CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

PREMIER CAPITAL, LLC *v.* JAY SHAW
(AC 40785)

Keller, Bright and Moll, Js.

Syllabus

The plaintiff, L Co., sought to enforce a judgment rendered in 1991 against the defendant that was predicated on a default on a loan. The trial court found that L Co. proved by a preponderance of the evidence that it owned the 1991 judgment and rendered judgment in favor of L Co., from which the defendant appealed to this court. Thereafter, L Co. filed with the trial court a postjudgment motion to correct the record to reflect that the plaintiff in the present action should have been designated as I Co., rather than L Co., claiming that L Co. and I Co. are two separate Massachusetts entities comprised of the same principals and principal offices, but that I Co. was the proper entity designation. Because the present case was on appeal, the trial court declined to take any action on L Co.'s motion to correct. On appeal, the defendant claimed that L Co. lacked standing, which deprived the trial court of subject matter jurisdiction. *Held* that because L Co. did not have standing to seek enforcement of the 1991 judgment, the trial court lacked subject matter jurisdiction over the present case and, thus, should have dismissed the case rather than deciding it on the merits; the evidence at trial indicated that I Co., and not L Co., had acquired assets in 1998 that purportedly included the 1991 judgment, it was undisputed that there was no evidence demonstrating that L Co. had a real interest in the 1991 judgment, L Co. conceded that it was a separate and distinct entity from I Co., and the listing of L Co. as the plaintiff in this action did not amount to a scrivener's error as claimed by L Co.

Argued January 4—officially released April 2, 2019

Procedural History

Action to enforce a judgment, and for other relief, brought to the Superior Court for the judicial district of Stamford-Norwalk and tried to the court, *Hon. Edward R. Karazin, Jr.*, judge trial referee; judgment for the plaintiff; thereafter, the plaintiff filed a motion to correct, and the defendant appealed to this court. *Reversed; judgment directed.*

Ellery E. Plotkin, for the appellant (plaintiff).

Thomas J. Lengyel, for the appellee (defendant).

Opinion

MOLL, J. The defendant, Jay Shaw, appeals from the judgment of the trial court, following a bench trial, rendered in favor of the plaintiff, Premier Capital, LLC (plaintiff LLC). On appeal, the defendant claims that (1) the trial court lacked subject matter jurisdiction over the present case as a result of the plaintiff LLC's lack of standing, (2) the court erred in determining that the plaintiff LLC established ownership of the prior judgment it sought to enforce because there were breaks in the chain of title, and (3) the court erred in concluding that his special defense was invalid. We agree with the defendant on the first claim and, accordingly, reverse the judgment of the trial court.[1]

The following facts and procedural history are relevant to our resolution of this appeal. In 1990, Charter Federal Savings commenced an action against the defendant predicated on a default on a loan. See *Charter Federal Savings* v. *Shaw*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-90-0109612. On August 7, 1991, following a hearing in damages, the trial court rendered judgment against the defendant and

[1] In light of our resolution of the defendant's first claim, which is dispositive of the appeal and requires dismissal of the plaintiff LLC's action, we need not reach the merits of the defendant's remaining claims.

in favor of Charter Federal Savings in the amount of $293,259.81, including costs, attorney's fees, and expenses (1991 judgment).

On August 5, 2016, the plaintiff LLC commenced the present case against the defendant. The summons identified the plaintiff as "Premier Capital, LLC," with a place of business located at 336 Lowell Street in Wilmington, Massachusetts. In its operative one count complaint filed on August 11, 2016, in which "Premier Capital, LLC," was identified as the plaintiff, the plaintiff LLC alleged, inter alia, that, following a series of transactions, it had acquired ownership of the 1991 judgment and that the 1991 judgment had not been satisfied. As relief, the plaintiff LLC sought, inter alia, enforcement of the 1991 judgment and postjudgment interest.[2] Thereafter, the defendant filed an answer and special defenses,[3] and the plaintiff LLC filed a reply denying the allegations in the special defenses.

On May 2, 2017, the matter was tried to the court. During trial, the plaintiff LLC offered and had admitted into evidence several exhibits that, according to the plaintiff LLC, established a chain of title demonstrating that it had acquired ownership of the 1991 judgment in 1998. Notably, none of the exhibits makes any reference to "Premier Capital, LLC"; instead, the plaintiff LLC's

[2] Prior to trial, the parties stipulated that the plaintiff LLC commenced the present case within twenty-five years following the 1991 judgment. See General Statutes § 52-598 (a) ("[n]o execution to enforce a judgment for money damages rendered in any court of this state may be issued after the expiration of twenty years from the date the judgment was entered and no action based upon such a judgment may be instituted after the expiration of twenty-five years from the date the judgment was entered").

[3] The defendant raised two special defenses. In his first special defense, the defendant alleged that the plaintiff LLC failed to state a cause of action on which relief could be granted. The defendant withdrew his first special defense prior to trial. In his second special defense, the defendant alleged that the present case was oppressive and harassing as a result of, among other things, his advanced age and poor health.

exhibit number one indicates that "Premier Capital, Inc.," which is not a party to the present case, had acquired certain assets that purportedly included the 1991 judgment. This incongruity was not raised as an issue during trial.

On August 8, 2017, the court issued a memorandum of decision in which it concluded, inter alia, that the plaintiff LLC had proven the allegations of its complaint by a preponderance of the evidence, including that it owned the 1991 judgment. The court rendered judgment in favor of the plaintiff LLC in the amount of $289,794.81,[4] plus postjudgment interest at a rate of 4 percent annually. On August 28, 2017, the defendant filed this appeal.

On September 13, 2017, the plaintiff LLC filed with the trial court a postjudgment motion to "correct the trial court record" (motion to correct) to reflect that the plaintiff in the present case should have been designated as "Premier Capital, Inc.," rather than "Premier Capital, LLC." The plaintiff LLC claimed that Premier Capital, Inc., and the plaintiff LLC are two separate Massachusetts entities comprised of the same principals and principal offices, and that Premier Capital, Inc., is the "proper entity designation." The plaintiff LLC characterized the listing of "Premier Capital, LLC," as the plaintiff as a scrivener's error. On October 11, 2017, the court issued an order noting that the present case is on appeal and, accordingly, the court declined to take any action on the plaintiff LLC's motion to correct absent approval from this court.[5]

[4] At trial, Louis Auciello, who testified that he is an account manager employed by "Premier Capital," testified that, from 2007 to 2010, the defendant made $3465 in payments against the balance of the 1991 judgment and, thus, the remaining balance of the 1991 judgment was $289,794.81.

[5] The plaintiff LLC has not sought appellate review of the October 11, 2017 order.

The defendant raises on appeal the dispositive claim that the trial court lacked subject matter jurisdiction over the present case as a result of the plaintiff LLC's lack of standing. Specifically, the defendant contends that the evidence adduced at trial demonstrates that Premier Capital, Inc., rather than the plaintiff LLC, acquired assets purportedly including the 1991 judgment and that, absent a real interest in the 1991 judgment, the plaintiff LLC lacked standing to seek enforcement of the 1991 judgment. In response, the plaintiff LLC argues that the listing of "Premier Capital, LLC," as the plaintiff is a scrivener's error that has not prejudiced the defendant. We agree with the defendant.

At the outset, we note that the defendant is raising this standing claim for the first time on appeal. "If a party is found to lack standing, the court is without subject matter jurisdiction to determine the cause. . . . [A] claim that a court lacks subject matter jurisdiction may be raised at any time during the proceedings . . . including on appeal . . . . Because the [defendant's] claim implicates the trial court's subject matter jurisdiction, we conclude that it is reviewable even though the [defendant has] raised it for the first time on appeal." (Citations omitted; internal quotation marks omitted.) *Perez-Dickson* v. *Bridgeport*, 304 Conn. 483, 506, 43 A.3d 69 (2012). "The issue of whether a party had standing raises a question of law over which we exercise plenary review." *Arciniega* v. *Feliciano*, 329 Conn. 293, 301, 184 A.3d 1202 (2018).

"Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party

to request an adjudication of the issue . . . .'' (Internal quotation marks omitted.) *Prime Locations of CT, LLC* v. *Rocky Hill Development, LLC*, 167 Conn. App. 786, 794, 145 A.3d 317, cert. denied, 323 Conn. 935, 150 A.3d 686 (2016).

The evidence in the record indicates that Premier Capital, Inc., acquired certain assets in 1998 that purportedly included the 1991 judgment. It is undisputed, however, that there is no evidence demonstrating that the plaintiff LLC has a real interest in the 1991 judgment. As the plaintiff LLC concedes, Premier Capital, Inc., and the plaintiff LLC are separate, distinct entities. The listing of ''Premier Capital, LLC,'' as the plaintiff does not amount to a scrivener's error, as the plaintiff LLC contends; rather, the wrong entity commenced the present case.[6] See *Cardi Materials Corp.* v. *Connecticut Landscaping Bruzzi Corp.*, 77 Conn. App. 578, 581–82, 823 A.2d 1271 (2003) (plaintiff, named ''Cardi Materials Corporation,'' lacked standing to commence breach of

[6] In its appellate brief, the plaintiff LLC argues that Premier Capital, Inc., and the plaintiff LLC ''are not that different, practically and/or logistically speaking, as they have a certain relationship that in essence undermines the main thrust of [the] defendant's standing argument.'' Regardless of the affiliation between the plaintiff LLC and Premier Capital, Inc., the record remains devoid of any evidence establishing that the plaintiff LLC has a real interest in the 1991 judgment.

In addition, the plaintiff LLC argues that the defendant was not prejudiced by the plaintiff LLC being named as the plaintiff, noting that at trial, there was evidence that the defendant made payments to partially satisfy the judgment between 2007 and 2010. Where, as here, the erroneous designation of a plaintiff is a substantial error rather than a circumstantial error, whether the defendant was prejudiced by the error is immaterial. See *Coldwell Banker Manning Realty, Inc.* v. *Cushman & Wakefield of Connecticut, Inc.*, 136 Conn. App. 683, 694, 47 A.3d 394 (2012) (concluding that plaintiff's commencement of action under fictitious name did not constitute circumstantial error and, thus, declining to consider plaintiff's argument that defendants were not prejudiced by error); *America's Wholesale Lender* v. *Pagano*, 87 Conn. App. 474, 480, 866 A.2d 698 (2005) (concluding that, although defendant could not argue that she suffered prejudice as result of corporation commencing action under trade name, lack of subject matter jurisdiction required dismissal of action regardless of whether prejudice existed).

contract action where contracting parties were defendant and "Cardi Corporation," a separate and distinct corporate entity not named as plaintiff in action). In sum, the plaintiff LLC did not have standing to seek enforcement of the 1991 judgment and, therefore, the court lacked subject matter jurisdiction over the present case. Accordingly, the court should have dismissed the present case rather than deciding it on the merits. See id., 582 (concluding that trial court should have dismissed case for lack of subject matter jurisdiction rather than deciding case on merits).

The judgment is reversed and the case is remanded with direction to render judgment dismissing the plaintiff's action.

In this opinion the other judges concurred.

DEBRA B. MARINO *v.* STATEWIDE GRIEVANCE COMMITTEE
(AC 40274)

Alvord, Prescott and Eveleigh, Js.

Syllabus

The plaintiff attorney appealed to the trial court from the decision of the reviewing committee of the defendant, the Statewide Grievance Committee, imposing sanctions on the plaintiff for violating rule 4.4 (a) of the Rules of Professional Conduct. The plaintiff had represented the former husband of the complainant, M, in connection with postjudgment marital dissolution proceedings. After a marshal served a subpoena duces tecum on M with respect to a noticed deposition, M, who had filed an appearance as a self-represented party, informed the plaintiff that she would not be attending the deposition. Subsequently, the plaintiff commenced the deposition for the purpose of noting on the record that M had failed to appear, and she thereafter prepared and filed a motion for a capias, in which she represented that M failed to appear for the deposition and that no motion to quash or for a protective order had been filed. The day before the scheduled deposition, however, M had filed a motion for a protective order requesting that the court issue an order preventing the deposition from taking place. M subsequently filed a grievance against the plaintiff. The reviewing committee for the defendant found,

by clear and convincing evidence, that the plaintiff violated rule 4.4 (a) of the Rules of Professional Conduct by engaging in unethical conduct in filing the motion for a capias, which the committee found had no substantial purpose other than to embarrass or burden M. After the defendant affirmed the decision of the reviewing committee, the plaintiff appealed to the trial court, which dismissed the plaintiff's appeal. On the plaintiff's appeal to this court, *held* that the trial court's decision that the defendant properly concluded that the plaintiff violated rule 4.4 (a) of the Rules of Professional Conduct was not based on clear and convincing evidence; the plaintiff, when filing the motion for a capias, was mistaken when she stated that no objection or motion to quash had been filed and there was no clear and convincing proof to the contrary, nor was there clear and convincing proof that she filed the motion for a capias for no substantial purpose other than to embarrass or burden M, as the reviewing committee made no factual finding to support its conclusion to that effect, there was no finding that the plaintiff was aware that M had filed her objection and motion the day before the plaintiff filed her motion for a capias, there is no statutory authority or rule of practice that requires an attorney to contact the court or to check the judicial website prior to filing a motion for a capias, which may properly be requested when a party is served with a subpoena duces tecum and fails to appear for a scheduled deposition, and although the fact that M was a self-represented party was a factor in the reviewing committee's determination that the plaintiff had violated rule 4.4 (a), that rule does not impose additional obligations on an attorney when dealing with a self-represented party.

Argued December 4, 2018—officially released April 2, 2019

Procedural History

Appeal from the decision of the defendant's reviewing committee imposing sanctions on the plaintiff, brought to the Superior Court in the judicial district of Hartford, where the court, *Robaina*, *J.*, dismissed the plaintiff's appeal and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed*; *judgment directed.*

Barbara M. Schellenberg, with whom, on the brief, was *David B. Zabel*, for the appellant (plaintiff).

Leanne M. Larson, assistant chief disciplinary counsel, with whom, on the brief, was *Beth L. Baldwin*, assistant chief disciplinary counsel, for the appellee (defendant).

Opinion

ALVORD, J. The plaintiff, Debra B. Marino, an attorney, appeals from the judgment of the trial court dismissing her appeal from the sanctions imposed by the reviewing committee of the defendant, the Statewide Grievance Committee, for violating rule 4.4 (a) of the Rules of Professional Conduct.[1] The plaintiff claims that the court improperly upheld the defendant's conclusion that the motion for a capias that she filed while representing a client in a family proceeding had no substantial purpose other than to embarrass or burden the complainant, Melissa Mathison.[2] We agree with the plaintiff and reverse the judgment of the trial court.

The following relevant facts largely are undisputed. The plaintiff represented the complainant's former husband, Jeffrey Samoncik, in connection with postjudgment proceedings following the dissolution of the Samonciks' marriage on April 24, 2009. In September, 2013, the complainant filed a motion to modify child support. On March 15, 2015, the complainant filed a self-represented appearance in the matter. A hearing on the complainant's motion for modification was scheduled for August 4, 2015. The discovery process in connection with the complainant's motion for modification had been somewhat prolonged and engendered communications between the plaintiff and the complainant that were sometimes strained. They exchanged a series of e-mails that addressed the issue of conducting a deposition of the complainant prior to the scheduled August hearing.

[1] Rule 4.4 (a) of the Rules of Professional Conduct provides: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."

[2] Melissa Mathison was formerly known as Melissa Samoncik. Following her divorce from Jeffrey Samoncik, she married Michael Mathison.

The plaintiff noticed the complainant's deposition for July 7, 2015. On July 3, 2015, a marshal served a subpoena duces tecum on the complainant with respect to the noticed deposition. That same day, the complainant e-mailed the plaintiff and informed her that she would not be attending the scheduled deposition. The complainant's July 3, 2015 e-mail reads as follows:

"Please find motions that were recently filed by me.

"Please make note that I will be unable to attend a deposition on July 7. My resources are limited for child care costs.

"In regards to the deposition items, 1-8 are erroneous requests as this information has been supplied to your office on more than one occasion and there are no new documents to produce. Items 9-11 are irrelevant requests and have no bearing on this case. I will be filing an objection to your deposition.

"Have a great weekend."

A few minutes later, the plaintiff responded: "You will need to appear. I'm proceeding." The complainant immediately e-mailed the following response: "I will not be attending on the 7th. Proceed as you please."

On July 7, 2015, the plaintiff commenced the deposition for the purpose of noting on the record that the complainant had failed to appear. That same day, the plaintiff prepared and filed a "Postjudgment Motion/Application for Capias/Civil Arrest Warrant." In her motion, the plaintiff made the representation that the complainant "was duly subpoenaed for a deposition [and] . . . failed to appear for said deposition in violation of a valid subpoena duces tecum and no motion to quash or for protective order was filed." In addition to requesting that the complainant pay for the costs of the subpoena, court reporter, and counsel fees, the plaintiff moved that the complainant "be precluded

from proceeding with her motions until she appears for a deposition."

On July 6, 2015, the day before the scheduled deposition, the complainant filed a motion for a protective order, requesting that the court issue an order preventing the deposition from taking place for the following reasons: (1) the complainant was not given sufficient notice to schedule the deposition at a mutually convenient date and time; (2) the complainant was not given sufficient notice to allow her to gather the documents requested by the plaintiff; (3) the documents requested by the plaintiff already had been produced or were the subject of objections filed by the complainant; and (4) the complainant's discovery objections should be resolved by the court prior to her deposition.

The plaintiff claimed that she did not receive a copy of the complainant's motion for a protective order until July 8, 2015, which was one day after she had filed her motion for a capias. She also claimed that, historically, the complainant e-mailed her copies of the pleadings that she filed with the court, but that she did not do so with her motion for a protective order.

In response, the complainant contended that her husband, Michael Mathison, after filing the motion for a protective order at the courthouse on July 6, 2015, drove to the plaintiff's office and handed a copy of that pleading to a woman he identified as Rose Rodriguez, the plaintiff's legal assistant. Rodriguez, however, claimed she had been on vacation on the day in question. At that time, the only other person who worked in the plaintiff's office was Danielle Vailonis, and Vailonis denied ever receiving any documents from Mathison.

The court, *Malone*, *J.*, held a hearing on the plaintiff's motion for a capias, the complainant's objection to that motion, and other outstanding motions on July 27, 2015. At the beginning of the hearing, the plaintiff stated that

the complainant's motion to modify child support was scheduled for a hearing on August 4, 2015. She represented that she needed information from the complainant in order to prepare adequately for the upcoming hearing on the complainant's motion scheduled for the following week. She claimed that she had tried to schedule the complainant's deposition twice before, unsuccessfully, and that the complainant would not provide her with alternate dates and times. The plaintiff requested that the court issue a capias and then stay its execution to afford the complainant the opportunity to appear at the plaintiff's office for a deposition two days later, Wednesday at 2 p.m. The plaintiff further stated: "If she can't do Wednesday at 2 [p.m.], I'm happy to do it at 3 [p.m.]. I'll do it at 4 [p.m.]. I'll even do it after five o'clock if that's more convenient for her but I want to take her deposition." The complainant responded that she could not attend a deposition on the proposed date because she "would have to secure child care. I don't know. I have a special needs child and it's very hard. It's very difficult for me." She did not suggest an alternate date. The court ruled: "It's no problem. Until you can agree to a notice for a deposition, the hearing next week is off."

Five days prior to the hearing before Judge Malone, the complainant filed a grievance complaint with the defendant on July 22, 2015. On September 25, 2015, the Ansonia-Milford judicial district grievance panel filed a determination that there was probable cause that the plaintiff violated rules 4.4 (a) and 8.4 (4)[3] of the Rules of Professional Conduct. On February 10, 2016, a three person reviewing committee conducted a hearing on the matter. In its decision dated April 15, 2016, the reviewing committee found the following facts by clear

[3] The reviewing committee determined that the record lacked clear and convincing evidence that the plaintiff violated rule 8.4 (4) of the Rules of Professional Conduct, and that determination was not challenged.

and convincing evidence: "The [plaintiff] represented the [c]omplainant's ex-husband in a dissolution of marriage proceeding. A judgment of dissolution entered on April 24, 2009, after an uncontested hearing. In September of 2013, the [c]omplainant filed a [postjudgment] motion to modify child support. On July 3, 2015, the [c]omplainant was served with a subpoena duces tecum for a July 7, 2015 deposition at the [plaintiff's] law office. The [c]omplainant was a pro se party at the time she was served with the subpoena. On July 3, 2015, the [c]omplainant advised the [plaintiff] that she was unable to appear for the July 7, 2015 deposition and that she would be filing an objection. The [plaintiff] declined to reschedule the deposition.

"On July 6, 2015, the [c]omplainant filed an [o]bjection and a [m]otion for [p]rotective [o]rder to prevent the deposition from taking place on July 7, 2015. The [c]omplainant did not appear at the July 7, 2015 deposition. The deposition went forward. Thereafter on that same day, the [plaintiff] filed a [m]otion for [c]apias in connection with the subpoena and the [c]omplainant's failure to appear at the deposition. The [plaintiff] did not check with the [c]ourt or the [c]ourt's docket to see whether the [c]omplainant had filed a [m]otion for [p]rotective [o]rder. Ultimately, the [c]ourt did not grant the capias."

On the basis of the reviewing committee's factual findings, it found "by clear and convincing evidence" that the plaintiff violated rule 4.4 (a). It stated: "This reviewing committee concludes that the [plaintiff] engaged in unethical conduct in filing a [m]otion for a [c]apias, in connection with a subpoena duces tecum served on the [c]omplainant on July 3, 2015, for a deposition scheduled for July 7, 2015. The [plaintiff's] filing of the [m]otion for a [c]apias on the day of the deposition, with a [m]otion for [p]rotective [o]rder and an objection pending, had no substantial purpose other

than to embarrass or burden the [c]omplainant, in violation of [r]ule 4.4 (a) of the Rules of Professional Conduct. The [c]omplainant had advised the [plaintiff] that she was unable to appear for the July 7, 2015 deposition and that she would be filing an objection. The [plaintiff] did not check to see whether a [m]otion for [p]rotective [o]rder had in fact been filed before filing the [m]otion for a [c]apias." After concluding that the plaintiff was in violation of rule 4.4 (a), the reviewing committee set forth sanctions to be imposed.

Upon the plaintiff's request for review pursuant to Practice Book § 2-35 (k),[4] the defendant affirmed the decision of the reviewing committee at a meeting held on June 16, 2016. The defendant stated: "The [defendant] concluded that the reviewing committee's findings, conclusions and decision that the [plaintiff] violated [r]ule 4.4 (a) of the Rules of Professional Conduct were not in excess of the authority of the reviewing committee; erroneous and contrary to law; clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. The [defendant] concluded that the decision was fully supported by the substantial evidence in the record."

Pursuant to Practice Book § 2-38,[5] the plaintiff filed an appeal with the Superior Court. In its March 9, 2017

[4] Practice Book § 2-35 (k) provides in relevant part: "Within thirty days of the issuance to the parties of the final decision by the reviewing committee, the respondent may submit to the Statewide Grievance Committee a request for review of the decision. . . ."

[5] Practice Book § 2-38 (a) provides in relevant part: "A respondent may appeal to the Superior Court a decision by the Statewide Grievance Committee or a reviewing committee imposing sanctions or conditions against the respondent . . . . A respondent may not appeal a decision by a reviewing committee imposing sanctions or conditions against the respondent if the respondent has not timely requested a review of the decision by the Statewide Grievance Committee under Section 2-35 (k). . . ."

memorandum of decision, the court found that there was "sufficient evidence in the record to support the [defendant's] conclusion" that the motion for a capias had no substantial purpose other than to embarrass or burden the complainant. In dismissing the plaintiff's appeal, the court concluded: "Having reviewed the record and considered the arguments presented to this court, the court concludes that the facts as found and the conclusion of the [defendant] are correct upon the application of the standard required." From that judgment, the plaintiff now appeals to this court.

Before considering the plaintiff's claim, we first address the standard of review applicable to grievance appeals. "[T]he clearly erroneous standard . . . is the preferable standard of review in attorney grievance appeals. . . . The clearly erroneous standard of review provides that [a] court's determination is clearly erroneous only in cases in which the record contains no evidence to support it, or in cases in which there is evidence, but the reviewing court is left with the definite and firm conviction that a mistake has been made. . . .

"Additionally, because the applicable standard of proof for determining whether an attorney has violated the Rules of Professional Conduct is clear and convincing evidence . . . we must consider whether the [fact finder's] decision was based on clear and convincing evidence. . . . [C]lear and convincing proof denotes a degree of belief that lies between the belief that is required to find the truth or existence of the [fact in issue] in an ordinary civil action and the belief that is required to find guilt in a criminal prosecution. . . . [The burden] is sustained if evidence induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist." (Citations omitted; internal quotation marks omitted.)

Chief Disciplinary Counsel v. *Zelotes*, 152 Conn. App. 380, 386, 98 A.3d 852, cert. denied, 314 Conn. 944, 102 A.3d 1116 (2014). "The burden is on the statewide grievance committee to establish the occurrence of an ethics violation by clear and convincing proof." (Internal quotation marks omitted.) *Notopoulos* v. *Statewide Grievance Committee*, 277 Conn. 218, 226, 890 A.2d 509, cert. denied, 549 U.S. 823, 127 S. Ct. 157, 166 L. Ed. 2d 39 (2006).

Accordingly, the principal issue in this appeal is whether there is clear and convincing evidence in the record for the defendant to find that the plaintiff violated rule 4.4 (a) of the Rules of Professional Conduct. For us to make that determination, we must construe the language in that rule. "Given that the Rules of Professional Conduct appear in our Practice Book, and given that [t]he interpretive construction of the rules of practice is to be governed by the same principles as those regulating statutory interpretation . . . *Wiseman* v. *Armstrong*, 295 Conn. 94, 99, 989 A.2d 1027 (2010); we employ our well established tools of statutory construction" to determine the meaning of the relevant language in rule 4.4 (a). (Internal quotation marks omitted.) *Helmedach* v. *Commissioner of Correction*, 168 Conn. App. 439, 459, 148 A.3d 1105 (2016), aff'd, 329 Conn. 726, 189 A.3d 1173 (2018). "The interpretation and application of a statute, and thus a Practice Book provision, involves a question of law over which our review is plenary. . . .

"The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case . . . . 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 . . . [General Statutes] § 1-2z directs us first to 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. . . . We recognize that terms in a statute are to be assigned their ordinary meaning, unless context dictates otherwise . . . ." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Wiseman* v. *Armstrong*, supra, 295 Conn. 99–100.

In accordance with § 1-2z, we turn to the relevant language of rule 4.4 (a) of the Rules of Professional Conduct, which provides that a lawyer, in representing a client, "shall not use means that have *no substantial purpose other than to embarrass . . . or burden* a third person . . . ." (Emphasis added.) We conclude that the meaning of the rule is clear and unambiguous. An attorney is in violation of rule 4.4 (a) if he or she, in representing a client, employs resources and methods that, although not illegal, have no important or considerable purpose other than to embarrass, delay, or burden a third person. Such actions are prohibited when the attorney engages in them for no other significant purpose other than to harass the third person. It is important to note that an attorney's lawful actions taken on behalf of his or her client may often cause embarrassment or inconvenience to an opposing party or another person. The attorney does not violate the rule, however, unless the means were employed for no legitimate and considerable purpose *other than* to cause embarrassment or inconvenience to the third person.

Accordingly, for the defendant to conclude that the plaintiff violated rule 4.4 (a) of the Rules of Professional Conduct, there must be clear and convincing proof that the only significant reason that the plaintiff had for filing

the motion for a capias was to embarrass or burden the complainant. We therefore must look to the factual findings of the reviewing committee to determine whether they support the conclusion that the rule was violated. The reviewing committee found: (1) the complainant, a self-represented party at the time, was served with a subpoena duces tecum to appear at a July 7, 2015 deposition at the plaintiff's office; (2) the day she was served, the complainant advised the plaintiff that she was unable to appear at the scheduled deposition and that she would be filing an objection; (3) the plaintiff declined to reschedule the deposition; (4) the complainant filed an objection and a motion for a protective order on July 6, 2015, to prevent the deposition from going forward on July 7, 2015; (5) the complainant did not appear at the scheduled deposition, but the deposition went forward; (6) the plaintiff thereafter filed a motion for a capias on the same day referencing the subpoena and the complainant's failure to appear at the scheduled deposition; (7) the plaintiff did not "check with the [c]ourt or the [c]ourt's [d]ocket" to see if the complainant had filed a motion for a protective order before filing her motion for a capias; and (8) the court did not grant the plaintiff's motion for a capias.[6]

Significantly, the reviewing committee made no factual finding to support the conclusion that the plaintiff's action in filing the motion for a capias had no legitimate or significant purpose other than to embarrass or burden the complainant.[7] Prior to making the conclusory

[6] The reviewing committee failed to note Judge Malone's actual ruling on the plaintiff's motion for a capias and the complainant's objection to that motion. The court's order was as follows: "Until there is an agreement on a deposition date and time then no hearing on a modification of child support can take place. Hearing off."

[7] At the hearing before Judge Malone on July 27, 2015, the plaintiff represented that the hearing on the complainant's motion to modify child support was scheduled for August 4, 2015, and that she had tried, without success, to schedule the complainant's deposition in preparation for that hearing. The plaintiff indicated that she had noticed the complainant's deposition twice, but that the complainant was "completely interfering with the discov-

statement that the plaintiff violated rule 4.4 (a) of the Rules of Professional Conduct, the statement was made by the reviewing committee that the plaintiff filed the motion for a capias while the complainant's objection and a motion for a protective order were pending. There was, however, no finding that the complainant's husband had delivered a copy of her motion for a protective order at the plaintiff's office, or that the plaintiff was aware that the complainant had filed her objection and motion the day before the plaintiff filed her motion for a capias. Instead, the reviewing committee focused on the fact that the complainant was a self-represented party, that she indicated that she would be filing an objection, and that the plaintiff failed to contact the court or check the judicial website[8] to determine whether the complainant had filed such a pleading.[9]

ery process, I can't even get her to appear for a deposition." The plaintiff then asked the court to issue the capias, but to stay its execution in order to afford the complainant the opportunity to appear for a deposition at the plaintiff's office.

[8] The record reflects that the family matter at issue between the plaintiff's client and the complainant was not an electronically filed case. If a party files a pleading electronically, the time and date of the filing is available for verification shortly after the filing. This family case is a paper file; the pleadings are in paper form and are mailed, faxed or hand-delivered to the office of the court clerk. The clerk date stamps the pleading upon receipt (the "official" filing date), but data entry of that pleading into the court's computer system frequently is not made the same day that the pleading is received. The defendant's counsel conceded at the hearing before the reviewing committee that although the complainant's objection and the motion for a protective order were delivered to the court and have an official filing date of July 6, 2015, there is no evidence as to when data entry of those filings actually occurred. Accordingly, there is no evidence as to when those filings were available for opposing counsel to view. As noted by the plaintiff's counsel, and not disputed by the defendant's counsel, data entry of those filings could have been made "on July 6th or July 7th or July 8[th] or any other time."

[9] At the hearing before the reviewing committee, the plaintiff testified that she had no reason to check with the court to see if the complainant had filed a motion for a protective order because, historically, the complainant copied her on motions via e-mail. The complainant did not dispute that representation.

At oral argument before this court, the defendant's counsel admitted that there is no statutory authority or Practice Book rule that would require an attorney to contact the court or to check the judicial website prior to filing a motion for a capias under such circumstances. Additionally, the defendant's counsel did not dispute that a capias properly may be requested when a party is served with a subpoena duces tecum and fails to appear for a scheduled deposition. Instead, the defendant's counsel argued that the plaintiff should have waited another day before filing her motion for a capias.

The fact that the complainant was self-represented appears to have been a factor in the reviewing committee's determination that the plaintiff violated rule 4.4 (a) of the Rules of Professional Conduct. As previously noted, it was one of the factual findings that the reviewing committee stated had been found by clear and convincing evidence in its April 15, 2016 decision. Further, a review of the transcript of the February 10, 2016 hearing before the reviewing committee reveals that one of the members of the panel had serious concerns about the self-represented status of the complainant. That member addressed the plaintiff as follows: "Yeah, but the issue here though, you're talking about a pro se [party]. So then somebody who is not a lawyer with an arrest warrant based on information that she received from her saying that she would not be able to make the 7th. Is it your practice generally if somebody does not appear in a deposition to right away issue a capias, or do you try to somehow find another date for deposition and then go ahead and do what you need to do?" The plaintiff responded that she normally did not subpoena people to attend depositions because in most cases she coordinates a date with the attorney representing the other party. She also said that in this case, she subpoenaed the complainant because it had

been a very contentious matter and that she and the complainant were unable ever to coordinate dates.

The same member of the panel subsequently made the following remarks: "In this particular instance, doing something that, honestly, you know, you're talking about a pro se person. You know, having somebody see a motion for arrest that has children to take care of, I mean, it's a scary proposition, honestly.[10] . . .

"So I think that it would have been, perhaps, much more prudent for you to go on the docket and see whether or not a motion, an objection, a [m]otion for [p]rotective [o]rder, has been filed or call the court and say, oh, by the way, you know, you may not have docketed it yet, but did somebody file an objection, a [m]otion for [p]rotective [o]rder against my motion . . . before going ahead . . . and doing a request for a capias. . . . That's my issue with this particular case not having made a—I'm not making a decision on it." (Footnote added.) When the plaintiff responded that she understood, the same member continued: "I'm just looking at issues that come up and facts that come up that do not quite make sense from a pro se perspective."[11] We note that rule 4.4 of the Rules of Professional Conduct does not impose additional obligations on an attorney when dealing with a self-represented party.[12]

[10] In his closing argument before the reviewing committee, the plaintiff's attorney stated: "It is clear that a lawyer has a right to file an application for a capias. An application is not a capias. Somebody isn't getting [arrested]. Whether or not the pro se litigant understood that is irrelevant to the lawyer's ethical obligations."

[11] Although this panel member suggested that different rules should apply when interacting with a self-represented party, it is well settled that "the right of self-representation provides no attendant license not to comply with relevant rules of procedure and substantive law." (Internal quotation marks omitted.) *Anghel* v. *Saint Francis Hospital & Medical Center*, 118 Conn. App. 139, 139 n.1, 982 A.2d 649 (2009), cert. denied, 294 Conn. 932, 986 A.2d 1055, cert. denied, 559 U.S. 1069, 130 S. Ct. 2111, 176 L. Ed. 2d 726 (2010).

[12] We do not determine that the fact that the complainant was self-represented may not be introduced for the purpose of giving the fact finder the entire relevant context of the plaintiff's conduct. We determine only that

For these reasons, we conclude that the court's decision that the defendant properly concluded that the plaintiff violated rule 4.4 (a) of the Rules of Professional Conduct is not based on clear and convincing evidence. The conclusory statement that the defendant demonstrated such a violation by clear and convincing evidence is belied by the dearth of proof in the record. We are particularly concerned about the determinations of the reviewing committee, the defendant, and the trial court for the reasons set forth in *Brunswick* v. *Statewide Grievance Committee*, 103 Conn. App. 601, 931 A.2d 319, cert. denied, 284 Conn. 929, 934 A.2d 244 (2007). The administration and interpretation of prohibitions against actions that a lawyer legitimately employs when zealously representing a client, which actions may cause embarrassment or inconvenience to a third person, "*should be tempered by concern to avoid overenforcement*. . . . For that reason, [t]ribunals usually sanction only extreme abuse." (Citation omitted; emphasis added; internal quotation marks omitted.) Id., 620.

Rule 4.4 (a) of the Rules of Professional Conduct "should be applied cautiously in light of its potential for chilling legitimate but difficult advocacy." Id. Danger exists that courts or disciplinary authorities might punish conduct as unethical that is the result of a simple mistake on the part of counsel, perceiving such conduct as deliberate indifference to the Rules of Professional Conduct. See id., 620–21. In the present case, the plaintiff filed a motion for a capias and stated that no objection or motion to quash had been filed. She was mistaken; there was no clear and convincing proof to the contrary. Moreover, there was no clear and convincing proof that she filed the motion for no substantial

the particular evidence that she was a self-represented party does not of itself provide a proper basis for an adverse inference that the plaintiff violated rule 4.4 (a) of the Rules of Professional Conduct.

purpose other than to embarrass or burden the complainant. Accordingly, because the evidence in the record does not support the court's determination, we order that the sanctions be vacated. See *Shelton* v. *Statewide Grievance Committee*, 277 Conn. 99, 111–12, 890 A.2d 104 (2006).

The judgment is reversed and the case is remanded with direction to render judgment sustaining the plaintiff's appeal and vacating the sanctions imposed by the reviewing committee.

In this opinion the other judges concurred.

MOUY TAING *v.* CAMRAC, LLC
(AC 40941)

Sheldon, Bright and Harper, Js.

Syllabus

The plaintiff sought to recover damages from the defendant company for, inter alia, the allegedly wrongful termination of her employment on the basis of pregnancy discrimination. The plaintiff, who worked for the defendant as an account executive in car sales, had received numerous performance evaluations documenting that she was habitually tardy for her shifts. In July, 2014, the plaintiff received a written warning, which stated that her tardiness was unacceptable and that, if her attendance record did not improve, she would be subject to further discipline up to and including termination. In December, 2014, shortly after notifying the defendant that she was pregnant, the plaintiff received a final written warning, noting that she continued to be habitually tardy despite adjustments made to her work schedule and that her position would be terminated if she was tardy again. On December 24, 2014, the plaintiff was sent home after she arrived late to work, and her employment was subsequently terminated. The trial court granted the defendant's motion for summary judgment and rendered judgment thereon in favor of the defendant, from which the plaintiff appealed to this court. *Held* that the plaintiff could not prevail on her claim that a genuine issue of material fact existed as to whether the defendant's proffered reason for her termination was pretextual, as the plaintiff failed to produce any evidence to suggest that the proffered reason had not been the only reason for the defendant's employment decision and that her pregnancy was at least one of the motivating factors behind her termination: although

the plaintiff claimed that several of her colleagues who were not pregnant were similarly situated because they were also late for work on December 24, 2014, and were not sent home or otherwise disciplined for their tardiness, the plaintiff did not provide any evidence to demonstrate that any of her fellow employees had the same extensive history of chronic tardiness or had received a written warning stating that he or she would be terminated if he or she was late, and, thus, the plaintiff could not demonstrate that any other employee was similarly situated to her with respect to his or her attendance records; moreover, the defendant provided a plethora of evidence documenting the plaintiff's habitual tardiness, it was evident from both her performance evaluations and the July, 2014 written warning that the plaintiff's habitual tardiness had been a notable issue that long preceded her pregnancy, and the defendant made multiple attempts to assist the plaintiff so that she would arrive to work on time.

Argued November 28, 2018—officially released April 2, 2019

Procedural History

Action to recover damages for, inter alia, alleged pregnancy discrimination, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Noble*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Matthew Muttart, with whom, on the brief, was *James V. Sabatini*, for the appellant (plaintiff).

Tanya A. Bovée, with whom, on the brief, was *Justin E. Theriault*, for the appellee (defendant).

Opinion

HARPER, J. This appeal arises from a pregnancy discrimination action brought by the plaintiff, Mouy Taing, under the Connecticut Fair Employment Practices Act[1] against the defendant, CAMRAC, LLC, after she was

[1] See General Statutes § 46a-51 et seq.

terminated from her employment with the defendant.[2] On appeal, the plaintiff argues that the trial court improperly rendered summary judgment in favor of the defendant. Specifically, she claims that there was a genuine issue of material fact as to whether the defendant's proffered reason for her termination was pretextual. We disagree and, accordingly, affirm the judgment of the trial court.

The following undisputed facts and procedural history are relevant to this appeal. The plaintiff was hired by the defendant in April, 2013, for a position that entailed renting cars to customers. Despite issues with tardiness, the plaintiff was promoted in January, 2014, to the position of account executive, in which she sold cars to customers. Throughout the plaintiff's employment with the defendant, the plaintiff received numerous performance evaluations documenting that she was habitually tardy for her shifts. On July 18, 2014, the plaintiff received a written warning for arriving late to work on multiple occasions without notifying management, in violation of the defendant's attendance and punctuality policy.[3] The warning informed the plaintiff that her tardiness was unacceptable and that, if her attendance record did not improve, she would be subject to further discipline up to and including termination. Matthew Fisher, the plaintiff's manager, and Kevin Hill, a supervisor, met with the plaintiff to assist her in planning out her daily schedule so that she could avoid being tardy. Moreover, the defendant twice permitted

[2] The plaintiff also alleged in her amended complaint violations of the state wage and hour law under General Statutes §§ 31-68 and 31-72 for the defendant's failure to pay her overtime but later conceded at a hearing on the defendant's motion for summary judgment that her position as a salesperson was exempt from those statutory requirements.

[3] The written warning stated that the plaintiff was late to work on nine occasions in June and July of 2014. On two of those occasions, the plaintiff failed to notify management that she was running late.

the plaintiff to alter her work schedule to better accommodate her child care needs.[4]

On or about December 16, 2014, the plaintiff notified the defendant's human resources department that she was pregnant. The plaintiff also notified her supervisors, Hill and Fisher, of her pregnancy. On December 19, 2014, the plaintiff received a final written warning, noting that she continued to be habitually tardy despite adjustments made to her work schedule.[5] Additionally, the warning stated that her position would be terminated if she was tardy again. On December 22, 2014, however, the plaintiff was again late. On December 24, 2014, Fisher sent the plaintiff home after she arrived late to work. On December 29, 2014, the next day that the plaintiff was scheduled to work, she was terminated. At that time, Fisher informed the plaintiff that she was being terminated for tardiness.

After obtaining a release of jurisdiction from the Commission on Human Rights and Opportunities,[6] the plaintiff filed a three count complaint against the defendant, alleging, inter alia, pregnancy discrimination in violation of General Statutes (Rev. to 2013) § 46a-60 (a) (7), now § 46a-60 (b) (7).[7] The defendant subsequently moved for summary judgment on all counts of the plaintiff's complaint. In a memorandum of decision, the court granted the defendant's motion, agreeing with the defendant that the plaintiff had failed to produce any

[4] The plaintiff often dropped her daughter off at daycare before work.

[5] The final written warning noted that she had been late to work on October 1, 13, 24, 27, 30, November 10, 14, 17, 21, 24, and December 6, 11, 12, 13, 18, 19, 2014. The plaintiff disputed being late on October 1, 13, 24, and 27, 2014. Fisher subsequently conceded that she had not been late on October 1 and 13, 2014.

[6] See General Statutes § 46a-100.

[7] General Statutes (Rev. to 2013) § 46a-60 (a) provides in relevant part: "It shall be a discriminatory practice in violation of this section . . . (7) [f]or an employer . . . [t]o terminate a woman's employment because of her pregnancy . . . ."

evidence that raises a genuine issue of material fact that the defendant's proffered reason for terminating the plaintiff was pretextual. This appeal followed. Additional facts will be provided as necessary.

We first set forth the relevant standard of review and legal principles that guide our analysis. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing . . . that the party is . . . entitled to judgment as a matter of law. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary." (Internal quotation marks omitted.) *Hopkins* v. *O'Connor*, 282 Conn. 821, 829, 925 A.2d 1030 (2007).

Although the plaintiff's claim is based solely on Connecticut law, "Connecticut antidiscrimination statutes should be interpreted in accordance with federal antidiscrimination laws." *Curry* v. *Allan S. Goodman, Inc.*, 286 Conn. 390, 407, 944 A.2d 925 (2008). "In defining the contours of an employer's duties under our state antidiscrimination statutes, we have looked for guidance to federal case law interpreting Title VII of the Civil Rights Act of 1964, the federal statutory counterpart to § 46a-60." *Brittell* v. *Dept. of Correction*, 247 Conn. 148, 164, 717 A.2d 1254 (1998).

"The legal standards governing discrimination claims involving adverse employment actions are well established. The framework this court employs in assessing disparate treatment discrimination claims under Connecticut law was adapted from the United States

Supreme Court's decision in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and its progeny. . . . Under this analysis, the employee must first make a prima facie case of discrimination. . . . In order for the employee to first make a prima facie case of discrimination, the plaintiff must show: (1) the plaintiff is a member of a protected class; (2) the plaintiff was qualified for the position; (3) the plaintiff suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances that give rise to an inference of discrimination. . . . The employer may then rebut the prima facie case by stating a legitimate, nondiscriminatory justification for the employment decision in question. . . . The employee then must demonstrate that the reason proffered by the employer is merely a pretext and that the decision actually was motivated by illegal discriminatory bias." (Citations omitted; internal quotation marks omitted.) *Feliciano* v. *Autozone, Inc.*, 316 Conn. 65, 73–74, 111 A.3d 453 (2015). "[T]o defeat summary judgment . . . the plaintiff's admissible evidence must show circumstances that would be sufficient to permit a rational finder of fact to infer that the defendant's employment decision was more likely than not based in whole or in part on discrimination . . . ." (Citations omitted; internal quotation marks omitted.) *Govori* v. *Goat Fifty, LLC*, 519 Fed. Appx. 732, 734 (2d Cir. 2013).

"To prove pretext, the plaintiff may show by a preponderance of the evidence that [the defendant's] reason is not worthy of belief or that more likely than not it is not a true reason or the only true reason for [the defendant's] decision to [terminate the plaintiff] . . . ." (Internal quotation marks omitted.) *Jacobs* v. *General Electric Co.*, 275 Conn. 395, 402, 880 A.2d 151 (2005). "Of course, to defeat summary judgment . . . the plaintiff is not required to show that the employer's proffered reasons were false or played no role in the employment decision, but only that they were not the

only reasons and that the prohibited factor was at least one of the motivating factors." (Internal quotation marks omitted.) *Garcia* v. *Hartford Police Dept.*, 706 F.3d 120, 127 (2d Cir. 2013).

Turning to the present matter, the plaintiff argues that a genuine issue of material fact existed as to whether the defendant's proffered reason for her termination was pretextual because similarly situated individuals who were not pregnant were treated differently than she was. Specifically, the plaintiff argues that several of her colleagues were similarly situated because they were also late for work on the morning of December 24, 2014, but they were not sent home or otherwise disciplined for their tardiness. The plaintiff, however, does not provide any evidence to demonstrate that any of her fellow employees had the same extensive history of chronic tardiness or had received a written warning stating that he or she would be terminated if he or she was late without notifying management. See *Harris* v. *Dept. of Correction*, 154 Conn. App. 425, 432–33, 107 A.3d 454 (2014) (plaintiff failed to proffer evidence of employee's comparable disciplinary history), cert. denied, 315 Conn. 925, 109 A.3d 921 (2015). Thus, even when viewing the evidence in the light most favorable to the plaintiff, she cannot, as a matter of law, demonstrate that any other employee was similarly situated to her with respect to his or her attendance records over an extended period of time.

Furthermore, the defendant provided a plethora of evidence documenting the plaintiff's habitual tardiness. It is evident from both her performance evaluations and the July 18, 2014 written warning given to her that the plaintiff's habitual tardiness had been a notable issue that long preceded her pregnancy in December, 2014. In particular, the July 18, 2014 written warning made clear that her tardiness was not acceptable and that she would be subject to further disciplinary action, up to and including termination, if she did not improve

her attendance. Moreover, it is evident that the defendant made multiple attempts to assist the plaintiff so that she would arrive to work on time. This is reflected in the plaintiff's alternative work schedule and the attempt by Fisher and Hill to help her map out her daily schedule. The plaintiff failed to produce any evidence to suggest that the proffered reason for her termination had not been the only reason for the defendant's employment decision and that her pregnancy was at least one of the motivating factors behind her termination. Accordingly, the trial court properly rendered summary judgment in favor of the defendant.[8]

The judgment is affirmed.

In this opinion the other judges concurred.

ION BANK *v.* J.C.C. CUSTOM HOMES, LLC, ET AL. (AC 40424)

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

Syllabus

The plaintiff sought, by way of a replevin action, to recover certain collateral in the possession of the named defendant that was the security for a promissory note, which had been executed by the named defendant in favor of the plaintiff and on which the named defendant had defaulted.

[8] The plaintiff also argues that there is a credibility issue regarding statements made in Fisher's deposition. Principally, the plaintiff points to Fisher's statement that he issued a verbal warning to two of the plaintiff's coworkers, Anastasia Nisyrios and Brianne Donlon, for arriving late to work on December 24, 2014. The plaintiff argues that those verbal warnings should have been recorded in accordance with company policy but were not. As a result, the plaintiff asserts that Fisher must not have actually issued the verbal warnings, and that a jury could reasonably conclude that Fisher was "manufacturing the discipline of other employees in an attempt to conceal his discriminatory treatment of the plaintiff." The plaintiff failed to produce any evidence to support these conclusory statements. In fact, it is well settled that a "plaintiff's opinions and assertions about the motives of the defendants . . . are not sufficient to establish facts as would be admissible in evidence, as required by Practice Book § 17-46." (Internal quotation marks omitted.) *Chadha* v. *Charlotte Hungerford Hospital*, 97 Conn. App. 527, 540, 906 A.2d 14 (2006).

After the named defendant had defaulted on the note, the plaintiff assigned all of its interest in the note to N Co. Thereafter, the plaintiff commenced this action by filing a writ of replevin in which it expressly identified itself as the party entitled to immediate possession of the collateral. Within thirty days of filing the underlying replevin action, the plaintiff filed an amended complaint, attached to which was an amended prejudgment writ of replevin purporting to substitute N Co. as the plaintiff. The defendants subsequently filed a motion to dismiss the action, which the trial court granted, concluding that because the plaintiff had assigned the note to N Co. prior to commencing the replevin action, it lacked standing to bring the action and that the court, therefore, lacked subject matter jurisdiction over the matter ab initio. The trial court also rejected the plaintiff's claims that it had successfully effectuated a substitution of N Co. as the plaintiff by filing its amended complaint, and that as the assignor of the note to N Co., it had standing to maintain the action on behalf of its assignee. From the judgment rendered thereon, the plaintiff appealed to this court. *Held*:

1. The plaintiff could not prevail on its claim that the trial court improperly granted the defendants' motion to dismiss, which was based on its claim that the court should have treated the amended complaint filed by the plaintiff as having cured any defect regarding the plaintiff's standing: the plaintiff's claim that it properly substituted N Co. as the plaintiff by operation of law by filing an amended complaint in compliance with the relevant rule of practice (§ 10-59) was unavailing, as although § 10-59 allows a plaintiff to correct technical or circumstantial defects in a pleading, or to add counts that could have been included in the original complaint, § 10-59 does not confer a right to correct a jurisdictional defect such as standing by allowing the substitution of a new party plaintiff without judicial approval; moreover, the relevant rule of practice (§ 9-20) and statute (§ 52-109) expressly vest discretion in the judicial authority, and not the parties, to permit a substitution of a plaintiff if the court determines that the action was commenced in the name of the wrong party due to mistake and that it is necessary for the determination of the real matter in dispute to allow the substitution.

2. Contrary to the plaintiff's claim, the trial court properly determined that the plaintiff was required to file a motion for permission to substitute N Co. as the party plaintiff and it did not abuse its discretion in declining to treat the plaintiff's amended complaint as such a motion: because the determination of whether to permit the substitution of a party requires an exercise of discretion and an order by the court, our rules of practice required the plaintiff to file a motion accompanied by a memorandum of law requesting that the court issue an order substituting N. Co. as the plaintiff, which the plaintiff did not do; moreover, because the plaintiff's amended complaint neither included nor was accompanied by any request for permission to substitute N Co., it was insufficient to alert the court that the plaintiff was seeking an adjudication and order on

the issue of substitution and there was no motion before the court over which it could have exercised its discretion to treat the amendment as a motion to substitute, and the trial court did not consider or make any finding as to whether the action was initiated by mistake, which was essential for it to evoke its discretionary authority to allow a substitution of N Co.

3. The plaintiff could not prevail on its claim that the trial court improperly granted the defendants' motion to dismiss because, as the assignor of the note to N Co., it had standing to maintain the action on behalf of its assignee: the plaintiff, having assigned the note to N Co., was neither a holder of the note nor a nonholder in possession and, therefore, did not have the authority to enforce the note at the time the action was commenced pursuant to the relevant statute (§ 42a-3-301), and, to the extent that prior case law suggested that an action commenced by an assignor of a promissory note would not fail for lack of standing, this court questioned its continued viability, as it was decided prior to the enactment of § 42a-3-301, and the common law of assignments did not displace the clear provisions of § 42a-3-301 because that statute was directly applicable to the situation underlying the present case; moreover, the plaintiff's initial complaint could not reasonably be construed as an action brought by N Co. in the name of the plaintiff, which had alleged that it was the party entitled to immediate possession of the collateral, and because the complaint was otherwise devoid of any jurisdictional facts that would support a determination that the action was brought by an assignee in the name of its assignor, the plaintiff failed to meet its burden of alleging facts demonstrating that it was the proper party to invoke judicial resolution of the dispute.

Argued December 6, 2018–officially released April 2, 2019

Procedural History

Action in replevin to recover certain chattel in the defendants' possession, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the court, *Brazzel-Massaro*, *J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Christopher R. LaSaracina, for the appellant (plaintiff).

John J. Ribas, for the appellees (defendants).

Opinion

PRESCOTT, J. In this replevin action, the plaintiff, Ion Bank, appeals from the judgment of the trial court granting a motion to dismiss filed by the defendants, J.C.C. Custom Homes, LLC (J.C.C.), Rock On Excavation Services, LLC (Rock On), John C. Ciappetta, and Dawn E. Ciappetta. The court concluded that the plaintiff lacked standing to bring the action because, prior to commencing it, the plaintiff had assigned its interest in the underlying promissory note to Nutmeg Financial Holdings, LLC (Nutmeg), and, therefore, the court lacked subject matter jurisdiction.

The plaintiff concedes that the action was commenced in the name of the wrong party. Nevertheless, the plaintiff claims on appeal that the court improperly granted the motion to dismiss because it (1) failed to consider an amended complaint that the plaintiff filed pursuant to Practice Book § 10-59, which, the plaintiff argues, substituted Nutmeg in as the proper plaintiff by operation of law and, thus, cured any defect regarding standing, (2) concluded that the plaintiff was required to file a motion for permission to substitute in a new plaintiff and failed to treat the amended complaint as a motion to substitute, and (3) failed to conclude that Nutmeg, as the assignee of the note, is entitled to maintain an action either in its own name or in the name of its assignor, the plaintiff. We are not persuaded by the plaintiff's arguments and, accordingly, affirm the judgment of the court.

The following facts, as set forth by the trial court in its memorandum of decision or taken from the complaint and viewed in the light most favorable to the plaintiff, are relevant to our resolution of the present appeal. J.C.C., through it owners, John C. Ciappetta and Dawn E. Ciappetta, executed a commercial promissory note in favor of the plaintiff on December 29, 2010, in

the principal amount of $170,000. J.C.C. agreed to repay the loan along with interest and any applicable late charges by January 1, 2016. J.C.C. also executed a commercial security agreement in which it pledged a 2004 Ford F350 pickup truck as collateral for the loan. As additional security for the note, Rock On, a limited liability company also owned by the Ciappettas, executed commercial security agreements providing as collateral a 1981 Kenworth W900 truck, a 1989 East Dump trailer, and a 1998 Caterpillar 416 backhoe. Rock On, John C. Ciappetta, and Dawn E. Ciappetta also executed guarantees assuming liability for repayment of the note.

J.C.C. failed to make the required monthly loan payments and defaulted on the note. Despite demands by the plaintiff for repayment, the defendants did not repay the loan or make the collateral available to the plaintiff.

On June 30, 2016, the plaintiff assigned all of its interest in the note to Nutmeg.[1] Despite the assignment, the plaintiff, on July 1, 2016, initiated the underlying replevin action against the defendants by service of process.[2] In addition to a prejudgment writ of replevin

[1] On August 16, 2016, the plaintiff also assigned to Nutmeg the security agreements and guarantees. The plaintiff has not argued on appeal that the late assignment of the secondary obligations is relevant to the issue of standing and, therefore, we do not address whether the assignment of the note also effectively operated as an assignment of the secondary obligations underlying it. See *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, 183 Conn. App. 128, 137, 192 A.3d 455, cert. granted, 330 Conn. 921, 193 A.3d 1213 (2018), and cert. granted, 330 Conn. 922, 194 A.3d 288 (2018).

[2] Replevin actions are governed by General Statutes § 52-515 et seq. General Statutes § 52-515 provides: "The action of replevin may be maintained to recover any goods or chattels in which the plaintiff has a general or special property interest with a right to immediate possession and which are wrongfully detained from him in any manner, together with the damages for such wrongful detention." Accordingly, to prevail in a replevin action, a plaintiff must plead and establish not only that the items sought are goods or chattels wrongfully detained by the defendant, but that the plaintiff has a property interest in the items and a right to immediate possession. See *Cornelio* v. *Stamford Hospital*, 246 Conn. 45, 49, 717 A.2d 140 (1998).

expressly identifying the plaintiff as the party entitled to immediate possession of the collateral, the process included the requisite affidavit and bond. See General Statutes § 52-518. The return date on the writ was August 9, 2016.

On August 17, 2016, the plaintiff filed a pleading titled "Plaintiff's Amended Complaint," attached to which was an amended prejudgment writ of replevin substituting Nutmeg as the named plaintiff. The amended complaint stated in relevant part: "Pursuant to Practice Book §§ 9-16[3] and 10-59,[4] the plaintiff hereby amends its complaint as of right to amend, among other things, the named plaintiff. The proper plaintiff, [Nutmeg], has acquired the right to collect the debt due, as evidenced by the allonge to the promissory note as alleged in the complaint. Said note is secured by, among other things, the guarantees and security agreements as described in the complaint, and said guarantees and security agreements have been assigned to [Nutmeg] as well. Accordingly, [Nutmeg] is now the proper plaintiff and should be substituted as the sole plaintiff in this action." (Footnotes added.)

On October 14, 2016, the defendants filed a motion to dismiss the action for lack of subject matter jurisdiction. According to the defendants, because the plaintiff assigned the note to Nutmeg prior to commencing the

[3] Practice Book § 9-16 provides: "If, *pending the action*, the plaintiff assigns the cause of action, the assignee, *upon written motion*, may either be joined as a coplaintiff or be substituted as a sole plaintiff, as the judicial authority may order; provided that it shall in no manner prejudice the defense of the action as it stood before such change of parties." (Emphasis added.) Because the plaintiff assigned the note to Nutmeg prior to the commencement of the action, rather than during its pendency as contemplated by Practice Book § 9-16, this rule is inapplicable.

[4] Practice Book § 10-59 provides in relevant part: "The plaintiff may amend any defect, mistake or informality in the writ, complaint or petition and insert new counts in the complaint, which might have been originally inserted therein, without costs, during the first thirty days after the return day. . . ."

replevin action, it lacked a legal interest in the items it sought to replevy and, thus, lacked standing to commence or maintain the action. The defendants further argued that the plaintiff's attempt to substitute in Nutmeg as the real plaintiff in interest by filing an amended complaint was improper and did not "accomplish the desired substitution."[5]

The plaintiff filed an objection to the motion to dismiss. The plaintiff argued with respect to the issue of standing that (1) Nutmeg was substituted in as the real plaintiff in interest by virtue of the amended complaint it filed pursuant to Practice Book § 10-59, (2) even if it was not entitled to substitute in Nutmeg as a matter of right, the court should treat the amended complaint as a motion to substitute pursuant to General Statutes § 52-109, and (3) it was entitled to maintain the action in its own name despite the assignment of the note to Nutmeg.

The court, *Brazzel-Massaro*, *J.*, heard argument on the motion to dismiss on December 5, 2016. On March 20, 2017, the court rendered a decision granting the motion to dismiss, concluding that, because the plaintiff lacked standing at the time it commenced the replevin action, the court lacked subject matter jurisdiction over the matter ab initio. The court rejected the plaintiff's argument that, as the assignor of the note to Nutmeg, it had standing to maintain the action on behalf of its assignee. The court reasoned that, in the present case, the plaintiff "[had given] up all of its rights, title, and

[5] The defendants also argued as an additional ground for dismissal that the plaintiff already had commenced an action to foreclose a mortgage on real property securing the same debt; *Ion Bank* v. *J.C.C. Custom Homes, LLC*, Superior Court, judicial district of Waterbury, Docket No. UWY-CV-14-6025446-S (February 16, 2017); and, therefore, the present action was barred by the prior pending action doctrine. We note that a judgment of strict foreclosure and a deficiency judgment were rendered in that action in 2017. The trial court did not address this claim and the defendants have not raised it as an alternative ground for affirmance.

interest in the note to Nutmeg on June 30, 2016, and did not have standing to commence suit itself." The court further rejected the plaintiff's argument that it had effectuated a substitution of Nutmeg as the plaintiff by virtue of its amended complaint. The court held that, pursuant to § 52-109, substitution of a plaintiff could only be effectuated if the court determined pursuant to a motion for substitution that the action had been "commenced in the name of the wrong plaintiff through mistake." (Internal quotation marks omitted.) The plaintiff, however, had never filed a proper motion with the court. The plaintiff filed a timely motion to reargue the court's granting of the motion to dismiss, which the court subsequently denied. This appeal followed.

We begin with general principles of law, including our standard of review. "Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . [If] a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause." (Citation omitted; internal quotation marks omitted.) *J.E. Robert Co.* v. *Signature Properties, LLC*, 309 Conn. 307, 318, 71 A.3d 492 (2013).

"[B]ecause the issue of standing implicates subject matter jurisdiction, it may be a proper basis for granting a motion to dismiss. . . . The standard of review for a court's decision on a motion to dismiss is well settled. A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to

dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone. . . . [I]t is the burden of the party who seeks the exercise of jurisdiction in his favor . . . clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." (Citations omitted; internal quotation mark omitted.) *Electrical Contractors, Inc.* v. *Dept. of Education*, 303 Conn. 402, 413–14, 35 A.3d 188 (2012). Finally, to the extent that we must engage in the interpretive construction of our rules of practice or related statutory provisions, this "involves a question of law over which our review is plenary." (Internal quotation marks omitted.) *Parnoff* v. *Yuille*, 163 Conn. App. 273, 281, 136 A.3d 48, cert. denied, 321 Conn. 902, 138 A.3d 280 (2016). With these principles in mind, we turn to the plaintiff's arguments made in support of its claim that the court improperly granted the defendants' motion to dismiss.[6]

I

The plaintiff first argues that the court improperly granted the defendants' motion to dismiss because it should have treated the amended complaint filed by the plaintiff pursuant to Practice Book § 10-59 as having cured any defect regarding the plaintiff's standing. We are not persuaded.

As previously noted, Practice Book § 10-59 provides in relevant part: "The plaintiff may amend any defect, mistake or informality in the writ, complaint or petition

[6] We address the plaintiff's arguments in the order that they were briefed in its principal brief.

and insert new counts in the complaint, which might have been originally inserted therein, without costs, during the first thirty days after the return day. . . ." Practice Book § 10-59 essentially mirrors the language found in General Statutes § 52-128.[7] In seeking to determine the meaning of statutory language, we consider not only the text of the statute but its relationship to other statutes. General Statutes § 1-2z. This same principle applies to our construction of our rules of practice. See *Meadowbrook Center, Inc.* v. *Buchman*, 328 Conn. 586, 594, 181 A.3d 550 (2018).

Considered in light of the overall structure of our rules of practice, we do not construe Practice Book § 10-59 as permitting the correction of jurisdictional defects related to parties. Chapter ten of our rules is titled "Pleadings," and, accordingly, contains rules governing the amendment to the substance of pleadings in civil proceedings. By contrast, rules concerning the nonjoinder or misjoinder of parties and, in particular, the substitution of plaintiffs are found in chapter nine of our rules of practice, titled "Parties." "[I]t is a [well settled] principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling." *LaFrance* v. *Lodmell*, 322 Conn. 828, 835 n.3, 144 A.3d 373 (2016).

Practice Book § 9-20 specifically addresses the procedure to remedy a defect of the type present in this case: "When any action has been commenced in the name of the wrong person as plaintiff, the judicial authority

[7] General Statutes § 52-128 provides: "The plaintiff may amend any defect, mistake or informality in the writ, complaint, declaration or petition, and insert new counts in the complaint or declaration, which might have been originally inserted therein, without costs, within the first thirty days after the return day and at any time afterwards on the payment of costs at the discretion of the court; but, after any such amendment, the defendant shall have a reasonable time to answer the same."

may, if satisfied that it was so commenced through mistake and that it is necessary for the determination of the real matter in dispute so to do, allow any other person to be substituted or added as plaintiff." Practice Book § 9-20. This language is identical to that used in § 52-109, except that where the rule of practice uses the term "judicial authority," the statute uses the term "court."

Practice Book § 9-20 and § 52-109, thus, expressly vest discretion in the judicial authority, not the parties, to permit a substitution of the plaintiff. As our Supreme Court has explained: "Although a plaintiff's lack of standing is a jurisdictional defect . . . it is a type of jurisdictional defect that our legislature, through the enactment of § 52-109, has deemed amenable to correction and, therefore, not irremediably fatal to an action. . . .

"[Section] 52-109 allow[s] a substituted plaintiff to enter a case [w]hen any action has been commenced in the name of the wrong person as [the] plaintiff, and that such a substitution will relate back to and correct, retroactively, any defect in a prior pleading concerning the identity of the real party in interest. . . . Thus, a substitution of a real party in interest as the plaintiff cures the lack of standing of the original plaintiff . . . and, further, is permissible even after the statute of limitations has run. . . . *An addition or substitution is discretionary*, but generally should be allowed when, due to an error, misunderstanding or misconception, an action was commenced in the name of the wrong party, instead of the real party in interest, whose presence is required for a determination of the matter in dispute." (Citations omitted; emphasis added; footnote omitted; internal quotation marks omitted.) *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, 320 Conn. 535, 552–53, 133 A.3d 140 (2016).[8]

[8] "[I]t is well within the authority of a court to permit a substitution of plaintiffs in lieu of dismissing an action provided that the court determines

Although the court in *Fairfield Merrittview Ltd. Partnership* held that a defect in standing potentially could be cured by the filing of an amended complaint, it did not hold that a party could cure such a standing defect on its own simply by filing an amended complaint as of right in compliance with Practice Book § 10-59. Rather, our Supreme Court, relying on the express legislative authority granted under § 52-109, concluded that an addition or substitution of a real party in interest as a plaintiff, *if allowed by the court*, would cure the original plaintiff's lack of standing. See id.

The plaintiff notes that § 52-128 and Practice Book § 10-59 authorize a plaintiff to "amend any defect, mistake or informality" in a complaint. Admittedly, read in isolation, that phrase appears broad. Neither the rule nor the statute, however, defines the term "any defect." Moreover, no court has construed Practice Book § 10-59 or § 52-128 as conferring a right to correct a *jurisdictional* defect such as standing by allowing the substitution of a new party plaintiff as a matter of right without judicial approval. Rather, the rule must be construed as a means to permit parties to correct technical or circumstantial defects in the pleading or, as expressly provided in the rule, for adding counts that could have been included in the original complaint.

For the foregoing reasons, we are unpersuaded by the plaintiff's argument that it properly substituted Nutmeg as the plaintiff by operation of law by filing, in compliance with Practice Book § 10-59, an amended

that the conditions set forth in § 52–109 have been met. . . . [I]f § 52-109 is to have the ameliorative purpose for which it was intended, then even assuming that the specter of subject matter jurisdiction rears its head, the statute is meant to give the trial courts jurisdiction for the limited purpose of determining if the action should be saved from dismissal by the substitution of plaintiffs." (Internal quotation marks omitted.) *Rana* v. *Terdjanian*, 136 Conn. App. 99, 111, 46 A.3d 175, cert. denied, 305 Conn. 926, 47 A.3d 886 (2012).

complaint within thirty days of the commencement of the action.

II

The plaintiff next argues that the court improperly concluded that the plaintiff was required to file a motion for permission to substitute Nutmeg as the party plaintiff, and that, even if a motion was required, the court should have treated the amended complaint as a motion to substitute. We disagree with both contentions.

As we have already discussed in part I of this opinion, the court lacks subject matter jurisdiction over an action commenced by a plaintiff without standing. Furthermore, this type of jurisdictional defect cannot be cured simply by resorting to the procedures set forth in Practice Book § 10-59. Other than a dismissal of the action, the only remedy available if the wrong party commences an action is found in § 52-109 and Practice Book § 9-20. Those provisions reflect the discretionary authority of the trial court to substitute the real party in interest as plaintiff if the court determines that due to a mistake—meaning an error, misunderstanding, or misconception—an action was commenced in the name of the wrong party. See *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, supra, 320 Conn. 552–53. Accordingly, because substitution requires some exercise of discretion and an order by the court, the court correctly determined that a party seeking a substitution must file a motion with the court. See Practice Book § 11-2 ("the term 'motion' means any application to the court for an order, which application is to be acted upon by the court or any judge thereof").

The plaintiff did not file a motion asking the court to issue an order substituting in Nutmeg but, instead, filed its amended complaint. The filing of an amended complaint as of right pursuant to Practice Book § 10-59 is not the equivalent of filing a proper motion. The

docketing of an amended pleading is insufficient to alert the court that a party is seeking an adjudication and order. Moreover, our rules require that a motion seeking to substitute in a new plaintiff pursuant to Practice Book § 9-20 be accompanied by a memorandum of law "outlining the claims of law and authority pertinent thereto." Practice Book § 11-10. The procedures for filing a proper motion to substitute were not followed here.

The plaintiff nevertheless contends that the court should have treat its amended complaint as a motion to substitute. In support of this argument, the plaintiff relies on our Supreme Court's decision in *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, supra, 320 Conn. 535. That reliance, however, is misplaced.

In *Fairfield Merrittview Ltd. Partnership*, our Supreme Court considered whether, in an action initially commenced by a party lacking standing due to its lack of ownership of the property at issue, the prompt filing of an amended complaint[9] that added a party with standing as an additional plaintiff would be sufficient to confer jurisdiction on the trial court. Id., 551. As we discussed previously, the court concluded that the legislature had deemed such a standing defect, if the result of mistake, amenable to correction at the discretion of the court by way of an amended complaint. Id., 552. As in the present case, the amended complaint filed in *Fairfield Merrittview Ltd. Partnership* was filed within thirty days of the return date on the original complaint. The plaintiff in that case also failed to file a motion to substitute, but there was no contemporaneous objection raised by the defendants to the substitution. Id., 546. Our Supreme Court held that, although

[9] The "complaint" in *Fairfield Merrittview Ltd. Partnership* was an administrative appeal of a municipal property tax assessment.

captioned as an amendment, the plaintiffs' filing effectively was a motion, which the trial court, in its discretion, granted. Id., 547

In reaching its decision, the court reasoned as follows: "Although the plaintiffs here *captioned the motion that accompanied their amended complaint* as a request for permission to amend, it clearly was, in its substance, a motion to add or substitute a party plaintiff. . . . Moreover, under the undisputed facts and circumstances of the present case, there is no question that the foregoing requirements for an addition or substitution were met. Because the [limited liability company (LLC)] was the sole owner of the property at issue at the relevant time, its addition as a party plaintiff undeniably was necessary for a determination of the matter in dispute, and the naming of the partnership, instead of the LLC, was due to an error, misunderstanding or misconception. The plaintiffs' counsel quickly took action to add the LLC as a party to the proceedings. The defendants have not identified any prejudice that they suffered from the action having been initiated and briefly maintained in the name of the wrong party, and we are unable to conceive of any. In sum, *the trial court properly allowed* the amendment to add the LLC, which cured any jurisdictional defect in the original complaint." (Citations omitted; emphasis added; footnote omitted.) Id., 554–55.

The outcome in *Fairfield Merrittview Ltd. Partnership* is readily distinguishable from the present case and, therefore, does not control the outcome of this appeal. First and foremost, the plaintiffs in *Fairfield Merrittview Ltd. Partnership* did not simply file an amended complaint. Rather, as indicated by our Supreme Court, their amendment was accompanied by a request asking the court for permission to amend the pleadings. In the present case, the plaintiff did not file a motion to substitute or a motion for permission to

amend; it filed a document captioned "Plaintiff's Amended Complaint." Accordingly, there was no motion before the court over which it could have exercised its discretion to treat the amendment as a motion to substitute.

Moreover, the trial court in *Fairfield Merrittview Ltd. Partnership* actually had exercised its discretion to allow a substitution, and the defendants raised no objection to the amended complaint. Id., 552. In the present case, the defendants moved to dismiss the action and objected to the substitution as invalid and inappropriate. Unlike in *Fairfield Merrittview Ltd. Partnership*, the court in the present case never considered or made a finding of whether the action was initiated by "mistake," a finding essential to evoking its discretionary authority to allow a substitution. See *Rana* v. *Terdjanian*, 136 Conn. App. 99, 112, 46 A.3d 175, cert. denied, 305 Conn. 926, 47 A.3d 886 (2012). In sum, we agree with the trial court that, in order to substitute Nutmeg as the plaintiff, the defendant was required to file a motion asking the court to exercise its discretion under § 52-109, and the court did not abuse its discretion by failing to treat a portion of the amended complaint as such a motion.

III

Finally, the plaintiff, citing to our Supreme Court's decision in *Jacobson* v. *Robington*, 139 Conn. 532, 95 A.2d 66 (1953), argues that the court should have concluded that Nutmeg, as the assignee of the promissory note, was entitled to bring an action to recover the property in the name of the plaintiff as its assignor. In other words, the plaintiff argues that the court should have construed the initial complaint as an action brought by Nutmeg in the name of the plaintiff as its assignor. There are a number of flaws in the plaintiff's

argument. First, it fails to take into account the provisions of the Uniform Commercial Code (UCC), General Statutes § 42a-3-101 et seq., which was adopted by Connecticut after the decision in *Jacobson*. See General Statutes § 42a-10-101. Moreover, to credit the plaintiff's argument, we would need to interpret *Jacobson* in a manner that conflicts with more recent jurisprudence regarding standing. Although we briefly discuss these issues, it is not necessary for us to resolve them at this juncture because our review of the initial complaint, particularly the allegations made in support of standing, belies any notion that the plaintiff initiated the action in its name as the assignor of Nutmeg rather than on its own behalf.

In *Jacobson*, the defendant appealed from a judgment of foreclosure by sale rendered against him following the entry of a default for failure to appear. *Jacobson* v. *Robington*, supra, 139 Conn. 534. On appeal, the defendant claimed that the court had abused its discretion by denying a motion to set aside the default and open the judgment of foreclosure because, inter alia, he had a viable defense, namely that "the plaintiff had no standing *to maintain* the case because he was no longer the owner of the note and mortgage." (Emphasis added.) Id., 539. It is important to note that the defendant did not argue that the plaintiff lacked standing at the time he initiated the action. Nevertheless, according to facts set forth in separate portions of the opinion, the plaintiff had assigned its interests in the note and mortgage to a third party on November 24, 1950; id.; but commenced the foreclosure action on December 19, 1950. Id., 534.

Our Supreme Court rejected the defendant's claim that he had a viable standing defense to the foreclosure action, stating that "[s]ince [the third party] took by assignment, it was permissible for him to *maintain* the action in the name of his assignor." (Emphasis added.)

Id., 539. The court never acknowledged that the assignment had occurred prior to the commencement of the action or whether there was any legal significance to that fact. Instead, likely due to the procedural posture of the appeal and how the standing issue was presented to the court, the court focused only on whether the action was properly "maintained" and went to judgment in the name of the party that had assigned its interest.

Because the precise issue now before us was not considered or decided by the court in *Jacobson*, it is questionable whether *Jacobson* reasonably may be read as standing for the proposition that the plaintiff claims it does. Significantly, the limited number of appellate courts that have cited to *Jacobson* in resolving an issue of standing have done so in cases in which the plaintiff had assigned its interest in the case after the action properly was commenced. See, e.g., *Citibank, N.A.* v. *Stein*, 186 Conn. App. 224, 245, 199 A.3d 57 (2018) (court had subject matter jurisdiction to adjudicate foreclosure action despite original plaintiff having transferred its interest in note to third party during pendency of action), cert. denied, 331 Conn. 903, A.3d (2019); see also *Dime Savings Bank of Wallingford* v. *Arpaia*, 55 Conn. App. 180, 184, 738 A.2d 715 (1999).

Even if *Jacobson* reasonably could be interpreted as holding that an action *commenced* by an assignor of a promissory note would not fail for lack of standing, *Jacobson* was decided prior to this state's adoption of the UCC, provisions of which undermine the continued viability of such a holding. Article 3 of the UCC governs negotiable instruments, which includes promissory notes. See General Statutes § 42a-3-102 (a). "Where the UCC expressly addresses an issue, the common law does not supplant the code." *Seven Oaks Enterprises, L.P.* v. *DeVito*, 185 Conn. App. 534, 553, 198 A.3d 88, cert. denied, 330 Conn. 953, 197 A.3d 893 (2018). The UCC contains several provisions addressing who has standing to enforce a note. A " '[p]erson entitled to

enforce' an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 42a-3-309 or 42a-3-418(d)."[10] General Statutes § 42a-3-301. Thus, "[u]nder [the applicable provisions of the UCC], only a holder of an instrument or someone who has the rights of a holder is entitled to enforce the instrument. . . . When a note is endorsed in blank, any person in possession of the note is a holder and is entitled to enforce the instrument. . . . If an endorsement makes a note payable to an identifiable person, it is a special endorsement, and only the identified person in possession of the instrument is entitled to enforce the instrument." (Citations omitted; internal quotation marks omitted.) *U.S. Bank, N.A.* v. *Ugrin*, 150 Conn. App. 393, 401–402, 91 A.3d 924 (2014). The assignment of the note to Nutmeg included an allonge making the note payable to Nutmeg. Thus, when the action was commenced, only Nutmeg had the authority under the UCC to enforce the note. To the extent that *Jacobson* can be read to suggest something to the contrary, we question its continued viability.

Our standing jurisprudence since *Jacobson* clearly establishes that a party can only invoke the jurisdiction of the court if it had some legal interest in the subject matter of the action at the time it commenced the lawsuit. Accordingly, if we were to agree that *Jacobson* holds that a party that has assigned its interest in a note could nevertheless bring an action for enforcement of its terms or to collect property securing the note, this would turn much of our standing precedent on its head.

Ultimately, it is not necessary for us to resolve at this time whether an assignor of a note has standing

[10] Section § 42a-3-301 (iii) concerns enforcement of lost or stolen notes and other situations not applicable here.

to bring an action seeking to enforce terms of the note on behalf of its assignee because the allegations in the plaintiff's initial complaint cannot reasonably be construed as an action brought by Nutmeg in the name of the plaintiff, Ion Bank. Rather, it is quite clear that the action was brought by the plaintiff in its own name. It is axiomatic that "[i]t is the burden of the party who seeks the exercise of jurisdiction in his favor . . . clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." (Internal quotation marks omitted.) *Wilcox* v. *Webster Ins., Inc.*, 294 Conn. 206, 213–14, 982 A.2d 1053 (2009). In the plaintiff's initial complaint, it alleged that it had "a right to immediate possession of the collateral." The complaint contained no allegations that the plaintiff had assigned to Nutmeg its interest in the note and in the collateral securing that note, and that the plaintiff was bringing the action, not in its own name, but on behalf of Nutmeg as Nutmeg's assignor. Because the complaint is devoid of any jurisdictional facts that would support a determination that the action was brought by an assignee in the name of its assignor, it is not necessary to resolve whether the court would have had standing if such allegation had been pleaded.

In sum, the plaintiff, which had the burden of alleging facts sufficient to establish a specific, personal and legal interest in the property it sought to replevy, could not properly do so because it had transferred all of its interest in the note to Nutmeg prior to commencing the underlying action. Its subsequent attempt to amend the complaint to remedy the jurisdictional defect without first obtaining permission of the court to substitute Nutmeg as the plaintiff was ineffective, and, accordingly, the court properly granted the motion to dismiss.

The judgment is affirmed.

In this opinion the other judges concurred.

EDWARD MCKIERNAN *v.* CIVIL SERVICE COMMISSION OF THE CITY OF BRIDGEPORT ET AL.
(AC 40377)

Sheldon, Keller and Flynn, Js.

Syllabus

The plaintiff police officer brought this action against the defendants, the Civil Service Commission of the City of Bridgeport and its president and personnel director, seeking a declaratory judgment that, inter alia, he be allowed to retake the oral assessment portion of the city's 2015 detective promotional examination. Pursuant to the city's charter, the commission is responsible for formulating and administering promotional examinations for city employees to determine the relative qualifications of persons seeking promotion to any class of position and their capacity to perform the duties of the position. I Co., which specializes in the development and administration of promotional examinations for public safety agencies, was retained to develop, administer and grade the city's 2015 police detective promotional examination, and M, I Co.'s project manager, supervised the project. Seventy-one candidates participated in the oral assessment, and, upon arrival at the test center, each candidate, including the plaintiff, was given and told to read carefully a four page document that provided important orientation information and instructions concerning the oral assessment process. The oral assessment was administered in groups of seven candidates every thirty minutes. M introduced the orientation documents to the plaintiff's group in a preparation room, gave the candidates time to review them and asked the candidates if there were any questions and whether each candidate had all of the test materials. No one in the plaintiff's group reported missing any documents. Following the preparation session, the candidates were escorted by a proctor to their individual assessment rooms. As M brought in the next group of candidates to the preparation room, he was informed by K, the proctor assigned to the preparation room, that someone had left a document on the table in the room. During his oral assessment, the plaintiff complained to his proctor that he was not given all of the necessary test materials. M determined that, in fairness to everyone taking the examination, nothing could or should be done with respect to the plaintiff's complaint. Following a trial, the court rendered judgment in favor of the defendants, concluding that the plaintiff failed to sustain his burden of proving that the defendants' actions in administering the examination were arbitrary, capricious or illegal. On appeal to this court, the plaintiff claimed that the trial court erred by rendering judgment in favor of the defendants on the basis of its

finding that the challenged examination was administered in accordance with the requirements of the city charter. *Held*:

1. The trial court's finding that the test administrators provided the plaintiff with all of the necessary test materials for the oral assessment was not clearly erroneous; that court's finding that the plaintiff had received the allegedly missing test materials but that he left them on the preparation room table when he moved from the preparation room to the assessment room was supported by testimony in the record from K, who testified that immediately after the plaintiff's test group left the preparation room, she discovered a document on the preparation room table with the I Co. logo printed on its first page and that she had informed M of this soon thereafter, and from M, who confirmed in his testimony that K gave him that document when he was bringing the next group of candidates into the preparation room.

2. The trial court's finding that M's description of the procedures that he followed during the examination was corroborated by other witnesses was not clearly erroneous; the record indicated that K and the other participants from the plaintiff's test group testified regarding many of the same procedures that M had described and that were followed during the examination, and that their testimony corresponded to M's testimony, and the court's decision to credit the testimony of M and K regarding the discovery of test materials in the preparation room after the plaintiff's test group had left the room was a factual determination that it was empowered to make, which this court declined to disturb on appeal.

3. The plaintiff's claim that the trial court erred in concluding that the examination was administered in a reasonable manner even though the test administrators failed to take any steps to provide him with the allegedly missing test materials after they were informed of his complaint was unavailing; because that court reasonably found that the plaintiff was provided with all of the necessary test materials in the preparation room, M's decision not to bring the plaintiff the materials that he had left behind did not indicate that the examination was administered in an unreasonable or arbitrary manner, nor did it undermine the policy underlying the civil service legislation to eliminate partisanship and favoritism and to ensure the appointment to the position persons whose merit and fitness have been determined by proper examination, as the administrators thereby ensured that equal treatment was given to all candidates taking the examination by refusing to interrupt the plaintiff's strictly timed oral assessment or to provide him with additional time and materials that the other candidates were not granted.

4. The trial court did not err in concluding that the oral assessment portion of the examination was given in compliance with the requirements of the city charter despite the lack of a system to keep track of the test materials that were provided to the candidates, the oral assessment

having been administered in an organized manner and carefully formulated to fairly determine the capacity of each candidate.

5. The plaintiff could not prevail on his claim that the examination was unreasonable and arbitrary because it was not administered in a uniform manner, which was based on his claim that the instructions given to the candidates on a video in the assessment room were different from those set forth in the documents given to them in the preparation room; because the record was silent as to the trial court's findings with respect to the instructions given on the video in the assessment room, this court was left to speculate about whether these instructions were different from those that the candidates had previously received or that any such differences impacted the reasonableness of the examination, and, therefore, this court presumed that the trial court undertook the proper analysis of the law and the facts in arriving at its conclusion that the examination was administered in accordance with the requirements of the city charter.

Argued January 7—officially released April 2, 2019

Procedural History

Action for a declaratory judgment that, inter alia, the plaintiff be allowed to retake the oral assessment portion of a certain police detective promotional examination, and for other relief, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Hon. Michael Hartmere*, judge trial referee; judgment for the defendants, from which the plaintiff appealed to this court. *Affirmed.*

John T. Bochanis, for the appellant (plaintiff).

John P. Bohannon, Jr., deputy city attorney, for the appellees (defendants).

Opinion

SHELDON, J. The plaintiff, Edward McKiernan, appeals from the trial court's judgment, rendered after a trial to the court, denying his request for a declaratory judgment allowing him to retake the oral assessment portion of the city of Bridgeport's 2015 detective promotional examination and prohibiting the defendants[1] from

[1] The defendants in this action are the Civil Service Commission of the City of Bridgeport (commission); Leonor Guedes, the commission's president; and David Dunn, the commission's personnel director.

certifying the results of that examination or promoting candidates on the basis of those results. On appeal, the plaintiff claims that the trial court erred by rendering judgment in favor of the defendants on the basis of its finding that the challenged examination was administered in accordance with the requirements of the charter of the city of Bridgeport. We affirm the judgment of the trial court.

The following procedural history and facts, as found by the trial court, are relevant to our disposition of this appeal. The plaintiff has been employed as a Bridgeport police officer since May, 2000. The defendant Civil Service Commission of the City of Bridgeport (commission) is responsible for formulating and administering promotional examinations for certain employees of the city of Bridgeport. In March, 2015, the commission held a promotional examination for the position of detective, in which the plaintiff participated. The examination consisted of two parts: a written multiple choice portion and an oral assessment. The latter portion of the examination, which was administered on March 16, 2015, is the subject of this appeal.

Seventy-one candidates, including the plaintiff, participated in the oral assessment portion of the promotional examination for the position of detective on that date. The trial court found the following: "Upon arrival each candidate was given a four page document entitled 'Bridgeport Police Department–Detective Assessment Candidate Introduction/Orientation' which, in pertinent part, provided: Welcome to the Detective Assessment Process. This document will provide important information about your participation in this assessment process. Please read over this document carefully. . . . Following this orientation period, you will be taken to a preparation room. In this room, you will receive specific instructions for the various components in this assessment process, a pad of paper and a writing utensil.

. . . The assessment process consists of a series of components that will be performed in a single assessment room and video-recorded.

"[The] [f]ollowing is an overview of the components and their order: Presentation: Your primary task in the preparation room should be to review the warrant affidavit, and prepare your response to the presentation exercise. . . . Scenario-based interview: You will be presented with several distinct scenarios involving crimes and will be asked to respond to them as if you were the detective assigned to the case. The first scenario in this component will not be given to you in the preparation instructions, rather it will be read to you via the video once in the assessment room. The scenario will also be presented on a card on the desk and you will be instructed when to flip it over. Once it is read to you, you must immediately provide your response. The second and third [scenarios] in this component will be given to you in the preparation instructions. These scenarios will not be re-read to you in the assessment, the video will simply ask you to provide your response[s]. You may use your time in the preparation room to review the scenarios. . . .

"Procedural Interview: Immediately after responding to the scenario-based questions, you will respond to two (2) questions that deal with the process of interviewing and interrogating victims/suspects/witnesses. You may use your time in the preparation room to review Question 1. Question 2 will be read to you via the video once in the assessment. . . .

"Preparation: When it is your turn to start the assessment, you will be placed in a preparation room and will be provided with the presentation instructions along with the warrant affidavit; two (2) of the scenario-based interview scenarios; and one (1) of the procedural-based interview questions. You will have thirty minutes

(30:00) to read these instructions and prepare any notes. . . . Transition: After preparation, proctors will escort you promptly to the assessment room. . . .

"Assessment: You will be placed in an assessment room. There will be a proctor in this room who will start an audio/video recording that will guide you through the assessment process. The proctor will also start two video cameras that will record your performance. Once the audio/video starts, it will instruct you to respond to the following items in this order . . . . Delivery of responses to [s]cenario-based [i]nterview questions: Scenario 1: Scenario 1 WILL be read to you via the video. It will also be imprinted on a card that will be on the desk in the assessment room. You will have four minutes (4:00) to respond to this scenario. Scenario 2: Scenario 2 WILL NOT be read to you via the recording. The video will simply prompt you when to respond. You will have four minutes (4:00) to respond to this scenario. Scenario 3: Scenario 3 WILL NOT be read to you via the recording. The video will supply prompt you when to respond. You will have four minutes (4:00) to respond to this scenario.

"Delivery of responses to [p]rocedural-based [i]nterview questions: Question 1: Question 1 WILL NOT be read to you via the recording. The video will simply prompt you when to respond. You will have five minutes (5:00) to respond to this question. Question 2: Question 2 WILL be read to you via the video. It will also be printed on a card that will be on the desk in the assessment room. You will have two minutes (2:00) minutes to respond to this question. . . . Remember to read over the preparation document carefully and completely. Everything you need to know will be contained within. . . .

"When [the plaintiff] arrived at the assessment center, he was given a complete copy of these Candidate Introduction/Orientation instructions and was told to study

them carefully. [He] testified that he did so, and knew that it was imperative to be able to follow the instructions during the examination process.

"The city of Bridgeport had retained a Chicago based company, Industrial and Organizational Solutions (IO Solutions) to develop, administer and grade the 2015 Bridgeport police detective promotional examination. IO Solutions specializes in the development and administration of entry level and promotional examinations for public safety agencies. Brian Marentett, formerly IO Solutions' project manager, personally supervised the development, administration and scoring of the promotional examination. . . . Marentett holds a bachelor's degree in psychology, a master of arts degree in industrial and organizational psychology, and a Ph.D in industrial and organizational psychology. Industrial and organizational psychology is the application of psychological principles and theories in the workplace. It is the scientific method to study workplace human phenomena to assess job applicants or incumbent candidates for promotional purposes. . . .

"Marentett developed the detective's promotional exam by studying the job of police detective and identifying the critical knowledge, skills and abilities that should be assessed in the examination process. This process is known as a job analysis. He interviewed current detectives and supervisors of detectives, asked about the daily duties and the tasks performed, and what knowledge they believed was essential to the job. That information was used to compile a questionnaire which was then administered to incumbent detectives. Data and information was then collected and analyzed in order to identify what the essential knowledge, skills and abilities are for the position of detective.

"For the 2015 detective examination, all candidates were administered the exact same scenarios and questions during the oral assessment. The candidates' oral

responses to various scenario based questions were then scored in accordance with structured preestablished scoring criteria. The overall goal of the oral component was to assess the critical knowledge, skills and abilities for each candidate in the exact same way, using the exact same materials, time and assessment process. Marentett tried to ensure that each candidate was treated exactly the same way to be sure that the result of the assessment, which is the score, was going to be a valid score, and reflected the candidate's performance and nothing else.

"[T]he oral examination was administered during morning and afternoon sessions, in groups of seven candidates every thirty minutes. [The plaintiff] was one of seven candidates in the 10:30 a.m. group. Marentett introduced the orientation documents . . . to them and gave the candidates ten minutes to review the documents. Ten to eleven minutes later, Marentett returned and asked if there were any questions. . . . Marentett had personally prepared and checked all of the materials which he passed out. He asked each candidate whether they had all of the materials. He then read some instructions to them and told them to begin their preparation session, which was thirty minutes, and he told them it was timed. Thirty minutes later, Marentett went back to the preparation room, escorted them out of the room and had a proctor take them to their individual assessment room[s]. Marentett [then went] back to the sign in table to give the orientation introductions to the next group of candidates.

* * *

"As Marentett was bringing the next group of candidates to the preparation room, the plaintiff and others in his group were responding to questions in front of a video camera. When Marentett got to the preparation room, [a proctor] handed him a candidate preparation

document, and informed him that someone had left the document on the table in the preparation room. This was the only document left in the preparation room during the oral assessment process. Marentett continued his set routine for administering the oral assessment.

"Marentett did not know which candidate left the candidate preparation document in the preparation room, but was not concerned since based on his experience, some candidates prefer to take notes and deliver responses from their notes rather than take the document with them. He saw no reason to attempt to identify the person who had left the document in the preparation room or to disturb candidates who were in the process of giving video presentations. The schedule was very tight, timed down to the minute, and Marentett did not want to interfere with anyone's response time, and thereby place them at a disadvantage.

"Marentett's description of his administration of and procedures followed during the oral examination was corroborated by other witnesses, including candidates taking the examination in the plaintiff's group. No one in the plaintiff's group reported missing any documents during the preparation time.

"The video of [the] plaintiff's oral examination shows that he had no trouble following the instructions for answering the warrant affidavit presentation which appear at the top of page two of the candidate preparation document. However, during his examination the plaintiff claimed that he was never given the scenarios and procedural based questions described in the candidate preparation document. . . . [The plaintiff] complained to the proctor during the examination . . . . Marentett had made the determination that nothing could or should be done as a matter of fairness to everyone taking the examination.

"Thereafter, [the plaintiff] filed an appeal with the [commission]. There, as in the present case, [he] claimed that he received the search warrant affidavit but was never given nor received any additional test materials. The commission denied the plaintiff's appeal." (Emphasis omitted.)

The plaintiff commenced the underlying action on July 29, 2015. After a three day trial, the court found that the plaintiff failed to sustain his burden to prove that the defendants' actions were arbitrary, capricious or illegal. The court determined that "[t]he credible evidence demonstrated that the defendants administered a professionally developed job related promotional examination in a uniform manner to all candidates, in accordance with clearly delineated rules and procedures. The instructions and procedures were structured to be identical for all candidates, and Marentett was meticulous in ensuring that the oral examination was administered fairly and uniformly to all candidates. [Marentett] testified that although candidates were not specifically scored on how well they followed the instructions, the instructions contained in the documents were part of the assessment process. The credible evidence demonstrated that the plaintiff left the instructions he had been given behind when he went to the [assessment] room. If, as he claimed, he was given grossly incomplete instructions and materials in the preparation room, he failed to follow repeated instructions to so indicate, even when questioned by [Marentett]." Accordingly, the trial court rendered judgment in favor of the defendants. This appeal followed.

The plaintiff claims that the trial court erred by (1) finding that the administrators provided him with all of the necessary test materials for the oral assessment, (2) finding that Marentett's description of the procedures that he followed during the examination were corroborated by other witnesses, (3) concluding that

the test was properly administered even though neither the commission nor IO Solutions took any steps to provide him with the allegedly missing test materials when they were informed of his complaint, (4) concluding that the test was properly administered even though the commission had no procedure in place to account for the test materials in order to ensure that each candidate received them, and (5) concluding that the test was properly administered even though the assessment video gave different instructions from those given in the test materials that were distributed to the candidates in the preparation room. We disagree with the plaintiff's claims.

Before turning to the merits of this appeal, we first set forth the standard of review that governs this appeal. "[T]he scope of our appellate review depends upon the proper characterization of the rulings made by the trial court. To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous. When, however, the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Kelly* v. *New Haven*, 275 Conn. 580, 607, 881 A.2d 978 (2005).

Section 207 (6) of the charter of the city of Bridgeport (charter) provides that the personnel director of the commission shall "provide for, formulate and hold competitive tests to determine the relative qualifications of persons who seek employment or promotion to any class of position and as a result thereof establish employment and reemployment lists for the various classes of positions . . . ." Section 211 (a) of the charter provides in relevant part that "[t]he personnel director shall, from time to time, as conditions warrant, hold tests for the purpose of establishing employment lists

for the various positions in the competitive division of the classified service. Such tests shall be public, competitive and open to all persons who may be lawfully appointed to any position within the class for which such examinations are held with limitations specified in the rules of the commission . . . . The personnel director shall hold promotion tests whenever there shall be an opening in a superior class to be filled. . . . All tests shall be practical, and shall consist only of subjects which will fairly determine the capacity of the persons examined to perform the duties of the position to which appointment or promotion is to be made . . . ."

"As with any issue of statutory construction, the interpretation of a charter or municipal ordinance presents a question of law, over which our review is plenary. . . . In construing a city charter, the rules of statutory construction generally apply. . . . In arriving at the intention of the framers of the charter the whole and every part of the instrument must be taken and compared together. In other words, effect should be given, if possible, to every section, paragraph, sentence, clause and word in the instrument and related laws.

"In addition, the present case involves the city's civil service system, and we previously have emphasized the importance of maintaining the integrity of that system. Statutory provisions regulating appointments under civil service acts are mandatory and must be complied with strictly. . . . The [civil service] law provides for a complete system of procedure designed to secure appointment to public positions of those whose merit and fitness has been determined by examination, and to eliminate as far as practicable the element of partisanship and personal favoritism in making appointments. . . . A civil service statute is mandatory as to every requirement." *Broadnax* v. *New Haven*, 270 Conn. 133, 161, 851 A.2d 1113 (2004). At trial in the present

case, the parties agreed that in order for the plaintiff to prevail he must establish that the promotional examination was created and administered unreasonably, arbitrarily, illegally or in abuse of discretion. See *Murchison* v. *Civil Service Commission*, 234 Conn. 35, 51, 660 A.2d 850 (1995).

The plaintiff first claims that the court erred in finding that the test administrators provided him with all of the necessary test materials for the oral assessment, specifically, the preparation document that contained written instructions for two scenario based questions and one procedural question. As this issue presents a question of fact, our review is limited to deciding whether the challenged finding was clearly erroneous. "A court's determination is clearly erroneous only in cases in which the record contains no evidence to support it, or in cases in which there is evidence, but the reviewing court is left with the definite and firm conviction that a mistake has been made." (Internal quotation marks omitted.) *Considine* v. *Waterbury*, 279 Conn. 830, 858, 905 A.2d 70 (2006). The court found that the plaintiff received the allegedly missing test materials but that he left them on the preparation room table when he moved from the preparation room to the assessment room. This finding is supported in the record by the testimony of Marentett and Kathryn Klett, the proctor assigned to the preparation room for the day of the oral assessment. Klett testified that, immediately after the plaintiff's test group left the preparation room, she discovered a document lying on the preparation room table that had the IO Solutions logo printed on its first page and that she informed Marentett of this soon thereafter. Marentett confirmed that Klett gave him this document when he was bringing the next group of candidates into the preparation room. The court's finding that the document discovered by Klett was the allegedly missing test materials and that the plaintiff

had left those materials on the preparation room table is supported by the record and, therefore, was not clearly erroneous.

The plaintiff next claims that the court erred in finding that Marentett's description of his administration of the examination and the procedures that he followed during the examination were corroborated by other witnesses. As this is also a question of fact, our review is limited to deciding whether such finding was clearly erroneous. We conclude that it was not. The procedures that were followed during the examination were testified to at length by Marentett. Klett testified regarding many of those same procedures that she had personally observed, including that Marentett asked the participants if they had received all of the necessary test materials as described in the "introduction/orientation" document when they arrived in the preparation room. The other participants from the plaintiff's test group also testified about the procedures they followed during the oral assessment, which corresponded to Marentett's testimony. The plaintiff contends that the participants from his test group testified that no documents were left on the table at the end of the preparation session, contrary to the testimony of Marentett and Klett. This, however, does not establish that the court erred in finding that Marentett's testimony describing the procedures he followed during the examination was corroborated at trial. To the contrary, the court's decision to credit the testimony of Marentett and Klett regarding the discovery of certain test materials in the preparation room after the plaintiff's test group had left it was a factual determination it was empowered to make, which this court will not disturb on appeal.

The plaintiff next claims that the court erred in finding that the examination was administered in a reasonable manner because neither the commission nor IO Solutions took any steps to provide the plaintiff with

the allegedly missing test materials after they were informed of his complaint. We disagree. As an initial matter, this claim assumes a fact that is inconsistent with the trial court's findings. As a premise of this claim, the petitioner assumes as true his contention that he was never provided with all of the necessary test materials. As previously addressed, however, the court reasonably found that the plaintiff was provided with these materials but that he left them on the table in the preparation room. Therefore, the issue is more accurately stated as whether, having already provided the plaintiff with the necessary test materials, it was unreasonable for the test administrators to not bring those materials to him in the assessment room upon his request.

In *Mattera* v. *Civil Service Commission*, 273 Conn. 235, 237, 869 A.2d 637 (2005), our Supreme Court affirmed a civil service commission's discretionary decision to set a three year service requirement for a candidate to be eligible for promotion to a higher rank even though the city charter simply required candidates to hold the position from which they sought to be promoted for one year or more. Importantly, the court did not conclude that the commission in that case had unfettered discretion to set a minimum service requirement, rather, it concluded that the requirement it established did not result from an abuse of discretion because it was a "rational standard" and a "bona fide employment criterion . . . [that] provides both a stable work force and fiscal stability." (Internal quotation marks omitted.) Id., 238–39. "In other words, [our Supreme Court] concluded that the . . . commission had exercised its authority in that case in a manner that furthered, rather than undermined, the purposes underlying the civil service system. Specifically, in *Mattera*, [our Supreme Court] fully adopted the opinion of the trial court, which reasoned: [I]t cannot be overemphasized that proper competitive examinations are the

cornerstone upon which an effective civil service system is built. Any violation of the law enacted for preserving this system, therefore, is fatal because it weakens the system of competitive selection which is the basis of civil service legislation. . . . Strict compliance is necessarily required to uphold the sanctity of the merit system. . . . [It is] [s]trict, not technical, compliance [that] is required. . . . Only rational results are allowed. . . .

"The object of providing for civil service examinations is to secure more efficient employees, promote better government, eliminate as far as practicable the element of partisanship and personal favoritism, protect the employees and the public from the spoils system and secure the appointment to public positions of those whose merit and fitness have been determined by proper examination. . . .

"Our [Supreme Court's] holding in *Mattera* . . . underscores that the authority of appointed boards must be exercised in conformity with the policy underlying a city's civil service legislation. . . . [I]n *New Haven Firebird Society* v. *Board of Fire Commissioners*, 32 Conn. App. 585, 591–92, 630 A.2d 131, cert. denied, 228 Conn. 902, 634 A.2d 295 (1993), [this court] held that the city of New Haven did not have the authority to construe its civil service rules to allow it to designate candidates for promotion in advance of a vacancy, even though the defendant firefighters' union contended that the practice facilitated filling expected vacancies. Citing to the principles . . . later underscored in *Mattera* . . . [we] concluded that such a construction of the rules was not reasonable, noting that its conclusion is forged by the deeply rooted policies that support civil service examinations." (Internal quotation marks omitted.) *Kelly* v. *New Haven*, supra, 275 Conn. 617–19.

The administrators' decision not to provide the plaintiff with the allegedly missing test materials once he entered the assessment room was not counter to the policy underlying the city's civil service legislation. As the court noted in its memorandum of decision, the administrators took steps to ensure that the examination was administered uniformly to all candidates so that the scores accurately reflected the candidates' capacity to perform the duties of the detective position. Because the facts, as found by the court, are that the plaintiff received all of the necessary test materials in the preparation room in order to prepare for the oral examination, Marentett's decision not to bring the plaintiff the materials that he had left behind does not indicate that the test was administered in an unreasonable or arbitrary manner, nor does it undermine the policy underlying the civil service legislation to eliminate partisanship and favoritism and to ensure the appointment to the position those whose merit and fitness have been determined by proper examination. To the contrary, the administrators thereby ensured that equal treatment was given to all candidates taking the examination by refusing to interrupt the plaintiff's strictly timed oral assessment or to provide him with additional time and materials that the other candidates were not granted. We therefore reject this claim.

The plaintiff next claims that the administrators should have employed a labeling system to keep track of the documents that were given to the participants to ensure that each participant received all of the necessary test materials and that their failure to do so resulted in an unreasonable examination. We disagree. As indicated in the court's memorandum of decision, the test was thoughtfully formulated and administered fairly and uniformly to all candidates. The benefit of hindsight may reveal ways in which the administration of the test could have been improved upon but, even so, that does

not render the test as given unreasonable, arbitrary, illegal, or an abuse of discretion. The oral assessment was administered in an organized manner and carefully formulated to fairly determine the capacity of the candidates. The trial court did not err by concluding that the oral assessment portion of the detective promotional examination was given in compliance with the requirements of the charter despite the lack of a document tracking system. We, therefore, reject this claim.

Finally, the plaintiff claims that the instructions given to the candidates on the video in the assessment room were different from those set forth in the documents given to the candidates in the preparation room and, thus, that the examination was not administered in a uniform manner, resulting in an unreasonable and arbitrary examination. "In Connecticut, our appellate courts do not presume error on the part of the trial court. . . . Rather, the burden rests with the appellant to demonstrate reversible error." (Citation omitted; internal quotation marks omitted.) *Jalbert* v. *Mulligan*, 153 Conn. App. 124, 145, 101 A.3d 279, cert. denied, 315 Conn. 901, 104 A.3d 107 (2014). Because the record is silent as to the court's findings with respect to the instructions given on the video in the assessment room, or whether it even considered the plaintiff's argument in this regard at trial, we are left to speculate about whether these instructions were different from those that the candidates had previously received or that any such differences impacted the reasonableness of the examination. We, therefore, presume that the trial court undertook the proper analysis of the law and the facts in arriving at its conclusion that the examination was administered in accordance with the requirements of the charter.

The judgment is affirmed.

In this opinion the other judges concurred.

SAINT FRANCIS HOSPITAL AND MEDICAL CENTER *v.* EDWARD MALLEY ET AL.
(AC 40619)

Alvord, Sheldon and Eveleigh, Js.

Syllabus

The plaintiff brought this action against the defendants, T and E, to collect a debt for unpaid medical expenses incurred by E. L, an attorney, filed an appearance and answer on behalf of both defendants, although he had filed motions to withdraw his appearance on behalf of T that were denied by the court. After L informed the court that he was prepared to stipulate to a judgment on behalf of E, the court asked how it should proceed with regard to T, to which the plaintiff's counsel responded that it should render a default judgment. L said nothing in response to that request from the plaintiff's counsel, and the court thereupon rendered a default judgment against T in the same amount as the stipulated judgment against E. On T's appeal to this court, *held* that the default judgment rendered against T was improper and constituted plain error: the trial court erred when it entered a default against T because it clearly lacked a basis to do so, as the court acknowledged that although T was not present in court on the scheduled trial date, she did not have to be present because her counsel, L, was present and had appeared on her behalf, and despite L's prior attempts to withdraw his appearance on behalf of T, the court did not grant any of his motions to withdraw and, at the time of the court's entry of a default against T, T was still represented by L; moreover, the consequences of the court's error were so grievous as to be fundamentally unfair or manifestly unjust, as T was unable to challenge her liability for E's medical expenses, the erroneous entry of a default against T was the sole basis for the court's rendering of a substantial judgment against her, the entry of a default against T implicated her due process rights in that she was deprived of her opportunity to be heard on the merits of the case, and the unwarranted rendering of a default judgment against T was likely to undermine public confidence in the judiciary because the court's actions deviated from established rules and procedures and denied T's due process rights.

Argued January 8—officially released April 2, 2019

Procedural History

Action to collect a debt, brought to the Superior Court in the judicial district of New Britain, where the court, *Young, J.*, rendered judgment for the plaintiff in accordance with a stipulation of the parties as against the

named defendant; thereafter, the court rendered a default judgment against the defendant Tracy Malley, from which the defendant Tracy Malley appealed to this court. *Reversed; further proceedings.*

Michael S. Taylor, with whom was *Brendon P. Levesque*, for the appellant (defendant Tracy Malley).

Opinion

EVELEIGH, J. The defendant Tracy Malley[1] appeals from the default judgment rendered against her in favor of the plaintiff, Saint Francis Hospital and Medical Center, in this action to collect a debt for unpaid medical expenses incurred by Edward Malley. On appeal, the defendant claims that there was no basis for the entry of a default against her, and, therefore, the rendering of the default judgment was improper.[2] The plaintiff, who prevailed before the trial court, did not file a brief, therefore, this appeal was considered on the basis of the defendant's brief, argument, appendix and record only. We agree with the defendant and reverse the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of the defendant's claim on appeal. In June, 2016, the plaintiff commenced the present action by serving a complaint, in which it claimed $37,913.27 for unpaid medical services it had provided to Edward Malley on five occasions between February 12, 2015, and July 15, 2015. Further, the plaintiff alleged

[1] The trial court also rendered a judgment by stipulation against Edward Malley. Edward Malley is not a party in the present appeal. All references to the defendant, therefore, are to Tracy Malley.

[2] The defendant also argues that even if the entry of default was proper, the trial court's rendering of a default judgment immediately after the entry of default was improper. Because we conclude that it was plain error for the court to enter a default against the defendant, we need not address this claim.

that, under General Statutes § 46b-37,[3] the defendant was liable for the unpaid medical services rendered to Edward Malley.

In July, 2016, Attorney Jon C. Leary filed an appearance on behalf of the defendant and Edward Malley. Leary also filed an answer on behalf of both individuals on August 26, 2016. On three occasions, however, Leary filed motions with the court for permission to withdraw his appearance on behalf of the defendant. The clerk of court rejected Leary's first two motions to withdraw, and the third motion was marked off by the court and not again considered until the scheduled trial date.

On June 14, 2017, Leary informed the court that he was prepared to stipulate to a judgment on behalf of Edward Malley, and he further indicated that he had unsuccessfully attempted to withdraw his appearance on behalf of the defendant and that he had been unable to communicate with her. The court responded: "I can't just grant you your motion to withdraw as counsel today . . . because we don't have notice of that being heard today with [the defendant]." The court went on to state: "Nevertheless, although [the defendant] has no obligation to be here, she's not here to defend herself."

Leary read into the record a stipulation for judgment against Edward Malley in the amount of $38,355.15 plus costs in the amount of $441.89. The court then asked how it should proceed with regard to the defendant, to which the plaintiff's counsel responded that it should render a default judgment. Leary said nothing in response to this request from the plaintiff's counsel. The court thereupon entered a default against the defendant and, immediately thereafter, rendered a default

[3] General Statutes § 46b-37 (b) provides in relevant part: "[I]t shall be the joint duty of each spouse to support his or her family, and both shall be liable for . . . [t]he reasonable and necessary services of a physician or dentist . . . ."

judgment against the defendant in the same amount as the stipulated judgment against Edward Malley. This appeal followed.

"We first briefly discuss our standard of review of the defendant's claim. To the extent that the defendant challenges the court's authority to enter a default, our review is plenary. . . . We also engage in plenary review with regard to the construction of any relevant statutory provisions or rules of practice. . . . Finally, provided we determine that the court had that authority to act, we review its exercise of that authority under an abuse of discretion standard." (Citations omitted; internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Bertrand*, 140 Conn. App. 646, 655–56, 59 A.3d 864, cert. dismissed, 309 Conn. 905, 68 A.3d 661 (2013). When, however, the court lacks authority to default a party, its entry of a default is erroneous as a matter of law and, thus, constitutes an abuse of discretion. *People's United Bank* v. *Bok*, 143 Conn. App. 263, 272–73, 70 A.3d 1074 (2013).

Because the defendant's claims were not raised below, we must at the outset also address the issue of reviewability. The defendant argues that "this court should reverse because the trial court's entry of default against [her] constitutes plain error." We agree with the defendant.

"Codified in Practice Book § 60-5, [t]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. . . . It is a doctrine that should be invoked sparingly and only on occasions requiring the reversal of the judgment under review. . . . Success on such a claim is rare. Plain error review is reserved for truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . .

"We engage in a two step analysis in reviewing claims of plain error. First, we must determine whether the trial court in fact committed an error and, if it did, whether that error was indeed plain in the sense that it is patent [or] readily discernable on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . [T]his inquiry entails a relatively high standard, under which it is not enough for the defendant simply to demonstrate that his position is correct. Rather, the party seeking plain error review must demonstrate that the claimed impropriety was so clear, obvious and indisputable as to warrant the extraordinary remedy of reversal. . . . Because [a] party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice . . . under the second prong of the analysis we must determine whether the consequences of the error are so grievous as to be fundamentally unfair or manifestly unjust." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *Clougherty* v. *Clougherty*, 131 Conn. App. 270, 273–74, 26 A.3d 704, cert. denied, 302 Conn. 948, 31 A.3d 383 (2011).

Addressing the first prong of plain error analysis, we conclude that the court erred when it entered a default against the defendant because it clearly lacked a basis to do so. "The failure to follow a procedural rule prescribing court procedures can also constitute plain error." (Internal quotation marks omitted.) *State* v. *Corona*, 69 Conn. App. 267, 274, 794 A.2d 565, cert. denied, 260 Conn. 935, 802 A.2d 88 (2002). One of the rules that governs the court's entry of a default against a party is Practice Book § 17-19, which provides in relevant part: "If a party . . . fails without proper excuse to appear in person *or* by counsel for trial, the party may be nonsuited or defaulted by the judicial authority." (Emphasis added.) "[O]ur rules of practice

do not require parties to be present for trial in civil cases, but permit them, rather, to appear through counsel . . . .'' *Housing Authority* v. *Weitz*, 163 Conn. App. 778, 782–83, 134 A.3d 749 (2016) (reversing court's entry of default against defendant on basis of defendant's failure to appear for trial when her counsel was present). In fact, in this case the court acknowledged that the defendant did not have to be present for the scheduled trial because her counsel was present, stating that ''she has no obligation to be here . . . .''

Despite Leary's attempts to withdraw his appearance for the defendant prior to the scheduled trial date, the court did not grant any of his motions to withdraw. At the time of the court's entry of a default against the defendant, therefore, Leary still represented her in this action. See Practice Book § 3-10 (e) (''[t]he attorney's appearance for the party shall be deemed to have been withdrawn upon the granting of the motion''). Leary admitted as much at the beginning of the hearing held on June 14, 2017, the scheduled trial date, when he introduced himself and stated that he was present ''on behalf of *both* defendants.'' (Emphasis added.) Because the defendant's counsel was present at that time, it was not proper for the court to enter a default against her on the basis of her failure to appear.[4]

Turning to the second prong of plain error analysis, we conclude that the consequences of the error are so grievous as to be fundamentally unfair or manifestly unjust. The consequences of the error were grievous for the defendant, in that she was unable to challenge

[4] It is worth noting that a party may also be defaulted for failure to plead according the rules and orders of the court; see General Statutes § 52-121, Practice Book §§ 10-18, 17-31, and 17-32; failure to comply with discovery requests; see Practice Book § 13-14; and failure to comply with a court order; see Practice Book § 17-19. There is nothing in the record to suggest the defendant acted in a manner that justified the entry of a default against her on any of these bases.

her liability for Edward Malley's medical expenses. The court's erroneous entry of a default against the defendant was the sole basis for the court's rendering of a substantial judgment against her. Moreover, the entry of a default against the defendant implicated her due process rights, as she was thereby deprived of her opportunity to be heard on the merits of the case. See, e.g., *Perugini* v. *Giuliano*, 148 Conn. App. 861, 883–84, 89 A.3d 358 (2014) ("A fundamental premise of due process is that a court cannot adjudicate any matter unless the parties have been given a reasonable opportunity to be heard on the issues involved . . . . It is a fundamental tenet of due process of law . . . that persons whose . . . rights will be affected by a court's decision are entitled to be heard at a meaningful time and in a meaningful manner." [Internal quotation marks omitted.]).

As part of plain error analysis, courts assess whether the error is likely to undermine public confidence in the judiciary. See, e.g., *Schimenti* v. *Schimenti*, 181 Conn. App. 385, 392, 168 A.3d 739 (2018). In the present case, the unwarranted entry of a default and the rendering of a default judgment against the defendant are likely to undermine public confidence in the judiciary because those actions deviated from established rules and procedures and denied the defendant's due process rights.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

GARDEN HOMES PROFIT SHARING TRUST, L.P. *v.* ROBERT CYR
(AC 41034)

Keller, Bright and Moll, Js.

Syllabus

The plaintiff owner of a mobile home community sought, by way of summary process, to regain possession of certain premises occupied by the defendant. The plaintiff's complaint alleged that the defendant resides in a mobile home owned by S, who leases a lot from the plaintiff that is located in the mobile home community, that following the defendant's failure to comply with the guidelines of the community, the plaintiff served him with notice to quit possession of the premises and that the defendant failed to do so. Following a hearing, the trial court rendered judgment in favor of the defendant on the basis of its conclusion that the plaintiff lacked statutory authority to proceed with the summary process action against the defendant in the absence of S, because, as the owner of the mobile home, she was a necessary party to the action. On the plaintiff's appeal to this court, *held*:

1. The trial court properly raised, sua sponte, the issue of nonjoinder in the absence of a motion to strike filed by the defendant; pursuant to the applicable statute (§ 52-108), the trial court has broad authority to address issues of nonjoinder that may arise in a case, including the authority to raise the issue sua sponte.

2. The trial court improperly rendered judgment in favor of the defendant on the basis of nonjoinder without giving the plaintiff an opportunity to add S as a party; that court's rendering of judgment immediately after concluding that S was a necessary party to the action effectively struck the plaintiff's complaint without affording the plaintiff notice and at least fifteen days to add S to the action pursuant to the applicable rule of practice (§ 10-44), and, as a result, the court ultimately defeated the plaintiff's summary process action on the basis of nonjoinder of a party despite being proscribed from summarily doing so by the relevant statute (§ 52-108) and rule of practice (§ 9-19).

Submitted on briefs January 4—officially released April 2, 2019

Procedural History

Summary process action brought to the Superior Court in the judicial district of Danbury, Housing Session, where the court, *Winslow, J.*, rendered judgment

for the defendant; thereafter, the court denied the plaintiff's motion to reargue, and the plaintiff appealed to this court. *Reversed; further proceedings.*

Thomas T. Lonardo and *Colin P. Mahon* filed a brief for the appellant (plaintiff).

Opinion

KELLER, J. The plaintiff, Garden Homes Profit Sharing Trust, L.P., appeals from the trial court's judgment in favor of the defendant, Robert Cyr.[1] The plaintiff claims that the court erred by (1) concluding that the plaintiff lacked statutory authority to proceed with the summary process action against the defendant in the absence of Susan Scribner, the owner of the mobile home where the defendant resides, (2) rendering judgment in favor of the defendant after concluding that the owner of the mobile home where the defendant resides was a necessary party to the action, and (3) denying the plaintiff's Practice Book § 11-11 motion to reargue the court's initial decision to dismiss the plaintiff's action. For the reasons set forth in this opinion, we reverse the judgment of the trial court and remand the case for further proceedings consistent with this opinion.

We briefly set forth the procedural course of the case. The plaintiff commenced this summary process action against the defendant by writ of summons and complaint dated August 3, 2017. The complaint alleged that "[o]n or about August 18, 2014, the defendant . . . took occupancy of a certain mobile home located at 68 Apple Blossom Lane, Danbury, Connecticut, in the plaintiff's

[1] We note that the defendant did not participate in this appeal. This court entered an order on July 23, 2018, providing that this appeal would be considered solely on the basis of the plaintiff's brief and the record, as defined by Practice Book § 60-4, in light of the defendant's failure to comply with this court's July 6, 2018 order requiring him to file a brief on or before July 20, 2018.

mobile home community." The complaint also alleged that the defendant "took occupancy of the premises pursuant to approval from the plaintiff community owner," and that the defendant "failed to comply with the community guidelines . . . ." In particular, the complaint alleged that the defendant violated the following guideline: "Activity that threatens the health, safety or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises; and/or any activity that threatens the health or safety of any onsite property management staff responsible for managing the premises."[2] The complaint further alleged that despite the plaintiff causing "notice to be duly served on the defendant to quit occupancy of the premises on or before July 21, 2017," the defendant "still continues to occupy [the premises]." Accordingly, the plaintiff sought "[j]udgment for possession of the premises."

The defendant filed his answer to the plaintiff's complaint on August 11, 2017, in which he indicated that he either disagreed with or had no knowledge of the allegations set forth in the complaint. He did not set forth any special defenses.

After one continuance was granted, the case was scheduled for trial on October 16, 2017. That morning, the defendant filed another motion for a continuance, which was denied by the court. When the case was called, the defendant reiterated his request to continue the case. He informed the court that he was in severe pain and in need of medical treatment. The plaintiff's counsel indicated to the court that he was prepared for trial. While reconsidering the defendant's request for a continuance, the court sought to clarify the plaintiff's claim against the defendant. The plaintiff's counsel indicated to the court that the defendant is a guest of

[2] The plaintiff, however, did not allege how the defendant became subject to the mobile home community guidelines.

Scribner, the owner of a mobile home who leases a lot in the mobile home community owned by plaintiff. The plaintiff's counsel further stated that the defendant is neither a resident nor a tenant but was approved by the plaintiff to "stay with [Scribner] as a guest only." The court expressed concern that the plaintiff might have "standing issues" because the plaintiff was seeking to evict a co-occupant who neither rented directly from the plaintiff nor owned a mobile home situated in the plaintiff's mobile home park. The plaintiff's counsel indicated to the court that he had filed a brief that day addressing the court's concerns. The court then continued the matter for one week and indicated that it would consider the issue of "standing" at the next hearing.

On October 23, 2017, the parties again appeared before the court. At the outset, the plaintiff's counsel indicated to the court that he was prepared to call two witnesses to testify in the matter. The defendant, however, made an oral motion to dismiss but stated no particular ground for his motion. The court then questioned how the plaintiff could seek to evict the defendant without also naming Scribner, the mobile home owner, with whom the defendant resided. The plaintiff's counsel argued that the plaintiff was not trying to take possession of the mobile home but, rather, the land underneath the mobile home. The plaintiff's counsel indicated to the court that the plaintiff was seeking "possession of it as it pertains to [the defendant]." The court stated: "You need to bring an action against [the mobile home owner] in order to get the mobile home off the land. . . . [Y]ou've got the land. But what you want to get rid of is the mobile home that houses [the defendant]." The plaintiff's counsel responded: "No, Your Honor, we want to get rid of [the defendant]." The court indicated that the plaintiff is unable to evict the defendant without bringing an action

against Scribner. It then stated that the "[m]atter is dismissed as to [the defendant]."

After the hearing was over, the court went back on the record without notice to and in the absence of the parties. The court indicated: "I believe I misspoke a few minutes ago when I stated that I was dismissing the case. I do not think this is a matter of jurisdiction. And I want to clarify that I am granting judgment to the defendant . . . on the basis of lack of statutory authority to proceed on the summary process action.

"The plaintiff has brought the action against a man who is neither a tenant of [the plaintiff] nor [does it] own the mobile home in which [the defendant] resides. So, [it is] not the owner either.

"[The plaintiff] represent[s] that [it is] the [owner] of the land on which the mobile home sits. But in order to evict . . . an occupant of a mobile home that's not owned by [the plaintiff, it has] to evict the owner of the mobile home as well as the tenant[3] or at least bring the action against the mobile home owner plus her co-occupant in this case.

"So, [the plaintiff] . . . was not seeking possession of the mobile home. [It] represent[s] that [it was] seeking possession of the land. [It] already [has] possession of the land. And in order to evict one occupant of a mobile home that [it does not] own, [it has] to bring the action against all occupants of the mobile home, and most particularly the owner, who in this case resides with [the defendant].

"So . . . judgment for the defendant is based on lack of statutory authority. I did not wish to and did not claim that the court had no jurisdiction. It's not dismissed.

[3] We believe that the court meant "occupant." The court previously referred to the defendant as an occupant, and the record demonstrates that the plaintiff indicated that the defendant was not a tenant.

Judgment for the defendant for lack of statutory authority." (Footnote added.)

On October 29, 2017, the plaintiff filed a motion for reargument on the basis of the court's October 23, 2017 decision, in which the plaintiff indicated that "the court *sua sponte* dismissed the plaintiff's summary process for lack of jurisdiction." (Emphasis in original.) In particular, the plaintiff argued that the court's decision was in direct conflict with applicable law because (1) "[Scribner] is not an indispensable party, and (2) even if she was indispensable, failure to join her in the action does not constitute a jurisdictional defect that warrants dismissal." The defendant filed an objection to the motion on October 31, 2017.

On October 31, 2017, after the plaintiff already had filed his motion for reargument on the basis of the court's purported dismissal of the case, the court issued written notice to the parties of the corrected decision it had orally rendered in the absence of the parties on October 23, 2017. The written order stated: "The court is granting judgment in favor of the defendant on the basis of lack of statutory authority to proceed on the summary process action. The plaintiff brought this action against a defendant who is not [its] tenant, nor [is] the [plaintiff] the [owner] of the mobile home in which the defendant resides. The plaintiff represents that [it is] the [owner] of the land on which the mobile home sits. In order to evict the tenant of the mobile home, [it had] to bring the action against the mobile home owner in addition to the co-occupant. The plaintiff is seeking possession of the land, not the mobile home, and the plaintiff already has possession of the land." The court denied the plaintiff's motion for reargument on November 2, 2017. This appeal followed.

On appeal, the plaintiff claims, among other things, that the court erred by concluding that the plaintiff

lacked statutory authority to bring the summary process action against the defendant. In the plaintiff's view, the Landlord Tenant Act, General Statutes § 47a-1 et seq., enables it to evict a guest who is residing in a mobile home owned by another person on land owned by the plaintiff. It also claims that the court erroneously determined that Scribner, the mobile home owner, is a necessary party to this action and, even if the court was correct in concluding as such, it was still error for the court to render judgment in favor of the defendant for nonjoinder of Scribner without first allowing the plaintiff the opportunity to add Scribner to the action. We agree with the plaintiff that it should have been afforded the opportunity to add Scribner as a party. Accordingly, we reverse the judgment of the trial court and remand the case for further proceedings consistent with this opinion.

At the outset, we note that the court's October 23, 2017 order, which was provided in writing to the parties on October 31, 2017, is not a model of clarity. The court indicated that it was "granting judgment in favor of the defendant on the basis of lack of statutory authority to proceed on the summary process action." It did not, however, cite to any law, but indicated that "[t]he plaintiff brought this action against a defendant who is not [its] tenant, nor [is the plaintiff the owner] of the mobile home in which the defendant resides." It also indicated that "[i]n order to evict the tenant of the mobile home, [the plaintiff would] have to bring the action against the mobile home owner in addition to the co-occupant."

In its appellate brief, the plaintiff acknowledges some ambiguity with regard to the court's order. The plaintiff indicates that "[t]he court's ruling could reasonably be construed to mean that the plaintiff could not evict the defendant because a necessary party—Ms. Scribner—was excluded from the action. If this was the trial court's rationale, then the decision should be overturned

because Ms. Scribner is not a necessary party." It also argues that to whatever extent the mobile home owner could be considered a necessary party, the "court's entry of judgment . . . was improper . . . ." It argues that the court improperly raised sua sponte the issue of nonjoinder and, even if it could raise the issue sua sponte, rendering judgment in favor of the defendant was improper on this ground because the plaintiff should have been afforded an opportunity to cite in Scribner as a defendant.

Although the court used language that there was a "lack of statutory authority to proceed" in this case, its rationale was based exclusively on the plaintiff's failure to bring the action against both Scribner, the mobile home owner, and her guest and co-occupant, the defendant. We interpret the court's ruling as raising the issue of nonjoinder. In effect, the court struck the plaintiff's complaint as legally insufficient on the basis that Scribner was a necessary party to the action.[4] Thus, we construe the court's order as rendering judgment in

[4] "Necessary parties . . . are those [p]ersons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. . . . [B]ut if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties." (Internal quotation marks omitted.) *Bloom* v. *Miklovich*, 111 Conn. App. 323, 334, 958 A.2d 1283 (2008).

The plaintiff alleged in its complaint that the defendant took occupancy "of a certain mobile home located" in its mobile home park after giving him approval to do so. We surmise that the plaintiff, at Scribner's request, gave Scribner permission to allow the defendant to reside with her in her mobile home, perhaps subject to any conditions of the lease between the plaintiff and Scribner. We decline, however, to address the issue of whether Scribner was in fact a necessary party to the action because, as we explain subsequently in this opinion, the court committed reversible error by failing to give the plaintiff an opportunity to amend its pleading to either cite in Scribner or to replead its complaint such that the court may no longer deem it necessary to join Scribner as a party.

favor of the defendant on the basis of the nonjoinder of Scribner. See *Avery* v. *Medina*, 174 Conn. App. 507, 517, 163 A.3d 1271 ("As a general rule, [orders and] judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the [order or] judgment. . . . The interpretation of [an order or] judgment may involve the circumstances surrounding [its] making. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The [order or] judgment should admit of a consistent construction as whole." [Internal quotation marks omitted.]), cert. denied, 327 Conn. 927, 171 A.3d 61 (2017).

Although the plaintiff argues that it was improper for the court to have raised the issue of nonjoinder on its own without a motion to strike filed by the defendant, General Statutes § 52-108 gives the court broad authority to address issues of nonjoinder and misjoinder that may arise in a case, including, as the court did in the present case, the authority to raise the issue sua sponte. To be sure, § 52-108 provides: "An action shall not be defeated by the nonjoinder or misjoinder of parties. New parties may be added and summoned in, and parties misjoined may be dropped, by order of the court, at any stage of the action, as the court deems the interests of justice require." Concluding that the court properly raised the issue of nonjoinder, we turn now to consider whether the court properly rendered judgment in favor of the defendant on the basis of nonjoinder without giving the plaintiff an opportunity to add Scribner as a party. The plaintiff argues that § 52-108 and Practice Book §§ 9-19 and 10-44 make clear that an action shall not be defeated by the nonjoinder of a party and that "the proper remedy would have been to cite . . . Scribner into the case or to require the plaintiff to replead and bring . . . Scribner into the action."

We begin with the standard of review. "The interpretive construction of the rules of practice is to be governed by the same principles as those regulating statutory interpretation. . . . The interpretation and application of a statute, and thus a Practice Book provision, involves a question of law over which our review is plenary." (Internal quotation marks omitted.) *Meadowbrook Center, Inc.* v. *Buchman*, 328 Conn. 586, 594, 181 A.3d 550 (2018); see also *Wiseman* v. *Armstrong*, 295 Conn. 94, 99, 989 A.2d 1027 (2010).

Practice Book § 9-19, which largely mirrors General Statutes § 52-108, makes clear that "[e]xcept as provided in Sections 10-44 and 11-3 *no action shall be defeated by the nonjoinder* or misjoinder of parties. New parties may be added and summoned in, and parties misjoined may be dropped, by order of the judicial authority, at any stage of the cause, as it deems the interests of justice requires." (Emphasis added.) The rules of practice also make clear that "the exclusive remedy for nonjoinder of parties is by motion to strike." Practice Book § 11-3.

With those provisions in mind, Practice Book § 10-44 further instructs that "[w]ithin fifteen days after the granting of any motion to strike, the party whose pleading has been stricken may file a new pleading; provided that in those instances where an entire complaint . . . has been stricken, and the party whose pleading . . . has been so stricken fails to file a new pleading within that fifteen day period, the judicial authority may, upon motion, enter judgment against said party on said stricken complaint . . . ." See *Lund* v. *Milford Hospital, Inc.*, 326 Conn. 846, 850, 168 A.3d 479 (2017) ("[a]fter a court has granted a motion to strike, [a party] may either amend his pleading [pursuant to Practice Book § 10-44] or, on the rendering of judgment, file an appeal" [internal quotation marks omitted]).

Thus, in the present case, after the court concluded that Scribner was a necessary party to the action,

thereby determining that the plaintiff's complaint was legally deficient due to the nonjoinder of a party, its immediate rendering of judgment in favor of the defendant effectively struck the plaintiff's complaint without affording the plaintiff notice and at least fifteen days to add Scribner to the action. See Practice Book § 10-44. By doing so, the court ultimately defeated the plaintiff's summary process action on the basis of nonjoinder of a party despite being proscribed from summarily doing so.[5] See General Statutes § 52-108; Practice Book § 9-19. Accordingly, we conclude that the trial court improperly rendered judgment in favor of the defendant.[6]

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

DEBRA COHEN *v.* PATRICIA A. KING
(AC 40834)

Lavine, Keller and Beach, Js.

Syllabus

The plaintiff attorney sought to recover damages from the defendant attorney for defamation and fraud in connection with a grievance complaint the plaintiff had failed against the defendant with the Statewide Grievance Committee. Specifically, she claimed that the defendant published false

[5] Even if we were to assume that the court properly believed that it lacked statutory authority to proceed in this action because the plaintiff failed to plead an essential fact for obtaining relief under the applicable statute, our case law instructs that, if possible, the plaintiff should be given the opportunity to "amend the complaint to correct the defect . . . ." (Internal quotation marks omitted.) *In re Jose B.*, 303 Conn. 569, 579, 34 A.3d 975 (2012) (explaining difference between lack of jurisdiction and lack of statutory authority). On the basis of the record before us, the plaintiff was not given the opportunity to add a party or to amend its complaint prior to the court rendering judgment in favor of the defendant, even though it is clear that the plaintiff could easily have done so.

[6] In view of our determination that the court committed reversible error by not providing the plaintiff with an opportunity to add Scribner to the case, we need not address the plaintiff's other claims because we cannot say that they are likely to occur on remand.

and defamatory statements and remarks about the plaintiff in the defendant's answer to the plaintiff's grievance complaint. The trial court granted the defendant's motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Held* that the trial court properly concluded that the litigation privilege barred the plaintiff's action sounding in defamation and fraud; that court properly concluded that the litigation privilege extends absolute immunity to statements made to the attorney disciplinary authority by an attorney who is the subject of a grievance complaint, as an attorney who is the subject of a grievance proceeding is a party to a quasi-judicial proceeding, and, therefore, relevant statements made by the attorney are shielded by the litigation privilege, and the plaintiff could not prevail in her claim that the litigation privilege did not properly apply because her complaint pleads facts suggesting that the defendant both abused the judicial process and breached the professional duty of candor, as our Supreme Court has refused to apply absolute immunity to causes of action alleging the improper use of the judicial system, which is disctict from attempting to impose liability on a participant in a judicial proceeding for the words used therein, and this court has determined prevously that statements made in a grievance proceeding are shielded by absolute immunity, and that the act of filing a grievance is protected as well.

Argued November 27, 2018—officially released April 2, 2019

Procedural History

Action to recover damages for defamation and fraud, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Wahla*, *J.*, granted the defendant's motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Debra Cohen, self-represented, the appellant (plaintiff).

Philip Miller, assistant attorney general, with whom, on the brief, was *George Jepsen*, former attorney general, for the appellee (defendant).

Opinion

PER CURIAM. The self-represented plaintiff, Debra Cohen, appeals from the judgment of the trial court granting a motion to dismiss filed by the defendant,

Patricia A. King. On appeal, the plaintiff claims that the trial court erred in concluding that the doctrine of litigation privilege barred her action sounding in defamation and fraud. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our decision. The defendant was the chief disciplinary counsel for the Office of Chief Disciplinary Counsel. The plaintiff was terminated from her position as a staff attorney for the Office of the Probate Court Administrator following a disciplinary proceeding conducted pursuant to the Connecticut Judicial Branch Administrative Policies and Procedures Manual Policy 612, titled "Corrective Discipline." While the proceeding was pending, the Probate Court Administrator notified the defendant of the matter.

The defendant then assigned an assistant chief disciplinary counsel to investigate the matter. Thereafter, the defendant initiated grievance proceedings against the plaintiff. A reviewing committee issued a reprimand to the plaintiff. The Statewide Grievance Committee (committee) and the Superior Court affirmed the reprimand.[1]

During the pendency of the grievance proceeding, the plaintiff filed her own grievance complaint against the defendant. The plaintiff alleged that the defendant's decision to file a grievance "violated several sections of the Practice Book, the duties and responsibilities of her office, and the public's trust . . . ." In response, the defendant contended that the plaintiff's grievance complaint was without merit. The grievance panel found no probable cause and dismissed the complaint against the defendant.

[1] The plaintiff has appealed from the judgment of the Superior Court affirming the reprimand in a separate appeal, which is pending before this court.

The plaintiff then instituted the present civil action against the defendant. The plaintiff claimed that the defendant "published false and defamatory statements and remarks about the plaintiff in her (defendant's) answer to [the plaintiff's] Grievance Complaint [against the defendant] . . . ."[2] The defendant moved to dismiss the action on the ground of litigation privilege. The court concluded that the litigation privilege barred the action and granted the motion to dismiss. This appeal followed.

The issue presented is whether the court erred in concluding that the litigation privilege extends absolute immunity to statements made to the attorney disciplinary authority by an attorney who is the subject of a grievance complaint. In deciding a motion to dismiss, a "court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader . . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone." (Internal quotation marks omitted.) *Gold* v. *Rowland*, 296 Conn. 186, 200–201, 994 A.2d 106 (2010). "Additionally, whether attorneys are protected by absolute immunity for their conduct during judicial proceedings is a question of law over which our review is plenary." *Simms* v. *Seaman*, 308 Conn. 523, 530, 69 A.3d 880 (2013).

Connecticut has long recognized the litigation privilege. See id., 535–39. "[T]he purpose of affording absolute immunity to those who provide information in connection with judicial and quasi-judicial proceedings

[2] Specifically, the plaintiff alleged that the defendant falsely and maliciously stated: "(a) That the plaintiff had engaged in serious misconduct concerning two estate matters, paying herself improper fiduciary fees; and (b) That the plaintiff was engaged in an unauthorized side business while serving as a court official and attorney."

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. . . . Put simply, [litigation privilege] furthers the public policy of encouraging participation and candor in judicial and quasi-judicial proceedings. This objective would be thwarted if those persons whom the common-law doctrine [of litigation privilege] was intended to protect nevertheless faced the threat of suit. In this regard, the purpose of the absolute immunity afforded participants in judicial and quasi-judicial proceedings is the same as the purpose of the sovereign immunity enjoyed by the state. . . . As a result, courts have recognized [litigation privilege] as a defense in certain retaliatory civil actions . . . .'' (Internal quotation marks omitted.) *MacDermid, Inc.* v. *Leonetti*, 310 Conn. 616, 627–28, 79 A.3d 60 (2013).

''The rationale underlying [litigation] privilege is grounded upon the proper and efficient administration of justice. . . . Participants in a judicial process must be able to testify or otherwise take part without being hampered by fear of defamation suits. . . . Therefore, in determining whether a statement is made in the course of a judicial proceeding, it is important to consider whether there is a sound public policy reason for permitting the complete freedom of expression that a grant of [litigation privilege] provides. . . . In making that determination, the court must decide as a matter of law whether the allegedly defamatory statements are sufficiently relevant to the issues involved in a proposed or ongoing judicial proceeding. The test for relevancy is generous and judicial proceeding has been defined liberally to encompass much more than civil litigation or criminal trials.'' (Citations omitted; internal quotation marks omitted.) *Hopkins* v. *O'Connor*, 282 Conn. 821, 839, 925 A.2d 1030 (2007).

"The judicial proceeding to which [absolute] 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." (Internal quotation marks omitted.) *Kelley* v. *Bonney*, 221 Conn. 549, 566, 571, 606 A.2d 693 (1992).

In a grievance proceeding, the committee performs a number of judicial functions, such as assigning the case to a reviewing committee, compelling testimony and the production of evidence via subpoena power, holding hearings at which both parties have the right to be heard, and, ultimately, recommending dismissal of the complaint or the imposition of sanctions. *Field* v. *Kearns*, 43 Conn. App. 265, 272–73, 682 A.2d 148, cert. denied, 239 Conn. 942, 684 A.2d 711 (1996), overruled in part on other grounds by *Rioux* v. *Barry*, 283 Conn. 938, 927 A.2d 304 (2007) (overruling grant of absolute privilege in vexatious litigation claim). Accordingly, a grievance proceeding is quasi-judicial in nature. Id., 273. This proposition is not in dispute.

The plaintiff, however, contends that the litigation privilege does not extend absolute immunity to statements made to a disciplinary authority by an attorney who is the subject of the grievance complaint or disciplinary investigation. The plaintiff argues that our conclusion in *Field* v. *Kearns*, supra, 43 Conn. App. 265, that "bar grievants are absolutely immune from liability for the content of any relevant statements made during a bar grievance proceeding"; Id., 273; does not apply

to attorneys who are the subjects of grievance proceedings, and that the privilege should not be so extended.[3] We disagree.

Field contains no language limiting the parties or participants who are protected by the litigation privilege in grievance proceedings. Moreover, this court stated that "parties to or witnesses before judicial or quasi-judicial proceedings are entitled to absolute immunity for the content of statements made therein." Id., 271, citing *Petyan* v. *Ellis*, 200 Conn. 243, 245–46, 510 A.2d 1337 (1986); see also *Hopkins* v. *O'Connor*, supra, 282 Conn. 839; *Kelley* v. *Bonney*, supra, 221 Conn. 573–74. An attorney who is the subject of a grievance proceeding is a party to a quasi-judicial proceeding, and, therefore, relevant statements made by the attorney are shielded by the litigation privilege. Accordingly, we conclude that absolute immunity applied to relevant statements the defendant made in response to the plaintiff's grievance complaint.

The plaintiff also argues that the litigation privilege did not properly apply because her complaint pleads

[3] In *Field*, the plaintiff was an attorney who was sued for malpractice by a client whom he previously had represented in a foreclosure action. *Field* v. *Kearns*, supra, 43 Conn. App. 267. The defendant, the attorney who handled the client's malpractice case, requested in writing that the plaintiff notify his professional malpractice insurance carrier of the lawsuit. Id. After the plaintiff declined to do so, the defendant filed a complaint against the plaintiff with the statewide grievance committee, alleging that the plaintiff obstructed judicial process by failing to appear in the lawsuit and by failing to confirm that his malpractice carrier had been notified of the claim. Id. Thereafter, the plaintiff provided a panel of the committee with a copy of the declarations page of his professional liability policy, and the defendant then sent a copy of a new complaint to the insurance carrier. Id., 267–68.

The plaintiff then brought a seven count complaint against the defendant concerning the defendant's conduct in both the malpractice action and the grievance complaint. Id., 268. The trial court granted the defendant's motion for summary judgment concluding, in relevant part, that the litigation privilege barred a number of the plaintiff's claims. Id., 269. On appeal, this court affirmed the trial court's judgment, concluding that the grievance proceeding was quasi-judicial and that absolute immunity applied to statements made therein. Id., 273.

facts suggesting that the defendant both abused the judicial process and breached the professional duty of candor. We disagree.

Our Supreme Court has "recognized a distinction between attempting to impose liability upon a participant in a judicial proceeding for the words used therein and attempting to impose liability upon a litigant for his improper use of the judicial system itself . . . . In this regard, we have refused to apply absolute immunity to causes of action alleging the improper use of the judicial system." (Citation omitted.) *MacDermid, Inc.* v. *Leonetti*, supra, 310 Conn. 629; see also id. at 625–26 (litigation privilege did not shield claim by employee against employer alleging that employer had brought action against employee solely in retaliation for employee exercising his rights under Workers' Compensation Act).

We note that *Field* held not only that statements made in a grievance proceeding were shielded by absolute immunity, but also that the act of filing a grievance was protected. *Field* v. *Kearns*, supra, 43 Conn. App. 273. In *Tyler* v. *Tatoian*, 164 Conn. App. 82, 137 A.3d 801, cert. denied, 321 Conn. 908, 135 A.3d 710 (2016), this court held that the litigation privilege barred the plaintiff's claim against an attorney who allegedly made fraudulent statements during the course of a judicial proceeding.[4] Id., 92. This court concluded that "fraudulent conduct by attorneys, while strongly discouraged,

[4] In *Tyler*, the plaintiffs were brothers who were named beneficiaries of their mother's trust. *Tyler* v. *Tatoian*, supra, 164 Conn. App. 83–84. The defendant, an attorney, was the trustee. Id., 84. The plaintiffs brought an action against the defendant, alleging, inter alia, that the defendant mismanaged the trust by failing to diversify the trust's assets. Id. At his deposition, the defendant testified that he had relied on the advice of an investment advisor in deciding not to diversify trust assets. Id., 84–85. The plaintiffs requested that the defendant seek to recover damages from the advisor, but the defendant declined to do so, and the court denied the plaintiffs' motion to compel the defendant to seek recovery from the advisor. Id., 85. At trial, the defendant testified that he did not rely on advice from the investment advisor. Id., 85–86. The jury returned a verdict for the defendant. Id., 86.

(1) does not subvert the underlying *purpose* of a judicial proceeding, as does conduct constituting abuse of process and vexatious litigation, for which the privilege may not be invoked, (2) is similar in essential respects to defamatory statements, which are protected by the privilege, (3) may be adequately addressed by other available remedies, and (4) has been protected by the litigation privilege in federal courts, including the United States Supreme Court and the Second Circuit Court of Appeals, for exactly the same reasons that defamatory statements are protected." (Emphasis in original; internal quotation marks omitted.) Id., 91–92. Our conclusions in *Tyler* and in *Field* dispose of the plaintiff's claims.

The judgment is affirmed.

SANDRA HARVEY, ADMINISTRATRIX (ESTATE OF ISAIAH BOUCHER) *v.* DEPARTMENT OF CORRECTION ET AL.
(AC 40956)

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

Syllabus

The plaintiff administratrix of the estate of the decedent, B, sought to recover damages from the state defendants, the Department of Correction and its inmate health care provider, for the wrongful death of B. On July 16, 2015, the Claims Commissioner had waived the state's sovereign immunity and authorized B to bring a medical malpractice action against

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The plaintiffs then commenced a second action, in which they alleged, inter alia, that the defendant committed fraud when he offered contradictory testimony at his deposition and at trial. Id., 86. The defendant moved to dismiss the plaintiff's complaint, claiming that his communications were made during the course of judicial proceedings and were thus protected by the litigation privilege. Id. The court granted the defendant's motion. Id. On appeal, the plaintiffs claimed that the litigation privilege should not bar their complaint because the defendant's alleged fraud constituted improper use of the judicial system. Id., 87. This court disagreed and affirmed the judgment of the trial court. Id., 94.

the state defendants, but B died on September 26, 2015, without having done so. On September 29, 2016, the plaintiff commenced this wrongful death action on behalf of B's estate. Thereafter, the state defendants filed a motion to dismiss the action, claiming that it was time barred pursuant to the statute (§ 4-160 [d]) that requires a plaintiff who has been granted authorization to sue the state by the Claims Commissioner to bring an action within one year from the date that the authorization was granted, and, therefore, that they were entitled to dismissal of the action for lack of subject matter jurisdiction under the doctrine of sovereign immunity. The trial court granted the state defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Held*:

1. The plaintiff could not prevail on her claim that the trial court improperly granted the state defendants' motion to dismiss, which was based on her claim that the applicable statute of limitations set forth in the wrongful death statute (§ 52-555), which permits a wrongful death action to be brought within two years from the date of the decedent's death, had not expired and is not limited by § 4-160 (d), and, therefore, her action was not untimely: to bring a timely action against the state defendants, the plaintiff had to comply with both the one year limitation period provided in § 4-160 (d) and the statute of limitations for her wrongful death action set forth in § 52-555, and because her action was not commenced within one year from the date that the Claims Commissioner granted authorization to sue, that authorization had expired, and, therefore, the plaintiff's action was barred by the state's sovereign immunity and the trial court properly dismissed it for lack of subject matter jurisdiction; moreover, the plaintiff's reliance on certain case law in support of her claim was unavailing, as those cases were either misinterpreted by the plaintiff or inapposite.
2. The plaintiff could not prevail on her claim that her action was timely because the one year limitation period prescribed in § 4-160 (d) was extended by statute (§ 52-594); even if § 52-594 were applicable and the plaintiff's contention that it prevents the expiration of the commissioner's waiver of sovereign immunity for one year following the death of a successful claimant to allow a representative of the claimant's estate an opportunity to file an action were correct, the plaintiff's action was still untimely, as it was not commenced within one year of the date B's death.

Argued December 11, 2018—officially released April 2, 2019

Procedural History

Action to recover damages for the wrongful death of the plaintiff's decedent as a result of the defendants' alleged medical malpractice, brought to the Superior Court in the judicial district of Hartford, where the

court, *Elgo*, *J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed*.

Juri E. Taalman, with whom, on the brief, was *David W. Bush*, for the appellant (plaintiff).

James M. Belforti, assistant attorney general, with whom, on the brief, was *George Jepsen*, former attorney general, for the appellees (defendants).

Opinion

PRESCOTT, J. The plaintiff, Sandra Harvey, administratrix of the estate of Isaiah Boucher, appeals from the judgment of the trial court dismissing the wrongful death action filed against the defendants, the Department of Correction and the University of Connecticut Health Center Correctional Managed Health Care, to which we collectively refer in this opinion as the state. On July 16, 2015, the Claims Commissioner (claims commissioner) authorized Boucher to bring a medical malpractice action against the state. Boucher, however, died during September, 2015, without having filed an action, and the plaintiff did not commence the underlying action on behalf of Boucher's estate until more than one year later. The state filed a motion to dismiss the action because it was untimely pursuant to General Statutes § 4-160 (d),[1] which requires a party who is granted authorization by the claims commissioner to sue the state to do so within one year from the date

[1] General Statutes § 4-160 provides in relevant part: "(a) Whenever the Claims Commissioner deems it just and equitable, the Claims Commissioner may authorize suit against the state on any claim which, in the opinion of the Claims Commissioner, presents an issue of law or fact under which the state, were it a private person, could be liable. . . .

"(d) No such action shall be brought but within one year from the date such authorization to sue is granted. With respect to any claim presented to the Office of the Claims Commissioner for which authorization to sue is granted, any statute of limitation applicable to such action shall be tolled until the date such authorization to sue is granted. . . ."

such authorization is granted. The plaintiff claims on appeal that the court improperly granted the state's motion to dismiss because the statute of limitations set forth in General Statutes § 52-555 (a), which permits a wrongful death action to be brought within two years from the date of the decedent's death,[2] had not expired and is not limited by § 4-160 (d). Alternatively, the plaintiff claims that the one year limitation period prescribed in § 4-160 (d) was extended in this case by operation of General Statutes § 52-594, and, therefore, her action was timely. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, as set forth by the court in its memorandum of decision or as taken from the complaint and viewed in a light most favorable to the plaintiff, are relevant to our consideration of the present appeal. Boucher became ill and eventually was diagnosed with oropharyngeal cancer while incarcerated and in the care and custody of the Department of Correction. In June, 2013, he underwent "a biopsy and surgery for a tracheotomy with a trachlaryngoscopy . . . ." In June, 2015, he filed a notice of claim with the claims commissioner, seeking permission to file a medical malpractice action against the state.[3] On July 16, 2015, the claims commissioner rendered a decision authorizing Boucher to sue the state. In his finding and

[2] General Statutes § 52-555 (a) provides: "In any action surviving to or brought by an executor or administrator for injuries resulting in death, whether instantaneous or otherwise, such executor or administrator may recover from the party legally at fault for such injuries just damages together with the cost of reasonably necessary medical, hospital and nursing services, and including funeral expenses, provided no action shall be brought to recover such damages and disbursements but within two years from the date of death, and except that no such action may be brought more than five years from the date of the act or omission complained of."

[3] In essence, Boucher claimed that despite making repeated requests for medical treatment over the course of nearly two years, the state failed to properly evaluate his medical condition or to provide the necessary diagnostic tests to discover his cancer in a timely manner.

order, the claims commissioner indicated that "[the] grant of permission to sue is limited to that portion of the claim alleging malpractice against the state, a state hospital or a sanitarium or against a physician, surgeon, dentist, podiatrist, chiropractor, or all other licensed health care providers employed by the state." (Internal quotation marks omitted.)

Boucher died on September 26, 2015, as a result of the progression of his cancer. On March 23, 2016, the plaintiff was appointed as the administratrix of Boucher's estate. In that capacity, on September 29, 2016, the plaintiff commenced the underlying action against the state.

The state filed a motion to dismiss the action on November 1, 2016. The state asserted in its motion that, pursuant to § 4-160 (d), the plaintiff's claims were time barred and should be dismissed. Specifically, the state argued that § 4-160 (d) requires a plaintiff who has obtained authorization to sue the state from the claims commissioner to bring an action within one year from the date that the commissioner grants authorization. Here, the plaintiff filed the action seventy-three days beyond that one year limitation period, and, thus, the state claimed that the action was untimely and barred by sovereign immunity.

The plaintiff filed an objection and a memorandum of law in opposition to the motion to dismiss. According to the plaintiff, because § 52-555 creates a statutory cause of action for wrongful death that did not exist at common law, that statute must be strictly construed, and the two year statute of limitations embodied in the statute cannot be extended, modified or enlarged in scope.[4] In other words, the plaintiff argues that despite the clear and unambiguous language of § 4-160 (d) requiring an action to be brought within one year of

[4] See footnote 2 of this opinion.

obtaining authorization from the claims commissioner, she had "within two years from the date of death" of Boucher to commence a wrongful death action, and, therefore, her action was timely despite any noncompliance with § 4-160 (d). According to the plaintiff, the one year statutory period for filing a claim against the state is inoperative under the present circumstances and cannot be construed properly to reduce the time period for filing her wrongful death action.

The trial court, *Elgo*, *J.*, agreed with the state's position and granted the motion to dismiss in a memorandum of decision filed on June 21, 2017. The court noted that any waiver of the state's sovereign immunity must be narrowly construed, and, thus, any statutory limitation period placed on bringing an action against the state must also be strictly applied. The court concluded that "the plaintiff, in attempting to bring a statutory cause of action against the state, must comply with two time limitations: (1) the one year limitation to bring suit after authorization is given to sue; and (2) the original statute of limitations on the underlying cause of action. Failure to comply with either deprives the court of subject matter jurisdiction and is grounds for dismissal. . . . Given that the plaintiff's authorization to sue ended on July 16, 2016, and the plaintiff commenced this action after that date, this court lacks subject matter jurisdiction."[5]

The plaintiff filed a motion for reconsideration and reargument on July 10, 2017. In that motion, the plaintiff argued for the first time that the one year limitation

[5] In a footnote, the trial court mentioned, among other things, that the plaintiff's action arguably might be subject to dismissal due to the fact that the claims commissioner had authorized Boucher to file a medical malpractice action against the state whereas the plaintiff's action sounded in wrongful death. Because the court did not grant the motion to dismiss on the basis of any of the issues raised in its footnote, however, we do not reach those issues on appeal.

period of § 4-160 (d) was extended by operation of § 52-594, which provides in relevant part that "[i]f the time limited for the commencement of any personal action, which by law survives to the representative of a deceased person, has not elapsed at the time of the person's death, one year from the date of death shall be allowed to his executor or administrator to institute an action therefor. . . ." According to the plaintiff, at the time Boucher died on September 26, 2015, his authorization to bring an action against the state had not expired and, therefore, under § 52-594, the plaintiff should have had until September 26, 2016, to bring an action. The state filed a memorandum in opposition to the plaintiff's motion, and the plaintiff filed a reply to the opposition. The court denied the plaintiff's motion for reconsideration and reargument without a hearing and without comment on September 28, 2017. This appeal followed.

We begin with our standard of review. "A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the trial court's ultimate legal conclusion and resulting [decision to] grant . . . the motion to dismiss will be de novo. . . . [T]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss." (Citation omitted; internal quotation marks omitted.) *Columbia Air Services, Inc.* v. *Dept. of Transportation*, 293 Conn. 342, 346–47, 977 A.2d 636 (2009).

"When a trial court decides a jurisdictional question raised by a pretrial motion to dismiss on the basis of the complaint alone, it must consider the allegations of the complaint in their most favorable light. . . . In

this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." (Internal quotation marks omitted.) Id., 347.

I

The plaintiff first claims that the court improperly granted the state's motion to dismiss on the ground that she failed to comply with the one year limitation period set forth in § 4-160 (d) because the applicable statute of limitations for a wrongful death action is the two year period set forth in § 52-555 and that limitation period cannot be limited by operation of § 4-160 (d). The state responds that the plaintiff's claim lacks merit because it ignores the plain language of § 4-160 (d), which imposes a time limit on the claims commissioner's waiver of sovereign immunity, and is premised on a misreading of case law. We agree with the state.

"The principle that the state cannot be sued without its consent, or sovereign immunity, is well established under our case law. . . . It has deep roots in this state and our legal system in general, finding its origin in ancient common law." (Citation omitted; internal quotation marks omitted.) *C. R. Klewin Northeast, LLC* v. *Fleming*, 284 Conn. 250, 258, 932 A.2d 1053 (2007). "Exceptions to this doctrine are few and narrowly construed under our jurisprudence." Id. "[B]ecause the state has permitted itself to be sued in certain circumstances, [our Supreme Court] has recognized the well established principle that statutes in derogation of sovereign immunity should be strictly construed. . . . Where there is any doubt about their meaning or intent they are given the effect which makes the least rather than the most change in sovereign immunity. . . . [T]he state's sovereign right not to be sued without its consent is not to be diminished by statute, unless a

clear intention to that effect on the part of the legislature is disclosed." (Citations omitted; internal quotation marks omitted.) *White* v. *Burns*, 213 Conn. 307, 312–13, 567 A.2d 1195 (1990). "Among the statutes in derogation of sovereignty and subject to the rule requiring strict construction in favor of the state are those allowing suits against the state or its representative, creating a claim against the state or waiving immunity from liability." *Berger, Lehman Associates, Inc.* v. *State*, 178 Conn. 352, 356, 422 A.2d 268 (1979).

"In the absence of a statutory waiver of sovereign immunity, the plaintiff may not bring an action against the state for monetary damages without authorization from the claims commissioner to do so. [A] plaintiff who seeks to bring an action for monetary damages against the state must first obtain authorization from the claims commissioner [in accordance with § 4-160 (a)]. . . . When sovereign immunity has not [otherwise] been waived, the claims commissioner is authorized by [§ 4-160] to hear monetary claims against the state . . . . This legislation expressly bars suits upon claims cognizable by the claims commissioner except as [the commissioner] may authorize, an indication of the legislative determination to preserve sovereign immunity as a defense to monetary claims against the state not sanctioned by the [claims] commissioner or other statutory provisions." (Citations omitted; internal quotation marks omitted.) *Columbia Air Services, Inc.* v. *Dept. of Transportation*, supra, 293 Conn. 351–52. Because § 4-160 authorizes the claims commissioner to waive sovereign immunity and grant permission to sue the state, the statute is in derogation of common-law sovereign immunity and, therefore, must be strictly and narrowly construed.

Section 4-160 contains limits on when and how an action may be brought if authorization to sue is given by the claims commissioner. Specifically, subsection

(d) provides in relevant part: "No such action shall be brought but within one year from the date such authorization to sue is granted. . . ." General Statutes § 4-160 (d). "[When] . . . a specific time limitation is contained within a statute that creates a right of action that did not exist at common law, then the remedy exists only during the prescribed period and not thereafter. . . . In such cases, the time limitation is not to be treated as an ordinary statute of limitation[s] . . . but rather is a limitation on the liability itself, and not of the remedy alone. . . . [U]nder such circumstances, the time limitation is a substantive and jurisdictional prerequisite, which may be raised [by the court] at any time . . . and may not be waived." (Internal quotation marks omitted.) *State* v. *Lombardo Bros. Mason Contractors, Inc.*, 307 Conn. 412, 444, 54 A.3d 1005 (2012). Accordingly, § 4-160 (d) is not an ordinary statute of limitations but, rather, constitutes a strict time limit on the waiver of the state's sovereign immunity granted by the claims commissioner. It follows that, once that time period expires, any action brought against the state would be subject to dismissal for lack of jurisdiction under the doctrine of sovereign immunity in the same manner as if the plaintiff never had been given authorization to sue.

In the present case, the claims commissioner granted Boucher a waiver of the state's sovereign immunity on July 16, 2015, authorizing him to file an action against the state for medical malpractice. That waiver was limited by § 4-160 (d) to a period of one year, which expired, at the latest, on July 17, 2016. Thus, the limited waiver of sovereign immunity had expired by the time the plaintiff commenced the present action on September 29, 2016. Without a valid waiver, the state was entitled to dismissal of the action on the ground of sovereign immunity.

The plaintiff nevertheless advances the novel theory that the two year statute of limitations found in the wrongful death statute somehow superseded or rendered inoperative the one year limitation placed on the claim commissioner's waiver of sovereign immunity by § 4-160 (d). The plaintiff has not directed our attention to any language in either statute that would support the construction she suggests. The legislature, in enacting § 4-160 (d), could have provided: *Except as otherwise provided in § 52-555*, no such action shall be brought but within one year from the date such authorization to sue is granted. It has not done so, and we cannot rewrite the statute. "It is well established that a court must construe a statute as written. . . . Courts may not by construction supply omissions . . . or add exceptions merely because it appears that good reasons exist for adding them." (Internal quotation marks omitted.) *Cady* v. *Zoning Board of Appeals*, 330 Conn. 502, 516, 196 A.3d 315 (2018). We agree with the trial court that the plaintiff had the duty to comply with both the statute of limitations set forth in § 52-555 and the one year limitation on the waiver of sovereign immunity provided in § 4-160 (d).

To the extent that the plaintiff suggests that her claim finds support in the decision rendered in *Lagassey* v. *State*, 50 Conn. Supp. 130, 913 A.2d 1153 (2005), which was affirmed and adopted as a proper statement of the law by our Supreme Court in *Lagassey* v. *State*, 281 Conn. 1, 5, 914 A.2d 509 (2007), we disagree with the plaintiff's interpretation of that decision.

In *Lagassey*, the plaintiff, an executrix of an estate, brought a wrongful death action against the state claiming that it had failed to diagnose and treat her decedent's leaking abdominal aortic aneurysm, thereby causing his death on October 8, 1992. Id., 2–3. The plaintiff filed a notice of claim with the claims commissioner on September 19, 1994, nineteen days before the expiration

of the two year wrongful death statute of limitations in § 52-555. Id., 4. She received permission to sue the state on August 23, 2000, but did not commence an action until April 20, 2001. Id., 3. The state subsequently moved for summary judgment, contending that the action was time barred because the plaintiff failed to commence it within the nineteen days remaining in the applicable two year limitation period following the August 23, 2000 decision by the claims commissioner. Id., 3–4. The plaintiff argued that the tolling provision of § 4-160 (d) not only tolled any operative statute of limitations until after authorization to sue was granted but also provided the claimant with an additional one year to bring an action against the state. Id., 4–5. The trial court agreed with the state's construction of § 4-160 (d) and granted its motion for summary judgment, concluding that the plaintiff's action was time barred because the tolling provision of § 4-160 (d) only suspended the running of the applicable statute of limitations. Id., 4. The court rejected the plaintiff's argument that a new limitation period began to run after authorization to sue was granted. Id.

The plaintiff wholly misinterprets the holding in *Lagassey*. The plaintiff notes that the court in *Lagassey* held that the executrix was required to comply with the two year wrongful death statute of limitations, and that the claim commissioner's authorization to file an action against the state did not affect the running of that statute. Although that is true, nothing in the decision suggests that, in a case in which the statute of limitations for a particular cause of action had not yet run, and more than one year remained before it expired, a plaintiff could ignore the one year limit on the waiver of sovereign immunity contained in § 4-160 (d). Rather, a logical reading of *Lagassey* is that a plaintiff who seeks to bring an action against the state following the

granting of permission to sue by the claims commissioner should comply not only with the one year waiver period but also with the statute of limitations for the substantive cause of action because failure to comply with either would render the action time barred.

Section 52-555 authorizes an executor or administrator of an estate to bring an action to recover damages on behalf of the estate against a party legally at fault for injuries resulting in the death of the decedent "provided no action shall be brought to recover such damages and disbursements but within two years from the date of death, and except that no such action may be brought more than five years from the date of the act or omission complained of." As the plaintiff correctly notes, § 52-555, the wrongful death statute, creates a statutory cause of action that did not exist at common law in Connecticut and, therefore, "must be strictly construed and cannot be *extended or enlarged* by judicial construction." (Emphasis added.) *Ecker* v. *West Hartford*, 205 Conn. 219, 226, 530 A.2d 1056 (1987). Furthermore, "the time limitation contained therein is a limitation upon the right itself, and as such, is jurisdictional in nature and cannot be waived." Id.

The plaintiff's reliance on *Ecker* is inapposite. *Ecker* simply involved a claim by the plaintiff in that case that the defendant had waived the limitation period in § 52-555 by failing to assert it in a timely manner. The question on appeal was whether the limitation period in § 52-555 is jurisdictional in nature and thus could be asserted at any time and could not be waived by the parties. *Ecker* did not involve the question of whether § 52-555 expanded the court's jurisdiction to hear cases that were untimely under other statutes. A conclusion in this case that the plaintiff's action is untimely pursuant to § 4-160 (d) does not in any way extend or enlarge the limitation period in § 52-555.

As the state correctly notes in its appellate brief, statutes of limitation generally are wielded by defendants as shields; their purpose is not to provide additional substantive rights to plaintiffs. "The purposes of statutes of limitation include finality, repose and avoidance of stale claims and stale evidence. . . . These statutes represent a legislative judgment about the balance of equities in a situation involving the tardy assertion of otherwise valid rights: [t]he theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." (Citation omitted; internal quotation marks omitted.) *Flannery* v. *Singer Asset Finance Co., LLC*, 312 Conn. 286, 322–23, 94 A.3d 553 (2014). The plaintiff has not cited a single case that supports her theory that she was not required to comply with § 4-160 (d) because the limitation period under § 52-555 continued to run.

Section 4-160 (d) serves a different purpose than an ordinary statute of limitations, and a plaintiff who seeks to bring an action against the state must, as the trial court correctly concluded, comply with both § 4-160 (d) and the underlying, applicable statute of limitations in order to timely bring an action against the state. Consequently, because the plaintiff's action was not commenced within one year from the time the claims commissioner granted authorization to sue, that authorization expired. Accordingly, the plaintiff's action was barred by sovereign immunity, and the court properly dismissed it for lack of subject matter jurisdiction.

II

We briefly turn to the plaintiff's remaining claim, namely, that even if the one year period for filing her action as set forth in § 4-160 (d) was applicable, it, nevertheless, was extended by operation of § 52-594,

which provides: "If the time limited for the commencement of any personal action, which by law survives to the representatives of a deceased person, has not elapsed at the time of the person's death, one year from the date of death shall be allowed to his executor or administrator to institute an action therefor. *In computing the times limited in this chapter*, one year shall be excluded from the computation in actions covered by the provisions of this section." (Emphasis added.)[6] The state argues that § 52-594 is, by its express terms, inapplicable because (1) it only applies to statutes of limitation contained in chapter 926 of the General Statutes, but § 4-160 (d) is found in chapter 53 and (2) it is not a statute of limitations but a limitation on the waiver of sovereign immunity. The state further argues that even if § 52-594 applied, the plaintiff's action was still untimely. We agree with the state that because the plaintiff's action was not commenced within one year of the date of Boucher's death, it is unnecessary for

[6] We note that the plaintiff did not raise her claim concerning the applicability of § 52-594 in her opposition to the motion to dismiss or at oral argument on the motion to dismiss. Rather, the issue was raised for the first time in the plaintiff's motion for reconsideration and reargument, which was rejected by the court without comment. In her motion, the plaintiff argued that Boucher died on September 26, 2015, and, "[t]herefore, his administrator had until September 26, 2016, within which to bring suit pursuant to [§] 52-594." On appeal, the plaintiff attempts to change her claim, suggesting that because at the time of his death Boucher had nine months remaining before the expiration of his authorization from the claims commissioner, the plaintiff had one year from the date of death "plus the unexpired nine months, or until July 16, 2017, to bring suit." As we have consistently stated, however, "[t]he theory upon which a case is tried in the trial court cannot be changed on review. . . . Moreover, an appellate court should not consider different theories or new questions if proof might have been offered to refute or overcome them had they been presented at trial." (Internal quotation marks omitted.) *Nweeia* v. *Nweeia*, 142 Conn. App. 613, 620, 64 A.3d 1251 (2013); see also *Curry* v. *Allan S. Goodman, Inc.*, 286 Conn. 390, 425, 944 A.2d 925 (2008) (legal theory raised for first time on appeal unreviewable). Accordingly, we limit our review to the claim as it was framed and presented to the trial court, namely, that the plaintiff had one year from the date of Boucher's death to file an action.

us to decide the applicability of § 52-594, because its application would not have saved the plaintiff's action from dismissal.

Boucher died on September 26, 2015. If the plaintiff's theory that § 52-594 prevents the expiration of the claims commissioner's waiver of sovereign immunity for one year following the death of a successful claimant to allow a representative of the claimant's estate an opportunity to file an action were correct, the plaintiff would have had until September 26, 2016, in which to file a timely action. "[U]nder the law of our state, an action is commenced not when the writ is returned but when it is served upon the defendant." (Internal quotation marks omitted.) *Rocco* v. *Garrison*, 268 Conn. 541, 549, 848 A.2d 352 (2004). Here, the marshal's return indicates that service on the state was not made until September 29, 2016. Accordingly, even if § 52-594 were applicable, the plaintiff's action was still untimely and, thus, subject to dismissal on the basis of sovereign immunity.

The judgment is affirmed.

In this opinion the other judges concurred.

MICHAEL HOLBROOK *v.* COMMISSIONER OF CORRECTION (AC 41165)

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

Syllabus

The petitioner, who had been convicted of manslaughter in the first degree with a firearm in connection with the shooting death of the victim, sought a writ of habeas corpus, claiming, inter alia, that his prior habeas counsel, D, had rendered ineffective assistance by declining to pursue a claim that the petitioner's criminal trial counsel, R, had rendered ineffective assistance when R chose not to call a witness, T, in the petitioner's second criminal trial after his first trial had ended in a mistrial. The habeas court concluded that D had exercised professional

judgment in winnowing down a list of twenty-seven possibly viable claims he had included in his habeas petition and had made a reasonable strategic decision not to pursue the ineffective assistance claim as to R. The habeas court further concluded that R's decision not to call T to testify at the second criminal trial did not constitute deficient performance but, rather, was a strategic decision. The court reasoned that T was impeachable by virtue of her prior personal connection with the petitioner and two inconsistent written statements that she had given to the police concerning the shooting. In her first statement, T stated that there had been a fight and that the petitioner indicated that he had been hit, but in her second statement she denied that a fight occurred and did not remember the petitioner stating that he had been hit. The habeas court rendered judgment denying the habeas petition, from which the petitioner, on the granting certification, appealed to this court. *Held*:

1. The habeas court properly determined that the petitioner failed to prove that D rendered ineffective assistance by failing to pursue a claim that R had been ineffective for failing to call T as a witness; R's strategic decision not to call T did not constitute deficient performance, as R inferentially made a presumptively prudential decision on whether to use T's second statement to the police, which could have led to further impeachment evidence as to T, R's trial strategy in not calling T to the witness stand was influenced by the fact that the state's witnesses had considerable baggage in terms of prior criminal histories, inconsistent statements, and losses of memory and recantations, which resulted in their prior written signed statements being admitted into evidence for substantive purposes, and the admission into evidence of T's statements would have rendered less persuasive a defense argument that the state's witnesses were all over the place, could not remember and were inconsistent.

2. There was no merit to the petitioner's claim that the prosecution suppressed evidence that was favorable to him when it allegedly failed to disclose that it had delayed making a plea offer to an eyewitness until after the eyewitness testified in the petitioner's second criminal trial; the petitioner failed to present any credible evidence that there was an agreement between the state and the witness that the state failed to disclose, the petitioner's claim was not distinctly raised in his habeas petition, and his counsel conceded at oral argument before this court that there is no authority for the proposition that the state is obligated to make a plea offer to a witness who is himself facing criminal charges before giving testimony in a case.

Argued January 10—officially released April 2, 2019

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of

Tolland and tried to the court, *Hon. John F. Mulcahy, Jr.*, judge trial referee; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Vishal K. Garg, assigned counsel, for the appellant (petitioner).

C. Robert Satti, Jr., supervisory assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Emily D. Trudeau*, assistant state's attorney, for the appellee (respondent).

Opinion

FLYNN, J. The petitioner, Michael Holbrook, appeals from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the court improperly concluded that he failed to prove (1) ineffective assistance of his prior habeas counsel, and (2) that the state suppressed exculpatory evidence at his criminal trial in violation of *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).[1] We affirm the judgment of the habeas court.

The following facts and procedural history surrounding the petitioner's conviction were set forth by

[1] The petitioner also claims that the court improperly concluded that he had failed to prove that his trial counsel was ineffective for declining to call a certain witness to testify at the underlying criminal trial. In its memorandum of decision, the habeas court dismissed the claim of ineffective assistance of trial counsel on the grounds that it was barred by res judicata and that it was successive. The court also determined that the claim was barred by laches and, alternatively, that the petitioner could not prevail on the merits. At oral argument before this court, the petitioner's counsel conceded that the claim of ineffective assistance of trial counsel, by itself, was successive. In light of this concession, we do not examine the merits of the petitioner's claim of ineffective assistance of trial counsel separately but only to the extent that his claim of ineffective assistance of prior habeas counsel is premised on such a claim. See *Mukhtaar* v. *Commissioner of Correction*, 158 Conn. App. 431, 438–39, 119 A.3d 607 (2015).

this court in our decision on direct appeal affirming the petitioner's conviction: "John Fred Dean was shot and killed inside a Bridgeport nightclub known as the Factory. The state charged the [petitioner] . . . with Dean's murder. In 2003, the [petitioner's] first jury trial ended in a mistrial. After a second trial, in 2004, the jury found the [petitioner] not guilty of murder but found him guilty of the lesser included offense of manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a (a). The jury also made a finding that the [petitioner] had committed a class A, B or C felony with a firearm in violation of General Statutes § 53-202k. The trial court rendered judgment in accordance with the verdict and sentenced the [petitioner] to a total effective term of thirty-five years incarceration." *State* v. *Holbrook*, 97 Conn. App. 490, 492, 906 A.2d 4, cert. denied, 280 Conn. 935, 909 A.2d 962 (2006).

In June, 2007, the petitioner filed a petition for a writ of habeas corpus, which was denied by the court, *T. Santos*, *J.*, following a trial. On appeal, this court affirmed the denial of the petition. *Holbrook* v. *Commissioner of Correction*, 149 Conn. App. 901, 87 A.3d 631, cert. denied, 311 Conn. 952, 91 A.3d 464 (2014).

In June, 2014, the petitioner, who was then self-represented, filed a petition for a writ of habeas corpus. Thereafter, represented by counsel, the petitioner filed an amended petition alleging ineffective assistance of his trial counsel, Attorney Frank J. Riccio, for declining to call Cherise Thomas as a witness; ineffective assistance of prior habeas counsel, Attorney Michael Day, for failing to pursue a claim that trial counsel was ineffective for failing to call Thomas as a witness; and the failure of the state to produce exculpatory information to the petitioner. The court, *Hon. John F. Mulcahy, Jr.*, judge trial referee, denied the petition. The court thereafter granted the petition for certification to appeal. This appeal followed.

I

The petitioner claims that the court erred in concluding that Day did not render ineffective assistance for declining in the prior habeas proceeding to pursue a claim that Riccio was ineffective for failing to call Thomas as a witness in the underlying criminal trial. We do not agree.

"It is well established that [a] criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings . . . . This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . As enunciated in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] . . . [a] claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . An ineffective assistance of counsel claim will succeed only if both prongs [of *Strickland*] are satisfied." (Citations omitted; internal quotation marks omitted.) *Sanders* v. *Commissioner of Correction*, 169 Conn. App. 813, 823, 153 A.3d 8 (2016), cert. denied, 325 Conn. 904, 156 A.3d 536 (2017).

"[When] applied to a claim of ineffective assistance of prior habeas counsel, the *Strickland* standard requires the petitioner to demonstrate that his prior habeas counsel's performance was ineffective and that this ineffectiveness prejudiced the petitioner's prior habeas proceeding. . . . Therefore, as explained by our Supreme Court in *Lozada* v. *Warden*, 223 Conn. 834, 613 A.2d 818 (1992), a petitioner claiming ineffective

assistance of habeas counsel on the basis of ineffective assistance of [trial] counsel must essentially satisfy *Strickland* twice: he must prove both (1) that his appointed habeas counsel was ineffective, and (2) that his [trial] counsel was ineffective. . . . We have characterized this burden as presenting a herculean task . . . .'' (Citations omitted; internal quotation marks omitted.) *Mukhtaar* v. *Commissioner of Correction*, 158 Conn. App. 431, 438–39, 119 A.3d 607 (2015).

The habeas court noted that Day, ''in an abundance of caution,'' included twenty-seven claims in his habeas petition, but upon further analysis pursued only six of the listed claims, which did not include the claim of ineffective assistance of trial counsel for failure to call Thomas as a witness. The habeas court concluded that Day's procedure of ''exercising professional judgment . . . in winnowing down from the long list of claims initially thought to be possibly viable'' did not constitute deficient performance. We will not disturb the court's finding that Day's decision not to pursue the claim at issue was a reasonable strategic decision. ''[A] reviewing court is required not simply to give [the trial attorney] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he] did . . . . [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . .'' (Citation omitted; internal quotation marks omitted.) *Michael T.* v. *Commissioner of Correction*, 319 Conn. 623, 632–33, 126 A.3d 558 (2015). Additionally, ''the failure to pursue unmeritorious claims cannot be considered conduct falling below the level of reasonably competent representation.'' (Internal quotation marks omitted.) *Tillman* v. *Commissioner of Correction*, 54 Conn. App. 749, 756–57, 738 A.2d 208, cert. denied, 251 Conn. 913, 739 A.2d 1250 (1999).

The court further found that *Strickland*'s prejudice prong was not satisfied because, "based on the previous analysis of trial counsel's tactical decision regarding the Thomas statements," a reasonable probability did not exist that the result of the first habeas trial would have been different had Day pursued the claim that Riccio was ineffective for failing to call Thomas as a witness. In analyzing the merits of the underlying claim of ineffective assistance of trial counsel, the court concluded that Riccio, who had represented the petitioner in both criminal trials and who had died before the petitioner brought his second petition for a writ of habeas corpus, was "seasoned," and was an "exceedingly experienced, skilled and proficient criminal defense attorney."[2]

The court concluded that Riccio's strategic decision not to call Thomas to testify at the second criminal trial did not constitute deficient performance. Thomas was impeachable by virtue of her prior personal connection with the petitioner, whom she had known for years. Thomas gave two statements on different dates to the police, recounting the events that occurred at the Factory nightclub on the night of the shooting. Both statements were admitted as full exhibits at the second

[2] The court in the petitioner's second habeas trial had ample evidence of the seasoned nature of Riccio's representation, including a transcript of Riccio's testimony in the petitioner's first habeas case that was admitted as a full exhibit in the second habeas proceeding. In the petitioner's first criminal trial, Riccio raised enough doubt that the jury was "hung," unable to agree on a verdict. In the petitioner's second criminal trial, Riccio succeeded in convincing the jury to return a not guilty verdict as to murder, and the petitioner was found guilty of the lesser included and less serious offense of manslaughter in the first degree in violation of § 53a-55a. Riccio testified at the first habeas trial that he had had thirty-five to forty murder trials in Connecticut state courts, had tried twelve federal criminal cases to conclusion and had been involved in approximately 100 other federal criminal cases. The record shows that Riccio had wide experience and had twice obtained results in two successive criminal trials in which the petitioner was not convicted of the most serious crime with which he was charged, namely, murder.

habeas trial. The second habeas court found that the two statements that Thomas had given to the police on separate dates were inconsistent. In the first statement, Thomas said there had been a fight and that the petitioner indicated that he had been "hit," but in her second statement she denied that a fight occurred and did not remember the petitioner stating that he had been hit. The court concluded that Thomas' first statement to the police that the petitioner had told her that he had been hit might "lend support" to the state's position that the petitioner had been involved in a physical fight with the victim, Dean, which precipitated the shooting that caused Dean's death. The court concluded that Riccio, who had been present during both of Thomas' statements to the police, inferentially made a "presumptively prudential decision" on whether to use Thomas' second statement that could have led to further impeachment evidence as to Thomas.

The court noted that Riccio's trial strategy in not calling Thomas to the witness stand was influenced by the fact that the state's witnesses brought considerable " 'baggage' " in terms of prior criminal histories, inconsistent statements, losses of memory and recantations, and that where those witnesses recanted or professed some loss of memory their prior written signed statements were admitted for substantive purposes under authority of *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986). In his summation to the jury, Riccio pointed out the inconsistencies in the testimony of the state's witnesses. Riccio testified in the first habeas trial that "I've never seen it [*Whelan*] used as much as it was in this particular case." The second habeas court stated in its decision: "An offer and admission of the Thomas statements by the defense would introduce yet another (in the court's view, material) inconsistency, resulting quite likely in another *Whelan* admission, this

time involving a defense witness. Such would render less persuasive a defense argument in summation that the state's witnesses were all over the place, could not remember, and were inconsistent."

The court concluded that Riccio, who had heard and observed Thomas at the time of her statements, made a strategic decision not to have Thomas testify that "should not now be second-guessed." *Michael T.* v. *Commissioner of Correction*, supra, 319 Conn. 632–33. As we have noted previously, reasonable strategic choices made after a thorough investigation are virtually unchallengeable. Id. After a careful review of the record, we conclude that the habeas court properly determined that the petitioner had failed to prove his claim of ineffective assistance of habeas counsel.

II

We next turn to the petitioner's claim that the court improperly rejected his claim that the prosecution suppressed evidence favorable to him in violation of *Brady* v. *Maryland*, supra, 373 U.S. 83. Specifically, the petitioner claims that the prosecution failed to disclose that it had declined to make any plea offers to Gary Browning, an eyewitness who testified for the state, regarding his charges of robbery until he testified in the petitioner's 2004 criminal trial. We disagree.

"Due process principles require the prosecution to disclose to the defense evidence that is favorable to the defendant and material to his guilt or punishment. . . . In order to obtain a new trial for improper suppression of evidence, the petitioner must establish three essential components: (1) that the evidence was favorable to the accused; (2) that the evidence was suppressed by the state—either inadvertently or wilfully; and (3) that the evidence was material to the case, i.e., that the accused was prejudiced by the lack of disclosure. . . .

"The state's failure to disclose an agreement with a cooperating witness may be deemed to be the withholding of exculpatory evidence. Impeachment evidence falls within *Brady*'s definition of evidence favorable to an accused. . . . Impeachment evidence is broadly defined in this context as evidence that could potentially alter the jury's assessment of a witness' credibility. . . . Specifically, we have noted that [a] plea agreement between the state and a key witness is impeachment evidence falling within the . . . *Brady* doctrine." (Citations omitted; internal quotation marks omitted.) *Marquez* v. *Commissioner of Correction*, 330 Conn. 575, 592, 198 A.3d 562 (2019). "Any . . . understanding or agreement between any state's witness and the state police or the state's attorney clearly falls within the ambit of *Brady* principles." (Internal quotation marks omitted.) *Elsey* v. *Commissioner of Correction*, 126 Conn. App. 144, 152–53, 10 A.3d 578, cert. denied, 300 Conn. 922, 14 A.3d 1007 (2011). "[A]n unexpressed intention of the state not to prosecute a witness does not fall within the ambit of the *Brady* principles concerning disclosure by the prosecution of evidence favorable to an accused." (Internal quotation marks omitted.) *State* v. *Rucker*, 177 Conn. 370, 376, 418 A.2d 55 (1979).

"The question of whether there existed an agreement between [a witness] and the state is a question of fact . . . . When reviewing the decision of a habeas court, the facts found by the habeas court may not be disturbed unless the findings were clearly erroneous." (Internal quotation marks omitted.) *Lewis* v. *Commissioner of Correction*, 116 Conn. App. 400, 407, 975 A.2d 740, cert. denied, 294 Conn. 908, 982 A.2d 1082 (2009). "Furthermore, the burden is on the defendant to prove the existence of undisclosed exculpatory evidence." *State* v. *Floyd*, 253 Conn. 700, 737, 756 A.2d 799 (2000). "Whether the petitioner was deprived of his due process rights due to a *Brady* violation is a question of law, to which we grant plenary review." (Internal quotation marks omitted.) *Peeler* v. *Commissioner of Correction*,

170 Conn. App. 654, 689, 155 A.3d 772, cert. denied, 325 Conn. 901, 157 A.3d 1146 (2017).

The petitioner contends that the prosecution delayed making a plea offer to Browning until after Browning testified in the petitioner's 2004 criminal trial. This claim rests on a very slender reed. The first habeas court found Browning not to be a credible witness, and he did not testify before the second habeas court. The only evidence of the allegation of a delayed plea offer is in a statement by Browning made in the first habeas trial in which he stated: "No, they wouldn't give me an offer until after I testified." The habeas court made no finding that the prosecution had made any statement to that effect, and the petitioner's claim is not distinctly raised in his habeas petition. At oral argument before this court, the *Brady* claim morphed into a claim that the state had waited to make a plea offer to Browning, the cooperating witness, until after he gave testimony. However, not only is there nothing in the petition that raises this claim distinctly, there is no finding by the habeas court that the prosecution ever told Browning that an offer of a sentence would be made in return for his guilty plea, but not until after his testimony. The petitioner's counsel conceded at oral argument that there is no authority for the proposition urged by the petitioner that the state is under an obligation to make a plea offer to a witness who is himself facing criminal charges before he gives testimony in a case. Here, the court made a finding that "the petitioner has failed to present any credible evidence that there was an actual or implied agreement between the state and Gary Browning that the state failed to disclose." The petitioner's claim of a *Brady* violation is without merit.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* HAJI JHMALAH BISCHOFF (AC 41367)

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

Syllabus

The defendant, who had been convicted of the crimes of possession of narcotics ([Rev. to 2013] § 21a-279) and possession of less than four ounces of a cannabis-type substance, appealed to this court from the judgment of the trial court dismissing his motion to correct an illegal sentence. In his direct appeal to this court, the defendant claimed that he was entitled to be resentenced as a result of a legislative amendment to the crime of possession of narcotics because in 2015, subsequent to his conviction, the legislature retroactively reclassified the violation of § 21a-279, for a first offense, as a class A misdemeanor, which carries a maximum sentence of one year of incarceration. This court considered and rejected the defendant's claim, and the defendant's petition for certification to appeal from that decision to our Supreme Court was denied. In his motion to correct an illegal sentence, the defendant claimed that the legislature had intended for the 2015 amendment to apply retroactively, and that the sentence imposed for his violation of § 21a-279 was illegal because it exceeded the maximum sentence allowed under the 2015 amendment. *Held* that there was no merit to the defendant's claim that the 2015 amendment applied retroactively: this court has determined previously that the 2015 amendment to § 21a-279 does not apply retroactively, our Supreme Court previously has rejected the applicability in Connecticut of the amelioration doctrine, which the defendant claimed applied and which provides that amendments that reduce a statutory penalty for a criminal offense are applied retroactively, and the defendant's request that this court overrule that precedent was unavailing, as it is axiomatic that, as an intermediate appellate court, this court is bound by Supreme Court precedent and is unable to modify it, nor can this court overrule a decision made by another panel of this court in the absence of en banc consideration; accordingly, the trial court should have rendered judgment denying rather than dismissing the defendant's motion to correct an illegal sentence.

Argued March 6—officially released April 2, 2019

Procedural History

Substitute information charging the defendant with two counts each of the crimes of possession of narcotics

with intent to sell by a person who is not drug-dependent, possession of narcotics with intent to sell and possession of narcotics, and with the crime of possession of less than four ounces of a cannabis-type substance, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, and tried to the jury before *Dennis*, *J.*; verdict and judgment of guilty of possession of less than four ounces of a cannabis-type substance and of two counts of possession of narcotics, from which the defendant appealed to this court, which affirmed the judgment; thereafter, the Supreme Court denied the defendant's petition for certification to appeal; subsequently, the court, *Doyle*, *J.*, dismissed the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Improper form of judgment; judgment directed.*

James B. Streeto, senior assistant public defender, with whom, on the brief, was *Emily H. Wagner*, assistant public defender, for the appellant (defendant).

Jennifer F. Miller, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Craig P. Nowak*, senior assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, Haji Jhmalah Bischoff, appeals from the judgment of the trial court dismissing his motion to correct an illegal sentence. After reviewing the record and the parties' briefs, we conclude that the defendant's claim is barred by appellate precedent. We further conclude that the form of the judgment is improper, and, accordingly, we reverse the judgment dismissing the defendant's motion to correct an illegal sentence and remand the case to the trial court with direction to render judgment denying the defendant's motion.

The defendant was convicted of possession of heroin in violation of General Statutes (Rev. to 2013) § 21a-279 (a), possession of cocaine in violation of § 21a-279 (a), and possession of less than four ounces of a cannabis-type substance (marijuana) in violation of General Statutes (Rev. to 2013) § 21a-279 (c). *State* v. *Bischoff*, 182 Conn. App. 563, 569, 190 A.3d 137, cert. denied, 330 Conn. 912, 193 A.3d 48 (2018). The trial court merged the conviction of possession of heroin and possession of cocaine into a single conviction of possession of narcotics in violation of § 21a-279 (a), and sentenced the defendant to seven years incarceration, execution suspended after five years, and three years of probation. Id. On the defendant's conviction of possession of less than four ounces of marijuana, the court sentenced the defendant to a concurrent term of one year incarceration. Id.

In his direct appeal, this court considered and rejected the defendant's claim that he was entitled to be resentenced as a result of the legislative amendment to the crime of possession of narcotics. Specifically, we stated: "The defendant finally claims that he is entitled to resentencing on his conviction of possession of narcotics because the legislature has retroactively reclassified the violation of § 21a-279, for a first offense, as a class A misdemeanor, which carries a maximum sentence of one year of incarceration. See Public Acts, Spec. Sess., June, 2015, No. 15-2, § 1. The defendant concedes, as he must, that this court's holding in *State* v. *Moore*, 180 Conn. App. 116, 124, [182 A.3d 696, cert. denied, 329 Conn. 905, 185 A.3d 595] (2018), in which this court held that the 2015 amendment to § 21a-279 (a), which took effect October 1, 2015, does not apply retroactively and is dispositive of his claim. The defendant's claim that he is entitled to be resentenced must therefore fail." *State* v. *Bischoff*, supra, 182 Conn. App.

579–80. This court released the decision in the defendant's direct appeal on June 12, 2018. Id., 563. On September 20, 2018, our Supreme Court denied the defendant's petition for certification to appeal. *State* v. *Bischoff*, 330 Conn. 912, 193 A.3d 48 (2018).

On May 11, 2017, the defendant filed the present motion to correct an illegal sentence. He argued that the legislature had intended the 2015 amendment to apply retroactively. According to the defendant, the sentence imposed for his violation of § 21a-279 (a) was illegal because it exceeded the maximum sentence allowed under the 2015 amendment.

On December 22, 2017, the trial court issued a memorandum of decision dismissing the motion to correct an illegal sentence. It concluded that, in the absence of any language indicating that the amendment was to be applied retroactively to crimes committed prior to its effective date, the general rule in Connecticut is that courts apply the law in effect at the time of the offense. It also rejected the defendant's argument as to the amelioration doctrine, which provides that amendments that reduce a statutory penalty for a criminal offense are applied retroactively. Specifically, the trial court stated: "[B]oth our Supreme and Appellate Courts have rejected application of the amelioration doctrine based on the plain language of the savings statutes." See General Statutes §§ 54-194 and 1-1 (t).

In his principal appellate brief, the defendant acknowledges that the present case is controlled by *State* v. *Moore*, supra, 180 Conn. App. 116, and *State* v. *Kalil*, 314 Conn. 529, 107 A.3d 343 (2014). In *Moore*, this court rejected a claim that the 2015 amendment to § 21a-279 (a) applied retroactively. *State* v. *Moore*, supra, 120–25. Specifically, we concluded that the 2015 amendment contained no language indicating a retroactive application and that the absence of such language

was informative as to the legislature's intent. Id., 123–24. "Thus, if the legislature had intended the 2015 amendment to apply retroactively, it could have used clear and unequivocal language indicating such intent. It did not do so. A prospective only application of the statute is consistent with our precedent and the legislature's enactment of the savings statutes . . . and, therefore, the statutory language is not susceptible to more than one plausible interpretation." (Citation omitted.) Id., 123; see also *State* v. *Bischoff*, supra, 182 Conn. App. 579–80. Additionally, in accordance with *State* v. *Kalil*, supra, 314 Conn. 552–53, this court rejected the applicability of the amelioration doctrine in Connecticut. *State* v. *Moore*, supra, 124.

In the present appeal, the defendant expressly asks us to overrule *State* v. *Kalil*, supra, 314 Conn. 529, *State* v. *Moore*, supra, 180 Conn. App. 116, and *State* v. *Bischoff*, supra, 182 Conn. App. 563. We reject this invitation. First, "[i]t is axiomatic that, [a]s an intermediate appellate court, we are bound by Supreme Court precedent and are unable to modify it . . . . [W]e are not at liberty to overrule or discard the decisions of our Supreme Court but are bound by them. . . . [I]t is not within our province to reevaluate or replace those decisions." (Internal quotation marks omitted.) *State* v. *Montanez*, 185 Conn. App. 589, 605 n.5, 197 A.3d 959 (2018); see also *State* v. *Corver*, 182 Conn. App. 622, 638 n.9, 190 A.3d 941, cert. denied, 330 Conn. 916, 193 A.3d 1211 (2018). Second, "[i]t is this court's policy that we cannot overrule a decision made by another panel of this court absent en banc consideration." *State* v. *Joseph B.*, 187 Conn. App. 106, 124 n.13, A.3d (2019); *State* v. *Carlos P.*, 171 Conn. App. 530, 545 n.12, 157 A.3d 723, cert. denied, 325 Conn. 912, 158 A.3d 321 (2017); see also *State* v. *Houghtaling*, 326 Conn. 330, 343, 163 A.3d 563 (2017) (Appellate Court panel appropriately recognized it was bound by that court's own

precedent), cert. denied, U.S. , 138 S. Ct. 1593, 200 L. Ed. 2d 776 (2018). For these reasons,[1] we conclude that the defendant's appeal has no merit.

The form of the judgment is improper, the judgment dismissing the defendant's motion to correct an illegal sentence is reversed and the case is remanded with direction to render judgment denying the defendant's motion.

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[1] Due in part to the timing of the ultimate resolution of the defendant's direct appeal and the filing of the motion to correct an illegal sentence, the state claimed, for the first time on appeal, that the defendant's claim is barred by res judicata. While we have considered a res judicata defense under similar circumstances; see *State* v. *Martin M.*, 143 Conn. App. 140, 150–57, 70 A.3d 135, cert. denied, 309 Conn. 919, 70 A.3d 41 (2013); *State* v. *Osuch*, 124 Conn. App. 572, 580–84, 5 A.3d 976, cert. denied, 299 Conn. 918, 10 A.3d 1052 (2010); we decline to travel that path in the present case.