previous owners of their property was not appurtenant to their land. The defendants also claim that the court erred in awarding the plaintiffs damages. We affirm the judgment of the trial court.

The following facts, as found by the court, are relevant to our resolution of the defendants' appeal. The plaintiffs' property, on the bank of the Salmon River, is located at 2 Cove Road, East Haddam. The defendants are the owners of 6 Cove Road, which abuts the plaintiffs' property.

In its memorandum of decision, the court stated: "The 2 Cove Road property was part of a 101 acre parcel of land . . . owned by Paul and Mary Campbell . . . .

"[Paul and Mary Campbell] lived in a ranch house at 6 Cove Road on the 101 acre parcel of property. In 1986, Paul and Mary Campbell sold the house [along] with [eighty-nine] acres of that property to Damon and Brian Navarro, who were real estate developers." The Campbells retained 2 Cove Road, which was the remainder of their original 101 acre property, located along the Salmon River. The court further found: "During the negotiations to purchase the property from the Campbells, Damon and Brian Navarro asked the Campbells to grant them a view easement over [2 Cove Road to benefit] 6 Cove Road. Richard Shea, Jr., the Navarros' counsel, requested language in the purchase and sale contract for the property, which provided that the view easement would run with the property and be binding upon the [Campbells' (sellers')] heirs, successors, and assigns. The Campbells refused to grant a view easement which ran with the property, or bound their successors or assigns. The sales contract, or bond for deed, dated June 23, 1986, stated: 'This right is personal to the buyers and the spouses of the buyers.'

"The Campbells conveyed the property via warranty deed to Damon and Brian Navarro on September 25, 1986. At the same time the parties executed a document [titled] License and View Easement, which provides, in pertinent part:

" 'This agreement is made and entered into [on September 25, 1986], by and between Paul J. Campbell and Mary E. Campbell, both of the town of Punta Gorda . . . Florida, hereinafter referred to as "Sellers," or "Owners" and Damon Navarro, of the town of Marlborough . . . Connecticut, and Brian Navarro, of the town of Hartford . . . Connecticut, hereinafter referred to as the "Buyers" or "Licensees."

" '2. View Easement: Sellers also hereby grant to the Buyers the right to thin and trim the trees on the land

retained by the Sellers lying west of the land purchased by the Buyers to permit a view of Salmon Cove from the ranch house on the land purchased by the Buyers. The area in which the Buyers shall have such right is on that portion of [the] Sellers' retained land which lies between the extension westerly of the northerly and southerly boundary lines of the meadow as the same is now constituted on the land purchased by the Buyers, which meadow lies to the west of said ranch house and is approximately [250] feet in width from its northerly to its southerly boundary lines. The Buyers hereby agree to bear the total cost of such tree trimming and tree removal, to perform or have performed the work in a good and workmanlike manner, and to remove or have removed any wood resulting from the thinning and/or trimming from the Sellers' land immediately after the said thinning and/or trimming. *It is strictly agreed and understood, however, that no thinning and/or trimming shall be performed without the agreement of the Sellers, which agreement shall not be unreasonably withheld.*' " (Emphasis in original.) This license and view easement was recorded in the East Haddam land records in Volume 219, Page 201.[1]

The court stated further: "Damon and Brian Navarro subdivided the property [that they purchased from the Campbells] as part of a subdivision known as Scoville Landing. In 1989, Damon and Brian Navarro quitclaimed a thirty acre portion of the property identified as Lot 19 of Scoville Landing to Anne Navarro. In 1992, Anne Navarro sold that property to Rolf H. Olson and Sioux S. Olson by a warranty deed.[2] . . . [T]he warranty deed

[1] The bond for deed contemplated that the Campbells would provide the Navarros with a warranty deed, but no warranty deed for the transaction is in evidence.

[2] In the warranty deed granted to the Olsons, although the property description attached as Schedule A refers to a utility company easement, an emergency access easement, and a well easement, there is no mention of the view easement.

contained the property description which referred to the property as 6 Cove Road and included the following language after the property description: 'Together with any and all assignable rights of Grantor to a license and view easement from Paul J. Campbell and Mary E. Campbell to Damon Navarro and Brian Navarro dated September 25, 1986, and recorded in the East Haddam land records in Volume 219, Page 201.'

"[The plaintiffs inherited the property retained by the Campbells, 2 Cove Road] via a quitclaim deed from the estate of Mary Campbell, their mother. That deed is dated December 22, 2010, and recorded at Volume 879, Page 85 of the East Haddam land records . . . .

* * *

"In 2012, Sioux [S.] Olson sold the 6 Cove Road property to the defendants . . . via warranty deed, dated August 1, 2012. . . . [T]he warranty deed contained the following language after the property description: 'Together with any and all assignable rights of Anne W. Navarro to a license and view easement from Paul J. Campbell and Mary E. Campbell to Damon Navarro and Brian Navarro [dated] September 25, 1986, and recorded in Volume 219 at Page 201 of the East Haddam land records.' . . .

"There was no evidence that at any time between 1986 and the date on which the [defendants] purchased the 6 Cove Road property that any other owner of that property had thinned or cut any trees on the 2 Cove Road property, now owned by the plaintiffs. . . .

"In the late fall of 2012, the defendants removed approximately [eighty] trees from the plaintiffs' property in the area of the direct sight line from the house at 6 Cove Road to . . . Salmon Cove. Approximately [fifty] of the felled trees had trunk diameters of more than [six] inches. The area from which the trees were

removed is approximately 100 feet by 225 feet. Prior to the removal of the trees, the plaintiffs' house was surrounded by [seventy to eighty] year old forest." After the defendants cut down the trees, the plaintiffs no longer had the same levels of privacy they previously enjoyed.

"The defendants did not request permission from the plaintiffs prior to cutting down the trees. Jon Biller . . . had not even read the license and view easement prior to cutting down all the trees . . . . He . . . did not realize that [the] document required the person cutting down trees to obtain permission before doing so. [Because] the plaintiffs did not reside at the 2 Cove Road property, they were not aware that the trees had been cut down until several months later." (Footnote added.) The defendants' trimming diminished the value of the plaintiffs' property by reducing a portion of the forest into the "botanical equivalent of a bomb site."

On October 31, 2013, the plaintiffs commenced the underlying action against the defendants. In the four count operative complaint, the plaintiffs alleged that they were entitled to damages because "the defendants unlawfully came upon the plaintiffs' property without their permission or knowledge and cut down and/or damaged a substantial number of trees and/or shrubbery." The plaintiffs' complaint contained counts sounding in temporary trespass, negligence, and violations of General Statutes §§ 52-560 and 25-102a through 25-102g.[3] On January 19, 2016, the defendants answered, denying the plaintiffs' allegations, and raising several special defenses and counterclaims. The gist of the defendants' special defenses and counterclaims was that they enjoyed the benefits of an appurtenant view

[3] The court concluded that the plaintiffs abandoned their statutory causes of action because "[t]he plaintiffs have specifically stated that they are not proceeding under . . . § 52-560" and "[t]hey have not addressed [their §§ 25-102a through 25-102g claims] in their posttrial memorandum."

easement over the plaintiffs' property and this afforded them the right to cut down the trees.

The matter was tried to the court, and, on March 24, 2017, the court issued a memorandum of decision. The court found in favor of the plaintiffs on their trespass and negligence counts. The court also found in favor of the plaintiffs on the defendants' counterclaim on the ground that the view easement granted to the Navarros "was a right personal to them," did not run with the land, and that the defendants do not enjoy a view easement over the plaintiffs' property. The court awarded the plaintiffs $446,660 in damages.[4] This appeal followed.

I

The defendants claim that the court improperly determined that the view easement was not appurtenant to their land. The following additional facts are relevant to this claim. In 1986, the Campbells and Navarros signed two documents, a bond for deed and the license and view easement. The license and view easement was recorded in the East Haddam land records at volume 219, page 201. The bond for deed, by its terms, was not to be recorded. In addition to the previously stated provision pertaining to the view easement, the license and view easement contained a section titled "License." This section provides that the "Sellers as Licensors hereby grant to the Buyers as Licensees a pedestrian right of way to Salmon Cove over land retained by the Sellers lying west of the land purchased by the Buyers. . . . Said license may be exercised only by the Buyers

[4] The plaintiffs' expert, Michael DiFranco, an arborist, testified that the cost to replace the trees would be at least $396,660 and estimated that it would cost $50,000 to clean up the debris left behind after the tree work. The court did not base its award on the plaintiffs' evidence that the tree cutting diminished the value of their property.

and members of their families who reside with the Buyers and by the invited guests of the Buyers when accompanied by the Buyers or said members of the Buyers' families."

The unrecorded bond for deed also contains a section titled "View Easement." This section provides: "The parties hereto agree that the Buyers shall be granted the right to thin and trim the trees on said other land of the Sellers adjacent to and westerly of the Property. The area in which the Buyers shall have such right is on that portion of [Sellers'] said property which is between the extension westerly of the northerly and southerly boundary lines of the meadow as the same is now constituted on the Property, which meadow is approximately two hundred fifty (250) feet in width from its northerly to its southerly boundary lines. *This right is personal to the Buyers and the spouses of the Buyers.* The Buyers shall bear the total cost of such tree trimming and tree removal, shall perform or have such work performed in a good and workman like manner and shall immediately remove any wood resulting therefrom from [Sellers'] said land." (Emphasis added.)

The recorded license and view easement contains the following introductory clause: "Whereas, the Sellers and the Buyers had agreed in the [bond for deed] that the Sellers would grant to the Buyers at the time of transfer of title both a pedestrian right of way and a view easement upon the terms and conditions hereinafter more particularly set forth."

In addition, the plaintiffs presented the testimony of Shea, the Navarros' attorney during the negotiations to purchase the property from the Campbells. Shea testified that he sent a proposed revision of the bond for deed to the representative of the Campbells. In this proposal, which was admitted into evidence, Shea suggested amending the portion of the bond for deed pertaining to the view easement by removing the clause

that stated the view easement would be personal to the buyers, the Navarros, and adding: "This right shall run with the Property and shall be binding upon the Sellers, their heirs, successors and assigns . . . ." According to Shea, the Campbells rejected this change.

The defendants make two principal arguments in support of their proposition that the view easement is appurtenant. First, the defendants assert that the value of the view easement is so great that it evinces an intent to run with the land. Specifically, the defendants state that "prior owners, when advertising [6 Cove Road] for sale, stressed that it had water views demonstrating the value of such a view to the property. . . . [T]he [defendants] testified the view easement was critical to their purchase of the home. . . . [T]he house itself demonstrates the value of the view easement to the land, not just to the original owners. The ranch house on 6 Cove Road is situated on a slope overlooking the cove and is designed in a U shape to maximize the view." (Citations omitted.) Secondly, the defendants argue that the language in the license and view easement executed by the Campbells and the Navarros evinces that the view easement was meant to be appurtenant. They assert that the phrase the "[s]ellers . . . grant to the Buyers the right to thin and trim the trees on the land retained by the Sellers . . . to permit a view of Salmon Cove from the ranch house on the land purchased by the Buyers," when compared to a clause in the pedestrian right-of-way that limits the use of it to "only by the Buyers and members of their families," supports the conclusion that the view easement is appurtenant because the pedestrian right-of-way contains limiting language and the view easement does not.

We now turn to our standard of review. "Although in most contexts the issue of intent is a factual question

on which our scope of review is limited . . . the determination of the intent behind language in a deed, considered in the light of all the surrounding circumstances, presents a question of law on which our scope of review is plenary." (Internal quotation marks omitted.) *Deane* v. *Kahn*, 317 Conn. 157, 166, 116 A.3d 259 (2015).

The following legal principles guide our determination of whether an easement is personal or appurtenant. "All easements, whether express or implied, are classified as either easements appurtenant or easements in gross. In an easement appurtenant, the easement belongs to and benefits the dominant estate, and burdens the servient estate." *Powers* v. *Grenier Construction, Inc.*, 10 Conn. App. 556, 559, 524 A.2d 667 (1987). "An easement in gross belongs to the owner of it independently of his ownership or possession of any specific land. Therefore, in contrast to an easement appurtenant, its ownership may be described as being personal to the owner of it." (Internal quotation marks omitted.) *Saunders Point Assn., Inc.* v. *Cannon*, 177 Conn. 413, 415, 418 A.2d 70 (1979).

"It is well settled that [i]f the easement makes no mention of the heirs and assigns of the grantee, a presumption is created that the intent of the parties was that merely a personal right-of-way was reserved. This presumption, however, is not conclusive. A reservation will be interpreted as creating a permanent easement if, from all the surrounding circumstances, it appears that that was the intention of the parties. . . . One circumstance which must be given great weight in the ascertainment of the intent of the parties is . . . [if the easement] is of value to the property to which it is appurtenant and will continue to be of value [to] whoever may own the property, that is strong evidence that the parties intended a permanent easement. . . . Also significant is whether the owner of the servient estate recognized the right of the subsequent owners of the

dominant estate to exercise the easement. . . . Finally, we will look to the actual language of the reservation clause itself." (Citations omitted; internal quotation marks omitted.) *Deane* v. *Kahn*, supra, 317 Conn. 171–72.

"The burden of proof rests upon [the party claiming appurtenance] to show the existence of all facts necessary to prove the right-of-way was created as an appurtenance, although our review of the trial court's conclusion as to whether the parties to a conveyance intended it to be appurtenant is plenary." (Internal quotation marks omitted.) Id., 172.

The defendants concede that the view easement does not expressly convey rights to heirs and assigns of the grantee. The absence of an express grant creates a presumption that the easement was personal to the Navarros and not appurtenant to 6 Cove Road. The question is whether the defendants can overcome that presumption based on the value of the easement to the property, historical usage of the property, and the language of the view easement executed by the Campbells and the Navarros.

The defendants argue that the view easement has significant value, suggesting that it was intended to be appurtenant. When the easement "will continue to be of value [to] whoever may own the property, that is strong evidence that the parties intended a permanent easement." (Internal quotation marks omitted.) *Leabo* v. *Leninski*, 182 Conn. 611, 614–15, 438 A.2d 1153 (1981); see also *Irving* v. *Firehouse Associates, LLC*, 95 Conn. App. 713, 729–30, 898 A.2d 270 (value of right-of-way great enough to support conclusion easement ran with land when property would be landlocked without it), cert. denied, 280 Conn. 903, 907 A.2d 90 (2006). Although our case law does not precisely define what constitutes value for the purpose of determining

whether an easement is appurtenant or in gross, the claimed easement must be more than a convenience to the owner of the dominant estate. See *Stiefel* v. *Lindemann*, 33 Conn. App. 799, 808–809, 638 A.2d 642 (right-of-way to access service entrance was convenience when other means of access to property available), cert. denied, 229 Conn. 914, 642 A.2d 1211 (1994). In the present case, the only evidence that the defendants provided with respect to value to the property is their own testimony that they deemed the view easement valuable because sightlines to the river factored into their decision to purchase the 6 Cove Road property. There was no evidence as to any added monetary value due to having a view of the river. In addition, there was photographic evidence that, even after cutting down the trees, the defendants still could only view a narrow sliver of the cove from their home. Thus, we conclude that the defendants have not provided a basis to conclude that the view easement has such sufficient value to demonstrate that it was intended to run with the land.

An easement also can be found to be appurtenant when "the *owner* of the estate to be burdened recognized that subsequent *owners* of the estate to be benefitted would have a right to exercise the easement." (Emphasis in original.) *Stiefel* v. *Lindemann*, supra, 33 Conn. App. 809. In the present case, this factor supports the conclusion that the view easement is not appurtenant because neither the plaintiffs nor the Campbells ever recognized that the previous owners of the defendants' property could thin trees to take advantage of the view easement; nor was there any evidence that the previous owners of 6 Cove Road requested or attempted to "ever cut or [thin] a single tree."

Lastly, we turn to the language of the license and view easement to examine whether the easement was meant to run with the land. "The meaning and effect of the reservation are to be determined, not by the

actual intent of the parties, but by the intent expressed in the deed, considering all its relevant provisions and reading it in the light of the surrounding circumstances . . . .'' *Taylor* v. *Dennehy*, 136 Conn. 398, 402, 71 A.2d 596 (1950). As previously stated, the defendants argue that the language in the section setting forth the ''view easement'' supports the conclusion that the view easement is appurtenant because it lacks a clause limiting the right to the Navarros, unlike the section granting the license to the pedestrian right-of-way. We are not persuaded.

The evidence pertaining to the negotiations that occurred between the Campbells and the Navarros is helpful in interpreting the intent expressed in the view easement. Specifically, the relevant evidence includes two documents, the unrecorded bond for deed and Shea's unaccepted proposed revisions to that deed,[5] and Shea's testimony. The unrecorded bond for deed contains a provision that the view easement is a right

[5] The defendants claim that the unrecorded bond for deed and the license and view easement should have been precluded because they are parol evidence. This claim was preserved because the defendants filed a motion in limine to preclude these documents from being admitted into evidence on the ground that they were inadmissible parol evidence and renewed this objection in a timely manner at trial. Nevertheless, in accordance with Practice Book § 67-4 (d), claims on appeal must be divided into separate parts and each point must include a separate brief statement of the appropriate standard of review in order to be adequately briefed. As the defendants have not provided this, we are not required to review this claim. See *Carmichael* v. *Stonkus*, 133 Conn. App. 302, 308–309, 34 A.3d 1026, cert. denied, 304 Conn. 911, 39 A.3d 1121 (2012).

Regardless, ''[a]lthough the parol evidence rule prohibits the introduction of evidence that varies or contradicts an exclusive written agreement . . . that rule does not bar the use of extrinsic evidence to aid in the interpretation of contractual language.'' (Citation omitted; internal quotation marks omitted.) *Hare* v. *McClellan*, 234 Conn. 581, 596, 662 A.2d 1242 (1995). As previously stated, the license and view easement is ambiguous because it does not expressly state whether the right is appurtenant or in gross. Additionally, interpretation of an easement requires reading it in light of the surrounding circumstances. Accordingly, these documents were properly admitted into evidence.

"personal to the Buyers and the spouses of the Buyers." Shea's proposed revisions to that document reveal that the Navarros sought an appurtenant easement, but the Campbells refused to grant it.

Viewing the license and view easement in light of the negotiations that occurred between the Campbells and Navarros, we conclude that the language of the easement granted the Navarros only a personal right. First, the license and view easement acknowledges that the bond for deed reflects the parties' agreement regarding the granting of both the pedestrian right-of-way and the view easement. Second, the intent expressed in the view easement, which grants "the Buyers the right," is that the benefit was not intended to run with the land. This is well supported by the evidence that the term "Buyers" is defined as and limited to Brian Navarro and Damon Navarro in the first paragraph of the license and view easement, that the parties agreed the easement was personal in the unrecorded bond for deed, and that Shea testified that the Campbells rejected an appurtenant easement. As a result, by defining the term "Buyers" as Brian Navarro and Damon Navarro, and acknowledging the nature of the parties' agreement in the bond for deed, the view easement does contain the sufficient limiting language that the defendants argue is lacking.

On the basis that the view easement has not been proven to enhance the value of the defendants' property, the lack of historical usage of the easement, and the intent of the parties expressed in the bond for deed and the license and view easement, we conclude that the defendants do not enjoy the rights of an appurtenant easement. The defendants cannot overcome the presumption that the view easement is not appurtenant. It was an easement in gross granted only to the Navarros. Therefore, their claim must fail.

II

The defendants' second claim is that the court erred in awarding the plaintiffs damages. Specifically, the defendants argue that "[i]f this [c]ourt finds that the defendants have rights under the view easement, then any award of damages must be reversed." The defendants do not take issue with the method the court used to calculate damages. Instead the defendants' claim is predicated on the defendants enjoying the rights to the view easement, and because we have decided that the view easement was not appurtenant, we conclude that this claim warrants no further discussion. Even if we were to conclude that the defendants enjoy the rights of an easement appurtenant, in accordance with the terms of the view easement, the defendants needed to obtain the plaintiffs' permission before cutting down or trimming any trees. Their undisputed failure to obtain such permission from the plaintiffs provides further support for the court's damages award.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* IJAHMON WALCOTT (AC 40252)

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

Syllabus

The defendant, who had been on probation in connection with his conviction of the crimes of assault in the first degree and carrying a pistol without a permit, appealed to this court from the judgment of the trial court revoking his probation and committing him to the custody of the Commissioner of Correction. The defendant's probation was revoked after police found a revolver and narcotics in a closet in a bedroom where the defendant stored his personal belongings, which was located in a residence that the defendant shared with others, including K. The trial court found that the state had established by a preponderance of the evidence that the defendant had violated certain special conditions of

his probation and the standard condition of his probation that he not violate any criminal law of this state. Specifically, the court found that the defendant had committed the crimes of possession of a controlled substance and criminal possession of a revolver while he was on probation. *Held* that the defendant could not prevail on his unpreserved claim that there was insufficient evidence to support the trial court's finding that he constructively possessed the narcotics and the revolver and, therefore, that the court abused its discretion by considering that unproven fact during the dispositional stage of the revocation proceeding: there was sufficient evidence to support that court's finding, by a preponderance of the evidence, that the defendant constructively possessed the revolver and narcotics, as the evidence presented, including testimony from a police officer that he and another officer observed the defendant use a key to lock the door of his residence after exiting that place in the morning before the police search of the premises, the defendant's admission that he had been storing his personal belongings in the bedroom where the police found the revolver and narcotics for approximately two months, and K's statement to the police that although his DNA may be found on the revolver and narcotics, those items belonged to the defendant, supported the court's reasonable inference that the defendant had a considerable presence in the premises, was aware of the presence and nature of the narcotics and the revolver, and exercised dominion and control over those items by placing them in the closet in the bedroom where he stored his personal belongings; accordingly, the trial court having properly found that the defendant constructively possessed the revolver and narcotics, the defendant's claim that the court abused its discretion by considering that fact during the dispositional phase of the proceedings necessarily failed.

Argued April 10—officially released September 18, 2018

Procedural History

Substitute information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Hon. John F. Mulcahy, Jr.*, judge trial referee; judgment revoking the defendant's probation, from which the defendant appealed to this court. *Affirmed.*

Dana H. Sanetti, assistant public defender, for the appellant (defendant).

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's

attorney, and *Richard J. Rubino*, senior assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Ijahmon Walcott, appeals from the judgment of the trial court revoking his probation and imposing a sentence of thirteen years incarceration, execution suspended after four years, with three years of probation. On appeal, the defendant claims that the court abused its discretion by relying on unproven facts when it revoked his probation and sentenced him during the dispositional phase of the violation of probation proceeding. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. On September 9, 2005, the defendant pleaded guilty to one count of assault in the first degree, in violation of General Statutes § 53a-59 (a) (3), and one count of carrying a pistol without a permit, in violation of General Statutes (Rev. to 2003) § 29-35 (a). The two convictions arose from an incident that occurred on November 10, 2003, when the defendant was fifteen years old and shot a woman in the chest. The court imposed a total effective sentence of twenty-five years incarceration, suspended after twelve years, followed by five years of probation. In addition to the standard conditions of probation, the sentencing court imposed special conditions of probation. The defendant was released from incarceration on October 20, 2014, and his probationary period commenced.

The standard and special conditions of his probation required, inter alia, the defendant to submit to random urine testing and mental health evaluation and/or treatment, not possess any drugs and/or narcotics, and "not violate any criminal law of the United States, this state or any other state or territory." On October 23, 2014,

the defendant signed the conditions of probation form, acknowledging that he read the form, and that he understood the conditions and would abide by them.

On December 7, 2015, the defendant, who was still on probation, was arrested and subsequently charged with, inter alia, criminal possession of a revolver in violation of General Statutes § 53a-217c, and possession of a controlled substance in violation of General Statutes § 21a-279 (a) (1). Thereafter, on March 31, 2016, he was charged with violating the conditions of his probation in violation of General Statutes § 53a-32.

The record reveals that the following events led to the defendant's arrest on December 7, 2015. Officer Robert Fogg, a member of the shooting task force for the Hartford Police Department, testified that he was conducting surveillance in the vicinity of 80 Cabot Street in Hartford on December 7, 2015. He was accompanied by Detective Brian Connaughton from the Windsor Police Department. They were dressed in plain clothes and sat in an unmarked truck preparing to execute an arrest warrant for Antonio Keane and a search warrant for 80 Cabot Street. Although the defendant was not the target of the search warrant, Fogg and Connaughton observed the defendant leave through the front door of 80 Cabot Street and lock the door behind him with a key. Fogg and Connaughton drove closer to the defendant, determined that he was not Keane, and continued to observe 80 Cabot Street.

The defendant walked past the officers' truck multiple times, and Fogg and Connaughton, believing that the defendant had identified them as police officers, called upon other officers to continue the surveillance of 80 Cabot Street before they left the area. Later that day, officers saw Keane leaving 80 Cabot Street, and took him into custody while other members of the

shooting task force secured the house. Fogg and Connaughton returned to 80 Cabot Street with the search warrant, and they joined the other officers. Keane did not have a key on his person, and the officers had to break down the door in order to execute the search warrant.

The officers searched the apartment that is located on the second and third floors, which has two bedrooms on each floor. In one of the bedrooms on the second floor, which Fogg identified as Keane's bedroom, the officers found plastic bags next to a glass container, which contained a razor blade and a digital scale; there was a white residue on the razor blade, scale, and container. In the drawer of a nightstand in Keane's bedroom, the officers found a plate containing a white, rock-like substance, another razor blade, and a second digital scale. Officers also found several individually packaged pieces of a white, rock-like substance. Connaughton performed a field test on the rock-like substances, and they tested positive for the presumptive presence of crack cocaine.

Fogg also testified that, in a pair of athletic shoes in a closet in one of the bedrooms on the third floor, they found a small revolver, a few bullets, and a bag containing a white, rock-like substance; the revolver was sticking out of the right shoe with the bullets resting on top of the shoe, and the white, rock-like substance was protruding from the left shoe. Connaughton performed a field test on the substance, and it tested positive for the presumptive presence of crack cocaine. Fogg further testified that officers found additional ammunition throughout that bedroom, including a loaded magazine for a firearm. In that same bedroom, among various personal items and clothing, the officers also found a letter addressed to the defendant with his address listed as 391 Shaker Road in Enfield, which, Fogg testified, is the location of a prison facility.

After completing the search of the premises, the officers exited the house and observed the defendant playing basketball on the street in front of 80 Cabot Street. The officers identified the defendant and arrested him on the basis of an unrelated warrant, but they subsequently also charged the defendant with possession of the revolver and narcotics that were found in the third floor bedroom closet at 80 Cabot Street. The defendant signed a form acknowledging that he received *Miranda*[1] warnings and waived his right to an attorney. Fogg then conducted an interview, during which the defendant stated that the clothes and personal items in the third floor bedroom at 80 Cabot Street, the same room in which the revolver and narcotics had been found, belonged to him. Although he stated that his possessions had been there for two months, he said that the revolver, ammunition, and narcotics did not belong to him. Keane, however, told the police that all of the illegal items found at 80 Cabot Street belonged to the defendant, and that the defendant had been living at 80 Cabot Street for more than one year. Keane also stated that his DNA likely would be found on the revolver, ammunition, and drugs because he had handled them in the past.

A probation revocation hearing was held over the course of two days, on September 15 and 28, 2016. On September 28, 2016, the court issued its oral decision. The court found, and the defendant does not contest on appeal, that the state had established by a preponderance of the evidence that the defendant had violated the special conditions of his probation[2] and the standard

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

[2] The court found that the defendant violated the following special conditions of his probation: receive mental health evaluation and/or treatment, as recommended by the Office of Adult Probation; do not possess any drugs and/or narcotics; and submit to random urine tests.

condition of his probation that he not violate any criminal law of this state. Specifically, the court found "by a preponderance of the evidence and on the reliable and credible evidence and the reasonable inferences to be drawn therefrom" that the defendant committed two crimes while he was on probation: possession of a controlled substance, in violation of § 21a-279 (a) (1), and criminal possession of a revolver, in violation of § 53a-217c (a).

After finding that the defendant violated conditions of his probation, the court proceeded to the dispositional phase of the proceeding. The court heard from the state and defense counsel before issuing its oral decision. The court stated in relevant part: "It's significant also that after beginning probation he violated the conditions almost immediately, almost right away, those conditions dealing with drug treatment and so on, all have been gone into on the record earlier. So, with reference to the [constructive possession] crimes, the possession of a narcotic substance and, of course, the possession of a revolver by a convicted felon, those occurred very early on in probation, during probation, roughly perhaps a little bit over a year when that particular incident occurred with the execution of the search warrant at 80 Cabot Street, and the drugs and the revolver were found. And even before that, while on probation, there was the domestic offense, as the state pointed out, and that involved, I'm told, assaultive conduct. So, right out of the state's prison and then there were these matters, negative matters, concerning his performance on probation.

* * *

"On the nonmitigating side of this is, as I alluded to, the seriousness of the possession of a revolver by a convicted felon . . . . And this court has an obligation,

a very serious obligation, balanced against rehabilitation, and a very serious obligation to undertake to effectuate the protection of society. And the possession of guns, particularly under these circumstances, in a premises which, as far as I can see from the evidence, was almost awash with drugs, illegal drugs. In any event, that's a very serious consideration and a very serious offense.

"Weighing all of those circumstances, it's my opinion that a split sentence is still appropriate. As I said, I recognize the probation officer's position, but I don't think probation should give up quite at this point with somebody this age. And I would be inclined, in imposing a split sentence, to also impose a period of probation as opposed to the special parole, a sensible suggestion also, but I just think that perhaps probation would be more appropriate at this point." The court revoked the defendant's probation and sentenced him to thirteen years incarceration, execution suspended after four years, followed by three years of probation. This appeal followed.

"[U]nder § 53a-32, a probation revocation hearing has two distinct components. . . . The trial court must first conduct an adversarial evidentiary hearing to determine whether the defendant has in fact violated a condition of probation. . . . If the trial court determines that the evidence has established a violation of a condition of probation, then it proceeds to the second component of probation revocation, the determination of whether the defendant's probationary status should be revoked. On the basis of its consideration of the whole record, the trial court may continue or revoke the sentence of probation . . . [and] . . . require the defendant to serve the sentence imposed or impose any lesser sentence. . . . In making this second determination, the trial court is vested with broad discretion. . . .

"To support a finding of probation violation, the evidence must induce a reasonable belief that it is more probable than not that the defendant has violated a condition of his or her probation. . . . In making its factual determination, the trial court is entitled to draw reasonable and logical inferences from the evidence. . . . This court may reverse the trial court's initial factual determination that a condition of probation has been violated only if we determine that such a finding was clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling. . . . A fact is more probable than not when it is supported by a fair preponderance of the evidence." (Internal quotation marks omitted.) *State* v. *Sherrod*, 157 Conn. App. 376, 381–82, 115 A.3d 1167, cert. denied, 318 Conn. 904, 122 A.3d 633 (2015).

On appeal, the defendant's sole claim is that the court abused its discretion by relying on unproven facts in sentencing him.[3] The defendant argues that there was insufficient evidence to support the court's finding that he constructively possessed the narcotics and the revolver and, therefore, that the court abused its discretion by considering that unproven fact during the dispo-

[3] We note that defense counsel appeared to agree that there was sufficient evidence to support the court's findings when, during the dispositional phase of the proceeding, he stated: "With respect to the underlying conduct, you've heard the evidence. Your Honor found by a preponderance of the evidence that he did possess those things. I would submit to Your Honor that there's *obviously evidence that's beyond a preponderance of the evidence that he constructively possessed those things.* But—and I think the state would agree that it's not the strongest case in the world against my client." (Emphasis added.)

sitional stage of the revocation proceeding.[4] We disagree.

As a preliminary matter, the defendant did not object to the court's consideration of the allegedly unproven facts, and, therefore, he requests that we review his unpreserved claim pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989).[5] The state argues that the record is inadequate for review because "it is not clear from the record whether the defendant's illegal possession of the firearm and narcotics was dispositive of the court's decision to revoke his probation and impose the sentence it ultimately [imposed], in light of its determination that the defendant also had violated the conditions of his probation in a number of other ways as well, based on the domestic assault and his failure to comply with treatment and his possession of narcotics as proven by the failed urine tests." We, however, conclude that the record is adequate for

[4] Although the defendant claims that the evidence does not support the court's finding that he constructively possessed a revolver and narcotics, he does not claim that the court improperly found that he violated his probation on this ground, likely because the finding of a probation violation was based on multiple grounds. See footnote 1 of this opinion; see also *State* v. *Fowler*, 178 Conn. App. 332, 343–44, 175 A.3d 76 (2017) ("[A] violation of any one condition of probation would suffice to serve as a basis for revoking the defendant's probation. . . . Our law does not require the state to prove that all conditions alleged were violated; it is sufficient to prove that one was violated." [Internal quotation marks omitted.]), cert. denied, 327 Conn. 999, 176 A.3d 556 (2018). Rather, he focuses on the court's reliance on this ground during the dispositional phase of the revocation hearing.

[5] Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis omitted; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40, as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).

review, and that the defendant's claim is of constitutional magnitude. See *State* v. *Fletcher*, 183 Conn. App. 1, 16, A.3d (2018) ("[w]e will review the claim under *Golding* because the record is adequate for review and the claim implicates the defendant's due process right not to be sentenced on the basis of improper factors or erroneous information"). Accordingly, we proceed to the third prong of *Golding* to determine whether a constitutional violation exists, thereby depriving the defendant of a fair trial. See footnote 4 of this opinion. We conclude that a constitutional violation does not exist.

The following legal principles are relevant to the defendant's claim. Section 21a-279 (a) (1) provides in relevant part that "[a]ny person who possesses or has under such person's control any quantity of any controlled substance . . . shall be guilty of a class A misdemeanor."

"[T]o prove illegal possession of a narcotic substance, it is necessary to establish that the defendant knew the character of the substance, knew of its presence and exercised dominion and control over it." (Internal quotation marks omitted.) *State* v. *Ellis T.*, 92 Conn. App. 247, 251, 884 A.2d 437 (2005). "Where . . . the contraband is not found on the defendant's person, the state must proceed on the alternate theory of constructive possession, that is, possession without direct physical contact. . . . Where the defendant is not in exclusive possession of the [place] where the narcotics are found, it may not be inferred that [the defendant] knew of the presence of the narcotics and had control of them, unless there are other incriminating statements or circumstances tending to buttress such an inference. . . . [T]he state had to prove that the defendant, and not some other person, possessed a substance that was of narcotic character with knowledge both of its narcotic character and the fact that he possessed it." (Emphasis

omitted; internal quotation marks omitted.) *State* v. *Diaz*, 109 Conn. App. 519, 524–25, 952 A.2d 124, cert. denied, 289 Conn. 930, 958 A.2d 161 (2008).

Section 53a-217c (a) provides in relevant part: "A person is guilty of criminal possession of a . . . revolver when such person possesses a . . . revolver . . . and (1) has been convicted of a felony . . . ."

" 'Possess,' as defined in General Statutes § 53a-3 (2), 'means to have physical possession or otherwise to exercise dominion or control over tangible property . . . .' " *State* v. *Diaz*, supra, 109 Conn. App. 525. "The essence of exercising control is not the manifestation of an act of control but instead it is the act of being in a position of control coupled with the requisite mental intent. In our criminal statutes involving possession, this control must be exercised intentionally and with knowledge of the character of the controlled object. . . . To prove that the defendant constructively possessed the [revolver], it was the state's burden to prove that he knowingly [had] the power and the intention at a given time of exercising dominion and control over [the revolver]. . . . When, as here, the doctrine of nonexclusive possession also is implicated, the state bears the burden of proving that there were incriminating statements or circumstances . . . other than the discovery of the [revolver] in the residence he shared with [others], tending to buttress the inference that he knew of the [revolver's] presence and had control over it." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 525–26.

Because the revolver and the narcotics in this case were not found on the defendant's person, it was necessary for the state to prove that he constructively possessed those items; the defendant claims that the state failed to do so. We disagree.

In its oral ruling, the court found that "all the elements of both crimes have been proven by a fair preponderance of the evidence; that is, on the credible, probative, and reliable evidence." The court also explained: "Now, both of these crimes are possessory offenses . . . . And the central issue here is constructive possession. It is my view that the credible, probative, and reliable evidence establishes by a preponderance, that is, more probable than not, that [the] defendant knowingly had constructive possession of the cocaine and the revolver and, for that matter, all of the items seized by the [police] officers executing the search warrant on that third floor of the premises."

The court noted several factors indicating that the defendant constructively possessed the revolver and narcotics, including: the officers observed the defendant leave 80 Cabot Street and lock the door behind him with a key; the revolver was "very visible" in a sneaker in the bedroom closet; the officers found a letter addressed to the defendant in the same bedroom in which the revolver and narcotics were found; and, after the defendant had been arrested, he told the officers that he had kept his belongings at 80 Cabot Street for more than two months. On the basis of that evidence, the court concluded that "the reasonable inference is that [the defendant] had control over those premises, that he did, during that period, have considerable presence in those premises. In my opinion, an inference can be drawn that that's where he was residing at that point in time. But in any event, he certainly was in an area where he had dominion and control. I think the key and the letter certainly indicate what I've just said, together with the defendant's statements to the police . . . . As I said, the gun and the drugs, the gun found in a pair of sneakers—again, we're getting into the area of personal belongings, and that's all consistent with

the defendant's statement or admission to the police . . . ."

The defendant argues that his "considerable presence" at 80 Cabot Street "does not rise to the level of dominion and control over an area, let alone over items contained within that area. . . . [T]he state did not provide sufficient evidence of a reliable nexus between the defendant and the premises, and certainly not between the defendant and the contraband." The defendant relies on several cases to support his argument. These cases, cited as relevant examples of constructive possession, however, involve appeals from criminal convictions, where the burden on the state is much higher, as it is required to prove possession beyond a reasonable doubt. See, e.g., *State* v. *Nova*, 161 Conn. App. 708, 716–18, 129 A.3d 146 (2015); *State* v. *Gainey*, 116 Conn. App. 710, 719–21, 977 A.2d 257 (2009); *State* v. *Williams*, 110 Conn. App. 778, 783–93, 956 A.2d 1176, cert. denied, 289 Conn. 957, 961 A.2d 424 (2008). By contrast, in a revocation of probation case, the state is required to prove a violation only by a preponderance of the evidence. See, e.g., *State* v. *Milner*, 130 Conn. App. 19, 35, 21 A.3d 907 (2011) ("The court could have found by a preponderance of the evidence that the defendant constructively possessed the gun. Accordingly, the court did not err by taking into consideration the defendant's constructive possession of the gun when revoking the defendant's probation . . . ."), appeal dismissed, 309 Conn. 744, 72 A.3d 1068 (2013). We, therefore, are not persuaded that the cases relied on by the defendant control or assist us in our resolution of his claim in the present case.

After applying the applicable law to the record before us, we conclude that the court's factual finding that the defendant constructively possessed the revolver and narcotics was not clearly erroneous. The evidence presented established that the defendant had a key to 80

Cabot Street, which both Fogg and Connaughton observed the defendant use to lock the door after exiting that address in the morning before the search of the premises. In addition, the defendant admitted that he had been storing his personal belongings in the third floor bedroom at 80 Cabot Street for approximately two months, and the revolver and narcotics were found in a pair of sneakers in the closet in that third floor bedroom. Moreover, Keane told the police that although his DNA may be found on the revolver and narcotics, those items belonged to the defendant. All of the aforementioned facts support the court's reasonable inference that the defendant had a considerable presence in the premises, was aware of the presence and nature of the narcotics and the revolver, and exercised dominion and control over those items by placing them in the closet in the bedroom where he stored his personal belongings. Consequently, we conclude that there was sufficient evidence to support the court's finding, by a preponderance of the evidence, that the defendant possessed a revolver and narcotics.

Because we conclude that the court properly found, by a fair preponderance of the evidence, that the defendant constructively possessed the revolver and narcotics, the defendant's claim that the court abused its discretion by considering that fact during the dispositional phase of the proceedings necessarily fails. The defendant has failed to demonstrate that a constitutional violation exists.

The judgment is affirmed.

In this opinion the other judges concurred.