US BANK NATIONAL ASSOCIATION, TRUSTEE *v.* BONNIE L. CHRISTOPHERSEN ET AL.
(AC 38914)

DiPentima, C. J., and Kahn and Sullivan, Js.

Syllabus

The plaintiff bank, as trustee, sought to foreclose a mortgage on certain real property owned by the defendant C. In accordance with an agreement between the parties in which C agreed to a judgment of strict foreclosure in exchange for an eight month law day, the court rendered a judgment of strict foreclosure and set a law day. Thereafter, the law day was automatically stayed when C filed a bankruptcy petition. Approximately four months later, the bankruptcy court lifted the stay, and the plaintiff filed a motion to open and modify the judgment. In its motion, the plaintiff requested that the court make a new finding of debt, award the plaintiff additional costs and attorney's fees, set a new law day and enter either a judgment of strict foreclosure or a judgment of foreclosure

by sale, whichever it deemed more appropriate. C subsequently filed four successive motions for a continuance of the hearing on the plaintiff's motion to open and modify the judgment, the last of which the court denied. During the hearing on the plaintiff's motion, C requested that the court order a judgment of foreclosure by sale and advised the court that she would be filing such a motion, which she did that day following the hearing. In ruling on the plaintiff's motion, the trial court opened the judgment and, relying on the plaintiff's affidavit of debt, rendered a modified judgment of strict foreclosure with new findings as to additional debt and a revised fair market value of the subject property. The court also set a new law day. In reaching its decision, the court found that approximately $63,000 of equity existed in the property but determined that it was barred from ordering a judgment of foreclosure by sale pursuant to the relevant statute (§ 49-15 [b]), which provides that, following the filing of a bankruptcy petition, a foreclosure judgment is automatically opened but only with respect to the law day. On C's appeal to this court, *held*:

1. The plaintiff had standing to commence the foreclosure action; the plaintiff presented evidence, including various documents and an affidavit related to the assignment of the subject note, that indicated that the note was endorsed in blank and delivered to the plaintiff prior to the commencement of the action, which constituted prima facie evidence that the plaintiff was the holder of the note and entitled to enforce it at the time the action was commenced, and C offered no evidence to rebut the presumption of the plaintiff's ownership of the underlying debt.
2. C could not prevail on her claim that the trial court denied her right to due process and abused its discretion by relying on the plaintiff's affidavit of debt in rendering its modified judgment without considering her written objections, challenges and offers of evidence; the court granted C three separate continuances, which provided her with ample time to prepare for the hearing on the plaintiff's motion to open and modify the judgment, and gave C a full opportunity to be heard at that hearing, but C failed to present any evidence that questioned the amount stated in the plaintiff's affidavit of debt, and there was no evidence in the record to establish that the court failed to consider C's concerns regarding the amount of debt when it rendered its modified judgment.
3. The trial court did not abuse its discretion in denying C's fourth motion for a continuance to allow her more time to complete discovery; in denying the motion, the court observed that it already had decided the issues on which C sought discovery and had granted her first three motions for a continuance, even though the case had been pending for more than four years, and, therefore, the court properly considered the age of the case, the accommodations it already had made for C and the basis on which she sought the continuance.
4. The trial court erred in failing to rule on C's request for a judgment of foreclosure by sale, that court having improperly concluded that it lacked

statutory authority to modify the judgment of strict foreclosure: although the court correctly determined that § 49-15 (b) did not grant it authority to modify the judgment, it incorrectly determined that no statutory authority existed to permit it to do so, and because the plaintiff had filed a motion to open and modify the judgment, which requested the court to render either a judgment of strict foreclosure or foreclosure by sale, § 49-15 (a) (1) conferred authority on the court to modify the judgment, and the court's failure to entertain the request for a judgment of foreclosure by sale constituted error; accordingly, because the trial court failed to take action on C's motion for a judgment of foreclosure by sale, the case was remanded to the trial court with direction to rule on C's motion.

Argued September 20, 2017—officially released January 30, 2018

Procedural History

Action to foreclose a mortgage on certain of the named defendant's real property, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendant Wells Fargo Bank, N.A., was defaulted for failure to appear and the defendant Southern Connecticut Gas Company et al. were defaulted for failure to plead; thereafter, the court, *Mintz*, *J.*, denied the named defendant's motion to dismiss; subsequently, the court, *Mintz*, *J.*, granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon; thereafter, the court, *Hon. David R. Tobin*, judge trial referee, denied the named defendant's motion for a continuance, granted the plaintiff's motion to open and modify the judgment and rendered a modified judgment of strict foreclosure, from which the named defendant appealed to this court. *Reversed in part; further proceedings.*

Bonnie L. Christophersen, self-represented, the appellant (named defendant).

Jeffrey M. Knickerbocker, for the appellee (plaintiff).

Opinion

KAHN, J. The defendant Bonnie L. Christophersen[1] appeals from the judgment of strict foreclosure, rendered in favor of the plaintiff, US Bank National Association, as Trustee of Maiden Lane Asset-Backed Securities I Trust 2008-1. On appeal, the defendant claims that (1) the plaintiff lacked standing to bring the foreclosure action, (2) the court improperly failed to consider the defendant's concerns regarding the amount of debt, (3) the court abused its discretion in denying her motion for a continuance, and (4) the court abused its discretion in ordering a judgment of strict foreclosure rather than a foreclosure by sale. We affirm in part and reverse in part the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. On July, 11 2003, the defendant secured a promissory note in the amount of $460,000 by a mortgage on premises known as 2 Woodcock Lane in Westport. As of September, 2008, the defendant had failed to pay the installments of principal and interest. In May, 2011, the plaintiff commenced this action, seeking to foreclose the mortgage on the defendant's property.[2] The plaintiff subsequently filed a motion for a judgment of strict foreclosure, to which

[1] The complaint also named as defendants Wells Fargo Bank, N.A., Southern Connecticut Gas Company, and Gordon & Scalo, but they were defaulted for failure to appear or plead. The trial court permitted John R. Christophersen, both individually and as trustee, Richard J. Margenot, successor trustee, and Theodore A. Youngling, successor trustee, to intervene as defendants. The court, however, subsequently granted the plaintiff's motion for default as to the intervening defendants for their failure to disclose a defense. Bonnie Christophersen, representing herself, filed this appeal and will be referred to in this opinion as the defendant.

[2] The plaintiff filed five motions to substitute Kondaur Capital Corporation (Kondaur) as the plaintiff, all of which the court, *Mintz*, *J.*, denied. In May, 2012, the defendant filed a motion to dismiss claiming that the plaintiff lacked standing because Kondaur was the party entitled to enforce the note. The court denied the motion to dismiss.

the defendant objected.[3] On February 21, 2014, the defendant, who then was represented by counsel,[4] filed an answer and special defenses. The parties later negotiated an agreement that the defendant would accept a judgment of strict foreclosure in exchange for an eight month law day. On April 14, 2014, the defendant informed the court of that agreement and withdrew both her answer and her objection to the plaintiff's motion for a judgment of strict foreclosure. The court accepted the agreement and, accordingly, granted the plaintiff's motion for a judgment of strict foreclosure, setting a law day of January 6, 2015. On December 24, 2014, the defendant filed a motion to open the judgment and extend the law day. The court denied the motion to open but sua sponte set a new law day of March 31, 2015. Just prior to the expiration of the new law day, on March 27, 2015, the defendant filed a bankruptcy petition, which resulted in an automatic stay of the foreclosure proceeding. On August 7, 2015, however, acting on a motion filed by the plaintiff, the bankruptcy court lifted the automatic stay.

Following the termination of the bankruptcy stay, the plaintiff, on October 1, 2015, filed a motion to open and modify the judgment of strict foreclosure. In its motion, the plaintiff requested that the court make a new finding of debt, award the plaintiff additional costs and attorney's fees, and set a new law day. The defendant filed

[3] At the time that the defendant filed her objection to the motion for a judgment of strict foreclosure, she had been defaulted for failure to plead. Along with her objection, she filed a motion seeking to open the default that had been entered against her. On April 14, 2014, the parties requested that the court vacate its existing orders, including the order defaulting the defendant. The court vacated those orders, and the defendant subsequently withdrew both her objection to the plaintiff's motion for a judgment of strict foreclosure and her motion to open the default.

[4] On September 2, 2014, the court granted the motion of the defendant's counsel to withdraw his appearance. Thereafter, the defendant represented herself.

four successive motions for a continuance of the hearing on the plaintiff's motion to open and modify the judgment. The court, *Povodator*, *J.*, granted the plaintiff's first three motions for a continuance, and the court, *Hon. David R. Tobin*, judge trial referee, denied the fourth motion for a continuance. On January 19, 2016, following a hearing, Judge Tobin granted the plaintiff's motion to open and rendered a modified judgment of strict foreclosure with the law days to commence on March 1, 2016. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the plaintiff lacked standing to bring the foreclosure action. We disagree.

"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 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." (Citation omitted; internal quotation marks omitted.) *Equity One, Inc.* v. *Shivers*, 310 Conn. 119, 125–26, 74 A.3d 1225 (2013).

"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. . . . Whether a party is entitled to enforce a promissory note is determined by the provisions of the Uniform Commercial Code, as codified in General Statutes § 42a-1-101 et seq. . . . Under [the Uniform Commercial Code], only a

holder of an instrument or someone who has the rights of a holder is entitled to enforce the instrument. . . .

"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 . . . . The defendant [must] . . . prove the facts which limit or change the plaintiff's rights." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Bliss*, 159 Conn. App. 483, 488–89, 124 A.3d 890, cert. denied, 320 Conn. 903, 127 A.3d 186 (2015), cert. denied, U.S. , 136 S. Ct. 2466, 195 L. Ed. 2d 801 (2016).

The trial court had before it evidence that, as of the time of the commencement of the foreclosure action in May, 2011, the plaintiff was the holder of the note endorsed in blank by virtue of an assignment. In a motion to substitute filed on January 16, 2013, the plaintiff attached documents detailing a chain of assignments, including: (1) an assignment of the mortgage deed, executed by the defendant, from Wells Fargo Bank, N.A., successor by merger to Wells Fargo Home Mortgage, Inc., to EMC Mortgage Corporation on January 18, 2007; (2) an assignment of the mortgage from EMC Mortgage Corporation to the plaintiff on December 12, 2008; (3) an assignment of the mortgage deed from the plaintiff to Kondaur Capital Corporation in December, 2011; and (4) an assignment of the mortgage deed from Kondaur Capital Corporation back to the plaintiff on September 12, 2012.[5] At a hearing on August

[5] Additionally, attached to the motion for relief from automatic stay, which was filed in bankruptcy court, was the original note and subsequent assignments, including the 2008 assignment to the plaintiff. See *Drabik* v. *East*

20, 2012, the plaintiff submitted an affidavit of an employee of Nationstar Mortgage, LLC, the mortgage loan servicer from July, 2010 to October, 2011, which stated that the promissory note reflected that on July 11, 2003, the defendant owed Wells Fargo Home Mortgage, Inc., $460,000. The note was endorsed in blank and delivered to the plaintiff on or before July 7, 2010. The assignment of the note to the plaintiff and the plaintiff's possession of it at the commencement of the foreclosure action was prima facie evidence that the plaintiff was the holder of the note at the relevant time and thus was entitled to enforce the note.

The defendant offered no evidence to rebut this presumption of ownership of the underlying debt. See *HSBC Bank USA, N.A.* v. *Navin*, 129 Conn. App. 707, 711–12, 22 A.3d 647, cert. denied, 302 Conn. 948, 31 A.3d 384 (2011) (plaintiff had standing to commence foreclosure action where defendant offered no evidence contesting plaintiff's affidavit asserting that note endorsed in blank was delivered to plaintiff prior to commencement of action). The plaintiff, as assignee of the mortgage, was entitled to bring the action in its own name. "General Statutes § 52-118 . . . 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 [its] name. Conversely . . . an assignee also has the option to maintain [an] action in the name of his assignor." (Internal quotation marks omitted.) *Dime Savings Bank of Wallingford* v. *Arpaia*, 55 Conn. App. 180, 184, 738 A.2d 715 (1999). We conclude, therefore, that the plaintiff had standing to commence the foreclosure action.

Lyme, 234 Conn. 390, 398, 662 A.2d 118 (1995) ("[t]here is no question that the trial court may take judicial notice of the file in another case, whether or not the other case is between the same parties" [internal quotation marks omitted]).

II

The defendant next claims that the court denied her right to due process and abused its discretion when it relied on the plaintiff's affidavit of debt in rendering its modified judgment of strict foreclosure without considering her oral and written objections, challenges, and offers of evidence. We disagree and, accordingly, conclude that the defendant's due process rights were not denied and the court did not abuse its discretion when it relied on the plaintiff's affidavit of debt.

The defendant cannot prevail on her due process claim. "[T]here is no violation of due process when a party in interest is given the opportunity at a meaningful time for a court hearing to litigate the question [at issue]." *Hartford Federal Savings & Loan Assn.* v. *Tucker*, 196 Conn. 172, 176–77, 491 A.2d 1084, cert. denied, 474 U.S. 920, 106 S. Ct. 250, 88 L. Ed. 2d 258 (1985). The defendant had notice and ample time to prepare for the hearing. After the automatic stay was lifted, the defendant filed three motions for a continuance—on November 25 and December 10, 2015, and January 6, 2016—all of which the court granted. After granting the three separate continuances, the court gave the defendant a full opportunity to be heard at the January 19, 2016 hearing where she raised numerous concerns and objections.

We are also mindful of the principle that "[w]ithout some evidence to the contrary, we will not presume that the trial court improperly applied the law." *Farrell* v. *Farrell*, 36 Conn. App. 305, 313, 650 A.2d 608 (1994). Tellingly, the defendant failed to present *any* evidence at the hearing on her motion—notwithstanding the passage of five months following the lift of the automatic stay—that called into question the amount stated in the plaintiff's affidavit of debt, and the court expressly gave her an opportunity to do so. That is, during the hearing,

the court asked the defendant, "Do you have a calculation of what you believe the debt to be?" The defendant responded that she was not prepared to answer that question. Finally, our review confirms that there is no evidence in the record, and the defendant directs us to none, to establish that the court failed to consider the defendant's concerns regarding the amount of debt when the court opened the judgment and rendered a modified judgment of strict foreclosure.

III

The defendant next claims that the court abused its discretion in denying her fourth motion for a continuance to allow her more time to complete discovery.[6] We disagree.

"The trial court has a responsibility to avoid unnecessary interruptions, to maintain the orderly procedure of the court docket, and to prevent any interference with the fair administration of justice. . . . In addition, matters involving judicial economy, docket management [and control of] courtroom proceedings . . . are particularly within the province of a trial court. . . . Accordingly, [a] trial court holds broad discretion in granting or denying a motion for a continuance. Appellate review of a trial court's denial of a motion for

[6] The defendant also claims that the denial of her fourth motion for a continuance violated her right to due process. "Ordinarily, a reviewing court analyzes a denial of a motion for a continuance in terms of whether the trial court abused its discretion. If, however, the refusal to grant a continuance interferes with a specific constitutional right, the analysis will involve whether there has been a denial of due process. . . . [W]hen an act is shown by reliable facts to affect a specific constitutional right . . . the analysis should turn on whether a due process violation exists rather than whether there has been an abuse of discretion." (Citations omitted; internal quotation marks omitted.) *Tyler* v. *Shenkman-Tyler*, 115 Conn. App. 521, 525, 973 A.2d 163, cert. denied, 293 Conn. 920, 979 A.2d 493 (2009). The defendant has not identified any specific constitutional right that was implicated by the court's denial of the motion for a continuance. As such, we will review this claim under an abuse of discretion standard.

a continuance is governed by an abuse of discretion standard that, although not unreviewable, affords the trial court broad discretion in matters of continuances." (Citations omitted; internal quotation marks omitted.) *Peatie* v. *Wal-Mart Stores, Inc.*, 112 Conn. App. 8, 12, 961 A.2d 1016 (2009).

For two reasons, the trial court's denial of the fourth motion for a continuance was well within its broad discretion. First, as the court observed when it rendered its oral decision denying the continuance during the January 19, 2016 hearing, it already had decided the issues on which the defendant sought discovery. Second, as we have noted in this opinion, the court already had granted the defendant's first three motions for a continuance, even though the case had been pending for more than four years. In denying the continuance, the court properly considered the age of the case, the accommodations it already had made for the defendant and the basis on which the defendant sought the fourth continuance. We therefore conclude that the court did not abuse its discretion in denying the defendant's motion. See id., 13 ("[s]ince the trial court had already granted one continuance, we find no abuse of discretion in the court's refusal to grant the [party's] motion for a further continuance"); see also *State* v. *Yednock*, 14 Conn. App. 333, 344–45, 541 A.2d 887 (1988).

IV

The defendant's final claim is that because the trial court found that there was approximately $63,000 of equity in the property, the court abused its discretion when, on January 19, 2016, it ordered a judgment of strict foreclosure instead of a foreclosure by sale. Following oral argument, this court sua sponte ordered the parties to submit supplemental briefs addressing the related issue of whether the trial court's refusal to entertain the defendant's "request for the entry of a

foreclosure by sale violated the provisions of [General Statutes] § 49-15 or was based on an erroneous application of . . . § 49-15."[7] We conclude that, under the facts of the present case, the trial court incorrectly interpreted § 49-15 to deprive the court of the authority to order a foreclosure by sale. Because the court's incorrect application of § 49-15 prevented the court from exercising its authority, we remand the case to the trial court with direction to rule on the defendant's motion for a judgment of foreclosure by sale. See footnote 9 of this opinion. The question of whether the court's factual finding regarding the equity in the property required it to order a judgment of foreclosure by sale may arise on remand. We therefore address that issue. We conclude that in circumstances where a court finds that the value of the property substantially exceeds the mortgage being foreclosed, a judgment of strict foreclosure would give the plaintiff an improper windfall. See *Brann* v. *Savides*, 48 Conn. App. 807, 812, 712 A.2d 963 (1998).

[7] General Statutes § 49-15 provides in relevant part: "(a) (1) Any judgment foreclosing the title to real estate by strict foreclosure may, at the discretion of the court rendering the judgment, upon the written motion of any person having an interest in the judgment and for cause shown, be opened and modified, notwithstanding the limitation imposed by section 52-212a, upon such terms as to costs as the court deems reasonable, provided no such judgment shall be opened after the title has become absolute in any encumbrancer except as provided in subdivision (2) of this subsection. . . .

"(b) Upon the filing of a bankruptcy petition by a mortgagor under Title 11 of the United States Code, any judgment against the mortgagor foreclosing the title to real estate by strict foreclosure shall be opened automatically without action by any party or the court, provided, the provisions of such judgment, other than the establishment of law days, shall not be set aside under this subsection, provided no such judgment shall be opened after the title has become absolute in any encumbrancer or the mortgagee, or any person claiming under such encumbrancer or mortgagee. The mortgagor shall file a copy of the bankruptcy petition, or an affidavit setting forth the date the bankruptcy petition was filed, with the clerk of the court in which the foreclosure matter is pending. Upon the termination of the automatic stay authorized pursuant to 11 USC 362, the mortgagor shall file with such clerk an affidavit setting forth the date the stay was terminated."

The following additional facts and procedural history are relevant to our resolution of this issue. At the January 19, 2016 hearing on the plaintiff's motion to open and modify the 2014 judgment of strict foreclosure, the court began by observing that the judgment, which had been predicated on an eight month law day, had been rendered irrelevant due to the passage of four months during the automatic bankruptcy stay. Therefore, the court reasoned, it was proper to grant the motion to open.

The plaintiff contended that under § 49-15 (b) everything with respect to that judgment remained in place and the court could only reset the law days. The court reminded the plaintiff that its motion requested greater relief than simply the reentry of the original judgment of strict foreclosure and the resetting of the law days.

The court next turned to the question of determining the amount of the debt. The plaintiff urged the court to rely on its most recent affidavit of debt, dated January 13, 2016. Prior to rendering a modified judgment, the court questioned its authority to modify the judgment by awarding additional fees and costs. In its remarks to counsel, the court indicated that it believed that the scope of its authority to act on the plaintiff's motion to open the judgment of strict foreclosure was governed by § 49-15 (b). The court further questioned whether that statutory provision granted the court the authority to take any action other than opening the judgment and setting new law days. The plaintiff suggested that the court *did* have such authority, pursuant to paragraph F of the Uniform Foreclosure Standing Orders issued by the Superior Court.[8] The court expressed skepticism

[8] Paragraph F of the Uniform Foreclosure Standing Orders provides: "At a hearing on a motion to open judgment after bankruptcy in order to set a new sale or law date after receiving relief from the automatic bankruptcy stay, a bankruptcy dismissal or any other bankruptcy order or law that allows the plaintiff to proceed with its foreclosure action, the plaintiff must present to the court an updated affidavit of debt that the court will use to make a new finding of the judgment debt as of the date of the hearing.

that a standing order of the Superior Court could grant the court greater authority than contemplated by the General Statutes. Nonetheless, the court accepted the plaintiff's argument and its affidavit of debt. The court then rendered a modified judgment of strict foreclosure with new findings as to additional debt and a revised fair market value of the property.

Although the court already had taken action on the motion to open that went beyond merely setting a new law day, it determined that § 49-15 (b) barred it from ordering a judgment of foreclosure by sale. Specifically, when the defendant asked whether the court would order a foreclosure by sale, the court stated: "No, this is a law day, a law day. *I cannot grant a motion for foreclosure by sale at this point because the statute precludes me from entertaining that. I can only deal with the motion—the matter that the statute allows me to which is to reset the law day.*"[9] (Emphasis added.) At the close of the hearing, the court set a law day of March 1, 2016.

We first address the question of whether the trial court properly concluded that it lacked authority pursuant to § 49-15 (b) to order a judgment of foreclosure by sale. In general, the court enjoys broad discretion in determining whether to order a judgment of foreclosure by sale or a judgment of strict foreclosure. Our Supreme Court has explained: "In a foreclosure proceeding the authority of the trial court to order either

Additionally, if the last finding made by the court as to the fair market value of the premises is more than 120 days old, then the plaintiff must also present to the court an updated appraisal for the court to make an updated finding of the fair market value of the premises on the date of the hearing." Uniform Foreclosure Standing Orders, form JD-CV-104, available at http://jud.ct.gov/webforms/form/cv104.pdf (last visited January 22, 2018).

[9] We observe that although the defendant had not filed a motion for a judgment of foreclosure by sale at the time of the hearing, she advised the court that she had prepared such a motion and would be filing the motion. The record reflects that the defendant filed such a motion on that same day, presumably following the conclusion of the hearing.

a strict foreclosure or a foreclosure by sale is clear. General Statutes § 49-24 provides: All liens and mortgages affecting real property may, on the written motion of any party to any suit relating thereto, be foreclosed by a decree of sale instead of a strict foreclosure at the discretion of the court before which the foreclosure proceedings are pending. In interpreting this statute, we have stated that [i]n Connecticut, the law is well settled that whether a mortgage is to be foreclosed by sale or by strict foreclosure is a matter within the sound discretion of the trial court. . . . The foreclosure of a mortgage by sale is not a matter of right, but rests in the discretion of the court before which the foreclosure proceedings are pending." (Citations omitted; internal quotation marks omitted.) *Fidelity Trust Co.* v. *Irick*, 206 Conn. 484, 488, 538 A.2d 1027 (1988).

The trial court was correct that § 49-15 (b) does not grant the court authority to modify a judgment of strict foreclosure. Specifically, § 49-15 (b) provides that when a mortgagor files a bankruptcy petition under title 11 of the United States Code, any existing judgment of strict foreclosure "shall be opened automatically without action by any party or the court, provided, the provisions of such judgment, other than the establishment of law days, shall not be set aside under this subsection . . . ." See footnote 7 of this opinion.

The trial court incorrectly concluded, however, that merely because § 49-15 (b) does not grant the court authority to modify the judgment, no statutory authority existed to allow the court to do so. This court has explained that, "[b]y its express terms, subsection (b) of § 49-15 governs what occurs *automatically* following the filing of a bankruptcy petition: the judgment is opened, but only with respect to the law day. It does not refer to how a plaintiff may request the court [not only to] reset the law day [but also] reenter [a modified]

judgment of strict foreclosure following the dismissal or discharge of the bankruptcy.

"In order to have the court reset the law day and reenter [a modified] judgment of strict foreclosure, a plaintiff must comply with subsection (a) (1) of § 49-15." (Emphasis added.) *U.S. Bank, N.A., Trustee* v. *Morawska*, 165 Conn. App. 421, 426–27, 139 A.3d 747 (2016). Because the plaintiff filed a motion to open and modify the judgment of strict foreclosure, § 49-15 (a) (1) conferred authority on the trial court to modify the judgment. In fact, the plaintiff's motion contained, among the relief sought, a request to enter either a judgment of strict foreclosure or foreclosure by sale, whichever the court deemed appropriate. The plaintiff's motion recognized the court's authority to modify the judgment and, within its discretion, to order a foreclosure by sale. Accordingly, the court had authority to order a judgment of foreclosure by sale.

The court's failure to entertain the request for a judgment of foreclosure by sale constituted error. "[I]n a case in which the court has discretion to act, but fails to exercise its discretion, that failure alone is error." *Meadowbrook Center, Inc.* v. *Buchman*, 169 Conn. App. 527, 534, 151 A.3d 404 (2016), cert. granted on other grounds, 324 Conn. 918, 154 A.3d 1007 (2017); see also *State* v. *Lee*, 229 Conn. 60, 73–74, 640 A.2d 553 (1994) ("[i]n the discretionary realm, it is improper for the trial court to fail to exercise its discretion"). As we have explained, because the trial court failed to take action on the defendant's motion for a judgment of foreclosure by sale on the basis of its incorrect application of § 49-15 (b), we remand the case to the trial court with direction to rule on the motion.

Finally, because the issue may likely arise on remand, we consider the implications of the trial court's finding on January 19, 2016, that approximately $63,000 of

equity existed in the property. Specifically, in light of that finding, the court's order of a judgment of strict foreclosure would appear to give the plaintiff an improper windfall. "Since a mortgage foreclosure is an equitable proceeding, either a forfeiture or a windfall should be avoided if possible." (Internal quotation marks omitted.) *Brann* v. *Savides*, supra, 48 Conn. App. 811–12. Even if the defendant did not have equity in the property herself, our case law is clear that the governing principle is that "a mortgagee is only entitled to the payment of the debt owing him, including such incidental charges as he may add to it . . . ." (Internal quotation marks omitted.) *Fidelity Trust Co.* v. *Irick*, supra, 206 Conn. 489. Accordingly, we have recognized that "when the value of the property substantially exceeds the value of the lien being foreclosed, the trial court abuses its discretion when it refuses to order a foreclosure by sale." (Internal quotation marks omitted.) *Brann* v. *Savides*, supra, 812; see also *Fidelity Trust Co.* v. *Irick*, supra, 491 (court abused discretion in ordering strict foreclosure rather than foreclosure by sale where fair market value exceeded debt).

The judgment is reversed with respect to the order of strict foreclosure and the case is remanded for further proceedings consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

THOMAS W. LANE, ZONING ENFORCEMENT OFFICER OF THE TOWN OF CLINTON *v.* JEFFREY S. CASHMAN ET AL.

(AC 38290)

Keller, Prescott and Beach, Js.

Syllabus

The plaintiff zoning enforcement officer of the town of Clinton sought a permanent injunction to prohibit the defendant property owners from

keeping cows on their premises without a permit, and a mandatory injunction to require the defendants to remove a metal corral from the street line setback and to keep any permitted livestock in an appropriate building. The plaintiff previously had issued to the defendants two written orders to discontinue those activities and uses of their property. The parties had discussions after the issuance of the first order to discontinue, and the defendants moved the cows into areas that met the setback requirements, but thereafter moved them back so that they continued to violate that first order to discontinue. The defendants did not appeal to the town Zoning Board of Appeals within fifteen days of the issuance of either order to discontinue, as required by statute (§ 8-7). The defendants filed a counterclaim and two special defenses alleging that the activities at issue were lawful nonconforming farming uses of their property and, thus, that they were entitled to constitutional protection of those uses, which existed prior to the amendment of the town's zoning regulations in 2012 that the plaintiff sought to enforce. The trial court granted the plaintiff's motion to strike the counterclaim and special defenses, concluding that they were legally insufficient because the defendants had failed to exhaust their administrative remedies by appealing to the board. The defendants thereafter filed three special defenses, the first two of which alleged that the activities at issue were lawful nonconforming uses of their property, and the third of which alleged municipal estoppel. In response to a request to revise by the plaintiff, the defendants deleted the first two special defenses, and revised their third special defense to include claims of municipal estoppel and that the defendants' farming activities at their property were lawful pursuant to statute (§ 19a-341). The trial court granted the plaintiff's motion to strike the revised third special defense, concluding that it was improper because it alleged a preexisting nonconforming use, which the court previously had stricken. The trial court also granted three motions that the plaintiff had filed to preclude evidence at trial to challenge the validity of the orders to discontinue, to preclude evidence pertaining to the defense of municipal estoppel, and to preclude evidence that would prove that the farming uses of the property were lawful, nonconforming uses. Following a trial to the court, the trial court rendered judgment for the plaintiff, from which the defendants appealed to this court, claiming that the trial court improperly struck their revised third special defense and improperly granted the plaintiff's motions in limine. *Held*:

1. The defendants could not prevail on their claim that the trial court improperly struck their revised third special defense and thereby prohibited them from demonstrating that they had a legally protected nonconforming right to use their property as a farm: the defendants' constitutional challenge to the plaintiff's activities did not excuse their failure to avail themselves of the administrative appeal process that was available to them, as nothing in the record suggested that the relief sought by the

defendants could not have been obtained by resort to the administrative remedy that they ignored, and the defendants did not demonstrate that the board was unable to grant them any appropriate relief or to determine whether the plaintiff properly found that a nonconforming use did not exist on their property; moreover, the defendants did not present any authority to support their assertion that the question of whether any constitutionally protected nonconforming use of their property existed was beyond the scope of the board and, thus, constituted an exception to the exhaustion doctrine that permitted them to bypass available administrative relief, as the defendants chose not to appeal within the time period set by the board, they had ample opportunity to demonstrate to the board that the farming uses of their property were nonconforming uses and presented no compelling reasons why that issue was not the proper subject of such an appeal, and nothing in the record suggested that the defendants could not have brought a timely appeal before the board while continuing to negotiate with the plaintiff in an effort to resolve the dispute.

2. The defendants' claim that the trial court improperly granted the plaintiff's motions to preclude certain evidence was unavailing, the defendants having failed to adequately analyze how that court's rulings likely affected the result of the trial: the defendants did not refer to any portion of the record for details concerning the excluded evidence or to any proffer they made to the trial court concerning evidence that would have been relevant to understanding their historic use of the premises, as well as the gravity and wilfulness of their zoning violation, they did not point to any zoning regulation to support a determination that their historic use of the premises was lawfully nonconforming, and they did not demonstrate how any excluded evidence would have proven a lack of wilfulness on their part; moreover, the record reflected undisputed facts, such as the defendants' admitted failure to exhaust their administrative remedies and their admitted violation of multiple zoning regulations, that supported the trial court's determination that injunctive relief was warranted.

Argued October 18, 2017—officially released January 30, 2018

Procedural History

Action for a permanent injunction to prohibit the defendants from conducting certain activities in violation of the zoning regulations of the town of Clinton, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the defendants filed a counterclaim; thereafter, the court, *Domnarski*, *J.*, granted the plaintiff's motion to strike; subsequently, the court, *Aurigemma*, *J.*, granted the plaintiff's motion

to strike; thereafter, the plaintiff withdrew the complaint in part; subsequently, the court, *Aurigemma*, *J.*, granted the plaintiff's motion to substitute Eric Knapp as the plaintiff; thereafter, the court, *Aurigemma*, *J.*, granted the plaintiff's motions to preclude certain evidence; subsequently, the matter was tried to the court, *Aurigemma*, *J.*; judgment for the plaintiff, from which the defendants appealed to this court. *Affirmed.*

Edward M. Cassella, for the appellants (defendants).

Sylvia K. Rutkowska, for the appellee (plaintiff).

Opinion

KELLER, J. The defendants, Jeffrey S. Cashman and Patricia Cashman, appeal from the judgment of the trial court rendered in favor of the plaintiff, Eric Knapp, the zoning enforcement officer for the town of Clinton.[1] The plaintiff brought the underlying action against the defendants to enforce orders to discontinue alleged zoning violations occurring at the defendants' property in Clinton. The defendants claim that the court erred in (1) striking their special defenses related to nonconforming uses and (2) granting the plaintiff's motions in limine. We affirm the judgment of the trial court.

In his original complaint dated September 6, 2012, the plaintiff alleged that the defendants, who are the owners of 66 River Road in Clinton, were in violation of several Clinton zoning regulations by virtue of their keeping and raising cows without a permit, constructing a metal corral within fifty feet of the street line and

[1] In 2012, the underlying action was commenced by Thomas W. Lane as zoning enforcement officer for the town of Clinton. On September 23, 2014, prior to the trial, Lane moved to substitute Knapp as the plaintiff in the present action because, on May 1, 2014, Knapp had assumed the position of zoning enforcement officer for Clinton. The court granted the motion. Because Lane and Knapp appear in the same representative capacity and it is not necessary to our analysis to distinguish between them, in this opinion, we will refer to both Lane and Knapp as the plaintiff.

within thirty-five feet of the southeast property line, and utilizing the metal corral as a structure or enclosure in which to keep the cows.[2] The plaintiff alleged that, on January 26, 2012, he issued a warning of violation to the defendants with respect to their keeping of cows on the property without a permit and that, on March 13, 2012, he issued a warning of violation to the defendants with respect to their placement of the metal corral within the minimum setback requirements and the keeping of cows in the metal corral. The plaintiff further alleged that, on April 16, 2012, he issued to the defendants an order to discontinue their uses of the premises that violated the applicable zoning regulations, that the defendants did not file an appeal from the order within fifteen days of the issuance of the order, and that the defendants had failed to comply with the order.[3] In his prayer for relief, the plaintiff sought, inter alia, a permanent injunction prohibiting the defendants from keeping cows on the subject premises without a permit; a mandatory injunction requiring the defendants to remove the metal corral from the street line setback and to keep any permitted livestock in an appropriate

[2] The plaintiff alleged in part: "The defendants' use of the property . . . violates Clinton zoning regulations, sections 24.1.42, which states that the keeping and raising of cows requires a zoning permit from the zoning enforcement officer; 25.1, which states that 'no structure shall extend into any setbacks required by [the zoning] regulations'; 25.10.6, which states that the minimum setback from the street line in a R-80 district is fifty feet; 25.10.8, which states that the minimum setback from the property line or side property in a R-80 district is 35 feet; and 26.1.4, which states that 'all livestock shall be kept in a building, stable or enclosure, not less than the legal setback for the appropriate zone for any abutting residential property.' "

[3] It is undisputed that the order of April 16, 2012, stated, in relevant part: "This violation must be remedied within ten (10) days of receipt of this notice. Failure to correct these violations within the above stated time frame may result in the party being fined $250 per day for each day the violation(s) continues and/or may result in a civil penalty not to exceed $2500 and/or result in legal action to enforce the order and to obtain penalties and fines accruing pursuant to . . . General Statutes § 8-12.

"This order may be appealed to the Zoning Board of Appeals of the Town of Clinton within fifteen days of its receipt."

building, stable, or enclosure; and civil penalties authorized by General Statutes § 8-12 for the defendants' failure to comply with the order to discontinue.

In their answer dated November 5, 2012, the defendants admitted their ownership of the subject premises and, with respect to the remainder of the allegations set forth in the original compliant, either denied the allegations or left the plaintiff to his proof. In a special defense dated November 5, 2012, the defendants alleged in relevant part that "[t]he complained of activities were nonconforming uses that predate the zoning laws the plaintiff is trying to enforce."[4] Also, in a counterclaim dated November 5, 2012, the defendants alleged that the plaintiff, by bringing "these complaints" against them, engaged in "extreme and outrageous" conduct that caused the defendants "extreme emotional distress"; the plaintiff, "[b]y filing these groundless complaints," committed intrusions of a "highly offensive" nature against the defendants; and that the plaintiff had engaged in professional malpractice that caused the defendants to suffer damages. The defendants sought, inter alia, money damages and "[a] court order requiring . . . [the plaintiff] to cease harassing, selective enforcement of the zoning regulations against . . . [the defendants]."

The plaintiff filed a "motion to dismiss and/or strike" with respect to the defendants' counterclaim and special defense. The plaintiff argued that the counterclaim

[4] The special defense stated: "1. The subject property has been classified by the town of Clinton as farmland under Public Act 63-490 since 1990 and is, therefore, a legally nonconforming use of the subject property not subject to zoning laws passed after its classification as farmland under Public Act 63-490.

"2. The complained of activities were nonconforming uses that predate the zoning laws the plaintiff is trying to enforce."

In general terms, No. 63-490 of the 1963 Public Acts, codified in General Statutes § 12-107a et seq., allows certain types of land, including farmland, to be assessed at its use value, rather than at its fair market value, for purposes of local property taxation.

and special defense "merely seek to contest the validity of a zoning order issued pursuant to General Statutes § 8-12, from which the [defendants] did not timely appeal pursuant to General Statutes § 8-7. Their failure to exhaust that administrative remedy leaves this court without subject matter jurisdiction over their special defense and counterclaim." Alternatively, the plaintiff argued that each counterclaim count "[failed] to state a claim upon which relief can be granted under the facts alleged."

Over the defendants' objection, and after hearing argument on the motion, the court, *Domnarski*, *J.*, by order dated May 10, 2013, granted the plaintiff's motion. In striking the special defense, the court reasoned that it was "legally insufficient" because the defendants failed to exhaust their administrative remedies. In dismissing "[a]ll counts of the counterclaim," the court likewise relied on the fact that the defendants had failed to exhaust their administrative remedies, noting that "[i]n the counterclaim counts, the defendants seek a collateral attack on a zoning determination that they did not appeal from." On June 3, 2013, the defendants, pursuant to Practice Book § 6-15, filed a notice of intent to appeal from Judge Domnarski's May 10, 2013 dismissal of their entire counterclaim "until a final judgment rendered in said matter disposes of the case for all purposes and as to all parties."

In the absence of an objection, on July 3, 2013, the plaintiff filed a request for leave to file an amended complaint and an amended complaint for the purpose of incorporating allegations of additional zoning violations at the subject premises. The amended complaint added an additional count to the cause of action. In this second count, the plaintiff sought enforcement with respect to an order to discontinue dated November 15, 2012. In count two, the plaintiff alleged that the defendants engaged in multiple activities on the subject

premises in violation of the Clinton zoning regulations. Specifically, the plaintiff alleged that the defendants "have sold, and continue to sell, firewood and mulch, or otherwise maintain a retail establishment on the premises"; "have brought, and continue to bring, wood, brush, logs, wood chips, branches, and/or leaves onto the site from outside sources to process into firewood and mulch, or otherwise manufacture or process goods, on the premises"; "have participated, and continue to participate, in the wholesale of mulch on the premises"; "have stored, and continue to store, heavy equipment, trucks, and small equipment and machinery associated with businesses being conducted at the site on the premises"; "have stockpiled, and continue to stockpile, wood materials, including wood, wood chips and compost, beyond what is required for personal use on the premises and in contact with vegetation"; "have parked, and continue to park, several commercial vehicles which exceed the maximum vehicle weight limit on the premises"; "have parked, and continue to park, more than one commercial vehicle within the vehicle weight limit on the premises"; "have stockpiled and stored, and continue to stockpile and store, materials and equipment outside on the premises, including mulch, logs, firewood, log splitters, wood chippers, grinders, vehicles, loaders, and light and heavy construction equipment"; "have stored, and continue to store, more than two unregistered vehicles on the premises, including a recreational vehicle, a tractor for a tractor trailer, a dump truck, and an SUV"; "have constructed and maintained, and continue to maintain, a shed on the premises without a permit"; "have kept, and continue to keep, chickens and ducks on the premises without a permit and in excess of a total of ten"; "have conducted, and continue to conduct, a farming operation of raising, keeping and caring for livestock, poultry and ducks on the premises without a permit or special exception";[5] and have

[5] Additionally, the plaintiff alleged that the defendants have caused dust and smoke; "[o]dors, fumes and/or gasses"; have made "[n]oise"; have failed

"kept, and continue to keep, livestock on the premises without any covered watertight container or containment on site for manure."

The plaintiff alleged that all of these activities violated specific zoning regulations, all of which were cited in the complaint; that he issued the defendants a warning of violation on October 18, 2012; that he issued the defendants an order to discontinue on November 15, 2012; that the defendants failed to comply with the order to discontinue; and that the defendants did not file an appeal from the order to discontinue within fifteen days of the issuance of that order.[6] Moreover, the plaintiff alleged that on March 13, 2013, the defendants notified him "that they intended to continue to regrind and sell wood chips from the premises," and that their conduct constituted a wilful failure to comply with the order to discontinue.

In his amended complaint seeking enforcement of both orders to discontinue, the plaintiff sought permanent and mandatory injunctive relief related to the defendants' activities on the premises, civil penalties for the defendants' wilful failure to comply with the orders to discontinue dated April 16, 2012, and November 15, 2012, and further just and equitable relief deemed appropriate by the court.

The defendants filed an answer to the amended complaint dated August 22, 2013. Therein, the defendants

to have proper provisions for the storage of waste; and have stockpiled wood materials in contact with vegetation. Prior to trial, the plaintiff withdrew these parts of the second count of the amended complaint.

[6] It is undisputed that the order of November 15, 2012, stated, in relevant part: "These violations must be remedied within ten (10) days of the receipt of this notice. Failure to correct these violations within the above stated time frame may result in the party being fined $250 per day for each day the violations continue and/or may result in a civil penalty not to exceed $2500 and/or result in legal action to enforce the order and to obtain penalties and fines accruing pursuant to . . . General Statutes § 8-12.

"This order may be appealed to the Zoning Board of Appeals of the Town of Clinton within fifteen days of receipt."

generally denied the substantive allegations in the amended complaint, or left the plaintiff to his proof. Additionally, the defendants raised three special defenses. In the first special defense, the defendants alleged that, to the extent that the plaintiff alleged that they used the subject premises as a farm, such use was a legally permissible nonconforming use of the premises.[7] In the second special defense, the defendants alleged that, to the extent that the plaintiff alleged that they used the premises as a commercial nursery operation, such use was a legally permissible nonconforming use of the premises.[8] In the third special defense, the defendants, claiming that the plaintiff's conduct led them to believe that their activities at the subject premises were legally permissible, alleged a defense of municipal estoppel.

Subsequently, on September 6, 2013, the plaintiff filed a request to revise in which he requested that the defendants delete the first and second special defenses in their entirety and, with respect to the third special defense, state the special defense more particularly. In his request to revise, the plaintiff asserted that the first two special defenses were legally improper because they previously had been stricken by Judge Domnarski. Thereafter, on November 22, 2013, the defendants

[7] The first special defense stated: "1. The various uses described in the plaintiff's amended complaint are uses directly associated with a farm on said premises, which is a specifically permitted use under the zoning regulations of the town of Clinton, which use has been established and operated by the defendants and their predecessors in ownership of said property for a period of at least thirty (30) years.

"2. The above described use of the property predates the present zoning regulations, which require a special permit or a special exception for said use, and hence is a permitted, preexisting, nonconforming use."

[8] The second special defense stated: "1. In addition to the use of said premises as a 'farm,' said premises also had been used by the defendants and their predecessors in title as a commercial nursery operation, and as such, is a legally permitted, preexisting, nonconforming use under the Clinton zoning regulations."

deleted the first and second special defenses in their entirety and repleaded the third special defense.

Following the revision, on December 24, 2013, the plaintiff moved to strike the repleaded third special defense in its entirety on the grounds that it failed to state a claim upon which relief could be granted and was, in part, unresponsive to the request to revise inasmuch as it injected into the special defense a new claim that appeared to challenge the validity of the orders, specifically, that the defendants' use of the subject premises was lawful pursuant to General Statutes § 19a-341.[9] The defendants filed an opposition to the motion to strike the third special defense. After the court, *Aurigemma, J.*, heard argument on the motion, on May 21, 2014, it granted the motion. In granting the motion, the court determined, first, that the defendants had failed

[9] General Statutes § 19a-341 provides in relevant part: "(a) Notwithstanding any general statute or municipal ordinance or regulation pertaining to nuisances to the contrary, no agricultural or farming operation, place, establishment or facility, or any of its appurtenances, or the operation thereof, shall be deemed to constitute a nuisance, either public or private, due to alleged objectionable (1) odor from livestock, manure, fertilizer or feed, (2) noise from livestock or farm equipment used in normal, generally acceptable farming procedures, (3) dust created during plowing or cultivation operations, (4) use of chemicals, provided such chemicals and the method of their application conform to practices approved by the Commissioner of Energy and Environmental Protection or, where applicable, the Commissioner of Public Health, or (5) water pollution from livestock or crop production activities, except the pollution of public or private drinking water supplies, provided such activities conform to acceptable management practices for pollution control approved by the Commissioner of Energy and Environmental Protection; provided such agricultural or farming operation, place, establishment or facility has been in operation for one year or more and has not been substantially changed, and such operation follows generally accepted agricultural practices. Inspection and approval of the agricultural or farming operation, place, establishment or facility by the Commissioner of Agriculture or his designee shall be prima facie evidence that such operation follows generally accepted agricultural practices. . . .

"(c) The provisions of this section shall not apply whenever a nuisance results from negligence or wilful or reckless misconduct in the operation of any such agricultural or farming operation, place, establishment or facility, or any of its appurtenances."

to allege sufficient facts to support a claim of municipal estoppel because they had failed to allege that the plaintiff had induced the defendants to engage in the activities at issue at the subject premises. The court determined, second, that, in their revised answer, the defendants improperly had included revisions that had not been requested by the plaintiff in his request to revise and which were unrelated to the special defense of municipal estoppel.[10] Also, with respect to the addition of paragraph 10 of the revised third special defense, which raised a claim that was based on § 19a-341, the court determined that it was improper because it "alleges preexisting nonconforming use, which has previously been stricken by this court."

Additionally, prior to the commencement of the trial, the plaintiff filed five motions in limine to preclude the defendants from presenting evidence for the purpose of (1) contesting the validity of the orders to discontinue dated April 16, 2012, and November 15, 2012; (2) proving a defense of municipal estoppel or laches; (3) demonstrating that relevant actions or decisions had been undertaken or made by any Clinton individuals or agencies other than the Clinton zoning authority; (4) demonstrating facts related to police reports and "claims of false or illegal entries into the record (specifically the zoning office 'street' file) by the plaintiff as zoning

[10] In revising the third special defense, in which the defendants originally had raised a claim of municipal estoppel, the defendants, inter alia, inserted a new paragraph, numbered as paragraph 10, which provides: "In addition, the defendants claim that their activities on said premises with respect to the mulching operation as a farming activity, together with other farming activities conducted on said premises by them, are protected and permitted under the provisions of [General Statutes § 19a-341]." In his memorandum of law in support of the motion to strike the third special defense, the plaintiff argued that this newly added paragraph should be stricken because it was unresponsive to the request to revise and, in light of the defendants' failure to exhaust their administrative remedies, jurisdictionally improper as a means of demonstrating that the defendants were lawfully using the subject premises.

enforcement officer"; and (5) proving a defense of nonconforming farm use of the subject premises. The defendants objected to these motions. The court expressly granted the first, second, fourth, and fifth of these motions, but a ruling on the third motion, related to evidence concerning other agencies or individuals, does not appear in the record.

Prior to the hearing, the parties entered into a joint stipulation of facts, dated April 28, 2015, as follows:

"(1) The defendants . . . purchased the [subject premises] . . . and are the current owners.

"(2) The premises is located within a R-80 residential zoning district.

"(3) The defendants have kept, and continue to keep, cows on the premises . . . .

"(4) The defendants have constructed a metal corral within fifty feet from the street line and thirty-five feet from the southeast property line. . . .

"(5) On April 16, 2012, the plaintiff issued to the defendants an order to discontinue the keeping of cows within a metal corral, which was constructed and located within the minimum front yard setback for the R-80 zoning district (50 feet) and the minimum side property line setback for the R-80 zoning district (35 feet).

"(6) The defendants did not file an appeal from the order to discontinue to contest its validity within fifteen (15) days after the issuance of said order to discontinue pursuant to . . . General Statutes §§ 8-6 and 8-7 and the rules of the Zoning Board of Appeals of the Town of Clinton [board] . . . establishing a fifteen (15) day appeal period. . . .

"(7) The defendants have sold, and continue to sell, firewood and mulch on the premises.

"(8) On October 18 and November 15, 2012, section 24.1.21 [of the Clinton zoning regulations] stated that retail establishments, as a permitted use, were prohibited in the R-80 district.

"(9) The defendants have brought, and continue to bring, wood, logs and wood chips onto the premises from outside sources to process into firewood and mulch.

"(10) The defendants have participated, and continue to participate, in the wholesale of mulch on the premises.

"(11) On October 18 and November 15, 2012, section 24.1.61 [of the Clinton zoning regulations] stated [that] manufacturing, processing or assembly of goods, as a permitted use, is prohibited in the R-80 district.

"(12) On October 18 and November 15, 2012, section 24.1.62 [of the Clinton zoning regulations] stated [that] warehousing and wholesale businesses, as a permitted use, are prohibited in the R-80 district.

"(13) The defendants have stored, and continue to store, heavy equipment, trucks, small equipment and machinery associated with the business being conducted at the site on the premises.

"(14) The defendants have stockpiled, and continue to stockpile, wood materials, including wood, wood chips and compost.

"(15) On October 18 and November 15, 2012, section 24.1.76 [of the Clinton zoning regulations] stated [that] storage of materials, which is dangerous due to explosion, extreme fire hazard and radioactivity, beyond what is required for person[al] residential use, as a permitted use, is prohibited in the R-80 district.

"(16) The defendants have parked, and continue to park, several vehicles, including two dump trucks, two

mason trucks, a 3500 Dodge pickup and a six wheel tanker truck on the premises.

"(17) On October 18 and November 15, 2012, section 24.1.70 [of the Clinton zoning regulations] stated [that] contractor's businesses, associated building and storage yards, as permitted uses, are prohibited in the R-80 district.

"(18) On October 18 and November 15, 2012, section 26.1.4 (d) (1) stated that parking of commercial vehicles in excess of one and one-half ton gross vehicle weight, as an accessory use, is prohibited in the R-80 district.

"(19) The defendants have stockpiled and stored, and continue to stockpile and store, materials and equipment outside on the premises, including mulch, logs, firewood, a log splitter, wood chippers, vehicles and loaders.

"(20) On October 18 and November 15, 2012, section 26.1.4 (m) [of the Clinton zoning regulations] stated [that] outside storage areas, as an accessory use, shall not extend into the areas required for setbacks from property line or residential district boundary lines; and section 26.1.4 (m) (1) [of the Clinton zoning regulations] stated [that] any permitted outside accessory storage areas shall be enclosed except for necessary access drive, by building and/or fence, walls, embankments or evergreen shrubs or trees so as to screen the storage area[s] from view from any other lot or from any street.

"(21) The defendants have kept, and continue to keep, chickens and ducks on the premises in excess of ten.

"(22) On October 18 and November 15, 2012, section 24.1.43 [of the Clinton zoning regulations] stated that chickens or other poultry, as a permitted use, are not to exceed a total of ten (10) on a lot.

"(23) The defendants have conducted, and continue to conduct, a farming operation of raising, keeping and caring for livestock, poultry and ducks on the premises.

"(24) On November 15, 2012, the plaintiff issued to the defendants an order to discontinue, listing numerous violations of the Clinton zoning regulations with activities on the site . . . .

"(25) The defendants did not file an appeal from the order to discontinue to contest its validity within fifteen (15) days after the issuance of said order to discontinue pursuant to . . . General Statutes §§ 8-6 and 8-7 and rules of the [board] . . . section IV, establishing a fifteen (15) day appeal period. . . .

"(26) On March 13, 2013, the defendants notified the plaintiff that they intended to continue to regrind wood chips and sell wood chips from the premises.

"(27) On March 28, 2013, the plaintiff, through counsel, issued to the defendants a letter advising them that the importation and processing of wood materials is a violation of the acts prohibited under section 24.1.61 of the Clinton zoning regulations and the order to discontinue dated November 15, 2012." (Citations omitted.)

The matter was tried before the court, *Aurigemma*, *J.*, on April 28, 2015. The court heard testimony from Lane, Knapp, and Jeffrey Cashman. Additionally, the parties presented several exhibits. On July 30, 2015, the court issued a memorandum of decision by which it rendered judgment in favor of the plaintiff, thereby enforcing the plaintiff's orders of April 16, 2012, and November 15, 2012. In its memorandum of decision, the court set forth the parties' stipulation of facts. Additionally, the court found that, after the plaintiff issued the April 16, 2012 order, which described the defendants' right to appeal, "the parties had discussions, and

the defendants agreed to move the cows into the areas that met the setback requirements. The defendants did relocate the cows, but only for a short period of time, [before they] moved them back so that they continued to violate the April 16, 2012 order to discontinue.

"On February 1, 2012, the plaintiff issued a warning of violation of sections 7.5, 23.4, 24.1.57 and 4.1.74 of the [Clinton zoning] regulations to the defendants. The warning expressly advised the defendants to '[s]top the manufacturing of wood materials for sale and the stockpiling of wood and debris away from vegetative areas to prevent any possible ignition of the vegetation. Stabilize the site by properly installing erosion controls along all disturbed areas and stockpiles. Stop the import of materials such as logs, wood chips, branches, leaves and other land/tree clearing debris.' After inspection, on February 13, 2012, the plaintiff issued a second warning of violations that was identical to the February 1, 2012 warning. Thereafter, the defendants met with the plaintiff and agreed to reduce and eliminate the mulch piles, eliminate the use of outside mulch and provide a place for the animals outside of the setbacks. The defendants also advised the plaintiff in April, 2012, that they had stopped accepting outside wood and wood chips. Thereafter, the defendants violated their agreements and failed to comply with the February warnings.

"After the plaintiff inspected the premises and found that the defendants had not remedied various violations of the zoning regulations, on October 18, 2012, he issued a notice of violations of numerous sections of the regulations. The notice reminded the defendants of their previous agreements to bring the premises into compliance and expressly advised the defendants that their failure to remedy the violations could lead to further legal action and the imposition of penalties under the Connecticut General Statutes. Thereafter, on November

15, 2012, the plaintiff issued an order to discontinue, listing the numerous violations of the regulations about which the defendants had previously received notice. This order, like the April order, expressly stated that it 'may be appealed to the [board] within fifteen days of its receipt.'

"On March 13, 2013, the defendants' attorney . . . sent a letter to . . . [the attorney] who represented the plaintiff, advising her that since the Department of [Energy and] Environmental Protection did not require [Jeffrey Cashman] to obtain a permit to regrind and sell wood chips, [Jeffrey Cashman] intended to resume regrinding and selling wood chips on the premises. The letter did not explain how the position of the Department of [Energy and] Environmental Protection had any relevance whatsoever to the violation of the Clinton zoning regulations. On March 28, 2013 . . . [another attorney who] also represented the plaintiff, sent a letter to the defendants' attorney . . . advising that accepting wood chips for regrinding and sale would constitute a wilful failure to comply with the November 15, 2012 order to discontinue.

"On November 13, 2013, the defendants petitioned to amend the Clinton zoning regulations to allow a number of the defendants' activities that are the subject of the orders to discontinue, including the mulching operation. The petition to amend was approved with modification on May 12, 2014. However, the defendants have never even attempted to take advantage of the amended regulations and, unbelievably, have not applied to obtain a special permit exception pursuant to the new regulations.

"[Lane] retired as zoning enforcement officer . . . and . . . [Knapp] became the Clinton [zoning enforcement officer] on May 1, 2014. He inspected the premises and found that almost all of the violations mentioned

in the orders to discontinue still existed, including cows in the corral, smoking piles of mulch, and heavy machinery on the premises. [Knapp] testified that [Jeffrey Cashman] has made it clear that he has no intention of complying with the orders at issue. [Jeffrey Cashman's] own testimony made it clear that, essentially, he does not think the zoning regulations should apply to him because he's a farmer.

"The plaintiff has incurred $16,388.50 in attorney's fees and $412.20 in costs related to this action through May 1, 2015. Since the briefs in this case were filed on June 19, 2015, and July 7, 2015, the plaintiff has undoubtedly incurred additional legal expenses in connection therewith.

"The defendants have stipulated to the majority of the allegations in the plaintiff's complaint. They don't deny that they are in violation of the orders to discontinue and the regulations referenced therein. They just don't believe the orders are valid and/or that the orders should apply to them. However, the defendants may not contest the validity of the orders to discontinue in this zoning enforcement action because they failed to appeal those orders."

The court proceeded in its analysis to reject the defendants' argument that the injunctive relief requested by the plaintiff was inequitable. The court, citing relevant case law, observed that the granting of such relief must be compatible with the equities of the case, and went on to determine that equitable considerations weighed in favor of granting the plaintiff relief. The court stated in relevant part: "[T]he fact that a party will suffer irreparable harm as a result of a zoning enforcement injunction does not make the injunction inequitable. . . . In this case . . . the court finds that the equities patently lie with the town. The defendants have blatantly and defiantly violated multiple zoning regulations, failing to even attempt to lessen or erase those

violations by applying for special permits." The court granted the plaintiff injunctive relief with respect to the activities and conditions at the subject premises that were the subject of the plaintiff's orders to discontinue. Moreover, the court ordered the defendants to pay a fine and awarded the plaintiff attorney's fees and costs. This appeal followed. Additional facts will be set forth as necessary.

I

First, the defendants claim that Judge Domnarski and Judge Aurigemma erred in striking one of their special defenses, thereby prohibiting them from demonstrating that they had a legally protected right to use the subject premises as a farm on the ground that such use of their property was a nonconforming use that existed prior to the town's amendment of the zoning regulations in 2012 with respect to farms and livestock. We disagree.

We begin our analysis of this claim by reviewing some of the relevant procedural history set forth previously in this opinion. The record reflects that on May 10, 2013, Judge Domnarski struck the defendants' special defense that was included in their answer dated November 5, 2012, which they had filed in response to the plaintiff's original complaint. This special defense was that the subject property had been classified as farmland under Public Act 63-490 and that the activities described in the April 16, 2012 order to discontinue "were nonconforming uses that predate the zoning laws the plaintiff is trying to enforce." In granting the motion to strike, Judge Domnarski agreed with the plaintiff's arguments and determined that the special defense was "legally insufficient" because the defendants had failed to exhaust their administrative remedies by exercising their right to challenge the validity of the order by appealing it to the board.

After the plaintiff filed an amended complaint, the defendants filed an answer to the amended complaint. As we explained previously, the answer to the amended complaint originally contained three special defenses. The defendants deleted the first two of these special defenses in response to the plaintiff's request to revise. Thus, following its revision by the defendants, the answer set forth only one special defense that included a claim of municipal estoppel and a claim that the defendants' activities at the subject premises were protected pursuant to § 19a-341. In striking this special defense in its entirety, Judge Aurigemma determined that the defendants had failed to allege sufficient facts to demonstrate that the plaintiff had engaged in activities that induced them to engage in the conduct at issue at the subject premises. Additionally, Judge Aurigemma concluded that, insofar as the defendants had revised the special defense to include a claim pursuant to § 19a-341, such revision was legally improper. See footnotes 9 and 10 of this opinion.

In their argument concerning the present claim, the defendants focus solely on whether the court properly precluded them from setting forth their special defense on the basis of farming as a nonconforming use. Specifically, the defendants argue: "Throughout the record of the case, the defendant[s] [have] attempted to provide evidence that shows, unequivocally, that some, if not all, of the 'violations' existed prior to the revision of the zoning regulations on January 1, 2012, and were legal as of right uses on December 31, 2011. The defendants admittedly failed to appeal the [zoning enforcement officer's] orders to the [board]. The trial court should have [nonetheless] . . . allowed the defendants to proceed with their special defenses. Because the defendants' uses were legal nonconforming uses, the defendants were entitled to constitutional protection of those nonconforming uses that were on the property

at the time of the amendment to the zoning regulations." The defendants proceed to argue that they operated a farm on the subject premises prior to January 1, 2012, that the zoning regulations at issue were amended to prohibit some of the defendants' activities on the subject premises on January 1, 2012, and that the plaintiff began enforcement action against the defendants approximately four months later. Additionally, the defendants argue that "[t]he facts are clear that once the town revised the regulations, the plaintiff began immediate enforcement against the defendants. Such behavior is a violation of the defendants' statutory and constitutional rights that are attached to property owners with nonconforming uses and, because of the egregious nature of the enforcement and the unconstitutional nature of the result, the doctrine of exhaustion of administrative remedies should not apply."

Additionally, in framing their claim, the defendants have referred to rulings made by Judge Domnarski *and* Judge Aurigemma. They argue that these rulings "prohibited [them] from raising the special defenses that they had a legal nonconforming right to use the property as a farm . . . ." Turning to the defendants' claim of error as it relates to Judge Aurigemma's ruling, we observe, once again, that, in this appeal, the defendants do not claim that Judge Aurigemma erroneously struck their special defense as it pertained to their claim of municipal estoppel or their reliance on § 19a-341. Instead, the defendants claim is limited to their assertion of a legally protected right to the nonconforming use of the subject premises as a farm. Although the defendants refer to Judge Aurigemma's ruling in their statement of the claim, they do not identify how Judge Aurigemma's ruling on the motion to strike harmed them or why it was erroneous. As counsel for the defendants acknowledged at oral argument before this court,

Judge Aurigemma did not strike a special defense related to such a nonconforming use of the subject premises because, by the time that Judge Aurigemma ruled on the motion to strike, the defendants had deleted their first and second special defenses (related to nonconforming use) in their response to the plaintiff's request to revise. Thus, any claim of error by the defendants that Judge Aurigemma improperly struck their special defenses related to nonconforming use is belied by a simple review of the record. We are unable to review a ruling that was not made.

Thus, we turn to the defendants' claim of error as it relates to Judge Domnarski's ruling striking their special defense that they had a legally protected right to continue to conduct nonconforming farming activities at the subject premises.[11] Before discussing the propriety of that ruling, we address the plaintiff's argument that the defendants voluntarily waived appellate review of Judge Domnarski's ruling because, following that ruling, the plaintiff filed an amended complaint, the defendants filed an answer in response to the plaintiff's amended complaint, and, later, the defendants amended their answer and voluntarily deleted special defenses alleging nonconforming use.[12]

[11] We reiterate that Judge Domnarski struck the special defense set forth in the defendants' answer to the plaintiff's original complaint. This special defense pertained to nonconforming *farming activities* at the subject premises. The defendants did not plead a special defense of nonconforming use related to *commercial nursery activities* at the subject premises until after the plaintiff amended his complaint to seek enforcement of the order to discontinue dated November 15, 2012.

[12] The defendants did not file a reply brief to respond to this waiver argument. At oral argument before this court, the defendants' attorney relied on the fact that the defendants had filed a notice of intent to appeal from Judge Domnarski's ruling dismissing their counterclaim. The defendants' notice of intent to appeal *from Judge Domnarski's dismissal of their counterclaim* does not affect our analysis of the waiver issue concerning the striking of their special defense.

It is well established in our law that "[w]hen an amended pleading is filed, it operates as a waiver of the original pleading. The original pleading drops out of the case and although it remains in the file, it cannot serve as the basis for any future judgment, and previous rulings on the original pleading cannot be made the subject of an appeal." (Internal quotation marks omitted.) *Lund* v. *Milford Hospital, Inc.*, 326 Conn. 846, 850, 168 A.3d 479 (2017); see also *Rockstone Capital, LLC* v. *Sanzo*, 175 Conn. App. 770, 788, 171 A.3d 77 (same), cert. granted on other grounds, 327 Conn. 968, A.3d (2017); *Ed Lally & Associates, Inc.* v. *DSBNC, LLC*, 145 Conn. App. 718, 746, 78 A.3d 148 (same), cert. denied, 310 Conn. 958, 82 A.3d 626 (2013). "When a defendant voluntarily files an amended or substitute answer after a former one has been adjudged insufficient on demurrer, he waives all right to except to the action of the court in sustaining the demurrer to the first answer." *Pettus* v. *Gault*, 81 Conn. 415, 418, 71 A. 509 (1908).

In the present case, following Judge Domnarski's ruling on the motion to strike on May 10, 2013, the defendants did not file an amended or substitute answer in response to the plaintiff's original complaint. Rather, on August 22, 2013, after the plaintiff filed a motion for default for the defendants' failure to file a responsive pleading to the amended complaint, the defendants filed an answer to the plaintiff's July 3, 2013 amended complaint. In their answer to the amended complaint, the defendants included two special defenses of nonconforming use, thereby reasserting the special defense related to farming activities that had been stricken by Judge Domnarski.[13] In his request to revise the answer

[13] Count one of the amended complaint was related to the zoning violations addressed in the order to discontinue dated April 16, 2012. Count two of the amended complaint was related to the zoning violations addressed in the order to discontinue dated November 15, 2012. The special defenses in the answer to the amended complaint were designated as "first," "second," and "third" special defenses and, thus, were not pleaded in accordance with

to the amended complaint, the plaintiff requested that the first and second special defenses be deleted in their entirety as having been "previously alleged" by the defendants in their response to his original complaint and having been "already stricken by Judge Domnarski" on the ground that the defendants failed to exhaust their administrative remedies. Although they had a right to object to any or all of the requested revisions; see Practice Book § 10-37 (b); the defendants did not do so.[14] Instead, they deleted the special defenses, thereby removing those special defenses from the trial court's consideration in adjudicating the merits of the case.

To clarify the narrow waiver issue before us, we reiterate that, presently, the defendants only challenge Judge Domnarski's ruling in striking their special defense related to farming activities on the subject premises. They deleted their special defense related to commercial nursery activities at the subject premises; see footnote 11 of this opinion; and no ruling was made with respect to that special defense. Moreover, they have not appealed from Judge Aurigemma's ruling striking their special defense that was based on municipal estoppel. The plaintiff's waiver argument is somewhat persuasive, for it is based on the defendants' voluntary decision to delete both their special defenses that were based on nonconforming use in response to the plaintiff's request to revise. The defendants, although failing to address the plaintiff's waiver argument by means of a reply brief, nonetheless rely on Judge Domnarski's

Practice Book § 10-51, which provides in relevant part that "[w]here the complaint . . . is for more than one cause of action, set forth in several counts, each separate matter of defense should be preceded by a designation of the cause of action which it is designed to meet, in this manner: *First Defense to First Count*, *Second Defense to First Count*, *First Defense to Second Count*, and so on. . . ." (Emphasis in original.)

[14] At oral argument before this court, the defendants' attorney stated that the defendants' trial counsel deleted the special defenses in recognition of Judge Domnarski's prior ruling.

ruling as a rationale for their failure to object to the request to revise, an undoubtedly futile endeavor that only would have compelled the court to revisit the issue of the validity of their special defenses.[15] We have not discovered any precedent that shares the unique procedural history presented in the present case and, thus, could be considered to be binding authority with respect to the issue. Lacking clearly applicable precedent, we turn to a review of the merits of the claim and conclude that Judge Domnarski's ruling was proper.

It is undisputed that the defendants did not exercise their right to appeal to the board from the plaintiff's April 16, 2012 order to discontinue within fifteen days of the receipt of that order. In moving to dismiss and/or strike the special defense at issue, the plaintiff argued that the court lacked subject matter jurisdiction to consider the special defense because the defendants failed to exhaust their administrative remedies by appealing to board within the time prescribed by the board. See General Statutes § 8-7.

In their written objection to the plaintiff's motion, submitted to the trial court, the defendants argued in relevant part that the exhaustion doctrine did not apply in this case because (1) the special defense was based on a determination that one or more zoning regulations were invalid, specifically, that by virtue of Public Act 63-490, the regulations on which the plaintiff relied are invalid or illegal and did not apply to the subject property, and (2) their special defense was based on the interpretation of a statute, specifically, that it required the court to interpret Public Act 63-490, which, the defendants argued, "exempts them from the zoning regulations of Clinton by making their property a valid

[15] "[T]he law does not require the performance of a futile act." (Internal quotation marks omitted.) *Barber* v. *Jacobs*, 58 Conn. App. 330, 336, 753 A.2d 430, cert. denied, 254 Conn. 920, 759 A.2d 1023 (2000).

nonconforming use that predates the zoning regulations of Clinton" and that "[a] land owner is not required to appeal to an administrative agency where the interpretation of a statute is required." During argument on the motion, the defendants' attorney reiterated that the defendants intended by their special defense to challenge the validity of the zoning regulations "because Public Act 63-490 . . . effectively trumps these zoning enforcement regulations" and that their special defense required the court to interpret Public Act 63-490. The plaintiff reiterated the central premise advanced in his motion, namely, that the special defense at issue raised a garden variety claim of whether the defendants had a nonconforming use and that such issue should have been raised before the board because it was "clearly within [its] purview."

Before this court, the defendants argue that they wanted to demonstrate that some, if not all, of the conditions and activities at issue on the subject property existed prior to the time that the Clinton zoning regulations were revised on January 1, 2012, such that they were legal on December 31, 2011. The defendants argue that farming uses were "lightly regulated" prior to the revisions, but beginning on January 1, 2012, farming uses required a permit. The defendants argue that, as part of proving their special defense, they intended to present evidence to show that they had been operating a farm on the subject premises since 1988 and had constructed the enclosure for cows prior to January 1, 2012, the date when newly enacted regulations prohibiting livestock from being kept within the setback area went into effect. They argue that it was obvious that their farming activities predated the newly enacted regulations and that the plaintiff's conduct, in immediately enforcing the newly enacted zoning regulations with respect to their property was "egregious" because their

activities clearly were legally protected as nonconforming uses. They argue that "[s]uch behavior is a violation of the defendants' statutory and constitutional rights that are attached to property owners with nonconforming uses . . . ."

The defendants argue that the present case falls into one of the narrow exceptions to the exhaustion doctrine. Relying on *Norwich* v. *Norwalk Wilbert Vault Co.*, 208 Conn. 1, 4, 544 A.2d 152 (1988), the defendants argue that they excusably bypassed available administrative relief, specifically, appealing to the board, because "a constitutional question is involved and obtaining relief from the [board] would be futile." In this regard, the defendants argue that the question of whether any constitutionally protected nonconforming uses existed was beyond the scope of review by the board and that "this case presents a constitutional question as to whether the plaintiff can eliminate a constitutionally protected nonconforming right just by the issuance of a cease and desist order that is not appealed." The defendants argue that the exception applies in this case to address what they describe as an "unconstitutional result" of the plaintiff's order. Additionally, the defendants argue that the plaintiff's actions "raised questions as to whether or not the newly enacted regulation[s] [were] invalid. The [board] was not in a position to make a determination as to whether or not the newly enacted regulation[s] [were] invalid, particularly, in [their] enforcement against the defendants." Without citing to any relevant authority, the defendants posit that the issue of whether a nonconforming use existed was simply "beyond the scope of the [board]."

Additionally, relying on *Upjohn Co.* v. *Zoning Board of Appeals*, 224 Conn. 96, 104–105, 616 A.2d 793 (1992), the defendants argue that they properly bypassed administrative relief because the plaintiff's "zoning action [was] so far outside [a] valid exercise of zoning

power that public policy dictates that the aggrieved party be allowed to challenge the zoning authority in court." In this regard, the defendants rely, in part, on the fact that the plaintiff began his enforcement action soon after the zoning regulations were revised and that the order to discontinue had the effect of "eliminat[ing]" their nonconforming right to use the subject property as a farm. At oral argument before this court, the defendants clarified that the timing of the plaintiff's enforcement activities in relation to the revisions to the zoning regulations was sufficient to reflect that the plaintiff's zoning enforcement activities fell so far outside of the lawful or legitimate exercise of zoning power that they should be permitted to challenge the zoning authority in court.

Thus, the arguments raised by the defendants before Judge Domnarski with respect to exceptions to the exhaustion doctrine differ from those, discussed previously, that the defendants currently advance before this court. Before the trial court, the defendants' exhaustion arguments were dominated by a reliance on Public Act 63-490, an enactment to which the defendants do not even refer in their appellate brief. It would be particularly unfair, both to the trial court and to the plaintiff, for this court to overturn the trial court's ruling on the basis of constitutional and public policy arguments that were neither raised before nor addressed by the court.

Even if we were to consider the merits of the arguments on which the defendants currently rely, we would readily conclude that they are not persuasive and, thus, do not afford them a right to bypass the administrative remedies available to them.[16] A motion to strike is the

[16] It suffices to state that, with respect to the exhaustion of administrative remedies issue, we are not persuaded by the defendants' reliance on *Haussherr-Hughes* v. *Redenz*, Superior Court, judicial district of Danbury, Docket No. CV-98-0332716 S (January 11, 2000) (26 Conn. L. Rptr. 256), which we deem to be factually and procedurally distinguishable from the present case.

procedural vehicle whereby a party may challenge the legal sufficiency of a special defense and, in ruling on a motion to strike, the court "must accept as true the facts alleged in the special defenses and construe them in the manner most favorable to sustaining their legal sufficiency." *Barasso* v. *Rear Still Hill Road, LLC*, 64 Conn. App. 9, 13, 779 A.2d 198 (2001). In the present case, the issue raised by the motion to strike concerned the exhaustion doctrine and, thus, the court's subject matter jurisdiction to consider the special defense rather than the legal sufficiency of the special defense. Accordingly, it is appropriate to view and review the ruling as one made in connection with a motion to dismiss. "The standard of review for a court's decision on a motion to dismiss . . . is well settled. A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the [special defense] in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the [special defense], including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone. . . . In undertaking this review, we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *Dorry* v. *Garden*, 313 Conn. 516, 521, 98 A.3d 55 (2014). If the resolution of the jurisdictional issue hinges on relevant facts that are in dispute, the court may hold an evidentiary hearing to

resolve them. Id., 523–24. In the present case, it is of no consequence that the court viewed the motion as it was framed by the parties, as a motion to strike, because the relevant facts were not in dispute in light of the parties' stipulation that the defendants did not pursue an appeal before the board.

The defendants argue that this case falls within an exception to the exhaustion doctrine because a "constitutional question is involved" and "[t]he [board] was not in a position to make a determination as to whether or not the newly enacted regulation was invalid . . . ."

In *Norwich* v. *Norwalk Wilbert Vault Co.*, supra, 208 Conn. 1, precedent on which the defendants expressly rely, our Supreme Court stated: "It is well settled that a jurisdictional prerequisite to seeking relief in a court of law is that all available administrative remedies must have been exhausted. . . . We have held, however, that under limited circumstances, there are exceptions to this principle. One such exception is that where the available relief is inadequate or futile, the administrative process may be bypassed. . . . [E]xhaustion of administrative remedies is generally not required when the challenge is to the constitutionality of the statute or regulation under which the board or agency operates, rather than to the actions of the board or agency. . . . Generally, such challenges have been instituted by a plaintiff in a declaratory judgment action." (Citations omitted; internal quotation marks omitted.) Id., 4–5.

In *Stepney, LLC* v. *Fairfield*, 263 Conn. 558, 821 A.2d 725 (2003), our Supreme Court provided additional guidance with respect to this type of issue: "[T]here are recognized exceptions to the exhaustion doctrine, but we have recognized such exceptions only infrequently and only for narrowly defined purposes. . . . One such exception involves a challenge to the constitutionality of the statute or regulation under which an

agency operates, rather than to the actions of the board or agency. . . . [T]he mere allegation of a constitutional violation [however] will not necessarily excuse a [party's] failure to exhaust available administrative remedies . . . . The test is whether the appeal would be futile because the administrative agency . . . lacks the authority to grant adequate relief. . . .

"Moreover . . . [s]imply bringing a constitutional challenge to an agency's actions will not necessarily excuse a failure to follow an available statutory appeal process. . . . [D]irect adjudication even of constitutional claims is not warranted when the relief sought by a litigant might conceivably have been obtained through an alternative [statutory] procedure . . . which [the litigant] has chosen to ignore. . . . [W]e continue to limit any judicial bypass of even colorable constitutional claims to instances of demonstrable futility in pursuing an available administrative remedy." (Citations omitted; internal quotation marks omitted.) Id., 570–71; see also *General Dynamics Corp.* v. *Groton*, 184 Conn. 483, 490, 440 A.2d 185 (1981) (exhaustion doctrine does not apply to questions concerning constitutionality of statute granting administrative agency authority to operate); *Friedson* v. *Westport*, 181 Conn. 230, 233, 435 A.2d 17 (1980) (exhaustion doctrine does not apply to questions related to "very enactment" of regulations at issue).

Looking beyond isolated assertions by which the defendants purport to challenge the validity of the zoning regulations at issue, which are unaccompanied by any legal analysis, a careful review of the substance of the defendants' arguments reveals that the "constitutional question" that they sought to raise by means of their special defense simply was whether the plaintiff's enforcement activities were valid despite the fact that, following the enactment of the revised zoning regulations at issue, they had a constitutionally protected

preexisting use resulting from their activities on the subject premises prior to January 1, 2012. As the defendants acknowledge ultimately, their special defense was meant to challenge "the unconstitutional *result* of the plaintiff's illegal enforcement," but not the constitutionality of the regulations that the plaintiff purported to enforce. (Emphasis added.) The defendants' constitutional challenge to the plaintiff's activities does not excuse their failure to avail themselves of the administrative appeal process that was available to them. Although we recognize that "[a] party need not exhaust an inadequate or futile administrative remedy"; *Conto* v. *Zoning Commission*, 186 Conn. 106, 115, 439 A.2d 441 (1982); the defendants have not demonstrated that the board was unable to fulfill its customary administrative function in the present case by considering the appropriate evidence and determining whether the plaintiff properly determined that a nonconforming use did not exist, a determination made manifest by the issuance of the order to discontinue. Moreover, the defendants have not demonstrated that the board, in fulfilling its customary administrative function, was unable to grant any appropriate relief warranted in the present case with respect to the plaintiff's order to discontinue. Nothing in the record suggests that the relief sought by the defendants could not have been obtained by resort to the administrative remedy that they ignored.

Our Supreme Court has "held that the statutory scheme [which affords a right to appeal from the decision of an administrative officer or agency to the zoning board of appeals] reflects the legislative intent that the issue of what constitutes a nonconforming use should be resolved in the first instance by local officials. . . . [W]hen a party has a statutory right of appeal from the decision of an administrative officer or agency, he may not, instead of appealing, bring an independent action

to test the very issue which the appeal was designed to test. . . . Likewise, the validity of the order may not be contested if zoning officials seek its enforcement after a violator has failed to appeal." (Citations omitted; internal quotation marks omitted.) *Gelinas* v. *West Hartford*, 225 Conn. 575, 595, 626 A.2d 259 (1993).

The rationale in another decision of our Supreme Court applies with equal force to the present case: "Clearly the defendant had a statutory right to appeal the cease and desist order to the zoning board of appeals. The zoning board [of appeals] would in that proceeding determine whether the defendant, in fact, had a nonconforming use. The statutory procedure reflects the legislative intent that such issues be handled in the first instance by local administrative officials in order to provide aggrieved persons with full and adequate administrative relief, and to give the reviewing court the benefit of the local board's judgment. . . . Instead of following this administrative process to establish the legality of his use after the receipt of the order to cease and desist, the defendant elected to await the institution of an action by the town to enforce the order. On the record of this case, we conclude that the trial court properly refused to resolve the issue of the defendant's special defense alleging a nonconforming use, since that issue was one properly for administrative determination in the first instance." (Citation omitted; footnote omitted.) *Greenwich* v. *Kristoff*, 180 Conn. 575, 578–79, 430 A.2d 1294 (1980). Accordingly, the defendants' futility argument is unpersuasive.

As the defendants properly observe, in *Upjohn Co.* v. *Zoning Board of Appeals*, supra, 224 Conn. 104–105, our Supreme Court, in rejecting a collateral attack upon a condition attached to a building application, stated that "there may be exceptional cases in which a previously unchallenged condition was so far outside what could have been regarded as a valid exercise of zoning

power that there could not have been any justified reliance on it, or in which the continued maintenance of a previously unchallenged condition would violate some strong public policy. It may be that in such a case a collateral attack on such a condition should be permitted. We leave that issue to a case that, unlike this case, properly presents it." See also *Gangemi* v. *Zoning Board of Appeals*, 255 Conn. 143, 150, 763 A.2d 1011 (2001) (rejecting claim that exception suggested in *Upjohn Co*. satisfied). The court in *Upjohn Co*. stated: "[W]e have ordinarily recognized that the failure of a party to appeal from the action of a zoning authority renders that action final so that the correctness of that action is no longer subject to review by a court. . . . [This rule rests] in large part, at least in the zoning context, on the need for stability in land use planning and the need for justified reliance by all interested parties—the interested property owner, any interested neighbors and the town—on the decisions of the zoning authorities." (Citations omitted.) *Upjohn Co*. v. *Zoning Board of Appeals*, supra, 102.

In arguing that this precedent permitted them to bypass the administrative remedies available to them, the defendants argue, inter alia, that they were faced with a fifteen day appeal period in which to appeal to the board, that they had complied with the plaintiff's initial orders and had made attempts to persuade the plaintiff that his zoning enforcement activities were unjust and illegal, that such discussions lasted beyond the appeal period, and that the plaintiff's orders had the effect of eliminating their nonconforming use rights with respect to the subject premises. The defendants challenge Judge Domnarski's ruling in striking their special defense, yet the defendants rely on "facts surrounding [their] decision not to appeal the orders" that were presented at the time of the trial, well *after* the

time that Judge Domnarski considered and ruled on the motion to strike.

Having reviewed *Upjohn Co.* and its progeny, we are not persuaded that the facts of the present case are sufficient to meet the "very high standard"; *Torrington* v. *Zoning Commission*, 261 Conn. 759, 769, 806 A.2d 1020 (2002); necessary to satisfy the narrow exception to the exhaustion doctrine on which they rely. Stripped of the defendants' rhetoric, their special defense was a means of demonstrating that a nonconforming use existed. The plaintiff, in issuing the order to discontinue, plainly disagreed with the defendants' position in this regard. That a property owner disagreed with the determination of a zoning enforcement officer hardly presents an extraordinary circumstance. Moreover, the defendants have not presented this court with any authority to support their assertion that "[t]he question of whether any constitutionally protected nonconforming uses [existed] is beyond the scope of the [board]." The defendants, having been apprised of their right to appeal, chose not to appeal within the time period set by the board. If, as they argue, their farming activities obviously were nonconforming uses of the property following January 1, 2012, they had an ample opportunity to demonstrate that fact before the board. They do not present any compelling reasons why the issue was not the proper subject of an appeal before the board or why, despite any ongoing efforts to persuade the plaintiff to rescind his order, they were unable to bring an appeal. Nothing in the record suggests that the defendants could not have brought a timely appeal before the board while simultaneously continuing to negotiate with the plaintiff in an effort to resolve the dispute.

For the foregoing reasons, we conclude that Judge Domnarski's ruling in striking the special defense was proper.

II

Next, we consider the defendants' claim that the court improperly granted three of the plaintiff's motions in limine. We disagree.

As explained previously in this opinion, the plaintiff brought five motions in limine in which he sought to preclude certain evidence. The defendants challenge the court's granting of three of those motions. The first motion pertained to evidence offered for the purpose of challenging the validity of the orders to discontinue dated April 16, 2012, and November 15, 2012. The second motion pertained to evidence offered for the purpose of proving a defense of municipal estoppel or laches. The third motion pertained to evidence offered for the purpose of proving a nonconforming farm use of the subject premises. In his written motions, the plaintiff argued in relevant part that any evidence by which the defendants sought to raise a collateral attack on the orders to discontinue, including any evidence offered to demonstrate that a nonconforming use existed, should be disallowed in light of Judge Domnarski's prior ruling that struck the defendants' special defense, the fact that the defendants had voluntarily withdrawn their special defenses related to nonconforming use in response to his request to revise, and the defendants' failure to appeal the orders to the board. Moreover, the plaintiff argued, in relevant part, that evidence related to the issues of municipal estoppel or laches should be disallowed in light of Judge Aurigemma's prior ruling that struck the defendants' special defense that was related to these issues. Previously in this opinion, we discussed the foregoing procedural history in greater detail.

The defendants filed a written objection to these motions, in which they argued in relevant part: "The

defendants intend to present evidence which will provide the court with the full history of the defendants' use of the property since they acquired the property in 1987. The defendants intend to present evidence concerning the steps that they have taken to improve their property and utilize it in a manner that they believed was consistent with the zoning regulations then in effect. The defendants intend to present evidence of their responses to the orders to discontinue and their obtaining and providing information concerning the nature of their use. . . . All of the evidence that the defendants intend to introduce is relevant to the court's central determination as to whether or not the permanent injunction should be granted." The defendants argued that because the plaintiff has invoked the court's equitable powers by seeking a permanent injunction with respect to the defendants' farming activities on the subject property, the court was obligated to consider the equities of the case and to assess the gravity and wilfulness of the violation and the potential harm to the defendants. The defendants argued: "Although the defendants failed to appeal the orders to discontinue, the court must look to the historic use of the property in ruling on whether the equities will be served in granting this injunction. . . . The evidence that the defendants seek to admit will provide the court with evidence that is necessary for the determination regarding the gravity and wilfulness of the violation as well as the potential harm [to the] defendants. The evidence will include the historic use of the property, the plaintiff's inspections of the property, town regulation of the property and the defendants' responses to the orders to discontinue." (Citation omitted; internal quotation marks omitted.)

Initially, during oral argument on the motions, the defendants' attorney argued in relevant part: "I disagree that we cannot challenge the validity of the orders [to

discontinue] because the court has the ultimate discretion as to whether or not those orders should be upheld and turned into permanent injunctions in favor of the town." The defendants' attorney argued that the evidence at issue, with respect to nonconforming use, was necessary so that the court would have "a full picture" of all of the facts surrounding the orders to discontinue and that such evidence was relevant to the equitable issues before the court in determining whether it should grant the plaintiff permanent injunctive relief. Later, the defendants' attorney appeared to have modified his argument slightly by stating that the defendants did not intend "necessarily" to challenge the validity of the orders to discontinue, but to present evidence that was relevant to a determination of what injunctive relief, if any, was warranted.

During oral argument on the motions, the plaintiff's attorney argued in relevant part that, despite the equitable considerations that were before the court, the defendants' position, that they should be allowed to present evidence in an attempt to demonstrate a nonconforming farm use or to otherwise challenge the validity of the orders to discontinue, would permit them, effectively, to transform the case into the administrative appeal that the defendants chose not to pursue.

With respect to the motions in limine pertaining to evidence of nonconforming use or evidence that otherwise would effectively challenge the validity of the orders to discontinue, the court, *Aurigemma*, *J.*, agreed with the plaintiff's arguments and granted the motions in limine related to such evidence. The court stated that the defendants had not pursued an administrative appeal. With respect to the motion in limine pertaining to the special defense of estoppel or laches, the plaintiff's attorney observed that the court already had stricken the special defense of the defendants to which such evidence would have pertained. The defendants'

attorney acknowledged that the parties already had presented relevant arguments in this regard in the context of the motion to strike that special defense. The court granted the motion.

Presently, the defendants argue that the court's rulings were erroneous because in so ruling the court prohibited them from presenting an equitable defense to the zoning enforcement action. The defendants argue: "In this case, although the defendants failed to appeal the orders to discontinue, the court must look to the historic use of the property in ruling on whether the equities will be served in granting this injunction." They argue: "The evidence that the defendants attempted to admit would have provided the trial court with evidence that was necessary for the determination regarding the gravity and wilfulness of the violation as well as the potential harm to the [defendants]. . . . [T]he evidence will include the historic use of the property, the plaintiff's inspections of the property, town regulation of the property and the defendants' responses to the orders to discontinue." (Internal quotation marks omitted.) Additionally, the defendants argue: "In the present matter, the defendants failed to appeal the cease and desist orders due to their belief that the matters would be amicably resolved. We do not believe that the mere failure to timely appeal the matter is sufficient to have the nonconforming uses extinguished. In reviewing the orders, it does not appear as though [the] plaintiff ever considered the property was a farm or understood that the farm use was permitted without a zoning permit until December 31, 2011." (Internal quotation marks omitted.)

Primarily, the plaintiff argues that the defendants have failed to claim, let alone demonstrate, that the court's rulings were harmful such that the disallowed evidence likely would have affected the result of the trial. Also, the plaintiff argues that the court's rulings

reflected a proper exercise of its discretion because the equitable nature of the proceeding did not limit the court's discretion in the manner claimed by the defendants.

The defendants urge us to review the court's rulings de novo because the court based its evidentiary rulings on its resolution of a question of law, specifically, whether their failure to exhaust their administrative remedies precluded them from presenting "any evidence concerning their historic use of the property or the regulations that had been in effect on December 31, 2011." Also, the defendants argue that the rulings require that we review questions of law, including "whether the defendants were entitled to a constitutional review of the elimination of the nonconforming rights, whether the plaintiff's actions deprived the defendants of constitutionally protected rights and whether this constitutional question presents an exception to the exhaustion of administrative remedies rule." The plaintiff urges us to apply the deferential abuse of discretion standard of review to the claimed errors.

Here, it is apparent that the court determined that the evidence at issue was inadmissible because (1) the defendants failed to exhaust their administrative remedies, (2) Judge Domnarski previously struck the special defense of nonconforming use, and (3) the court previously struck the special defense of equitable estoppel. The defendants urge us to reconsider whether the evidence at issue related to the historic use of the subject property, the zoning regulations in effect on December 31, 2011, and estoppel nonetheless was admissible in the present enforcement action. We note, however, that we already have determined in part I of this opinion that the court properly struck the special defense of farming as a nonconforming use, and the defendants do not challenge Judge Aurigemma's ruling that struck their special defense that was based on estoppel. At no

time did the court strike the voluntarily deleted special defense of operating a commercial nursery as a nonconforming use.

We recognize that the function performed by the court in issuing the challenged evidentiary ruling dictates our scope of review. See *State* v. *Saucier*, 283 Conn. 207, 219, 926 A.2d 633 (2007). Regardless of whether we review the rulings under a plenary standard of review or under an abuse of discretion standard of review, it remains the defendant's burden on appeal to demonstrate that the court's evidentiary rulings were harmful. "[B]efore a party is entitled to a new trial because of an erroneous evidentiary ruling, he or she has the burden of demonstrating that the error was harmful. . . . The harmless error standard in a civil case is whether the improper ruling would likely affect the result. . . . When judging the likely effect of such a trial court ruling, the reviewing court is constrained to make its determination on the basis of the printed record before it. . . . In the absence of a showing that the [excluded] evidence would have affected the final result, its exclusion is harmless." (Internal quotation marks omitted.) *Desrosiers* v. *Henne*, 283 Conn. 361, 366, 926 A.2d 1024 (2007).

As the plaintiff aptly observes, the defendants' brief does not adequately set forth an analysis of how the court's exclusion of evidence affected the final result of the proceeding. Faced with an appellant's failure adequately to brief how a challenged evidentiary ruling was harmful, both this court and our Supreme Court have declined to review a claim of error related to such ruling. See, e.g., *Saint Bernard School of Montville, Inc.* v. *Bank of America*, 312 Conn. 811, 823, 95 A.3d 1063 (2014); *State* v. *Toro*, 172 Conn. App. 810, 813, 162 A.3d 63, cert. denied, 327 Conn. 905, 170 A.3d 2 (2017); *In re James O.*, 160 Conn. App. 506, 526, 127 A.3d 375 (2015), aff'd, 322 Conn. 636, 142 A.3d 1147 (2016).

The consequence of the defendants' failure to analyze the issue of harm adequately is that we are left to speculate with respect to the content and significance of the evidence that was excluded by the court's rulings. The defendants argued before the trial court that they would have presented evidence relevant to an understanding of the historic use of the subject premises, as well as the gravity and wilfulness of the zoning violation.[17] In their brief, the defendants do not draw our attention to any proffer made by them to the trial court and, beyond conclusory statements concerning the existence of a nonconforming use, the record does not clearly describe the content of the evidence that the court excluded.[18]

In their appellate brief, the defendants state in broad terms that the court erroneously excluded evidence concerning "the historic utilization of the property, the previous versions of the regulations under which the defendants acted and the unreasonableness of the plaintiff when considering the history prior to January 1, 2012." Apart from failing to refer us to any portion of the record for details concerning the excluded evidence, the defendants fail to attempt to demonstrate

[17] The defendants also argued that they would have presented evidence concerning the potential harm to them arising from injunctive relief. We observe that, during his testimony before the trial court, Jeffrey Cashman testified with respect to what actions he took in an attempt to address the zoning violations at issue, why he did not bring an administrative appeal, and how the granting of injunctive relief would impact and harm him.

[18] Our review of the trial transcript reveals that the defendants made an offer of proof on two separate occasions. During argument on the plaintiff's motions in limine, the defendants made an offer of proof with respect to certain police report evidence. The defendants, however, do not appeal from the court's ruling on the plaintiff's motion in limine related to this evidence. Later, during Jeffrey Cashman's examination, the defendants attempted to make an offer of proof with respect to an inspection report that was provided to Jeffrey Cashman by the Department of Agriculture to demonstrate that "what he was doing on his property was within generally accepted agricultural practices."

how the excluded evidence was likely to have affected the result—a showing that, on the scant record before us, is not at all self-evident. As the defendants assert, "[e]ven in an action brought by a zoning enforcement officer to require conformity with the zoning regulations, the granting of injunctive relief, which must be compatible with the equities of the case, rests within the trial court's sound discretion. . . . Those equities should take into account the gravity and wilfulness of the violation, as well as the potential harm to the defendants." (Citation omitted.) *Johnson* v. *Murzyn*, 1 Conn. App. 176, 183, 469 A.2d 1227, cert. denied, 192 Conn. 802, 471 A.2d 244 (1984). "This court previously has observed that [t]here is a general principle that a court of equity will balance the equities between the parties in determining what, if any, relief to give. The equities on both sides must be taken into account in considering an appeal to a court's equitable powers. An equity court wisely considers the relative positions of the parties and makes a decree that does substantial justice to all. It is the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief. . . . [C]ourts should not intervene unless the need for equitable relief is clear, not remote or speculative. Thus, a court of equity should not grant an award which would be disproportionate in its harm to the defendant and its assistance to the plaintiff." (Internal quotation marks omitted.) *Steroco, Inc.* v. *Szymanski*, 166 Conn. App. 75, 90–91, 140 A.3d 1014 (2016).

At the core of the defendants' claim is their belief that a nonconforming use existed and that the plaintiff unjustly deprived them of such use. General Statutes § 8-2 (a), as amended by Public Acts 2017, No. 17-39, § 1, provides in relevant part that zoning regulations "shall not prohibit the continuance of any nonconforming use, building or structure existing at the time of the

adoption of such regulations. Such regulations shall not provide for the termination of any nonconforming use solely as a result of nonuse for a specified period of time without regard to the intent of the property owner to maintain that use. Such regulations shall not terminate or deem abandoned a nonconforming use, building or structure unless the property owner of such use, building or structure voluntarily discontinues such use, building or structure and such discontinuance is accompanied by an intent to not reestablish such use, building or structure. The demolition or deconstruction of a nonconforming use, building or structure shall not by itself be evidence of such property owner's intent to not reestablish such use, building or structure." A nonconforming use has been defined as "a use or structure [that is] prohibited by the zoning regulations but is permitted because of its existence at the time that the regulations [were] adopted." (Internal quotation marks omitted.) *Stamford* v. *Ten Rugby Street, LLC*, 164 Conn. App. 49, 71, 137 A.3d 781, cert. denied, 321 Conn. 923, 138 A.3d 284 (2016). "A [nonconforming] use is merely an existing use, the continuance of which is authorized by the zoning regulations. . . . Stated another way, it is a use . . . prohibited by the zoning regulations but . . . permitted because of its existence at the time that the regulations [were] adopted. . . . [T]he rule concerning the continuance of a nonconforming use protects the right of a user to continue the same use of the property as it existed before the date of the adoption of the [relevant] zoning regulations." (Internal quotation marks omitted.) *Wiltzius* v. *Zoning Board of Appeals*, 106 Conn. App. 1, 25, 940 A.2d 892, cert. denied, 287 Conn. 906, 907, 950 A.2d 1283, 1284 (2008). "For a use to be considered nonconforming . . . that use must possess two characteristics. First, it must be lawful and second, it must be in existence at the time that the zoning regulation making the use nonconforming was

enacted." (Emphasis omitted; internal quotation marks omitted.) *Cummings* v. *Tripp*, 204 Conn. 67, 91–92, 527 A.2d 230 (1987); see also R. Fuller, 9 Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 2:2 p. 28 ("[a] nonconforming use is one that was in existence at the time that the zoning regulation making the use nonconforming was enacted and which was previously lawful"). "The party claiming the benefit of a nonconforming use bears the burden of proving that the nonconforming use is valid." *Connecticut Resources Recovery Authority* v. *Planning & Zoning Commission*, 225 Conn. 731, 744, 626 A.2d 705 (1993).

Although the defendants bear the burden of demonstrating that the exclusion of evidence and, particularly, the exclusion of evidence of a nonconforming use, likely affected the result of the trial, they do not demonstrate how the record justifies that they were prepared to present such evidence to the court. Although they argue that, on and before December 31, 2011, they used the subject property as a farm, they do not point to evidence, or proffered evidence, in the record, or to any applicable zoning regulation in effect prior to January 1, 2012, to support a determination that their historic use of the subject premises was *lawfully* nonconforming. Additionally, by reference to the record, they do not demonstrate how any excluded evidence would have proven a lack of wilfulness on the defendants' part.

Instead, the record reflects the existence of many undisputed facts, all of which tend to support the court's determination that injunctive relief was warranted. Specifically, the facts reflect that the defendants admittedly failed to exhaust their administrative remedies by appealing from either of the orders to discontinue and that they admittedly violated multiple zoning regulations and manifested to the plaintiff an intent to continue activities that violated zoning regulations.[19]

[19] We note that, although the defendants purport to challenge the court's ruling in excluding evidence pertaining to estoppel, they do not adequately

Additionally, in determining that "the equities patently lie with [the plaintiff]," the court found: "The defendants have blatantly and defiantly violated multiple zoning regulations, failing to even attempt to lessen or erase those violations by applying for special permits."

The defendants do not afford this court any basis on which to conclude that the excluded evidence would have tipped the balance of the equities in their favor. For the foregoing reasons, we reject the claim that the court's evidentiary ruling was erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

PAUL FAGAN *v.* CITY OF STAMFORD ET AL. (AC 38836)

Keller, Elgo and Bear, Js.

Syllabus

The plaintiff, who previously had been employed with the defendant city of Stamford as a police officer and was injured while acting within the scope of his employment, appealed to the trial court from the decision of the defendant City of Stamford Policemen's Pension Trust Fund Board awarding him a disability pension in the amount of 50 percent of his annual compensation. At all relevant times, two distinct disability pensions were available to members of the city's police department under the city's charter and the collective bargaining agreement. Under the city charter, the board was authorized to grant a disability pension equal to 50 percent of the member's compensation during the last year of service to members who, without personal fault or misconduct, were incapacitated in the performance of duty. Pursuant to the collective bargaining agreement, the board was authorized to grant a disability pension equal to 75 percent of the member's base pay at the time of application to police officers who suffered a work related injury, but only when at least two out of three independent medical physicians selected by the board concurred that the member had a permanent or

address this issue in their brief, and the record does not contain sufficient facts to warrant any discussion of harm with respect to the exclusion of such evidence.

partial disability of 30 percent or more of any part of his or her body. In the present case, in January, 2013, the board approved a 50 percent disability pension to the plaintiff, pursuant to the charter, after two out of three independent medical physicians selected by the board, including C, assigned total disability ratings below 30 percent. Subsequently, in an April, 2013 letter, C, after noting that the plaintiff had asked him to reevaluate his prior report and to apply the fifth edition of a medical guide used to evaluate permanent impairment instead of the sixth edition of the guide, assigned the plaintiff a new disability rating of 36 percent. Thereafter, the plaintiff requested that the board reconsider his application for a 75 percent disability pension under the collective bargaining agreement because two out of three independent medical examiners concurred that his permanent or partial disability ratings totaled 30 percent or more, which the board denied. The trial court subsequently rendered judgment dismissing the appeal, from which the plaintiff appealed to this court. *Held*:

1. The board did not act arbitrarily, capriciously, or in abuse of its discretion in reaching its January, 2013 decision approving a 50 percent disability pension to the plaintiff pursuant to the city's charter; the record contained substantial evidence to support the board's determination that the plaintiff did not meet the requirements for an enhanced disability pension under the collective bargaining agreement, as the evidence available to the board at the time of its decision indicated that at least two out of three independent medical physicians did not concur that the plaintiff had a permanent or partial disability of 30 percent or more, which was required for the plaintiff to receive an enhanced disability pension.

2. The board did not act arbitrarily, capriciously, or in abuse of its discretion in denying the plaintiff's request for the board to reconsider his application for a 75 percent disability pension under the collective bargaining agreement in light of C's April, 2013 letter, which contained new disability calculations that would satisfy the requirements of the collective bargaining agreement for an enhanced disability pension: given the plain language utilized by C in his April, 2013 letter indicating that, pursuant to the plaintiff's request, he had applied the fifth edition of the guide instead of the sixth edition, the board reasonably could have construed that letter as a supplement to, rather than a replacement for, C's prior report, in which the plaintiff's impairment was calculated under an alternative methodology specifically requested by the plaintiff but not by the board, and the board was well within its discretion in accepting as valid C's prior report that applied the sixth edition of the guide, as neither the charter nor the collective bargaining agreement required application of any particular edition in the independent medical examination process; furthermore, the board's decision to credit C's prior report and to accord little weight to C's later communication in rendering its decision on the plaintiff's disability pension application implicated its

exclusive role as arbiter of credibility and the weight to be afforded to particular evidence, and the board was free, in its discretion, to decline to credit the substance of C's later communication because it was made at the behest of the plaintiff.

Argued October 16, 2017—officially released January 30, 2018

Procedural History

Appeal from the decision of the defendant pension trust fund board awarding the plaintiff a disability pension in the amount of 50 percent of his annual compensation, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Truglia*, *J.*, granted the motion for summary judgment filed by the defendant city of Stamford et al.; thereafter, the matter was tried to the court, *Hon. A. William Mottolese*, judge trial referee; judgment dismissing the appeal, from which the plaintiff appealed to this court. *Affirmed.*

Paul Fagan, self-represented, the appellant (plaintiff).

Anthony M. Macleod, with whom, on the brief, was *James C. Riley*, for the appellees (defendant Policemen's Pension Trust Fund Board of the City of Stamford et al.).

Opinion

ELGO, J. The self-represented plaintiff, Paul Fagan, a former police officer for the defendant city of Stamford (city), appeals from the judgment of the Superior Court dismissing his appeal from the decision of the defendant Policemen's Pension Trust Fund Board of the city (board) awarding him a disability pension in the amount of 50 percent of his annual compensation.[1] On appeal,

[1] Also named as defendants in the plaintiff's complaint were the city's police department and the individual members of the board—Michael Noto, Michael Merenda, Michael Berkoff, Thomas E. Deegan, and Frank J. Mercede. Approximately thirteen months after that appeal was commenced in the Superior Court, the court rendered summary judgment in favor of the city and the police department. The plaintiff does not contest the propriety of that judgment in this appeal.

the plaintiff contends that the board improperly denied his request for an enhanced disability pension pursuant to the collective bargaining agreement (agreement) between the city and the Stamford Police Association (association). We disagree and, accordingly, affirm the judgment of the Superior Court.[2]

The relevant facts, as gleaned from the amended return of record that was submitted by agreement of the parties, are largely undisputed. In 1971, the city and the association entered into an "Agreement and Declaration of Trust" (trust agreement), which established the city's "Policemen's Pension Trust Fund" (fund). The stated purpose of the fund is to provide "pension and related benefits to [e]mployees, [r]etirees, their families, dependents, or beneficiaries who satisfy the eligibility requirements . . . ." The fund is administered by the board, whose powers and duties are delineated in the trust agreement. Pursuant to article fifth, § 2, thereof, the board is empowered, inter alia, to "[c]onstrue the provisions of this [t]rust [a]greement, and [its] terms" and to "[f]ormulate, adopt, and promulgate any and all rules and regulations necessary or desirable to facilitate the proper administration of the [fund] . . . ." The board's authority to administer the fund also is memorialized in the city charter. See Stamford Charter § C7-10-1 et seq.

At all times relevant to this appeal, two distinct disability pensions were available to members of the city's police department under the city charter and the

[2] In hearing administrative appeals such as the present one, the Superior Court acts as an appellate body. See General Statutes § 4-183 (j); see also *Connecticut Coalition Against Millstone* v. *Connecticut Siting Council*, 286 Conn. 57, 85, 942 A.2d 345 (2008) (noting that Superior Court sits "in an appellate capacity" when reviewing administrative appeal); *Par Developers, Ltd.* v. *Planning & Zoning Commission*, 37 Conn. App. 348, 353, 655 A.2d 1164 (1995) (distinguishing administrative appeals in which Superior Court "reviewed the agency's decision in an appellate capacity").

agreement, respectively. Pursuant to § C7-20-1 of the Stamford Charter, the board is authorized to grant a disability pension "equal to [50 percent] of the member's compensation during the last year of service" upon finding that a member of the police department "in the actual performance of duty and without personal fault or misconduct, shall have become permanently disabled, so as to be incapacitated in the performance of duty."

In addition, the agreement authorizes the board to award an enhanced disability pension, provided certain criteria are met. Relevant to this appeal is paragraph 9 (K) of the agreement, which provides in relevant part: "Active police officers of the Stamford Police Department who suffer a work related illness or injury at any time during their employment as a police officer shall be eligible for the following [d]isability [p]ension benefits, in addition to those currently existing pursuant to the [c]harter of the [city] and [trust agreement]. . . . [2] Such members shall be entitled to a [d]isability [p]ension equal to [75 percent] of his/her base pay at the time of the [a]pplication if at least two out of three independent medical physicians selected by the [board] in accordance with the provisions of [p]aragraph 9 (K) (1) above,[3] concur that same member has a permanent/partial disability of [30 percent] or a combined permanent/partial disability of [30 percent] or more of any part of his/her body, including mental disability, and also at least two out of three of said independent medical physicians concur that said member is unable to meet the physical or mental requirements of an entry level patrolman for the Stamford Police Department." (Footnote added.)

[3] Paragraph 9 (K) (1) of the agreement provides in relevant part that the board "shall select the independent medical examiners from [b]oard [c]ertified [p]hysicians who are specialists in the field which involves the particular physical or mental disability claimed by such member." It is undisputed that the board complied with that mandate in the present case.

Pursuant to its authority under the trust agreement to enact rules and regulations related to the proper administration of the fund, the board promulgated a retirement guide. The retirement guide details the protocols and procedures by which members may retire from the police department. It requires members to submit a letter to both the chief of police and the board that "[m]ust include [the] effective date of retirement and type of retirement." It also requires members who are applying for a disability pension to apprise the board of that request. The retirement guide then explains that "[t]hree [i]ndependent [m]edical [e]xaminations . . . will be arranged for you. These exams must not be with any [d]octor that has seen you in the past. Please review with the [board's office] which [independent medical examination] [d]octors are available for use. . . ." Those independent medical examinations, in turn, are used by the board to determine an applicant's eligibility for a disability pension under the city charter and the agreement.

The plaintiff began his employment with the city's police department in July of 2004. On October 1, 2012, pursuant to the procedures outlined in the retirement guide, the plaintiff sent a letter to the chief of police and the board. That letter stated in relevant part: "I am submitting my notice to retire from the Stamford Police Department after more than eight years of service. I am applying for a disability pension under the [agreement], as I am eligible for the disability benefits listed in the [agreement] in addition to those currently existing pursuant to the charter . . . based on injuries I received in the line of duty. My projected date of retirement at this time is December 7, 2012."[4]

In accordance with both paragraph 9 (K) (1) of the agreement and the retirement guide, three independent

[4] The plaintiff subsequently notified the board of his request to "extend [his] retirement date until January 11, 2013."

medical examinations of the plaintiff were scheduled in October and December of 2012. In the two October, 2012 examinations, the board sent a letter to the physician that stated in relevant part that the board "would like you to perform an [i]ndependent [m]edical [e]xamination on [the plaintiff]. Please do not proceed if this officer has ever been treated by you. Please advise us if that is the case. The specific information we need in your report includes: [1] Your diagnosis and prognosis. [2] Your opinion of the percentage of disability. [3] Your opinion of the permanency of disability. [4] Your opinion of the causation and job relatedness of the condition. [5] Your opinion if the [o]fficer would be unable to meet the physical requirements of an entry level patrolman." (Emphasis in original.) The relevant language in a November, 2012 letter is virtually identical except that it does not require that the physician's report include his opinion as to whether the plaintiff would be unable to meet the physical requirements of an entry level patrolman. It is undisputed that the board did not direct the physicians to use any specific edition of the Guides to the Evaluation of Permanent Impairment (guide),[5] published by the American Medical Association, in preparing their reports. It further is undisputed that, pursuant to the agreement, the physicians were free to utilize whichever edition of the guide that they preferred.[6] As the plaintiff acknowledges in

[5] The return of record contains a documentary presentation prepared by the American Medical Association regarding the sixth edition of the guide. It states in relevant part that "[t]he state of Connecticut allows the use of the [f]ourth, [f]ifth, and [s]ixth editions of the [guide]. However, the Connecticut State Medical Society recommends the use of the most recent edition." The record also contains the minutes of the March 6, 2009 meeting of the Connecticut Workers' Compensation Commission, at which the chairman of that commission "advised that it is Commission policy to encourage but not require the use of the [guide]. Physicians are not limited to a particular edition of the [guide] but are expected to be able to objectively justify the basis for their rating."

[6] The return of record in this case does not include any edition of the guide or any excerpt therefrom.

his principal appellate brief, the agreement "makes no mention of any particular guide to permanent impairment [and] the independent medical examiner may use any guide he/she chooses . . . ."[7]

On October 24, 2012, the plaintiff was examined by Patrick Carolan, a physician with Merritt Orthopaedic Associates, P.C. In his October 25, 2012 report, Carolan assigned a 27 percent disability rating to the plaintiff utilizing the sixth edition of the guide. Carolan further opined that the plaintiff's injuries were causally related to his official duties and that the plaintiff was unable to meet the physical requirements of an entry level patrolman.

On October 31, 2012, the plaintiff was examined by Gary Solomon, a physician with Rehabilitation Consultants, P.C. In his October 31, 2012 report, Solomon assigned a 38 percent disability rating to the plaintiff. Significantly, Solomon did not specify in his report which edition of the guide he utilized in reaching that determination. Rather, he simply indicated that he was "[f]ollowing the [American Medical Association] Guides to the Evaluation of Permanent Impairment . . . ."[8] Like Carolan, Solomon opined that the plaintiff's injuries were causally related to his official duties and that he was unable to meet the physical requirements of an entry level patrolman.

[7] Later in his appellate brief, the plaintiff states that the agreement "essentially leaves the ultimate decision [as to which edition to utilize] to whichever independent medical examiner that the board chooses, and the board is then governed by the [agreement] to follow what the Physician then reports to the board."

[8] In their respective appellate briefs, the parties state that Solomon's report indicates that he utilized the fifth edition of the guide in determining the plaintiff's disability. That report, however, contains no reference to *any* edition of the guide. Moreover, in a May 27, 2013 letter addressed to the president and the vice president of the association, which is contained in the return of record, the plaintiff stated that the reports of the three independent medical examiners that were relied on by the board in reaching their January 8, 2013 decision "all used the sixth edition" of the guide.

On December 14, 2012, the plaintiff was examined by Kevin Plancher, a physician at Plancher Orthopaedics & Sports Medicine.[9] In his subsequent report, Plancher assigned a 13 percent disability rating to the plaintiff utilizing the sixth edition of the guide. Plancher also opined that the plaintiff's injuries were causally related to his official duties.

On January 8, 2013, a regular meeting of the board was convened. At that meeting, the board went into an executive session to discuss three retirements.[10] The minutes of that meeting indicate that, when the executive session concluded, a motion "to approve a 50 percent disability pension, as per the charter, to one officer" was unanimously approved by the board. The board then issued a written resolution dated January 8, 2013, which stated: "Resolved that the [board] hereby grant[s] a [d]isability [p]ension, pursuant to [§] 7-20-1 of the [c]harter of the [city], to: [the plaintiff] who has been a member of the Stamford Police Department for over eight years. [He] will be entitled to a total pension of 50 [percent] of [his] annual salary, or $37,427.35 annually, effective January 11, 2013."[11] That resolution was signed by all five members of the board.

Ten days later, the plaintiff sent a letter to Carolan that lies at the heart of this appeal. In that written

[9] At the time of his examination by Plancher, the plaintiff was thirty-five years old.

[10] Because the board conducted its review of the plaintiff's application for a disability retirement and the corresponding independent medical evaluations in an executive session, the record necessarily lacks evidence of the board's deliberations at that time.

[11] The return of record also contains a "Retirement Worksheet" that the board completed on behalf of the plaintiff on January 9, 2013. That worksheet specifies that the plaintiff was to receive a monthly pension of $3118.95 commencing on January 11, 2013. In its appellate brief, the board notes that the plaintiff at that time began collecting his disability benefits "without objection." The plaintiff did not dispute that contention in either his reply brief or at oral argument before this court.

correspondence, the plaintiff informed Carolan that his October 25, 2012 report was "vastly different from another doctor's opinion of the same injuries." He then explained that, in the "spirit of transparency," he believed that Carolan should know that "Solomon has reached a numerical value of 38 [percent disability] compared to a total of 27 [percent] by [Carolan]."[12] The plaintiff also informed Carolan that he had "applied for a disability pension from the Stamford Police Department and the requirements were a numerical value [of 30 percent] or more . . . and [Carolan] did not reach that numerical requirement based on his ratings not totaling 30 [percent] or more." Accordingly, the plaintiff stated that he had "included [Solomon's] medical report for your review and consideration. If [Carolan] chooses to review the report and make any amendments, as he deems [necessary, it] would be greatly appreciated." The plaintiff at that time also opined that the discrepancy between the disability ratings assigned by Carolan and Solomon "seem[s] to be based on a different schematic or methodology . . . ." The plaintiff then requested that "Carolan consider using the same schematic or methodologies that were used by [Solomon] *to come to a similar numerical value*." (Emphasis added.) Notably, the plaintiff in that letter never referenced the guide or any particular edition thereof.

The plaintiff then stated that Carolan "has every right to amend his report as he determines necessary, in light of this new information he is receiving today, and in the spirit of accuracy and fairness. Any amendments to the medical report would be considered an act that was executed on [Carolan's] own volition and without

[12] Although the plaintiff represented to Carolan that the information contained in his January 18, 2013 letter was communicated in "the spirit of transparency" and "the spirit of accuracy and fairness," he failed to mention in that letter that a third medical examiner had assigned a 13 percent disability rating utilizing the same edition of the guide as Carolan.

duress or influence by any other person. Purposes of this letter were solely for informative reasons. The information provided to [Carolan] was divulged for transparency and accuracy alone. Any amendment/changes or additions to the report can be forwarded to [the plaintiff], his address is listed below. Kindly respond to this request in writing at your earliest convenience. Thank you in advance for anticipated cooperation concerning this matter regarding the disability ratings of retired police officer Paul Fagan." The letter concluded by listing the plaintiff's home address. It is undisputed that the board was not copied on that written communication or informed in any manner that the plaintiff had sent it to Carolan ten days after the board's January 8, 2013 decision on his application for a disability pension.

The return of record is silent as to what transpired over the ensuing months until Carolan mailed a letter to the plaintiff dated April 9, 2013, which was addressed to the board. In that letter, Carolan stated: "I have been requested by [the plaintiff] to [reevaluate] the independent medical report that I had submitted to you on October 25, 2012. In a letter received from [the plaintiff], he asked that I use the [fifth] [e]dition of the [guide]. Previously, I had used the [sixth] [e]dition."[13] Carolan then detailed eight specific changes "in the calculations of the impairment present" in the plaintiff "[w]hen the [fifth] [e]dition is used," which together resulted in a disability rating of 36 percent.[14] Both the plaintiff and

[13] Carolan's reference to the fifth edition of the guide in his April 9, 2013 letter is, in a word, curious. Although he directly attributes that reference to the written request of the plaintiff, we repeat that, in his January 18, 2013 letter to Carolan, the plaintiff made no mention of the guide or any particular edition. To the extent that further communications transpired between Carolan and either the plaintiff or the legal counsel copied on Carolan's April 9, 2013 letter, those communications are not contained in the record before us.

[14] Carolan's April 9, 2013 letter to the board states in full: "I have been requested by [the plaintiff] to [reevaluate] the independent medical report that I had submitted to you on October 25, 2012. In a letter received from [the plaintiff], he asked that I use the [fifth] [e]dition of the [guide]. Previously,

"Attorney William J. Varese" were copied on the bottom of that letter.

The plaintiff then forwarded a copy of Carolan's April 9, 2013 letter to the board under cover dated April 14, 2013. In that correspondence, the plaintiff stated: "I'm writing to inform you that [Carolan] has amended his independent medical exam report regarding my injuries . . . and I am requesting that the [board] reconsider my application for a 75 [percent] disability pension under the [agreement]. Two out of three independent medical examiners [concur] that my permanent/partial disability ratings . . . total 30 [percent] or more."

The board considered the plaintiff's request for reconsideration at its June 12, 2013 meeting. At that time, the board unanimously denied that request. Michael Noto, in his capacity as chairman of the board, sent the plaintiff a letter on June 26, 2013, notifying the plaintiff of that decision. That correspondence stated in relevant part: "[T]he [board] has asked me to confirm to you the [b]oard's decision that you do not qualify for a 75 [percent] disability pension under [p]aragraph 9 (K) (2) of the [agreement]. The [b]oard, by formal vote at its meeting on January 8, 2013, previously granted you a 50 [percent] disability retirement benefit pursuant to [§] C7-20-1 of the [city charter] and found at the same

I had used the [sixth] [e]dition. When the [fifth] [e]dition is used, the following changes occur in the calculation of the impairment present within [the plaintiff's] various body parts:

1. Cervical spine, 18 [percent] of the cervical spine.
2. Lumbar spine, 6 [percent] of the lumbar spine.
3. Right shoulder, 4 [percent] of the right upper extremity.
4. Right elbow, 0 [percent] of the right upper extremity.
5. Right wrist, 2 [percent] of the right upper extremity.
6. Right knee, 2 [percent] of the right lower extremity.
7. Left knee, 2 [percent] of the left lower extremity.
8. Right foot and ankle, 2 [percent] of the right lower extremity.

If there is any further information necessary regarding this matter, please contact me at the above address."

time that you did not meet the criteria for a 75 [percent] disability pension pursuant to [the agreement]. The [b]oard, in reaching that decision, had before it three [i]ndependent [m]edical [e]xamination reports which it accepts as valid reports. Examining physicians may use either the [fourth], [fifth], or [sixth] editions of the [guide], and the [b]oard did not specify or request that any physician who examined you use a particular edition. Consequently, the [b]oard does not believe it is necessary now to ask for a reevaluation of your condition using any specific edition. A motion for such a reevaluation was made at the [b]oard's June 12, 2013 meeting . . . but failed on a unanimous negative vote."

The plaintiff appealed from that decision to the Superior Court, claiming that the board's decision was "arbitrary and capricious, and an abuse of discretion." Following a hearing, the court rendered judgment dismissing the appeal. In so doing, the court determined that the agreement does not permit an applicant for a disability pension, following the submission of three independent medical examination reports to the board, to thereafter petition one of the medical examiners to reevaluate the applicant's disability rating in light of the report of another medical examiner. The court further determined that such communications, particularly when done without notice to the board, compromise the independence of those examinations. As the court noted in its memorandum of decision, the agreement "evinces an unmistakable intent that the parties to the agreement wish to keep the examination process free from any outside influences or biases and have a process that would promote honesty and integrity." It continued: "[T]he element of independence is essential to the process [set forth in paragraph 9 (K) (2) of the agreement]. To permit either the applicant or the board to communicate with an examiner when dissatisfied with a disability rating would invite attempts to exert

improper influence on the decision maker not only by the applicant but perhaps by the board itself if it was unhappy with an examiner's opinion." The court therefore concluded that substantial evidence in the record supported the board's decision not to reconsider its prior disability pension determination. From that judgment, the plaintiff appealed to this court.

Preliminarily, we note the standard applicable to our review of administrative decisions. The board is a creature of municipal enactment and its powers and duties are recognized in both the city charter and the trust agreement. It, therefore, is tantamount to a municipal administrative agency for purposes of appellate review. See *O'Connor* v. *Waterbury*, 286 Conn. 732, 740–41, 945 A.2d 936 (2008). The scope of review of an administrative decision "is very restricted. . . . With regard to questions of fact, it is neither the function of the trial court nor of this court to retry the case or to substitute its judgment for that of the administrative agency. . . .

"The substantial evidence rule governs judicial review of administrative fact-finding . . . . Substantial evidence exists if the administrative record affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . This substantial evidence standard is highly deferential and permits less judicial scrutiny than a clearly erroneous or weight of the evidence standard of review. . . . The burden is on the [plaintiff] to demonstrate that the [agency's] factual conclusions were not supported by the weight of substantial evidence on the whole record. . . .

"Even as to questions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . Conclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct

application of the law to the facts found and could reasonably and logically follow from such facts." (Citations omitted; internal quotation marks omitted.) *MacDermid, Inc.* v. *Dept. of Environmental Protection*, 257 Conn. 128, 136–37, 778 A.2d 7 (2001); accord *Ferrier* v. *Personnel & Pension Appeals Board*, 8 Conn. App. 165, 167, 510 A.2d 1385 (1986) (court's function in reviewing decision of municipal pension board "is limited to the examination of the record to determine whether the ultimate decision was factually and legally supported to ensure that the board did not act illegally, arbitrarily or in abuse of its discretion"). "It is fundamental that a plaintiff [bears] the burden of proving that the [municipal board], on the facts before [it], acted contrary to law and in abuse of [its] discretion . . . ." (Internal quotation marks omitted.) *O'Connor* v. *Waterbury*, supra, 286 Conn. 741–42; see also *Fonfara* v. *Reapportionment Commission*, 222 Conn. 166, 177, 610 A.2d 153 (1992) ("well established judicial principles . . . attach a presumption of validity to decisions of authorized public agencies" and burden therefore rests with party challenging agency determination to demonstrate impropriety).

In addition, "[b]ecause the . . . appeal to the [Superior Court was] based solely on the record, the scope of the [Superior Court's] review of the [board's] decision and the scope of our review of that decision are the same. . . . In other words, the [Superior Court's] decision in this administrative appeal is entitled to no deference from this court." (Internal quotation marks omitted.) *Pictometry International Corp.* v. *Freedom of Information Commission*, 307 Conn. 648, 670 n.21, 59 A.3d 172 (2013). In reviewing this administrative appeal, we therefore focus our attention on the propriety of the decisions of the board.

I

BOARD'S JANUARY 8, 2013 DECISION

We first consider the propriety of the board's decision on January 8, 2013, in which it granted the plaintiff a 50 percent disability pension pursuant to § C7-20-1 of the Stamford Charter. In so doing, the board determined that the plaintiff did not meet the requirements for an enhanced disability pension under the agreement.

The record contains substantial evidence to support that determination. When the board met at its January 8, 2013 meeting, it had before it three independent medical examination reports prepared by Carolan, Solomon, and Plancher. Only Solomon's report assigned the plaintiff a disability rating of 30 percent or more; Carolan and Plancher's reports assigned disability ratings of 27 and 13 percent, respectively. That evidence indicated that "at least two out of three independent medical physicians" did not "concur that [the plaintiff] has a permanent/partial disability of [30 percent] or a combined permanent/partial disability of [30 percent] or more," as required by paragraph 9 (K) (2) of the agreement. On that evidence, the board concluded that the plaintiff was eligible for a disability pension pursuant to § C7-20-1 of the charter, but not an enhanced one pursuant to paragraph 9 (K) (2) of the agreement. In light of the substantial evidence in the record, we conclude that the board did not act arbitrarily, capriciously, or in abuse of its discretion in reaching its January 8, 2013 decision. The plaintiff has not suggested otherwise in this administrative appeal.

II

BOARD'S JUNE 12, 2013 DECISION

The plaintiff nevertheless asserts that the board acted arbitrarily, capriciously, and in abuse of its discretion in denying his April 14, 2013 request "that the [board]

reconsider [his] application for a 75 [percent] disability pension under the [agreement].'' He claims that once the board received the April 9, 2013 letter from Carolan containing calculations that resulted in a disability rating of 36 percent, the board was obligated, pursuant to paragraph 9 (K) (2) of the agreement, to discard its prior decision and grant his request for an enhanced disability pension. We disagree.

A

As an initial matter, we note that the plaintiff's position in this administrative appeal is premised on a faulty presumption—that Carolan's April 9, 2013 letter constituted an amendment of his medical opinion on the plaintiff's disability rating intended to supplant that contained in his earlier report of October 25, 2012. The record before us contains no such finding by the board.[15] To the contrary, Noto's June 26, 2013 letter to the plaintiff suggests that the board regarded Carolan's April 9, 2013 letter as merely a submission of alternate calculations under a different methodology.[16] Substantial evidence in the record supports such a determination. In his April 9, 2013 letter to the board, Carolan stated in

[15] The return of record does not contain a transcript or minutes of the board's June 12, 2013 hearing, at which it considered the plaintiff's request for reconsideration.

[16] We repeat that, in his January 18, 2013 letter to Carolan, the plaintiff represented that he was requesting a reevaluation of his disability rating ''solely for informative reasons.'' In his subsequent letter to the board, Carolan stated that, at the behest of the plaintiff, he was providing a calculation of the plaintiff's impairment pursuant to the fifth edition of the guide. In response, Noto, in his June 26, 2013 letter to the plaintiff, stated in relevant part that ''[e]xamining physicians may use either the [fourth], [fifth], or [sixth] editions of the [guide], and the [b]oard did not specify or request that any physician who examined you use a particular edition. Consequently, the [b]oard does not believe it is necessary now to ask for a reevaluation of your condition using any specific edition.'' The plain inference of that response is that the board considered Carolan's disability calculations under an alternative edition of the guide to be an unnecessary supplement to the administrative record on which it predicated its January 8, 2013 decision.

relevant part: "I have been requested by [the plaintiff] to [reevaluate] the independent medical report that I had submitted to you on October 25, 2012. . . . [The plaintiff] asked that I use the [fifth] [e]dition of the [guide]. . . . When the [fifth] [e]dition is used, the following changes occur in the calculation of the impairment . . . ." Nowhere in that written correspondence does Carolan disavow his earlier medical opinion or otherwise indicate that the calculations contained in the April 9, 2013 letter were intended to supplant that prior opinion. See footnote 14 of this opinion. Given the plain language utilized therein by Carolan, the board reasonably could construe that letter as a supplement to, rather than a replacement for, Carolan's prior report, in which the plaintiff's impairment was calculated under an alternative methodology specifically requested by the plaintiff but not by the board.

Furthermore, the board was not required, under either the terms of the agreement or its own protocols and procedures, to give any weight to the alternative calculations contained in Carolan's April 9, 2013 letter. The plaintiff concedes, as he must, that neither the charter nor the agreement requires application of any particular edition of the guide in the independent medical examination process. As the plaintiff recognizes in his principal appellate brief, "the independent medical examiner may use any guide he/she chooses . . . ."[17] After conducting his examination of the plaintiff on October 24, 2012, Carolan chose to utilize the sixth edition of the guide in preparing his report to the board. Accordingly, the board was well within its discretion in accepting "as valid" that report, a determination that

[17] It bears repeating that, apart from the abstract assertion contained in the plaintiff's January 18, 2013 letter, there is no evidence in the record indicating that Solomon utilized a different edition of the guide or methodology from that employed in Carolan's October 25, 2012 report. See footnote 8 of this opinion.

Noto confirmed in his June 26, 2013 letter to the plaintiff.

B

On a more fundamental level, the board's decision to credit Carolan's October 25, 2012 report in rendering its decision on the plaintiff's disability pension application implicates its exclusive role as arbiter of credibility and the weight to be afforded to particular evidence. As our Supreme Court has observed, "weighing the accuracy and credibility of the evidence" is the province of the administrative agency. *Connecticut Natural Gas Corp.* v. *Public Utilities Control Authority*, 183 Conn. 128, 136, 439 A.2d 282 (1981). Reviewing courts thus "must defer to the agency's assessment of the credibility of the witnesses and to the agency's right to believe or disbelieve the evidence presented by any witness, even an expert, in whole or in part." *Briggs* v. *State Employees Retirement Commission*, 210 Conn. 214, 217, 554 A.2d 292 (1989); see also *Standard Oil of Connecticut, Inc.* v. *Administrator, Unemployment Compensation Act*, 320 Conn. 611, 623, 134 A.3d 581 (2016) (reviewing court cannot "substitute its own judgment for that of the administrative agency on the weight of the evidence" [internal quotation marks omitted]); *Tarasovic* v. *Zoning Commission*, 147 Conn. 65, 69, 157 A.2d 103 (1959) ("[i]t is not the function of the court to pass upon the credibility of the evidence heard" by administrative agency).

The board in the present case credited Carolan's October 25, 2012 report in rendering its January 8, 2013 decision on the plaintiff's disability pension application. Noto's June 26, 2013 letter further confirms that the board adhered to that credibility determination even after it was presented with Carolan's subsequent letter offering different calculations of the plaintiff's disability pursuant to an alternative edition of the guide. Although

the record of the board's proceedings on the plaintiff's motion for reconsideration is sparse, Noto's letter suggests that the board accorded little weight to Carolan's supplemental communication, as it indicates that reconsideration of the board's prior decision was not warranted. This appellate tribunal cannot revisit that determination. Id.

Moreover, in making that credibility determination, the board also could consider the undisputed circumstances that gave rise to Carolan's April 9, 2013 letter. As the Superior Court emphasized in its memorandum of decision, the independence of examining physicians is a crucial component of the medical examination process detailed in paragraph 9 (K) (2) of the agreement and the board's retirement guide.[18] In the present case, it is undisputed that, after being notified of the board's January 8, 2013 decision on his disability pension application, the plaintiff unilaterally contacted Carolan without providing any notice to the board and apprised Carolan (1) that a disability rating of "30 percent or more" was required to qualify for the requested disability pension; (2) that Carolan's October 25, 2012 report was "vastly different" from that submitted by Solomon; (3) that Solomon had assigned a 38 percent disability rating to the plaintiff; and (4) that the plaintiff was "requesting that [Carolan] consider using the same schematic or methodologies that were used by [Solomon] to come to a similar numerical value." That correspondence also included a copy of Solomon's medical report "for [Carolan's] review and consideration." By so doing, the plaintiff undermined, if not eviscerated,

[18] For that reason, the retirement guide mandates that an applicant's three independent medical examinations "must not be with any doctor that has seen you in the past." The board's appointment letter to those physicians likewise cautioned: "Please do not proceed if this officer has ever been treated by you." (Emphasis omitted.) In the letters that were sent to Carolan, Solomon, and Plancher, that sentence was underlined for emphasis.

the independence that is integral to the medical examination process outlined in paragraph 9 (K) (2) of the agreement and the retirement guide.[19] Because Carolan's April 9, 2013 communication to the board expressly states that it was made at the behest of the plaintiff, the board was free, in its discretion, to decline to credit the substance of that communication. See *Briggs* v. *State Employees Retirement Commission*, supra, 210 Conn. 217.

Our review of the record reveals substantial evidence on which the board could determine that reconsideration of its January 8, 2013 decision was unwarranted.

[19] In his principal appellate brief, the plaintiff makes much of the use of the term "concur" in paragraph 9 (K) (2) of the agreement, which provides in relevant part that a member of the city's police department is eligible for an enhanced disability pension "if at least two out of three independent medical physicians . . . concur that same member has a permanent/partial disability of [30 percent] or a combined permanent/partial disability of [30 percent] or more . . . ." The plaintiff thus argues that the agreement requires that the three independent medical examiners "must review each other's reports [prior to making] a decision."

It is well established that individual words or clauses of a contract "cannot be construed by taking them out of context and giving them an interpretation apart from the contract of which they are a part." *Levine* v. *Advest, Inc.*, 244 Conn. 732, 753, 714 A.2d 649 (1998); see also Restatement (Second), Contracts § 202, comment (d), p. 88 (1981) ("Meaning is inevitably dependent on context. A word changes meaning when it becomes part of a sentence, the sentence when it becomes part of a paragraph."). When properly read in the context in which the word "concur" arises in the agreement between the city and the association, the plaintiff's assertion is absurd, as it contravenes the plain intent of those parties in setting forth a mechanism for the independent medical evaluation of a member's physical impairment by three different physicians. See *Welch* v. *Stonybrook Gardens Cooperative, Inc.*, 158 Conn. App. 185, 198, 118 A.3d 675 (courts "will not construe a contract's language in such a way that it would lead to an absurd result"), cert. denied, 318 Conn. 905, 122 A.3d 634 (2015); see also *Foley* v. *Huntington Co.*, 42 Conn. App. 712, 729, 682 A.2d 1026 ("[t]he law is clear that a contract includes not only what is expressly stated therein but also what is necessarily implied from the language used" [internal quotation marks omitted]), cert. denied, 239 Conn. 931, 683 A.2d 397 (1996). The examination process outlined in the agreement and the retirement guide requires separate examinations and reports, and not a group effort by the physicians.

The plaintiff, therefore, has not demonstrated that the board's June 12, 2013 decision was arbitrary, capricious, or an abuse of the board's discretion. We, therefore, conclude that the court properly dismissed the plaintiff's administrative appeal.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* KASON U. ESQUILIN (AC 38762)

Keller, Elgo and Bear, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court revoking his probation and sentencing him to a period of four years incarceration following his arrest on charges of violating certain conditions of his probation, including, inter alia, that he not use or possess drugs or alcohol. At the probation revocation hearing, the state sought to admit testimony from A, a probation officer, regarding the results of drug tests performed on the defendant's urine during his probationary period, and to introduce the reports of such results into evidence as an exhibit. The defendant objected on the grounds that the admission of the reports was an unreliable form of double hearsay and a violation of his right to confrontation because A did not conduct the actual drug testing. The trial court overruled the defendant's objection, ruling that the testimony and the drug tests that were being offered did not constitute unsupported testimonial hearsay. After finding that the defendant had violated the terms of his probation, the court revoked his probation and sentenced him to four years incarceration. Thereafter, the defendant appealed to this court, claiming, for the first time, that the trial court violated his right to due process by admitting the drug test reports into evidence without requiring the state to introduce such results through the testimony of the analysts who performed the actual testing. *Held* that this court declined to review the defendant's unpreserved claim that the trial court violated his right to due process by admitting the reports into evidence, the defendant having failed to provide this court with an adequate record for review of his unpreserved claim pursuant to *State* v. *Golding* (213 Conn. 233); because the defendant did not object at the probation revocation hearing to the admission of the reports of the drug test results on the ground that their admission violated his

right to due process, the state was not given adequate notice of the defendant's due process claim and did not provide the possible reasons for not producing the analysts who had performed the drug tests as witnesses at the probation revocation hearing, and, therefore, this court could not balance the state's interest in not producing the persons who performed the drug tests against the defendant's interest in confronting those persons to determine whether a due process violation occurred.

Argued October 16, 2017—officially released January 30, 2018

Procedural History

Information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of New London, where the matter was tried to the court, *Williams*, *J.*; judgment revoking the defendant's probation, from which the defendant appealed to this court. *Affirmed.*

Steven B. Rasile, assigned counsel, for the appellant (defendant).

David J. Smith, senior assistant state's attorney, with whom, on the brief, was *Michael L. Regan*, state's attorney, for the appellee (state).

Opinion

KELLER, J. The defendant, Kason U. Esquilin, appeals from the judgment of the trial court revoking his probation pursuant to General Statutes § 53a-32 and imposing a four year prison sentence. On appeal, the defendant claims that the court deprived him of his right to due process by admitting into evidence reports of the results of drug tests performed on urine samples collected from the defendant, without requiring the state to introduce such results through the testimony of the analysts who performed the actual testing. We conclude, in accordance with *State* v. *Polanco*, 165 Conn. App. 563, 571, 140 A.3d 230, cert. denied, 322 Conn. 906, 139 A.3d 708 (2016), that this claim was not preserved and that the record is inadequate to review it pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40,

567 A.2d 823 (1989). Accordingly, we affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of the defendant's appeal. On April 28, 2008, the defendant was convicted of the underlying offense of the sale of hallucinogens/narcotics in violation of General Statutes § 21a-277 (a). On June 17, 2008, he was sentenced to ten years incarceration, execution suspended after two years, and three years of probation. The defendant was released from incarceration on September 10, 2010, and his probationary period began.

On March 21, 2012, the defendant was convicted of violating his probation pursuant to § 53a-32. He was sentenced to eight years incarceration, execution suspended after two years, and three years of probation. The terms of his probation, in addition to the standard conditions, required as special conditions, that the defendant (1) obey all federal and state laws, (2) not possess weapons, (3) submit to psychological evaluation and treatment, (4) take medications as prescribed, (5) submit to substance abuse evaluation and treatment, (6) not use or possess drugs and alcohol, (7) submit to random urine and alcohol sensor testing, (8) not associate with drug dealers, users, and gang members, (9) secure full time employment, and (10) pass a general education development course. On August 5, 2013, the defendant, after he reviewed the conditions of probation, acknowledged that he understood the conditions and would follow them. On August 27, 2013, the defendant again was released from incarceration and his probationary period commenced.

On January 29, 2014, an arrest warrant for the defendant was issued charging him with a violation of probation on the grounds that the defendant violated the following standard conditions of his probation: (1) "[d]o

not violate any criminal law of the United States, this state or any other state or territory" and (2) "[s]ubmit to any medical and/or psychological examination, urinalysis, alcohol and/or drug testing, and/or counseling sessions required by the [c]ourt or the [p]robation [o]fficer." The defendant also was charged with failing to comply with the following special conditions of his probation: (1) submit to substance abuse evaluation and treatment, (2) do not use or possess drugs or alcohol, (3) submit to random urine and alcohol sensor testing, (4) do not associate with drug dealers, users, or gang members, and (5) obey all federal and state laws. The defendant denied that he committed any violations and a probation revocation hearing was held on April 2, 2015.

After hearing evidence and argument, the court found that the state had proven, by a preponderance of the evidence, that the defendant had violated his probation. The court found,[1] in relevant part: "[Probation] Officer [Robert] Amanti of the Office of Adult Probation spoke with [the defendant] about the conditions of his probation, including his requirement that he successfully complete treatment and remain free of any illicit substance. . . . [The defendant] acknowledged those conditions. . . . [O]n August 15, 2013, the [defendant] was

[1] Both parties have relied on the court's oral ruling of April 2, 2015. The record does not contain a signed transcript of the court's decision, as is required by Practice Book § 64-1 (a), and the defendant did not file a motion pursuant to Practice Book § 64-1 (b) providing notice that the court had not filed a signed transcript of its oral decision. Nor did the defendant take any additional steps to obtain a decision in compliance with Practice Book § 64-1 (a). In some cases in which the requirements of Practice Book § 64-1 (a) have not been followed, this court has declined to review the claims raised on appeal due to the lack of an adequate record. Despite the absence of a signed transcript of the court's oral decision or a written memorandum of decision, however, our ability to review the claims raised on the present appeal is not hampered because we are able to readily identify a sufficiently detailed and concise statement of the court's findings in the transcript of the proceeding. See *State* v. *Brunette*, 92 Conn. App. 440, 446, 886 A.2d 427 (2005), cert. denied, 277 Conn. 902, 891 A.2d 2 (2006).

confronted about his substance abuse. . . . [The defendant] indicated he was proud of getting high[2] and was referred for treatment at [the Southeastern Council on Alcoholism and Drug Dependence (rehabilitation facility)]. . . . [The defendant], while on probation with the previously noted conditions, rendered several dirty urines on at least seven occasions while on probation. One of the urines dated [August 27, 2013,] was positive for [tetrahydrocannabinol (THC)] with a level of 757. The [defendant] did not successfully complete treatment at [the rehabilitation facility] and was unsuccessfully discharged.[3] The court finds that he was then rereferred to [the rehabilitation facility] by probation, and again was unsuccessfully discharged. . . .

"[P]robation elected to continue working with [the defendant] toward its intended goal of rehabilitation and did not submit a warrant for violation of probation, which would be a second violation of probation . . . [probation] continued to work with the [defendant] even after seven positive urines; and that the [defendant] eventually was arrested on [January 20, 2014]. . . . [The defendant's] conduct included grabbing the hair of a pregnant victim, pulling out at least one of her braids. . . . The [defendant] struck this pregnant female in the face with an open hand, causing pain.

[2] Amanti testified at the hearing that the defendant came to the Office of Adult Probation on August 15, 2013, for a scheduled visit. On that date, Amanti testified that the defendant stated that "he was proud of getting high and getting drunk."

[3] Amanti testified at the probation revocation hearing that because of the defendant's use of drugs and alcohol, a probation officer referred the defendant to submit to treatment at the rehabilitation facility. Amanti testified that, despite the defendant's awareness that submitting to treatment at the rehabilitation facility was a condition of his probation, probation officers learned that the defendant did not successfully complete the treatment program at the rehabilitation facility. Moreover, Amanti testified that because of his continued use of marijuana, the defendant was again referred to submit to treatment at the rehabilitation facility. Amanti testified that the defendant failed to complete the treatment program for a second time.

. . .[4] [The defendant] attempted to run away from the police and struggled with those police officers.[5] [The defendant committed the] crimes of breach of peace, assault in the third degree on a pregnant victim, [and] interfering with an officer . . . [and demonstrated an] inability to successfully complete treatment or to remain sober . . . . [Therefore] . . . the state . . . met its burden of proof by a preponderance of the evidence, and [proved that the defendant] violated conditions of his probation for the aforementioned conduct." (Footnotes added.) After the conclusion of the dispositional phase, the court revoked the defendant's probation and sentenced him to four years of incarceration. This appeal followed.

The defendant's sole claim is that the court deprived him of his right to due process by admitting into evidence the reports of the results of drug tests performed on his urine samples without requiring the state to introduce such results through the testimony of the analysts who performed the actual testing.

The following additional facts are relevant to the disposition of this appeal. At the defendant's probation revocation hearing, the state sought to present testimony from Amanti about the results of the drug tests

[4] The defendant's girlfriend, the female to whom the court refers, testified at the probation revocation hearing that, while she was pregnant, the defendant pulled her off a couch by grabbing her by the braids, took her phone, and physically prevented her from leaving their shared apartment and when she did attempt to leave the apartment, the defendant grabbed her by the hair and struck her in the face with an open palm.

[5] Charles Flynn, a New London police officer, testified at the probation revocation hearing about arresting the defendant after he struck his pregnant girlfriend. Flynn testified that as he approached the defendant's apartment building in a marked police car, the defendant ran inside the building when he saw the police arrive. Flynn testified that, after he and another officer searched the building, they found the defendant hiding in an unlit basement. Furthermore, Flynn testified that after the defendant attempted to flee from the officers, the defendant began to fight the officers as they arrested him, jeopardizing the officers' safety.

performed on the defendant's urine and to introduce the reports of such results into evidence as an exhibit. The drug tests were performed on samples of the defendant's urine collected by both probation and the rehabilitation facility between August, 2013, and December, 2013. These samples were sent to out-of-state laboratories to be analyzed and the laboratories would fax reports of the results to the Office of Probation. The analysts who performed the drug tests and authored the reports of the drug tests were not present to testify at the defendant's probation revocation hearing. The identity of these analysts is not explicitly contained in the record, nor is there any indication that the defendant had the opportunity to cross-examine these analysts prior to his probation revocation hearing.

During the state's direct examination of Amanti, the prosecutor asked him about the results of a drug test on one of the defendant's urine samples, collected on August 27, 2013. Before Amanti could answer, defense counsel objected on the basis that the report of the results of that drug test was not in evidence. Defense counsel argued that Amanti testifying about the drug test results was inadmissible because it was an unreliable form of double hearsay and a violation of the defendant's right to confrontation. With respect to the right to confrontation, defense counsel argued that admitting Amanti's testimony concerning the results of the drug test violated the defendant's right to confrontation as explicated by the Supreme Court in *Bullcoming* v. *New Mexico*, 564 U.S. 647, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011).[6] The prosecutor responded that *Crawford* v.

[6] In *Bullcoming*, the Supreme Court was presented with the question of "whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification." *Bullcoming* v. *New Mexico*, supra, 564 U.S. 652. The Supreme Court held "that surrogate testimony of that order does not meet the constitutional requirement. The accused's right is to be con-

Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)[7] and its progeny do not apply to probation revocation hearings. In response, defense counsel specified that, on the basis of the reasoning set forth in *Bullcoming*, the results of the drug test were unreliable hearsay without testimony from the person who performed the actual testing and were, thus, inadmissible. Defense counsel never explicitly argued that the admission of the test results violated the defendant's right to due process, which is his sole claim on appeal. The court overruled defense counsel's objection, finding "that the testimony being elicited now and the use of the document is not just a testimonial variety of hearsay that's unsupported. This is a document that the state wishes to reference through the testimony of [Amanti] along the lines of what is clearly admissible under Connecticut law . . . . So the court's going to at this point overrule the objection by the defense . . . ."

After the court ruled that Amanti could testify about the results of the drug test, the state opted to "skip a little ahead and do something a little different" by introducing the reports of the results of the drug tests as an exhibit at the hearing. Defense counsel objected to the admission of the reports as an exhibit, again arguing that pursuant to *Bullcoming*, the reports of the results of the drug test were inadmissible hearsay because Amanti did not conduct the actual testing. The court, overruling the defendant's objections, admitted the reports into evidence. All but one of the reports in the state's exhibit indicated that marijuana was detected in the defendant's urine samples collected

fronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist." Id.

[7] In *Crawford*, the Supreme Court stated, in a criminal trial: "Where testimonial evidence is at issue . . . the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination." *Crawford* v. *Washington*, supra, 541 U.S. 68.

while he was on probation. The prosecutor then asked Amanti whether the defendant's urine samples tested positive for THC, which is an indication of the use of marijuana, and Amanti answered that they did several times.

The state argues that the defendant's due process claim was not preserved because, at the probation revocation hearing, the defendant did not object to the admission of the reports of the results of the drug tests as a violation of his right to due process. As a result, the state argues that the record is inadequate to review the defendant's claim that the admission of the results denied him of his right to due process. In response, the defendant argues that the claim was preserved or, if the claim is unpreserved, it is nonetheless reviewable pursuant to *Golding*. We agree with the state.

We first turn to a brief review of the principles relating to probation and the defendant's rights at a probation revocation hearing. "[P]robation is, first and foremost, a penal alternative to incarceration . . . . [Its] purpose . . . is to provide a period of grace in order to aid the rehabilitation of a penitent offender; to take advantage of an opportunity for reformation which actual service of the suspended sentence might make less probable. . . . [P]robationers . . . do not enjoy the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions. . . . These restrictions are meant to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large. . . .

"The success of probation as a correctional tool is in large part tied to the flexibility within which it is permitted to operate. . . . In this regard, modifications

of probation routinely are left to the office of adult probation. When the court imposes probation, a defendant thereby accepts the possibility that the terms of probation may be modified or enlarged in the future pursuant to [General Statutes] § 53a-30. . . . To this end, probation officers shall use all suitable methods to aid and encourage [a probationer] and to bring about improvement in his [or her] conduct and condition. . . .

"The due process clause of the fourteenth amendment to the United States constitution requires that certain minimum procedural safeguards be observed in the process of revoking the conditional liberty created by probation. . . . Among other things, due process entitles a probationer to a final revocation hearing . . . . A revocation proceeding is held to determine whether the goals of rehabilitation thought to be served by probation have faltered, requiring an end to the conditional freedom obtained by a defendant at a sentencing that allowed him or her to serve less than a full sentence. . . . [T]he ultimate question [in the probation process is] whether the probationer is still a good risk . . . . This determination involves the consideration of the goals of probation, including whether the probationer's behavior is inimical to his own rehabilitation, as well as to the safety of the public. . . .

"On the other hand . . . a [probation] revocation proceeding . . . is not a criminal proceeding. . . . It therefore does not require all of the procedural components associated with an adversary criminal proceeding." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Faraday*, 268 Conn. 174, 180–83, 842 A.2d 567 (2004). As such, at a revocation proceeding, the state must prove each alleged violation of probation by a preponderance of the evidence

in accordance with General Statutes § 53a-32[8] and Practice Book § 43-29.[9] Id., 183–84.

[8] General Statues § 53a-32 provides in relevant part: "(a) At any time during the period of probation or conditional discharge, the court or any judge thereof may issue a warrant for the arrest of a defendant for violation of any of the conditions of probation or conditional discharge, or may issue a notice to appear to answer to a charge of such violation, which notice shall be personally served upon the defendant. Any such warrant shall authorize all officers named therein to return the defendant to the custody of the court or to any suitable detention facility designated by the court. . . .

"(c) Upon notification by the probation officer of the arrest of the defendant or upon an arrest by warrant as herein provided, the court shall cause the defendant to be brought before it without unnecessary delay for a hearing on the violation charges. At such hearing the defendant shall be informed of the manner in which such defendant is alleged to have violated the conditions of such defendant's probation or conditional discharge, shall be advised by the court that such defendant has the right to retain counsel and, if indigent, shall be entitled to the services of the public defender, and shall have the right to cross-examine witnesses and to present evidence in such defendant's own behalf. Unless good cause is shown, a charge of violation of any of the conditions of probation or conditional discharge shall be disposed of or scheduled for a hearing not later than one hundred twenty days after the defendant is arraigned on such charge.

"(d) If such violation is established, the court may: (1) Continue the sentence of probation or conditional discharge; (2) modify or enlarge the conditions of probation or conditional discharge; (3) extend the period of probation or conditional discharge, provided the original period with any extensions shall not exceed the periods authorized by section 53a-29; or (4) revoke the sentence of probation or conditional discharge. If such sentence is revoked, the court shall require the defendant to serve the sentence imposed or impose any lesser sentence. Any such lesser sentence may include a term of imprisonment, all or a portion of which may be suspended entirely or after a period set by the court, followed by a period of probation with such conditions as the court may establish. No such revocation shall be ordered, except upon consideration of the whole record and unless such violation is established by the introduction of reliable and probative evidence and by a preponderance of the evidence."

[9] Practice Book § 43-29 provides: "In cases where the revocation of probation is based upon a conviction for a new offense and the defendant is before the court or is being held in custody pursuant to that conviction, the revocation proceeding may be initiated by a motion to the court by a probation officer and a copy thereof shall be delivered personally to the defendant. All other proceedings for revocation of probation shall be initiated by an arrest warrant supported by an affidavit or by testimony under oath showing probable cause to believe that the defendant has violated any of the conditions of the defendant's probation or his or her conditional discharge or by a written notice to appear to answer to the charge of such violation, which notice, signed by a judge of the superior court, shall be personally served

"The due process clause of the fourteenth amendment mandates certain minimum procedural safeguards before that conditional liberty interest [of probation] may be revoked." *State* v. *Polanco*, supra, 165 Conn. App. 570. Among these minimum procedural safeguards is the right to confrontation at a probation revocation hearing. See *Morrissey* v. *Brewer*, 408 U.S. 471, 489, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). With respect to the right to confrontation at a revocation of probation hearing, the Supreme Court has stated that minimum due process requires that the defendant be afforded "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation) . . . ." Id.[10] This court,

upon the defendant by a probation officer and contain a statement of the alleged violation. All proceedings thereafter shall be in accordance with the provisions of Sections 3-6, 3-9 and 37-1 through 38-23. At the revocation hearing, the prosecuting authority and the defendant may offer evidence and cross-examine witnesses. If the defendant admits the violation or the judicial authority finds from the evidence that the defendant committed the violation, the judicial authority may make any disposition authorized by law. The filing of a motion to revoke probation, issuance of an arrest warrant or service of a notice to appear, shall interrupt the period of the sentence as of the date of the filing of the motion, signing of the arrest warrant by the judicial authority or service of the notice to appear, until a final determination as to the revocation has been made by the judicial authority."

[10] We surmise that the defendant by citing to *Crawford* and its progeny is asserting that the due process right to confrontation equates to the sixth amendment right to confrontation at a criminal trial. Whether *Crawford* applies at a probation revocation hearing has not been addressed by a Connecticut appellate court. Although it is not necessary to address this issue in order to resolve this appeal, we observe that, since *Crawford*, an overwhelming majority of federal circuit and state appellate courts that have addressed this issue have concluded that *Crawford* does not apply to a revocation of probation hearing. See, e.g., *United States* v. *Ferguson*, 752 F.3d 613, 619 (4th Cir. 2014) (revocation of parole proceeding "does not involve the Sixth Amendment"); *United States* v. *Lloyd*, 566 F.3d 341, 343 (3d Cir. 2009) ("[the] limited right to confrontation [afforded at a revocation proceeding] stems from the Fifth Amendment's Due Process Clause, not from the Confrontation Clause of the Sixth Amendment"); *United States* v. *Ray*, 530 F.3d 666, 668 (8th Cir. 2008) ("[t]he Sixth Amendment only applies to 'criminal prosecutions,' and a revocation of supervised release is not part of a criminal prosecution"); *United States* v. *Kelley*, 446 F.3d 688, 691 (7th Cir. 2006) ("*Crawford* changed nothing with respect to [probation] revocation hearings" because the "limited confrontation right in revocation proceedings

with guidance from the Second Circuit Court of Appeals and the Federal Rules of Criminal Procedure, previously determined that whether there is good cause for not allowing confrontation should be determined by using a balancing test, which requires the court to balance, "on the one hand, the defendant's interest in confronting the declarant, against, on the other hand, the government's reasons for not producing the witness and the reliability of the proffered hearsay. *United States* v. *Williams*, 443 F.3d 35, 45 (2d Cir. 2006); see also *United*

was explicitly grounded in considerations of due process, not the Sixth Amendment"); *United States* v. *Rondeau*, 430 F.3d 44, 47 (1st Cir. 2005) ("[n]othing in *Crawford* indicates that the Supreme Court intended to extend the Confrontation Clause's reach beyond the criminal prosecution context"); *United States* v. *Hall*, 419 F.3d 980, 985–86 (9th Cir.) ("[w]e . . . see no basis in *Crawford* or elsewhere to extend the Sixth Amendment right of confrontation to supervised release proceedings"), cert. denied, 546 U.S. 1080, 126 S. Ct. 838, 163 L. Ed. 2d 714 (2005); *United States* v. *Kirby*, 418 F.3d 621, 627 (6th Cir. 2005) ("*Crawford* does not apply to revocation of supervised release hearings"); *United States* v. *Aspinall*, 389 F.3d 332, 343 (2d Cir. 2004) ("[n]othing in *Crawford*, which reviewed a criminal trial, purported to alter the standards set by *Morrissey*/[*Gagnon* v. *Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973)] or otherwise suggested that the Confrontation Clause principle enunciated in *Crawford* is applicable to probation revocation proceedings"); *State* v. *Carr*, 167 P.3d 131, 134 (Ariz. App. 2007); *People* v. *Loveall*, 231 P.3d 408, 420 n.18 (Col. 2010) (Eid, J., concurring in part and dissenting in part); *Jenkins* v. *State*, Docket No. 133, 2004, 2004 WL 2743556, *3 (Del. November 23, 2004) (decision without published opinion, 862 A.2d 386 [Del. 2004]); *Peters* v. *State*, 984 So. 2d 1227, 1227 (Fla. 2008), cert. denied, 555 U.S. 1109, 129 S. Ct. 917, 173 L. Ed. 2d 127 (2009); *Ware* v. *State*, 658 S.E.2d 441, 444 (Ga. App. 2008); *State* v. *Rose*, 171 P.3d 253, 258 (Idaho 2007); *Reyes* v. *State*, 868 N.E.2d 438, 440 n.1 (Ind. 2007); *State* v. *Marquis*, 257 P.3d 775, 777 (Kan. 2011); *State* v. *Michael*, 891 So.2d 109, 115 (La. App.) writ denied, 904 So.2d 681 (La. 2005); *Commonwealth* v. *Wilcox*, 841 N.E.2d 1240, 1243 (Mass. 2006); *Blanks* v. *State*, 137 A.3d 1074, 1087 (Md. Spec. App. 2016); *People* v. *Breeding*, 772 N.W.2d 810, 812 (Mich. App.) appeal denied, 773 N.W.2d 261 (Mich. 2009); *State* v. *Johnson*, 842 N.W.2d 63, 73 (Neb. 2014); *People* v. *Brown*, 32 A.D.3d 1222, 1222, 821 N.Y.S.2d 348, appeal denied, 7 N.Y.3d 924, 860 N.E.2d 994, 827 N.Y.S.2d 692 (2006); *Wortham* v. *State*, 188 P.3d 201, 205 (Okla. Crim. App. 2008); *State* v. *Gonzalez*, 157 P.3d 266, 266 (Or. App. 2007); *State* v. *Pompey*, 934 A.2d 210, 214 (R.I. 2007); *State* v. *Pauling*, 639 S.E.2d 680, 682 (S.C. App. 2006); *State* v. *Divan*, 724 N.W.2d 865, 870 (S.D. 2006); *State* v. *Walker*, 307 S.W.3d 260, 265 (Tenn. Crim. App. 2009); *Trevino* v. *State*, 218 S.W.3d 234, 239 (Tex. App. 2007); *Henderson* v. *Commonwealth*, 736 S.E.2d 901, 905 (Va. 2013); *State* v. *Abd-Rahmaan*, 111 P.3d 1157, 1160–61 (Wash. 2005).

States v. *Chin*, 224 F.3d 121, 124 (2d Cir. 2000)." (Internal quotation marks omitted.) *State* v. *Shakir*, 130 Conn. App. 458, 468, 22 A.3d 1285, cert. denied, 302 Conn. 931, 28 A.3d 345 (2011).[11]

This court recently concluded that a claim that a court denied a defendant's right to due process by admitting testimonial hearsay at a probation revocation hearing, without giving the defendant the opportunity to confront the declarant, was not preserved for appeal because the defendant, at the hearing, never argued to the trial court that it was required to conduct the balancing test discussed in *Shakir* to determine whether his right to due process had been violated. See *State* v. *Polanco*, supra, 165 Conn. App. 571. *Polanco* controls our determination as to whether the defendant's claim is preserved in the present case. As the record reveals, in both the defendant's initial objection to the admission of the reports of the drug test results and in the ensuing colloquy between defense counsel and the prosecutor, the defendant never argued that the trial court was required to conduct the balancing test to determine whether the admission of the reports of the drug test results denied him the right to due process. Accordingly, this claim was not preserved for appellate review.

The defendant contends that if his claim is unpreserved, it is nonetheless reviewable pursuant to *State* v. *Golding*, supra, 213 Conn. 239–240. *Golding* review, as modified in *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), allows this court to review an

[11] In *Shakir*, this court observed that the principles in *Morrissey* are codified in the Federal Rules of Criminal Procedure. *State* v. *Shakir*, supra, 130 Conn. App. 467. With respect to the right to confrontation, the Federal Rules mandate that at a probation revocation hearing the defendant should be afforded, "upon request, an opportunity to question any adverse witness, unless the judge determines that the interest of justice does not require the witness to appear." Fed. R. Crim. P. 32.1 (b) (1) (B) (iii).

unpreserved claim when all of the following conditions are met: "(1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Polanco*, supra, 165 Conn. App. 572.

The appellate tribunal is free to respond to the defendant's claim by focusing on whichever *Golding* prong is most relevant. *State* v. *Santana*, 313 Conn. 461, 469–70, 97 A.3d 963 (2014). "[T]he inability to meet any one prong requires a determination that the defendant's claim must fail." (Internal quotation marks omitted.) *State* v. *Soto*, 175 Conn. App. 739, 755, 168 A.3d 605, cert. denied, 327 Conn. 970, A. 3d (2017). We conclude that the defendant's claim does not satisfy the first *Golding* prong.

Our Supreme Court discussed the first prong of *Golding* in *State* v. *Brunetti*, 279 Conn. 39, 901 A.2d 1 (2006), cert. denied, 549 U.S. 1212, 127 S. Ct. 1328, 167 L. Ed. 2d 85 (2007), and stated: "[T]he defendant may raise . . . a constitutional claim on appeal, and the appellate tribunal will review it, but only if the trial court record is adequate for appellate review. The reason for this requirement demands no great elaboration: in the absence of a sufficient record, there is no way to know whether a violation of constitutional magnitude in fact has occurred. Thus, as we stated in *Golding*, we will not address an unpreserved constitutional claim [i]f the facts revealed by the record are insufficient, unclear or ambiguous as to whether a constitutional violation has occurred . . . ." (Footnotes omitted; internal quotation marks omitted.) Id., 55–56. Our analysis of whether

the defendant's claim satisfies the first *Golding* prong is guided by our precedent in *Polanco* and *Shakir*. *Polanco* and *Shakir* both held that an unpreserved claim that a court violated a defendant's right to due process by admitting testimonial hearsay at a probation revocation hearing without according the defendant the right to confront the declarant did not satisfy the first *Golding* prong because the defendant did not object to the admission of such hearsay as a violation of the right to due process during the probation revocation hearing. *State* v. *Polanco*, supra, 165 Conn. App. 564–65, 576 (claim that court violated defendant's right to due process at probation revocation hearing by admitting laboratory test results without affording defendant opportunity to confront analyst who performed such tests was not reviewable pursuant to *Golding* because defendant did not object to admission of results as violation of his right to due process); *State* v. *Shakir*, supra, 130 Conn. App. 460, 468 (claim that court violated defendant's right to due process at probation revocation hearing by admitting videotape of social worker's interview with minor complainant without affording defendant opportunity to confront minor complainant was not reviewable pursuant to *Golding* because defendant did not object to admission of videotape as violation of his right to due process).

Polanco and *Shakir* control our resolution of whether the defendant's claim in the present case is reviewable pursuant to *Golding*.[12] Both cases held that

[12] The defendant neither distinguishes the present case from *Shakir* and *Polanco*, nor provides a basis for this court to conclude that those cases were wrongly decided. The defendant asserts that the determination of whether the admission of the reports of the drug test results, without allowing the defendant to confront the analysts who analyzed the defendant's urine, amounted to a violation of the defendant's due process rights only requires this court to make a legal conclusion. Yet, the defendant's argument is not persuasive because the legal conclusion the defendant requests requires the factual underpinnings as to why the analysts who performed the drug tests were not called to testify. Those facts are not contained in the record.

in order for a claim that the admission of testimonial hearsay at a probation revocation hearing, without the opportunity to confront the declarant, is a violation of the right to due process to be reviewable pursuant to *Golding*, there must be an adequate record from the probation revocation hearing that enables the appellate tribunal to balance (1) the defendant's interest in confronting the witness against (2) the government's reasons for not producing the witness and the reliability of the proffered hearsay. *State* v. *Polanco*, supra, 165 Conn. App. 575–76; *State* v. *Shakir*, supra, 130 Conn. App. 468. In order for the record to be adequate, the state must be given notice of the due process claim so that it can present its reasons for not producing the witness. See *State* v. *Polanco*, supra, 575. In both *Shakir* and *Polanco*, the state was not given notice because the defendants did not object to the admission of testimonial hearsay at their probation revocation hearings on the grounds that it was a violation of their right to due process. See *State* v. *Polanco*, supra, 575–76; *State* v. *Shakir*, supra, 462, 468. As a result, the record in each of those cases was inadequate for this court to balance the defendant's interest in confrontation against the state's reasons for not producing the witness and the reliability of the proffered hearsay. *State* v. *Polanco*, supra, 576; *State* v. *Shakir*, supra, 468.

Guided by our precedent, we conclude that the defendant in the present case failed to sustain his burden of providing this court with an adequate record to review his claim of a due process violation. The defendant, at the probation revocation hearing, did not object to the admission of the reports of the drug test results on the basis that the admission of such results violated his right to due process.[13] Therefore, the state was not given

[13] At the probation revocation hearing, defense counsel cited *State* v. *Giovanni P.*, 155 Conn. App. 322, 338 n.14, 110 A. 3d 442, cert. denied, 316 Conn. 909, 111 A.3d 883 (2015), when objecting to the admission of the reports of the drug test results. A footnote in that case states: "When the trial court ruled on the objection [to out-of-court statements], it addressed

adequate notice of the defendant's due process claim and, accordingly, did not provide the possible reasons for not calling the analysts who performed the drug tests. As a result, we are unable to balance the state's interest in not producing the persons who performed the drug tests against the defendant's interest in confronting those persons. Without this basis, we cannot determine whether a violation of due process occurred and, thus, the record is inadequate for *Golding* review of the defendant's claim.

The judgment is affirmed.

In this opinion the other judges concurred.

the defendant's objection as to the credibility of the witness and the reliability of the hearsay statements. Thus, the defendant's claim on appeal that the admission of [the out-of-court declarant's] testimony denied him the right to confront and cross-examine witnesses was not presented to the trial court. We further note that, under *Golding*, the defendant's claim cannot be reviewed because it fails to satisfy the first prong, which requires that the record is adequate to review the alleged claim of error. *State* v. *Golding*, [supra, 213 Conn. 239]. Because the defendant failed to object to the admission of the testimony as a violation of his due process right to cross-examine an adverse witness, the court had no occasion to consider whether there was good cause not to allow confrontation. Therefore, the record is inadequate for review of that claim." (Internal quotation marks omitted.) *State* v. *Giovanni P.*, supra, 155 Conn. App. 338 n.14.

In the present case, during the hearing, defense counsel argued that "had there been an objection to hearsay . . . [in *Giovanni P.*]—it was not lab result hearsay; it was testimony—[the Appellate Court] might have considered the question." Although the defendant does not now argue on appeal that citing to this case preserved his claim or developed an adequate record for review, we observe that at the defendant's probation revocation hearing, defense counsel misconstrued the language in *Giovanni P. Giovanni P.* does not, contrary to what defense counsel suggested, support the contention that objecting to the admission of testimonial hearsay on hearsay grounds alone at a probation revocation hearing creates an adequate record for an appellate tribunal to review a claim that the admission of such testimonial hearsay denies a defendant his due process right to confrontation. Moreover, defense counsel's incorrect interpretation of *Giovanni P.* neither alerted the court that it needed to balance the defendant's due process right to confrontation against the state's interest in not presenting the witness, nor developed an adequate record for appellate review of the defendant's claim pursuant to *Golding*.

VALLEY NATIONAL BANK *v.* PRIVATE TRANSERVE, LLC, ET AL.
(AC 39542)

Prescott, Elgo and Harper, Js.

Syllabus

The plaintiff bank commenced this action seeking to foreclose two mortgages on certain properties owned by the defendant P Co. that secured a revolving promissory note, and to enforce personal guarantees of P Co.'s debts that were executed by the defendants J and T. The trial court denied the defendants' motion to dismiss in which they challenged the plaintiff's standing. Subsequently, the plaintiff withdrew its foreclosure counts and filed an amended complaint seeking to enforce only the personal guarantees. The court granted the plaintiff's motion for summary judgment as to liability only and, following a hearing in damages, rendered judgment in favor of the plaintiff, from which J and T appealed to this court. They claimed, inter alia, that genuine issues of material facts existed regarding the plaintiff's ownership of the debt and that the plaintiff lacked standing. *Held* that the claims of J and T that the plaintiff lacked standing were properly rejected by the trial court, as the record reflected that the plaintiff established through documentary and other evidence that it was the owner of the debt when this action was commenced, and to the extent that J and T, on appeal, relied on certain evidence to support their claim that the plaintiff did not own the debt, that evidence merely cast doubt on whether this action was initiated under the proper corporate name, which was never raised before the trial court, and any such defect was amenable to correction and did not implicate the plaintiff's standing; moreover, the trial court's decision granting the plaintiff permission to file a third amended complaint and its evidentiary rulings at the hearing in damages were discretionary in nature and entitled to deference, and J and T failed to demonstrate that any of those rulings relied on clearly erroneous factual findings or a misapprehension of the law, or that the court otherwise abused its discretion.

Argued November 28, 2017—officially released January 30, 2018

Procedural History

Action, inter alia, to foreclose a mortgage on certain real property owned by the named defendant, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the defendant Geoffrey Minte et al. were defaulted for failure to plead; thereafter,

the court, *Tyma*, *J.*, denied the defendants' motion to dismiss; subsequently, the court, *Hon. Alfred J. Jennings*, judge trial referee, granted the plaintiff's motion for summary judgment as to liability; thereafter, the plaintiff withdrew the counts of the complaint seeking foreclosure; subsequently, following a hearing in damages, the court, *Wenzel*, *J.*, rendered judgment for the plaintiff, from which the defendant John Tartaglia et al. appealed to this court. *Affirmed*.

John Tartaglia, self-represented, with whom, on the brief, was *Linda Tartaglia*, self-represented, the appellants (defendant John Tartaglia et al.).

Andrew M. McPherson, with whom, on the brief, was *William J. Kupinse*, *Jr.*, for the appellee (plaintiff).

Opinion

PER CURIAM. In this action seeking, inter alia, to enforce a personal guarantee of a mortgage note, the defendants John Tartaglia and Linda Tartaglia,[1] against whom summary judgment as to liability only was rendered, appeal following a hearing in damages from the court's award of $967,467.59 in favor of the plaintiff, Valley National Bank. On appeal, the defendants argue that the court improperly (1) denied their motion to dismiss the action, in which they alleged that the plaintiff was not the owner of the debt at the time the action was commenced and, thus, lacked standing to prosecute the action; (2) granted summary judgment as to liability only despite the defendants' insistence that genuine issues of material facts existed regarding the plaintiff's ownership of the debt; (3) permitted the plaintiff to amend the complaint after summary judgment

[1] Geoffrey Minte, Private Transerve, LLC, and Randall Properties, LLC, also are named as defendants in the underlying action, but they did not participate in the present appeal, and, thus, all references to the defendants in this opinion are to the Tartaglias only. The remaining defendants are referred to by name.

despite the defendants' contention that the amendment added a new cause of action; and (4) made several evidentiary rulings against the defendants at the hearing in damages. We are not persuaded by the defendants' claims and, accordingly, affirm the judgment of the court.

The record reveals the following relevant facts and procedural history. The plaintiff commenced the underlying action in January, 2011. The initial complaint contained three counts. The first two counts sought to foreclose mortgages on two multifamily residential properties located in Bridgeport. The mortgages were executed by Private Transerve, LLC, as security for a revolving building promissory note of up to $500,000. The third count sought money damages based upon breach of an unconditional guarantee of the debts of Private Transerve, LLC. The guarantee was executed by the defendants and Geoffrey Minte.

On May 31, 2013, the plaintiff filed a motion for summary judgment as to liability only. The defendants, Minte, and Private Transerve, LLC, filed an opposition. On October 23, 2013, after argument on the motion for summary judgment but prior to the court acting on that motion, the defendants, Minte, and Private Transerve, LLC, filed a motion to dismiss the action, claiming that the plaintiff lacked standing to bring the action, and, thus, the court lacked subject matter jurisdiction. The plaintiff opposed the motion to dismiss.

On August 15, 2014, the court, *Tyma*, *J.*, issued a decision denying the motion to dismiss. The court rejected all arguments that the plaintiff did not own the debt at the time the action was commenced in January, 2011, finding on the basis of the pleadings, affidavits, and other proof in the file that the note and mortgages initially had been assigned from the original lender, PAF Capital, LLC, to The Park Avenue Bank, and then,

in June, 2010, were assigned to the plaintiff by the Federal Deposit Insurance Corporation acting as receiver for The Park Avenue Bank. The court moreover rejected all claims that there were problems affecting the validity of the aforementioned assignments.

On August 17, 2015, the court, *Hon. Alfred J. Jennings*, judge trial referee, issued a decision granting the motion for summary judgment as to liability only on all counts of the complaint. The court again rejected all arguments regarding the plaintiff's lack of standing to prosecute the action, indicating that the original signed note had been presented and reviewed by the court and the defendants at the hearing on the motion for summary judgment. The court concluded that the plaintiff had made "an adequate showing of the prima facie elements of its case for foreclosure and breach of guaranty: ownership of the loan, default of payment, and notice of breach."[2]

During the pendency of the underlying action, the two properties at issue were foreclosed in separate actions brought by Bridgeport's water pollution control authority. In each of those actions, the plaintiff exercised its right to redeem each of the properties on its assigned law day. As a result, the plaintiff acquired title to the properties and rendered moot its own foreclosure

[2] We note that the motion for summary judgment filed by the plaintiff only asked the court for a finding as to liability on the foreclosure counts. Nonetheless, in its decision, the court also granted summary judgment as to liability on the third count based on the personal guarantee. The defendants have not raised this discrepancy as an issue in the present appeal, or argued that the trial court exceeded its authority or otherwise committed reversible error in this regard. Absent extraordinary circumstances not present here, this court limits its review to those claims of error actually raised and adequately briefed by the parties. See *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 161–64, 84 A.3d 840 (2014); see also id., 164 ("our system is an adversarial one in which the burden ordinarily is on the parties to frame the issues, and the presumption is that issues not raised by the parties are deemed waived").

counts in the present action. Each time the plaintiff acquired a property, it filed an amended complaint removing the related foreclosure count, eventually leaving a single count complaint seeking money damages on the basis of the defendants' breach of the personal guarantee of the debt. The last such amendment was the third amended complaint, to which the defendants objected, arguing, inter alia, that the plaintiff was attempting to correct defects in its prior pleadings or to change the cause of action alleged. The court overruled the defendants' objection and permitted the amendment.

A hearing in damages was held by the court, *Wenzel*, *J.*, on July 26 and August 2, 2016. John Tartaglia appeared as a self-represented party at the hearing. Linda Tartaglia and Minte did not appear. On August 11, 2016, the court issued a memorandum of decision awarding joint and several damages totaling $967,467.59 against the defendants and Minte. This appeal followed.[3]

On appeal, the defendants raise a number of claims, none of which warrants significant discussion. The court's granting of permission to file the third amended complaint and its evidentiary rulings at the hearing in damages were discretionary in nature and are entitled to deferential review. The defendants have failed to demonstrate that any of these rulings relied upon clearly erroneous factual findings or a misapprehension of the law, or that the court otherwise abused its discretion.

As they have argued throughout these proceedings, the defendants continue to maintain that the plaintiff lacked standing to bring this action against them. Most

[3] John Tartaglia, who is not an attorney, initially filed this appeal as a self-represented party, purportedly on his own behalf and on behalf of Linda Tartaglia. Linda Tartaglia subsequently filed a joint appeal consent form in compliance with Practice Book § 61-7 (a) (3). The defendants submitted a joint brief.

of the arguments are identical to those raised in conjunction with both the motion to dismiss and the motion for summary judgment. On the basis of our review of the record provided, as well as the briefs and arguments of the parties, we are convinced that the claims raised before the trial court regarding standing lack merit and were properly rejected by the court for the reasons provided in its memoranda of decision. In short, the record reflects that the plaintiff established through documentary and other evidence that it was the owner of the debt at the time this action was commenced, and it would serve no useful purpose to engage in further discussion.

The defendants attempt to breathe new life into their standing claim on appeal by bringing to our attention certain testimony provided by the plaintiff's agent at the hearing in damages in response to his cross-examination by John Tartaglia. In that testimony, the plaintiff's agent appears to agree with John Tartaglia's suggestion that the debt at issue was owned in 2010 by a corporate entity, VNB New York, Corp., that merged into and became the plaintiff sometime in 2011.[4] The defendants suggest that this response amounted to an admission that the plaintiff did not own the debt when the action was initiated. Rather than truly implicating the plaintiff's standing, however, the defendants' argument seems only to cast doubt on whether the action was initiated under the proper corporate name, an issue never raised to the trial court. If such a defect exists here, which is not entirely clear from the record before us, it was amenable to correction in accordance with General Statutes § 52-109 and Practice Book § 9-20, and does not implicate the plaintiff's status as the owner

[4] We note that the transcript of the August 2, 2016 proceeding indicates that John Tartaglia misstated to the witness that the complaint had been filed in 2010. The record, however, shows that it was filed in February, 2011, shortly after this action was commenced.

of the debt or its standing to prosecute this action. See *NewAlliance Bank* v. *Schaeppi*, 139 Conn. App. 94, 97–98, 54 A.3d 1058 (2012) (distinguishing between challenges implicating proper assignment of note or mortgage between distinct parties and nomenclature problems arising from mergers and corporate name changes), cert. denied, 307 Conn. 948, 60 A.3d 737 (2013).

Having thoroughly reviewed the record and the arguments of the parties, we conclude that the defendants have not met their burden of proving any of the claims raised on appeal.

The judgment is affirmed.

KATE L. DOYLE ET AL. *v.* ASPEN DENTAL OF SOUTHERN CT, PC, ET AL.
(AC 39325)

Sheldon, Keller and Bishop, Js.

Syllabus

The plaintiff sought to recover damages from the defendant oral surgeon, K, for dental malpractice in connection with an implant procedure performed on the plaintiff by K. The trial court granted K's motion to dismiss on the ground that the plaintiff had failed to provide an opinion letter from a similar health care provider, as required by statute (§§ 52-190a and 52-184c [c]). Specifically, because the plaintiff had attached an opinion letter authored by M, a general dentist, and K was trained as an oral and maxillofacial surgeon and his treatment of the plaintiff fell into the area of oral and maxillofacial surgery, the trial court determined that M's opinion letter was not that of a similar health care provider because M was not board certified in K's specialty. On appeal to this court, the plaintiff claimed that the opinion letter, authored by a general dentist, was sufficient because there was no authentic public record from which she could have discovered or verified that K had training and experience in oral and maxillofacial surgery beyond the information available on the website of the Department of Public Health, which did not indicate that K was a board certified oral and maxillofacial surgeon. *Held* that the trial court properly granted K's motion to dismiss for lack of personal jurisdiction; because it was undisputed that M was

not a board certified specialist trained and experienced in oral and maxillofacial surgery, M was not a similar health care provider as defined in § 52-184c (c) and, thus, the opinion letter attached to the plaintiff's complaint was legally insufficient under § 52-190a (a), and the plaintiff's claim that she could rely solely on the department's website to determine K's credentials was unavailing, as this court previously has rejected a similar claim, the plain language of § 52-190a (a) requires the plaintiff to conduct a reasonable inquiry for a defendant health care provider's credentials, there are other methods, aside from searching the department's website, for ascertaining such credentials, including filing a bill of discovery, and the plaintiff was put on notice of K's credentials by notations in the medical file referring to her treatment by an oral surgeon.

Argued October 17, 2017—officially released January 30, 2018

Procedural History

Action to recover damages for, inter alia, the defendants' alleged dental malpractice, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Wenzel*, *J.*, granted the defendants' motions to dismiss and rendered judgment thereon; thereafter, the court denied the plaintiffs' motion to reargue, and the plaintiffs appealed to this court; subsequently, the appeal was withdrawn as to the named defendant et al. *Affirmed*.

Scott D. Camassar, for the appellants (plaintiffs).

Beverly Knapp Anderson, with whom was *Craig A. Fontaine*, for the appellee (defendant Brandon Kang).

Opinion

BISHOP, J. This appeal arises out of a dental malpractice action brought by the plaintiffs, Kate L. Doyle and Brendan Doyle,[1] against the defendants, Aspen Dental of Southern CT, PC, and Aspen Dental Management, Inc. (Aspen Dental), and Brandon Kang, DDS,[2] in connection

[1] Brendan Doyle's claim for loss of consortium is a derivative claim of Kate L. Doyle's claims. Therefore, we refer in this opinion to Kate L. Doyle as the plaintiff.

[2] On February 17, 2017, the plaintiff withdrew her appeal as to Aspen Dental of Southern CT, PC, and Aspen Dental Management, Inc. Accordingly, references herein to the defendant are to Kang.

with a dental implant procedure performed by Kang. The plaintiff appeals from the judgment rendered by the trial court dismissing her action against the defendant on the basis of her failure to comply with General Statutes § 52-190a (a),[3] which required the plaintiff to attach to her complaint an opinion letter authored by a "similar health care provider," as defined in General Statutes § 52-184c (c).[4] On appeal, the plaintiff argues that the court erred in concluding that the opinion letter written by a general dentist was not authored by a "similar health care provider" and that an opinion letter from an oral and maxillofacial surgeon was required instead. In support of this claim, the plaintiff alleges that she had no method of discovering or verifying that the defendant was an oral and maxillofacial surgeon in addition to being a licensed general dentist because there was no authentic public record from which the plaintiff could have determined that the defendant had training and experience as an oral and maxillofacial

[3] General Statutes § 52-190a (a) provides in relevant part: "No civil action . . . shall be filed to recover damages resulting from personal injury . . . in which it is alleged that such injury . . . resulted from the negligence of a health care provider, unless the attorney or party filing the action . . . has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. . . . To show the existence of such good faith, the claimant or the claimant's attorney. . . shall obtain a written and signed opinion of a similar health care provider, as defined in section 52-184c, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion."

[4] General Statutes § 52-184c (c) provides: "If the defendant health care provider is certified by the appropriate American board as a specialist, is trained and experienced in a medical specialty, or holds himself out as a specialist, a 'similar health care provider' is one who: (1) [i]s trained and experienced in the same specialty; and (2) is certified by the appropriate American board in the same specialty; provided if the defendant health care provider is providing treatment or diagnosis for a condition which is not within his specialty, a specialist trained in the treatment or diagnosis for that condition shall be considered a 'similar health care provider.' "

surgeon. We conclude that the court properly determined that because the defendant did, in fact, have training and experience in the specialty of oral and maxillofacial surgery, the opinion letter submitted by the plaintiff was not authored by a "similar health care provider."[5] Accordingly, we affirm the judgment of the trial court.

The plaintiff's complaint, filed on August 19, 2015, contained the following factual allegations, the truth of which the court was required to assume for purposes of deciding the defendant's motion to dismiss. On March 15, 2011, the plaintiff underwent an examination and treatment at Aspen Dental for a broken crown on one of her front teeth. The tooth was removed on March 29, 2011, after which the plaintiff, under sedation, received a dental implant for the missing tooth on July 29, 2011. By December 21, 2012, however, the plaintiff's implant was failing, allegedly because it had been placed at an improper angle. It penetrated the nasal floor, resulting in bone loss along the sides of the implant. The plaintiff alleged that the defendant knew or should have known that the implant was failing, but failed to inform her of this circumstance. On August 4, 2013, the defendant performed a bone grafting procedure. At that time, the defendant informed the plaintiff

[5] The plaintiff additionally claims on appeal that the court erred in concluding that the requirement in § 52-184c (c) to obtain an opinion letter from an oral and maxillofacial surgeon also was triggered because the defendant "held himself out" as an oral and maxillofacial surgeon. Specifically, the plaintiff claims that there was insufficient evidence that the defendant was "held out" as a specialist trained and experienced in oral and maxillofacial surgery at the time of her treatment. Because our resolution of the plaintiff's first claim is dispositive of this appeal, we do not address this claim.

We also do not address the plaintiff's argument on appeal that "dismissal notwithstanding, the plaintiff still has a remedy under the accidental failure of suit statute, General Statutes § 52-592." As the plaintiff's counsel conceded at oral argument, this claim is not one that this court can address on appeal, as the plaintiff has not commenced an action pursuant to § 52-592.

that the implant might have to be removed at a later date.

The plaintiff commenced the present dental malpractice action, alleging medical negligence by the defendant, by complaint dated August 19, 2015. As required by §§ 52-190a and 52-184c, the plaintiff attached to the complaint a certificate of reasonable inquiry by the plaintiff's attorney and an opinion letter prepared by Andrew Mogelof, a general dentist, who the plaintiff claimed to be a "similar health care provider" to the defendant.

On October 27, 2015, the defendant filed a motion to dismiss the action against him for lack of personal jurisdiction on the basis of the plaintiff's failure to provide a proper opinion letter, as required by § 52-190a (a), authored by a similar health care provider, as defined in § 52-184c (c). Specifically, the defendant claimed that "the author of the opinion letter must be a board certified, trained and experienced oral and maxillofacial surgeon because the defendant is trained and experienced in the specialty of oral and maxillofacial surgery and holds himself out as an oral and maxillofacial surgeon. . . . [Because] the [plaintiff] attached an opinion letter authored by a general dentist . . . [she has] failed to comply with . . . [§ 52-190a (a)]." In support of his motion to dismiss, the defendant submitted an affidavit dated October 22, 2015, in which he averred that: "After obtaining my dental degree in 2004, I completed a four year residency program in [o]ral [and] [m]axillofacial [s]urgery, which is one of the dental specialties recognized by the American Dental Association. This four year training certificate program covered the full scope of [o]ral and [m]axillofacial [s]urgery. Rotations included . . . [thirty-six] months on service with [o]ral and [m]axillofacial [s]urgery. . . . At all times while working at Aspen Dental, I represented myself to patients as an oral and maxillofacial surgeon.

. . . All of the treatment that I rendered to [the] plaintiff . . . was in my capacity as an oral and maxillofacial surgeon. The consent form signed by [the] plaintiff was entitled 'Consent for Oral Surgery and Anesthesia.' "

On December 14, 2015, the plaintiff filed a memorandum of law in opposition to the defendant's motion to dismiss. In support of her opposition, the plaintiff attached an affidavit from Mogelof, which stated, in relevant part, that he is "experienced in all of the relevant services provided by . . . [the defendant] in the case of [the plaintiff]." In this affidavit, Mogelof also acknowledged that he is "not trained as an oral and maxillofacial surgeon." Mogelof further stated that "the failure to properly place and treat [the plaintiff's] dental implant was due to a failure to meet the standards of care of basic general surgery and diagnosis, which standards were required to have been met not only by general dentists but also oral surgeons such as [the defendant]."

Oral argument on the defendant's motion to dismiss took place on December 21, 2015. Subsequently, the parties filed supplemental briefs and affidavits on December 31, 2015.[6] Oral argument on the defendant's motion to dismiss continued on January 14, 2016. On May 5, 2016, the court, *Wenzel*, *J.*, granted the defendant's motion to dismiss. In its memorandum of decision, the court held that "there is significant evidence . . . that the treatment afforded to the plaintiff fell into the area of oral and maxillofacial surgery. . . . [The

[6] Attached to the defendant's supplemental memorandum of law in further support of his motion to dismiss was a supplemental affidavit, dated December 18, 2015, in which the defendant stated in relevant part: "Extractions, bone grafting procedures and implant placements are among the procedures that I was trained to perform during my post-graduate residency training program in oral and maxillofacial surgery. Extractions, bone grafting and implant placements are within the scope of practice of oral and maxillofacial surgery."

defendant] began treating the plaintiff immediately after her referral to 'the oral surgeon.' Moreover, the records which detailed the treatment of [the] plaintiff were reviewed and quoted by the opinion author, including this very notation [referencing an oral surgeon]. Of the three criteria which can trigger a specialist level of evaluation, the court finds that the evidence submitted in support of this motion by the [defendant] proves that . . . [1] [the defendant] was in fact trained and experienced in the area of oral surgery and [2] was referred to and held out as an oral surgeon. . . . Accordingly, having determined that . . . the author of the opinion letter submitted was not a similar health care provider having not been board certified in [the defendant's] specialty, the court grants the [defendant's] motion to dismiss."

On May 18, 2016, the plaintiff filed a motion to reargue or reconsider, which the court denied on June 6, 2016. This appeal followed.

On appeal, the plaintiff argues that the court erred in dismissing her malpractice action for her failure to attach to the complaint an opinion letter authored by a board certified specialist in oral and maxillofacial surgery. Specifically, the plaintiff argues that she "met the requirement of [§ 52-190a (a)] because counsel made a good faith inquiry into whether or not there was dental malpractice, and found a 'similar health care provider' in accordance with the [d]efendant's credentials on file with the public health authorities." We are unpersuaded.

We first set forth our standard of review. "The court granted the [defendant's] motion to dismiss for lack of personal jurisdiction on the ground that the . . . opinion letter [attached to the plaintiff's complaint] was not legally sufficient." *Gonzales* v. *Langdon*, 161 Conn. App. 497, 503, 128 A.3d 562 (2015). In reviewing "a challenge

to a ruling on a motion to dismiss. . . [w]hen the facts relevant to an issue are not in dispute, this court's task is limited to a determination of whether, on the basis of those facts, the trial court's conclusions of law are legally and logically correct. . . . Because there is no dispute regarding the basic material facts, this case presents an issue of law, and we exercise plenary review." (Internal quotation marks omitted.) *Helfant* v. *Yale-New Haven Hospital*, 168 Conn. App. 47, 56, 145 A.3d 347 (2016); see also *Torres* v. *Carrese*, 149 Conn. App. 596, 608, 90 A.3d 256 ("[o]ur review of a trial court's ruling on a motion to dismiss pursuant to § 52-190a is plenary"), cert. denied, 312 Conn. 912, 93 A.3d 595 (2014).

"[D]ismissal is the mandatory remedy when a plaintiff fails to file an opinion letter that complies with § 52-190a (a)." *Bennett* v. *New Milford Hospital, Inc.*, 300 Conn. 1, 28, 12 A.3d 865 (2011); see also General Statutes § 52-190a (c) ("[t]he failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action"); *Morgan* v. *Hartford Hospital*, 301 Conn. 388, 401, 21 A.3d 451 (2011) (failure to attach a proper opinion letter constitutes lack of jurisdiction over the person). "Section 52-190a (a) provides in relevant part that, prior to filing a [malpractice] action against a health care provider, the attorney or party filing the action . . . [must make] a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. . . . To show the existence of such good faith, the claimant or the claimant's attorney . . . shall obtain a written and signed opinion of a similar health care provider, as defined in [§] 52-184c . . . that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion." (Internal quotation marks omitted.) *Gonzales* v. *Langdon*, supra, 161 Conn. App. 504.

"Pursuant to [§ 52-184c], the precise definition of similar health care provider depends on whether the defendant health care provider is certified by the appropriate American board as a specialist, is trained and experienced in a medical specialty, or holds himself out as a specialist." (Internal quotation marks omitted.) Id. General Statutes "§ 52-184c (b) establishes the qualifications of a similar health care provider when the defendant is neither board certified nor in some way a specialist, and § 52-184c (c) [establishes] those qualifications when the defendant is board certified, trained and experienced in a medical specialty, or holds himself out as a specialist." (Internal quotation marks omitted.) *Wilkins* v. *Connecticut Childbirth & Women's Center*, 314 Conn. 709, 725, 104 A.3d 671 (2014).

In the present case, it is undisputed that the defendant is trained and experienced in the specialty of oral and maxillofacial surgery. Pursuant to § 52-184c (c), "[i]f the defendant health care provider . . . is trained and experienced in a medical specialty . . . a 'similar health care provider' is one who: (1) [i]s trained and experienced in the same specialty; and (2) is certified by the appropriate American board in the same specialty." Thus, to satisfy the requirements of §§ 52-190a (a) and 52-184c (c), the plaintiff was required to obtain an opinion letter from one who was (1) "trained and experienced in" oral and maxillofacial surgery *and* (2) "certified by the appropriate American board in" oral and maxillofacial surgery. See General Statutes §§ 52-190a (a) and 52-184c (c).

The plaintiff attached to her complaint an opinion letter authored by a general dentist. It is undisputed that Mogelof was not board certified in the specialty of oral and maxillofacial surgery. In his affidavit dated November 12, 2015, Mogelof acknowledged that he is "not trained as an oral and maxillofacial surgeon." Thus, although Mogelof claimed to have knowledge of the

procedure performed by the defendant, and the relevant standard of care applicable to that procedure, the possession of such knowledge, alone, is insufficient to meet the credentialing requirements of § 52-184c (c). See *Gonzales* v. *Langdon*, supra, 161 Conn. App. 505 ("Our precedent indicates that under § 52-184c [c], it is not enough that an authoring health care provider has familiarity with or knowledge of the relevant standard of care. . . . A similar health care provider *must be* trained and experienced in the same specialty and certified by the appropriate American board in the same specialty." [Citation omitted; emphasis added; internal quotation marks omitted.]). Given that Mogelof was not trained and experienced, or board certified, in the defendant's specialty of oral and maxillofacial surgery, as required by § 52-184c (c), the opinion letter submitted by the plaintiff was not legally sufficient under § 52-190a (a).

Despite the defendant's training and experience in oral and maxillofacial surgery, the plaintiff maintains that an opinion letter from a general dentist was sufficient in the present case because "there was no authentic public record by which to determine or verify that [the defendant] had training as an oral and maxillofacial surgeon" and she could verify only that the defendant was a licensed general dentist.[7] More specifically, the plaintiff argues that because the defendant's profile on the website of the Department of Public Health (department) did not indicate that he was a board certified

[7] To the extent that the plaintiff suggests that a plaintiff should not need to conduct an inquiry in order to ascertain a defendant health care provider's credentials prior to bringing an action, this may be a worthy issue for our legislature to address, but our role is not to contort legislation and is to apply its clear and unambiguous requirements and limitations. See *Bennett* v. *New Milford Hospital, Inc.*, supra, 300 Conn. 15–16 ("[g]iven the legislature's specific articulations of who is a similar health care provider under § 52-184c [b] and [c], we have hewn very closely to that language and declined to modify or expand it in any way").

oral and maxillofacial surgeon, she was not required to obtain an opinion letter from a board certified oral and maxillofacial surgeon. In response, the defendant argues that "there is no statutory requirement that the defendant's specialty training be verifiable on the website of a public health authority." We agree with the defendant.

As an initial matter, we reject the plaintiff's reliance on *Gonzales* v. *Langdon*, supra, 161 Conn. App. 497, to support her argument that she could rely solely on the information available on the department's website to determine the defendant's credentials. This court previously has rejected that argument. In *Gonzales*, "[t]he plaintiff argue[d] that she was only required to obtain an opinion letter authored by a board certified dermatologist because that was the only certification that was listed on [the defendant's] profile on the [department's] website." Id., 503. This court disagreed, concluding that the plaintiff had failed to obtain an opinion letter from a similar health care provider. See *Gonzales* v. *Langdon*, supra, 503.

Nevertheless, the plaintiff in the present case claims that this court, in *Gonzales*, described reliance on the department's website as a "good faith effort . . . to attach an opinion letter authored by a similar health care provider." Id., 515. Our review of the case reveals that the plaintiff takes this quote out of context. In *Gonzales*, this court was simply explaining why the situation it confronted, where "the plaintiff made a good faith effort in her original complaint to attach an opinion letter authored by a similar health care provider"; id., 515; by looking at the department's website, differed from the situation in *New England Road, Inc.* v. *Planning & Zoning Commiss*ion, 308 Conn. 180, 189, 61 A.3d 505 (2013), where "the plaintiff failed to comply in any fashion with one or more of the process requirements." (Internal quotation marks omitted.) *Gonzales*

v. *Langdon*, supra, 161 Conn. App. 515. More importantly, the reference to the plaintiff's "good faith effort" in *Gonzales* is found in this court's analysis of whether the trial court in that case improperly denied the plaintiff's request for leave to amend the complaint, not whether the plaintiff's reliance on the department's website rendered the opinion letter legally sufficient in the first place. Id., 509, 515. Accordingly, we find the plaintiff's reliance on *Gonzales* unavailing.[8]

The plaintiff argues that, aside from the department's website, she had no way of verifying the defendant's training in oral and maxillofacial surgery, and she "cannot be expected to match credentials that [she has] no way of discovering and verifying." We disagree.

We first note that the plain language of § 52-190a (a) requires that a plaintiff, prior to filing a medical malpractice action against a health care provider, make "*a reasonable inquiry as permitted by the circumstances* to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant." (Emphasis added.) General Statutes § 52-190a (a). As part of that reasonable inquiry, a plaintiff "shall obtain a written and signed opinion of a similar health care provider, as defined in [§] 52-184c, which similar health care provider shall be selected pursuant to the provisions of said section. . . ." See General Statutes § 52-190a (a). Our legislature

[8] More generally, we also reject the plaintiff's argument that reliance on the information in a defendant health care provider's profile on the department's website is sufficient because such an interpretation would render meaningless the other two potential triggers of the requirements under § 52-184c (c)—trained and experienced in a medical specialty, or held out as a specialist—that our legislature has clearly defined. See *Bennett* v. *New Milford Hospital, Inc.*, supra, 300 Conn. 15–16. In other words, if we were to agree with the plaintiff, only board certification would trigger the requirements of § 52-184c (c), since it is alleged that only board certification is available on that website.

amended § 52-190a (a) in 2005 to include this requirement that a plaintiff obtain "the written opinion of a similar health care provider that there appears to be evidence of medical negligence . . . [as] part of a comprehensive effort to control significant and continued increases in malpractice insurance premiums by reforming aspects of tort law, the insurance system and the public health regulatory system." (Citations omitted; internal quotation marks omitted.) *Wilkins* v. *Connecticut Childbirth & Women's Center*, supra, 314 Conn. 728. Thus, to the extent that the plaintiff suggests that she should not be expected to conduct a reasonable inquiry for a defendant health care provider's credentials, we disagree because the plain language of § 52-190a (a) requires her to do so.

Further, in focusing her argument solely on information that was available on the department's website, the plaintiff ignores the existence of other methods for ascertaining a defendant health care provider's credentials. She specifically could have asked Aspen Dental or the defendant for the defendant's credentials or resume, a simple request that she does not allege she undertook unsuccessfully in her affidavit in opposition to the defendant's motion to dismiss. Even if the defendant was not forthcoming with the plaintiff's requests for information on the defendant's credentials, the plaintiff could have filed a bill of discovery. See, e.g., *Journal Publishing Co., Inc.* v. *Hartford Courant Co.*, 261 Conn. 673, 680–81, 804 A.2d 823 (2002) ("The bill of discovery is an independent action in equity for discovery, and is designed to obtain evidence for use in an action other than the one in which discovery is sought. . . . As a power to enforce discovery, the bill is within the inherent power of a court of equity . . . [and] is well recognized . . . . [B]ecause a pure bill of discovery is favored in equity, it should be granted unless there is some well founded objection against the

exercise of the court's discretion. . . . To sustain the bill, the petitioner must demonstrate that what he seeks to discover is material and necessary for proof of, or is needed to aid in proof of or in defense of, another action already brought or about to be brought. . . . Although the petitioner must also show that he has no other adequate means of enforcing discovery of the desired material, [t]he availability of other remedies . . . for obtaining information [does] not require the denial of the equitable relief . . . sought." [Internal quotations marks omitted.]). In sum, the department's website is not, as the plaintiff suggests, the only reliable method of obtaining or verifying a defendant health care provider's credentials.

The plaintiff's argument that she had no way of discovering or verifying the defendant's training and experience as an oral and maxillofacial surgeon is further undercut by Mogelof's identification, in his opinion letter, of notations in the medical file referring to the plaintiff's treatment by an "oral surgeon." Even if the plaintiff was unaware up to that point that the defendant had training as an oral and maxillofacial surgeon, she was put on notice once Mogelof identified the references in the medical file to treatment by an "oral surgeon." Moreover, if the plaintiff had become aware of the defect in the opinion letter before the statute of limitations had expired, she could have requested leave to amend the complaint and cured the defect. See *Gonzales* v. *Langdon*, supra, 161 Conn. App. 510 ("if a plaintiff alleging medical malpractice seeks to amend his or her complaint in order to amend the original opinion letter, or to substitute a new opinion letter . . . the trial court . . . has discretion to permit such an amendment if the plaintiff seeks to amend within the applicable statute of limitations but more than thirty days after the return day"). On the basis of the foregoing, we reject the plaintiff's argument that she had no

way of discovering or verifying the defendant's credentials in order to obtain an opinion letter authored by a similar health care provider.

In sum, it is undisputed that the defendant is trained and experienced in oral and maxillofacial surgery. It is also undisputed that Mogelof is not trained and experienced in, or board certified in, the defendant's specialty of oral and maxillofacial surgery. Because Mogelof was not a "similar health care provider" as defined in § 52-184c (c), the opinion letter attached to the plaintiff's complaint was legally insufficient under § 52-190a (a), requiring dismissal of the case. See *Bennett* v. *New Milford Hospital, Inc.*, supra, 300 Conn. 28; General Statutes § 52-190a (c). Accordingly, the trial court properly granted the defendant's motion to dismiss for lack of personal jurisdiction.

The judgment is affirmed.

In this opinion the other judges concurred.