CITIBANK, N.A., TRUSTEE *v.* LAURA A. STEIN ET AL. (AC 40199)

Lavine, Sheldon and Bright, Js.

Syllabus

The plaintiff bank, C Co., sought to foreclose a mortgage on certain real property owned by the defendant B and his former wife, the defendant L. Prior to trial, B filed a motion to dismiss, claiming that C Co. lacked standing to pursue the action against him. The trial court, which heard and decided the motion to dismiss in connection with the merits of the foreclosure action, denied the motion to dismiss and rendered a judgment of strict foreclosure. Thereafter, B filed postjudgment motions for a new trial and for reconsideration of the denial of his motion to dismiss. Subsequently, the trial court granted C Co.'s motion to substitute W Co. as the plaintiff, and B filed a motion for reconsideration of the substitution of W Co. as the plaintiff. After the trial court opened the record to hear additional testimony from C Co.'s witness, N, to determine the identity of the trustee in June, 2015, the identity of the loan servicer on that date, and whether N was familiar with the books of the mortgage servicer, the trial court denied all three of B's postjudgment motions and opened the judgment of strict foreclosure previously entered for the purpose of setting the law days. On B's appeal to this court, *held*:

1. B could not prevail on his claim that the trial court improperly denied his motion to dismiss and found that C Co. had standing to bring the foreclosure action: that court found that C Co. was the holder of the note at the time the foreclosure action was commenced, as C Co. presented a photocopy of the note secured by the mortgage and the court, which credited testimony of the servicing authority that C Co. was the holder of the note endorsed in blank, did not find any evidence that C Co. was not in possession of the note when the present action commenced, B

did not present any evidence to contradict that finding, and although B claimed that C Co. was not the trustee at the time of trial and that W Co. had been substituted thereafter, an assignee may continue litigation in the name of the original plaintiff and W Co. was substituted prior to the court's opening the judgment of strict foreclosure for the purpose of resetting the law days; moreover, the court did not abuse its discretion by opening the record to take additional evidence, as the court opened the record to address B's jurisdictional claims and not to give C Co. a second bite at the apple, and even if the court abused its discretion by opening the record in response to B's motion for reconsideration, claims of error will not be reviewed when they have been induced by the party claiming error on appeal.

2. B's claim that the trial court abused its discretion by failing to consider certain documents that he claimed disputed C Co.'s purported ownership of the note and authority to prosecute the foreclosure action was not reviewable, B having failed to brief the claim adequately, as B did not identify where in the record the court issued the ruling with which he took issue, and his brief did not cite any law or analyze the facts pursuant to the law on which he purportedly relied.

3. B could not prevail on his claim that the foreclosure action was deficient and false, which was based on his claim that the mortgagor did not default on the note; although B claimed that L was a nontitle owner of the property and could not mortgage the property, L stipulated at trial that the note she signed was in default and that the signatures on the mortgage appeared to be her signature and that of B, and because B, who was the owner of the property and pledged the property as security for the note signed by L, did not challenge L's stipulation or otherwise dispute that his signature was on the mortgage, he was a mortgagor in default.

4. B's claim that C Co. failed to meet its burden to prove its right to bring the present action as a nonholder in possession of the note was unavailing; the trial court's findings that C Co. was the holder of the note entitled to bring the action against B and that N Co. was the servicer as of 2014 and through the time of trial were supported by the record, and, therefore, the court properly determined that C Co. met the requirements to prosecute the foreclosure action.

Argued September 7—officially released November 27, 2018

Procedural History

Action to foreclose a mortgage on certain real property of the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Stamford and tried to the court, *Heller*, *J.*; judgment of strict foreclosure; thereafter, the court granted the

plaintiff's motion to substitute Wilmington Trust, N.A., as the plaintiff, and the defendant Brian Stein appealed to this court. *Affirmed.*

Brian Stein, self-represented appellant (defendant Brian Stein).

Crystal L. Cooke, for the appellee (substitute plaintiff).

Opinion

LAVINE, J. The present appeal concerns the foreclosure of real property located at 983 New Norwalk Road in New Canaan (property). The self-represented defendant, Brian Stein,[1] appeals from the judgment of strict foreclosure rendered in favor of the substitute plaintiff, Wilmington Trust, N.A. (Wilmington Trust), as successor trustee to the plaintiff, Citibank, N.A. (Citibank), as trustee of the holders of Bear Stearns Alt-A Trust 2006-6, Mortgage Pass-Through Certificates, Series 2006-6. On appeal, the defendant claims that the trial court, *Heller*, *J.*, (1) erred by denying his motion to dismiss, (2) abused its discretion by denying his motion to reargue and for reconsideration, (3) abused its discretion by refusing to consider, after the June 2015 trial, documents the defendant considered newly discovered evidence, (4) erred in finding that the mortgagor had defaulted on the note and default notice, and (5) erred under *J.E. Robert Co.* v. *Signature Properties, LLC*, 309 Conn. 307, 71 A.3d 492 (2013), in concluding that Citibank had proven its right as a nonholder in possession to bring the foreclosure action.[2] We affirm the judgment of the trial court.

[1] Laura A. Stein, JPMorgan Chase Bank, N.A., the state of Connecticut, and Standard Oil of Connecticut, Inc., also were served as defendants, but they are not parties to this appeal. The defendants, other than Laura Stein, were defaulted. In this opinion, we refer to Brian Stein, also known as Brian M. Stein, as the defendant.

[2] Wilmington Trust claims that the defendant has failed to provide an adequate record for review as required by Practice Book § 61-10 ("responsibility of the appellant to provide an adequate record for review"). Specifically

In its memoranda of decision issued on January 7, 2016, and on February 21, 2017, the trial court set forth the following relevant facts and procedural history. On July 7, 2006, Laura A. Stein, the defendant's then wife,[3] executed and delivered an interest only adjustable rate note to Countrywide Bank, N.A. (Countrywide Bank), in the principal amount of $1,650,000. Countrywide Bank endorsed the note to Countrywide Home Loans, Inc.

it claims that the defendant failed to provide copies of certain memoranda of law and portions of the transcript. We agree that the defendant failed to provide an adequate record in his principal brief or appendix. In his reply brief, however, he has included some of the documents omitted from his opening brief as noted by Wilmington Trust. Although the defendant provided a complete transcript of the June, 2015 trial and the August 30, 2016 hearing, he failed to include in his brief citations to the transcript that support his representation of facts as required by Practice Book § 67-4 (c). The defendant did not provide transcripts of oral arguments at the hearings on the various motions at issue in this appeal.

The defendant is a self-represented party. "[I]t is the established policy of the Connecticut Courts to be solicitous of [self-represented] litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the [self-represented] party . . . we are also aware that [a]lthough we allow [self-represented] litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law." (Internal quotation marks omitted.) *Darin* v. *Cais*, 161 Conn. App. 475, 481, 129 A.3d 716 (2015). We have held, however, that an appellant may not raise new arguments for the first time in a reply brief as doing so deprives the appellee of an opportunity to respond to them. See *State* v. *Myers*, 178 Conn. App. 102, 106, 174 A.3d 197 (2017). In the present case, the defendant's belated efforts to provide an adequate record do not appear to have interfered with the rights of Wilmington Trust, and Wilmington Trust makes no such claim.

The failure of the defendant to cite to the record and portions of the transcript in his brief, as required by our rules, however, presents the court with a different problem. It requires the court, in its discretion, to search the record and transcript with respect to the defendant's representations of fact. Such review is time-consuming, and without citations, the court inadvertently may fail to find evidence that supports a party's representation or may be unable to review the claim. See part II of this opinion.

[3] The court found that the defendant and Laura Stein were divorced during the pendency of the present action. Their separation agreement (agreement) was incorporated in the March 12, 2013 judgment of dissolution. Pursuant to paragraph 2.1 of the agreement, the defendant retained ownership of the property free and clear of any claims by Laura Stein. Paragraph 9.5 of the agreement provides that both the defendant and Laura Stein are responsible for the first and second mortgages on the property.

(Home Loans). Home Loans, thereafter, endorsed the note in blank and provided it to Citibank. To secure the note, the defendant and Laura Stein executed in duplicate a mortgage[4] on the property and delivered it to Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Countrywide Bank. MERS assigned the mortgage to Citibank on November 25, 2009.

The court also found, pursuant to paragraph 3 (A) of the note, that Laura Stein was to make monthly payments of interest only on the first day of each month, commencing on September 1, 2006. She and the defendant last made a monthly payment on the note on July 16, 2008. On September 16, 2008, Home Loans, which was the servicer of the loan on behalf of the holder of the note at that time, sent a letter to Laura Stein advising her that the loan was in default and of the amount required to cure the default and reinstate the loan.[5] Laura Stein and the defendant failed to cure the default. Citibank elected to accelerate the balance due on the note, declare the note due in full, and foreclose the mortgage securing the note.[6] Citibank commenced the present foreclosure action by service of process on July 13, 2009.[7] The complaint alleges, in relevant part, that

[4] The property is located partially in New Canaan and partially in Norwalk. The mortgage was recorded in the land records of both New Canaan and Norwalk.

[5] Paragraph 15 of the mortgage provides that all notices were to be in writing and that any notice to the borrower "shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise . . . ."

[6] On June 15, 2009, Citibank notified the defendant and Laura Stein of their rights under the Emergency Mortgage Assistance Program. See General Statutes § 8-265cc et seq.

[7] The marshal served all defendants, except the defendant and Laura Stein, whom the marshal was unable to locate. On December 2, 2009, Citibank filed a motion to cite in the defendant and Laura Stein. The court, *Mintz, J.*, granted the motion to cite in and abode service was effectuated on January 13, 2010.

Citibank, as trustee, is the holder of the note and mortgage.

The defendant and Laura Stein filed an answer and special defenses on March 19, 2010. Their special defenses alleged that Citibank lacked standing as a trustee under General Statutes § 52-106, but that if Citibank had standing, it was required to modify the mortgage pursuant to an agreement between the Connecticut Attorney General and Countrywide Bank. They also alleged that Citibank did not provide the original note, and, therefore, could not commence the action, and that the complaint failed to establish that Citibank was the current holder and owner of the note and mortgage. Citibank pleaded a general denial in response to the special defenses.

On September 27, 2010, Citibank filed a motion for summary judgment as to liability only. The defendant and Laura Stein objected to the motion for summary judgment on the ground that there were genuine issues of material fact as to whether Citibank was the holder of the note and mortgage. The court, *Mintz*, *J.*, sustained the defendant's objection to the motion by granting additional time for discovery on the issue of Citibank's standing and ordering that the motion for summary judgment be set down for argument on November 17, 2014. Judge Heller found that Citibank's motion for summary judgment was never argued.

On September 10, 2014, Laura Stein filed a motion to dismiss in which she contended, among other things, that Citibank lacked standing to pursue the present action under General Statutes §§ 42a-3-301 and 52-106. She withdrew her motion to dismiss, however, on the first day of trial, stipulated to certain facts, and consented to the entry of summary judgment against her as to liability only.[8]

[8] Laura Stein stipulated that she attended the closing and signed numerous documents, but she could not recall what documents she had signed. She agreed that the signature on the documents that were shown to her appears

On June 19, 2015, five days before trial, the defendant filed a motion to dismiss on the ground that Citibank lacked standing to pursue the action against him. After hearing from counsel for the parties, Judge Heller determined that she would hear and decide the defendant's motion to dismiss at the same time and, in connection with, the merits of Citibank's foreclosure case. The parties, all represented by counsel, appeared before the court for trial on June 24, 25 and 26, 2015.[9] On January 7, 2016, after the parties had submitted posttrial briefs, the court issued a memorandum of decision in which it denied the defendant's motion to dismiss and rendered a judgment of strict foreclosure in favor of Citibank.

On January 19, 2016, the defendant filed a motion for a new trial and on January 27, 2016, filed a motion for reargument and reconsideration of the court's ruling on his motion to dismiss. Citibank objected to both motions. The court granted the motion for reargument, and counsel for Citibank and the defendant appeared for argument before the court on February 16, 2016.[10] The court reserved reconsideration of its ruling on the motion to dismiss and determined to open the record and take additional testimony from Citibank's witness,

to be hers. Those documents were the loan application, a HUD-1 form, the note, a mortgage that was recorded in the New Canaan land records, a mortgage that was recorded in the Norwalk land records, and a notice of a right to cancel. Laura Stein recognized what appeared to be the defendant's signature on the HUD-1 form, the New Canaan mortgage, and the Norwalk mortgage. She stipulated that the loan is in default. She did not recall receiving a demand letter dated September 6, 2008.

[9] On June 25, 2015, Citibank moved to default the defendant for failing to file a trial memorandum containing a statement of law and legal theories as required by the trial management order. The court denied the motion for default but limited the defendant to proceeding on the defenses he had alleged in his special defenses and motion to dismiss.

[10] The defendant failed to provide a copy of the transcript of the February 16, 2016 argument.

Johnny Nguyen of Nationstar Mortgage LLC (Nationstar), the servicer of the subject mortgage.[11]

On August 29, 2016, Citibank filed a motion to substitute Wilmington Trust as the plaintiff because the mortgage had been assigned to Wilmington Trust after the present action was commenced. On August 30, 2016, the court heard additional testimony from Nguyen. Before commencing the hearing, the court granted Citibank's motion to substitute Wilmington Trust as the plaintiff. On September 19, 2016, the defendant filed a motion for reargument and reconsideration of Citibank's motion to substitute Wilmington Trust as the plaintiff. The court heard argument from counsel on the defendant's motion for reargument and reconsideration on November 28, 2016.[12] On February 1, 2017, counsel for the defendant filed a memorandum in further support of his motion to reargue the motion to substitute, and the defendant submitted a statement and memorandum of his own. Wilmington Trust filed an objection to the motion to reargue on February 15, 2017.

On February 21, 2017, the court issued a memorandum of decision on the defendant's three pending motions before it, to wit, his motion for a new trial, filed on January 19, 2016; his motion for reargument on his motion to dismiss, filed on January 27, 2016; and his motion for reargument on Citibank's motion to

[11] The court issued its order on the defendant's motion for a new trial on May 26, 2016, stating "the court has opened the record and will take additional testimony from [Citibank's] witness at the foreclosure trial . . . Nguyen . . . regarding the following: whether . . . Citibank, Wilmington Trust . . . or some other entity was the trustee of the trust on June 25, 2015 when . . . Nguyen testified before this court; whether Nationstar, Wells Fargo Bank . . . or some other entity was the mortgage servicer for the defendant's mortgage when . . . Nguyen testified; and if an entity other than Nationstar was the mortgage servicer, whether . . . Nguyen was familiar with the books and records of such mortgage servicer at that time and was authorized to testify on its behalf."

[12] The defendant did not provide a transcript of the oral argument.

substitute Wilmington Trust as the plaintiff, filed on September 19, 2016. The court denied all three of the defendant's reargument motions and opened the judgment of strict foreclosure previously entered for the purpose of setting the law days. The defendant timely appealed to this court.

I

The defendant first claims that the court erred in finding that Citibank had standing to bring this foreclosure action against him and, thus, that it had subject matter jurisdiction over the action. Specifically, he claims that the court (1) erred by denying his motion to dismiss because Citibank lacked standing to commence the action and (2) abused its discretion by failing to grant his motion to reargue and for reconsideration of his motion to dismiss.[13] We reject the defendant's claims.

The defendant's claims require us to examine the court's memoranda of decision in detail. The court's decisions set forth the following facts and legal analyses.

Prior to the start of trial in June, 2015, the defendant filed a motion to dismiss claiming that he had a good faith belief that Citibank lacked standing to pursue the action. In its January 7, 2016 memorandum of decision, the trial court found that the defendant had argued that Citibank lacked standing because (i) it was not the owner of the note and the debt at issue and/or it was not the holder of the note and (ii) it was not authorized by the owner of the note and the debt to prosecute the action on behalf of the owner. The defendant also argued that Citibank lacked standing under General

[13] The record clearly demonstrates that the court granted the defendant's reargument on his motion to dismiss. We will not address that portion of the defendant's claim further.

Statutes § 52-106. Citibank contended that it had standing as both the holder of the note and as trustee.

The court credited the uncontroverted testimony of Nguyen that Citibank was the holder of the note that had been endorsed in blank. The court cited the statutory and common-law definitions of "holder." General Statutes § 42a-3-104 (a) provides, in relevant part, that a holder is "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." "The holder is the person or entity in possession of the instrument if the instrument is payable to bearer. . . . When an instrument is endorsed in blank, it becomes payable to bearer and may be negotiated by transfer of possession alone . . . ." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Equity One, Inc.* v. *Shivers*, 310 Conn. 119, 126, 74 A.3d 1225 (2013). The court concluded, therefore, that because Citibank was the holder of the note, it had proved that it was the owner because "the note holder is presumed to be the owner of the debt, and unless the presumption is rebutted, may foreclose the mortgage under [General Statutes] § 49-17." (Internal quotation marks omitted.) *American Home Mortgage Servicing, Inc.* v. *Reilly*, 157 Conn. App. 127, 133–34, 117 A.3d 500, cert. denied, 317 Conn. 915, 117 A.3d 854 (2015). Citing *Anderson* v. *Litchfield*, 4 Conn. App. 24, 28, 492 A.2d 210 (1985),[14] for the law regarding the burden necessary to rebut the presumption of ownership, the court found that the defendant had failed to offer sufficient and persuasive contradictory evidence to disprove the presumption that Citibank was the holder of the note.

[14] "A presumption in favor of a party, that a particular fact is true, shifts the burden of persuasion to the proponent of the invalidity of that fact, and that burden is met when, by the particular quantum of proof, the validity of the fact has been rebutted." *Anderson* v. *Litchfield*, supra, 4 Conn. App. 28.

The defendant further argued that Nguyen's testimony alone was insufficient to prove that Citibank was authorized to commence and pursue the action without the relevant business records, particularly the pooling and service agreement, being offered into evidence. The court found that the defendant offered no evidence to contradict Nguyen's testimony, which was predicated on his personal knowledge of Nationstar's business records. It disagreed that Citibank was required to produce its business records to support its claim. "Appellate courts in this state have held that [the evidentiary] burden is satisfied when the mortgagee includes in its submission to the court a sworn affidavit averring that the mortgagee is the holder of the promissory note in question at the time it commenced the action." *GMAC Mortgage, LLC* v. *Ford*, 144 Conn. App. 165, 176, 73 A.3d 742 (2013).

The court also concluded that Citibank had standing to prosecute the foreclosure action as holder of the note and as a trustee.[15] Section 52-106 provides, "[a]n executor, administrator, or trustee of an express trust may sue or be sued without joining the persons represented by him and beneficially interested in the action." "[T]he trustee's standing to sue arises out of its legal title to the trust res." (Internal quotation marks omitted.) *Chase Home Finance, LLC* v. *Fequiere*, 119 Conn. App. 570, 580, 989 A.2d 606, cert. denied, 295 Conn. 922, 991 A.2d 564 (2010). Moreover, "[o]ur appellate courts have not required a foreclosure plaintiff to produce

[15] In a footnote, the court addressed the defendant's claim raised in his posttrial brief that Wilmington Trust had succeeded Citibank as trustee. The court declined to take judicial notice of the transfer as the defendant requested. It concluded that even if it had taken judicial notice of the transfer, the change of trustee would not be a basis to dismiss the action, citing *Washington Mutual Bank, F.A.* v. *Walpuck*, 134 Conn. App. 446, 447, 43 A.3d 174 (assignee has option to pursue litigation in its own name or in name of its assignor), cert. denied, 305 Conn. 902, 43 A.3d 663 (2012).

evidence of ownership deriving from a pooling and servicing agreement in making its prima facie case . . . .'' *Wells Fargo Bank, N.A.* v. *Strong*, 149 Conn. App. 384, 399, 89 A.3d 392, cert. denied, 312 Conn. 923, 94 A.3d 1202 (2014).

''The relevance of securitization documents on a lender's standing to foreclose a mortgage is questionable. Simply put, a borrower has a contract—the note and mortgage—with the owner or holder of the loan documents. The borrower, however, is not a party to the pooling and servicing agreement, commonly referred to as a 'trust' document. . . . It is a basic tenet of contract law that only parties to an agreement may challenge its enforcement. . . . [C]lose scrutiny of trust documents and challenges to their veracity appear to offer little benefit to the court in determining the owner or holder of a note in a particular case. If admissible evidence of holder status has been presented, a borrower must then challenge those facts by competent evidence addressed to the delivery of the loan documents. In most instances, a borrower's challenge to the content of trust documents or other borrower claims appear to have little relevance to the issue of standing.'' (Internal quotation marks omitted.) Id., 393–94.

The court continued quoting that ''[t]he law of trusts limits the ability of a borrower to challenge whether conditions in the pooling and servicing agreement were satisfied. . . . [A] stranger to a trust, when sued by the Trustee, cannot set up as a defense a violation of the rights of the Trust by the Trustee. . . . Generally, the parties to a pooling and servicing agreement are the certificate holders, who own interests in the mortgages, a trustee, a depositor of the assets, and a servicer. Borrowers, however, have no contractual privity with the parties to a pooling and servicing agreement.'' (Citations omitted; internal quotation marks omitted.) Id.,

394. The court found that Citibank had standing to prosecute the present action and that the action was not barred by any of the defendant's remaining special defenses. The court, therefore, denied the defendant's motion to dismiss. After hearing appraisal evidence and the amount of debt, the court found that the debt far exceeded the fair market value of the property. It issued a judgment of strict foreclosure in favor of Citibank and set law days.

As previously stated, the defendant filed a motion for reargument and reconsideration of his motion to dismiss. The defendant contended that following the hearing on the motion to dismiss and the foreclosure trial, he discovered new evidence to the effect that Citibank was not the owner of the note and debt at issue and had not been for some time. According to the defendant, Wilmington Trust was the owner. The defendant first raised the argument in his posttrial memorandum filed on August 24, 2015, in which he asked the court to take judicial notice of certain public documents that purportedly demonstrated that Wilmington Trust had succeeded Citibank as trustee for the Holders of Bear Stearns Alt-A Trust 2006-6. The court declined to do so, noting that even if it took judicial notice, as requested, the information would not have afforded a basis for dismissing the action. See footnote 15 of this opinion. The defendant also claimed that Wells Fargo Bank was the servicer of the mortgage, not Nationstar, thus calling into question the veracity of Nguyen's testimony.

The court granted reargument on February 16, 2016, but reserved decision on reconsideration of the motion to dismiss. On May 26, 2016, the court decided to open the record to take further testimony from Nguyen to determine whether Citibank, Wilmington Trust, or some other entity was the trustee of the trust on June 25, 2015, when Nguyen testified at the foreclosure trial;

whether Nationstar, Wells Fargo, or some other entity was the mortgage servicer for the defendant's mortgage when Nguyen testified; and if an entity other than Nationstar was the mortgage servicer, whether Nguyen was familiar with the books and records of such mortgage servicer at the time of trial and was authorized to testify on its behalf.

The court heard further testimony from Nguyen on August 30, 2016. The court issued its decision in a memorandum of decision on February 21, 2017. The court credited Nguyen's testimony and made the following additional findings of fact. Nationstar has been the primary servicer of the mortgage since the beginning of 2014 and was the servicer on June 25, 2015, when Nguyen testified at the foreclosure trial and it continued to be the mortgage servicer. Citibank was the trustee and the holder of the note at the time the foreclosure complaint was served in 2009 and had authority to commence the action. Wilmington Trust became the trustee in 2012, was the trustee on June 25, 2015, and remained the trustee. It also was the holder of the note in June, 2015. Two assignments of the mortgage were admitted into evidence. Citibank assigned it to Nationstar on May 4, 2016, and Nationstar assigned it to Wilmington Trust on March 30, 2016.

With respect to the defendant's motion for reconsideration of his motion to dismiss, the court stated that the ground of the defendant's motion for reconsideration was newly discovered evidence. The court cited the controlling law. "A party who wishes to reargue a decision or order rendered by the court shall, within twenty days from the issuance of notice of the rendition of the decision or order, file a motion to reargue setting forth the decision or order which is the subject of the motion, the name of the judge who rendered it, and the specific grounds for reargument upon which the party relies." Practice Book § 11-12 (a). "[T]he purpose of

reargument is . . . to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts. . . . [Reargument] also may be used to address alleged inconsistencies in the trial court's memorandum of decision as well as claims of law that the [movant] claimed were not addressed by the court." (Citation omitted; internal quotation marks omitted.) *Opoku* v. *Grant*, 63 Conn. App. 686, 692–93, 778 A.2d 981 (2001).

"Newly discovered evidence may warrant reconsideration of a court's decision. However, [f]or evidence to be newly discovered, it must be of such a nature that [it] could not have been earlier discovered by the exercise of due diligence." (Internal quotation marks omitted.) *Durkin Village Plainville, LLC* v. *Cunningham*, 97 Conn. App. 640, 656, 905 A.2d 1256 (2006). The court found that the evidence the defendant offered fell short of this standard. In fact, the court stated, the defendant never sought to open the record to introduce evidence that Wilmington Trust was the successor trustee to Citibank. It was the court that ordered further testimony from Nguyen to respond to the issues raised by the defendant.

The court found that the defendant, in his posttrial brief, had represented that he had learned through a Lexis case search and a search of public records that Wilmington Trust had replaced Citibank as the trustee in late 2012. The defendant reported that he had learned of the transfer of the trust from a Moody's rating service, pleadings in other lawsuits alleging that Wilmington Trust had succeeded Citibank, and a Schedule A to a document described as a limited power of attorney dated November 18, 2013, and recorded in county records in Salt Lake City, Utah. The court found, however, that although the evidence may have been newly

discovered by the defendant, it had been available publicly on the Moodys.com website, in the New York federal bankruptcy court files, and the Utah land records for years. A Lexis case search and a search of the public records months before the foreclosure trial would have revealed the information regarding the change of trustee. The court, therefore, declined to reconsider its ruling denying the defendant's motion to dismiss.[16] The court set new law days and the defendant appealed.

A

We now turn to the defendant's central claim that the court erred when it denied his motion to dismiss because the court lacked subject matter jurisdiction due to Citibank's lack of standing. We disagree.

"A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the [plaintiff] cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . [It] tests, inter alia, whether on the face of the record, the court is without jurisdiction. . . . The issue of standing implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss." (Citation omitted; internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Torres*, 149 Conn. App. 25, 29, 88 A.3d 570 (2014).

"The issue of standing implicates the trial court's subject matter jurisdiction and therefore presents a threshold issue for our determination. . . . Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or

[16] The court also addressed at length the defendant's motion for a new trial, distinguishing the deference between a motion for a new trial and a petition for a new trial. The denial of the defendant's motion for a new trial is not at issue in this appeal.

a legal or equitable right, title or interest in the subject matter of the controversy. . . . [When] a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause. . . . We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . In addition, because standing implicates the court's subject matter jurisdiction, the issue of standing is not subject to waiver and may be raised at any time. . . . [T]he plaintiff ultimately bears the burden of establishing standing." (Citations omitted; internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Strong*, supra, 149 Conn. App. 397–98.

"[W]here legal conclusions of the [trial] court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision. . . . Thus, our review of the trial court's ultimate legal conclusion and resulting [denial] of the motion to dismiss will be de novo." (Internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Torres*, supra, 149 Conn. App. 29.[17]

[17] In conjunction with this claim that the court erred by denying his motion to dismiss, the defendant argues that the court erred, as a matter of law, by failing to determine whether it had subject matter jurisdiction before permitting Citibank to present its case. "It is axiomatic that once the issue of subject matter jurisdiction is raised, it must be immediately acted upon by the court. . . . Our Supreme Court has explained that once raised, either by a party or by the court itself, the question [of subject matter jurisdiction] must be answered before the court may decide the case. . . . [e]verything else screeches to a halt whenever a non-frivolous jurisdictional claim is asserted." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Fennelly* v. *Norton*, 103 Conn. App. 125, 136–37, 931 A.2d 269, cert. denied, 284 Conn. 918, 931 A.2d 936 (2007).

The record discloses that several days prior to the start of trial on June 24, 2015, the defendant filed a motion to dismiss and the plaintiff filed two motions in limine. The court heard from counsel as to the bases of the parties' motions, which included multiple discovery issues regarding the production of documents and the parties' failure to comply with the court's standing orders. Thereafter, the court stated: "Well, I think we're going to

proceed because I think we are starting this hearing, we have the motion to dismiss that is still on the table. We are past the point of conducting discovery. I think that based on Judge Povodator's order, it appears the parties were not in compliance with the standing orders and here we are, so we are going forward."

Although counsel for the defendant agreed to go forward with evidence, he repeated his request for the court to order Citibank to produce certain documents. In reply, the court stated: "I think you had the trial date and the trial was not continued. It had been continued, previously, but not continued in anticipation of any of the discovery that you are looking for now. The motion for protective order was denied. The motion to dismiss has been filed. There's not been a motion to continue the trial, and as I said when we started we're not going to continue the trial because the evidence in the trial will, you know, the plaintiff has the burden of proof, and if the plaintiff doesn't have standing, then the plaintiff can't go forward. So the evidence is going to address your motion as well."

Following trial, the court issued its memorandum of decision on January 7, 2016. In its decision, the court determined that Citibank had standing to pursue the action, which is the principal issue in the present appeal. Although the defendant is correct that a court, generally, is required to determine whether a party has standing before it considers the merits of a case, under the circumstances of the present matter, the timing of the court's determination does not constitute legal error. The evidence that Citibank would have had to present to prove standing was the same evidence that it was required to present to prove its case-in-chief. In 2015, the case had been pending for six years and the parties had been arguing over the production of documents for an extended period of time. Judge Mintz sustained the defendant's objection to Citibank's motion for summary judgment as to liability in order to permit the defendant to conduct discovery. Judge Mintz ordered that Citibank's motion for summary judgment was to be argued on November 17, 2014, but it was not argued on that date or ever. The discovery issue languished until June, 2015, when the case was set down for trial. The defendant could have secured a ruling on the issue of standing by pursuing discovery and arguing the motion for summary judgment on November 17, 2014. Judge Heller noted that the defendant took no action to compel discovery.

On appeal, the defendant has not demonstrated that he was harmed by Judge Heller's decision to hear the motion to dismiss and the plaintiff's case simultaneously. "When the jurisdictional facts are intertwined with the merits of the case, the court may in its discretion choose to postpone resolution of the jurisdictional question until the parties complete further discovery or, if necessary, a full trial on the merits has occurred." *Conboy* v. *State*, 292 Conn. 642, 653 n.16, 974 A.2d 669 (2009).

The trial court is empowered to manage its own docket. See *Ill* v. *Manzo-Ill*, 166 Conn. App. 809, 824–25, 142 A.3d 1176 (2016) (court has power to manage its dockets to prevent undue delays in disposition of pending cases). Under the procedural and factual circumstances of the present case, we cannot conclude that the court committed legal error or abused its discretion by pragmatically and flexibly proceeding with respect to the defendant's motion to dismiss. See *Suntech of Connecticut, Inc.* v. *Lawrence Brunoli*,

The basis of the defendant's multiple claims appears to stem from the securitization of the note and its transfer from one trustee or holder to another. The defendant's claims are fact based,[18] as he does not take exception to the law cited by the court in its memoranda of decision. The resolution of the present appeal turns on the entity legally entitled to commence the present action and the authority to prosecute the action at trial in June, 2015. The trial court found that Citibank was the holder of the debt and the trustee with authority to commence the action. The court also found that at the time of trial, Nationstar was the primary servicer of the mortgage and was authorized to prosecute the foreclosure action. Wilmington Trust became the trustee in 2012 and was the trustee and holder of the note in June, 2015. Citibank assigned the mortgage to Nationstar, which assigned it to Wilmington Trust in 2016.

Our review of the record, including the exhibits and trial testimony, supports the court's factual findings and is consistent with our law of negotiable instruments and foreclosure. "[Section] 49-17 permits the holder of a negotiable instrument that is secured by a mortgage

Inc., 173 Conn. App. 321, 333–34 n.15 (2017) (court does not abuse discretion by adhering to scheduling order), appeal dismissed, 330 Conn. 342, A.3d (2018).

[18] To the extent that the defendant claims that Nguyen was not a credible witness, he cannot prevail. "[A]s a general rule, appellate courts do not make credibility determinations. [I]t is within the province of the trial court, when sitting as the fact finder, to weigh the evidence presented and determine the credibility and effect to be given the evidence. . . . Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude. . . . An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences from them." (Internal quotation marks omitted.) *Zilkha* v. *Zilkha*, 167 Conn. App. 480, 487–88, 144 A.3d 447 (2016).

to foreclose on the mortgage even when the mortgage has not yet been assigned to him. . . . The statute codifies the common-law principle of long standing that the mortgage follows the note, pursuant to which only the rightful owner of the note has the right to enforce the mortgage. . . . Our legislature, by adopting § 49-17, has provide[d] an avenue for the holder of the note to foreclose on the property when the mortgage has not been assigned to him." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Chase Home Finance, LLC* v. *Fequiere*, 119 Conn. App. 570, 576–77, 989 A.2d 606, cert. denied, 295 Conn. 922, 991 A.2d 564 (2010).

"Generally, in order to have standing to bring a foreclosure action the plaintiff must, at the time the action is commenced, be entitled to enforce the promissory note that is secured by the property. . . . The plaintiff's possession of a note endorsed in blank is prima facie evidence that it is a holder and is entitled to enforce the note, thereby conferring standing to commence a foreclosure action. . . . After the plaintiff has presented this prima facie evidence, the burden is on the defendant to impeach the validity of [the] evidence that [the plaintiff] possessed the note at the time that it commenced the . . . action or to rebut the presumption that [the plaintiff] owns the underlying debt." (Internal quotation marks omitted.) *Bank of America, N.A.* v. *Kydes*, 183 Conn. App. 479, 487, A.3d , cert. denied, 330 Conn. 925, A.3d (2018).

"The rules for standing in foreclosure actions when the issue of standing is raised may be succinctly summarized as follows. When a holder seeks to enforce a note through foreclosure, the holder must produce the note. The note must be sufficiently endorsed so as to demonstrate that the foreclosing party is a holder, either by a specific endorsement to that party or by means of a blank endorsement to bearer. If the foreclosing party

shows that it is a valid holder of the note and can produce the note, it is presumed that the foreclosing party is the rightful owner of the debt. That presumption may be rebutted by the defending party, but the burden is on the defending party to provide sufficient proof that the holder of the note is not the owner of the debt, for example, by showing that ownership of the debt had passed to another party. It is not sufficient to provide that proof, however, merely by pointing to some documentary lacuna in the chain of title that *might* give rise to the possibility that some other party owns the debt. In order to rebut the presumption, the defendant must *prove* that someone else is the owner of the note and debt. Absent that proof, the plaintiff may rest its standing to foreclose on its status as the holder of the note." (Emphasis in original.) *U.S. Bank, National Assn.* v. *Schaeffer*, 160 Conn. App. 138, 150, 125 A.3d 262 (2015).

"Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved. . . . The statute authorizing standing in this [foreclosure] case is General Statutes § 52-118, which provides in relevant part that an assignee . . . may sue . . . in his own name . . . . The legislature's use of the word may in the statute indicates that an assignee merely has the option to sue in his name. Conversely, as the Supreme Court has stated, an assignee also has the option to maintain [an] action in the name of his assignor. *Jacobson* v. *Robington*, 139 Conn. 532, 539, 95 A.2d 66 (1953)." (Internal quotation marks omitted.) *Dime Savings Bank of Wallingford* v. *Arpaia*, 55 Conn. App. 180, 184, 738 A.2d 715 (1999); see also *Washington Mutual Bank, F.A.* v. *Walpuck*, 134 Conn. App. 446, 447, 43 A.3d 174, cert. denied, 305 Conn. 902, 43 A.3d 663 (2012) (*Dime Savings Bank of Wallingford* is dispositive).

Citibank alleged in the complaint that it was the holder of the note and in possession of the mortgage. A bank that "alleged that it possessed the note at the time it commenced [the] action, [is] entitled to reply upon that allegation unless the defendant present[s] facts to the contrary . . . ." *Bank of America, N.A.* v. *Kydes*, supra, 183 Conn. App. 489. The court did not find evidence that Citibank was not in possession of the note when the present action was commenced. The defendant has not pointed us to any evidence that disputes, let alone contradicts, the court's conclusion that Citibank was the holder of the note at the time the foreclosure action was commenced. At trial, Citibank presented a photocopy of the note secured by the mortgage. The defendant failed to provide any evidence to counter Citibank's claim. The defendant's principal argument seems to be that Citibank was not the trustee at the time of trial in June, 2015, and that Wilmington Trust was not substituted as the plaintiff until August, 2016. An assignee may continue litigation in the name of the original plaintiff. *Jacobs* v. *Robington*, supra, 139 Conn. 539.

In the present case, Laura Stein signed the note in favor of Countywide Bank, which endorsed the note in favor of Home Loans, which endorsed the note in blank and provided it to Citibank. The court concluded that Citibank was the trustee and holder of the note when the action was commenced, and therefore, it had standing to do so. The court thus had subject matter jurisdiction. During trial, Citibank transferred the note to Wilmington Trust, which authorized Nationstar, its server, to prosecute the action in the name of Citibank. Wilmington Trust was substituted as the plaintiff prior to the court's opening the judgment of strict foreclosure for the purpose of setting the law days. See *Jacobson* v. *Robington*, supra, 139 Conn. 539 (assignee may prosecute in name of assignor). The court, therefore, had

subject matter jurisdiction to adjudicate the action, and the defendant's claim fails.

B

The defendant further claims that the court abused its discretion by opening the record to hear additional testimony from Citibank's witness. By opening the record and receiving more testimony from Nguyen, the defendant claims that the court gave Citibank a second bite at the apple. The defendant further claims that the court compounded the error by denying him the right to conduct further discovery. We disagree.

"Whether the trial court has jurisdiction to open a judgment of strict foreclosure is generally dependent on whether title has vested in the encumbrancer. See General Statutes § 49-15 (a) (1) (upon written motion by interested person, court may open and modify any judgment of strict foreclosure as it deems reasonable, provided no such judgment shall be opened after the title has become absolute in any encumbrancer)." (Emphasis omitted; internal quotation marks omitted.) *Real Estate Mortgage Network, Inc.* v. *Squillante*, 184 Conn. App. 356, 360–61, A.3d (2018).

In the present case, after the court rendered judgment in favor of Citibank in its January 7, 2016 memorandum of decision, the defendant filed a motion for reargument and reconsideration of the motion to substitute Wilmington Trust as the plaintiff. In the motion, the defendant alleged that Citibank and Wilmington Trust are not the investors or servicing authority for the loan, that the note is not in the BALTA 2006-6 Trust and that Nationstar has no current servicing authority. The court stated that it opened the record to take further testimony from Nguyen to determine the identity of the trustee on June 25, 2015, the identity of the servicer on that date, and whether Nguyen was familiar with the books of the mortgage servicer, and whether he was

authorized to testify on its behalf. It is obvious that the court opened the record to address the defendant's jurisdictional claims, and not to give Citibank a second bite at the apple.

We conclude that the court did not abuse its discretion by opening the record to take more evidence. Even if the trial court had abused its discretion by opening the record in response to the defendant's motion for reargument and reconsideration, this court has held that it will not review claims of error, if any, when they have been induced by the party claiming error on appeal. *LPP Mortgage, Ltd.* v. *Lynch*, 122 Conn. App. 686, 698, 1 A.3d 157 (2010). "[T]he appellate courts of this state have made it clear that a party cannot take a path at trial and change tactics on appeal. Furthermore, no party has the right to induce or invite error, if any, on the part of the trier of fact and seek reversal on appeal." *Moran* v. *Media News Group, Inc.*, 100 Conn. App. 485, 501, 918 A.2d 921 (2007).[19]

For the foregoing reasons, the defendant's claim that the court erred by denying his motions to dismiss and for reconsideration fails.

II

The defendant claims that the court abused its discretion by failing to consider documents that he claims

[19] The defendant also claims that by opening the record and taking additional testimony from Nguyen, he was denied due process and the right to conduct further discovery. The claim is not reviewable, as the defendant did not preserve it in the trial court. Moreover, the defendant failed to identify what efforts he made to pursue posttrial discovery or how the trial court prevented him from pursuing additional discovery. "[I]t is well established that [w]e will not decide an appeal on an issue that was not raised before the trial court. . . . To review claims articulated for the first time on appeal and not raised before the trial court would be nothing more than a trial by ambuscade of the trial judge." (Internal quotation marks omitted.) *In re Anna Lee M.*, 104 Conn. App. 121, 124 n.2, 931 A.2d 949, cert. denied, 284 Conn. 939, 937 A.2d 696 (2007). The defendant has not asked us to review the claim under any of the extraordinary remedy doctrines.

dispute the witness' servicing authority, as well as Citibank's purported ownership of the note and authority to prosecute the foreclosure. We agree with Wilmington Trust that this claim is inadequately briefed.

Wilmington Trust points out that the defendant's brief on this issue is rambling and that it is not possible to determine the documents to which the defendant is referring. We have noted that the brief contains no references to a transcript from which Wilmington Trust, or this court, can infer how or when the defendant sought to introduce the documents he claims the court failed to consider. See footnote 2 of this opinion. We acknowledge that the defendant is representing himself and that we generally grant self-represented litigants some latitude so long as it does not interfere with the rights of other parties. See *Darin* v. *Cais*, 161 Conn. App. 475, 481, 129 A.3d 716 (2015). The defendant's briefing of the present claim is an instance, however, in which the plaintiff is at a disadvantage in replying to the defendant's arguments.

Appellate courts "are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than [mere] abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed." (Internal quotation marks omitted.) *McClancy* v. *Bank of America, N.A.*, 176 Conn. App. 408, 414, 168 A.3d 658, cert. denied, 327 Conn. 975, 174 A.3d 195 (2017). The defendant has not brought to our attention where in the record the court issued the ruling with which he takes issue. His brief cites no law and does not analyze the facts pursuant to the law on which he purportedly relies. We, therefore, are unable to review the claim.

III

The defendant claims that Citibank's foreclosure action is deficient and false because the mortgagor did not default on the note. The defendant's argument is that Laura Stein is a nontitle owner of the property and, therefore, she could not mortgage the property. The fallacy in the defendant's argument is that he is the owner of the property and that he pledged the property as security for the note signed by Laura Stein, who admitted that the note is in default.

The mortgage, which is in evidence, states, among other things: "Borrower is Laura A. Stein and Brian M. Stein . . . Borrower is the mortgagor under this Security Instrument." "A mortgage is a contract of sale executed, with power to redeem. . . . The condition of a mortgage may be the payment of a debt, the indemnity of a surety, or the doing or not doing [of] any other act." *Cook* v. *Bartholomew*, 60 Conn. 24, 25, 22 A. 444 (1891). Black's Law Dictionary defines mortgagor as "[o]ne who, having all or some part of the title to property, by written instrument pledges that property for some particular purpose such as security for a debt. That party to a mortgage who gives legal title or a lien to the mortgagee to secure the mortgage loan." Black's Law Dictionary (5th Ed. 1979). Also "[o]ne who mortgages property; the mortgage-debtor, or borrower." Black's Law Dictionary (9th Ed. 2004).

"It has long been established at common law that [t]he mortgage is an incident only to the debt, which is the principal; it cannot be detached from [the debt]; distinct from the debt, it has no determinate value; and the assignee must hold it, at the will and disposal of the creditor, who has the note or bond, for which it is a collateral security." (Internal quotation marks omitted.)

J.E. Robert Co. v. *Signature Properties, LLC*, supra, 309 Conn. 318.[20]

At trial, Laura Stein stipulated that the note she signed was in default. She also stipulated that the signatures on the mortgage appeared to be hers and the defendant's. The defendant has not challenged the stipulation or otherwise disputed that his signature is on the mortgages. The defendant, therefore, is a mortgagor in default and his claim fails.[21]

IV

The defendant's final claim is that Citibank failed to meet its burden under *J.E. Robert Co.* v. *Signature Properties, LLC*, supra, 309 Conn. 307,[22] to prove its right to bring the present action as a nonholder in possession of the note. He argues that Citibank never appeared in court, and that its alleged servicer, who is not identified in the note, failed to prove the transfers by which it acquired the note. We do not agree.

The issue in *J.E. Robert Co.* concerned the "standing of parties other than the lender to bring [foreclosure]

[20] The common-law rule has been codified in General Statutes § 49-17, which provides: "When any mortgage is foreclosed by the person entitled to receive the money secured thereby but to whom the legal title to the mortgaged premises has never been conveyed, the title to such premises shall, upon the expiration of the time limited for redemption and on failure of redemption, vest in him in the same manner and to the same extent as such title would have vested in the mortgagee if he had foreclosed, provided the person so foreclosing shall forthwith cause the decree of foreclosure to be recorded in the land records in the town in which the land lies."

[21] The defendant also claims that Citibank failed to comply with the notice provisions of the mortgage as the default notice was sent to Laura Stein, who is not a mortgagor. Because Laura Stein and the defendant signed the mortgage, the claim fails.

[22] In *J.E. Robert Co.*, the defendants appealed from the judgment of strict foreclosure and a deficiency judgment "predicated on the standing of the original plaintiff, loan servicer J.E. Robert Company, Inc. . . . and the substitute plaintiff, Shaw's New London, LLC." *J.E. Robert Co.* v. *Signature Properties, LLC*, supra, 309 Conn. 311. The underlying facts concerning the transfers of notes and mortgages and assignment of rights are recounted in the opinion; see id., 313–14; but are not relevant to the present appeal.

actions . . . [s]pecifically . . . whether a loan servicer for the owner and holder of a note and mortgage can have standing in its own right to institute a foreclosure action against the mortgage as transferee of the holder's rights under the Uniform Commercial Code (UCC), General Statutes §§ 42a-3-203 and 42a-3-301." Id., 310–11. Our Supreme Court determined that "through the pooling agreement, J.E. Robert had standing as a transferee . . . to enforce the note and mortgage in accordance with §§ 42a-3-203 and 42a-3-301"; id., 318; and as servicer, it had authority to institute the foreclosure action in its own name. Id., 311.

Our Supreme Court explained that "[s]ecuritization starts when a mortgage originator sells a mortgage and its note to a buyer, who is typically a subsidiary of an investment bank. . . . The investment bank bundles together the multitude of mortgages it purchased into a special purpose vehicle, usually in the form of a trust, and sells the income rights to other investors. . . . A pooling and servicing agreement establishes two entities that maintain the trust: a trustee, who manages the loan assets, and a servicer, who communicates with and collects monthly payments from the mortgagors." (Citations omitted; internal quotation marks omitted.) Id., 313 n.4. "The pooling agreement also designates another entity as [m]aster [s]ervicer, whose general responsibility is to administer mortgage loans other than those designated as specially serviced loans due to certain events such as imminent or actual default." (Internal quotation marks omitted.) Id., 313 n.5.

"A plaintiff's right to enforce a promissory note may be established under the UCC." Id., 319. See General Statutes §§ 42a-3-203 (a) and (b). "Consistent with these provisions, our appellate case law has recognized that, to enforce a note, one need not be the owner of the note; see, e.g., *Ninth RMA Partners, L.P.* v. *Krass*, 57 Conn. App. 1, 7, 746 A.2d 826 . . . cert. denied, 253

Conn. 918, 755 A.2d 215 (2000); or even the holder of the note. See, e.g., *Ulster Savings Bank* v. *28 Brynwood Lane, Ltd.*, 134 Conn. App. 699, 709–10, 41 A.3d 1077 (2012)." *J.E. Robert Co.* v. *Signature Properties, LLC*, supra, 309 Conn. 320 n.14. Under § 42a-3-203 (a), there are two requirements to transfer an instrument: "(1) the transferor must intend to vest in the transferee the right to enforce the instrument; and (2) the transferor must deliver the instrument to the transferee so that the transferee has either actual or constructive possession." Id., 320.

Section 49-17 permits "the person entitled to receive the money secured [by a mortgage] but to whom the legal title to the mortgaged premises has never been conveyed" to bring a foreclosure action. (Emphasis omitted; internal quotation marks omitted.) Id., 324. The statute "simply requires a party to prove that [it is] the person entitled to receive the money secured [by the mortgage], and such a party may be someone other than the owner of the note." (Internal quotation marks omitted.) Id., 325. "[A] loan servicer entitled to receive money and otherwise administer a loan under the terms of a pooling and service agreement would not necessarily need to be the owner or holder of the note in order to institute a foreclosure action against the debtor." Id., 326.

"[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 § 49-17." (Internal quotation marks omitted.) Id., 325 n.18. If the presumption is rebutted, the burden shifts "back to the plaintiff to demonstrate that the owner has vested it with the right to receive the money secured by the note." Id.

As to the plaintiff's burden of proof, "[i]t is a fundamental precept of the law to expect a foreclosing party to actually be in possession of its claimed interest in the

note, and have the proper supporting documentation in hand when filing suit, showing the history of the note, so the defendant is duly apprised of the rights of the plaintiff." Id., 325–26 n.18. "The transferee does not enjoy the statutorily provided assumption of the right to enforce the instrument that accompanies a negotiated instrument, and so the transferee must account for possession of the [unendorsed] instrument by providing the transaction through which the transferee acquired it." (Internal quotation marks omitted.) Id., 326 n.18. "If there are multiple prior transfers, the transferee must prove each prior transfer. . . . Once the transferee establishes a successful transfer from a holder, he or she acquires the enforcement rights of that holder. Therefore, in cases in which a nonholder transferee seeks to enforce a note in foreclosure proceedings, if the defendants dispute the plaintiff's right to enforce the note, the plaintiff must prove that right." (Citations omitted; internal quotation marks omitted.) Id.

As set forth in part I of this opinion, the court found that Citibank was the holder of the note and, therefore, that it had standing to bring the action against the defendant.[23] The court also found that Nationstar was the servicer of the loan at the time of trial in June, 2015. Contrary to the defendant's argument that Citibank was required to present documentary evidence that Citibank was the holder of the note and that Nationstar was the servicer, *Wells Fargo Bank, N.A.* v. *Strong*, supra, 149 Conn. App. 392–93, holds otherwise. In the present matter, the court found that Citibank was the holder of the note entitled to bring the action against the defendant and that Nationstar was the servicer as of 2014 and

[23] Nguyen testified, in part, as follows:

"[The Plaintiff's counsel]: In this instance, was [Citibank] in physical possession of the note prior to the commencement of the action?

"[Nguyen]: Yes.

"[The Plaintiff's counsel]: And was the note sent to my law firm?

"[Nguyen]: It was."

through the time of trial. Our review of the record and the court's memoranda of decision supports the court's findings and, therefore, we conclude that the court properly determined that Citibank met the requirements of *J.E. Robert Co.* to prosecute the foreclosure action. Moreover, Wilmington Trust, which also acquired the mortgage, was substituted as the plaintiff prior to the court's opening the judgment of strict foreclosure for the purpose of setting the law days.

The judgment is affirmed and the case is remanded for the purpose of setting new law days.

In this opinion the other judges concurred.

JOSEPH MOORE *v.* COMMISSIONER OF CORRECTION
(AC 40112)

Lavine, Keller and Elgo, Js.

Syllabus

The petitioner, who previously had been convicted of robbery in the first degree and commission of a class B felony with a firearm, sought a writ of habeas corpus, claiming, inter alia, ineffective assistance of trial counsel. Specifically, the petitioner claimed, inter alia, that his trial counsel rendered ineffective assistance by failing to advise him of the maximum sentence he faced if he was successful in proving a theory of defense at trial that amounted to conceding that he was guilty only of the lesser included offense of robbery in the third degree. The petitioner claimed that trial counsel had a duty to encourage him to accept the state's plea offers by advising him that the maximum sentence at trial were he convicted only of robbery in the third degree would be at least as severe or exceed the sentences of the plea offers initially made to him. The habeas court rendered judgment denying the amended habeas petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court did not abuse its discretion in denying the petition for certification to appeal, the petitioner having failed to demonstrate that his trial counsel provided ineffective assistance: trial counsel adequately advised the petitioner on the best course of action given the facts of the underlying case and informed him of the potential total sentence to which he was exposed, as trial counsel had many discussions with the petitioner

throughout the course of his representation, advised the petitioner to accept each of the plea deals offered to him, and properly explained the state's evidence and provided adequate information for the petitioner to make an informed decision as to whether to accept the state's plea offers, and the failure of counsel to inform the petitioner of the potential total sentence exposure he faced if he succeeded on the unlikely theory of proving robbery in the third degree and counsel's decision not to further persuade the petitioner to accept the plea offers did not constitute deficient performance, the petitioner having cited no relevant case to support his claim on appeal and having presented no evidence at the habeas trial to demonstrate that the prevailing professional norms in Connecticut made it necessary for trial counsel to advise the petitioner in the manner he claimed was required; accordingly, the petitioner failed to show that his claim was debatable among jurists of reason, that a court could have resolved the claim in a different manner, or that the question was adequate to deserve encouragement to proceed further.

Argued September 14—officially released November 27, 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, *Cobb*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Michael W. Brown, for the appellant (petitioner).

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *Matthew C. Gedansky*, state's attorney, and *Angela Macchiarulo*, senior assistant state's attorney, for the appellee (respondent).

Opinion

KELLER, J. The petitioner, Joseph Moore, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. The petitioner claims that the habeas court (1) abused its discretion in denying his petition for certification to appeal and (2) improperly rejected his claim that his trial counsel had rendered ineffective assistance. We

conclude that the court did not abuse its discretion in denying the petition for certification to appeal, and, accordingly, dismiss the petitioner's appeal.

The following facts and procedural history are relevant to our resolution of the petitioner's claims. Following a trial, a jury found the petitioner guilty of robbery in the first degree in violation of General Statutes § 53a-134 (a) (4) and commission of a class B felony with a firearm in violation of General Statutes § 53-202k. The petitioner then pleaded guilty, in response to a part B information, that the aforementioned offenses were committed while on release in violation of General Statutes § 53a-40b. The petitioner also pleaded guilty to a second part B information charging him with being a persistent felony offender in violation of General Statutes § 53a-40 (f). The trial court sentenced the petitioner to a total effective term of thirty-four years incarceration.

On direct appeal from the petitioner's underlying conviction, this court set forth the following facts that the jury reasonably could have found. "At approximately 1 p.m. on July 13, 2009, the [petitioner] entered the New Alliance Bank in Columbia wearing a white tank top and dark sweatpants. Branch manager Penny Ritchie and tellers Maria DePietro and Michelle LaLiberty, who were working at the bank that day, observed the [petitioner] approach the check writer station. The [petitioner] then asked another patron, David Woodward, where the withdrawal slips were located, at which point the [petitioner] took a slip from the station and began to write on it. Photographs from the bank's security cameras introduced into evidence depict the [petitioner] writing on a piece of paper at the check writer station and then approaching the teller station with the piece of paper in his hand.

"The [petitioner] approached Ritchie and handed her a deposit slip that read, '[g]ive cash. I have gun.' When

Ritchie explained that she was not a teller, the [petitioner] ordered her to '[g]ive me the cash. Give it now.' Ritchie then slid the deposit slip to DePietro, who unlocked her teller drawer. As she did, the [petitioner] demanded, '[h]urry up, hurry up' and reached over the counter. DePietro then handed the [petitioner] $3500 in cash.

"The [petitioner] immediately exited the bank and Woodward followed. As Ritchie locked the bank's doors and DiPietro called 911, LaLiberty closed the bank's drive-through window. As she did, she saw the [petitioner] walking at the rear of the bank to a grassy strip between the drive-through lane and an adjacent firehouse. LaLiberty wrote down a description of the [petitioner] at that time. Approximately six hours later, the Connecticut state police apprehended the [petitioner] in a grassy area near Route 66 in Columbia. The [petitioner] subsequently reviewed and executed a waiver of *Miranda*[1] rights form and agreed to speak with Detective Derek Kasperowski. The [petitioner] then admitted to robbing the bank and stated that he remembered 'smoking crack before going into the bank, going to the bank teller and telling her to give him money.' Although no firearm was found on the [petitioner's] person or the surrounding area, the $3500 in cash was recovered." (Internal quotation marks omitted.) *State* v. *Moore*, 141 Conn. App. 814, 816–17, 64 A.3d 787, cert. denied, 309 Conn. 908, 68 A.3d 663 (2013). This court affirmed the petitioner's conviction. Id., 825.

On May 16, 2014, the petitioner, as a self-represented party, filed an application for a writ of habeas corpus. After obtaining counsel, he filed an amended petition on April 28, 2016. He alleged in relevant part that his constitutional right to effective assistance of counsel

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

was violated, arguing that his "trial counsel's performance was deficient because he failed to adequately counsel the petitioner about the advisability of accepting the plea offer" and that there was a "reasonable probability that—but for trial counsel's deficient performance—the petitioner would have accepted the plea offer and the court would have imposed a more favorable sentence than the petitioner received."

At the habeas trial on September 15, 2016, the habeas court heard testimony from Matthew Gedansky, the state's attorney in the petitioner's criminal case, Douglas Ovian, the petitioner's trial counsel, and the petitioner. In particular, the petitioner testified that he admitted from the beginning that he robbed the bank, but he believed that he was only guilty of robbery in the third degree because he only had handed the bank teller a note and never hurt anyone.[2] There was testimony that three plea offers were made to the petitioner: an offer for ten years to serve with five years of special parole; an offer for ten years to serve with two years of special parole; and an offer made at a judicial pretrial conference with *Sullivan*, *J.*, offering the petitioner fifteen years to serve if he pleaded guilty to one count of robbery in the first degree.[3] Ovian testified that his

[2] At the habeas trial, Ovian testified that the petitioner had taken a position that the note recovered at the bank was not the note he had written and handed to the teller. Ovian testified that it was the petitioner's position that the note he handed to the teller never indicated that he had a gun, and that the teller had given him back the note prior to his running from the bank and jumping into a river. Gedansky indicated that the petitioner had a theory that the police had invented the note on which the state relied; Gedansky described this as a "conspiracy theory." Ovian also testified that he recalled contacting a handwriting expert to see if his evaluation of the note could give some support to the petitioner's theory. Ovian testified that after the handwriting analyst reviewed a copy of the note, the handwriting analyst indicated to him that he thought it "would not be a good idea to call him as a witness."

[3] Gedansky testified that Ovian was able to persuade him to reduce his initial offer of ten years to serve with five years special parole to ten years to serve with two years special parole.

notes indicated that he advised the petitioner to accept the offers and that he would never have told the petitioner to take this case to trial. In addition, Gedansky testified that he recalled Ovian telling him that Ovian had advised the petitioner to take the offer of ten years to serve with two years special parole. The petitioner testified that he rejected these offers because he had faith the state might present him with a more favorable offer, and that he believed he deserved only five years of imprisonment. There also was differing testimony between Ovian and the petitioner with respect to what Ovian advised as to the potential maximum sentence the petitioner faced if he was found guilty of all the charges, and whether he advised the petitioner of the potential maximum sentence he faced if he prevailed on a robbery in the third degree theory at trial.[4]

In a memorandum of decision filed January 10, 2017, the habeas court denied the amended petition for a writ

[4] At the habeas trial, Ovian testified that he recalled there being a "specific discussion of numbers" with the petitioner about his exposure if he was found guilty of robbery in the first degree. He also testified that his notes contained a chart showing that the total exposure the petitioner faced was forty-eight and one-half years, which included the enhancements the petitioner likely faced for committing a crime while he was out on bond and for being a persistent felony offender. Ovian then testified that he could not definitively say that he advised the petitioner on the maximum sentence the petitioner faced if convicted on the lesser included offense of robbery in third degree, but he indicated that he would not have led the petitioner to believe that he would have avoided jail time, especially in light of the conversations they had about the enhancements the petitioner faced.

The petitioner testified that Ovian did not tell him that he may receive a sentence of thirty-four years. He also said that he did not think that Ovian had brought to his attention the potential maximum sentence if he was found guilty on all the charges. The petitioner indicated that had he known that he was going to receive a thirty-four-year sentence, he would not have gone to trial. Additionally, the petitioner testified that he was asking at trial that he be found guilty of robbery in the third degree and felt that the maximum sentence was five years; he testified that Ovian never told him the maximum potential sentence for robbery in the third degree was twenty years. He also testified, though, that he did not recall whether Ovian told him that a five year sentence was a likely outcome.

of habeas corpus, finding that the petitioner had failed to prove deficient performance or prejudice. In particular, the habeas court found that "Ovian had many discussions with the petitioner throughout the course of his representation," and that Ovian "went over the state's evidence with [the petitioner] and he advised the petitioner to take each of the deals as they were offered given the circumstances." Additionally, the habeas court found that Ovian "informed the petitioner that he was facing a maximum exposure of forty-eight and one-half years if convicted of robbery in the first degree due to the sentence enhancements the petitioner faced." The habeas court concluded that Ovian relayed the offers to the petitioner, properly explained the state's evidence to him, and adequately warned him of the exposure he could face should he choose to go to trial. On January 17, 2017, the petitioner filed a petition for certification to appeal, which was later denied by the habeas court. This appeal followed.

We begin by setting forth the applicable standard of review and procedural hurdles that the petitioner must overcome in order to obtain appellate review of the merits of a habeas court's denial of the habeas petition following denial of certification to appeal. "In *Simms* v. *Warden*, 229 Conn. 178, 187, 640 A.2d 601 (1994), [our Supreme Court] concluded that . . . [General Statutes] § 52-470 (b) prevents a reviewing court from hearing the merits of a habeas appeal following the denial of certification to appeal unless the petitioner establishes that the denial of certification constituted an abuse of discretion by the habeas court. In *Simms* v. *Warden*, 230 Conn. 608, 615–16, 646 A.2d 126 (1994), [the Supreme Court] incorporated the factors adopted by the United States Supreme Court in *Lozada* v. *Deeds*, 498 U.S. 430, 431–32, 111 S. Ct. 860, 112 L. Ed. 2d 956 (1991), as the appropriate standard for determining

whether the habeas court abused its discretion in denying certification to appeal. This standard requires the petitioner to demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . A petitioner who establishes an abuse of discretion through one of the factors listed above must then demonstrate that the judgment of the habeas court should be reversed on its merits. . . . In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous." (Internal quotation marks omitted.) *Hankerson* v. *Commissioner of Correction*, 150 Conn. App. 362, 366–67, 90 A.3d 368, cert. denied, 314 Conn. 919, 100 A.3d 852 (2014).

On appeal, the petitioner argues that the habeas court improperly rejected his claim that his trial counsel, Ovian, had rendered ineffective assistance.[5] In his view, although Ovian advised him of the maximum sentence that he faced on the charge of robbery in the first degree, Ovian's performance was deficient for failing to advise him of the maximum sentence he faced if he was successful in proving at trial that he was guilty only of committing the lesser included offense of robbery in the third degree.[6] For the reasons set forth in this opinion, we disagree with the petitioner and conclude that

[5] The petitioner appears to predicate his claim of ineffective assistance of counsel on both the sixth amendment to the United States constitution and article first, §§ 8 and 9, of the Connecticut constitution. Because he has not separately analyzed his state constitutional claim, we address only his claim under the federal constitution. See e.g., *Ham* v. *Commissioner of Correction*, 301 Conn. 697, 702 n.6, 23 A.3d 682, 686 (2011); *State* v. *Melendez*, 291 Conn. 693, 704 n.16, 970 A.2d 64, 72 (2009).

[6] After filing this appeal, the petitioner filed a motion for articulation on April 13, 2017, requesting that the habeas court articulate, inter alia, the factual and legal bases for "whether counsel had a duty to advise the peti-

the habeas court did not abuse its discretion in denying the petition for certification to appeal.

"The sixth amendment to the United States constitution, made applicable to the states through the due process clause of the fourteenth amendment, affords criminal defendants the right to effective assistance of counsel. *Davis* v. *Commissioner of Correction*, 319 Conn. 548, 554, 126 A.3d 538 (2015), cert. denied sub nom. *Semple* v. *Davis*, U.S. , 136 S. Ct. 1676, 194 L. Ed. 2d 801 (2016); see also *Thiersaint* v. *Commissioner of Correction*, 316 Conn. 89, 100, 111 A.3d 829 (2015) (criminal defendant constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings). Although a challenge to the facts found by the habeas court is reviewed under the clearly erroneous standard, whether those facts constituted a violation of the petitioner's rights under the sixth amendment is a mixed determination of law and fact that requires the application of legal principles to the historical facts of this case. . . . As such, that question requires plenary review by this court

tioner about his potential and realistic exposure after a trial where he prevailed on his robbery in the third degree theory." The habeas court denied that motion on May 10, 2017, and pursuant to Practice Book § 66-7, the petitioner filed a motion for review in this court challenging the habeas court's denial of his motion for articulation. On July 12, 2017, this court granted review, but denied the relief requested.

In the petitioner's appellate brief, he appears to renew the arguments he made in his motion for review. He seems to suggest that the record is inadequate for review because the habeas court did not address whether trial counsel's failure to advise the petitioner that "a conviction for robbery in the third degree would very likely result in a sentence at least as high as the offers by the prosecuting authority" constituted deficient performance. We disagree. It is evident from the habeas court's well reasoned decision that it determined that trial counsel's failure to advise the petitioner that a conviction of robbery in the third degree would likely result in a sentence at least as high as the offers by the prosecuting authority did not constitute deficient performance in light of the adequate advice that he did provide the petitioner. Accordingly, we conclude that the record is adequate for our review.

unfettered by the clearly erroneous standard." (Internal quotation marks omitted.) *Duncan* v. *Commissioner of Correction*, 171 Conn. App. 635, 646, 157 A.3d 1169, cert. denied, 325 Conn 923, 159 A.3d 1172 (2017).

The United States Supreme Court has made clear that the failure to adequately advise a client throughout the plea process can form the basis for a sixth amendment claim of ineffective assistance of counsel, and that such claims should be evaluated under the two-part standard enunciated in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See *Hill* v. *Lockhart*, 474 U.S. 52, 57, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). "[I]t is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law." (Internal quotation marks omitted.) *Silver* v. *Commissioner of Correction*, 180 Conn. App. 592, 597, 184 A.3d 329, cert. denied, 328 Conn. 940, 184 A.3d 759 (2018).

"Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered. Determining whether an accused is guilty or innocent of the charges in a complex legal indictment is seldom a simple and easy task for a layman, even though acutely intelligent." *Von Moltke* v. *Gillies*, 332 U.S. 708, 721, 68 S. Ct. 316, 92 L. Ed. 309 (1948). "A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable." (Internal quotation marks

omitted.) *Vazquez* v. *Commissioner of Correction*, 123 Conn. App. 424, 437 (2010), 1 A.3d 1242, cert. denied, 302 Conn. 901, 23 A.3d 1241 (2011), quoting *Boria* v. *Keane*, 99 F.3d 492, 496 (2d Cir. 1996), cert. denied, 521 U.S. 1118, 117 S. Ct. 2508, 138 L. Ed. 2d 1012 (1997).

"Although the defendant ultimately must decide whether to accept a plea offer or proceed to trial, this critical decision, which in many instances will affect a defendant's liberty, should be made by a represented defendant with the adequate professional assistance, advice, and input of his or her counsel. Counsel should not make the decision for the defendant or in any way pressure the defendant to accept or reject the offer, but counsel should give the defendant his or her professional advice on the best course of action given the facts of the particular case and the potential total sentence exposure." (Emphasis omitted.) *Barlow* v. *Commissioner of Correction*, 150 Conn. App. 781, 800, 93 A.3d 165 (2014). "We are mindful that [c]ounsel's conclusion as to how best to advise a client in order to avoid, on the one hand, failing to give advice and, on the other, coercing a plea enjoys a wide range of reasonableness. . . . Accordingly, [t]he need for recommendation depends on countless factors, such as the defendant's chances of prevailing at trial, the likely disparity in sentencing after a full trial compared to the guilty plea . . . whether [the] defendant has maintained his innocence, and the defendant's comprehension of the various factors that will inform [his] plea decision." (Citation omitted; internal quotation marks omitted.) *Sanders* v. *Commissioner of Correction*, 169 Conn. App. 813, 828, 153 A.3d 8 (2016), cert. denied, 325 Conn. 904, 156 A.3d 536 (2017).

The petitioner argues that his trial counsel's performance was deficient for failing to advise him of the maximum sentence he faced if he was successful in proving a theory of defense at trial that amounted to

conceding that he was guilty only of the lesser included offense of robbery in the third degree.[7] Specifically, the petitioner argues that although Ovian advised him of the maximum exposure he faced if convicted of robbery in the first degree, Ovian's performance was deficient because he had a duty to further encourage the petitioner to accept the plea offers by advising him that the maximum sentence at trial were he convicted only of robbery in the third degree would be "at least as severe" or exceed the sentences of the plea offers initially made to him. In other words, the petitioner argues that his trial counsel was deficient because he was required, but failed, to adequately address the reasons that the petitioner had for proceeding to trial, rendering him unable to meaningfully weigh his options. We disagree.

In the present case, our review of the record demonstrates that Ovian provided the petitioner with professional advice on the best course of action given the facts of the petitioner's case and also informed him of the potential total sentence to which he was exposed. See *Barlow* v. *Commissioner of Correction*, supra, 150 Conn. App. 800. While the petitioner may prefer that we broaden this duty by requiring trial counsel to advise their clients on the total sentence exposure they face for each and every possible defense scenario, we decline to adopt such a rule.

As the petitioner points out, both parties agree that the evidence against the petitioner was overwhelming

[7] As previously noted, the petitioner took the position that the note he handed to the teller never indicated that he had a gun, and that the teller had given him back the note prior to his running from the bank. In his view, the note on which the state relied was not the note he had written. As such, it was his theory that because he never referenced a gun in the note that he handed the teller, he could be found guilty only of robbery in the third degree. Accordingly, after the petitioner declined to follow his counsel's advice to take the plea offers, Ovian pursued the petitioner's preferred theory at trial that called into question the authenticity of the note, which, if the jury believed, would constitute only robbery in the third degree.

and that it was highly unlikely that the petitioner could have prevailed with respect to the charge of robbery in the first degree. To be sure, the evidence at trial included, inter alia, still photographs from the video surveillance of the petitioner entering the bank and writing a note, photographs of him approaching the teller station with the piece of paper in hand, the slip containing the petitioner's written demand for money and reference to a gun, testimony of the bank teller explaining that she had written a description of the petitioner on the back of the slip, and evidence that the petitioner was apprehended with the proceeds of the crime on him. In its memorandum of decision, the habeas court found that Ovian had many discussions with the petitioner throughout the course of his representation and discussed the strengths and weaknesses of the state's evidence with him. On the basis of his assessment of the case, Ovian advised the petitioner to accept each of the plea deals offered to him, informing the petitioner that he was facing a maximum sentence of forty-eight and one-half years if he proceeded to trial.

Although the petitioner was apprised of the evidence against him and advised to accept each of the plea deals offered, the record demonstrates that he held strong, subjective, and unrealistic beliefs about his case. For example, the habeas court found that the petitioner believed he should be convicted only of robbery in the third degree because he merely gave the bank teller a note and did not hurt anyone; that he believed that five years was a more reasonable sentence for his offense; that the petitioner, at a judicial pretrial conference, stated, "[s]ir, I apologize, to offend you all but I just want you to know this is not a [r]obbery [first] and I will be going to trial to prove it because I am not copping out to this"; that he believed that the maximum sentence he could receive for robbery in the third degree was five years; and that he rejected plea offers from the

state because he had faith the state might present him with a more favorable offer.[8] Despite counsel's advice to the petitioner to accept the plea offers, the petitioner chose to proceed to trial where he attempted to prove that his actions constituted only robbery in the third degree.[9]

The petitioner acknowledges that he was "fully advised" about the likelihood of being convicted on the robbery in the first degree charge and the maximum potential sentence that he likely faced, but instead, focuses his argument on trial counsel's lack of specific advice on the maximum sentence he could have faced if he had succeeded on the unlikely strategy of proving that he only had committed robbery in the third degree. In doing so, he argues that he was unable to meaningfully weigh his options on whether to proceed to trial without understanding that the maximum sentence at trial on a theory of robbery in the third degree would be "at least as severe" or exceed the sentences of the plea offers initially made to the petitioner. He asserts that his "decision to proceed to trial was influenced highly by trial counsel's flawed advice" to him, characterizing his decision to reject the plea offers and proceed to trial as "irrational and suicidal given the circumstances." The petitioner's argument, however, completely ignores the adequate and accurate advice Ovian did provide him. Ovian's conversations with the petitioner fully apprised him of the reality of his case. Moreover, the court found that Ovian had many discussions with the petitioner throughout the course of his

[8] Ovian also testified at the habeas trial that the petitioner believed that the plea deals offered by the state were too high given his poor health, especially "for someone who might not make it." Ovian noted that the petitioner recently had a heart attack and felt like his "life was fleeting."

[9] Ovian testified at the habeas trial that although he disagreed with the petitioner's decision to go to trial, he told him he would do his best to represent him. Accordingly, Ovian decided to pursue a strategy that called into question the authenticity of the note.

representation, where Ovian properly explained the state's evidence to him, relayed the plea offers to him, and informed him that he faced up to forty-eight and a half years incarceration if he proceeded to trial. Given the circumstances, Ovian advised the petitioner that the plea offers from the state were desirable and that he should accept them. See *Vazquez* v. *Commissioner of Correction*, supra, 123 Conn. App. 437.

While the petitioner may now describe his decision to proceed to trial as "suicidal," that decision was his alone to make. See *Andrews* v. *Commissioner of Correction*, 155 Conn. App. 548, 554, 110 A.3d 489 ("[c]ounsel should not make the decision for the defendant or in any way pressure the defendant to accept or reject the offer" [internal quotation marks omitted]), cert. denied, 316 Conn. 911, 112 A.3d 174 (2015). From the beginning, Ovian's advice to him was unequivocal; he made clear that the petitioner should be prepared for a conviction on the charge of robbery in the first degree should he choose to proceed to trial. And, as counsel had warned, the petitioner was in fact convicted of robbery in the first degree and sentenced to thirty-four years incarceration following his trial. Our case law requires that the petitioner be given "adequate professional assistance, advice, and input" from his counsel and be advised "on the best course of action given the facts of [his] case and the potential total sentence exposure." (Emphasis omitted.) *Barlow* v. *Commissioner of Correction*, supra, 150 Conn. App. 800. On the basis of our review of the record, we conclude that he was provided with just that. We cannot say that Ovian's failure to inform the petitioner of the potential total sentence exposure he faced if he succeeded on the unlikely theory of proving robbery in the third degree or his decision not to further persuade the petitioner to accept the plea offers constituted deficient performance. It also bears noting that the petitioner has cited no relevant cases to support

his claim on appeal and presented no evidence at the habeas trial to demonstrate that the prevailing professional norms in Connecticut made it necessary for Ovian to advise the petitioner in the manner he argues. As this court has noted before, trial counsel's decision on "how best to advise a client in order to avoid, on the one hand, failing to give advice and, on the other, coercing a plea enjoys a wide range of reasonableness . . . ."[10] (Internal quotation marks omitted.) *Peterson* v. *Commissioner of Correction*, 142 Conn. App. 267, 274, 67 A.3d 293 (2013).

The information and advice provided to the petitioner by trial counsel was adequate for him to make an informed decision as whether to accept the state's plea offers. See *Melendez* v. *Commissioner of Correction*, 151 Conn. App. 351, 359, 95 A.3d 551, cert. denied, 314 Conn. 914, 100 A.3d 405 (2014). Although the petitioner claims he was entitled to further explanation about the consequences of proceeding to trial, he has not demonstrated, as required under the first prong of *Strickland*, that trial counsel's actual explanation and advice fell below an objective standard of reasonableness under prevailing professional norms.[11] See *Strickland* v. *Washington*, supra, 466 U.S. 687–88; *Heredia* v. *Commissioner of Correction*, 106 Conn. App. 827, 836–37, 943 A.2d 1130, cert. denied, 287 Conn. 918, 951 A.2d 568 (2008).

We, therefore, conclude, after a thorough review of the record, that the petitioner failed to establish that

[10] In fact, advising the petitioner of the consequence of a robbery in the third degree conviction might only have encouraged his unfounded belief that the state only could prove the lesser offense when the evidence of robbery in the first degree was strong.

[11] Because Ovian did not render deficient performance, we need not reach the prejudice prong of the *Strickland* test. See *Brunetti* v. *Commissioner of Correction*, 134 Conn. App. 160, 172 n.2, 37 A.3d 811, cert. denied, 305 Conn. 903, 44 A.3d 180 (2012).

the issue he raised is debatable among jurists of reason, that a court could resolve it in a different manner, or that the question he raised is adequate to deserve encouragement to proceed further. Accordingly, we conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

DE AUTO TRANSPORT, INC. *v.* EUROLITE, LLC, ET AL.
(AC 39973)

Lavine, Alvord and Moll, Js.

Syllabus

The plaintiff sought to recover damages from the defendants for wrongful repossession, conversion, and statutory theft in connection with a business deal involving the purchase and use of a truck and trailer. The plaintiff, a company that provided motor vehicle services, was formed by D and E. D had entered into an agreement with the defendant Z, who was a member of the defendant E Co., whereby E Co. would loan a certain sum to the plaintiff to purchase a truck and trailer. Under the terms of the loan, the plaintiff would make payments on the loan for thirty-six months at a certain interest rate, and E Co. would receive a certain percent of the profits from the use of the truck and trailer for the term of the loan. After the truck and trailer were purchased and payments on the loan commenced, D left the United States to return to Poland, and E assumed responsibility for managing the plaintiff corporation. Thereafter, E Co. repossessed the truck and trailer, and the plaintiff commenced this action. The matter was tried to the court, where the plaintiff presented evidence, including testimony and a financial report from a certified public accountant, G, as to its claim for lost profits. The trial court rendered judgment in favor of the defendants, from which the plaintiff appealed to this court. The plaintiff claimed that the trial court, having assumed liability, improperly failed to award damages. *Held* that the trial court did not err in its damages determination, as no credible evidence was presented in support of the plaintiff's claim for lost profits and the court did not have a sufficient basis for estimating its amount with reasonable certainty; the trial court's determination that G's testimony and financial report were not credible was not clearly erroneous given that G failed to list some of the plaintiff's

trucks on its tax returns, that the disclosures of D and E failed to comply with generally accepted accounting principles, and that G was unaware of the terms of the loan agreement, including the profit splitting arrangement, and that the parties were involved in a money laundering scheme to avoid the payment of taxes, and there was no further credible evidence presented by which the court could estimate damages with reasonable certainty.

Argued October 16—officially released November 27, 2018

Procedural History

Action to recover damages for wrongful repossession, conversion, and statutory theft, and for other relief, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Wiese*, *J.*; judgment for the defendants, from which the plaintiff appealed to this court. *Affirmed.*

Robert T. Rimmer, for the appellant (plaintiff).

Paul A. Catalano, for the appellees (defendants).

Opinion

PER CURIAM. The plaintiff, DE Auto Transport, Inc., appeals from the judgment of the trial court, rendered after a trial to the court, in favor of the defendants, Eurolite, LLC (Eurolite), and Leopold Zayaczkowski. On appeal, the plaintiff claims that the trial court erred in its damages analysis. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to our resolution of the plaintiff's claims on appeal. In 2008, Dariusz Penkiewicz (Dariusz) and Elzbieta Penkiewicz (Elzbieta), who were married at the time, formed the plaintiff, which provided motor vehicle services, including the transportation of vehicles. In 2011, the plaintiff had four transport vehicles. Dariusz and Zayaczkowski, on behalf of Eurolite, entered into an oral agreement whereby Eurolite would loan up to $50,000 for Dariusz to purchase a larger truck

and trailer for the plaintiff. Under the terms of the agreement, the plaintiff would make payments on the loan for thirty-six months at an interest rate of 14 percent. In addition, Eurolite would receive 40 percent of the profits and the plaintiff would receive 60 percent of the profits resulting from the use of the truck and trailer for the thirty-six month term. Dariusz subsequently purchased a 2005 Peterbuilt truck for $23,500 and a Cottrell trailer for $25,000. Eurolite provided the funds for the purchase, and the parties agreed on a printed loan amortization schedule. The total amount borrowed was $48,500. The plaintiff made its first payment on the loan in March, 2011.

In February, 2012, Dariusz left the United States to return to Poland because he was concerned about being deported. His absence adversely affected the business operations of the plaintiff. He did not return to the United States until January, 2014. During the time of his absence, it was Elzbieta's responsibility to manage the plaintiff. On April 27, 2013, Elzbieta contacted the police to report that the Peterbuilt truck and trailer had been wrongfully repossessed by Eurolite. Eurolite subsequently returned the Peterbuilt truck and trailer, at the direction of the police, but repossessed the Peterbuilt truck and trailer again a few days later. In May, 2013, Elzbieta learned that Dariusz had been having an extramarital affair, and had a wife and child in Poland. Elzbieta shortly thereafter liquidated the plaintiff and sold its remaining assets. She relocated to Florida, divorced Dariusz, and remarried in December, 2013.

On July 12, 2013, the plaintiff served a complaint on the defendants, which alleged claims of wrongful repossession, conversion, and statutory theft.[1] A trial

[1] The complaint included five counts: (1) wrongful repossession and conversion as against Eurolite, (2) statutory theft as against Eurolite, under General Statutes § 52-564, (3) statutory theft as against Zayaczkowski, under § 52-564, (4) unfair trade practices by Eurolite, in violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110b et seq., and

to the court took place on February 25 and 26, 2016. On November 18, 2016, the court issued its memorandum of decision and rendered judgment in favor of the defendants. The court concluded that "[e]ven assuming that [the plaintiff] has sustained its burden to prove liability under one or more of the various counts of its complaint, the court finds that it has still failed to prove causation and damages." In reaching its conclusion, the court determined that "[t]he liquidation of [the plaintiff] was not caused by a repossession of the Peterbuilt truck and trailer. Rather, it occurred as a result of a combination of other events," such as "declining business revenues, [Dariusz'] return to Poland, the divorce and [Elzbieta's] desire to relocate to Florida, remarry and start her life over."

On appeal, the plaintiff claims that the trial court, having assumed liability, erred in failing to award damages.[2] Specifically, the plaintiff argues that the court "[failed] to analyze the amount of harm . . . caused by the defendants' wrongful repossession, conversion and statutory theft of the [Peterbuilt truck] and trailer."[3] We disagree.

(5) disgorgement of payments as against Eurolite. During trial, the court dismissed the CUTPA count because the plaintiff stated it was no longer pursuing that claim. In addition, the court noted in its memorandum of decision that "[t]he plaintiff has not addressed the disgorgement of payment claim in its posttrial brief, and, more specifically, has not cited to a single case or other legal authority in its brief regarding the disgorgement of payment claim. As such, the plaintiff has abandoned that claim." On appeal, the plaintiff does not dispute the court's finding that it abandoned the disgorgement claim.

[2] Both parties briefed additional arguments related to the Eurolite's liability for wrongful possession, conversion, and statutory theft. For purposes of this appeal, this court, like the trial court, will assume, without deciding, that the plaintiff established liability. Therefore, we turn to the plaintiff's challenges to the trial court's determination of damages.

[3] The plaintiff also argues that the court "created a new element of 'causation' and added it to the elements necessary to prove wrongful repossession, conversion and statutory theft." This claim is without merit. The court did not err in determining that, in order for the plaintiff to recover damages for its liquidation, the liquidation must have been caused by the wrongful repossession, conversion, or statutory theft.

"The legal principles that govern our review of damage awards are well established. It is axiomatic that the burden of proving damages is on the party claiming them. . . . Damages are recoverable only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty. . . . [T]he court must have evidence by which it can calculate the damages, which is not merely subjective or speculative . . . but which allows for some objective ascertainment of the amount. . . . This certainly does not mean that mathematical exactitude is a precondition to an award of damages, but we do require that the evidence, with such certainty as the nature of the particular case may permit, lay a foundation [that] will enable the trier to make a fair and reasonable estimate. . . . Evidence is considered speculative when there is no documentation or detail in support of it and when the party relies on subjective opinion. . . . The trial

Moreover, the court's conclusion that "[t]he liquidation of [the plaintiff] was not caused by a repossession of the Peterbuilt truck and trailer [but rather] occurred as a result of a combination of other events" was supported by the evidence presented at trial. See *State* v. *Krijger*, 313 Conn. 434, 446, 97 A.3d 946 (2014) (finding is clearly erroneous if there is "no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed"). Dariusz testified that he went to Poland in 2012 and left Elzbieta to make all of the decisions for the plaintiff. Elzbieta testified that she decided to terminate the business at the end of May, 2013, "when [she] found out [her] husband [was] cheating on [her] and he . . . had a family in Poland . . . and [she] didn't get the big truck . . . ." There was also evidence to support the court's finding that the plaintiff had declining business revenues. First, Dariusz testified that, in January or February, 2013, he purchased a trailer for the plaintiff but could not purchase a truck because he had "no money to buy the truck." In addition, in April, 2013, Elzbieta located another larger truck and trailer that she wanted to purchase, but was denied a loan because of poor credit and could not make the purchase. Similarly, in May, 2013, Elzbieta applied for a replevin bond, which was denied because of poor credit. Moreover, the plaintiff's payments to Eurolite on the loan became past due. Because there was evidence to support the court's conclusion that the liquidation of the plaintiff was caused by events other than Eurolite's repossession of the Peterbuilt truck and trailer, its determination was not clearly erroneous.

court's determination that damages have not been proved to a reasonable certainty is reviewed under a clearly erroneous standard." (Citations omitted; internal quotation marks omitted.) *Weiss* v. *Smulders*, 313 Conn. 227, 253–54, 96 A.3d 1175 (2014).

At oral argument before this court, the plaintiff contended that there were three types of damages that the trial court could have awarded: (1) lost profits, (2) the value of the Peterbuilt truck, and (3) payments made to Eurolite.[4] At trial, however, the plaintiff did not claim damages related to the value of the Peterbuilt truck or payments made to Eurolite.[5] Therefore, we decline to review these two claims on appeal. See *DiMiceli* v. *Cheshire*, 162 Conn. App. 216, 229–30, 131 A.3d 771 (2016) ("Our appellate courts, as a general practice, will not review claims made for the first time on appeal. . . . [B]ecause our review is limited to matters in the record, we [also] will not address issues not decided by the trial court.").

[4] The plaintiff also argues that it was entitled to statutory damages under General Statutes § 36a-785 (i). The plaintiff argues that "upon a finding of liability under [General Statutes § 36a-770 et seq.] damages must be awarded." (Emphasis omitted.)

At trial, however, the plaintiff did not claim statutory damages. In its complaint and posttrial brief, it claimed that § 36a-785 did not apply because there was no written retail installment contract. It argued, alternatively, that repossession would still be wrongful under § 36a-785. The plaintiff did not seek statutory damages under § 36a-785 (i). Therefore, we decline to review this claim on appeal. See *DiMiceli* v. *Cheshire*, 162 Conn. App. 216, 229–30, 131 A.3d 771 (2016) ("Our appellate courts, as a general practice, will not review claims made for the first time on appeal. . . . [B]ecause our review is limited to matters in the record, we [also] will not address issues not decided by the trial court.").

[5] The only claim that the plaintiff raised before its appeal regarding payments made to Eurolite was its claim for disgorgement of payments. On appeal, however, the plaintiff does not challenge the court's finding that it abandoned this claim. See footnote 1 of this opinion. With regard to the value of the Peterbuilt truck, the plaintiff contends that it presented evidence as to the cost of the Peterbuilt truck and trailer when it was first purchased. The plaintiff, however, did not seek the value as damages in its complaint, at trial, or in its posttrial brief.

With regard to the plaintiff's claim for lost profits, the plaintiff conceded at oral argument that a report prepared by the plaintiff's certified public accountant, Robert Gollnick, was "the only evidence of economic loss." In the report, dated May 20, 2013, Gollnick concluded that the fair market value of the plaintiff was $116,000. In addition, Gollnick determined that there was "a loss of $97,810 of income for 2013 before other operating expenses."[6]

Gollnick's testimony and report were subject to a credibility determination by the court. "[I]t is the exclusive province of the trier of fact to weigh the conflicting evidence, determine the credibility of witnesses and determine whether to accept some, all or none of a witness' testimony. . . . Thus, if the court's dispositive finding . . . was not clearly erroneous, then the judgment must be affirmed. . . . The function of the appellate court is to review, and not retry, the proceedings of the trial court." (Internal quotation marks omitted.) *Keith E. Simpson Associates, Inc.* v. *Ross*, 125 Conn. App. 539, 543, 9 A.3d 394 (2010). A finding is clearly erroneous if there is "no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *State* v. *Krijger*, 313 Conn. 434, 446, 97 A.3d 946 (2014).

The court found Gollnick's testimony and report not credible, concluding that "[a] substantial portion of the information provided to him [by the plaintiff] was either inaccurate and/or incomplete." Specifically, the court found that Gollnick was not made aware of the loan on the Peterbuilt truck and trailer or the agreement to

[6] At trial, Gollnick first testified that the $97,810 loss "[reflected] the loss of the vehicle," but later testified that "it was the loss of the business, but that resulted from the loss of the truck . . . ."

divide the profits on a 60/40 basis, he did not list some of the plaintiff's trucks on its tax returns, he was unaware that the parties were involved in a money laundering scheme to avoid the payment of taxes,[7] and that Dariusz and Elzbieta "elected to omit substantially all of the disclosures required by generally accepted accounting principles." Most significantly, the court found that "when Gollnick prepared the projected income and expense for [the plaintiff] to arrive at the claimed damage figure of $116,000, he utilized tax returns for years 2010, 2011 and 2012. These returns are inaccurate and/or incomplete." Because there was evidence to support the court's credibility determination, its finding was not clearly erroneous.[8] Consequently, no credible evidence was presented in support of the plaintiff's claim for lost profits and the court did not have a sufficient basis for estimating its amount with reasonable certainty. See *Ray Weiner, LLC* v. *Connery*, 146 Conn. App. 1, 7, 75 A.3d 771 (2013) ("[i]t is axiomatic that damages are awarded on the basis of facts and credible evidence, as found by the trier of fact" [internal quotation marks omitted]). Therefore,

[7] The trial court found that the plaintiff made payments to third parties, not reported to the Internal Revenue Service, to avoid paying taxes.

[8] The testimony at trial provided a basis for the court's finding. Gollnick testified that he "was never told that there was a loan" or that 40 percent of the profit went to Eurolite. He conceded that the value of the Peterbuilt truck would change if 40 percent belonged to someone else and that the fair market value would be reduced. In addition, he conceded that the Peterbuilt truck was not listed on the 2012 tax return and explained that he "wasn't given the . . . proper information." Rather, he listed only three trucks on the tax return even though he knew that the plaintiff had five trucks. Moreover, Gollnick testified that he did not know about the money laundering, and that he "would have an ethical question if [he] knew about it at the time and [he] probably would've not done it." Lastly, Gollnick's report states that "Dariusz & Elzbieta Penkiewicz have elected to omit substantially all of [the] disclosures required by generally accepted accounting principles. If the omitted disclosures were included in the statement of financial condition, they might influence the user's conclusions about the financial condition of Dariusz & Elzbieta Penkiewicz."

we conclude that the court did not err in its damages determination.

The judgment is affirmed.

CHANDRA BOZELKO *v.* TINA SYPEK D'AMATO ET AL.
(AC 40466)

Sheldon, Keller and Bright, Js.

Syllabus

The plaintiff sought to recover damages from the defendant attorney, D, and her law firm, for, inter alia, legal malpractice in connection with D's representation of the plaintiff at her sentencing hearing. Following the plaintiff's conviction of various crimes, the trial court granted the motion of the plaintiff's prior counsel to withdraw and continued the plaintiff's sentencing hearing to December 7, 2007, so that she could hire new counsel to represent her. The court expressly informed the plaintiff that she would be sentenced on that date, that it would not consider any further requests for continuances of sentencing and that she should be prepared to be sentenced on the scheduled date. Thereafter, the plaintiff retained D to represent her. On December 7, 2007, the trial court held the sentencing hearing as scheduled, during which it heard from the assistant state's attorney and D, offered the plaintiff the opportunity to speak on her own behalf, which she declined, and sentenced the plaintiff. The plaintiff thereafter commenced the present action against the defendants, who filed a motion for summary judgment on the ground that the plaintiff had failed to disclose an expert witness to testify that D had breached the standard of care in representing her or that any such breach had proximately caused her alleged injuries. In opposition to the motion for summary judgment, the plaintiff argued, inter alia, that the allegations in her complaint fit the gross negligence exception to the expert testimony requirement for legal malpractice claims. The trial court granted the defendants' motion for summary judgment and rendered thereon, concluding that D had not been grossly negligent in her representation of the plaintiff, and, therefore, that the plaintiff's failure to disclose an expert witness was fatal to her claim. On the plaintiff's appeal to this court, *held* that the trial court properly rendered summary judgment in favor of the defendants, as the plaintiff failed to disclose an expert witness to testify that her alleged injuries were caused by D's allegedly grossly negligent representation of her: even if this court assumed that D did not advise the plaintiff that she

would be sentenced on December 7, 2007, and that D was grossly negligent in not doing so, the plaintiff failed to show that such alleged negligence caused her to be unprepared for sentencing on that date, as the sentencing court was unequivocal in its advisement to the plaintiff that she would be sentenced on the scheduled date, regardless of who her attorney was at that time, that requests for further continuances would not be considered, and that she should be ready to be sentenced on that date, and, therefore, the plaintiff failed to demonstrate either required component of causation for her legal malpractice claim, namely, that she would have been prepared for sentencing on the scheduled date but for D's conduct, or that D's conduct was a substantial factor in causing her to be unprepared for sentencing on that date; moreover, there was a clear absence of an unbroken sequence of events that tied the plaintiff's injuries to D's conduct, and the causal link between the alleged negligence of D and the plaintiff's alleged injuries was not so obvious as to negate the need for expert testimony on that issue.

Argued September 21—officially released November 27, 2018

Procedural History

Action to recover damages for, inter alia, legal malpractice, and for other relief, brought to the Superior Court in the judicial district of New London, where the court, *Bates*, *J.*, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Chandra Bozelko, self-represented, the appellant (plaintiff).

Michele C. Wojcik, for the appellees (defendants).

Opinion

SHELDON, J. In this legal malpractice action, the plaintiff, Chandra Bozelko, appeals from the summary judgment rendered by the trial court in favor of the defendants, Tina Sypek D'Amato and the Law Offices of Tina Sypek D'Amato. The trial court granted the defendants' motion for summary judgment on the ground that the plaintiff had failed to disclose an expert witness in support of her malpractice claim. The plaintiff challenges the summary judgment on the grounds

that expert testimony was unnecessary to prove her claim of legal malpractice because her allegations against D'Amato fit the gross negligence exception to the expert testimony requirement for legal malpractice claims and expert testimony is not required when a legal malpractice case is tried to the court rather than to a jury. Because the plaintiff failed to disclose an expert witness who would testify that her alleged injury was caused by D'Amato's alleged grossly negligent representation of her, we affirm the judgment of the trial court.

The following procedural history is relevant to this appeal. In October, 2007, following a criminal jury trial, the plaintiff was convicted of fourteen offenses[1] and acquitted of eight others. On November 19, 2007, when the court, *Cronan*, *J.*, granted the motion of the plaintiff's prior counsel to withdraw and continued the plaintiff's sentencing hearing to December 7, 2007, so that she might hire new counsel to represent her at that hearing, it expressly informed the plaintiff that she would be sentenced on December 7, 2007, that it would not consider any further requests for continuances of sentencing beyond that date, and, thus, that she should be ready to be sentenced on that date. Thereafter, at some point in late November, the plaintiff retained

[1] The plaintiff was convicted of offenses charged in four separate case files. *State* v. *Bozelko*, 119 Conn. App. 483, 485, 987 A.2d 1102, cert. denied, 295 Conn. 916, 990 A.2d 867 (2010), cert. denied, U.S. , 134 S. Ct. 1314, 188 L. Ed. 2d 331 (2014). In the first case, the plaintiff was convicted of attempt to commit larceny in the first degree, identity theft in the first degree, attempt to commit illegal use of a credit card, and forgery in the third degree. Id., 485–86. In the second case, the plaintiff was convicted of larceny in the third degree, identity theft in the third degree, illegal use of a credit card, and forgery in the third degree. Id., 486. In the third case, the plaintiff was convicted of attempt to commit larceny in the fifth degree, attempt to commit illegal use of a credit card, and identity theft in the third degree. Id. In the fourth case, the plaintiff was convicted of larceny in the fifth degree, illegal use of a credit card, and identity theft in the third degree. Id.

D'Amato to represent her. D'Amato filed a motion for a new trial on behalf of the plaintiff. On December 7, 2007, before proceeding with the previously scheduled sentencing hearing, the court heard argument on the plaintiff's motion for a new trial. Despite D'Amato's request for an evidentiary hearing on that motion, which she asked to be held at a later date, the court heard argument on the motion and denied it from the bench without an evidentiary hearing. Thereafter, the court proceeded with the sentencing hearing, at which it heard from the assistant state's attorney and D'Amato, offered the plaintiff the opportunity to speak on her own behalf, which she declined, and then sentenced the plaintiff to a total effective sentence of ten years imprisonment, execution suspended after five years, and four years of probation. The plaintiff's convictions were later upheld on direct appeal. *State* v. *Bozelko*, 119 Conn. App. 483, 510, 987 A.2d 1102, cert. denied, 295 Conn. 916, 990 A.2d 867 (2010), cert. denied, U.S. , 134 S. Ct. 1314, 188 L. Ed. 2d 331 (2014).

The plaintiff filed this action against the defendants by way of a complaint dated July 15, 2011, alleging legal malpractice, breach of fiduciary duty and negligent infliction of emotional distress. The trial court granted the defendants' motion to strike the plaintiff's claims of breach of fiduciary duty and negligent infliction of emotional distress. The defendants thereafter moved for summary judgment on the plaintiff's legal malpractice claim against them on the ground that the plaintiff had failed to disclose an expert witness to testify that D'Amato had breached the standard of care in representing the plaintiff or that any such breach had proximately caused any of the plaintiff's alleged injuries. In opposition to the defendants' motion for summary judgment, the plaintiff argued that her allegations fit the gross negligence exception to the expert testimony requirement for legal malpractice claims. The plaintiff

also argued that expert testimony was unnecessary in this case because the case would not be tried to a jury but, rather, to the court, which assertedly had no need for expert testimony to help it understand and decide the merits of her legal malpractice claims because it was "not a layperson." The court rejected the plaintiff's arguments, concluding that D'Amato had not been grossly negligent in her representation of the plaintiff and, thus, that the plaintiff's failure to disclose an expert was fatal to her legal malpractice claim. The court therefore rendered summary judgment in favor of the defendants, and this appeal followed.

We begin with general principles of law and the standard of review. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law. . . . Our review of the trial court's decision to grant [a] motion for summary judgment is plenary. . . . Summary judgment in favor of a defendant is proper when expert testimony is necessary to prove an essential element of the plaintiff's case and the plaintiff is unable to produce an expert witness to provide such testimony. . . .

"Malpractice is commonly defined as the failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession *with the result of injury, loss, or damage* to the recipient of

those services . . . . Generally, a plaintiff alleging legal malpractice must prove all of the following elements: (1) the existence of an attorney-client relationship; (2) the attorney's wrongful act or omission; (3) *causation*; and (4) damages. . . .

"The essential element of causation has two components. The first component, causation in fact, requires us to determine whether the injury would have occurred but for the defendant's conduct. . . . The second component, proximate causation, requires us to determine whether the defendant's conduct is a substantial factor in bringing about the plaintiff's injuries. . . . That is, there must be an unbroken sequence of events that tied [the plaintiff's] injuries to the [defendant's conduct]. . . . This causal connection must be based [on] more than conjecture and surmise. . . . [N]o matter how negligent a party may have been, if his negligent act bears no [demonstrable] relation to the injury, it is not actionable . . . .

"The existence of the proximate cause of an injury is determined by looking from the injury to the negligent act complained of for the necessary causal connection. . . . In legal malpractice actions arising from prior litigation, the plaintiff typically proves that the . . . attorney's professional negligence caused injury to the plaintiff by presenting evidence of what would have happened in the underlying action had the [attorney] not been negligent. This traditional method of presenting the merits of the underlying action is often called the case-within-a-case. . . . More specifically, the plaintiff must prove that, in the absence of the alleged breach of duty by her attorney, the plaintiff would have prevailed [in] the underlying cause of action and would have been entitled to judgment. . . . To meet this burden, the plaintiff must produce evidence explaining the legal significance of the attorney's failure

and the impact this had on the underlying action." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Bozelko* v. *Papastavros*, 323 Conn. 275, 282–84, 147 A.3d 1023 (2016).

Here, the plaintiff has abandoned any claim that the sentence that she received was enhanced by D'Amato's representation of her at her sentencing hearing. She is not claiming that but for D'Amato's allegedly gross negligence, she would have received a better or different sentence from the court. Rather, her claim focuses exclusively on certain emotional and inconvenience costs she claims to have arisen from D'Amato's alleged failure to advise her that she would be sentenced on December 7, 2007. She claims that "what would have been different would have been [her] mindset and personal preparation for the day." The plaintiff argued to this court that her claim is that D'Amato was grossly negligent in telling her that she might not be sentenced on December 7, 2007, and that because of that representation, she was surprised when she was, in fact, sentenced and remanded to the custody of the Commissioner of Correction on that day.

Even if this court were to assume that D'Amato did not advise the plaintiff that she would be sentenced on December 7, 2007, and that she was grossly negligent in not doing so, the plaintiff has failed to show that such alleged negligence caused her to be unprepared for sentencing on that date. This is because the sentencing court was unequivocal in its advisement to the plaintiff that she would be sentenced on December 7, 2007, regardless of who her attorney was at that time, that requests for further continuances would not be considered, and that she should be ready to be sentenced on that date. The plaintiff has failed to demonstrate either required component of causation—that she would have been prepared for sentencing on December 7, 2007, but for D'Amato's conduct, or that D'Amato's conduct was

a substantial factor in causing her to be unprepared for sentencing on that day. There is a clear absence of an unbroken sequence of events that tied the plaintiff's injuries to D'Amato's conduct, and the causal link between the alleged negligence of D'Amato and the plaintiff's alleged injuries is not so obvious as to negate the need for expert testimony on that issue. We thus agree with the trial court that the plaintiff's failure to disclose an expert witness was fatal to her legal malpractice claim. Therefore, the trial court properly rendered summary judgment in favor of the defendants.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MARK T.*
(AC 40439)

Keller, Bright and Pellegrino, Js.

Syllabus

Convicted of the crime of risk of injury to a child in connection with an incident in which he dragged the victim, his minor daughter, through the corridors of her school in an effort to take her to a counseling appointment at a mental health facility, the defendant appealed to this court. He claimed, inter alia, that the trial court improperly precluded testimony about the victim's violent disposition, which bore on whether he used a reasonable amount of force when he attempted to remove her from the school, where she was enrolled in a behavioral support class for children who are prone to disruptive behavior. When W, the victim's special education teacher, accompanied the victim to the school's front office to meet the defendant, he approached the victim in a hallway and unsuccessfully attempted to persuade her to go with him. The defendant then attempted to pick her up and carry her, but she resisted, and the defendant then dragged her toward the exit. *Held*:

1. The defendant could not prevail on his claim that the trial court improperly precluded him from questioning W about whether the victim had been

* In accordance with our policy of protecting the privacy interests of the victims of the crime of risk of injury to a child, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

violent with others at school, which was based on his assertion that his questions were not beyond the scope of the state's redirect examination of W; that court acted within its discretion to limit the defendant's inquiry, as it did not relate to W's capacity to recall accurately the incident at issue, which was the only subject of the state's redirect examination, W testified generally about the victim's past disruptive and oppositional behavior, and, to the extent that her behavioral history was relevant to the defendant's subjective belief that the amount of force he used during the incident at school was reasonable to maintain discipline, that issue was not raised during the state's redirect examination, and the defendant could have called W to testify if he had wanted to explore that line of inquiry further.

2. The defendant could not prevail on his claim that the trial court improperly sustained the state's objections to his testimony about the victim's misbehavior at home and how desperate he was to obtain treatment for her, which was based on his assertion that without such context, his defense of parental justification was hamstrung and toothless; the court's preclusion of the name of the mental health institution where the defendant was trying to take the victim for treatment did not render his theory of defense toothless, as certain details about the victim and the name of the institution, which had been placed under seal, were not material to the defense of parental justification, and it was clear from the record that the court allowed the defendant to testify about his difficult relationship with the victim, her misbehavior at home, his belief that she needed urgent mental health treatment, and the fact that he had obtained a more significant type of help for her than an after-school program.

Argued September 6—officially released November 27, 2018

Procedural History

Substitute information charging the defendant with the crimes of risk of injury to a child and breach of the peace in the second degree, brought to the Superior Court in the judicial district of New London, geographical area number ten, where the court, *Jongbloed, J.*, granted in part the state's motion to preclude certain evidence and denied the defendant's motion to dismiss; thereafter, the matter was tried to the jury; verdict of guilty of risk of injury to a child; subsequently, the court rendered judgment in accordance with the verdict, from which the defendant appealed to this court. *Affirmed.*

Robert L. O'Brien, assigned counsel, with whom, on the brief, was *William A. Adsit*, assigned counsel, for the appellant (defendant).

Rita M. Shair, senior assistant state's attorney, with whom were *Michael L. Regan*, state's attorney, and, on the brief, *Sarah E. Steere*, senior assistant state's attorney, for the appellee (state).

Opinion

PELLEGRINO, J. The defendant, Mark T., appeals from the judgment of conviction, rendered after a jury trial, of one count of risk of injury to a child in violation of General Statutes § 53-21 (a) (1). On appeal, the defendant claims that the trial court abused its discretion by excluding relevant evidence, and thereby violated his constitutional right (1) to present a defense and (2) to testify in his own defense. We disagree and, therefore, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. The defendant, who was thirty-five years of age, had maintained custody of his biological daughter, the victim, for hardly three weeks at the time of the incident. The victim was thirteen, in the eighth grade, and enrolled in an intensive behavioral support class for children who were prone to disruptive behavior. At home, the defendant had significant difficulty maintaining control of the victim. He therefore arranged for the victim to participate in independent after-school counseling at a local mental health facility.

On the morning of September 9, 2015, the defendant arrived at the victim's school to take her to her scheduled appointment at the mental health facility. The front office secretary contacted the victim's classroom to inform Monika Wilkos, the victim's special education teacher, that the defendant had arrived in the main office to pick up the victim. As the victim was gathering her belongings in the classroom, she protested in front of Wilkos, stating that she did not want to go with the defendant. Wilkos asked the victim to accompany her

to the front office, and while en route, the defendant approached the victim and Wilkos in the hallway.

After a number of unsuccessful attempts to persuade the victim to come with him, the defendant attempted to pick her up and carry her. When the victim resisted, a tussle ensued, and the defendant dragged the victim by one leg through the school corridors toward the exit. School personnel called the police. By the time police arrived, the defendant had dragged the victim through the front office and into the foyer. When he saw the police, the defendant released the victim. The police interviewed the defendant and school staff, but took no further actions.

The following day, both the school psychologist and the school nurse spoke to the victim regarding the incident. During the interviews, they both noticed bruising on the victim's body and subsequently reported the incident to the Department of Children and Families (department). A police officer assigned to the school district investigated the incident and, thereafter, an arrest warrant was issued for the defendant. After learning of the arrest warrant, the defendant turned himself in to the police without incident.

The operative information charged the defendant with one count of risk of injury to a child in violation of § 53-21 (a) (1) and one count of breach of the peace in the second degree in violation of General Statutes § 53a-181 (a) (1). During multiple pretrial hearings, the defendant insisted on representing himself despite the court's many warnings about the dangers of self-representation.[1] The defendant refused court-appointed

[1] On more than one occasion, the court canvassed the defendant in accord with Practice Book § 44-3 (4), ensuring that he was aware of the dangers and disadvantages of self-representation. The record also indicates that the state offered a series of plea agreements to the defendant. On May 4, 2016, the state offered an alternative disposition if the defendant would accept the lesser charge of breach of the peace, a misdemeanor. On July 29, 2016, the state offered an alternative disposition if the defendant would accept a

counsel, but the court ultimately assigned the defendant standby counsel in accordance with Practice Book § 44-4.

Before trial, the state filed, among other things, a motion in limine requesting that the name, address, and any other identifying information pertaining to the victim be kept confidential pursuant to General Statutes § 54-86e. The victim's guardian ad litem also argued in favor of the motion, underscoring the harmful impact that disclosure of sensitive facts could have on the victim. The defendant objected, claiming that details of his relationship with the victim were necessary to demonstrate his urgent need to get help for the victim. The court granted the motion in part and ordered that only the victim's first initial be used in the record and at trial. The court also ordered that the defendant's pretrial motions containing the name of the victim and the name of the program that the defendant was planning to take her to be placed under seal for the purposes of the record. The court further ordered that it would rule on the admissibility of other facts as they arose at trial.

On September 19, 2016, following a three day jury trial, the jury found the defendant guilty of risk of injury to a child, but not guilty of breach of the peace in the second degree. On April 4, 2017, the court imposed a total effective sentence of four years imprisonment, execution suspended, with three years of probation. This appeal followed. Additional facts will be set forth as necessary.

The defendant's appeal is predicated on his contention that the trial court deprived him of his constitutional right (1) to present a defense and (2) to testify

charge of creating a public disturbance, a simple infraction. And finally, on August 4, 2016, the state presented the defendant with a nolle prosequi offer that provided that the state would not pursue any charges, so long as the defendant completed a court-approved parenting course. The defendant rejected the offers.

in his own defense in violation of the fifth, sixth, and fourteenth amendments to the federal constitution.[2] Specifically, the defendant argues that the court erred when it excluded evidence relevant to his theory of defense of parental justification by limiting his inquiry with respect to the victim's violent behavior toward others at school. He further claims that when he testified in his own defense, the trial court unconstitutionally limited his testimony with respect to his struggles with the victim's behavior, and her history of extreme and physical opposition. He argues that because the jury did not hear this evidence, it was unable to fully understand the urgent need to get the victim mental health treatment. The state argues that the trial court did not abuse its discretion when it limited certain aspects of the defendant's testimony. Specifically, the state argues that the trial court gave the defendant wide latitude with respect to his presentation of evidence and did not abuse its discretion when it excluded evidence that was beyond the scope of redirect examination or of a collateral nature. In other words, the state argues that the defendant's claims are not of a constitutional nature but, rather, are evidentiary. As an initial matter, we agree with the state that the defendant's claims are not of a constitutional magnitude and, instead, are evidentiary in nature.

"Regardless of how the defendant has framed the issue, he cannot clothe an ordinary evidentiary issue in constitutional garb to obtain [a more favorable standard of] review." (Internal quotation marks omitted.) *State* v. *Warren*, 83 Conn. App. 446, 452, 850 A.2d 1086, cert. denied, 271 Conn. 907, 859 A.2d 567 (2004). "[R]obing garden variety claims [of an evidentiary nature] in

[2] Although the defendant also asserts a violation of our state constitution, he has provided no independent state constitutional analysis. We thus limit our review to the defendant's federal constitutional claim. See *State* v. *Jarrett*, 82 Conn. App. 489, 498 n.5, 845 A.2d 476, cert. denied, 269 Conn. 911, 852 A.2d 741 (2004).

the majestic garb of constitutional claims does not make such claims constitutional in nature. . . . Putting a constitutional tag on a nonconstitutional claim will no more change its essential character than calling a bull a cow will change its gender." (Internal quotation marks omitted.) *State* v. *Rosario*, 99 Conn. App. 92, 99 n.6, 912 A.2d 1064, cert. denied, 281 Conn. 925, 918 A.2d 276 (2007).

Furthermore, "[t]hese . . . [constitutional] rights, although substantial, do not suspend the rules of evidence . . . . A court is not required to admit all evidence presented by a defendant; nor is a court required to allow a defendant to engage in unrestricted cross-examination. . . . Instead, [a] defendant is . . . bound by the rules of evidence in presenting a defense . . . ." (Internal quotation marks omitted.) *State* v. *Holley*, 327 Conn. 576, 594, 175 A.3d 514 (2018). Moreover, "[i]t is axiomatic that [t]he trial court's ruling on the admissibility of evidence is entitled to great deference. . . . In this regard, the trial court is vested with wide discretion in determining the admissibility of evidence, including issues of relevance and the scope of cross-examination. . . . [T]he trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be made in favor of the correctness of the trial court's ruling, and we will upset that ruling only for a manifest abuse of discretion." (Internal quotation marks omitted.) *State* v. *Ramos*, 182 Conn. App. 604, 614–15, 190 A.3d 892, cert. denied, 330 Conn. 917, A.3d (2018). Accordingly, we review the defendant's claims under the abuse of discretion standard.

I

The defendant first claims that the trial court improperly precluded testimony regarding the victim's violent

disposition, which bore on whether the defendant used a reasonable amount of force when he attempted to remove the victim from school. Specifically, he argues that the court erred when it precluded questions posed to Wilkos with respect to whether the victim had been violent with others at school. The defendant argues that his questions were not beyond the scope of the redirect examination because Wilkos experienced the victim's misbehavior firsthand and, in her response to the state's redirect examination, raised the issue of physical altercations between children and school officials. We disagree.

The following facts are relevant to the disposition of this claim. At trial, during the state's presentation of evidence, the victim's special education teacher, Wilkos, testified about the nature of the school's intensive behavioral education program, which she described as a "self-contained educational, therapeutic program for students with emotional disturbance and behavior difficulties." She testified that the victim had been identified through an early intervention program as a candidate for special education because of her emotional disturbances. She further testified about the incident and how the victim's behavior that day was consistent with her history of disorderly conduct.

On cross-examination, however, Wilkos admitted that she was uncertain about certain details surrounding the altercation, but because she had never seen a parent dragging a child by the foot through school, her memory of the incident was still quite vivid. During redirect examination, in response to Wilkos' admission that she was unsure about the precise mechanics of the altercation, the prosecutor asked Wilkos how long she had been a teacher, and, whether in that time, she had ever seen anything like the September 9, 2015 incident. Wilkos responded that she had been a teacher for approximately thirteen years, and

that in that time she had never seen anything like the incident between the victim and the defendant. She also stated that, as a result, the incident was still quite vivid in her memory. Wilkos testified: "[I]t's a vivid recollection. Some of the specifics of which arm went where in what sequence isn't, like, clear, but it's a very clear recollection . . . ."

During the subsequent recross-examination that followed, the defendant addressed Wilkos' redirect testimony by inquiring whether the victim had ever been disruptive in Wilkos' class. Wilkos answered that September 9, 2015, was not the first time the victim had been disruptive, and that every child in her class had behavioral issues. The defendant then asked whether the victim had been violent with anyone else in school. The state objected to the question, and the court sustained the objection. The defendant then attempted to ask whose idea it was to enroll the victim in the intensive care program at school. The state again objected, and the court sustained the objection, stating that it was outside the scope of the redirect examination.

Here, the question of whether the trial court abused its discretion hinges on whether the victim's prior violent behavior toward others at school was within the scope of the state's redirect examination of Wilkos. With this in mind, the following legal principles are relevant to the disposition of the defendant's claim. Section 6-8 (a) of the Connecticut Code of Evidence provides: "Cross-examination and subsequent examinations shall be limited to the subject matter of the preceding examination and matters affecting the credibility of the witness, except in the discretion of the court." Additionally, our Supreme Court has stated: "[I]n . . . matters pertaining to control over cross-examination, a considerable latitude of discretion is allowed. . . . The determination of whether a matter is relevant or

collateral, and the scope and extent of cross-examination of a witness, generally rests within the sound discretion of the trial court. . . . Every reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Moore*, 293 Conn. 781, 790, 981 A.2d 1030 (2009), cert. denied, 560 U.S. 954, 130 S. Ct. 3386, 177 L. Ed. 2d 306 (2010).

In the present case, the prosecutor's questions on redirect examination specifically related to Wilkos' experience as a teacher and her ability to remember the incident accurately. The state was rehabilitating Wilkos' testimony after she had admitted on cross-examination that she did not remember the precise physical sequence of the altercation—whereas the defendant's questions related to whether the victim had ever been violent with other students at school. It is important to underscore that, contrary to the defendant's argument, the trial court did allow Wilkos to testify generally about the victim's past disruptive behavior. The trial court's limiting of the defendant's line of inquiry with respect to the victim's violent behavior toward others in school, therefore, was well within its discretion to preclude examination that was beyond the scope of the redirect examination of Wilkos.

Furthermore, to the extent that the victim's behavioral history may have been relevant to the defendant's subjective belief that the amount of force he used during the incident was reasonable to maintain discipline, the issue simply was not raised during the state's redirect examination. Moreover, the jury heard testimony from Wilkos during her recross-examination regarding the victim's oppositional behavior. Had the defendant wanted to explore this line of inquiry further, he could have called Wilkos as his own witness and controlled the scope of the examination.

In sum, because the defendant's inquiry as to whether the victim was violent toward others did not relate to Wilkos' capacity to recall the incident at issue accurately, which was the only subject of the state's redirect examination, the trial court acted within its discretion to sustain the state's objection to the inquiry on the ground that it was outside the scope of the state's redirect examination. See *State* v. *Holley*, supra, 327 Conn. 594 ("These sixth amendment rights, although substantial, do not suspend the rules of evidence . . . . A court is not required to admit all evidence presented by a defendant; nor is a court required to allow a defendant to engage in unrestricted cross-examination." [Internal quotation marks omitted.]); see also *State* v. *Moore*, supra, 293 Conn. 803 ("[o]nce [a] defendant has been permitted cross-examination sufficient to satisfy the sixth amendment, restrictions on the scope of cross-examination are within the sound discretion of the trial judge" [internal quotation marks omitted]). The defendant's claim, therefore, fails.

II

The defendant next claims that he was prevented from testifying about the victim's extreme misbehavior at home, which he argues was relevant because it demonstrated how desperate he was to obtain mental health treatment for her. Without this context, he claims, his defense of parental justification was "effectively [hamstrung] and toothless." He also argues that the testimony directly bore on the reasonableness of his actions because it demonstrated the severity and urgency of the situation at home, and that without it, the jury had no evidence to suggest that the defendant was justified in his actions. We disagree.

Whether a particular piece of evidence or testimony is admissible hinges on whether it is relevant to a material issue before the court. "As it is used in our code [of

evidence], relevance encompasses two distinct concepts, namely, probative value and materiality. . . . Conceptually, relevance addresses whether the evidence makes the existence of a fact material to the determination of the proceeding more probable or less probable than it would be without the evidence. . . . In contrast, materiality turns upon what is at *issue* in the case, which generally will be determined by the pleadings and the applicable substantive law." (Emphasis in original; internal quotation marks omitted.) *State* v. *Maner*, 147 Conn. App. 761, 768, 83 A.3d 1182, cert. denied, 311 Conn. 935, 88 A.3d 550 (2014).

Moreover, General Statutes § 53a-18 provides in relevant part: "The use of physical force upon another person which would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances: (1) A parent, guardian or other person entrusted with the care and supervision of a minor or an incompetent person . . . may use reasonable physical force upon such minor or incompetent person when and to the extent that he reasonably believes such to be necessary to maintain discipline or to promote the welfare of such minor or incompetent person . . . ."

The issue of "[w]hether the force used by a parent under § 53a-18 (1) is justifiable and not criminal depends on whether it is reasonable physical force that the parent believes to be necessary to maintain discipline or to promote the welfare of [the] minor . . . . While there exists a parental right to punish children for their own welfare, to control and restrain them and to adopt disciplinary measures in the exercise of that right, whether the limit of reasonable physical force has been reached in any particular case is a factual determination to be made by the trier of fact." (Internal quotation marks omitted.) *State* v. *Brocuglio*, 56 Conn. App. 514, 517–18, 744 A.2d 448, cert. denied, 252 Conn. 950, 748 A.2d 874 (2000). In other words, the defense

of parental justification requires both subjective and objective reasonableness on behalf of the parent or guardian with respect to the use of physical force.

With this legal framework in mind, we now set forth the following facts that are relevant to the disposition of the defendant's claim. During the defendant's case-in-chief, he presented evidence with respect to the incident at school, the nature of his relationship with the victim, and whether he intended to harm the victim during the incident. Specifically, the defendant testified about the victim's misbehavior at home. The court permitted the defendant's testimony that the victim ran away from home on a nightly basis and that, as a result, the police visited the defendant's home daily. The court also allowed the defendant to testify that he sought help from a number of sources, including the department, but that no one was willing to help him, and, as a result, he was concerned that the victim would end up in foster care. The defendant testified that he "urgently needed help dealing with [the victim's] behaviors . . . [and that he] reached out to [the department] on many occasions . . . ." The state objected on relevancy grounds, but the court overruled the objection. The defendant then continued to testify about the nature of the appointment he scheduled for the victim, and the state again objected. The court again overruled the objection and allowed the testimony to stand.

The defendant claims, however, that during his direct examination, which he conducted himself, the court abused its discretion by precluding his testimony with respect to the following exchange:

"[The Defendant]: So, Mr. [T.], [where] did you go to get your daughter help?

"[The Prosecutor]: Objection, Your Honor, relevancy to the case at hand.

"The Court: Well, I'll allow a limited amount of this.

"[The Defendant]: Okay, so this isn't really allowed. . . .

"[The Defendant]: So, Mr. [T.], at almost the end of that month that you had your daughter, what happened that she was taken away from you again?

"[The Defendant]: Well, I needed help with her, and I made an appointment to get her the help that she needed, which was—

"[The Prosecutor]: Objection, Your Honor.

"The Court: Sustained.

"[The Defendant]: Okay. The help that she needed, which was not just some after-school program; it was much more significant.

"[The Prosecutor]: Objection, Your Honor.

"[The Defendant]: Okay.

"The Court: I'll allow that answer to stand."

The defendant claims that without this testimony identifying the name of the institution, his defense of parental justification was "toothless." We disagree with the defendant that the court's preclusion of the name of the institution rendered his theory of defense "toothless." We also disagree with the defendant that the court prevented him from testifying about the victim's misbehavior at home and the urgency of the situation. It is clear from the record that the court allowed the defendant to testify about his difficult relationship with the victim, including factors that supported his subjective belief that the victim needed urgent mental health treatment. Furthermore, it is clear from the record that the defendant was permitted to testify that ultimately he obtained a more significant type of help for the victim than just an after-school program. Rather, it was only

when the defendant attempted to provide details about the help he sought for her—information that had been placed under seal during the hearing on the state's motion in limine to protect the victim—that the trial court sustained the state's objections. The trial court's preclusion of the defendant's testimony with respect to certain details about the victim and the name of the mental health institution, which were not material facts, was well within its discretionary authority.

Given that the trial court had a legitimate interest in excluding sensitive details about the victim—especially those that were not material to the defendant's defense of parental justification—the court did not abuse its discretion when it sustained the state's objections.

The judgment is affirmed.

In this opinion the other judges concurred.