SHERRI BRADY ET AL. *v.* BONNIE BICKFORD ET AL.
(AC 38581)

Lavine, Elgo and Beach, Js.

Syllabus

The plaintiffs, S and her husband, J, sought to recover damages for, inter alia, intentional infliction of emotional distress, negligent infliction of emotional distress and defamation from the defendants, the parents of S, arising out of a long-running family dispute. The defendants filed special defenses, which alleged that some of the tortious acts alleged in the plaintiffs' complaint were barred by the applicable statute of limitations. After the trial court granted the defendants' motion for summary judgment as to certain claims, the remaining counts were tried to the court, which found that the acts or omissions complained of in the remaining counts that had occurred before January, 2008, were, absent a tolling of the limitations period, barred as untimely. The plaintiffs had argued that the limitations period was tolled by the defendants' continuing course of conduct, some of which occurred within three years of January, 2008, and included testimony at an August, 2009 hearing before the Freedom of Information Commission by the defendant B, S's mother. The defendants had contended that all of B's conduct after January, 2008, was protected by the litigation privilege or absolute immunity, and, thus, no actionable conduct occurred during the limitations period to constitute a continuing course of conduct that tolled the statute of limitations. The court agreed with the defendants and rendered judgment for the defendants, from which the plaintiffs appealed to this court. They claimed, inter alia, that the trial court improperly permitted the defendants to file a motion for summary judgment after the case had been scheduled for trial pursuant to a scheduling order. *Held*:

1. The trial court did not abuse its discretion in granting the defendants' motion to modify the scheduling order and permitting the defendants to file a motion for summary judgment; that court granted the defendants' unopposed request to modify the original scheduling order before the case was scheduled for trial, which did not disrupt the court's docket, although the plaintiffs claimed that the filing of a motion for summary judgment delayed trial, the plaintiffs themselves contributed to any delay by filing their own requests for continuances and mediation, the defendants showed good cause by representing that the case could be resolved on legal grounds, thereby obviating the need for trial, and the plaintiffs did not demonstrate that they were harmed or prejudiced by the fact that the defendants were allowed to file their motion for summary judgment.
2. The plaintiffs could not prevail on their claim that the trial court improperly allowed the defendants to assert the litigation privilege during the trial

to bar their claims because the defendants failed to plead absolute privilege as a special defense: the plaintiffs' claim that the defendants waived the litigation privilege during the argument on their motion for summary judgment and that the defendants' waiver operated throughout the entire action was unavailing, as the defendants, who withdrew privilege as a basis for their motion for summary judgment but did not withdraw the defense of litigation privilege or absolute immunity with respect to the issues to be tried, did not intentionally relinquish their right to raise the litigation privilege at trial when they argued their motion for summary judgment; moreover, this court found unavailing the plaintiffs' claims that it was improper for the trial court to construe the defendants' midtrial assertion of the litigation privilege as a ground to exclude evidence to be a motion to amend their pleadings to conform to the evidence, and that the defendants failed to plead the litigation privilege as a defense and failed to file a motion in limine to preclude certain evidence as required by the trial management order, as the plaintiffs could not claim surprise when the defendants raised the matter of the litigation privilege in their motion for summary judgment two years before trial commenced and the plaintiffs addressed the issue in their response, and subject matter jurisdiction cannot be waived by either party and can be raised at any stage of the proceedings.

3. The plaintiffs could not prevail on their claim that the trial court improperly concluded that their intentional infliction of emotional distress claim was barred by the applicable statute of limitations, which was based on their claim that the statement made by B at the August, 2009 hearing before the commission was not relevant to the proceedings and, therefore, was not privileged; B's testimony before the commission was absolutely privileged, as the commission was a quasi-judicial body and statements made before it were absolutely privileged if relevant to the issue before the commission, the testimony, which repeated her complaints regarding alleged personal and professional wrongdoing by J, bore some relevance to the purpose of the hearing, and because B's testimony was privileged, the plaintiffs could not establish a continuing course of conduct that barred the application of the statute of limitations to their claim.

Argued September 8, 2017—officially released February 27, 2018

Procedural History

Action to recover damages for, inter alia, intentional infliction of emotional distress, and for other relief, brought to the Superior Court in the judicial district of New London, where the court, *Cosgrove*, *J.*, granted the defendant's motion to modify a scheduling order and granted the defendants permission to file a motion

for summary judgment; thereafter, the court, *Zemetis, J.*, granted in part the defendants' motion for summary judgment and rendered judgment thereon; subsequently, the matter was tried to the court, *Zemetis, J.*; judgment for the defendants, from which the plaintiffs appealed to this court. *Improper form of judgment; judgment directed.*

Michael E. Satti, with whom was *Rebecca Malinguaggio*, for the appellants (plaintiffs).

Michael T. Vitali, for the appellees (defendants).

Opinion

LAVINE, J. The claims of emotional distress and defamation at issue in this appeal arise out of a long-running family dispute involving malicious gossip and unsubstantiated allegations of police misconduct that led to two state police internal affairs investigations, two arrests of the same defendant, a protective order, intervention by the Attorney General and the Department of Public Safety, a complaint to the Freedom of Information Commission (commission), and a daughter's refusing further contact with her parents. Following a four day trial to the court, the court concluded that the statements at issue were protected by the litigation privilege and rendered judgment in favor of the defendants. The litigation privilege affords absolute immunity to the speaker and implicates the court's subject matter jurisdiction.[1] We reverse the judgment of the trial court

[1] In *Simms* v. *Seaman*, 308 Conn. 523, 525 n.1, 69 A.3d 880 (2013), our Supreme Court noted that "[t]he terms 'absolute immunity' and 'litigation privilege' [were] used interchangeably throughout [that] opinion. See, e.g., R. Burke, 'Privileges and Immunities in American Law,' 31 S.D. L. Rev. 1, 2 (1985) (defining 'privilege' as 'a special favor, advantage, recognition or status' and 'immunity' as a 'special exemption from all or some portion of the legal process and its judgment')." "It appears that other cases and treatises also use the term absolute privilege interchangeably with those previously mentioned. See, e.g., *Gallo* v. *Barile*, 284 Conn. 459, 466, 935 A.2d 103 (2007) ([t]he effect of an absolute privilege is that damages cannot be recovered for the publication of the privileged statement even if the statement is false and malicious); 53 C.J.S. 166, Libel & Slander: Injurious

and remand the case with direction to render a judgment of dismissal.

The plaintiffs, Sherri Brady (Sherri) and James Brady (James), appeal from the judgment of the court rendered in favor of the defendants, Bonnie Bickford and Kenneth Bickford, who are Sherri's parents. On appeal, the plaintiffs claim that the trial court abused its discretion by permitting the defendants to file a motion for summary judgment in contravention of the scheduling order and to assert the litigation privilege to bar the plaintiffs' claims, and improperly concluded that their claims of intentional infliction of emotional distress were barred by the statute of limitations and their claim of intentional infliction of emotional distress was barred under the continuing course of conduct doctrine and by the statute of limitations.

In its memorandum of decision following trial, which was held in August, 2015, the court, *Zemetis, J.*, made extensive findings of fact pertaining to the plaintiffs' claims. The plaintiffs live in Groton Long Point, are married to one another, and have two children. Sherri is a school teacher; James is a retired state police trooper.[2] The defendants are married to each other and live in Stonington. The parties enjoyed a close relationship until unsubstantiated family gossip led to a state police internal affairs investigation of James in 2000 (2000 investigation). The parties' relationship was further damaged in 2007 when the defendants caused a second state police internal affairs investigation of James to be

Falsehood § 112 (2005) ([a]bsolute privilege confers immunity from liability for defamation regardless of motive).'' (Internal quotation marks omitted.) *Bruno* v. *Travelers Cos.*, 172 Conn. App. 717, 719 n.2, 161 A.3d 630 (2017). Regardless of the frequent interchangeability of the terms, we have tried, where possible, to distinguish between the terms ''absolute immunity'' and ''litigation privilege'' or ''absolute privilege.''

[2] In 2007, James retired from the state police force due to injuries he sustained in the line of duty.

initiated (2007 investigation). Both investigations found that the allegations of wrongdoing were unsubstantiated.

The factual history underlying the plaintiffs' appeal begins in the summer of 2000 when the defendants hosted a family gathering. Given that the events unfolded over a period of fifteen years, we set them out in some detail to provide context for the plaintiffs' claims. During the family gathering, one of Sherri's cousins speculated to others that Sherri, who was then pregnant, was the victim of spousal rape. The cousin later repeated her suspicion to a municipal police officer who reported the accusation to the state police, prompting the 2000 investigation. The defendants were interviewed during the 2000 investigation and stated that they too suspected James of spousal abuse. The plaintiffs learned of the 2000 investigation when state police investigators came to their home days after Sherri had given birth. Sherri denied the allegations against James and was distraught. James arrived during the interview and was angered by the allegations. The investigators found that there was no substance to the allegations against James, and the 2000 investigation was closed.

The court found that the plaintiffs had turned to the defendants for consolation and guidance during the 2000 investigation. The defendants claimed ignorance of the 2000 investigation, despite knowing of it and having offered evidence against James. In 2004, Sherri "perceived" troubling behavior on the part of the defendants, particularly Kenneth Bickford's consumption of alcohol, when they were babysitting her children. She tried to craft a solution but eventually determined that it was best to sever the plaintiffs' relationship with Kenneth Bickford. She forbade Kenneth Bickford to

come to the plaintiffs' home and formalized her decision in a certified letter to him. The defendants did not accept Sherri's decision. On Halloween, 2005, the defendants drove by the plaintiffs' home, which disturbed Sherri, and she asked James to complain to the Groton Long Point police (police). As a result, the police explained Sherri's certified letter to the defendants and cautioned them to stay away from the plaintiffs' property. Bonnie Bickford, however, went to the plaintiffs' home in December, 2005, which upset Sherri. The plaintiffs reported the incident to the police.

The court found that the police report regarding the December, 2005 incident stated that James "requested that Bonnie Bickford be warned to stay off the property. [James] was asked why he did not call when [Bonnie Bickford] was at the property. [James] stated [that Sherri] wished [Bonnie Bickford] not be arrested." (Internal quotation marks omitted.) The court found that the police report concerning the December, 2005 incident does not contain a false statement by James, as Bonnie Bickford later alleged.

Following the December, 2005 incident, Bonnie Bickford went to the police and complained that James mentally and physically abused Sherri. Kenneth Bickford accused James of using his contacts in law enforcement inappropriately. The police investigated the abuse complaints by interviewing Sherri, who denied the accusations of abuse. Although the plaintiffs did not want Bonnie Bickford to be arrested, the police sought a warrant for her arrest and arrested her in April, 2006.

In March, 2006, the defendants sent Sherri flowers and a birthday card at her place of employment. Sherri purposely had kept her new employment from her parents and felt harassed by their contact. She telephoned the resident state trooper for assistance. Trooper Robert Scavello investigated Sherri's complaint against

Bonnie Bickford. As a result of the investigation, Bonnie Bickford was arrested again.

The court also found that in the fall of 2006, the defendants learned for the first time that the accusations of spousal rape of Sherri's cousin were the basis of the 2000 investigation. The defendants contacted the office of then Attorney General Richard Blumenthal and claimed that James' personal and professional misconduct needed to be investigated. In January, 2007, they met with Jeffrey Meyers, an investigator from Blumenthal's office. They suggested that the 2000 investigation was inadequate or a cover-up. Blumenthal directed the Department of Public Safety (department) to conduct another investigation of James. Although none of the defendants' allegations concerned James' duties as a state trooper, the allegation that he had influenced investigations to secure Bonnie Bickford's arrests suggested that he had abused his position as a state trooper. Following a second internal affairs investigation, the state police issued a report dated December 19, 2007, concluding that the allegations of wrongdoing on the part of James were "unfounded."[3]

In 2009, the defendants attempted to obtain a copy of the 2007 investigation report, claiming that they needed it to prove to the plaintiffs that they had not initiated the 2000 investigation.[4] The defendants accused James of personal and professional criminal misconduct during the 2007 investigation, in their communications with Blumenthal, in letters written by their

[3] The plaintiffs' exhibit 10, an excerpt from the Connecticut Department of Public Safety IA Handbook, provides the following definition: "Unfounded— [t]his disposition shall be made whenever there is sufficient evidence to prove that the complaint or incident is false or not factual and did not occur."

[4] In June, 2008, the plaintiffs obtained a prejudgment remedy against the defendants in advance of commencing a lawsuit against them. The plaintiffs, however, never served process on the defendants, and the matter was dismissed in October, 2011, for failure to prosecute with reasonable diligence.

legal counsel, and in Bonnie Bickford's testimony at the August 19, 2009 commission hearing. The court found that, as with much of their testimony, the defendants' claimed basis for their actions did not hold up under close examination.

The department declined to give the defendants a copy of the 2007 investigation report because there was no evidence to support the claims of criminal wrongdoing. Counsel for the department explained to the defendants the statutory basis for the department's refusal to release the report. The defendants, however, appealed to the commission from the department's decision not to release the 2007 investigation report. The commission held a public hearing on August 19, 2009, to determine whether the 2007 investigation report was subject to disclosure. At the hearing, Bonnie Bickford testified that she filed a complaint against James on the ground that he had used his position as a state trooper to have her arrested. The commission dismissed the defendants' complaint on February 24, 2010.[5]

The plaintiffs commenced the present action on January 14, 2011, and filed an amended complaint on August 3, 2011, which sounded in nine counts alleging intentional infliction of emotional distress, negligent infliction of emotional distress, defamation, tortious invasion of privacy, and permanent injunctive relief. The defendants filed an answer in which they denied the material allegations of the amended complaint and alleged generally that the plaintiffs' claims were barred by the statutes of limitations set forth in General Statutes §§ 52-

[5] Following an in camera review of the 2000 investigation report, the commission concluded that the 2000 investigation was thorough, that the record contained no new evidence that supported or confirmed the allegations made by the defendants or attested to the truth or accuracy of the allegations. Because the 2000 investigation report contains uncorroborated allegations that an individual had engaged in criminal activity, it was not subject to disclosure by the commission.

577[6] and 52-584.[7] In response to the plaintiffs' request to revise, on May 23, 2012, the defendants filed revised special defenses alleging in relevant part that "all tortious acts alleged in counts 1, 3, 4, 5, 6 and 7 to have been committed by the defendants prior to January 14, 2008, are barred by the three year statute of limitations set forth in [§ 52-577] . . . [and] all negligent acts alleged in count 2 to have been committed by the defendants prior to January 14, 2009, are barred by the two year statute of limitations set forth in [§ 52-584]." On August 10, 2012, the plaintiffs filed a reply to the defendants' special defenses, denying them and alleging that the continuing course of conduct doctrine applied to toll the statutes of limitations. The defendants did not respond to the plaintiffs' reply. The plaintiffs filed a certificate of closed pleadings and claimed the matter for the trial list on December 18, 2012.

After securing permission from the court to file a motion for summary judgment, the defendants filed the motion on August 20, 2013. Judge Zemetis granted the motion for summary judgment as to counts six through nine of the amended complaint, which alleged invasion of privacy and sought permanent injunctive relief. The court denied the motion for summary judgment as to counts one through five of the amended complaint, which alleged intentional infliction of emotional distress, negligent infliction of emotional distress, and defamation. The case was tried to the court in August, 2015.

Following the presentation of evidence, the court found that paragraph 5 of count one contains the plaintiffs' allegations of wrongdoing against Bonnie Bickford, which are realleged in subsequent counts. The

[6] General Statutes § 52-577 provides: "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."

[7] General Statutes § 52-584 provides in relevant part: "No action to recover damages for injury to person . . . caused by negligence . . . shall be brought but within two years from the date when the injury is first sustained . . . ."

allegations concern Bonnie Bickford's tortious acts in two time periods: acts that Bonnie Bickford committed between October 31, 2005, and March 15, 2006, subparagraphs (a) to (h) of paragraph 5, and acts committed between January, 2007, and February, 2010, subparagraphs (i) to (m) of paragraph 5. The first set of allegations concerns Bonnie Bickford's interaction with Sherri. The second set concerns her interactions with the attorney general's office, the state police internal affairs division, and the commission regarding criminal acts James allegedly committed and his alleged abuse of his authority and office as a state trooper. The defendants pleaded that some of the allegations were barred by the applicable statute of limitations. In reply, the plaintiffs alleged that the continuing course of conduct doctrine tolled the running of the statutes of limitations because Bonnie Bickford's allegedly tortious conduct continued when she testified before the commission. The defendants did not file a response to the continuing course of conduct reply; that is, they did not allege that Bonnie Bickford's testimony before the commission was protected by the litigation privilege.

In its memorandum of decision, the court quoted language from our Supreme Court, which noted that the "purposes of statutes of limitation include finality, repose and avoidance of stale claims and stale evidence." (Internal quotation marks omitted.) *Flannery* v. *Singer Asset Finance Co., LLC*, 312 Conn. 286, 322, 94 A.3d 553 (2014). It found that the plaintiffs had served the present action on the defendants on January 14, 2011, and that the acts or omissions complained of that had occurred before January 14, 2008, were, absent a tolling of the limitations period, barred as untimely.

The plaintiffs had argued that the limitations period was tolled by the defendants' continuing course of conduct, some of which occurred within three years of

January 14, 2008, such as the March 24, 2009 correspondence from the defendants' lawyer to the department seeking a copy of the 2007 investigation report, the defendants' May 4, 2009 complaint to the commission seeking a copy of the 2007 investigation report, Bonnie Bickford's testimony at the August 19, 2009 commission hearing, and the February 24, 2010 commission decision. The defendants had contended that all of Bonnie Bickford's post-January 14, 2008 conduct was protected by the litigation privilege or absolute immunity. Because her statements were privileged, the defendants argued, no actionable conduct occurred during the limitation of action period to constitute a continuing course of conduct that tolled the statute of limitations. The court agreed with the defendants.

The court found that Bonnie Bickford's complaints to the attorney general's office and statements made during the 2007 investigation and during the commission hearing, no matter how offensive, were absolutely privileged and could not support a claim of tortious conduct within the three year statute of limitations. Consequently, the court concluded that the older conduct set out in subparagraphs (a) to (h) of paragraph 5 of count one alleged no conduct within the limitation period, and hence, there was no continuing course of conduct and the plaintiffs' relief was barred by the statute of limitations. The court also concluded that absolute immunity and the applicable statute of limitations barred the plaintiffs' claims alleged in counts two through five of the amended complaint, negligent infliction of emotional distress and defamation as to Sherri and two counts of defamation as to James. The court, therefore, rendered judgment for the defendants, and the plaintiffs appealed. Additional facts will be set forth as necessary.

I

The plaintiffs first claim that the court, *Cosgrove, J.*, abused its discretion by granting the defendants permission to file a motion for summary judgment after the case had been scheduled for trial pursuant to the original scheduling order. We disagree.

The record reveals that the plaintiffs' counsel filed a proposed scheduling order on February 1, 2013, which stated that the pleadings were closed, that dispositive motions were to be filed by June 1, 2013, that responses to dispositive motions were to be filed by July 1, 2013, and that dispositive motions would be marked ready for argument soon thereafter. The case was to be ready for trial in September, 2013. The plaintiffs' counsel proposed several dates for trial between September, 2013, and January, 2014. The following statement, however, was attached to the proposed scheduling order: "Counsel attempted to reach [the defendants' counsel] on multiple occasions regarding the proposed order. It is unknown if [the defendants' counsel] agrees or disagrees with the dates on the proposed scheduling order." Judge Cosgrove approved the scheduling order proposed by the plaintiffs on February 5, 2013.

On August 15, 2013, counsel for the defendants filed a motion to modify the scheduling order. Counsel requested that the date for filing dispositive motions be extended to August 20, 2013, stating that the case was "not presently assigned for trial" and that the "case should be disposed of on legal grounds in the interest of judicial economy . . . ."[8] The plaintiffs did not

[8] Practice Book § 17-44 provides in relevant part: "In any action . . . any party may move for a summary judgment as to any claim or defense as a matter of right at any time if no scheduling order exists and the case has not been assigned for trial. If a scheduling order has been entered by the court, either party may move for summary judgment as to any claim or defense as a matter of right by the time specified in the scheduling order. . . ."

oppose the motion to modify. Judge Cosgrove granted the motion and ordered the defendants to file their motion for summary judgment by August 20, 2013. The defendants complied. The plaintiffs filed their own motions for extension of time and responded to the defendants' motion for summary judgment on October 30, 2013. Both parties subsequently filed serial requests for extensions of time and memoranda of law regarding the summary judgment motion.[9] Judge Zemetis heard oral arguments on the motion for summary judgment on December 19, 2014, and, on March 13, 2015, issued a memorandum of decision, granting summary judgment in part. Trial commenced in August, 2015.

On appeal, the plaintiffs argue that Judge Cosgrove abused his discretion by permitting the defendants to file a motion for summary judgment because the defendants had failed to demonstrate good cause to do so. They also claim that permitting the defendants to file a motion for summary judgment necessitated a lengthy continuance of the trial date.

We first set forth the applicable standard of review. "A motion for continuance is addressed to the discretion of the trial court, and its ruling will not be overturned absent a showing of a clear abuse of that

[9] In February, 2014, counsel for the defendants filed a motion for continuance of oral argument on the motion for summary judgment as counsel for both parties were recovering from surgery. In April, 2014, and again in June, 2014, the plaintiffs filed supplemental memoranda of law in support of their objection to the defendants' motion for summary judgment. In an October 1, 2014 letter that reveals that in May, 2014, the parties participated in mediation before the court, *Martin, J.*, the plaintiffs' counsel requested that Judge Cosgrove hold another status conference concerning a resumption of mediation. *Significantly, the plaintiffs' counsel also stated that the defendants' motion for summary judgment "as to the slander claim is based on a special defense of 'privilege,' although the defendants never filed any such special defense in either their October 7, 2011 answer and special defenses . . . or their amended answer and special defenses dated May 23, 2012."* (Emphasis added.) Judge Cosgrove denied without prejudice the request for a continuance as the case was set down for trial.

discretion." (Internal quotation marks omitted.) *Irving* v. *Firehouse Associates, LLC*, 82 Conn. App. 715, 719, 846 A.2d 918 (2004). "Every reasonable presumption in favor of the proper exercise of the trial court's discretion will be made. . . . In deciding whether to grant a continuance, the court of necessity balances several factors, including the importance of effective case flow management and the relative harm or prejudice to both parties." (Citation omitted; internal quotation marks omitted.) Id., 720.

On the basis of our review of the foregoing procedural history, we conclude that the court did not abuse its discretion by permitting the defendants to file a motion for summary judgment. When the plaintiffs' counsel submitted the scheduling order for the court's approval on February 1, 2013, he acknowledged that he had not been able to communicate with the defendants' counsel and did not know whether counsel agreed to the proposed schedule. Although the defendants did not file their motion for summary judgment in accordance with Judge Cosgrove's order, they filed a request to modify the scheduling order, stating that the case had not yet been assigned for trial and that the case should be disposed of on legal grounds in the interest of judicial economy. The plaintiffs did not object to the motion to modify. Judge Cosgrove granted the motion to modify and issued a new scheduling order, which the plaintiffs themselves did not follow. The plaintiffs twice filed a request for permission to extend the time in which to file an objection to the motion for summary judgment. See footnote 9 of this opinion. Thereafter, both parties filed numerous motions for continuances and attempted to resolve their dispute through mediation.

At the time Judge Cosgrove ruled on the motion to modify the scheduling order, the case was not yet scheduled for trial and granting it did not disrupt the court's docket. Although the plaintiffs claim that the filing of

a motion for summary judgment delayed trial, the plaintiffs themselves contributed to any delay by filing their own requests for continuances and mediation. As to good cause, the defendants represented that the case could be resolved on legal grounds, thereby obviating the need for trial. Moreover, the plaintiffs have not demonstrated that they were harmed or prejudiced by the fact that the court permitted the defendants to file their motion for summary judgment. We conclude that Judge Cosgrove did not abuse his discretion by granting the motion to modify the scheduling order and permitting the defendants to file a motion for summary judgment.

II

The plaintiffs claim that it was error for Judge Zemetis to allow the defendants to assert the litigation privilege during trial to bar their claims because the defendants had failed to plead absolute privilege as a special defense.[10] The defendants argue that they were not required to plead absolute privilege as a special defense because it implicates subject matter jurisdiction. The plaintiffs cannot prevail on their claim of legal error. Although a conditional or qualified privilege is an affirmative defense in a defamation action and must be specially pleaded; *Miles* v. *Perry*, 11 Conn. App. 584, 594 n.8, 529 A.2d 199 (1987); the litigation privilege implicates a trial court's subject matter jurisdiction. *Bruno* v. *Travelers Cos.*, 172 Conn. App. 717, 719, 161

[10] On appeal, the plaintiffs articulated two interrelated claims as to absolute privilege. They claim that (1) the court erred in finding that the defendants' "midtrial assertion of, in effect, a motion in limine was a motion to amend, wherein the defendants' counsel attempted to apply an absolute privilege to the introduction of any evidence regarding the defendants' statements at the [commission] hearing in August, 2009" and (2) the "defendants waived any claim of privilege by failing to plead a special defense where the defendants had waived it during the oral argument on the defendants' summary judgment motion in December, 2014, and never sought, even after trial, to move to amend its special defenses to add such a defense."

A.3d 630 (2017). A claim that the court lacks subject matter jurisdiction "may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Internal quotation marks omitted.) *Guerra* v. *State*, 150 Conn. App. 68, 74–75, 89 A.3d 1028, cert. denied, 314 Conn. 903, 99 A.3d 1168 (2014).

Whether a claim is barred by absolute privilege is a question of law to be determined by the court. See generally *Nelson* v. *Tradewind Aviation, LLC*, 155 Conn. App. 519, 537, 111 A.3d 887, cert. denied, 316 Conn. 918, 113 A.3d 1016 (2015). If a court lacks subject matter jurisdiction, it must dismiss the case. See *Fennelly* v. *Norton*, 103 Conn. App. 125, 133–34, 931 A.2d 269, cert. denied, 284 Conn. 918, 931 A.2d 936 (2007).

The following procedural history is relevant to the plaintiffs' claim. In their memorandum in support of their motion for summary judgment, the defendants stated that "all of the plaintiffs' claims are untimely and otherwise fail as a matter of law." They argued, in part, that any statements they may have made at the commission's August, 2009 hearing enjoy a shield of absolute immunity that is a complete defense to a defamation claim, as witnesses in a court of law are privileged when testifying in relation to the subject matter of the litigation.

When the parties appeared before Judge Zemetis to argue the motion for summary judgment, counsel for the plaintiffs argued that the court should not consider the defendants' position with respect to the litigation privilege because the defendants had failed to plead it as an affirmative defense. In response, counsel for the defendants stated that the defendants were withdrawing their privilege argument for purposes of the summary judgment motion.[11]

[11] Specifically, counsel for the defendants stated: "Just to simplify this argument and cut to the chase, it was never a flagship argument in the eyes of the defendants, but more specifically, we concede the point. The defendants did not plead a special defense of privilege, therefore, are not

At trial, the plaintiffs proffered the testimony of retired State Police Lieutenant James Kenefick regarding the 2007 investigation. The testimony included Bonnie Bickford's statements accusing James of spousal abuse and professional wrongdoing. The defendants objected to the testimony on the ground of relevance, asserting that Bonnie Bickford's statements regarding James' alleged wrongdoing were privileged.[12] The plaintiffs argued that the testimony was relevant to their claims of intentional and negligent infliction of emotional distress. The plaintiffs' counsel also claimed surprise, stating that the defendants had never pleaded absolute privilege as a special defense and had waived any reliance on it during the argument on the motion for summary judgment.

The court stated that it understood that the defendants were arguing that they did not need to plead the litigation privilege as a defense because they were asserting it as a basis to object to the admissibility of evidence. The court also stated that it was not in a position to rule on the matter because the parties had failed to raise it in their trial management documents. Given that Kenefick was present, however, the court permitted him to testify and reserved its decision. Kenefick testified about the 2007 investigation at length over two days.

pursuing summary judgment based on any claim of absolute or qualified privilege, and would agree that summary judgment is not appropriate on that ground. Nevertheless, the defendants would argue that summary judgment is appropriate on statute of limitations grounds."

[12] Counsel for the defendants stated: "The internal affairs investigation is a quasi-judicial proceeding. . . . [S]tatements made in such proceedings by witnesses are subject to absolute immunity. This immunity is true whether . . . they are under oath or not under oath, whether they are uttered during the context of the proceedings or in any way leading up to it. Anything stated by the Bickfords in a quasi-judicial proceeding is something for which they have absolute immunity and, as it is something for which they have absolute immunity, there is no relevance in going through it."

In its memorandum of decision, the court stated that, although the plaintiffs argued at trial that the defendants had waived the litigation privilege by failing to plead it as a special defense and had withdrawn absolute privilege at the hearing on their motion for summary judgment, the defendants had asserted the litigation privilege at the start of trial and had sought to conform their pleadings to the proof. The court continued that it had reserved its decision on what it believed to be the defendants' motion to amend their pleadings. In its memorandum of decision, the court rejected the plaintiffs' assertion that the defendants had withdrawn absolute privilege from the case. It found that during argument on their motion for summary judgment, the defendants "did not withdraw, relinquish, abandon or waive that privilege from the entire case." (Emphasis omitted.)

In permitting the defendants to amend their pleading during trial, the court noted the factors a court is to consider when passing on a motion to amend. See *Congress Street Condominium Assn., Inc.* v. *Anderson*, 132 Conn. App. 536, 548, 33 A.3d 274 (2011) (*Alvord*, *J.*, dissenting) (factors to consider in passing on motion to amend are length of delay, fairness to opposing parties and negligence, if any, of party offering amendment; motion to amend is addressed to trial court's discretion which may be exercised to restrain amendment of pleadings to prevent unreasonable delay of trial).

The court concluded that the litigation privilege cannot be waived because it implicates subject matter jurisdiction; and the defendants' very late assertion of it did not unduly prejudice the plaintiffs because they were unable to assert their claims against the defendants by statements *other* than those covered by the litigation privilege.

We now turn to the plaintiffs' claim that the court improperly permitted the defendants to amend their

pleadings to allege the special defense of litigation privilege. We review such claims pursuant to an abuse of discretion standard. See id.

Practice Book § 10-50 provides in relevant part that "[n]o facts may be proved under either a general or special denial except such as show that the plaintiff's statements of fact are untrue. *Facts which are consistent with such statements but show, notwithstanding, that the plaintiff has no cause of action, must be specially alleged.* Thus, accord and satisfaction, arbitration and award, duress, fraud, illegality not apparent on the face of the pleadings, infancy, that the defendant was non compos mentis, payment . . . release, the statute of limitations and res judicata must be specially pleaded . . . ." (Emphasis added.)

Our Supreme Court has stated that "[p]leadings have their place in our system of jurisprudence. While they are not held to the strict and artificial standard that once prevailed, we still cling to the belief, even in these iconoclastic days, that no orderly administration of justice is possible without them." (Internal quotation marks omitted.) *Foncello* v. *Amorossi*, 284 Conn. 225, 233, 931 A.2d 924 (2007). "Privilege is an affirmative defense in a defamation action and must, therefore, be specifically pleaded by the defendant." *Miles* v. *Perry*, supra, 11 Conn. App. 594 n.8.; see also *Monczport* v. *Csongradi*, 102 Conn. 448, 450–51, 129 A. 41 (1925); *Haight* v. *Cornell*, 15 Conn. 73, 82 (1842). "The purpose of pleading is to apprise the court and opposing counsel of the issues to be tried, not to conceal basic issues until the trial is under way." (Internal quotation marks omitted.) *Pawlinski* v. *Allstate Ins. Co.*, 165 Conn. 1, 6, 327 A.2d 583 (1973). "It is for the court to determine, as a matter of law, whether the defendant made the defamatory statements while acting on an occasion of privilege, as in the bona fide discharge of a public or

private duty." *Miles* v. *Perry*, supra, 594 n.8, citing *Flanagan* v. *McLane*, 87 Conn. 220, 222, 87 A. 727 (1913).

A

The plaintiffs claim that the defendants waived the litigation privilege during the argument on their motion for summary judgment and that the defendants' waiver operated throughout the entire case. We disagree.

"Waiver involves an intentional relinquishment of a known right. . . . [It] does not have to be express, but may consist of acts or conduct from which waiver may be implied. . . . In other words, waiver may be inferred from the circumstances if it is reasonable to do so." (Citation omitted; internal quotation marks omitted.) *Banks Building Co., LLC* v. *Malanga Family Real Estate Holding, LLC*, 102 Conn. App. 231, 239, 926 A.2d 1 (2007). Whether a waiver has occurred is a question of fact for the trier of fact. See *Ridgefield* v. *Eppoliti Realty Co.*, 71 Conn. App. 321, 340, 801 A.2d 902, cert. denied, 261 Conn. 933, 806 A.2d 1070 (2002). An appellate court will not disturb the trial court's finding unless it is clearly erroneous. See *Naftzger* v. *Naftzger & Kuhe, Inc.*, 26 Conn. App. 521, 526, 602 A.2d 606 (1992).

After reviewing the record, we agree with the court that the defendants withdrew privilege as the basis for their motion for summary judgment and relied on their statutes of limitations special defenses at that time. The court found that the defendants did not withdraw their defense of litigation privilege or absolute immunity with respect to the issues to be tried. We therefore conclude that the defendants did not intentionally relinquish their right to raise the litigation privilege at *trial* when they argued their motion for summary judgment.

B

The plaintiffs claim that it was improper for the court to construe the defendants' midtrial assertion of the

litigation privilege as a ground to exclude evidence to be a motion to amend their pleadings to conform to the evidence. The plaintiffs argue that not only did the defendants fail to plead the litigation privilege as a defense, but also that they failed to file a motion in limine to preclude certain evidence as required by the trial management order. We disagree.

The plaintiffs contend that had the defendants pleaded absolute privilege as a special defense, they would have tried the case differently and saved attorney's fees. The defendants raised the matter of the litigation privilege in their motion for summary judgment that was filed in August, 2013, two years before trial commenced. In their second supplemental memorandum of law in opposition to the defendants' motion for summary judgment, the plaintiffs addressed the defendants' litigation privilege argument. They cannot plausibly claim surprise. If the plaintiffs were uncertain of the defendants' position, they could have raised it as an issue in their trial management document and brought it to the attention of the court, which they failed to do. More importantly, however, "[s]ubject matter jurisdiction cannot be waived by any party and can be raised at any stage of the proceedings." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *New London*, 282 Conn. 791, 802, 925 A.2d 292 (2007). Accordingly, because absolute immunity implicates the trial court's subject matter jurisdiction, once the trial court determined that the doctrine of absolute immunity applied, it should have dismissed the case.

III

The plaintiffs next claim that the court improperly concluded that their intentional infliction of emotional distress claim was barred by the statute of limitations. They assert that the statement Bonnie Bickford made at the hearing before the commission was not relevant

to the proceedings and, therefore, was not privileged. We disagree.

The plaintiffs' claim is predicated on Bonnie Bickford's testimony before the commission on August 19, 2009, when she stated "that's correct," in response to a leading question from her counsel. Counsel had asked Bonnie Bickford whether she had complained that James used his influence as a state trooper to have her arrested falsely on two occasions. The court found Bonnie Bickford's testimony "troubling" because the issue before the commission was whether the 2007 investigation report should be disclosed, not the basis of her complaint to the attorney general and state police. The court found that Bonnie Bickford's repeated assertion that James misused his office as a state trooper to influence the legal process implicates the arresting officer, the assistant state's attorney, and the Superior Court judge in a conspiracy to unlawfully arrest her.[13]

On appeal, the plaintiffs claim that Bonnie Bickford's testimony about the nature of her complaint was not relevant to the commission's decision-making, but rather was a gratuitous attempt to defame James one more time. The defendants argue that the statement was relevant to explain why the defendants wanted the 2007 investigation report.[14] Despite its finding that the purpose of the commission hearing was to determine whether the 2007 investigation report should be disclosed, the court found that the question and Bonnie Bickford's response were within the ambit of information relevant to the dispute before the commission. The court stated that the bounds of relevance with respect to the doctrine of absolute privilege are more generous

[13] The court also found that Bonnie Bickford had no evidence to support her suspicion and accusation.

[14] The defendants wanted the 2007 investigation report to prove that they did not initiate the 2000 investigation.

than the relevance of evidence at trial. Bonnie Bickford's statements before the commission, therefore, were pertinent because she identified herself as the party whose complaints, and their nature, initiated the 2007 investigation. She explained to the commission that although she had initiated the 2007 investigation, she had never received written notification of the investigation's findings. Her statements at the commission hearing, therefore, were pertinent in the context of her request for the document, even though they were not pertinent to whether her request for the document should be granted. The court concluded that Bonnie Bickford's statements at the commission hearing, however offensive, are absolutely privileged and therefore cannot support a claim of tortious conduct within the three year statute of limitations.

"There is a long-standing common law rule that communications uttered or published in the course of judicial proceedings are absolutely privileged so long as they are in some way pertinent to the subject of the controversy. . . . The effect of an absolute privilege is that damages cannot be recovered for a defamatory statement even if it is published falsely and maliciously. . . . The policy underlying the privilege is that in certain situations the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements. . . .

"The judicial proceedings to which the immunity attaches has not been defined very exactly. It includes any hearing before a tribunal which performs a judicial function, ex parte or otherwise, and whether the hearing is public or not. It includes for example, lunacy, bankruptcy, or naturalization proceedings, and an election contest. It extends also to the proceedings of many administrative officers, such as boards and commissions, so far as they have powers of discretion in

applying the law to the facts which are regarded as judicial or quasi-judicial, in character. . . . This privilege extends to every step of the proceeding until final disposition. . . . [L]ike the privilege which is generally applied to pertinent statements made in formal judicial proceedings, an absolute privilege also attaches to relevant statements made during administrative proceedings which are quasi-judicial in nature." (Citations omitted; internal quotation marks omitted.) *Petyan* v. *Ellis*, 200 Conn. 243, 245–46, 510 A.2d 1337 (1986). "The absolute privilege for statements made in the course of a judicial proceeding applies equally to defamation claims . . . and claims for intentional infliction of emotional distress." (Citation omitted.) *Gallo* v. *Barile*, 284 Conn. 459, 466, 935 A.2d 103 (2007).

The plaintiffs do not challenge the court's finding that the commission was a quasi-judicial body and that statements made before it were absolutely privileged, if relevant to the issue before the commission. Instead, they claim that Bonnie Bickford's repeating of her complaints regarding alleged personal and professional wrongdoing by James was irrelevant to the issue before the commission. The defendants do not challenge the court's finding that Bonnie Bickford knew or should have known that two state police internal affairs investigations found that the allegations against James were unsubstantiated. We agree with the court that the testimony bore some relevance to the purpose of the hearing and was, therefore, absolutely privileged. Because Bonnie Bickford's testimony was privileged, the plaintiffs cannot establish a continuing course of conduct that bars the application of the statute of limitations to their claims. That is, no actionable conduct occurred within the applicable statute of limitations, and the continuing course of conduct doctrine, therefore, cannot be applied to allow recovery for conduct outside the statute of limitations.

The form of the judgment is improper, the judgment is reversed and the case is remanded with direction to render judgment of dismissal.

In this opinion the other judges concurred.

LITA WICKSER TOLAND *v.* JOHN GERARD TOLAND (AC 39241)

Lavine, Sheldon and Elgo, Js.

Syllabus

The plaintiff appealed to this court from the judgment of the trial court dissolving her marriage to the defendant after the court denied her motion to vacate an arbitration award and granted the defendant's motion to confirm the award, which divided the parties' assets and awarded the defendant attorney's fees. *Held*:

1. The trial court properly construed the parties' submission to the arbitrator as unrestricted with regard to alimony and property division, and correctly declined the plaintiff's request that it engage in a more searching review of those issues; the parties' arbitration agreement broadly authorized the arbitrator to resolve the parties' dissolution of marriage action, including, but not limited to, issues of alimony, property division, and attorney's fees and costs, and provided for limited appellate review of the arbitrator's legal conclusions, but did not expand the scope of judicial review to include factual determinations, and although courts will conduct a more searching review of an arbitrator's conclusions of law where the parties agreed to that, the parties here did not do so, and the plaintiff's attack on the arbitrator's legal conclusions was, in reality, simply a disagreement with the arbitrator's factual determinations regarding alimony and the division of property.
2. The plaintiff could not prevail on her claim that the arbitrator's award violated public policy and should have been vacated because the arbitrator failed to properly apply the statutory (§§ 46b-81 and 46b-82) factors regarding how alimony is awarded and property is divided; the plaintiff failed to provide any authority holding that the proper application of §§ 46b-81 and 46b-82, which are intensely factual in application, requires any particular result, and, thus, because she failed to identify a clear public policy allegedly violated by the arbitrator's award, the trial court properly refused to review the award de novo.
3. The plaintiff's claim that the arbitrator's award violated statute (§ 52-418 [a] [2]) due to the arbitrator's evident partiality was unavailing: the arbitrator's admonishments and warnings to the plaintiff as to the imposition of sanctions against her did not demonstrate evident partiality, as

the arbitrator appropriately attempted to control the proceedings and keep the testimony relevant and focused in light of the fact that the plaintiff was combative with counsel and had provided answers that were nonresponsive, the record belied the plaintiff's claim that evident partiality existed on the basis of the arbitrator's failure to inquire into the plaintiff's ability to proceed with the hearing, the award itself and the arbitrator's denial of the plaintiff's request for a recess did not amount to evidence of bias, and the plaintiff failed to provide any authority to support her claim that certain editorial comments in the arbitrator's decision demonstrated evident partiality; moreover, the plaintiff failed to establish her claim that the arbitrator acted in manifest disregard of the law, in violation of § 52-418 (a) (4), which was based on her claim that the arbitrator had failed to properly apply the facts or consider all of criteria within §§ 46b-81 and 46b-82, the arbitrator's decision having stated that all statutory criteria and case law regarding the issues presented for dissolution were considered.

4. The plaintiff's claim that the trial court committed plain error by not vacating the arbitration award was not reviewable, the plaintiff having failed to brief her claim adequately.
5. The plaintiff could not prevail on her claim that the arbitrator improperly awarded the defendant attorney's fees pursuant to statute (§§ 46b-62 and 46b-82); the plaintiff failed to specify why the trial court should have vacated the arbitrator's award under any of the three viable grounds for vacating an arbitrator's award involving an unrestricted submission, and her claim amounted to nothing more than disagreement with the award of attorney's fees.

Argued October 19, 2017—officially released February 27, 2018

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendant filed a cross complaint; thereafter, the court, *Hon. Stanley Novack*, judge trial referee, granted the plaintiff's motion to approve the parties' agreement to engage in arbitration; subsequently, the defendant filed a motion to confirm the arbitration award, and the plaintiff filed a motion to vacate the award; thereafter, the matter was tried to the court, *Colin, J.*; judgment granting the defendant's motion to confirm, denying the plaintiff's motion to vacate, and dissolving the parties' marriage

and granting certain other relief, from which the plaintiff appealed to this court. *Affirmed.*

Michael V. Longo, with whom were *David V. DeRosa* and, on the brief, *Kenneth A. Votre* and *Jeffrey A. Denner*, pro hac vice, for the appellant (plaintiff).

Charles D. Ray, with whom, on the brief, was *Brittany A. Killian*, for the appellee (defendant).

Opinion

LAVINE, J. The plaintiff, Lita Wickser Toland, appeals from the judgment of the trial court dissolving her marriage to the defendant, John Gerard Toland, rendered after the court denied her motion to vacate and granted the defendant's motion to confirm an arbitrator's award. On appeal, the plaintiff claims (1) that the arbitration proceeding involved a restricted submission, warranting expanded judicial review of the arbitrator's award of alimony and property division. Alternatively, she argues that the trial court improperly confirmed the award because: (2) the award violates the public policy underlying General Statutes §§ 46b-81 and 46b-82 and case law construing those statutes; (3) the award contravenes General Statutes § 52-418 given the arbitrator's evident partiality and manifest disregard of the law; (4) the trial court committed plain error by confirming the arbitrator's decision; and (5) the arbitrator improperly awarded attorney's fees. We affirm the judgment of the trial court.

The following facts and procedural history are relevant. The parties were married on August 22, 1987. In September, 2014, the plaintiff commenced the underlying dissolution action. After litigating the matter in the trial court for approximately sixteen months, the parties, on January 5, 2016, agreed to submit the matter to arbitration. On that same day, the court, *Hon. Stanley Novack*, judge trial referee, granted the plaintiff's

motion to approve the arbitration agreement. See General Statutes § 46b-66 (c). Pursuant to their agreement, the parties consented to have a retired judge of the Superior Court serve as the arbitrator. A two day arbitration proceeding took place on February 1 and 2, 2016.

The parties agreed that Connecticut law would govern the substantive issues to be decided by the arbitrator. Additionally, paragraph 5 of the parties' agreement provided: "Issues: The parties shall arbitrate the dissolution of marriage action, including, but not limited to issues of alimony, property division for both assets and liabilities, lump sum alimony, and attorney fees and costs. The parties will stipulate to the maximum Child Support Guidelines amount for one child. The arbitrator shall consider this amount in making the appropriate alimony determination." Paragraph 11 of the agreement provided in relevant part: "Arbitration Award . . . . The legal conclusions and applicability of what is considered property or income for alimony shall be reserved and subject to appeal by either party within the appeal period commencing upon the approval of the arbitrator's decision by the Superior Court. The findings of fact made by the arbitrator shall not be reserved as an issue for appeal. The parties are separately acknowledging this in Schedule A appended hereto."[1]

The arbitrator rendered her award on March 10, 2016. She awarded the plaintiff alimony, divided the parties' marital and premarital assets, and awarded the defendant attorney's fees.[2] On March 22, 2016, the defendant

[1] Schedule A of the agreement provided: "Both parties acknowledge that they have read the provisions of this arbitration agreement and in particular the provisions of paragraph 11. Neither party shall challenge the right of appeal as set forth in paragraph 11 and may only seek an appeal consistent with the provisions of paragraph 11."

[2] The parties also asked the arbitrator to determine how their children's college tuition should be paid. Neither party challenges the arbitrator's award with respect to payment of their children's college tuition. The parties also do not challenge the arbitrator's decision with respect to awards associ-

filed a motion to confirm the arbitration award. See General Statutes §§ 52-417 and 52-420; see also General Statutes § 46b-66 (c). The plaintiff filed her motion to vacate on March 24, 2016. See General Statutes §§ 52-418 and 52-420.

In her memorandum of law in support of the motion to vacate, the plaintiff argued the same claims she presses on appeal, including her contention that the agreement "specifically provided for judicial review of all . . . issues of law in the award, as well as the application of Connecticut law by the arbitrator." Thus, she argued that the submission to arbitration "was clearly not unrestricted." The defendant opposed the plaintiff's motion to vacate and argued that the plaintiff misunderstood paragraph 11 of the parties' agreement. According to the defendant, paragraph 11 "allow[ed] a party to appeal after confirmation of the arbitration award on the limited issue of what is considered property or income for alimony purposes. In other words, this provision *allows an appeal to the Appellate Court*, not the Superior Court, on the sole issue of the *classification* of something as property or income *for alimony* purposes." (Emphasis added.) Thus, the defendant took the position that judicial review of the award was limited because "[t]he plaintiff ha[d] not claimed . . . that there was a mischaracterization of any of the parties' holdings as property or income for alimony purposes."

The court, *Colin, J.*, denied the plaintiff's motion to vacate and granted the defendant's motion to confirm on May 16, 2016.[3] The court found that the plaintiff had failed to prove her claims, but did not specifically address whether the agreement involved a restricted

ated with "life insurance," "health insurance and expenditures," "club memberships," and "taxes and dependency exemptions."

[3] The court also dissolved the parties' marriage and incorporated the arbitration decision into the dissolution decree when it granted the defendant's motion to confirm the award.

or an unrestricted submission. The plaintiff appeals from the judgment, in which the court granted the defendant's motion to confirm and dissolved the parties' marriage. Additional facts will be set forth as necessary.

I

We first address our standard of review. The plaintiff claims that the arbitration proceeding involved a restricted submission, warranting expanded judicial review of the arbitrator's award of alimony and property division. She asserts that her appeal "challenges the *legal conclusions* of [the arbitrator] as to alimony and property division . . . ." (Emphasis added.) According to her, these issues were explicitly reserved for appellate review. Therefore, she argues, we should review her appeal under the abuse of discretion standard that is generally applicable to domestic relations matters. See, e.g., *Gervais* v. *Gervais*, 91 Conn. App. 840, 843–44, 882 A.2d 731, cert. denied, 276 Conn. 919, 888 A.2d 88 (2005).

The defendant appears to agree that the "conclusions of law made by the arbitrator are specifically subject to judicial review in the agreement . . . ." According to the defendant, however, the plaintiff simply challenges "the arbitrator's application of the evidence to the various factors set forth in General Statutes §§ 46b-81 and 46b-82. Thus, her claim falls within the unrestricted portion of the agreement and should be reviewed as would any other arbitration award." In other words, he argues that we should apply standard rules governing review of arbitration awards because the plaintiff's appeal does not implicate the arbitrator's legal conclusions.[4] We agree with the defendant.

[4] We note that paragraph 11 of the agreement is arguably ambiguous as to what the parties reserved for appellate review. For purposes of the present appeal, however, we accept the parties' interpretation of paragraph 11 as carving out the arbitrator's "legal conclusions" for judicial review.

"Our analysis of the [plaintiff's] claim is guided by the well established principles of law governing arbitration. Arbitration is a creature of contract and the parties themselves, by the terms of their submission, define the powers of the [arbitrator]. . . .

"Because we favor arbitration as a means of settling private disputes, we undertake judicial review of arbitration awards in a manner designed to minimize interference with an efficient and economical system of alternative dispute resolution. . . . Under an unrestricted submission, [an arbitrator's] decision is considered final and binding; thus the courts will not review the evidence considered by the [arbitrator] nor will they review the award for errors of law or fact. . . . Such a limited scope of judicial review is warranted given the fact that the parties voluntarily bargained for the decision of the arbitrator and, as such, the parties are presumed to have assumed the risks of and waived objections to that decision. . . . It is clear that a party cannot object to an award which accomplishes precisely what the [arbitrator was] authorized to do merely because that party dislikes the results." (Citations omitted; internal quotation marks omitted.) *LaFrance* v. *Lodmell*, 322 Conn. 828, 850–51, 144 A.3d 373 (2016).

"The submission constitutes the charter of the entire arbitration proceedings and defines and limits the issues to be decided." (Internal quotation marks omitted.) *Schoonmaker* v. *Cummings & Lockwood of Connecticut, P.C.*, 252 Conn. 416, 454, 747 A.2d 1017 (2000). "When the submission to the arbitrator contains express language restricting the breadth of issues, reserving explicit rights, or conditioning the award on court review, the submission is deemed restricted and we engage in de novo review." (Internal quotation marks omitted.) *Office of Labor Relations* v. *New England Health Care Employees Union, District 1199*,

AFL-CIO, 288 Conn. 223, 229, 951 A.2d 1249 (2008); see also *Garrity* v. *McCaskey*, 223 Conn. 1, 5, 612 A.2d 742 (1992). "In the absence of any such qualifications, an agreement is unrestricted." (Internal quotation marks omitted.) *LaFrance* v. *Lodmell*, supra, 322 Conn. 851.

"The significance, therefore, of a determination that an arbitration submission was unrestricted or restricted is not to determine what the [arbitrator is] obligated to do, but to determine the scope of judicial review of what [he or she has] done. Put another way, the *submission* tells the [arbitrator] what [he or she is] obligated to decide. The determination by a court of whether the submission was restricted or unrestricted tells the court what its scope of review is regarding the [arbitrator's] decision." (Emphasis in original.) *United States Fidelity & Guaranty Co.* v. *Hutchinson*, 244 Conn. 513, 520, 710 A.2d 1343 (1998). "If the parties engaged in voluntary, but restricted, arbitration, the trial court's standard of review would be broader *depending on the specific restriction*." (Emphasis added.) *Maluszewski* v. *Allstate Ins. Co.*, 34 Conn. App. 27, 32, 640 A.2d 129, cert. denied, 229 Conn. 921, 642 A.2d 1214 (1994), overruled in part on other grounds by *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, 310 Conn. 38, 53 n.13, 74 A.3d 1212 (2013).[5]

[5] As previously noted, the trial court denied the plaintiff's motion to vacate, but did not address whether the submission was restricted or unrestricted. Whether the submission is restricted or unrestricted is a key determination that defines the scope of judicial review. See, e.g., *LaFrance* v. *Lodmell*, supra, 322 Conn. 852. Although the plaintiff did not seek an articulation; see Practice Book § 66-5; see also Practice Book § 61-10; this issue is properly before us and we therefore address it.

The trial court cited *Gary Excavating Co.* v. *North Haven*, 160 Conn. 411, 413, 279 A.2d 543 (1971), for the proposition that the burden rests with the party challenging an arbitration award to produce sufficient evidence to invalidate it. That case "examine[d] the submission and the award to determine whether the award [was] in conformity with the submission so as to constitute a mutual, final and definite award upon the subject matter submitted." Id. Case law subsequent to *Gary Excavating Co.* conducts such analysis under § 52-418, which applies when a party attempts to vacate *unrestricted* submissions. See, e.g., *Harty* v. *Cantor Fitzgerald & Co.*, 275

The plaintiff argues that the arbitrator's "findings of fact when applied to the law" governing alimony awards and the division of property amount to legal conclusions. She therefore claims that the parties' agreement requires expanded judicial review of those issues and asks us to review the arbitrator's award for an abuse of discretion. Courts will conduct a more searching review of an arbitrator's conclusions of law where the parties agree to that; see, e.g., *United Illuminating Co.* v. *Wisvest-Connecticut, LLC*, 259 Conn. 665, 670 n.1, 791 A.2d 546 (2002); but the plaintiff, here, is not attacking conclusions of law. See, e.g., *Lynch* v. *Lynch*, 153 Conn. App. 208, 227, 100 A.3d 968 (2014) (alimony "is *damages* to compensate for loss of marital support and maintenance" and "represents *the court's finding*, measured in dollars, of the financial needs of the receiving spouse" [emphasis added; internal quotation marks omitted]), cert. denied, 315 Conn. 923, 108 A.3d 1124, cert. denied, U.S. , 136 S. Ct. 68, 193 L. Ed. 2d 66 (2015); *Lynch* v. *Lynch*, 135 Conn. App. 40, 51 n.9, 43 A.3d 667 (2012) (rejecting plaintiff's invitation to apply plenary review to his challenge to court's distribution of intellectual property because, inter alia, "the decision of the court . . . *constituted a factual determination*" and noting that "[t]he court did not conduct a legal analysis or consider a mixed question of law or fact in making

Conn. 72, 84–88, 881 A.2d 139 (2005). The court also stated that the plaintiff had "failed to produce sufficient evidence to satisfy any of her claims." If the court treated the submission as restricted, it simply would have reviewed the arbitrator's award to determine whether the arbitrator abused her discretion in awarding alimony and dividing the parties' property without reference to the plaintiff's failure to produce "evidence" to prove her claims. Therefore, we construe the trial court's judgment as having treated the submission as unrestricted.

"[W]hether the trial court engaged in the correct level of review of the arbitrator's decision presents a question of law over which our review is plenary." *HH East Parcel, LLC* v. *Handy & Harman, Inc.*, 287 Conn. 189, 196, 947 A.2d 916 (2008). Accordingly, our review of the trial court's implicit determination that the submission was unrestricted is plenary.

this determination" [emphasis added]). The plaintiff couches her argument as an attack on the arbitrator's "legal conclusions," but in reality she simply disagrees with the arbitrator's *factual determinations* regarding alimony and the division of property.

The parties could have agreed to expanded judicial review of those issues; see, e.g., *HH East Parcel, LLC* v. *Handy & Harman, Inc.*, 287 Conn. 189, 204 n.16, 947 A.2d 916 (2008) ("[p]arties to agreements remain . . . free to contract for expanded judicial review of an arbitrator's findings"); but they did not. Expanded judicial review does not apply to those issues that the parties wanted the arbitrator to decide, but did not agree to have a court revisit. See *United Illuminating Co.* v. *Wisvest-Connecticut, LLC*, supra, 259 Conn. 669, 675 (parties agreed to de novo judicial review of arbitrators' conclusion of law, but court deferred to arbitrators' factual findings because those were "conclusive and binding . . . and not subject to judicial review" according to parties' agreement [internal quotation marks omitted]); see also *Milford* v. *Coppola Construction Co.*, 93 Conn. App. 704, 711, 891 A.2d 31 (2006) ("even if restricted, the breadth or narrowness of the scope of our review is necessarily limited by the nature of the restriction"); *Maluszewski* v. *Allstate Ins. Co.*, supra, 34 Conn. App. 35–36 (trial court properly treated submission as unrestricted because parties' arbitration agreement did not alter submission or otherwise expand judicial review of arbitrator's conclusions of law). This aligns with the general principle that "we undertake judicial review of arbitration awards in a manner designed to minimize interference with an efficient and economical system of alternative dispute resolution." (Internal quotation marks omitted.) *LaFrance* v. *Lodmell*, supra, 322 Conn. 851.

Here, paragraph 5 of the agreement broadly authorized the arbitrator to resolve "the dissolution of marriage action, including, but not limited to issues of

alimony, property division for both assets and liabilities, lump sum alimony, and attorney fees and costs." Paragraph 11 provided for limited appellate review of "legal conclusions," but not findings of fact. Therefore, paragraph 11 does not alter the broad submission set forth in paragraph 5 or otherwise expand the scope of judicial review to include factual determinations. See *Maluszewski* v. *Allstate Ins. Co.*, supra, 34 Conn. App. 34–36. Accordingly, the trial court properly construed the submission as unrestricted with regard to alimony and property division, and correctly declined to engage in a more searching review of those issues.

II

Having determined the proper standard of review, we turn to the plaintiff's alternative claims. "Even in the case of an unrestricted submission, we have . . . recognized three grounds for vacating an award: (1) the award rules on the constitutionality of a statute . . . (2) the award violates clear public policy . . . [and] (3) the award contravenes one or more of the statutory proscriptions of § 52-418." (Internal quotation marks omitted.) *Alexson* v. *Foss*, 276 Conn. 599, 612, 887 A.2d 872 (2006). The present appeal implicates the second and third grounds. We review the trial court's decision with regard to each ground de novo. See, e.g., *Bridgeport* v. *Kasper Group, Inc.*, 278 Conn. 466, 475, 899 A.2d 523 (2006); *Groton* v. *United Steelworkers of America*, 254 Conn. 35, 45, 757 A.2d 501 (2000).

The plaintiff claims that the arbitrator's award should be vacated because it violates public policy. According to the plaintiff, the arbitrator ignored or misapplied statutes and well established case law "in rendering her utterly disproportionate award . . . ." More specifically, she argues that the arbitrator failed to properly

apply and consider all of the statutory factors in §§ 46b-81 and 46b-82.[6] Because the arbitrator allegedly failed to properly apply and consider the statutory factors regarding how alimony is awarded and property is divided, the plaintiff claims that the award violates public policy.

In response, the defendant argues that the plaintiff has not identified a well-defined and dominant public policy that the arbitrator's decision violates. He argues that "there is no public policy that any particular outcome is required in a case such as this one," where the governing statutes afford the arbitrator wide discretion in distributing marital property, awarding alimony, and awarding attorney's fees. We agree with the defendant.

"Our Supreme Court in *Schoonmaker* v. *Cummings & Lockwood of Connecticut, P.C.*, [supra, 252 Conn. 416], enunciated the proper standard of review for determining whether an arbitral decision violates a clear public policy." *Cheverie* v. *Ashcraft & Gerel*, 65

[6] General Statutes § 46b-81 (c) provides in relevant part: "In fixing the nature and value of the property, if any, to be assigned, the court . . . shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates."

General Statutes § 46b-82 (a) provides in relevant part: "At the time of entering the decree, the Superior Court may order either of the parties to pay alimony to the other, in addition to or in lieu of an award pursuant to section 46b-81. . . . In determining whether alimony shall be awarded, and the duration and amount of the award, the court . . . shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81, and, in the case of a parent to whom the custody of minor children has been awarded, the desirability and feasibility of such parent's securing employment."

Conn. App. 425, 431, 783 A.2d 474, cert. denied, 258 Conn. 932, 785 A.2d 228 (2001). "*Schoonmaker* require[s] a two-step analysis in cases such as this one in which a party raises the issue of a violation of public policy in an arbitral award. First, we must determine whether a clear public policy can be identified. Second, if a clear public policy can be identified, we must then address the ultimate question of whether the award itself conforms with that policy." (Internal quotation marks omitted.) Id., 432. "The substance, not the form, of the challenge will govern. Thus, the court should not afford de novo review of the award without first determining that the challenge truly raises a legitimate and colorable claim of violation of public policy. If it does raise such a claim, de novo review should be afforded. If it does not, however, the normal deferential scope of review should apply." *Schoonmaker* v. *Cummings & Lockwood of Connecticut, P.C.*, supra, 429 n.7.

According to the plaintiff, public policy required the arbitrator to consider all of the factors in §§ 46b-81 and 46b-82 before awarding alimony and dividing property, to correctly weigh the evidence, and to provide sufficient alimony. The essence of her claim is that public policy required the arbitrator to *properly* award alimony and divide property pursuant to §§ 46b-81 and 46b-82. Generally speaking, a trial court enjoys broad discretion when it decides these issues in connection with a dissolution action. See, e.g., *Greco* v. *Greco*, 275 Conn. 348, 354, 880 A.2d 872 (2005); *Wood* v. *Wood*, 165 Conn. 777, 783–84, 345 A.2d 5 (1974). The plaintiff has failed to provide us with any authority holding that the proper application of §§ 46b-81 and 46b-82 *requires* any particular result, and we are unaware of such authority.[7] Both

[7] The plaintiff cites *Wood* v. *Wood*, supra, 165 Conn. 777, and *Boyne* v. *Boyne*, 112 Conn. App. 279, 962 A.2d 818 (2009). The plaintiff relies on a passing reference in *Wood* that "[a]limony is based upon the continuing duty of a divorced husband to support an abandoned wife and should be sufficient to provide her with the kind of living which she might have enjoyed but for the breach of the marriage contract by [the husband]." *Wood* v. *Wood*, supra,

§§ 46b-81 and 46b-82 are "intensely factual in application . . . ." (Internal quotation marks omitted.) *Cheverie* v. *Ashcraft & Gerel*, supra, 65 Conn. App. 433–34 (rule 1.5 of Rules of Professional Conduct does not implicate legitimate public policy because "reasonableness" of attorney's fees is "intensely factual in application"). Therefore, the plaintiff failed to identify a clear public policy allegedly violated by the arbitrator's award. Accordingly, the trial court properly refused to review the award de novo.

III

The plaintiff next claims that the award should be vacated because it violates § 52-418 (a) (2) and (4).[8] We are unpersuaded.

A

The plaintiff claims that the award violates § 52-418 (a) (2) due to the arbitrator's evident partiality. She makes various arguments in support of her claim. As she did before the trial court, she argues that both the "award itself" and the fact that the arbitrator admonished her during the arbitration proceedings and threatened sanctions for "her style of answering questions"

784. There, the court affirmed the trial court's judgment to award the plaintiff alimony that was less than she sought, noting that the trial court did not abuse its "wide discretion." See id., 783–84. The plaintiff relies on *Boyne* for the proposition that "[a] fundamental principle in dissolution actions is that a trial court may exercise broad discretion in awarding alimony and dividing property as long as it considers all relevant statutory criteria." (Internal quotation marks omitted.) *Boyne* v. *Boyne*, supra, 282. Neither case persuades us that the plaintiff has identified a well-defined and dominant public policy allegedly violated by the arbitrator's award.

[8] General Statutes § 52-418 (a) provides in relevant part: "Upon the application of any party to an arbitration, the superior court . . . or, when the court is not in session, any judge thereof, shall make an order vacating the award if it finds any of the following defects . . . (2) if there has been evident partiality or corruption on the part of any arbitrator . . . or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

demonstrate evident partiality. For the first time on appeal, the plaintiff also argues: the arbitrator knew that she suffered from Lyme disease and was ill during the proceedings, but "made no meaningful inquiry, thus . . . ignoring the whole issue of [the plaintiff's] competence to testify and generally proceed with the hearing"; the arbitrator denied the plaintiff's request for a recess; and the arbitrator made certain "editorial comments" in her written decision that were "arguably unnecessary, if not gratuitous."[9] We conclude that the plaintiff's claim is meritless.

"A party seeking to vacate an arbitration award on the ground of evident partiality has the burden of producing sufficient evidence in support of the claim. An allegation that an arbitrator was biased, if supported by sufficient evidence, may warrant the vacation of the arbitration award. . . . The burden of proving bias or evident partiality pursuant to § 52-418 (a) (2) rests on the party making such a claim, and requires more than a showing of an appearance of bias. . . . In construing § 52-418 (a) (2), [our Supreme Court] concluded that evident partiality will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration. To put it in the vernacular, evident partiality exists where it reasonably looks as though a given arbitrator would tend to favor one of the parties." (Internal quotation marks omitted.) *Stratford* v. *International Federation of Professional & Technical Engineers, Local 134*, 155 Conn. App. 246, 257, 108 A.3d 280 (2015).

[9] The defendant correctly notes that the plaintiff did not make these latter *arguments* before the trial court in support of her *claim* that the award should be vacated in accordance with § 52-418 (a) (2). We address them on appeal because they are subsumed within the plaintiff's legal claim that the award should be vacated due to the arbitrator's evident partiality. See, e.g., *Michael T.* v. *Commissioner of Correction*, 319 Conn. 623, 635–36 n.7, 126 A.3d 558 (2015). Additionally, the defendant partially addresses the merits of these arguments in his own brief and does not argue that they are improperly before us.

The "award itself" and denying the plaintiff a recess are, at most, adverse rulings. They in no way amount to evidence of bias. See, e.g., *Alexson* v. *Foss*, supra, 276 Conn. 618.

The transcripts of the arbitration proceedings also disclose that the plaintiff wanted to tell her side of the story and that, at times, the arbitrator expressed some frustration and impatience with her. The plaintiff, however, draws our attention to isolated instances in the record that are taken out of context. Throughout the proceedings, the plaintiff provided answers that were nonresponsive, began to respond to questions before counsel completed them, attempted to testify when no questions were pending, or was combative with counsel.[10] The record suggests that the arbitrator was simply attempting, appropriately, to control the proceedings and keep the testimony relevant and focused. Cf. *Wiegand* v. *Wiegand*, 129 Conn. App. 526, 535, 21 A.3d 489 (2011) (trial court, "at times, demonstrated some frustration and impatience with the plaintiff," but was impartial because "it [was] apparent that the court was

[10] For example, the following colloquy took place:

"[Eric J. Broder, counsel for the defendant]: Can I finish my question, ma'am? It's your testimony that you did not deny your husband's request to let the children use that car over the holiday; correct?

"[The Plaintiff]: You have to say it again because you didn't mean to ask it that way. What you wanted to ask—ask it again.

"[Kenneth A. Votre, counsel for the plaintiff]: That's all right. Don't correct his question.

"[The Plaintiff]: I'm sorry. I didn't understand it.

"[The Arbitrator]: Ma'am, Mr. Broder has asked for sanctions because you are frustrating him at every turn. I have up until now assumed you're doing your very best and denied his request, but when you decide to battle with him—

"[The Plaintiff]: I just didn't understand him.

"[The Arbitrator]: When you decide to battle with him, then you're not taking the proper role. Your answers are to be responsive to the questions, okay. That's all you do. You don't speak back to him. If anything else happens, it's Mr. Votre's duty. I need to know you understand that.

"[The Plaintiff]: To the best of my knowledge, I understand that."

attempting to keep the testimony relevant and focused"). The arbitrator's admonishment of the plaintiff and warnings to her about the imposition of sanctions, therefore, fail to demonstrate evident partiality.

The plaintiff fails to direct our attention to any authority supporting her argument that the "editorial comments" in the arbitrator's decision demonstrate evident partiality. Simply put, the plaintiff takes issue with how the arbitrator phrased some of her factual findings or how she characterized the plaintiff's claims. The plaintiff has failed to bring to our attention any words or phrases used by the arbitrator indicating that she tended to favor one party over the other.

Finally, the plaintiff's argument that evident partiality exists based on the arbitrator's failure to inquire into the plaintiff's ability to proceed with the hearing is belied by the record. The arbitrator expressly found that the plaintiff "has Lyme disease and . . . that its symptoms interfere with many of her activities, causing fatigue and pain. There were times during the hearing that the plaintiff engaged in outbursts; she attributed that to the Lyme disease." The arbitrator even asked the plaintiff about her treatment for Lyme disease. On multiple occasions, the plaintiff also stated that "I don't need a break" after both her lawyer and the arbitrator sought a break on her behalf. The record, therefore, does not support the claim that the arbitrator was partial under the circumstances. Accordingly, we agree with the trial court that the plaintiff failed to meet her burden of demonstrating evident partiality under § 52-418 (a) (2).

B

The plaintiff's next claim is that the award violates § 52-418 (a) (4).[11] Her argument is "premised upon the

[11] The plaintiff cites § 52-418 (a) (3) throughout her briefs. But as she acknowledged during oral argument before this court, this was a typographical error because her argument actually relies on § 52-418 (a) (4).

fact that the legal conclusions rendered by [the arbitrator] failed to properly apply the facts or consider all of the statutory criteria enumerated within §§ 46b-81 and 46b-82, and that said failure resulted in an award which was not mutual, final and definite upon the subject matter submitted, in violation of § 52-418."[12] We see little merit in this claim.

"Section 52-418 (a) (4) provides that an arbitration award shall be vacated if the [arbitrator has] exceeded [his or her] powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made. This . . . section is commonly referred to as manifest disregard of the law." (Internal quotation marks omitted.) *Kellogg* v. *Middlesex Mutual Assurance Co.*, 326 Conn. 638, 649, 165 A.3d 1228 (2017). "The party challenging the award bears the burden of producing evidence sufficient to demonstrate a violation of General Statutes § 52-418." *LaFrance* v. *Lodmell*, supra, 322 Conn. 855.

To prove that an arbitrator acted in manifest disregard of the law, the party challenging the award must satisfy a three-pronged test: "(1) the error was obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator; (2) the [arbitrator] appreciated the existence of a clearly governing legal principle but decided to ignore it; and (3) the governing law alleged to have been ignored by the [arbitrator] is well defined, explicit, and clearly

[12] The plaintiff also argues that the arbitrator improperly failed to find the defendant at fault for the breakdown of the marriage under the "intolerable cruelty" standard, which "negatively affected the property division and award of alimony." See General Statutes § 46b-40 (c) (8). We agree with the defendant that we must defer to the arbitrator's factual finding that "[n]either party is found more at fault [for the breakdown of the marriage]." See, e.g., *LaFrance* v. *Lodmell*, supra, 322 Conn. 851; see also *Richards* v. *Richards*, 153 Conn. 407, 409, 216 A.2d 822 (1966) ("[w]hether intolerable cruelty exists or not in a particular case is ordinarily a conclusion of fact for the trier to draw").

applicable." (Internal quotation marks omitted.) *Economos* v. *Liljedahl Bros., Inc.*, 279 Conn. 300, 307, 901 A.2d 1198 (2006).

We agree with the trial court's conclusion that the plaintiff failed to meet her burden. The plaintiff's argument is nothing more than a claim that the arbitrator misapplied the law. "Even if the [arbitrator] . . . misapplied the law governing [the award of alimony or division of property], such a misconstruction of the law would not demonstrate the [arbitrator's] egregious or patently irrational rejection of clearly controlling legal principles." *Garrity* v. *McCaskey*, supra, 223 Conn. 11–12. The arbitrator's decision also states that "the arbitrator has considered all statutory criteria and case law regarding the issues presented for resolution." See *SBD Kitchens, LLC* v. *Jefferson*, 157 Conn. App. 731, 744–45, 118 A.3d 550 (arbitrator referencing "[i]n accordance with Connecticut law," with regard to award of punitive damages, demonstrates that arbitrator did not manifestly disregard law [emphasis omitted]), cert. denied, 319 Conn. 903, 122 A.3d 638 (2015). Accordingly, the plaintiff failed to prove the first prong and the second prong of her claim that the arbitrator acted in manifest disregard of the law.

IV

The plaintiff next claims that we should reverse the judgment of the trial court under the plain error doctrine. Specifically, she argues that "it is abundantly clear that the arbitrator abused her discretion and made a plain error in her application of the law regarding the award of alimony and the division of property." Thus, the trial court allegedly committed plain error by not vacating the award. Because this claim is inadequately briefed, we decline to address it.

Although the plaintiff generally references Practice Book § 60-5 and two appellate decisions, she fails to

analyze her plain error claim under governing legal principles.[13] See, e.g., *Massey* v. *Branford*, 118 Conn. App. 491, 504, 985 A.2d 335 (2009) (appellate court may decline to review inadequately briefed plain error claim), cert. denied, 295 Conn. 913, 990 A.2d 345 (2010).

V

The plaintiff's final claim is that the arbitrator improperly awarded the defendant attorney's fees pursuant to General Statutes §§ 46b-62 and 46b-82. Specifically, she argues that the award of attorney's fees was "unjustified" and "constituted an abuse of discretion . . . ." We are unpersuaded.

The plaintiff fails to specify why the trial court should have vacated the arbitrator's award under any of the three viable grounds for vacating an arbitrator's award involving an unrestricted submission. See, e.g., *Alexson* v. *Foss*, supra, 276 Conn. 612. On the basis of her arguments, however, we understand her claim to be that the arbitrator acted in manifest disregard of the law and, therefore, the trial court should have vacated the award. See General Statutes § 52-418 (a) (4). Because this claim amounts to nothing more than the plaintiff's disagreement with the award of attorney's fees pursuant to §§ 46b-62 and 46b-82, it fails. See, e.g., *Garrity* v. *McCaskey*, supra, 223 Conn. 11–12. The plaintiff failed to prove the first prong and the second prong of her manifest disregard of the law claim. See, e.g., *Economos* v. *Liljedahl Bros., Inc.*, supra, 279 Conn. 307. Paragraph 5 of the agreement indicates that the parties bargained

[13] The plaintiff cites *Wiegand* v. *Wiegand*, supra, 129 Conn. App. 526, and *Watrous* v. *Watrous*, 108 Conn. App. 813, 949 A.2d 557 (2008), in support of her plain error claim without any analysis. "[An appellant] cannot prevail under [the plain error doctrine] . . . unless [she] demonstrates that the claimed error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest injustice." (Emphasis in original; internal quotation marks omitted.) *State* v. *McClain*, 324 Conn. 802, 812, 155 A.3d 209 (2017).

for the arbitrator's authority to award attorney's fees. "It is clear that a party cannot object to an award which accomplishes precisely what the [arbitrator was] authorized to do merely because that party dislikes the results." (Internal quotation marks omitted.) *LaFrance* v. *Lodmell*, supra, 322 Conn. 851.

The judgment is affirmed.

In this opinion the other judges concurred.

CLIFF'S AUTO BODY, INC. *v.* CARL M. GRENIER
(AC 39988)

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

Syllabus

The plaintiff C Co. sought to foreclose a judgment lien on certain real property owned by the defendant. In an underlying debt collection action, which concerned a debt that arose out of a motor vehicle accident involving D, the defendant's deceased mother, C Co. had secured a judgment in its favor against D in December, 2008. The trial court also awarded C Co. interest but did not set the rate at which the interest would accrue. C Co. thereafter placed a judgment lien on certain of D's real property. D then appealed from the judgment to this court, which dismissed the appeal for lack of a final judgment because there was an unresolved claim for discretionary prejudgment interest. In April, 2010, C Co. filed a motion for clarification requesting the trial court to enter an order setting the rate of prejudgment interest. The court granted the motion and ordered prejudgment and postjudgment interest at a rate of 10 percent per year. Following D's death, the defendant became the owner of the subject property. Thereafter, C Co. commenced this action against the defendant seeking to foreclose the judgment lien. The defendant filed a motion to dismiss on the grounds that the judgment lien was not valid, that the court lacked subject matter jurisdiction and that the lien did not specify the rate of interest. The court denied the motion and rendered a judgment of foreclosure by sale in favor of B Co., which had been substituted as the plaintiff. On the defendant's appeal to this court, *held* that the trial court improperly rendered a judgment of foreclosure by sale, as the judgment lien was invalid as a matter of law and could not have served as the basis for the judgment of foreclosure by sale; the judgment lien was predicated on the judgment in the debt collection action, which did not state the rate of interest and, therefore, did not specify with certainty the amount for which it was rendered, nor

was the amount ascertainable from the record or by mere mathematical computation, and because this court previously had determined that the judgment in the debt collection action was not a final judgment and C Co. had failed to timely file a motion to open within four months of the judgment to obtain an award of interest that included the rate of interest, the trial court in that action lacked the power to determine the rate of prejudgment and postjudgment interest more than fifteen months after the judgment had been rendered.

Argued October 24, 2017—officially released February 27, 2018

Procedural History

Action to foreclose a judgment lien on certain of the defendant's real property, and for other relief, brought to the Superior Court in the judicial district of New London, where Basley Holdings, Inc., was substituted as the plaintiff; thereafter, the court, *Hon. Robert C. Leuba*, judge trial referee, denied the defendant's motion to dismiss and rendered a judgment of foreclosure by sale, from which the defendant appealed to this court. *Reversed*; *judgment directed*.

James J. Schultz, for the appellant (defendant).

Kerin M. Woods, with whom, on the brief, was *Rachael M. Gaudio*, for the appellee (substitute plaintiff).

Opinion

LAVINE, J. The defendant, Carl M. Grenier, appeals from the judgment of foreclosure by sale rendered by the trial court in favor of the plaintiff Basley Holdings, Inc.[1] The defendant's principal claim on appeal is that it was improper for the court, *Hon. Robert C. Leuba*, judge trial referee, to deny his motion to dismiss for

[1] Following the commencement of the present action by the named plaintiff, Cliff's Auto Body, Inc., its successor in interest, Basley Holdings, Inc., was substituted as the party plaintiff. For convenience, we refer in this opinion to the named plaintiff and the substitute plaintiff collectively as the plaintiff.

lack of subject matter jurisdiction.[2] We reverse the judgment of the trial court.

The following historical facts and procedural history are relevant to our resolution of the defendant's appeal. The debt at issue arose out of a motor vehicle accident involving the defendant's deceased mother, Frances Grenier (decedent), many years ago. The plaintiff undertook to repair the decedent's vehicle, but for reasons not relevant to the present matter, the decedent refused to pay the plaintiff for its efforts. The plaintiff, therefore, brought a debt collection action against the decedent and secured a judgment in its favor in the amount of $9887.22 on December 30, 2008. The court, *Riley, J.*, also awarded the plaintiff interest pursuant to General Statutes § 37-3a[3] but did not set the rate at which the interest would accrue.[4] On January 2, 2009, the plaintiff placed a judgment lien in the amount of $9887.22 on the decedent's real property at 82 Pendleton Hill Road in Voluntown (property). The decedent appealed from

[2] The defendant also claims that the court improperly (1) rendered a judgment of foreclosure by sale in the absence of a final judgment, (2) deferred to the ruling of the court, *Divine, J.*, on his motion to dismiss, (3) ordered him to trial under the pain of sanctions when a motion to dismiss was pending, (4) rendered a decision on a judgment that had not timely been opened, (5) permitted the plaintiff to put documents into evidence without authenticating them or laying a foundation, and (6) violated his right to due process on numerous grounds.

The plaintiff states that the issue on appeal is whether the court properly rendered a judgment of foreclosure by sale pursuant to General Statutes § 52-380a. We reverse the judgment of foreclosure by sale for the lack of a valid underlying judgment. We therefore need not address the remainder of the defendant's claims.

[3] General Statutes § 37-3a provides in relevant part: "[I]nterest at the rate of ten percent a year and no more, may be recovered and allowed in civil actions . . . as damages for the detention of money after it becomes payable. . . ."

[4] "In *Sears, Roebuck & Co.* v. *Board of Tax Review*, 241 Conn. 749, 765–66, 699 A.2d 81 (1997), this court held that the 10 percent interest rate set forth in § 37-3a is not a fixed rate, but rather the maximum rate of interest that a trial court, in its discretion, can award." *Gianetti* v. *Meszoros*, 268 Conn. 424, 426, 844 A.2d 851 (2004).

the judgment against her, but, on April 15, 2010, this court sua sponte ordered the appeal dismissed for want of an appealable final judgment.[5] The judgment was not a final judgment for purposes of appeal because there was an unresolved claim for discretionary prejudgment interest. See *Balf Co.* v. *Spera Construction Co.*, 222 Conn. 211, 214, 608 A.2d 682 (1992) (prejudgment interest part of compensation due).

On April 13, 2010, more than fifteen months after Judge Riley rendered judgment in the debt collection action, the plaintiff filed a motion for clarification asking the court to set the amount of prejudgment interest. On April 26, 2010, Judge Riley ordered prejudgment and postjudgment interest at the rate of 10 percent per year.

In May, 2014, the defendant became the owner of the property by devise due to his mother's death. The plaintiff commenced the present action against the defendant in early 2015 to foreclose the judgment lien it had placed on the property in January, 2009. The defendant, who was then self-represented, responded by filing several special defenses grounded in our probate statutes and thereafter filed a motion for summary judgment on those grounds. The motion for summary judgment was denied by the court, *Cosgrove, J.* The self-represented defendant subsequently filed an amended answer and special defenses and an amended motion for summary judgment on the ground that the judgment lien was flawed because General Statutes § 52-328 (b) requires a judgment creditor to file a judgment lien

[5] This court issued the following order: "After a hearing as to why the defendant's appeal should not be dismissed for lack of a final judgment because there has been no final determination regarding the amount of damages, in light of the fact that the trial court, in rendering judgment in accordance with the factfinder's report, failed to specify the rate at which prejudgment interest should be calculated; see *Gianetti* v. *Meszoros*, 268 Conn. 424, 426 [844 A.2d 851] (2004); it is hereby ordered that this appeal is dismissed."

within four months of the final judgment.[6] Judge Cosgrove sustained the plaintiff's objection to the amended motion for summary judgment on August 25, 2015, stating that the plaintiff obtained a valid judgment against the decedent and when the judgment was not paid, the plaintiff placed a lien on the property.

The defendant obtained counsel, who filed numerous motions to dismiss the action on the ground, among others, that the judgment lien was flawed and unenforceable because it was predicated on a judgment that was not final. On October 28, 2015, the defendant filed a motion to dismiss on the ground that the court lacked subject matter jurisdiction. On April 21, 2016, the court, *Devine, J.*, denied the defendant's motion to dismiss after finding that the plaintiff had filed the lien within four months of when the judgment was rendered against the decedent. The court, relying on *Mac's Car City, Inc.* v. *DiLoreto*, 238 Conn. 172, 183, 679 A.2d 340 (1996), concluded that the judgment lien was valid even though the decedent had taken an appeal.[7] Subsequently, the defendant filed numerous motions to dismiss, for reargument, and for clarification, all of which were denied. On November 25, 2016, when the foreclosure matter was scheduled to begin trial, the defendant filed another motion to dismiss and, on November 29, 2016, a motion for a continuance. The court, *Nazzaro, J.*, denied the motion for a continuance.[8]

[6] General Statutes § 52-328 (b) provides that no real estate may be subject to attachment "unless the judgment creditor places a judgment lien on the real estate within four months after a final judgment."

[7] In his memorandum of decision, Judge Devine stated in part: "The ruling was appealed and then remanded to the trial court to determine the amount of interest. Even though the Appellate Court ruled that the trial court's judgment was not final, the lien filed after the original judgment remains valid."

The order dismissing the appeal contains no remand order. See footnote 5 of this opinion.

[8] Judge Nazzaro issued the following order: "Counsel on the eve of trial filed no less than its third motion to dismiss, one of which was withdrawn and then refiled and then denied on the merits. Counsel moved for reargument

The matter was tried before Judge Leuba. Following the presentation of evidence, Judge Leuba learned that Judge Nazzaro had not ruled on the defendant's motion to dismiss and, therefore, heard the arguments of counsel.[9] The court denied the defendant's motion to dismiss predicated on the grounds that there was no valid judgment lien, that the court lacked subject matter jurisdiction, and that the lien placed in evidence did not specify the rate of interest. In denying the motion to dismiss, Judge Leuba cited Judge Devine's memorandum of decision denying one of the defendant's prior motions to dismiss. Judge Leuba thereafter rendered a judgment of foreclosure by sale in favor of the plaintiff on November 30, 2016.[10]

The defendant appealed. He claims, among other things, that the court improperly rendered a judgment of foreclosure by sale on the basis of an invalid judgment lien in the debt collection action. We agree that

on dismissal. That motion was denied. Counsel moved for clarification of rulings. Those motions were denied. Subject matter jurisdiction has already been argued and determined. Counsel again attempts to revive dismissal on this basis on the eve of trial. The motion to continue the court trial one day before trial is denied. The parties are ordered to appear and try the case in accordance with the trial management report. Failure to appear and or proceed may result in sanctions and or dismissal. This motion is untimely, is prejudicial and if granted would permit unreasonable delay."

[9] In his argument, counsel for the defendant referred to *Unifund CCR Partners* v. *Schaeppi*, 140 Conn. App. 281, 59 A.3d 282 (2013). He argued, in relevant part, that a judgment is not a full or final judgment when it does not specify with certainty the amount for which it was rendered, nor was the amount ascertainable from the record or by mere mathematical computation. "It's been argued that you can't look at the record and ascertain the amount of the judgment, but the lien was filed in January, 2009. In 2010, there was an untimely opening where [Judge Riley] specified interest at 10 percent. Well, the lien should have been refiled, if anything, to have a position, but it was not. As I said, what was presented to the court today was a lien that does not specify interest, it is not of any specified amount in total, and there has been no testimony, no evidence, to the contrary."

[10] The court found the debt to be $21,497.72. The value of the property was $200,000. The court also awarded attorney's fees of $7150, an appraisal fee of $600, and a title search fee of $250.

the judgment lien submitted at the foreclosure hearing was invalid and, therefore, conclude that the court erred in rendering the judgment of foreclosure by sale.

The determinative question before us is whether the court properly rendered a judgment of foreclosure by sale. An appellate court ordinarily reviews "a trial court's decision to grant foreclosure for an abuse of discretion. . . . When, however, the claims on appeal are not targeted at the trial court's exercise of discretion, but at a subsidiary legal conclusion, our review is plenary." (Citation omitted.) *ARS Investors II 2012-1 HVB, LLC* v. *Crystal, LLC*, 324 Conn. 680, 685, 154 A.3d 518 (2017). The legal issue before us is whether the court properly concluded that the judgment lien on the property was valid.

The following facts are relevant to our decision. Two days before the decedent's appeal was dismissed for lack of a final judgment, the plaintiff requested that Judge Riley enter an order setting the rate of prejudgment interest in the debt collection action. Judge Riley granted the plaintiff's request in April, 2010, more than fifteen months after he had rendered judgment in the debt collection action. He, however, lacked the power to do so.

"Our case law establishes that any substantive modification of a judgment constitutes an opening of the judgment. The issue of whether a particular action by the trial court opens the judgment typically arises when the court alters the judgment more than four months after the judgment was rendered and a party challenges the court action as an untimely opening of the judgment . . . ." *Commissioner of Transportation* v. *Rocky Mountain, LLC*, 277 Conn. 696, 705, 894 A.2d 259 (2006). General Statutes § 52-212a provides in relevant part: "[A] civil judgment or decree rendered in the Superior Court may not be opened or set aside unless a motion

to open or set aside is filed within four months following the date on which it was rendered or passed. . . ." Both § 52-212a and Practice Book § 17-4[11] provide that the trial court lacks the power to open a judgment more than four months after the judgment is rendered. *Commissioner of Transportation* v. *Rocky Mountain, LLC*, supra, 706.

In the present case, Judge Riley fixed the rate of prejudgment interest and added postjudgment interest to the debt collection judgment more than fifteen months after the judgment was rendered. The defendant claims that assigning the rate of interest on the debt collection judgment constituted a substantive change in the judgment. We agree; adding an award of postjudgment interest to a damages award is a substantive modification of the judgment. Id., 707, citing *Goldreyer* v. *Cronan*, 76 Conn. 113, 117, 55 A. 594 (1903). Because the plaintiff did not seek to have the debt collection judgment opened to determine the rate of prejudgment interest within four months of December 30, 2008, when the judgment was rendered, the court lacked the power to determine the rate of prejudgment interest and to add postjudgment interest in April, 2010.

The case of *Unifund CCR Partners* v. *Schaeppi*, 140 Conn. App. 281, 59 A.3d 282 (2013), informs our decision in the present case. *Unifund CCR Partners* was a debt collection action in which the trial court, *Miller, J.*, rendered judgment in favor of Unifund CCR Partners (Unifund) on June 19, 2006. Id., 283, citing *Unifund CCR Partners* v. *Schaeppi*, 126 Conn. App. 370, 372, 11 A.3d 723 (2011). Unifund placed a judgment lien on real property owned by the Schaeppis on July 18, 2006. Id.

[11] Practice Book § 17-4 (a) provides in relevant part: "Unless otherwise provided by law . . . any civil judgment or decree rendered in the superior court may not be opened or set aside unless a motion to open or set aside is filed within four months succeeding the date on which notice was sent. . . ."

On August 25, 2006, Unifund filed a motion for an order of weekly payments, which the court granted on September 11, 2006. Id. Unifund initiated a foreclosure action against the Schaeppis and filed a motion for summary judgment as to liability. The trial court, *Hon. Robert Satter*, judge trial referee, denied the motion on exemption grounds but noted that the judgment and lien against the Schaeppis did not state the amount of the lien. Id., 284. Unifund filed a motion seeking clarification of the June 19, 2006 judgment, but Judge Miller found that there never was a finding as to the amount of the debt. Id., 285. Consequently, there was no judgment to clarify. Id.

Thereafter, the Schaeppis filed their own motion for summary judgment on the basis of Judge Satter's observations in his memorandum of decision regarding the issue of liability. Id. By memorandum of decision filed October 15, 2008, Judge Satter granted the Schaeppis' motion for summary judgment and stated, as a matter of law, "a judgment of no amount, underlying a judgment lien in an incorrect amount cannot form the basis of a foreclosure action." (Internal quotation marks omitted.) Id. Unifund appealed to this court arguing that the June 19, 2006 judgment was a full and final judgment and, in the alternative, that the order for weekly payments entered on September 11, 2006, was a money judgment. Id.

This court rejected both of Unifund's arguments and affirmed the summary judgment in favor of the Schaeppis. Id., 286. This court determined that the "June 19, 2006 judgment was not a full and final judgment because it did not specify with certainty the amount for which it was rendered, nor was the amount ascertainable from the record or by mere mathematical computation. . . . Without deciding whether the installment payment order of September 11, 2006, was a money judgment, this court concluded that it was

impossible for it to have served as the basis for the judgment lien, as the judgment lien was recorded weeks before the court entered its installment payment order." (Citation omitted; internal quotation marks omitted.) Id.

After this court affirmed the judgment granting the Schaeppis' motion for summary judgment, Unifund filed a motion to open and modify the judgment of June 19, 2006. The motion was denied, as were the subsequent motions for reargument and reconsideration. Id. Unifund then asked Judge Miller to articulate his reasons for denying its motion to open the judgment. Id. Judge Miller articulated that the judgment Unifund sought to open lacked a specific dollar amount and, therefore, was not a valid judgment, and the court did not "have the ability to open a judgment that was never really a judgment." (Internal quotation marks omitted.) Id. Unifund thereafter appealed once more to this court. Id.

In its second appeal, Unifund argued that Judge Miller abused his discretion by failing to open the June 19, 2006 judgment because the court has authority pursuant to § 52-212a in cases where the judgment was obtained by mutual mistake. Id., 287. This court rejected Unifund's argument on the ground that it rested "on the faulty premise that there exists a judgment to open." Id. Because this court already had determined that "the judgment rendered on June 19, 2006, was not a full and final judgment; *Unifund CCR Partners* v. *Schaeppi*, supra, 126 Conn. App. 380; it declined to engage in that analysis for the second time." (Internal quotation marks omitted.) *Unifund CCR Partners* v. *Schaeppi*, supra, 140 Conn. App. 287.

In the present case, the judgment lien placed on the property on January 2, 2009, was predicated on the December 30, 2008 judgment in the debt collection action. In the decedent's appeal, this court determined

that the debt collection judgment was not a final judgment because the rate of interest had not been set. The plaintiff failed to open timely the debt collection judgment to obtain an award that set the rate of prejudgment interest. Moreover, for the sake of argument only, even if the plaintiff timely had opened the debt collection judgment and had obtained a judgment that incorporated the rate of interest, in order to obtain a valid judgment lien, it was required to file a new judgment lien on the property. There is no evidence that the plaintiff has filed a judgment lien on the property since January 2, 2009.[12] General Statutes § 52-380a (a) provides in relevant part that "[a] judgment lien, securing the unpaid amount of any money judgment, including interest and costs, may be placed on any real property by recording, in the town clerk's office of the town where the real property lies, a judgment lien certificate . . . containing . . . the date on which the judgment was rendered, and the original amount of the money judgment and the amount due thereon . . . ." Pursuant to § 52-328 (b), the lien must be recorded within four months of judgment.

We conclude, therefore, that the judgment lien submitted in evidence in the present foreclosure action was invalid as a matter of law and could not serve as a basis for the judgment rendered by the court. The judgment lien was predicated on a judgment that did not state the rate of interest and, therefore, did not specify with certainty the amount for which it was rendered, nor was the amount ascertainable from the record or by mere mathematical computation. We, therefore, reverse the judgment of foreclosure by sale.

The judgment is reversed and the case is remanded with direction to grant the defendant's motion to dismiss for lack of subject matter jurisdiction.

In this opinion the other judges concurred.

[12] The copy of the judgment lien attached to the plaintiff's complaint is dated January 2, 2009, and states the amount of damages as $9887.22.

STATE OF CONNECTICUT *v.* ROBERT S.*
(AC 38667)

Alvord, Prescott and Pellegrino, Js.

Syllabus

Convicted of the crime of criminal violation of a protective order arising out of a telephone call made from the defendant's cell phone to the home in which the victim, his former wife, was residing, the defendant appealed to this court. *Held*:

1. The evidence was sufficient to support the defendant's conviction of criminal violation of a protective order; although the defendant claimed that the jury could not reasonably have found that he had the requisite intent to engage in conduct that violated the condition in the protective order that prohibited him from contacting the victim, there was sufficient evidence before the jury from which it could have concluded that the defendant intended to, and did, call the home in which the victim resided in violation of the protective order, as both the victim and a police officer testified that that the phone number that appeared on the home's caller ID belonged to the defendant, and the jury was free to infer that the defendant had made the call, there having been no evidence before the jury from which it reasonably could have inferred that someone other than the defendant had access to his cell phone, nor any evidence to support a conclusion that the defendant had inadvertently dialed the home from his cell phone.
2. The defendant could not prevail, pursuant to *State* v. *Golding* (213 Conn. 233), on his unpreserved claim that the trial court denied him due process at sentencing by relying on unreliable information and denying him an opportunity to present mitigating evidence, as he failed to establish that a constitutional violation existed; it was clear from the record that the trial court, in determining the defendant's sentence, did not substantially rely on certain statements by the victim that the defendant maintained were materially untrue or unreliable, as the record demonstrated that the court, in determining the proper sentence, did not refer directly to the challenged evidence and had sufficient reliable information before it, including the defendant's statements to the court, its own assessment of the defendant's behavior, and information contained in a presentence investigation report, and it was within the trial court's discretion to prevent the defendant from presenting certain evidence that it determined was not relevant to the sentencing proceeding.

Argued November 14, 2017—officially released February 27, 2018

* In accordance with our policy of protecting the privacy interest of the victim of a criminal violation of a protective order, we decline to identify the victim or others through whom the victim's identity may be ascertained.

Procedural History

Substitute information charging the defendant with the crimes of harassment in the second degree and criminal violation of a protective order, brought to the Superior Court in the judicial district of Hartford, geographical area number fourteen, and tried to the jury before the court, *Suarez, J.*; verdict and judgment of guilty of criminal violation of a protective order, from which the defendant appealed to this court. *Affirmed.*

James P. Sexton, assigned counsel, with whom were *Megan Wade*, assigned counsel, and, on the brief, *Cameron Dorman*, assigned counsel, for the appellant (defendant).

Rita M. Shair, senior assistant state's attorney, with whom were *Gail P. Hardy*, state's attorney, and, on the brief, *Kathleen Dwyer*, former senior assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Robert S., appeals from the judgment of conviction, rendered after a jury trial, of one count of criminal violation of a protective order in violation of General Statutes § 53a-223.[1] On appeal, the defendant claims that (1) there was insufficient evidence presented at trial to support his conviction, and (2) the trial court denied him due process by using, and denying him the opportunity to contest, unreliable information during sentencing. We affirm the judgment of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts.

[1] General Statutes § 53a-223 (a) provides: "A person is guilty of criminal violation of a protective order when an order issued pursuant to subsection (e) of section 46b-38c, subsection (f) of section 53a-28, or section 54-1k or 54-82r has been issued against such person, and such person violates such order."

The defendant and the victim were married in 2006 and divorced in 2013. The couple has two minor children, ages four and five at the time of trial, both of whom live with the victim. On October 22, 2014,[2] the court, *Murphy, J.*, issued a protective order against the defendant, naming the victim as the protected person.[3] The order provided in relevant part: "Do not contact the protected person in any manner, including by written, electronic or telephone contact, and do not contact the protected person's home, workplace or others with whom contact would be likely to cause annoyance or alarm to the protected person." Under "Additional Orders of Protection," the order provided: "Any access to the minor child must be arranged and facilitated through a third party relative,"[4] and "[t]he [d]efendant is allowed to have contact with the protected person only through Our Family Wizard software."[5]

In 2015, the victim and the children were living at the maternal grandmother's home in Bloomfield. That house had a landline telephone (landline). On January 5, 2015, a phone call was placed from the defendant's cell phone to the landline. The victim recognized the defendant's cell phone number on the landline's caller ID. The victim did not answer the phone call. The victim felt anxious when she received this phone call. She checked on the children, checked the doors and locks, and then called the police.

Officer Adrian J. Loignon of the Bloomfield Police Department responded to the residence. Officer Loignon spoke to the victim, who showed him the landline's

[2] A prior protective order was issued on August 31, 2014. That order was not admitted into evidence at trial.

[3] At the October 22 hearing, the court noted that the defendant had two criminal files pending, one of which was for custodial interference.

[4] The defendant arranged and facilitated access to the children through the victim's maternal aunt, who did not live in the victim's home.

[5] Our Family Wizard is a communication software used in high conflict divorces. The software allows professionals, such as attorneys or guardians ad litem, to monitor communications between the parents.

caller ID. Officer Loignon recorded the phone number from the caller ID, and when he returned to the police department, called the phone number four times. No one answered his calls, and the voicemail box was full. Officer Loignon reviewed the police department's in-house records and learned that the phone number recorded from the caller ID was listed as the defendant's phone number. He also reviewed the in-house records and confirmed that there was a protective order prohibiting the defendant from contacting the victim. On the basis of this information, Officer Loignon applied for an arrest warrant for the defendant.

After trial, the jury convicted the defendant of criminal violation of a protective order.[6] The court, *Suarez, J.*, sentenced the defendant to a term of incarceration of five years, execution suspended after three years, followed by five years of probation. This appeal followed.

I

The defendant first claims that the evidence at trial was insufficient to support his conviction of criminal violation of a protective order. The defendant does not challenge that he was subject to a valid protective order,[7] or that a call was made from his cell phone to the landline at the home where the victim was living. Rather, the defendant argues that the jury reasonably could not have found beyond a reasonable doubt that he had the requisite intent to engage in conduct that violated the protective order's condition that prohibited him from contacting the victim because there was insufficient evidence that (1) the defendant made the phone

[6] The defendant was also charged with and acquitted of harassment in the second degree in violation of General Statutes § 53a-183 (a) (3).

[7] A copy of the operative protective order was entered as a full exhibit at trial.

call to the landline, or (2) if he did in fact make the call to the landline, he did so intentionally. We disagree.

We begin with the applicable standard of review and principles of law that guide our analysis. "In reviewing a sufficiency of the evidence claim, we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether the facts so construed and the inferences reasonably drawn therefrom the jury reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . In evaluating evidence, the trier of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The trier may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . . This does not require that each subordinate conclusion established by or inferred from the evidence, or even from other inferences, be proved beyond a reasonable doubt . . . because this court has held that a jury's factual inferences that support a guilty verdict need only be reasonable. . . .

"[A]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the trier, would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty. . . . Furthermore, [i]n [our] process of review, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than

direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . Indeed, direct evidence of the accused's state of mind is rarely available. . . . Therefore, intent is often inferred from conduct . . . and from the cumulative effect of the circumstantial evidence and the rational inferences drawn therefrom. . . . [A]ny such inference cannot be based on possibilities, surmise or conjecture. . . . It is axiomatic, therefore, that [a]ny [inference] drawn must be rational and founded upon the evidence." (Citations omitted; internal quotation marks omitted.) *State* v. *Fagan*, 280 Conn. 69, 79–81, 905 A.2d 1101 (2006), cert. denied, 549 U.S. 1269, 127 S. Ct. 1491, 167 L. Ed. 2d 236 (2007).

A conviction of criminal violation of a protective order requires proof beyond a reasonable doubt that "an order . . . has been issued against such person, and such person violates such order."[8] General Statutes § 53a-223 (a). Regarding intent, "the violation of a protective order statute is not a specific intent crime. All that is necessary is a general intent[9] that the defendant intended to perform the activities that constituted the violation." (Footnote in original.) *State* v. *Larsen*, 117 Conn. App. 202, 208, 978 A.2d 544, cert. denied, 294 Conn. 919, 984 A.2d 68 (2009).

On the basis of our review of the record, we conclude that there was sufficient evidence before the jury from

[8] The defendant testified that he was aware of the protective order and its terms.

[9] "General intent is the term used to define the requisite mens rea for a crime that has no stated mens rea; the term refers to whether a defendant intended deliberate, conscious or purposeful action, as opposed to causing a prohibited result through accident, mistake, carelessness, or absent-mindedness. . . . *State* v. *Charles*, 78 Conn. App. 125, 131, 826 A.2d 1172, cert. denied, 266 Conn. 908, 832 A.2d 73 (2003)." (Internal quotation marks omitted.) *State* v. *Larsen*, 117 Conn. App. 202, 208 n.4, 978 A.2d 544, cert. denied, 294 Conn. 919, 984 A.2d 68 (2009).

which it could conclude that the defendant both intended to, and did, call the landline in violation of the protective order. The jury heard evidence that the defendant and the victim were married, that they shared two children, and that the couple subsequently divorced. A copy of the protective order was entered into evidence, along with a transcript of the hearing at which the order was issued. The protective order prohibited the defendant from "contact[ing], including by . . . telephone contact . . . the protected person's home . . . ." The jury heard evidence that, on January 5, 2015, a call was placed from the defendant's cell phone to the landline at the grandmother's house, where the victim and children were living. The victim testified that she recognized the phone number on the caller ID as belonging to the defendant, that this made her anxious, and that she did what she "usually" does when "calls come in at odd times" and checked on the kids, the doors, and the locks before calling the police. We conclude that this evidence provided a sufficient basis for the jury's conclusion that the defendant called the landline, thereby contacting the protected person's home, in violation of the protective order.

As to the defendant's argument that the state did not prove that he, rather than someone else, made the call on January 5, we conclude that the jury was free to infer that the defendant made the call. The defendant testified that he did not remember making the call. The victim testified, however, that she recognized the phone number on the caller ID as belonging to the defendant. See, e.g., *State* v. *Cummings*, 46 Conn. App. 661, 682, 701 A.2d 663 (sufficient evidence that defendant drove by victim's house because jury could draw reasonable inferences from testimony of victim that she identified defendant's truck, which was known to her, driving

past her apartment), cert. denied, 243 Conn. 940, 702 A.2d 645 (1997).

Officer Loignon testified that he confirmed with in-house records that the phone number on the caller ID was listed as belonging to the defendant. There was no evidence before the jury from which it reasonably could have inferred that someone other than the defendant had access to his cell phone. The absence of direct evidence that the defendant made the phone call from his cell phone to the landline does not compel a conclusion by this court that there was insufficient evidence from which the jury could have inferred that the defendant placed the phone call. "If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . . Moreover, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct." (Internal quotation marks omitted.) *State* v. *Stanley*, 161 Conn. App. 10, 16, 125 A.3d 1078 (2015), cert. denied, 320 Conn. 918, 131 A.3d 1154 (2016). We conclude that it was reasonable and logical for the jury to infer, in light of the evidence, that the defendant placed the phone call from his cell phone to the landline. Furthermore, there was no evidence that would compel a conclusion by the jury that the defendant inadvertently dialed the landline from his cell phone. In other words, the jury was free to infer, on the basis of this record and its common sense, that if a call is placed from a phone, the call was made intentionally in the absence of credible evidence to the contrary.

On the basis of our review of the record, we conclude that there was sufficient evidence before the jury from which it could conclude that the defendant was guilty of criminal violation of a protective order.[10]

[10] Alternatively, the defendant argues that "even had the defendant called the 'family phone,' it was permissible under the protective orders," because "it was established that the [g]randmother was a third party relative and the 'family phone' was a phone number the defendant could use to contact the [g]randmother." We reject this argument for two reasons.

First, the plain terms of the protective order prohibit the defendant from contacting the victim's home. Second, even if we were to assume arguendo that the protective order stating "[a]ny access to the minor child must be arranged and facilitated through a third party relative" created an exception from the blanket prohibition on calling the victim's home, we conclude that there was sufficient evidence before the jury from which it could reasonably infer that the defendant was not calling for that purpose. Although the defendant testified that he would communicate with the children on the landline, and that he would contact the grandmother to facilitate visitation with the children, the jury heard evidence that contradicted that testimony. Specifically, during the grandmother's testimony, the following exchange occurred:

"[The Prosecutor]: Thank you. You're aware that visitation for your grandchildren is facilitated—has to be facilitated through a third party; correct?

"[The Witness]: Yes.

"[The Prosecutor]: Who is that third party; do you know?

"[The Witness]: Well, it's my sister.

"[The Prosecutor]: Does your sister live with you?

"[The Witness]: No.

"[The Prosecutor]: Why is it not you?

"[The Witness]: I—Robert don't want to have any dealings with me.

"[The Prosecutor]: So there's no reason for him to call your house?

"[The Witness]: No.

"[The Prosecutor]: So if he wanted visitation with the children he should be calling the—your sister's house?

"[The Witness]: Yes.

"[The Prosecutor]: When was the last time that you talked to [the defendant]?

"[The Witness]: Over a year or more."

"In evaluating the evidence, the [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence." (Internal quotation marks omitted.) *State* v. *Arthurs*, 121 Conn. App. 520, 524, 997 A.2d 568 (2010), cert. denied, 310 Conn. 957, 82 A.3d 626 (2013). Furthermore, the jury was free to credit the testimony of one witness and not the other. See *State* v. *Miles*, 132 Conn. App. 550, 563, 32 A.3d 969 (2011) ("[c]onflicting testimony and the credibility of witnesses is a matter

II

The defendant next claims that the court denied him due process under the federal constitution[11] at sentencing. Specifically, he argues that the court abused its discretion in (1) relying on "unreliable information" in sentencing the defendant, and (2) denying the defendant the opportunity to present mitigating evidence to contest that information. The defendant concedes that this claim was not properly preserved before the trial court, but nonetheless seeks review pursuant to our Supreme Court's ruling in *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 120 A.3d 1188 (2015).[12] Here, the record is adequate to review the defendant's claim, and the issue of a denial of due process at sentencing is an issue of constitutional magnitude. See *State* v. *Ruffin*, 144 Conn. App. 387, 395, 71 A.3d 695 (2013), aff'd, 316 Conn. 20, 110 A.3d 1225 (2015). The defendant cannot, however, establish a constitutional violation. Therefore, we conclude that the defendant's due process claim fails under the third prong of *Golding*.

left to the province of the jury"), cert. denied, 303 Conn. 934, 36 A.3d 692 (2012).

[11] To the extent that the defendant also asserts a claim in violation of his due process rights under article first, § 8, of the Connecticut constitution, we conclude that he has abandoned this claim by failing to provide an independent analysis of this issue under the state constitution. See *State* v. *Schultz*, 100 Conn. App. 709, 712 n.2, 921 A.2d 595, cert. denied, 282 Conn. 926, 926 A.2d 668 (2007).

[12] Pursuant to *Golding*, a defendant may prevail on a claim of constitutional error not preserved at trial only if all four of the following conditions are satisfied: "(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." (Footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40; see also *In re Yasiel R.*, supra, 317 Conn. 781 (modifying third prong of *Golding* by eliminating word "clearly" before words "exists" and "deprived").

The following additional facts and procedural history are relevant to this claim. On August 31, 2015, the defendant and his counsel appeared before the trial court, *Suarez, J.*, for sentencing. Prior to that hearing, a presentence investigation (PSI) was completed, and the PSI report was submitted to the court. The state argued for the maximum sentence, five years incarceration. The state also requested that the court impose a standing criminal protective order.

The victim was present for sentencing. She submitted and read a letter to the court, also requesting that the court impose the maximum sentence. In relevant part, the victim stated that: (1) the defendant "broke into my house that I presently live in," (2) the defendant "kidnap[ped] the kids only to be found by the police states away," and (3) that she was "threatened by bodily harm by [the defendant], despite court protective orders . . . ."

The defendant also submitted a letter to the court. During allocution, the defendant claimed, in relevant part, that: (1) the protective order at issue in the case was "an outdated court order," which had been modified "specific to things like family access and stuff like that"; (2) the family court, in its dissolution order, issued credibility determinations regarding certain claims made by the victim; (3) there was "documentation in opposition" to some of the claims made by the victim; (4) he documented the victim's family members threatening and harassing him, even while he was incarcerated; and (5) he had "supporting documents showing things contrary" to "things that [the victim] alleged in the police report."

The court explained to the defendant that it could not "assess the credibility of what somebody else said at some other hearing," and that it could "only decide what happened in the hearing that [it] presided over."

The court further explained: "All I'm here to do right now is to decide how much time, if any, should be given to you because of that finding of guilty. I recognize the two of you had a long history of custody battles and trials and things of that sort. That's been made very clear, but what I'm saying to you is that it wasn't me who decided the credibility of those people at those separate trials. All I have to do is decide how much time to give you as a result of a jury finding you guilty of this violation."

The court concluded that a period of incarceration was appropriate, and in consideration of the defendant's statements to the court, the victim's statement, and information contained in the PSI report, the court sentenced the defendant to five years incarceration, execution suspended after three years, followed by five years of probation. The court also issued a standing criminal protective order, listing the victim as the protected person, until August, 2065. In articulating the basis for the sentence imposed, the court noted, in relevant part, that it found the defendant to be stubborn, aggressive, manipulative, and controlling. The court also noted that the victim indicated that she was fearful for the safety of herself and her children, and that the defendant's statements to the court and behavior in violating the protective order indicated that "whatever order I issue, you are not particularly going to abide by because you are accusing everybody else of being the wrong people and not accepting any responsibility at all, and I have absolutely no assurance for the safety of this victim and the children."

The defendant requested that the court reduce his sentence, and the court responded: "I understand that you want to have a relationship with your children, but as I said to you just a minute ago, I am deeply troubled by your manipulation particularly when you accused

everybody in this courtroom and other courts of preventing you from having a relationship with your children when it's your behavior that has done so. . . .

"[M]ore importantly, because of your statements to this court today and the PSI and the letter that you wrote to this court leads me to believe that you don't care about court orders or that you will do whatever you need to do regardless of anybody's orders, which leads me to believe that in this particular case, the victim's safety is in question."

The court concluded its reasoning: "I continue to be very nervous about the safety of these individuals because of your actions and because of the attitude toward this whole case."

We now set forth the applicable standard of review. Our rules of practice provide, in relevant part: "Before imposing a sentence . . . (1) [t]he judicial authority shall afford the parties an opportunity to be heard and, in its discretion, to present evidence on any matter relevant to the disposition, and to explain or controvert the presentence investigation report . . . or any other document relied upon by the judicial authority in imposing sentence. . . ." Practice Book § 43-10.

"A sentencing judge has very broad discretion in imposing any sentence within the statutory limits and in exercising that discretion he may and should consider matters that would not be admissible at trial. . . . It is a fundamental sentencing principle that a sentencing judge may appropriately conduct an inquiry broad in scope, and largely unlimited either as to the kind of information he may consider or the source from which it may come. . . .

"Nevertheless, [t]he trial court's discretion . . . is not completely unfettered. As a matter of due process, information may be considered as a basis for a sentence

only if it has some minimal indicium of reliability. . . . As long as the sentencing judge has a reasonable, persuasive basis for relying on the information which he uses to fashion his ultimate sentence, an appellate court should not interfere with his discretion." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Eric M.*, 271 Conn. 641, 649–50, 858 A.2d 767 (2004). "Nonetheless, the mere reference to information outside of the record does not require a sentence to be set aside unless the defendant shows: (1) that the information was materially false or unreliable; and (2) that the trial court substantially relied on the information in determining the sentence." *State* v. *Collette*, 199 Conn. 308, 321, 507 A.2d 99 (1986).

We conclude that when the record is read as a whole, it is clear that the court did not substantially rely on the challenged information when it determined the defendant's sentence. See *State* v. *Anderson*, 212 Conn. 31, 50, 561 A.2d 897 (1989). Again, the court received statements from both the defendant and the victim, heard the defendant's allocution, reviewed the PSI report, and heard argument from counsel. We therefore reject the defendant's claim that the court violated his due process rights by considering the victim's statement to the court and "not [permitting him] to present any evidence in mitigation of the sentence . . . ." Before imposing the sentence, the court noted: (1) that the case stemmed from a "long history" of conflict between the parties, particularly over child care and custody; (2) the evidence from trial that contradicted the defendant's claim that he called the landline to arrange visitation with the children; (3) information and statements contained in the PSI, including one by a relative referring to him as "stubborn and aggressive," and one by a friend that indicated that the defendant was "not willing to lose the battle to win the war"; (4) the "contentious" nature of this case; (5) its own assessment of

the defendant's parenting skills, particularly in light of his decision to place the children "in the middle of a custody battle"; (6) evidence that the defendant violated the protective order; (7) the defendant's statements to the court, particularly accusations against the victim's family members and the courts, which indicated to the court "how manipulating and controlling" the defendant could be; (8) the defendant's failure to accept responsibility for his actions; and (9) its own concerns for the safety of the victim. Even if this court were to assume, arguendo, that the victim's statements to the court contained information that was materially untrue or unreliable, as the defendant contends, we conclude that the defendant has not shown that the court substantially relied on that information. The court did not directly refer to the challenged information, and there was sufficient reliable information on which the court relied in sentencing.

We are similarly unpersuaded by the defendant's argument that "[b]ecause the trial court did not permit the defendant to present any evidence in mitigation of the sentence, the defendant's due process rights were violated." The court did not, as the defendant contends, impose "an absolute bar on any offer of evidence." The court permitted the defendant to submit evidence and to address the court, both during allocution and through counsel. The court declined only to hear evidence that it determined was outside the scope of the sentencing hearing. As we have noted, our rules of practice afford the court discretion in permitting evidence "on any matter relevant" to the disposition. It was within the court's discretion to prevent the defendant from presenting evidence that it determined was not relevant to the sentencing. Because the defendant has failed to establish a constitutional violation, his due process claim fails under the third prong of *Golding*.

The judgment is affirmed.

In this opinion the other judges concurred.

EDWARD FRANTZEN *v.* DAVENPORT ELECTRIC ET AL.
(AC 39009)

Alvord, Keller and Beach, Js.

Syllabus

V, an attorney who had represented the claimant in proceedings before the Workers' Compensation Commission, appealed to this court from the decision of the Workers' Compensation Review Board, which affirmed in part the decision of the Workers' Compensation Commissioner determining that the commission had the authority to adjudicate a fee dispute between V and W Co., a law firm that previously had represented the claimant in the matter before the commission. V had challenged, inter alia, the commission's subject matter jurisdiction over the fee dispute. After a hearing, the commissioner found that the commission had subject matter jurisdiction over the fee dispute and ordered a fifty/fifty split of the attorney's fees between V and W Co. The board affirmed the commissioner's decision as to subject matter jurisdiction but reversed as to the division of the fees, and V appealed to this court. *Held*:

1. V could not prevail on his claim that the commission lacks subject matter jurisdiction to resolve disputes regarding attorney's fees between counsel who serially represent a claimant before the commission; the plain language of the applicable statute (§ 31-327 [b]) unambiguously provides that all attorney's fees, including the division of attorney's fees between successive counsel, are subject to the commissioner's approval, and, therefore, § 31-327 (b) authorizes the commission to adjudicate fee disputes between successive counsel concerning their representations of a claimant before the commission.
2. Contrary to V's claim, the commissioner and the board did not deprived V of his constitutional right to have the attendant factual issues in the matter resolved by a jury; it is well established that there is no right to a jury trial in proceedings before the commission, and there was no reason to distinguish between trials of issues expressly within the commission's jurisdiction and those impliedly within its jurisdiction, as both are administrative in nature.

Argued November 15, 2017—officially released February 27, 2018

Procedural History

Appeal from the decision by the Workers' Compensation Commissioner for the Fourth District ordering the equal division of certain attorney's fees between the

claimant's counsel, brought to the Workers' Compensation Review Board, which affirmed in part the commissioner's decision, and Enrico Vaccaro appealed to this court. *Affirmed.*

Emily A. Gianquinto, with whom, on the brief, was *Enrico Vaccaro*, for the appellant (Enrico Vaccaro).

Sarah Gleason, with whom were *David M. Cohen* and, on the brief, *Adam J. Blank*, for the appellee (Wofsey, Rosen, Kweskin & Kuriansky, LLP).

Opinion

BEACH, J. This case presents the issue of whether the Workers' Compensation Commission (commission) has the statutory authority, pursuant to General Statutes § 31-327 (b),[1] to decide fee disputes among attorneys who have represented a claimant at different times during the pendency of a case before the commission. Pursuant to General Statutes § 31-301b, the appellant, Enrico Vaccaro,[2] appeals from the decision of the Workers' Compensation Review Board (board), which affirmed in part the decision of the Workers' Compensation Commissioner (commissioner), insofar as it determined that the commission has the authority to adjudicate a fee dispute between Vaccaro and the appellee, the law firm of Wofsey, Rosen, Kweskin & Kuriansky, LLP (Wofsey Rosen). On appeal, Vaccaro claims (1) that the commission does not have subject matter jurisdiction to resolve disputes regarding attorney's fees between lawyers who serially represented a claimant and (2) that the commissioner and the board deprived Vaccaro of his constitutional right to have the attendant

[1] General Statutes § 31-327 (b) provides: "All fees of attorneys, physicians, podiatrists or other persons for services under this chapter shall be subject to the approval of the commissioner."

[2] Vaccaro has standing to bring this § 31-301b appeal even though he was not a party to the underlying workers' compensation proceeding. See *Day* v. *Middletown*, 245 Conn. 437, 441, 716 A.2d 47 (1998).

factual issues resolved by a jury. We disagree with Vaccaro's claims and, accordingly, affirm the decision of the board.

The following facts and procedural history are relevant to this appeal. Both Vaccaro and Wofsey Rosen represented Edward Frantzen, the claimant, in claims for compensation brought against his employer, Davenport Electric, for work related injuries sustained in 1994, 1998, and 2003. Wofsey Rosen represented the claimant from March 18, 1998 to April 1, 2005.[3] Attorney Allan Cane, who is not a party to this appeal, represented the claimant from April 27, 2005 to July 13, 2007. Vaccaro represented the claimant from July 13, 2007 to May 8, 2014. On May 8, 2014, a stipulation was approved by Commissioner Charles F. Senich pursuant to which $850,000 was awarded to the claimant. The commissioner also approved attorney's fees of 20 percent, with instruction for Vaccaro to hold the amount of the fees in escrow until the fee dispute was resolved. On June 13, 2014, Vaccaro filed a brief that challenged the commission's subject matter jurisdiction over the fee dispute and attacked Wofsey Rosen's claim to any portion of the escrowed fees.

On September 30, 2014, a hearing was held before Commissioner Michelle D. Truglia on, among other things, Vaccaro's challenge to the commission's subject matter jurisdiction. Vaccaro was given the opportunity to submit evidence of his fee arrangement with the claimant, along with a statement of time and charges attributable to this representation. Vaccaro submitted a copy of his fee agreement but did not provide any evidence of time or charges attributable to this representation. Wofsey Rosen, on the other hand, provided

[3] Specifically, the claimant was represented by Judith Rosenberg and Patricia Carriero of Wofsey Rosen. For simplicity, we will refer to those attorneys and the law firm collectively as Wofsey Rosen throughout this opinion.

substantial evidence regarding its representation of the claimant. After finding that the commission had subject matter jurisdiction over the fee dispute, the commissioner decided that, because of Vaccaro's failure to document his time and charges, it was impossible to determine the scope and value of his representation of the claimant, and ordered a fifty/fifty split of the escrowed attorney's fees between Vaccaro and Wofsey Rosen.

Vaccaro then appealed from the decision to the board, which on February 24, 2016, affirmed the commissioner's decision as to subject matter jurisdiction but reversed as to the division of the fees, and remanded the matter to the commissioner for a full evidentiary hearing on the issue. Vaccaro thereafter appealed to this court.[4] Additional facts will be set forth as necessary.

Vaccaro claims on appeal that the commission does not have subject matter jurisdiction to resolve disputes regarding attorney's fees between lawyers who serially represent a claimant and that the commissioner and the board deprived him of his constitutional right to have the attendant factual issues resolved by a jury.

As a threshold matter, we set forth the standard of review applicable to workers' compensation appeals. "It is well established that [a]lthough not dispositive, we accord great weight to the construction given to the workers' compensation statutes by the commissioner and review board. . . . A state agency is not entitled, however, to special deference when its determination of a question of law has not previously been subject to

[4] The board's decision is appealable pursuant to § 31-301b even though the board remanded the matter to the commissioner for further proceedings, because § 31-301b expressly provides that a board's decision is appealable to the Appellate Court "whether or not the decision is a final decision within the meaning of section 4-183 [of the Uniform Administrative Procedure Act] or a final judgment within the meaning of section 52-263."

judicial scrutiny. . . . Where . . . [a workers' compensation] appeal involves an issue of statutory construction that has not yet been subjected to judicial scrutiny, this court has plenary power to review the administrative decision." (Citations omitted; internal quotation marks omitted.) *Day* v. *Middletown*, 59 Conn. App. 816, 819, 757 A.2d 1267, cert. denied, 254 Conn. 945, 762 A.2d 900 (2000). "We [accord] deference to . . . a time-tested agency interpretation of a statute, but only when the agency has consistently followed its construction over a long period of time, the statutory language is ambiguous, and the agency's interpretation is reasonable." *State Medical Society* v. *Board of Examiners in Podiatry*, 208 Conn. 709, 719, 546 A.2d 830 (1988).

Our analysis of this claim is guided by our well established principles of statutory construction. "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case . . . . In seeking to determine that meaning . . . [we] first . . . consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . .

"Moreover, [i]n applying these general principles, we are mindful that the [Workers' Compensation Act, General Statutes § 31-275 et seq.] indisputably is a remedial statute that should be construed generously to accomplish its purpose. . . . The humanitarian and remedial purposes of the act counsel against an overly narrow construction that unduly limits eligibility for workers' compensation. . . . Accordingly, [i]n construing workers' compensation law, we must resolve statutory ambiguities or lacunae in a manner that will further the remedial purpose of the act. . . . [T]he purposes of the act itself are best served by allowing the remedial legislation a reasonable sphere of operation considering those purposes." (Internal quotation marks omitted.) *Kinsey* v. *World PAC*, 152 Conn. App. 116, 124, 98 A.3d 66 (2014).

"The powers and duties of workers' compensation commissioners are conferred upon them for the purposes of carrying out the stated provisions of the Workers' Compensation Act. . . . It is well settled that the commissioner's jurisdiction is confined by the . . . act and limited by its provisions." (Citations omitted; internal quotation marks omitted.) *Tufaro* v. *Pepperidge Farm, Inc.*, 24 Conn. App. 234, 236, 587 A.2d 1044 (1991).

I

In determining whether the commission has subject matter jurisdiction to resolve disputes regarding attorney's fees between lawyers who serially represent a claimant, we first examine the statutory language to determine whether any ambiguity exists in § 31-327 (b).[5] Vaccaro claims that "[t]he word 'all' in subsection (b) simply is not a blanket grant of authority by the legislature to the commission to resolve any and all issues related to attorney's fees."

[5] See footnote 1 of this opinion.

In *Prioli* v. *State Library*, 64 Conn. App. 301, 307–10, 780 A.2d 172, cert. denied, 258 Conn. 917, 782 A.2d 1246 (2001), this court affirmed the board's decision upholding the commissioner's authority to reduce attorney's fees from the amount prescribed in a fee agreement in order to be consistent with the commission's fee guidelines. The appellant attorney in that case argued that the commissioner had the authority to approve only fees payable directly by a claimant to her attorney. Id., 307. The attorney argued that the commissioner exceeded his authority in ordering a reduction to his fee, because, pursuant to a negotiated settlement, the employer, rather than the claimant, was required to pay the fee.[6] Id. This court disagreed and cited with approval the board's decision in a prior case, which held that pursuant to the plain language of § 31-327 (b), "[i]t would be inconsistent with both the clear meaning of [its language] and the humanitarian purpose of the Workers' Compensation Act in general to read § 31-327 (b) as limiting the authority of commissioners to oversee attorney's fees . . . ." (Internal quotation marks omitted.) Id., 309. The court held that "[s]ubsection (b) directly follows and modifies subsection (a), and further provides that *all* attorney's fees shall be subject to the commissioner's approval. Subsection (b) makes no distinction between fees that are awarded separately and fees that are combined with other compensation. In the absence of a statutory exception, we are not persuaded that a separate award of fees is exempt from the commissioner's approval." (Emphasis in original.) Id.

The precise issue in *Prioli*, to be sure, did not concern whether any portion of the awarded fees could have

[6] The attorney had submitted to the claimant an accounting that resulted in a fee of more than twice the amount that the commissioner previously had awarded; the previous award had been replaced by a negotiated agreement. Id., 305.

been allocated to other lawyers who represented the claimant successively. Vaccaro claims that this court determined in *Prioli* only that subsection (b) of § 31-327 modifies subsection (a).[7] The court quite clearly held, however, that § 31-327 (b) both modified subsection (a) *and* provided that all attorney's fees are subject to the commissioner's approval. Id., 308–309. Vaccaro's claim is contrary to the plain language of the statute, in that subsection (b) provides that all attorney's fees "for services *under this chapter*" are subject to the commissioner's approval. (Emphasis added.) General Statutes § 31-327 (b). The principles we cited in deciding *Prioli* would be contravened if we were to read into the unambiguous statute an exception to the word "all." Thus, under a plain reading of § 31-327 (b), we conclude that the statute unambiguously provides that the division of attorney's fees between successive counsel is subject to the commissioner's approval. Accordingly, the commissioner, and by extension the commission, had the authority to direct the division of the attorney's fees award.

This holding is consistent with our Supreme Court precedent. In *Gill* v. *Brescome Barton, Inc.*, 317 Conn. 33, 43–44, 114 A.3d 1210 (2015), our Supreme Court held that it was within the commissioner's statutory authority to order one insurance company to reimburse another for 50 percent of the claimant's temporary total disability payments, where, in the unique circumstances of that case, either of two independent injuries caused temporary total disability, and thus the commissioner had the authority to order either insurer to make 100

[7] General Statutes § 31-327 (a) provides: "Whenever any fees or expenses are, under the provisions of this chapter, to be paid by the employer or insurer and not by the employee, the commissioner may make an award directly in favor of the person entitled to the fees or expenses, which award shall be filed in court, shall be subject to appeal and shall be enforceable by execution as in other cases. The award may be combined with an award for compensation in favor of or against the injured employee or the dependent or dependents of a deceased employee or may be the subject of an award covering only the fees and expenses."

percent of the disability payments. The court reasoned that it could "think of no logical reason why, if the commissioner was authorized under the literal language of the relapse statute[8] to order either of the insurance carriers to make 100 percent of the claimant's temporary total disability payments, he would not also be authorized to order each of the insurance carriers to make, in effect, only 50 percent of such payments." (Footnote added.) Id., 44. After reviewing each of the ways the commissioner could have resolved the insurance carriers' dispute about their concurrent responsibility, the court concluded that the commissioner's decision "was a necessary and reasonable interim compromise . . . ." Id., 44–45. Although there was no statutory authority precisely on point for the commissioner's decision, the court held that General Statutes § 31-278 granted commissioners the powers necessary to perform the duties imposed by law and noted that agencies have implied powers reasonably necessary to carry out powers expressly granted, because the legislature cannot possibly foresee all of the problems and circumstances that may arise in the implementation of the law. Id., 44.

Because the commissioner has the authority to approve attorney's fees regardless of source, it follows that she may decide to allocate the fees between successive counsel according to their actions and involvement in the underlying matter. The commissioner generally is in the best position to evaluate the relative contributions of counsel to the ultimate result, and resolution by the commissioner is likely to be more efficient than a second court proceeding, which likely would subject all parties and attorneys to additional time and aggravation. If the commissioner has the authority to determine that an attorney is not entitled to the full 20 percent, the maximum amount allowed by the guidelines, then

[8] See General Statutes § 31-307b.

it is within the reasonable exercise of that statutory authority for the commissioner to decide that more than one attorney that has performed work on the matter is entitled to some portion of the fees.

Therefore, we hold that § 31-327 (b) grants the commission the authority to adjudicate fee disputes between successive counsel concerning their representations of a claimant before the commission.

II

Having held that the commission had the statutory authority to decide the issue of the division of the attorney's fees, we briefly address Vaccaro's constitutional claim that his right to a jury trial was violated.[9] The General Assembly enacted the Workmen's Compensation Act in 1913. Two years later, our Supreme Court held in *Powers* v. *Hotel Bond Co.*, 89 Conn. 143, 146, 93 A. 245 (1915), that the legislature had the power to eliminate traditional tort actions by employees against their employers in return for the relative speed and certainty of the administrative action. The Supreme Court more recently reiterated that the provisions of the Workers' Compensation Act stating that a claim to the commission is the exclusive remedy of a worker against his employer do not violate the constitutional right to redress in the courts; access to the commission is a "reasonable alternative" to a common-law cause of action. *Mello* v. *Big Y Foods, Inc.*, 265 Conn. 21, 31–35, 826 A.2d 1117 (2003).

Once the constitutional validity of the express statutory powers of the commission is recognized, it follows that exercise of its implied powers necessarily passes constitutional muster. See part I of this opinion. Abrogation of the common-law tort action, with its attendant

[9] Vaccaro's constitutional claim was not preserved before the commission or the board. We thus consider the claim only pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 120 A.3d 1188 (2015). The record is adequate to review Vaccaro's claim, and the claim is of constitutional magnitude, but we con-

right to jury trial, is the necessary result of an effective administrative remedy; see *Mello* v. *Big Y Foods, Inc.*, supra, 265 Conn. 34; a jury trial on the subordinate issue of attorney's fees would partly defeat the purpose of the Workers' Compensation Act. As stated in a slightly different context more than one hundred years ago: "If the [a]ct permits each cause to be appealed and tried de novo in the Superior Court, its objects will be defeated, and more delay, less certainty, and more expense will ensue to the claimant than with the single trial of the old method. We may not lightly presume that the legislature intended to set up a new system, the result of long agitation, much study and the fullest publicity, and then deliberately, in the very [a]ct creating its new system, pull down the work of its hands." *Powers* v. *Hotel Bond Co.*, supra, 89 Conn. 147. It is well established that there is no right to a jury trial in proceedings before the commission. We see no reason to distinguish between trials of issues expressly within the commission's jurisdiction and those impliedly within its jurisdiction: either way, the actions are administrative.

The decision of the Workers' Compensation Review Board is affirmed.

In this opinion the other judges concurred.

KIMBERLY C. *v.* ANTHONY C.*
(AC 38991)

Alvord, Keller and Pellegrino, Js.

Syllabus

The plaintiff appealed to this court from the judgment of the trial court dissolving her marriage to the defendant and making certain custody

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clude that the alleged constitutional violation does not exist, and, therefore, his claim fails under the third prong of *Golding*.

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

orders. The plaintiff claimed that the trial court improperly awarded the parties joint legal custody of their minor child and improperly denied her motions for sexual behavior and substance abuse evaluations of the defendant. The plaintiff alleged that the defendant had physically, verbally and sexually abused her during the course of their marriage, and she had previously obtained a one year restraining order against the defendant per written agreement of the parties, pursuant to which the defendant did not admit to the allegations of the alleged abuse. Upon expiration of the first restraining order, the plaintiff filed a second application, which the trial court denied, finding that there was no continuous threat of present physical pain or physical injury. The trial court, however, during the proceedings on the second application, stated that it accepted as credible the testimony of the plaintiff that she was physically, verbally, and sexually abused by the defendant. During the dissolution proceedings, the plaintiff filed a motion in limine seeking, on the ground of collateral estoppel, to preclude the defendant from relitigating the court's findings in the second restraining order proceeding that he had abused the plaintiff, which the trial court denied. Following the dissolution trial, the trial court, in its memorandum of decision, found that neither party was a credible witness and made no finding that the defendant had abused the plaintiff. On appeal, the plaintiff claimed that under the doctrine of collateral estoppel, the trial court, in the dissolution proceeding, was bound by the facts found in the previous proceeding on the plaintiff's second restraining order application that the defendant was physically, verbally and sexually abusive to the plaintiff. *Held* that the trial court properly declined to apply the doctrine of collateral estoppel, as the issues involved in the dissolution action were neither actually litigated nor necessarily determined in the proceeding on the second restraining order application: in the proceeding on the second restraining order application, the court did not make any factual findings with regard to the alleged abuse but, rather, made only a credibility determination regarding the plaintiff, which was not necessary to its determination to deny the application, the issue to be determined in the second restraining order proceeding, namely, whether the plaintiff was exposed to a continuous threat of physical pain or injury, was not identical to the issues to be determined in the dissolution proceeding, which concerned whether the marriage was irretrievably broken down, alimony, child support, educational support, and the equitable division of the marital estate, and there was no indication that the issue of abuse had been necessarily determined in the second restraining order proceeding; moreover, the court's denial of the plaintiff's motions for sexual behavior evaluation and substance abuse evaluation for the defendant were discretionary in nature and entitled to deferential review, and the plaintiff failed to demonstrate that the court's rulings denying those motions relied on clearly erroneous factual findings or a misapprehension of the law, or that the court otherwise abused its discretion.

Argued December 12, 2017—officially released February 27, 2018

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Windham and tried to the court, *Graziani, J.*; judgment dissolving the marriage and granting certain other relief, from which the plaintiff appealed to this court. *Affirmed.*

Joseph Rodowicz, Jr., for the appellant (plaintiff).

Opinion

PER CURIAM. The plaintiff, Kimberly C., appeals from the judgment of the trial court dissolving her marriage to the defendant, Anthony C.[1] On appeal, the plaintiff claims that the court improperly (1) awarded the parties joint legal custody of their minor child by relitigating the issue of the occurrence of domestic violence between the parties when that issue had been determined in a prior proceeding and the court was bound by the finding on domestic violence in that proceeding by virtue of the doctrine of collateral estoppel, and (2) denied the plaintiff's motions for sexual behavior evaluation and substance abuse evaluation of the defendant. We disagree and, accordingly, affirm the judgment of the trial court.

The record reveals the following facts and procedural history. The plaintiff and defendant were married in Connecticut on July 21, 2011. One minor child was born during the marriage. On November 27, 2013, the plaintiff filed an application for relief from abuse from the defendant pursuant to General Statutes § 46b-15 (first

[1] The defendant-appellee did not file a brief in this appeal. On June 2, 2017, this court ordered that the appeal be considered on the basis of the plaintiff-appellant's brief and the record only. Similarly, the Department of Social Services, Bureau of Child Support Enforcement, notified this court that it did not intend to file a brief in this appeal on April 7, 2017.

restraining order application).[2] That same day, the court, *Graziani, J.*, issued an ex parte restraining order effective until the court held a full hearing. On December 2, 2013, the plaintiff commenced the underlying dissolution action, citing the ground of irretrievable breakdown of the marriage, and seeking dissolution of her marriage to the defendant, equitable division of property and assets, alimony, child support, and sole custody of the parties' minor child. On December 11, 2013, the court, *Boland, J.*, issued a one year restraining order by written agreement of the parties; see General Statutes § 46b-66 (a);[3] which automatically expired on December 11, 2014. In that written agreement, the defendant agreed to the restraining order without admitting the truthfulness of the allegations contained in the plaintiff's application for relief from abuse. The agreement also permitted the defendant to have access to the parties' minor child.

On February 4, 2015, the plaintiff filed a second application for relief from abuse (second restraining order application). On February 17, 2015, the court, *dos Santos, J.*, conducted a hearing and heard testimony from the plaintiff about allegations of past abuse by the defendant. Although Judge dos Santos made a statement that he believed the plaintiff had been abused by the defendant, he nonetheless denied the application, concluding

[2] General Statutes § 46b-15 (a) provides in relevant part: "Any family or household member . . . who has been subjected to a continuous threat of present physical pain or physical injury, stalking or a pattern of threatening . . . by another family or household member may make an application to the Superior Court for relief under this section."

[3] General Statutes § 46b-66 (a) provides in relevant part: "In any case under this chapter where the parties have submitted to the court an agreement concerning the custody, care, education, visitation, maintenance or support of any of their children . . . the court shall . . . determine whether the agreement of the spouses is fair and equitable under all the circumstances. If the court finds the agreement fair and equitable, it shall become part of the court file, and if the agreement is in writing, it shall be incorporated by reference into the order or decree of the court . . . ."

that the evidence was insufficient to find a "continuous threat of present physical pain or physical injury" required to issue a restraining order pursuant to § 46b-15. The plaintiff did not appeal that judgment.

On October 22, 2015, during the pendency of the dissolution action, the plaintiff filed a motion in limine seeking to preclude the defendant from relitigating findings in the second restraining order application that he had physically, verbally, and sexually abused the plaintiff on the ground of collateral estoppel. Judge Graziani denied the plaintiff's motion in limine on November 18, 2015. A three day dissolution trial took place from December 9, 2015 through December 11, 2015. Both parties testified at trial. The plaintiff testified that the defendant had physically, verbally, and sexually abused her during the course of the marriage. The defendant denied all allegations of abuse. On February 23, 2016, the court issued its written memorandum of decision, in which it found that neither the plaintiff nor defendant were credible witnesses and made no finding that the defendant had abused the plaintiff. The court found both parties responsible for the breakdown of the marriage. It dissolved the marriage, distributed the marital assets, awarded joint legal custody of the minor child to the parties with the plaintiff having the primary residence of the child, and made orders of visitation which provided the defendant with detailed parenting time, including overnights. This appeal followed.

In connection with the plaintiff's first claim that the doctrine of collateral estoppel precluded the court from making findings of fact that were made in the previous proceeding on the plaintiff's second restraining order application, we begin by setting forth the applicable standard of review and legal principles. "Whether the court properly applied the doctrine of collateral estoppel is a question of law for which our review is plenary.

. . . The fundamental principles underlying the doctrine are well established. Collateral estoppel, or issue preclusion, is that aspect of res judicata which prohibits the relitigation of an issue when that issue was *actually litigated* and *necessarily determined* in a prior action between the same parties upon a different claim. . . . For an issue to be subject to collateral estoppel, it must have been *fully and fairly litigated in the first action*. It also must have been actually decided and the decision must have been necessary to the judgment. . . .

"An issue is *actually litigated* if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined. . . . An issue is *necessarily determined* if, in the absence of a determination of the issue, the judgment could not have been validly rendered." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Cadle Co.* v. *Gabel*, 69 Conn. App. 279, 293–94, 794 A.2d 1029 (2002). "To establish whether collateral estoppel applies, the court must determine what facts were necessarily determined in the first trial, and must then assess whether the [party] is attempting to relitigate those facts in the second proceeding. . . . In order for collateral estoppel to bar the relitigation of an issue in a later proceeding, the issue concerning which relitigation is sought to be estopped *must be identical* to the issue decided in the prior proceeding." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Kenneson* v. *Eggert*, 176 Conn. App. 296, 305, 170 A.3d 14 (2017).

The plaintiff argues on appeal that under the doctrine of collateral estoppel, the trial court in the dissolution action was bound by the facts found in the proceeding on the second restraining order application that the defendant was physically, verbally, and sexually abusive to the plaintiff. "To establish whether collateral estoppel applies, the court must determine what facts were necessarily determined in the first trial, and must then assess whether the [party] is attempting to relitigate those facts in the second proceeding." (Internal

quotation marks omitted.) *Marques* v. *Allstate Ins. Co.*, 140 Conn. App. 335, 340, 58 A.3d 393 (2013). We now turn to the facts that were found in the second restraining order proceeding to determine if collateral estoppel prohibits the relitigation of those facts.[4]

In the proceeding on the second restraining order application, Judge dos Santos did not make any factual findings with regard to the alleged abuse; instead, he made only credibility determinations regarding the plaintiff, stating: "The court accepts as credible the testimony of the [plaintiff] that she was physically, verbally, and sexually abused by her spouse. . . . I do believe your client about what happened to her sexually with her husband. . . . I cannot find based upon the evidence in its totality that the respondent stalked the applicant. I cannot find based upon the totality of the testimony that the respondent threatened the applicant. And I cannot find that this condition that existed at the time of the first . . . restraining order that this has continued. . . . [T]here's really no basis, no finding that this condition continues to exist . . . that this is a continuous threat of present physical pain or physical injury or that there's been stalking, or that there's been a pattern of threatening by the respondent. So on that basis, the court does deny the application." The court also did not make a finding that the plaintiff was being abused at the time of the hearing. Because the court denied the second restraining order application, finding no continuous threat to the plaintiff, we cannot hold that its credibility finding was necessarily determined, as the application could have been denied without the court determining that the plaintiff had been abused in the past.

[4] As noted previously, the plaintiff sought restraining orders against the defendant in two separate proceedings. No findings of fact were made in the first restraining order action, because Judge Boland merely adopted the agreement of the parties; see footnote 3 of this opinion; that allowed a restraining order to be issued without the defendant admitting the truthfulness of the allegations contained in the plaintiff's application.

Furthermore, there are significant differences between the issues to be determined in a proceeding on an application for a restraining order and the issues to be determined in a dissolution action. Pursuant to § 46b-15, "[d]omestic violence restraining orders will not issue in the absence of the showing of a threat of violence, specifically a continuous threat of present physical pain or physical injury to the applicant." (Internal quotation marks omitted.) *Jordan M.* v. *Darric M.*, 168 Conn. App. 314, 319, 146 A.3d 1041, cert. denied, 324 Conn. 902, 151 A.3d 1287 (2016). By contrast, "[t]he purpose of a dissolution action is to sever the marital relationship, to fix the rights of the parties with respect to alimony and child support . . . to divide the marital estate . . . and to consider custody issues." (Citation omitted; internal quotation marks omitted.) *Bouchard* v. *Sundberg*, 80 Conn. App. 180, 189, 834 A.2d 744 (2003); see also *Ireland* v. *Ireland*, 246 Conn. 413, 430, 717 A.2d 676 (1998) ("best interests of the child must always govern decisions involving custodial or visitation matters").

The only issue before Judge dos Santos in the proceeding on the second restraining order application was whether the plaintiff was exposed to a "continuous threat of physical pain or physical injury" by the defendant. The issues before Judge Graziani in the dissolution action, however, were whether the marriage was irretrievably broken down, alimony, child support, educational support, and the equitable division of the marital estate, as well as what orders of joint custody and visitation were in the best interests of the parties' minor child. Because the issue to be determined in the second restraining order proceeding, continuous threat of physical injury, was not identical to the issues to be determined in the dissolution proceeding, nor was there any indication that the issue of abuse had been necessarily determined in the second restraining order proceeding, collateral estoppel has no application. See, e.g., *Gladysz* v. *Planning & Zoning Commission*, 256 Conn. 249,

261, 773 A.2d 300 (2001); see also *Aetna Casualty & Surety Co.* v. *Jones*, 220 Conn. 285, 297, 596 A.2d 414 (1991). We conclude that the issues involved in the dissolution action were neither actually litigated nor necessarily determined in the proceeding on the second restraining order application, and, therefore, the court properly declined to apply the doctrine of collateral estoppel.

The plaintiff's second claim does not warrant significant discussion. The court's denial of the plaintiff's motions for sexual behavior evaluation and substance abuse evaluation for the defendant were discretionary in nature and are entitled to deferential review. See *Loughlin* v. *Loughlin*, 280 Conn. 632, 641, 910 A.2d 963 ("in . . . questions arising out of marital disputes, this court relies heavily on the exercise of sound discretion by the trial court" [internal quotation marks omitted]). The plaintiff has failed to demonstrate that these rulings relied on clearly erroneous factual findings, a misapprehension of the law, or that the court otherwise abused its discretion.

Having thoroughly reviewed the record and the arguments of the plaintiff, we conclude that the plaintiff has not met her burden of proving either of the claims raised on appeal.

The judgment is affirmed.

STATE OF CONNECTICUT *v.* GARY ALAN PECOR
(AC 39613)

Lavine, Bright and Flynn, Js.

Syllabus

The defendant, who previously had been convicted on a guilty plea of the crime of robbery in the second degree, appealed to this court from the trial court's dismissal of his motion to correct an illegal sentence. The trial court initially had sentenced the defendant to a definite period of incarceration of two years followed by a period of eight years of special parole. In September, 2014, following a motion to correct an illegal

sentence filed by the defendant, the trial court vacated the defendant's sentence and resentenced him to two years and one day of incarceration, followed by seven years and 364 days of special parole. Subsequently, the defendant filed a second motion to correct an illegal sentence, in which he claimed, inter alia, that the court did not have jurisdiction to modify the two years of incarceration to which he was originally sentenced because that was not an illegal sentence, and that the court was permitted to modify only the illegal portion of the sentence, namely, the eight years of special parole. Additionally, he claimed that the new sentence violated his constitutional right against double jeopardy. The trial court rendered judgment dismissing the defendant's second motion to correct an illegal sentence, determining that because the defendant was collaterally attacking its September, 2014 judgment, the claim was moot and, thus, that it lacked subject matter jurisdiction to address the defendant's claims. *Held*:

1. The trial court improperly determined that it lacked jurisdiction to address the defendant's motion to correct an illegal sentence; because the court could have granted the defendant relief by correcting the alleged illegal sentence that had been imposed in September, 2014, the issue was not moot, and the court's conclusion that it lacked subject matter jurisdiction because the defendant was collaterally estopped from claiming that his new sentence was illegal was incorrect, as the doctrine of collateral estoppel did not implicate the trial court's subject matter jurisdiction.
2. The state could not prevail on its claim that the defendant's claims were barred by the doctrine of res judicata, as the claims regarding the new sentence imposed in September, 2014, were not fully and fairly litigated prior to the imposition of that new sentence: although the defendant's original sentence was found to be illegal in September, 2014, a new sentence was imposed at that time, and the defendant's challenge to that sentence as illegal had not been considered and decided on the merits when the defendant later filed his second motion to correct an illegal sentence; furthermore, the defendant's claim that he was being deprived of his liberty unconstitutionally was of such import that it should be heard on its merits and not ignored because it could have been raised at an earlier proceeding, and res judicata did not preclude the defendant's claims because an illegal sentence is always capable of correction in the interest of justice.
3. This court declined to address the merits of the defendant's motion to correct an illegal sentence on appeal, in which he alleged that the trial court, by imposing an additional day of incarceration to the definite period of incarceration that he already had completed, violated his constitutional rights to due process and against double jeopardy: although the defendant's double jeopardy claim ostensibly presented a question of law, there were factual findings that could be relevant to the resolution of that claim, the issue had not been properly briefed and there was an insufficient factual record to determine whether the

defendant's due process rights were violated, which involved a factual issue of whether the defendant had engaged in wrongdoing that could not be resolved by this court; accordingly, the case was remanded for a hearing on the merits of the defendant's motion to correct.

Argued November 16, 2017—officially released February 27, 2018

Procedural History

Substitute information charging the defendant with the crime of robbery in the second degree, brought to the Superior Court in the judicial district of Danbury, where the defendant was presented to the court, *Cobb*, *J.*, on a plea of guilty; judgment of guilty in accordance with the plea; thereafter, the court, *Shaban*, *J.*, dismissed the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Reversed; further proceedings.*

Michael K. Courtney, public defender, for the appellant (defendant).

Matthew A. Weiner, assistant state's attorney, with whom, on the brief, was *Stephen J. Sedensky III*, state's attorney, for the appellee (state).

Opinion

BRIGHT, J. The defendant, Gary Alan Pecor, appeals from the judgment of the trial court dismissing his motion to correct an illegal sentence. On appeal, the defendant claims that the court improperly determined that it did not have jurisdiction to address his motion to correct. He also claims that this court should find, as matter of law, that his sentence is illegal and remand the case to the trial court with direction to resentence him as he has requested. The state agrees that the trial court incorrectly dismissed the defendant's motion to correct, but argues that the defendant's claim of illegality is barred by the doctrine of res judicata. The state asks this court to reverse the judgment of the trial court and remand the case with instruction that the court

deny the defendant's motion, or, in the alternative, that this court remand the case to the trial court for a hearing on the merits. We agree with the parties that the trial court erred in dismissing the defendant's motion for lack of subject matter jurisdiction. We disagree, though, that res judicata precludes the defendant's claim. We also disagree with the defendant that we should address the merits of his claim on the basis of the record before us. Accordingly, we reverse the judgment of the trial court, and remand the case for a hearing on the merits of the defendant's motion to correct an illegal sentence.

The following facts and procedural history are relevant to our resolution of the defendant's claim on appeal. On June 7, 2011, the defendant pleaded guilty under the *Alford* doctrine[1] to robbery in the second degree in violation of General Statutes § 53a-135. The factual basis for the plea was that, on March 4, 2011, the defendant attempted to steal a beef tenderloin from a supermarket in Brookfield. When the supermarket's employees attempted to detain him, he displayed a knife in an effort to escape. Pursuant to the plea agreement, the trial court sentenced the defendant to a definite period of incarceration of two years followed by a period of eight years of special parole. The two years of incarceration were to run concurrently with the sentence that the defendant then was serving on an unrelated conviction.

On May 7, 2013, the defendant filed a motion to correct an illegal sentence.[2] The defendant claimed that the sentence imposed by the court on June 7, 2011, was illegal because he had been sentenced to a period of special parole without receiving a definite sentence of more than two years in violation of General Statutes

[1] See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

[2] The record is not clear as to whether the defendant had completed the definite period of incarceration when he filed the motion to correct.

§ 54-125e (a).[3] See *State* v. *Boyd*, 272 Conn. 72, 78, 861 A.2d 1155 (2004) ("[s]ection 54-125e [a] applies only to defendants who have received a definite sentence of *more than* two years followed by a period of special parole" [emphasis added; internal quotation marks omitted]).

Following a series of continuances, and a reclaim of the defendant's motion to correct, the trial court conducted a hearing on September 12, 2014. Although the defendant withdrew his motion the previous day, the state indicated to the trial court that the court still was required to correct the illegal sentence. At the hearing, the state acknowledged that the defendant's sentence was illegal, and it proposed that the court simply resentence the defendant to two years and one day of incarceration followed by seven years and 364 days of special parole. Defense counsel stated that he believed that the court could restructure the defendant's sentence in that manner, although he believed that the court was required to afford the defendant the opportunity to withdraw his guilty plea.

Rejecting defense counsel's argument that it was required to permit the defendant to withdraw his guilty plea, the court vacated the defendant's sentence and resentenced him to two years and one day of incarceration, followed by seven years and 364 days of special parole.[4] The defendant received sentence credit for all of the time that he previously had served. There was no appeal taken from the court's judgment.

[3] General Statutes § 54-125e (a) applies to "[a]ny person convicted of a crime committed on or after October 1, 1998, who received a definite sentence of more than two years followed by a period of special parole . . . ."

[4] Although the court signed the defendant's motion to correct an illegal sentence on September 12, 2014, after it had been withdrawn by the defendant on September 11, 2014, and the judgment file reflects that the court granted the defendant's motion, it is clear from the record that the court corrected the defendant's illegal sentence in accordance with the state's oral request, after acknowledging that the defendant had withdrawn his motion.

On January 15, 2016, approximately sixteen months after the defendant was resentenced, he filed a second motion to correct an illegal sentence. In his second motion, the defendant challenged the sentence imposed on September 12, 2014, claiming that because the two years of incarceration to which he was originally sentenced was not an illegal sentence, the court did not have jurisdiction to modify it. The defendant argued that the court was permitted to modify only the illegal portion of the sentence, the eight years of special parole. Additionally, the defendant claimed that by sentencing him to an additional day of incarceration after he had completed his definite sentence of two years incarceration, the trial court violated his constitutional right against double jeopardy. The state, in a written objection to the defendant's motion in the trial court, claimed that (1) the matter previously was decided on September 12, 2014, and (2) the court did not have jurisdiction over the motion because the court imposed a legal sentence on September 12, 2014, from which the defendant did not appeal.

On March 11, 2016, the court conducted a hearing. At the hearing, the state argued that the defendant should have taken an appeal from the court's judgment on September 12, 2014. Defense counsel argued that the defendant was challenging the sentence imposed on September 12, 2014, on the ground that the court improperly increased the defendant's sentence by sentencing him to an additional day of incarceration after he had completed the original sentence of two years of incarceration. Defense counsel disagreed with the state's contention that an appeal needed to be taken from the court's previous judgment, stating that "the Practice Book doesn't require an appeal to be taken, if the sentence is illegal . . . . It's illegal today; it's illegal ten years from now."

The court issued a written decision on the defendant's motion to correct on July 6, 2016. The court reasoned that the defendant's motion essentially sought reconsideration of the court's judgment on September 12, 2014. The court reasoned that "[t]hrough his motion, the defendant attempts to collaterally attack the court's [September 12, 2014 judgment]. However, the defendant is collaterally estopped from doing so." The court concluded that the issue, therefore, was moot because its "prior [judgment] already [had] addressed the defendant's challenge to the legality of his original sentence." Accordingly, the court determined that it lacked subject matter jurisdiction, and it dismissed the motion to correct an illegal sentence. This appeal followed.

I

The defendant contends that the trial court improperly determined that it did not have jurisdiction to address his motion to correct. The state now agrees with the defendant, and so do we.

"[T]he jurisdiction of the sentencing court terminates once a defendant's sentence has begun, and, therefore, that court may no longer take any action affecting a defendant's sentence unless it expressly has been authorized to act. . . . Practice Book § 43-22, which provides the trial court with such authority, provides that [t]he judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner. An illegal sentence is essentially one which either exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. . . . We previously have noted that a defendant may challenge his or her criminal sentence on the ground that it is illegal by raising the issue on direct appeal or by filing a motion pursuant

to . . . § 43-22 with the judicial authority, namely, the trial court. . . . [B]oth the trial court, and this court, on appeal, have the power, at any time, to correct a sentence that is illegal. . . . [T]he issue is one of law, and we afford it plenary review." (Citations omitted; internal quotation marks omitted.) *State* v. *Ruiz*, 173 Conn. App. 608, 616–17, 164 A.3d 837 (2017).

In the present case, the trial court understood the defendant's motion to be a collateral attack on the court's September 12, 2014 judgment. The defendant, however, explained that he was not collaterally attacking the judgment that held that his original sentence had been illegal, but, rather, he was challenging the new sentence imposed on September 12, 2014, and the manner in which it was imposed. He specifically argued that the court improperly modified the legally correct part of his sentence and had violated his right against double jeopardy by sentencing him to an additional day of incarceration after he already had completed the definite portion of his sentence. The defendant argued that his claims appropriately were brought pursuant to Practice Book § 43-22. The trial court, however, determined that the claim was moot, and it dismissed the motion to correct.

"Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [a] court's subject matter jurisdiction . . . . It is well settled that [a]n issue is moot when the court can no longer grant any practical relief." (Citation omitted; internal quotation marks omitted.) *Middlebury* v. *Connecticut Siting Council*, 326 Conn. 40, 53–54, 161 A.3d 537 (2017). Additionally, we recognize that "the doctrine of collateral estoppel does not implicate a court's subject matter jurisdiction." *State* v. *T.D.*, 286 Conn. 353, 360 n.6, 944 A.2d 288 (2008).

Here, the court could have granted the defendant relief by correcting the alleged illegal sentence that had

been imposed on September 12, 2014. Therefore, the issue was not moot. Furthermore, the court's conclusion that it lacked subject matter jurisdiction because the defendant was collaterally estopped from claiming that his new sentence was illegal was incorrect. See id. Accordingly, the court improperly dismissed the defendant's motion to correct for lack of subject matter jurisdiction.

II

Although the state concedes that the trial court improperly concluded that it lacked subject matter jurisdiction to address the merits of the defendant's motion to correct, it argues that this court should conclude that the defendant's claims are barred by the doctrine of res judicata. The state, therefore, asks this court to remand the case with direction to the trial court to deny the defendant's motion to correct an illegal sentence. Because we conclude that the defendant's claims are not barred by the doctrine of res judicata, we decline the state's invitation.

"Res judicata is a judicial doctrine . . . designed to inhibit the ability of a plaintiff to litigate the same question over and over again, encumbering the mechanisms our society has established to resolve disputes . . . . At the same time, our Supreme Court has instructed that this doctrine of preclusion should be flexible and must give way when [its] mechanical application would frustrate other social policies based on values equally or more important than the convenience afforded by finality in legal controversies. . . . For that reason, the scope of matters precluded necessarily depends on what has occurred in the former adjudication. . . .

"Under the doctrine of res judicata, or claim preclusion, a former judgment on a claim, if rendered on the merits, is an absolute bar to a subsequent action on the same claim. A judgment is final not only as to every

matter [that] was offered to sustain the claim, but also as to any other admissible matter [that] might have been offered for that purpose. . . . Nonetheless, in applying the doctrine of res judicata to a [criminal] defendant's constitutional claim, special policy considerations must be taken into account. The interest in achieving finality in criminal proceedings must be balanced against the interest in assuring that no individual is deprived of his liberty in violation of his constitutional rights. . . . Whether two claims in a criminal case are the same for the purposes of res judicata should therefore be considered in a practical frame and viewed with an eye to all the circumstances of the proceedings. . . . Because the doctrine has dramatic consequences for the party against whom it is applied . . . we should be careful that the effect of the doctrine does not work an injustice." (Citations omitted; internal quotation marks omitted.) *State* v. *Brundage*, 148 Conn. App. 550, 561–62, 87 A.3d 582 (2014), aff'd, 320 Conn. 740, 135 A.3d 697 (2016).

"We must determine, therefore, whether the claim raised by the defendant in his motion to correct an illegal sentence was already litigated and determined in an earlier proceeding. The applicability of res judicata principles depends on whether the present claim is sufficiently similar to the previous claim to warrant our giving preclusive effect to the prior judgment." *State* v. *Osuch*, 124 Conn. App. 572, 581, 5 A.3d 976, cert. denied, 299 Conn. 918, 10 A.3d 1052 (2010).

During the hearing on September 12, 2014, defense counsel conceded that the court *would* be permitted to sentence the defendant to an additional day of incarceration, provided that the court allowed the defendant the opportunity to withdraw his plea. In the second motion to correct an illegal sentence, the defendant argued that the court, under any circumstance, could not modify his sentence in this way. Instead, he claimed

that because a portion of his original sentence—two years of incarceration—was a legal sentence, the court had no jurisdiction or authority to modify it, and could only strike the special parole portion of the sentence, which was illegal because the incarceration portion of the sentence did not exceed two years. Furthermore, he claimed that the court violated the prohibition against double jeopardy by adding an additional day of incarceration to the definite sentence of incarceration that he already had completed.

Although the state contends that these claims are barred by res judicata, we conclude that the claims regarding the new sentence imposed on September 12, 2014, were not fully and fairly litigated prior to the imposition of that new sentence.

In support of its argument, the state relies on this court's decision in *State* v. *Osuch*, supra, 124 Conn. App. 572. We conclude that such reliance is misplaced. In *Osuch*, the defendant challenged his original sentence for a third time on the basis of the same claim that the presentence investigation report contained incorrect information. Id., 582. This court concluded that the defendant's claim in his motion to correct an illegal sentence was barred by the doctrine of res judicata because it was "the same claim that both the habeas court and the [sentence review] division had previously considered and decided on the merits through the issuance of final judgments." Id.

In the present case, the defendant's claim that the sentence imposed on September 12, 2014, is illegal was not previously considered and decided on the merits. Although the defendant's *original sentence* was found to be illegal on September 12, 2014, *a new sentence* was imposed on that date. A challenge to that sentence had not been considered and decided on the merits when the defendant filed his motion to correct an illegal

sentence on January 15, 2016. Moreover, applying the doctrine to the defendant's claim would work an injustice. The defendant's claim involves his having been resentenced to an additional day of incarceration, after he had been released from custody and after completing the definite period of incarceration. A claim by a defendant that he is being deprived of his liberty unconstitutionally is of such import that it should be heard on its merits and not ignored because it could have been raised at an earlier proceeding. Accordingly, we conclude that the defendant's claims in his motion to correct an illegal sentence are not barred by the doctrine of res judicata.

This court's decision in *State* v. *Gaskin*, 7 Conn. App. 131, 508 A.2d 40 (1986), further supports our conclusion in the present case. In *Gaskin*, the trial court had granted the defendant's motion to correct an illegal sentence, and the state did not appeal from that judgment. Id., 133, 135. Several months after the court rendered judgment, the state moved to correct the amended sentence, claiming that the defendant's original sentence was not illegal. Id., 133. The trial court denied the motion, and the state appealed. Id. On appeal, the defendant claimed that the state's motion was improper because the state should have appealed from the judgment of the trial court granting his motion to correct. Id., 135.

This court rejected the defendant's claim, stating that "[t]he defendant categorizes the state's motion as a transparent device to relitigate issues now res judicata, and to resurrect rights to appeal now expired. Practice Book § [43-22], however, expressly provides that [t]he judicial authority may *at any time* correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner. . . . An illegal sentence is always capable of correction in the interest

of justice." (Emphasis in original; footnote omitted; internal quotation marks omitted.) Id., 135–36. In this case, the state takes the same position that it argued against in *Gaskin*. Nevertheless, the principle remains the same: "An illegal sentence is always capable of correction in the interest of justice." Id., 136. Therefore, res judicata does not preclude the defendant's claims.

III

Having concluded that the trial court incorrectly dismissed the defendant's motion, and that the defendant's claims are not barred by the doctrine of res judicata, we now consider the proper remedy. The defendant requests that we address the merits of his motion to correct an illegal sentence and remand this case to the trial court with direction to resentence him to the original sentence of two years incarceration that he already has served and eliminate the special parole portion of the sentence. The state, however, requests that we remand the case to the trial court with direction to hold a hearing on the merits of the defendant's claims. We conclude that the state's requested remedy is more appropriate under the circumstances of this case.

"Although this court, on appeal, has the power, at any time, to correct a sentence that is illegal, we may decline to do so when the record is not adequate for review. When presented with an inadequate record, we are precluded from reviewing the claim on appeal. . . . It is not an appropriate function of this court, when presented with an inadequate record, to speculate . . . or to presume error from a silent record." (Footnote omitted; internal quotation marks omitted.) *State* v. *Abraham*, 152 Conn. App. 709, 731, 99 A.3d 1258 (2014).

Although the defendant's double jeopardy claim ostensibly presents a question of law, we conclude that there are factual findings that may be relevant to the

resolution of his claim. Therefore, we decline to address the merits of the defendant's claim on appeal.

First, the state did not argue the merits of the defendant's claims in the trial court, and the issue received only cursory attention in its appellate brief. Second, the trial court only briefly addressed the merits of the defendant's claim, and it did not make factual findings. In particular, the record is not clear as to whether the defendant had completed the definite portion of his sentence when he filed his May, 2013 motion to correct an illegal sentence, which might affect the court's conclusion as to whether the defendant had a reasonable expectation of finality in connection with the defendant's double jeopardy argument. See, e.g., *State* v. *Wade*, 178 Conn. App. 459, 465, A.3d (2017) ("[e]ven if the defendant had raised claims that challenged only some of the counts under which he had been convicted, the fact that he exercised his right to an appeal undermines his argument to an expectation of finality in the sentence originally imposed" [internal quotation marks omitted]), cert. denied, 327 Conn. 1002, A.3d (2018).

Third, we question whether double jeopardy is the correct lens through which to examine the defendant's claim, in light of our Supreme Court's decision in *State* v. *Tabone*, 292 Conn. 417, 973 A.2d 74 (2009). The defendant's principal claim is that the trial court, by imposing an additional day of incarceration to the definite period of incarceration that the defendant already had completed, violated the double jeopardy clause of the fifth amendment to the United States constitution. In *State* v. *Tabone*, supra, 292 Conn. 426, 430–31, our Supreme Court addressed a similar claim under the due process clauses of the federal and state constitutions. The court reaffirmed the guiding principle that a defendant's due process rights are not violated when the court corrects an illegal sentence, so long as the new sentence is not

more severe than the original sentence. Id., 428. Applying that principle to the present case, we have serious concerns about a purportedly corrective sentence that increased the defendant's period of incarceration, even if only by one day.

Nevertheless, the issue has not been properly briefed and there is an insufficient factual record for us to determine whether the defendant's due process rights were violated. As the defendant recognized in his motion to correct, whether the defendant's due process rights have been violated may depend, in part, on whether the defendant engaged in some wrongdoing in order to obtain the illegal sentence. While the defendant claims that such a conclusion would be ludicrous, it is nonetheless a factual issue that we are not in a position to resolve. In light of these issues, we conclude that the trial court is in a better position to address fully the defendant's constitutional claims. Therefore, we decline to address the merits of the defendant's motion to correct, and, accordingly, we remand the case to the trial court for a hearing on the merits of the defendant's motion to correct an illegal sentence.

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

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ANIBAL BOBE (AC 39781)

Alvord, Bright and Sullivan, Js.

Syllabus

Convicted of the crime of sexual assault in the second degree and two counts of the crime of risk of injury to a child, the defendant appealed to this court. The defendant's conviction stemmed from his alleged sexual abuse of the minor victim, who had resided for a short period of time in the defendant's apartment with his siblings and his mother.

At trial, over the defendant's objection, the victim testified regarding what his mother had told him the defendant said about why the family was asked to move out of the apartment. On appeal, the defendant claimed that the trial court improperly admitted his alleged out-of-court statement to the victim's mother through the testimony of the victim. *Held* that the defendant failed to demonstrate that any claimed error in the admission of the challenged statement was harmful, he having failed to demonstrate that the jury's verdict was substantially swayed by the claimed error: the state's case against the defendant was strong in that the jury heard a detailed description of the defendant's conduct from the victim, whose testimony was corroborated by his stepbrother's constancy of accusation testimony, the challenged testimony consisted of one question and one short answer, and the prosecutor referred to the challenged statement only once in her closing argument and did not use the statement for its truth or to disparage the defendant; moreover, to the extent that the challenged statement had any impact on the jury, it was inconsistent with the testimony of another witness regarding the reason that the victim's family had to leave the apartment and, therefore, would have undermined, rather than bolstered, the victim's credibility.

Argued November 28, 2017—officially released February 27, 2018

Procedural History

Substitute information charging the defendant with the crime of sexual assault in the second degree and two counts of the crime of risk of injury to a child, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before the court, *Kahn*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Lisa J. Steele, assigned counsel, for the appellant (defendant).

Sarah Hanna, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Ann P. Lawlor*, senior assistant state's attorney, for the appellee (state).

Opinion

SULLIVAN, J. The defendant, Anibal Bobe, appeals from the judgment of conviction, rendered after a jury trial, of sexual assault in the second degree in violation

of General Statutes § 53a-71 (a) (1), and of injury to a child in violation of General Statutes § 53-21 (a) (1), and risk of injury to a child in violation of § 53-21 (a) (2). On appeal, the defendant claims that the trial court improperly admitted into evidence hearsay and double hearsay through the testimony of the victim.[1] We conclude that any claimed error was harmless and, accordingly, affirm the judgment of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. In July, 2012, the male victim, then fourteen years old, and his family were homeless. The victim's mother was acquainted with the defendant, who allowed them to live in his one bedroom apartment with him. The defendant helped his landlord with building maintenance and had access to the building's attic and vacant apartments in the building that required work. The defendant asked the victim's mother if the victim could help him paint a neighboring vacant apartment. That apartment had painting mats down on the floor. The defendant provided the victim with a brown bottle of liquor that the victim described as "[tasting] horrible."[2] The defendant and the victim took off each other's clothes. The victim put his mouth on the defendant's penis and performed oral sex until the defendant ejaculated on the floor, and the defendant did the same to the victim.

On another occasion, the defendant invited the victim to come up to the attic, where there was a bed, to have "sweaty sex." The victim went into the attic with the defendant, and they took off each other's clothes and performed oral sex on each other. The defendant "put the tip of his [penis] in [the victim's anus], but it didn't

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

[2] The defendant provided the victim with alcohol on two other occasions.

go all the way in because [the victim] . . . clenched up . . . and . . . [pushed] away because it . . . [hurt].'' Another time in the vacant apartment, the defendant asked the victim to ''turn over so that he [could] stick it in.'' The victim did not want to engage in anal sex, but the defendant told him that ''[it was] ok'' and fully penetrated the victim's anus. The victim described it as a ''painful,'' ''awful feeling.'' The victim stated that when the defendant finished it felt like the defendant had ''[ejaculated] inside [of him].'' The defendant never used a condom during any of the assaults. Afterward, the victim went to the bathroom and saw blood in his underwear. The victim told the defendant, but the defendant ''tried to deny it and say that . . . it wasn't blood.'' The victim was scared, and he threw away the bloody underwear.

The victim engaged in oral sex with the defendant approximately two other times, and the defendant attempted to engage in anal sex with the victim on one other occasion. The defendant told the victim multiple times ''not to tell anyone because [they] would both get in trouble.'' Initially, the victim did not tell anyone about the assaults because he ''was scared and . . . [did not] know what was going to happen'' or ''what anybody would think.'' The victim was ''very concerned'' about whether his family would be able to stay in the defendant's apartment. Later that month, the landlord discovered that the victim's family was living in the defendant's apartment and asked them to leave. In the spring of 2013, the victim told his stepbrother the defendant's name and ''exactly what happened from the beginning . . . to the end.'' The victim then told his father and stepmother, who contacted the Bridgeport Police Department.

The state subsequently charged the defendant with sexual assault in the second degree, and two counts of

risk of injury to a child. A three day jury trial commenced on July 6, 2016, at which the victim testified. The victim's testimony was corroborated by his stepbrother's constancy of accusation testimony. During the state's direct examination of the victim, the following exchange occurred:

"[The Prosecutor]: [W]ith respect to your birthday and the time you moved out of [the defendant's] apartment, can you tell us about that?

"[The Victim]: He kicked us out a few days before my birthday. And my mom told me the reason he kicked us out—

"[Defense Counsel]: Objection. It's hearsay.

"The Court: Sustained as to hearsay. You can tell us—I'll permit—well, actually I'm going to overrule the objection because it's the defendant's statement. So it's a statement against penal interest. So under that. . . . [Y]ou may—you may say what the defendant told you or told your mom.

"And it's not to be admitted for the truth of the matter asserted. So to the extent it's double hearsay, I'll overrule it on that basis. I'm sorry. The question is what the defendant told [the victim's] mother why he was—why they were being kicked out. . . .

"[The Prosecutor]: Yes.

"The Court: Ok. . . . I'll permit that.

"[The Prosecutor]: What, if anything, did [the defendant] tell your mother or you about why you were getting kicked out?

"[The Victim]: [The defendant] told my mom we were getting kicked out because he wanted to jerk off in peace."

On July 8, 2016, the jury returned a verdict of guilty as to all charges and, thereafter, the defendant was convicted and sentenced to a total effective sentence of

thirty-five years of incarceration, execution suspended after seventeen years, followed by thirty years of probation. This appeal followed.

On appeal, the defendant generally argues that the trial court improperly admitted hearsay and double hearsay evidence by permitting the victim to testify about what his mother told him the defendant said. The state argues that because the testimony was not admitted for the truth of the matter asserted, it was properly admitted as nonhearsay. The state further argues that the defendant's claim is not preserved because once his hearsay objection was overruled, he did not object to the testimony on any other basis. We conclude that, even assuming, arguendo, that the admission of the testimony was improper, it was not harmful because the evidence did not substantially affect the verdict in this case.

We turn to the standard of review and legal principles that guide our review of the defendant's claim. "[T]o the extent that we assume impropriety in the trial court's evidentiary [rulings], [w]hen an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [W]hether [the improper admission of a witness' testimony] is harm[ful] in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harm[ful] should be whether the jury's verdict was substantially swayed by the error." (Internal quotation marks omitted.) *State* v. *Paul B.*, 315 Conn. 19, 30–31, 105 A.3d

130 (2014). "Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Toro*, 172 Conn. App. 810, 817, 162 A.3d 63, cert. denied, 327 Conn. 905, 170 A.3d 2 (2017).

We conclude that the defendant has not demonstrated that any claimed error was harmful. The state presented a strong case against the defendant. The jury heard a detailed description of the defendant's conduct from the victim, whose testimony was corroborated by his stepbrother's constancy of accusation testimony. Additionally, the challenged testimony consisted of one question and one short answer. The prosecutor referred to the statement only once in her closing argument and did not use the statement for its truth or to disparage the defendant, but only referenced that the "information was shared" with the victim.[3] Moreover, the challenged testimony was inconsistent with the landlord's testimony, in which she stated that *she told* the defendant that the victim's family had to leave the apartment. The state highlighted the landlord's testimony in its closing argument.[4] Accordingly, to the extent that the challenged testimony had any impact on the jury's verdict,

[3] The prosecutor, in her closing argument, stated: "So [the victim] tells us he's living in an apartment . . . for about a month and he knows that they got kicked out a few days before his birthday. He doesn't tell his mother. He describes how he was feeling scared and worried. He does testify to that. And how he was worried that they would get kicked out of the apartment. This is a kid that's homeless. And I would submit to you that at no time did he testify or was there any evidence presented that he would be safe and secure if he lived with his father. He's [a] fourteen year old kid. . . . He's with his mother and two younger siblings. And when they do get kicked out for whatever reason, his mother tells him, according to [the victim's] testimony, they got kicked out of the apartment because the defendant wants to jerk off in peace. For better or for worse, that information was shared with [the victim] because he told us."

[4] The prosecutor, in her closing argument, also stated: "[The defendant] knows that they are homeless because they're living with him. They're in the apartment with him. They're not supposed to be there. The [landlord] told us that. That's why she told [the defendant] that they had to leave."

it would have undermined, rather than bolstered, the victim's credibility. In light of this, and, recognizing the strength of the state's case and the insignificance of the challenged testimony, we conclude that, even if we assume that the victim's testimony as to the challenged statements improperly was admitted, the defendant has not demonstrated that its admission was harmful.

The judgment is affirmed.

In this opinion the other judges concurred.