# BENISTAR EMPLOYER SERVICES TRUST COMPANY ET AL. *v.* JAMES J. BENINCASA ET AL.

(AC 40081)

Lavine, Alvord and Prescott, Js.

*Syllabus*

The plaintiffs sought to vacate an arbitration award in favor of the defendants, who filed a motion to confirm the award, pursuant to which an arbitrator had awarded the defendants monetary damages relating to the purchase of certain life insurance policies by the plaintiffs on behalf of the defendants. The trial court denied the plaintiffs' application to vacate the award, granted the defendants' motion to confirm the award and rendered judgment thereon, from which the plaintiffs appealed to this court. *Held*:

1. The plaintiffs could not prevail on their claim that the award should have been vacated because it was not timely issued, which was based on their claim that the award was not made within thirty days from the close of the hearing as required by statute (§ 52-416 [a]); given that the plaintiffs had informed the arbitrator of their intention to file counterclaims and to initiate a separate arbitration arising out of the same facts and circumstances at issue in the present arbitration, and had asked the arbitrator to keep the matter open after the next week's hearings and to refrain from issuing any award in connection with those hearings, so that they could assert their claims and consolidate the arbitration matters, the trial court properly determined that the arbitrator reasonably awaited the closing of the hearing in expectation of the submission of the additional arbitration, and it was reasonable for the arbitrator to

close the hearing on April 18, 2013, as it only then became clear that the two arbitrations could not be consolidated, and closing the hearing after the determination that the cases could not be consolidated was consistent with the public policy that favors arbitration for efficiency and economic reasons, and was a reasonable interpretation of the previously stated intentions of the plaintiffs, who did not object until May 13, 2013, which reasonably led the arbitrator to conclude that he was prolonging the hearings with the consent of the parties.

2. The plaintiffs could not prevail on their claim that because the arbitration award was predicated on a manifest disregard of the law, the trial court improperly denied their application to vacate the award; the plaintiffs' claim that the arbitrator's award was in manifest disregard of the law relied on the argument that the arbitrator ignored contract law in his improper factual determination that elements of a contract existed, it was clear from the award that the arbitrator considered the plaintiffs' argument but disagreed with it, and it was not for this court to review the evidence or otherwise second-guess the arbitrator's factual determination where, as here, the arbitration submission was unrestricted.

3. The plaintiffs' claim that the arbitration award should have been vacated because it was not mutual, final and definite was unavailing: the award definitively set the liability and legal responsibility of the plaintiffs, even though it did not determine a precise amount of damages, which could not be determined by the arbitrator because the damages had yet to be calculated by the Internal Revenue Service (IRS), and given that the parties were well aware of the nature of the involvement of the IRS when they agreed to have the matter resolved through arbitration, to vacate the award when it was as final and definite as existing circumstances permitted would have undermined the strong public policy favoring arbitration as a means of resolving disputes; moreover, the fact that the arbitrator retained jurisdiction to interpret and resolve any disputes arising from the final effectuation of his ruling did not undermine the finality of the award.

4. The trial court properly denied the plaintiffs' application to vacate the arbitration award on public policy grounds; the arbitrator's conclusion that the transfer of the life insurance policies to the defendants created a tax liability that would not have otherwise been imposed but for the transfer did not violate an explicit, well-defined, and dominant public policy of this state but, rather, was a factual finding that this court could not reverse or second-guess.

Argued December 10, 2018—officially released April 23, 2019

*Procedural History*

Application to vacate an arbitration award, brought to the Superior Court in the judicial district of Hartford, where the defendants filed a motion to confirm

the award; thereafter, the matter was tried to the court, *Noble*, *J.*; judgment denying the application to vacate and granting the motion to confirm, from which the plaintiffs appealed to this court. *Affirmed.*

*Daniel J. Krisch*, with whom were *Logan A. Carducci* and, on the brief, *Daniel P. Scapellati*, for the appellants (plaintiffs).

*Mark J. Kallenbach*, pro hac vice, with whom was *Jerome Patger*, for the appellees (defendants).

*Opinion*

LAVINE, J. The plaintiffs, Benistar Employer Services Trust Company (BESTCO) and Benistar Admin Services, Inc. (BASI), appeal from the judgment of the trial court denying their application to vacate and granting a motion to confirm an arbitration award in favor of the defendants, James J. Benincasa and Jody L. Benincasa. On appeal, the plaintiffs claim that the court improperly denied the application to vacate the arbitration award because the award was (1) not timely issued, (2) predicated on a manifest disregard of the law, (3) not mutual, final and definite, and (4) in violation of public policy. We disagree and affirm the judgment of the trial court.

The following undisputed facts, as found by the trial court, and procedural history are relevant to this appeal. "The dispute which brought the parties to arbitration involved the purchase of two $16 million individual whole life insurance policies on the lives of the [defendants], who were the president and vice president, respectively, and sole owners of [Mortgages Unlimited, Inc. (MUI)], an S corporation. The policies were purchased by the Benistar 419 Plan and Trust (plan), a multiple employer welfare benefit plan. The funding for the purchase of the policies came from MUI's participation in, and contributions to, the plan. BESTCO was the plan sponsor, and BASI was the administrator of

the plan. The Plan was designed to comply with Internal Revenue Code, 26 U.S.C. § 419A (f) (6). In its conception, the plan was to provide tax deductions to participating employers, such as MUI, for contributions paid by them to the plan's trust fund. The contributions, in turn, funded the premiums for preretirement life insurance policies for key employees under the plan. The Plan issued a certificate of coverage to the employer, MUI, listing the participants as the [defendants], each of whom was to receive $16 million in death benefits. In this case, MUI contributed [$700,000] annually to fund the policies between 2001 and 2004, totaling $2.8 million. The contributions to the plans were, in fact, claimed as tax deductions by MUI.

"In 2004, MUI transferred the benefits and life insurance policies from the plan to the Grist Mill Trust Welfare Benefit Plan out of concern that the plan would no longer support tax free contributions to the life insurance policies. Benistar 419 Plan Services, Inc., was the Grist Mill [Trust Welfare Benefit] Plan's sponsor and administrator. The [defendants], as participants, and MUI, as employer, shortly thereafter, terminated their participation in the Grist Mill Trust [Welfare Benefit Plan], and the [defendants] took possession of the policies in their own names. The [defendants] were charged $33,546.90 for the surrender of the policies.

"The Commissioner of Internal Revenue (commissioner) challenged the validity of the tax deductions and ultimately issued the [defendants] a notice of deficiency on their personal income taxes on the basis that the contributions to the plan were payments on their personal behalf and were not ordinary and necessary business expenses of their employer, MUI, under 26 U.S.C. § 162 (a). The commissioner also asserted that the distribution of the two life insurance policies resulted in taxable income to the [defendants], which they failed to report. In addition, the commissioner

imposed underpayment penalties pursuant to 26 U.S.C. § 6662A. . . .

"The [defendants] filed a claim for arbitration against the [plaintiffs][1] on November 29, 2007, asserting, among other theories of liability, breach of contract for their failure to provide a tax exempt vehicle to purchase the life insurance policies. The arbitration was sought in accordance with identical provisions found in the plan Administration Agreement and the Grist Mill Trust Welfare Benefit Plan Administration Fee Agreement, which provided in relevant part: 'Any dispute or controversy arising under or in connection with this Agreement or with respect to the Employer's participation in the Plan shall be settled by Arbitration, conducted by a single arbitrator in New York City in accordance with the rules of the American Arbitration Association [(AAA)] then in effect. . . .' The [defendants] submitted, inter alia, breach of contract and fiduciary duty claims to arbitration.

"Evidence in the arbitration was taken on March 5 and 6, 2013, [before Arbitrator Jeffrey G. Stein]. The arbitrator's award dated May 15, 2013, was transmitted to AAA on May 17, 2013. The award recited a prearbitration request by the [plaintiffs] to add a cross claim in the context of the pending arbitration submittal, which Stein had denied on the basis that the AAA rules required them to file a separate arbitration and then consolidate the cases. Stein declared in the award that '[o]n or about April 18, 2013 . . . the record was closed.' Substantively, Stein made the specific finding that the [plaintiffs] 'breached their promises and obligations to [the defendants] in numerous ways.' Pertinently, this included a breach of the [plaintiffs'] 'contractual fiduciary duties [by] failing to provide a

[1] The defendants named other individuals and entities who are not parties to the present action or this appeal.

compliant 26 U.S.C. § 419A (f) (6) plan and, most specifically, by not determining the maximum amount of contributions that could be contributed. . . . [The plaintiffs] . . . failed to provide a tax free transfer of the policy out of the plan to the [defendants].' Stein awarded the [defendants] the following damages: (1) taxes, including 26 U.S.C. § 6662A taxes, as of the date of the award attributable to 'the transfer of the [life insurance] polic[ies] as part of the exit strategy from the failed Plan'; (2) 'the $33,546.90 transfer fee' for the surrender of the policies; (3) the attorney's fees for 'the legal defense of the [Internal Revenue Service (IRS)] assessment' . . . and (4) any state taxes assessed for the transfer of the policies. Because the amount of the federal and state taxes and penalties had not yet been determined, and no findings as to such were made by Stein, he retained jurisdiction to interpret and resolve any disputes concerning the award. The parties moved for clarification of the award. In the clarification, Stein explained that the [defendants] had 'not [yet] settled with the IRS and, therefore, there [could be] no set amount of taxes and penalties that could be awarded.' Stein observed that his award detailed 'each component of the ultimate settlement [the defendants] [would] reach with the IRS and which party is responsible for that component. [Stein] believe[d] that [the award was] specific and clear enough.' " (Footnotes added and omitted.) Additional facts will be set forth as needed.

Before reaching the plaintiffs' claims on appeal, we underscore that the policy behind arbitration compels a deferential standard of review of arbitration awards. "[T]he law in this state takes a strongly affirmative view of consensual arbitration. . . . Arbitration is a favored method to prevent litigation, promote tranquility and expedite the equitable settlement of disputes. . . . As a consequence of our approval of arbitral proceedings, our courts generally have deferred to the award that

the arbitrator found to be appropriate. . . . The scope of review for arbitration awards is exceedingly narrow. . . . Additionally, every reasonable inference is to be made in favor of the arbitral award and of the arbitrator's decisions. . . .

"Despite the wide berth given to arbitrators and their powers of dispute resolution, courts recognize three grounds for vacating arbitration awards. . . . As a routine matter, courts review de novo the question of whether any of those exceptions apply to a given award. . . . The first ground for vacating an award is when the arbitrator has ruled on the constitutionality of a statute. . . . The second acknowledged ground is when the award violates clear public policy. . . . Those grounds for vacatur are denominated as common-law grounds and are deemed to be independent sources of the power of judicial review. . . . The third recognized ground for vacating an arbitration award is that the award contravenes one or more of the statutory proscriptions of . . . [General Statutes] § 52-418. . . .

"Where the submission does not otherwise state, the arbitrators are empowered to decide factual and legal questions and an award cannot be vacated on the [ground] that . . . the interpretation of the agreement by the arbitrators was erroneous. Courts will not review the evidence nor, where the submission is unrestricted,[2] will they review the arbitrators' decision of the legal questions involved. . . . In other words, [u]nder an

[2] "A submission is restricted if the agreement conferring the arbitrator's authority over the dispute limits the breadth of issues to be resolved, reserves explicit rights or conditions the award on court review. In the absence of any such restraints, it is unrestricted. *Rocky Hill Teachers' Assn.* v. *Board of Education*, 72 Conn. App. 274, 278 n.6, 804 A.2d 999, cert. denied, 262 Conn. 907, 810 A.2d 272 (2002)." *Board of Education* v. *Local R1-126, National Assn. of Government Employees*, 108 Conn. App. 35, 40 n.3, 947 A.2d 371 (2008). The record does not disclose the existence of a formal written submission in this case; therefore, we treat the submission as unrestricted.

unrestricted submission, the arbitrators' decision is considered final and binding; thus the courts will not review the evidence considered by the arbitrators nor will they review the award for errors of law or fact. . . . Furthermore, in applying this general rule of deference to an arbitrator's award, [e]very reasonable presumption and intendment will be made in favor of the [arbitral] award and of the arbitrators' acts and proceedings." (Citations omitted; footnote altered; internal quotation marks omitted.) *Board of Education* v. *Local R1-126, National Assn. of Government Employees*, 108 Conn. App. 35, 39–41, 947 A.2d 371 (2008).

I

The plaintiffs claim that the trial court improperly denied their application to vacate the arbitration award because the award was not timely issued. Specifically, the plaintiffs argue that the award was not made within thirty days from the close of the hearing and, thus, pursuant to General Statutes § 52-416 (a), the arbitration award has "no legal effect." We disagree.

The standard of review for statutory interpretation is well settled. "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, including the question of whether the language actually does apply. . . .

"Moreover, [t]his court will not reverse the factual findings of the trial court unless they are clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . In making this determination, every

reasonable presumption must be given in favor of the trial court's ruling." (Citation omitted; internal quotation marks omitted.) *Petrucelli* v. *Travelers Property Casualty Ins. Co.*, 146 Conn. App. 631, 635–36, 79 A.3d 895 (2013), cert. denied, 311 Conn. 909, 83 A.3d 1164 (2014).

"Section 52-416 addresses the time within which an award must be rendered. Subsection (a) of § 52-416 provides: 'If the time within which an award is rendered has not been fixed in the arbitration agreement, the arbitrator or arbitrators or umpire shall render the award within thirty days from the date the hearing or hearings are completed, or, if the parties are to submit additional material after the hearing or hearings, thirty days from the date fixed by the arbitrator or arbitrators or umpire for the receipt of the material. An award made after that time shall have no legal effect unless the parties expressly extend the time in which the award may be made by an extension or ratification in writing.' " *Bumbolow* v. *Foreman*, 151 Conn. App. 307, 316–17, 95 A.3d 1153, cert. denied, 314 Conn. 916, 100 A.3d 405 (2014).

When reviewing the closing date of the hearing, "it is apparent to us that we should test the arbitrator's decision [of the hearing's closing date] by whether it was reasonable, under the circumstances . . . to extend the completion date of the hearing . . . ." *Carr* v. *Trotta*, 7 Conn. App. 272, 276, 508 A.2d 799, cert. denied, 200 Conn. 806, 512 A.2d 229 (1986).

In *Carr*, this court concluded that it was reasonable for the completion date of the hearing to be extended until the arbitrator received the transcript, as "a transcript aids the trier in the same manner as a brief does, and that it is wholly consistent with good trial practice, when the trier feels the need, to request a transcript of the proceeding before rendering the decision." Id.

Additionally, this court noted that "[t]here is no requirement that [the arbitrator] seek the consent of the parties before [extending the completion date]." Id., 275. This court also concluded in *Shore* v. *Haverson Architecture & Design, P.C.*, 92 Conn. App. 469, 475, 886 A.2d 837 (2005), cert. denied, 277 Conn. 907, 894 A.2d 988 (2006), that it was reasonable for an arbitrator to choose a closing date that allowed the parties additional time to submit further documentary evidence. And, in *Bumbolow* v. *Foreman*, supra, 151 Conn. App. 318–19, this court found that it was reasonable for an arbitrator to keep a hearing open in order to receive audit results.

The following additional facts, as found by the trial court, are relevant to our resolution of the plaintiffs' claim. "Rulings on dispositive motions were issued by Stein on October 23, 2012. Joseph M. Pastore III, counsel for the [plaintiffs], wrote to Stein to advise him that the [plaintiffs] were going to file a counterclaim against the [defendants] and a third-party claim against MUI for indemnification. Stein replied by e-mail on November 7, 2012. While he deferred to Veneda Edenfield, AAA senior case manager, as to the application of the AAA rules, Stein expressed his belief that the [plaintiffs] would need to file an arbitration demand and commence an action which would, thereafter, be joined with the arbitration before him. . . .

"On February 28, [2013], Pastore wrote again to Stein, indicating that the [plaintiffs] intended to initiate a separate arbitration against the [defendants] to assert a variety of claims which arose out of the same facts and circumstances at issue in the arbitration before Stein. Pastore asked for a formal affirmation from Stein that the [plaintiffs] would not be precluded from asserting such a counterclaim in a subsequent AAA proceeding or in a court of law. In the alternative, *Pastore asked that Stein keep the matter open after the hearings scheduled for the following week* and to refrain from

issuing any award in order to allow the [plaintiffs] to assert their intended counterclaims, including a claim for attorney's fees, against the [defendants] in a separate AAA arbitration, which could then be consolidated with the pending action to allow further hearings on the [plaintiffs'] claims against the [defendants] and/or MUI.

"Stein replied on March 1, 2013, by e-mail: 'I did not preclude anyone from doing anything. What I said in November, [2012], is that in arbitration you don't file a counterclaim or cross claim, you file a demand for arbitration. I am not going to opine on the consequences that stem from your failure to do so. I assume that if you file a demand for arbitration in 2013 for a breach in 2004 your adversary will assert a [statute of limitations] defense. Just guessing. As to claims for attorney's fees, let's wait and see.' On March 4, 2013, the [plaintiffs][3] filed such separate claims with [AAA against] the [defendants] and MUI . . . .

"The hearing on the [defendants'] claims in this arbitration took place on March 5, 2013, and March 6, 2013. On March 7, 2013, Stein wrote via e-mail that he thought the facts were clear and the law already fully briefed and resolved. 'Unless you all strenuously object, I am ready to issue an award and can do so in a matter of weeks. If anyone still wants to send me something, let me know, but otherwise [let's] close this and get it resolved quickly.' By a later e-mail that day, Stein provided the parties with an opportunity to file posthearing briefs through March 14, 2013. Although the record is not clear, apparently later that day, Mark Kallenbach, counsel for the [defendants], advised Stein that he had received the [plaintiffs'] arbitration claims and asked if Stein would hear a motion to dismiss the claims. Stein replied, on that same date, that he had not been assigned

[3] Benistar 419 Plan Services, Inc., Nova Benefit Plans, LLC, and Daniel E. Carpenter joined BASI.

the case and would have no authority to rule on such a motion. Pastore e-mailed Kallenbach and Stein, commenting that Stein did not procedurally have the authority to rule on the new matter.

"In response, Stein replied to all that he was aware of the intent of the [plaintiffs] to consolidate their claims, asked Edenfield as to the procedure for consolidation and indicated that he would delay his decision. 'I will hold my hearing determination in abeyance awaiting guidance from AAA.' Stein, thereafter, e-mailed the parties on March 15, 2013, to advise them that AAA informed him that the [plaintiffs'] claim was not 'a labor/benefits case but rather a commercial case' and that the parties would receive a list of arbitrators from which they would choose. Stein indicated that he believed he would be on that list and that any motions made in that file would be made to the chosen arbitrator. . . .

"On April 17, 2013, Stein again e-mailed Kallenbach and Pastore, indicating that he was informed by AAA that another arbitrator had been selected in the new case and he would, therefore, be issuing an opinion in the case before him. On May 13, 2013, Pastore e-mailed a letter to the AAA case manager, noting that the arbitration award had not been issued within thirty days, as required by AAA Rule 30 and Connecticut law, that [the plaintiffs] did not consent to the length of time it [was] taking for the award to be rendered, and that Pastore had not waived any future objection that the award [was] untimely. In response to Pastore's letter, Stein replied that he had 'told the parties that [he] was waiting on assignment regarding the new arbitration and that [he] would not begin to write the award until [he] heard from the parties about possible assignment and consolidation. No one objected to that.' The award was dated May 15, 2013, and e-mailed to Edenfield and counsel for the parties on May 17, 2013. The award makes a specific finding that '[a]t that time, on or about April

18, 2013, just before my scheduled trip to Europe, the record was closed.' This comment likely refers to Stein's e-mail of April 17, 2013, where he indicated that he would be issuing an opinion." (Emphasis added; footnotes added and omitted.)

The trial court applied the reasonableness standard when reviewing the closing of the hearing and found that "Stein reasonably awaited the closing of the hearings in expectation of the submission of [the] additional element [of the separate AAA arbitration]" and, therefore, concluded that the award was timely. The plaintiffs argue that the trial court improperly interpreted § 52-416 (a) and mistakenly concluded that the award was timely because the statute is clear and unambiguous that the award must be made within thirty days of the date that the hearing was completed or the date fixed for the receipt of material, and that "[t]he arbitration ended March 6, [2013], and the [plaintiffs] submitted their posthearing brief by March 14, 2013, yet the arbitrator did not render his decision until May 17, 2013." Therefore, the plaintiffs argue, the trial court improperly confirmed the award, as it was untimely as a matter of law. We disagree.

Our case law is clear that the closing date of the hearing is reviewed under a standard of reasonableness. *Carr* v. *Trotta*, supra, 7 Conn. App. 276. In the present matter, April 18, 2013, was a reasonable date for Stein to close the hearing, as it only then became clear that the two arbitrations could not be consolidated. Closing the hearing after the determination that the cases could not be consolidated is not only consistent with the public policy that favors arbitration for efficiency and economic reasons; see *Remax Right Choice* v. *Aryeh*, 100 Conn. App. 373, 381, 918 A.2d 976 (2007); but also was a reasonable interpretation of the plaintiffs' previously stated intentions. The plaintiffs had informed Stein of their intention to file counterclaims and also

notified him of their intention to initiate a separate arbitration. The plaintiffs asked him to "keep this matter open after next week's hearings, and refrain from issuing any award in connection with next week's hearings, in order to allow the [plaintiffs] to assert their intended claims . . . by initiation of a separate AAA arbitration, which could then be consolidated with this action . . . ." Further, although an arbitrator does not need the consent of the parties to extend the completion date of a hearing; see *Carr* v. *Trotta*, supra, 275; the plaintiffs did not object until May 13, 2013, which reasonably led Stein to conclude that he was prolonging the hearings with the consent of the parties. Therefore, we conclude that the trial court did not err in determining that the closing date of April 18, 2013, was reasonable and that the award was timely.

II

The plaintiffs' second claim is that the trial court improperly denied their application to vacate the arbitration award because the award was predicated on a manifest disregard of the law. Specifically, the plaintiffs argue that Stein ignored well settled contract law and improperly concluded that a contract existed despite the lack of elements necessary for a contract, and that the trial court erred in upholding the award predicated on that conclusion. We disagree.

Pursuant to § 52-418 (a) (4), an arbitration award shall be vacated "if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made." "[A]n award that manifests an egregious or patently irrational application of the law is an award that should be set aside pursuant to § 52-418 (a) (4) because the arbitrator has exceeded [his] powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted

was not made." (Internal quotation marks omitted.) *Economos* v. *Liljedahl Bros., Inc.*, 279 Conn. 300, 306, 901 A.2d 1198 (2006). Our Supreme Court has emphasized that "the manifest disregard of the law ground for vacating an arbitration award is narrow and should be reserved for circumstances of an arbitrator's extraordinary lack of fidelity to established legal principles.

"So delimited, the principle of vacating an award because of a manifest disregard of the law is an important safeguard of the integrity of alternat[ive] dispute resolution mechanisms. Judicial approval of arbitration decisions that so egregiously depart from established law that they border on the irrational would undermine society's confidence in the legitimacy of the arbitration process. . . . Furthermore, although the discretion conferred on the arbitrator by the contracting parties is exceedingly broad, modern contract principles of good faith and fair dealing recognize that even contractual discretion must be exercised for purposes reasonably within the contemplation of the contracting parties. . . .

"In *Garrity* [v. *McCaskey*, 223 Conn. 1, 9, 612 A.2d 742 (1992)], [our Supreme Court] adopted the test enunciated by the United States Court of Appeals for the Second Circuit in interpreting the federal equivalent of § 52-418 (a) (4). . . . The test consists of the following three elements, all of which must be satisfied in order for a court to vacate an arbitration award on the ground that the arbitration panel manifestly disregarded the law: (1) the error was obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator; (2) the arbitration panel appreciated the existence of a clearly governing legal principle but decided to ignore it; and (3) the governing law alleged to have been ignored by the arbitration panel is well defined, explicit, and clearly applicable." (Internal quotation marks omitted.) *Economos* v. *Liljedahl Bros.*, supra, 279 Conn. 306–307.

When reviewing the plaintiffs' argument that the award was a manifest disregard of the law, the trial court concluded that "the award is clear that Stein considered all of the contracts and communications between the parties. The award incorporated Stein's review of the plan, which claimed to provide 'virtually unlimited [tax] deductions for the employer' and asserted that deductions to the plan were tax deductible as ordinary and necessary expenses of the business pursuant to 26 U.S.C. § 162 (a). Although Stein did not expressly state the basis for his determination that the [plaintiffs] failed to provide a tax free transfer of the policy out of the plan to the [defendants], the parties have submitted a letter from the plan to participating employers, which described the ability of the plan to distribute a policy to a covered employee upon the participating employer's termination of participation in the plan. The award is clear that Stein considered the [plaintiffs'] argument that the [defendants] had no evidence of a contract that was breached. He simply disagreed. As such, these are findings of fact which the court is not at liberty to reverse." We agree.

The plaintiffs claim, in essence, that this court may review the arbitrator's ultimate determination because it is not in alignment with contract law and the evidence presented to the arbitrator. It is well settled that such a claim "has no basis in arbitration law. . . . [Such an] argument appears to be a thinly veiled attempt to have the award vacated on the ground that it was not supported by any evidence presented at the hearings. . . . [Our Supreme Court] considered a similar argument in *Milford Employees Assn.* v. *Milford*, 179 Conn. 678, 684, 427 A.2d 859 (1980), wherein the plaintiffs assert[ed] that, as a matter of law, the evidence required a conclusion in their favor. In rejecting the plaintiffs' argument, [our Supreme Court] noted that the plaintiffs were essentially requesting a full trial on their claim,

which § 52-418 does not permit. . . . [Our Supreme Court] explained: The parties freely bargained for the remedy of arbitration in the event of a dispute of this nature. Having done so, they are bound by the decision lawfully rendered." (Citations omitted; internal quotation marks omitted.) *AFSCME, Council 4, Local 2663* v. *Dept. of Children & Families*, 317 Conn. 238, 257–58, 117 A.3d 470 (2015). "[C]ourts do not review the evidence or otherwise second-guess an arbitration panel's factual determinations when the arbitration submission is unrestricted." *Industrial Risk Insurers* v. *Hartford Steam Boiler Inspection & Ins. Co.*, 273 Conn. 86, 96, 868 A.2d 47 (2005). The plaintiffs' claim that Stein's award was in manifest disregard of the law relies on the argument that Stein ignored contract law in his improper factual determination that elements of a contract existed. Therefore, we agree with the trial court's rejection of the plaintiffs' argument that the award was made in manifest disregard of law.

III

The plaintiffs' third claim is that the trial court improperly denied the application to vacate the arbitration award because the award was not mutual, final and definite. Specifically, the plaintiffs argue that because the defendants' litigation with the IRS was ongoing at the time of the award, there was not a definite amount of taxes, penalties, or legal fees, as needed for the award to be mutual, final and definite. We disagree.

"In assessing whether an arbitrator has exceeded his or her powers, the basic test has become the comparison of the award with the submission to determine whether the award conforms to the submission.[4] . . .

[4] We again note; see footnote 2 of this opinion; that, upon review of the record, it does not appear that the parties made a formal submission in this case. In an e-mail from Stein to the parties, Stein stated that he "hoped that [his] decision [on dispositive motions] would supply [the simple statement of the issue needed]." Additionally, in the posthearing decision and award, Stein articulated the questions before him as: "(1) Did [the defendants]

Conformity with § 52-418 also requires that the award meet the minimum requirements of being mutual, final and definite. [A]n award must be final as to the matters submitted so that the rights and obligations of the parties may be definitely fixed." (Footnote added; internal quotation marks omitted.) *Board of Education* v. *Local R1-126, National Assn. of Government Employees*, supra, 108 Conn. App. 42.

"In support of its claim that the award is indefinite, the board cites *State* v. *AFSCME, Council 4, Local 1565*, 49 Conn. App. 33, 713 A.2d 869 (1998), aff'd, 249 Conn. 474, 732 A.2d 762 (1999), and *Rocky Hill Teachers' Assn.* v. *Board of Education*, [72 Conn. App. 274, 804 A.2d 999, cert. denied, 262 Conn. 907, 810 A.2d 272 (2002)] . . . . [These cases] hold that when future negotiations are required by an arbitration award, that award is indefinite and fails to conform to the requirements of § 52-418. In *AFSCME, Council 4, Local 1565*, the aggrieved party was a correction officer who wrongly had been dismissed from her job. The arbitration award ordered the grievant to be reinstated at *either* the Niantic correctional facility or at an alternate facility that would be agreeable to all parties. This court concluded that the language of the award was indefinite because it did not specify an exact location for placement and, thus, left the location for the placement open to negotiation, and, therefore, it cannot be said to fix definitively the rights and obligations of the parties. . . .

"In *Rocky Hill Teachers' Assn.*, the issue was the calculation of employee contributions for health and dental care premiums. In the award, the arbitrator ordered the parties to negotiate the issue of whether to include the dental costs within the formula to determine teacher

suffer any damages? And (2), if so, how can they be calculated and (3) who should be responsible? . . . At the hearing, the issues were whether [the plaintiffs] breached their contractual duties to [the defendants], including their contractual breach of fiduciary duties . . . ."

contributions toward medical/health premiums. In the event that said negotiations do not result in an agreement between the parties within thirty (30) days, I order the parties to submit this issue to binding arbitration . . . . This court concluded in that case, as in *AFSCME, Council 4, Local 1565*, that because the award similarly required further negotiation, it thereby failed to fix the rights and obligations of the parties and was not final under § 52-418." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Board of Education* v. *Local R1-126, National Assn. of Government Employees*, supra, 108 Conn. App. 42–43.

Those two cases are distinguishable from the present circumstances because in *AFSCME, Council 4, Local 1565*, and *Rocky Hill Teachers' Assn.*, the awards left the determination of an issue submitted to the arbitrator open to further negotiation when a more definite remedy was available at the time. Here, upon review of the subject matter submitted, we conclude that the present situation differs, as the parties agreed to arbitrate at a time when no more definite remedy was available.[5]

"Section 52-418 (a) (4) provides that an award shall be vacated if 'the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award *upon the subject matter submitted* was not made.' In our construction of § 52-418 (a) (4), [our Supreme Court has], as a general matter, looked to a comparison of the award with the submission to determine whether the arbitrators have exceeded their powers." (Emphasis added.) *Garrity* v. *McCaskey*, supra, 223 Conn. 7.

[5] We additionally do not view the present situation to be similar to that of *AFSCME, Council 4, Local 1565*, where the remedy was left to the sole predilection of one of the parties. In this case, the record is unclear as to the extent of the opportunity, if any, for the defendants to negotiate with the IRS with respect to settlement of their tax liabilities attributable to their participation in this unsuccessful tax avoidance scheme.

The trial court found that "[t]he first element of damages definitely fixes the rights and obligations of the parties with respect to taxes and penalties owed by the [defendants] for the transfer of the policies from the Grist Mill Trust Welfare Benefit Plan and its termination. The award clearly does not identify a specific amount of damages but, as the [defendants] assert, [w]hatever resulting amount is what it is, [and] the [plaintiffs] are obliged to pay it as damages. The second element of damages, the $33,546.90 transfer, admits of no ambiguity. The obligation to pay the [defendants'] legal defense costs for the IRS assessment is unambiguously fixed as the legal responsibility of the [plaintiffs]. Similarly, any assessment of state taxes for the transfer of the policies, whatever the amount, must be paid by the [plaintiffs] as damages. The absence of a specific dollar figure does not render the rights and obligations in doubt as to who is entitled to receive or pay the damages. The award provides sufficient guidance from which the parties may identify the specific amounts of payments. The amounts are those sums assessed by the IRS and the appropriate state agency, as well as the legal defense costs of the IRS assessment charged by Attorney [Thomas] Brever. The [plaintiffs], therefore, have adequate information from Stein's decision to effectuate the award. The submission of the arbitration to Stein authorized him to use his own judgment and discretion and to render an appropriate award. . . . Stein exercised his judgment in effecting an award this court finds to be final and definite." (Citation omitted; internal quotation marks omitted.)

We agree that the award definitively set the liability and legal responsibility of the plaintiffs, even though it did not determine a precise amount of damages. The arbitrator could not possibly have determined the precise amounts, as they had yet to be calculated by the

IRS.[6] We note that although the plaintiffs argue that the unsettled amount of legal fees lacks definitiveness, much of the plaintiffs' argument focuses on Stein's factual finding that the plaintiffs promised to pay legal fees. As we have previously mentioned, "courts do not review the evidence or otherwise second-guess an arbitration panel's factual determinations when the arbitration submission is unrestricted." *Industrial Risk Insurers* v. *Hartford Steam Boiler Inspection & Ins. Co.*, supra, 273 Conn. 96.

We also emphasize that in the present matter, the subject matter submitted involved a contract dispute and determination of damages while the settlement litigation with the IRS was still ongoing. The parties were well aware of the active nature of the involvement of the IRS when they agreed to have the matter resolved through arbitration. To vacate an award when it was as final and definite as existing circumstances permitted, would undermine the strong public policy favoring arbitration as a means of resolving disputes. "[T]he parties voluntarily bargained for the decision of the arbitrator and, as such, the parties are presumed to have assumed the risks of and waived objections to that decision. . . . It is clear that a party cannot object to an award which accomplishes precisely what the arbitrators were authorized to do merely because that party dislikes the results. . . . Thus, [our Supreme Court has] previously held that the parties should be bound by a decision that they contracted and bargained for, even if it is regarded as unwise or wrong on the merits." (Citations omitted.) *American Universal Ins. Co.* v. *DelGreco*, 205 Conn. 178, 186–87, 530 A.2d 171 (1987).

[6] Again, there is no evidence in the record that would suggest that the amount of taxes and penalties is left to the predilection of the defendants. At best, the defendants may attempt to negotiate those amounts with the IRS and, if the plaintiffs are of the view that the defendants did not do so in good faith, the plaintiffs could attempt to raise this with the arbitrator, who has retained jurisdiction.

The plaintiffs additionally argue that the award was indefinite because Stein retained jurisdiction to interpret and resolve any disputes concerning the award. We are unpersuaded. "[W]hen there is no Connecticut case law directly on point, [the court] may turn for guidance to the applicable federal law." *Nussbaum* v. *Kimberly Timbers, Ltd.*, 271 Conn. 65, 73 n.6, 856 A.2d 364 (2004). The United States Court of Appeals for the Ninth Circuit has differentiated between a retention of jurisdiction in which a remedy is not provided to the parties that is not final and definite, and one that retained jurisdiction in a case in which a court held the award to be improper or if the parties were unable to agree on nonmandatory terms. *Sheet Metal Workers' International Assn., Local 206, AFL-CIO* v. *R.K. Burner Sheet Metal, Inc.*, 859 F.2d 758, 760–61 (9th Cir. 1988). It concluded that the latter was "final and binding as to all mandatory bargaining terms. Indeed, the award was final for all purposes if no court acted."[7] Id., 761.

[7] This reasoning has been used in our Superior Courts, which, although not binding on this court, is persuasive. In *State* v. *New England Health Care Employees Union, District 1199, AFL-CIO*, Superior Court, judicial district of Hartford, Docket No. CV-96-0558742 (April 16, 1997) (19 Conn. L. Rptr. 337, 339), the Superior Court upheld an award as final and definite when the arbitrator retained jurisdiction to "oversee the parties' progress in performing the 'ministerial' task of calculating the exact monetary amount . . . ." The court stated: "An arbitrator's use of boilerplate language generally retaining jurisdiction does not make an award nonfinal. *International Assn. of Bridge, Structural & Ornamental Iron Workers, Shopmen's Local Union 501* v. *Burtman Iron Works, Inc.*, 928 F. Supp. 83, 86 (D. Mass. 1996), citing *Dreis & Krump Mfg. Co.* v. *International Assn. of Machinists & Aerospace Workers, District No. 8*, 802 F.2d 247, 250 (7th Cir. 1986). The fact that an award requires prospective implementation does not make the relief awarded any less final or definite. *Dighello* v. *Busconi*, 673 F. Supp. 85, 91 (D. Conn. 1987).

"Courts have drawn an important distinction between awards that retain jurisdiction and direct the parties to follow specific instructions regarding implementation of the remedy and awards that retain jurisdiction but fail to provide any remedy and order the parties to fashion a remedy. In *Sheet Metal Workers' International Assn., Local 206, AFL-CIO* v. *R.K. Burner Sheet Metal, Inc.*, [supra, 859 F.2d 758] [*Local 206*], the court explained the foregoing distinction when it distinguished its holding in *Millmen Local*

In the present matter, Stein retained jurisdiction for the sole purpose of interpreting the award or resolving any potential disputes arising from the final effectuation of his ruling. Such a retention of jurisdiction does not involve fashioning a remedy and, thus, does not undermine the finality of the award.[8] We, therefore, agree with the trial court that the award was sufficiently definite and final.

IV

The plaintiffs' final claim is that the trial court improperly denied their application to vacate the arbitration award because the award violated public policy. Specifically, the plaintiffs argue that the award violates public policy by allowing for damages due to increased tax liability, as it would "place [the defendants] into a better position than if they had never invested in the 419 Plan," and by infringing on the freedom to contract through Stein's determination of contractual obligations. We disagree.

We begin by setting forth our standard of review. "[W]e favor arbitration as a means of settling private

*550, United Brotherhood of Carpenters & Joiners of America, AFL-CIO* v. *Wells Exterior Trim*, 828 F.2d 1373 (9th Cir. 1987) [*Millmen*]. *Millmen* vacated an award in which the arbitrator ruled only on whether the collective bargaining agreement was violated but declined to fashion any remedy, and sent the question of remedy back to the parties while retaining jurisdiction in case they were unable to reach an agreement. In contrast, the issue in *Local 206* involved an arbitration award in which the arbitrator ordered the parties to sign a [s]tandard [f]orm [u]nion [a]greement, but retained jurisdiction in the event that a court found that the remedy improperly imposed terms on nonmandatory subjects of bargaining and the parties were unable to reach [an] agreement on those terms. The court held that that award was final and binding. The arbitrator's contingent retention of jurisdiction did not render the award indefinite." *State* v. *New England Health Care Employees Union, District 1199, AFL-CIO*, supra, 19 Conn. L. Rptr. 339.

[8] We additionally note that Stein's retention of jurisdiction addresses the concern voiced by the plaintiffs regarding the reasonableness of attorney's fees.

disputes, [thus] we undertake judicial review of arbitration awards in a manner designed to minimize interference with an efficient and economical system of alternative dispute resolution. . . . We will, however, submit to higher scrutiny an arbitration award that is claimed to be in contravention of public policy. . . . [P]arties cannot expect an arbitration award approving conduct which is . . . contrary to public policy to receive judicial endorsement any more than parties can expect a court to enforce such a contract between them. . . . When a challenge to the arbitrator's authority is made on public policy grounds, however, *the court is not concerned with the correctness of the arbitrator's decision but with the lawfulness of enforcing the award*. . . .

"Thus, when a party challenges a consensual arbitral award on the ground that it violates public policy, and where that challenge has a legitimate, colorable basis, de novo review of the award is appropriate in order to determine whether the award does in fact violate public policy. . . . As this court maintained in [*State* v. *AFSCME*, *Council 4*, *Local 391*, 309 Conn. 519, 528, 69 A.3d 927 (2013)], we defer to the arbitrator's interpretation of the agreements regarding the scope of the [contract] provision . . . . We conclude only that as a reviewing court, we must determine, pursuant to our plenary authority and giving appropriate deference to the arbitrator's factual conclusions, whether the contract provision in question violates those policies. . . .

"To determine whether an arbitration award must be vacated for violating public policy, we employ a two-pronged analysis. . . . First, we must determine whether the award implicates any explicit, well-defined, and dominant public policy. . . . To identify the existence of a public policy, we look to statutes, regulations, administrative decisions, and case law. . . . Second, if the decision of the arbitrator does implicate a clearly

defined public policy, we then determine whether the contract, as construed by the arbitration award, violates that policy." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Burr Road Operating Co. II, LLC* v. *New England Health Care Employees Union, District 1199*, 316 Conn. 618, 629–31, 114 A.3d 144 (2015). "Our case law . . . has emphasized, however, that a reviewing court still is bound by the arbitrator's factual findings in making such a determination." *AFSCME, Council 4, Local 1565* v. *Dept. of Correction*, 298 Conn. 824, 837, 6 A.3d 1142 (2010).

The trial court found that "Stein essentially concluded that the transfer of the life insurance policies to the [defendants] created a tax liability that would not have otherwise been imposed but for the transfer. When a challenge to the arbitrator's authority is made on public policy grounds, however, the court is not concerned with the correctness of the arbitrator's decision but with the lawfulness of enforcing the award. . . . A court reviewing a violation of public policy challenge to an arbitration award is bound by the arbitrator's factual findings in making such a determination. Stein's conclusion, therefore, as to the creation of a tax liability that would not otherwise have been imposed but for the transfer is a factual finding this court may not reverse." (Citations omitted; internal quotation marks omitted.) We agree with the trial court.

The plaintiffs misconstrue Stein's factual findings as a violation of an explicit, well-defined, and dominant public policy. We see no such public policy in this case. As previously stated in parts II and III of this opinion, "courts do not review the evidence or otherwise second-guess an arbitration panel's factual determinations when the arbitration submission is unrestricted." *Industrial Risk Insurers* v. *Hartford Steam Boiler*

*Inspection & Ins. Co.*, supra, 273 Conn. 96. We, therefore, conclude that the trial court properly denied the application to vacate the award on public policy grounds.

The judgment is affirmed.

In this opinion the other judges concurred.

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## NOVA BENEFIT PLANS, LLC, ET AL. *v.* MORTGAGES UNLIMITED, INC., ET AL.
## (AC 40166)

Lavine, Alvord and Prescott, Js.

*Syllabus*

The plaintiffs appealed to this court from the judgment of the trial court denying their application to vacate and confirming an arbitration award in favor of the defendants. The arbitrator had found that the agreements and transactions that formed the basis for the present arbitration claims were the same as those that were the basis for the claims in a prior arbitration in 2007, and, thus, granted the defendants' motions to dismiss the arbitration action for lack of subject matter jurisdiction, concluding that the 2007 arbitration precluded the present arbitration. Thereafter, the trial court denied the plaintiffs' application to vacate the award and granted the defendants' motions to confirm the award, and this appeal followed. *Held* that the plaintiffs could not prevail on their claim that because the 2007 arbitration award was predicated on a manifest disregard of the law, the trial court's denial of their application to vacate the arbitration award was improper; the 2007 award on which the present arbitration award was predicated was confirmed by the trial court and appealed to this court, which determined, in a decision released today in *Benistar Employer Services Trust Co.* v. *Benincasa* (189 Conn. App. 304), that the 2007 arbitration award did not constitute a manifest disregard of the law, and, therefore, the plaintiffs' claim failed.

Argued December 10, 2018—officially released April 23, 2019

*Procedural History*

Application to vacate an arbitration award, brought to the Superior Court in the judicial district of Hartford, where the named defendant and the defendant James

J. Benincasa et al. filed separate motions to confirm the award; thereafter, the matter was tried to the court, *Noble*, *J.*; judgment denying the application to vacate and granting the motions to confirm, from which the plaintiffs appealed to this court. *Affirmed.*

*Daniel J. Krisch*, with whom were *Logan A. Carducci* and, on the brief, *Daniel P. Scapellati*, for the appellants (plaintiffs).

*Marc S. Edrich*, for the appellee (named defendant).

*Mark J. Kallenbach*, with whom was *Jerome Patger*, for the appellees (defendant James J. Benincasa et al.).

*Opinion*

LAVINE, J. The plaintiffs, Nova Benefit Plans, LLC, for the Grist Mill Trust, Benistar 419 Plan Services, Inc., for Benistar 419 Plan and Trust, Benistar Admin Services, Inc., and Daniel Carpenter appeal from the judgment of the trial court denying their application to vacate and confirming an arbitration award in favor of the defendants, James J. Benincasa, Jody L. Benincasa, and Mortgages Unlimited, Inc. The plaintiffs claim on appeal that the trial court improperly confirmed the award that was predicated on a prior related arbitration award, which, the plaintiffs argue, constituted a manifest disregard of the law. This court determined in *Benistar Employer Services Trust Co.* v. *Benincasa*, 189 Conn. App. 304, A.3d (2019), also released today, that the prior arbitration award did not constitute a manifest disregard of the law. We, therefore, affirm the judgment of the trial court.

The following undisputed facts, as articulated by the arbitrator, and procedural history are relevant to this appeal. "In [November], 2007, [James J. Benincasa and Jody L. Benincasa (Benincasas)] filed a demand for arbitration ('2007 arbitration') against [Benistar 419 Plan Services, Inc., Benistar Admin Services, Inc., The

Grist Mill Trust Welfare Benefit Plan, and Benistar Employer Services Trust Company (Benistar respondents)]. The 2007 arbitration was decided by Arbitrator Jeffrey G. Stein on May 15, 2013, and found that the [Benistar respondents] breached their contractual obligations and were jointly and severally liable to pay the [Benincasas] for the actual costs they incurred on the transfer of certain life insurance policies to themselves by the Grist Mill Trust.

"On or about March 4, 2013, [the plaintiffs in the present case] filed a separate demand for arbitration, seeking an award for breach of contract, indemnification, vexatious litigation, unjust enrichment and fraud or negligent misrepresentation . . . .

"It is not disputed that the several agreements and related transactions that form the basis for the instant arbitration claims are the same agreements and transactions that were the basis for the claims in the 2007 arbitration. In his final award, [Stein] stated that although he had not seen [the plaintiffs'] new arbitration demand, he 'carefully reviewed all the documents signed by the parties' and that 'all of these provisions are certainly entered into evidence before me, and I cannot determine the relative responsibilities of the parties without reviewing them.' . . . Stein stated that the [Benistar respondents] . . . focused 'on the provisions of the documents that they believed exculpated them from responsibility.' Those same exculpatory provisions form the basis for the contractual claims in this arbitration, and [the plaintiffs'] contention that [the defendants] failed to abide by those exculpatory provisions and other contractual provisions forms the basis for their . . . claims." (Footnotes omitted.)

On August 19, 2013, Arbitrator William F. Chandler granted the defendants' motions to dismiss the arbitration action for lack of subject matter jurisdiction, concluding that the 2007 arbitration precluded the present

arbitration. On September 13, 2013, the plaintiffs filed an application to vacate the award, and the defendants filed separate motions to confirm the award on November 13, 2013. On February 8, 2017, the trial court denied the plaintiffs' application to vacate and confirmed the arbitration award. The plaintiffs appealed.

The 2007 arbitration award, upon which the present arbitration award is predicated, was confirmed by the trial court. The plaintiffs appealed. On appeal, this court affirmed the judgment of the trial court, rejecting the claim that the 2007 award was predicated on a manifest disregard of the law. *Benistar Employer Services Trust Co.* v. *Benincasa*, supra, 189 Conn. App. 320.

The plaintiffs claim that the trial court improperly denied their application to vacate the award on the ground that the 2007 arbitration award was predicated on a manifest disregard of the law. We, however, have determined that the 2007 arbitration award was not made in manifest disregard of the law. The plaintiffs' claim, therefore, fails.

The judgment is affirmed.

In this opinion the other judges concurred.

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## AMERICAN INSTITUTE FOR NEURO-INTEGRATIVE DEVELOPMENT, INC. *v.* TOWN PLAN AND ZONING COMMISSION OF THE TOWN OF FAIRFIELD
## (AC 40102)

Keller, Moll and Lavery, Js.

*Syllabus*

The plaintiff appealed to the trial court from the decision by the defendant Town Plan and Zoning Commission of the Town of Fairfield (commission) denying its application for a special exception to use a portion of a former high school building it owned, which was located in a residential zone, to provide educational, vocational and other services to individuals

with severe learning disabilities. The trial court rendered judgment dismissing the appeal, from which the plaintiff, on the granting of certification, appealed to this court. *Held*:

1. The commission's conclusion that the plaintiff had not satisfied certain traffic related requirements under the town zoning regulations was improper, as the commission's ground for denying the special exception application was not supported by the record: the plaintiff presented testimony from an expert witness concluding that the roads could adequately accommodate the anticipated additional traffic generated, and although neighbors disagreed with the analysis of the plaintiff's expert, their comments concerning the adequacy of the streets to accommodate traffic and prospective hazards or congestion addressed matters of professional expertise, the neighbors did not purport to have the training or skills needed to properly assess traffic impact, nor did they offer an expert's opinion on their behalf, and their comments, thus, amounted to generalized concerns about hypothetical effects of increased traffic; moreover, the commission's conclusion essentially turned on public testimony regarding the mere potential for adverse effects to the neighborhood, which did not constitute substantial evidence.
2. The commission's other stated reason for denying the plaintiff's application, namely, that the plaintiff did not demonstrate that the proposed offices for charitable institutions would be nonprofit entities, was not supported by the record; in making its application, the plaintiff agreed to be bound by a condition that it would lease the office spaces only to nonprofit charitable corporations, that use was consistent with the zoning regulations, and, therefore, despite that express agreement and the absence of evidence that the proposed use would not be a permitted use, the commission's denial of the plaintiff's application on the basis of a concern that a for-profit entity might operate on the property was based on speculation.

Argued December 5, 2018—officially released April 23, 2019

*Procedural History*

Appeal from the decision of the defendant denying the plaintiff's request for a special exception, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Hon Richard P. Gilardi*, judge trial referee; judgment dismissing the appeal; thereafter, the court denied the plaintiff's motion to reargue, and the plaintiff, on the granting of certification, appealed to this court. *Reversed*; *judgment directed.*

*Michael T. Bologna*, with whom was William J. Fitzpatrick, for the appellant (plaintiff).

*Stanton H. Lesser*, for the appellee (defendant).

*Opinion*

LAVERY, J. The plaintiff, American Institute for Neuro-Integrative Development, Inc., appeals from the judgment of the trial court dismissing its appeal from the decision of the defendant, the Town Plan & Zoning Commission of the Town of Fairfield (commission), in which the commission denied the plaintiff's request for a special exception pursuant to § 27.0 of the Fairfield Zoning Regulations (regulations). On appeal, the plaintiff claims that the trial court erred when it concluded that the commission properly denied the plaintiff's special exception application on the basis of (1) concerns about increased off-site traffic, and (2) the plaintiff's inability to identify specific tenants that would occupy the proposed office spaces. We reverse the judgment of the trial court.

The record reveals the following facts. The plaintiff, a Connecticut 501 (c) (3) nonprofit corporation, owns an approximately 11.7 acre parcel of land at 309 Barberry Road in the Southport section of Fairfield. The property is located in a AA residential zone and is solely accessible by a private driveway off the Barberry Road cul-de-sac. The property contains two buildings: a former parochial elementary school, which the plaintiff now occupies; and the former Christ the King preparatory high school, which currently stands vacant but previously had hosted 132 students and ten faculty and staff adults.

In the former elementary school building, the plaintiff operates its Giant Steps School (Giant Steps), a private school that provides educational and therapeutic services for students with complex neurobiological based learning and developmental disorders. Giant Steps is approved by the Connecticut Department of Education to serve up to forty students between two and sixteen years of age.

The plaintiff wishes to use the former high school building for its proposed project, Next Steps. Next Steps would provide continued educational, vocational, and other services to Giant Steps graduates with severe learning disabilities, as well as to similarly situated adults, who otherwise would be ineligible for many programs after reaching twenty-one years of age.

On June 16, 2015, pursuant to § 27.0 of the regulations, the plaintiff applied to the commission for a special exception, requesting permission to use part of the former high school building for Next Steps. The application proposed designating six rooms in the building to host nonprofit agencies that would agree to provide vocational training opportunities to these young adults with severe learning disabilities. Section 27.0 of the regulations governs the granting of special exceptions. Section 5.1.4 of the regulations specifically enumerates the various special exception uses in all residential districts. As provided in the regulations, such permitted uses, subject to the securing of a special exception pursuant to § 27.0 of the regulations, include, inter alia, "schools" and "charitable institutions," provided they are "not conducted as a business, or for profit . . . ." Fairfield Zoning Regs., § 5.1.4 (d).

On July 14, 2015, the commission held a public hearing on the plaintiff's application. Attorney William Fitzpatrick appeared on behalf of the plaintiff and offered presentations from, inter alia, engineers and the founder and executive director of Giant Steps, Kathy Roberts, detailing how the plaintiff's proposal complied with the technical requirements of the applicable regulations. The commission reconvened on July 28, 2015, for public comment, during which time it heard both support for and opposition to the plaintiff's application. A common thread among the neighbors who appeared in opposition to the application was concern about possible

adverse effects caused by the anticipated increased traffic volume in the neighborhood.

On August 25, 2015, the commission voted five to two to deny the plaintiff's application. On August 28, 2015, notice of this decision was published in the Fairfield Citizen.[1] The plaintiff, thereafter, timely appealed to the Superior Court, claiming that the commission's decision lacked support in the record.[2] Following an April 21, 2016 hearing, the court dismissed the plaintiff's appeal, concluding that the commission properly denied the plaintiff's application. Subsequently, the plaintiff filed a petition for certification to appeal pursuant to General Statutes § 8-8 (o) and Practice Book § 81-1, which this court granted. Additional facts and procedural history will be set forth as needed.

As a preliminary matter, we consider whether the commission has provided a collective statement setting forth its reasons for denial. "Where a zoning agency has stated its reasons for its actions, the court should determine only whether the assigned grounds are reasonably supported by the record and whether they are pertinent to the considerations which the authority was required to apply under the zoning regulations. . . . The principle that a court should confine its review to the reasons given by a zoning agency does not apply to any utterances, however incomplete, by the members of the agency subsequent to their vote. It applies where

[1] General Statutes § 8-3c (b) provides in relevant part that "[n]otice of the decision of the commission shall be published in a newspaper having a substantial circulation in the municipality and addressed by certified mail to the person who requested or applied for a special permit or special exception . . . ."

[2] The plaintiff also claimed that the commission's denial was in violation of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq. (2006). The court dismissed this claim, and the plaintiff did not appeal from that aspect of the court's decision. Therefore, we do not discuss the ADA claim in further detail.

the agency has rendered a formal, official, collective statement of reasons for its action. . . .

"[F]ailure of the zoning agency to give such reasons requires the court to search the entire record to find a basis for the commission's decision." (Citations omitted; internal quotation marks omitted.) *Protect Hamden/North Haven from Excessive Traffic & Pollution, Inc.* v. *Planning & Zoning Commission*, 220 Conn. 527, 544, 600 A.2d 757 (1991). "The search is conducted against the backdrop of the particular regulation under which the plaintiff sought approval of its application." *Smith-Groh, Inc.* v. *Planning & Zoning Commission*, 78 Conn. App. 216, 227, 826 A.2d 249 (2003).

In the present case, the notice of the commission's decision, published in the August 28, 2015 edition of the Fairfield Citizen, states: "309 Barberry Road Special Exception application of the American Institute for Neuro [Integrative] Development Inc., to establish a school and offices for charitable institutions in an existing building. DENIED." The reasons for the denial are not set forth in the published notice. On that same date, a clerk for the commission, however, wrote the plaintiff's counsel a letter providing the following three purported reasons for the commission's denial: "(1) In accordance with [§] 27.4.1 of the [regulations] it has not been demonstrated that the location, type, character and size of use will be in harmony with and conform to appropriate and orderly development of the neighborhood, and will not hinder or discourage appropriate development and use of adjacent property or impact its value. (2) In accordance with [§] 27.4.3 of the [regulations] it has not been demonstrated that the streets serving the proposed use shall be adequate to carry prospective traffic and that provisions for entering or leaving the site have been made to avoid hazard or congestion. (3) It has not been demonstrated that the

proposed use is a permitted use in that there is no evidence that the proposed offices for charitable institutions will be [nonprofit] entities nor has [it] been demonstrated that the proposed use is a compliant education facility."[3]

Although our case law directs that we not rely on a letter that was not adopted by the commission to evince the commission's collective decision; see *Smith-Groh, Inc.* v. *Planning & Zoning Commission*, supra, 78 Conn. App. 224–26 (concluding that letter to applicant's attorney from town planner, purporting to state reasons for commission's denial of application for site plan approval and special permit, was not collective statement of commission's decision, given that commission had not adopted letter, and stating that "[a]lthough the reasons outlined in the letter were discussed by the commission during either the public hearing or the special meeting, the planner could not speak for the commission"); because the parties in the present case agree that the letter properly sets forth the reasons for the commission's decision and do not claim that the August 28, 2015 letter should not be considered, we will, for purposes of this case, consider the reasons set forth in the letter.

We now set forth general principles governing special permit or special exception review procedures. At the outset, we note that the terms "special exception" and

[3] On October 1, 2015, after the plaintiff had filed its appeal to the Superior Court, however, a clerk for the commission then sent Fitzpatrick a new letter, containing the same first two reasons for denial, but modifying the third reason to state: "(3) It has not been demonstrated that the proposed use is a permitted use in that there is no evidence that the proposed [nonprofit] entities will be charitable institutions nor has it been demonstrated that the proposed use is a compliant educational facility." For purposes of the present appeal, this change is minor and does not bear on our decision. Unaware of any precedent that would permit the commission to modify its decision after the applicant has appealed to the Superior Court, we will disregard the October 1, 2015 letter.

"[s]pecial permit" are interchangeable. (Internal quotation marks omitted.) *Beckish* v. *Planning & Zoning Commission*, 162 Conn. 11, 15, 291 A.2d 208 (1971). "[T]he function of a special [exception] is to allow a property owner to use his property in a manner expressly permitted under the zoning regulations, subject to certain conditions necessary to protect the public health, safety, convenience, and surrounding property values. . . . The basic rationale for the special [exception] [is] . . . that while certain [specially permitted] land uses may be generally compatible with the uses permitted as of right in particular zoning districts, their nature is such that their precise location and mode of operation must be regulated because of the topography, traffic problems, neighboring uses, etc., of the site. Common specially permitted uses, for example, are hospitals, churches and schools in residential zones. These uses are not as intrusive as commercial uses would be, yet they do generate parking and traffic problems that, if not properly planned for, might undermine the residential character of the neighborhood. If authorized only upon the granting of a special [exception] which may be issued after the [zoning commission] is satisfied that parking and traffic problems have been satisfactorily worked out, land usage in the community can be more flexibly arranged than if schools, churches and similar uses had to be allowed anywhere within a particular zoning district, or not at all." (Citation omitted; internal quotation marks omitted.) *St. Joseph's High School, Inc.* v. *Planning & Zoning Commission*, 176 Conn. App. 570, 585–86, 170 A.3d 73 (2017).

"When ruling upon an application for a special permit, a planning and zoning board acts in an administrative capacity. . . . Generally it is the function of a zoning board or commission to decide within prescribed limits and consistent with the exercise of [its] legal discretion, whether a particular section of the zoning regulations

applies to a given situation and the manner in which it does apply. The [Appellate Court and] trial court . . . decide whether the board correctly interpreted the section [of the regulations] and applied it with reasonable discretion to the facts. . . . In applying the law to the facts of a particular case, the board is endowed with a liberal discretion, and its action is subject to review by the courts only to determine whether it was unreasonable, arbitrary or illegal. . . .

"Although . . . the zoning commission does not have discretion to deny a special [exception] when the proposal meets the standards, it does have discretion to determine *whether* the proposal meets the standards set forth in the regulations. If, during the exercise of its discretion, the zoning commission decides that all of the standards enumerated in the special [exception] regulations are met, then it can no longer deny the application. The converse is, however, equally true. Thus, the zoning commission can exercise its discretion during the review of the proposed special exception, as it applies the regulations to the specific application before it." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Irwin* v. *Planning & Zoning Commission*, 244 Conn. 619, 627–28, 711 A.2d 675 (1998).

"In reviewing a challenge to a commission's administrative decision, we . . . must be mindful of the fact that . . . the applicant . . . bore the burden of persuading the commission that it was entitled to the permits that it sought under the zoning regulations." (Internal quotation marks omitted.) *St. Joseph's High School, Inc.* v. *Planning & Zoning Commission*, supra, 176 Conn. App. 586. "[T]he reviewing court must sustain the agency's determination if an examination of the record discloses evidence that supports any one of the reasons given. . . . The evidence, however, to support any such reason must be substantial; [t]he credibility

of witnesses and the determination of factual issues are matters within the province of the administrative agency. . . . This so-called substantial evidence rule is similar to the sufficiency of the evidence standard applied in judicial review of jury verdicts, and evidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . The reviewing court must take into account [that there is] contradictory evidence in the record . . . but the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence . . . . *Evidence of general environmental impacts, mere speculation, or general concerns do not qualify as substantial evidence.*" (Emphasis in original; internal quotation marks omitted.) *AvalonBay Communities, Inc.* v. *Inland Wetlands & Watercourses Agency*, 130 Conn. App. 69, 75, 23 A.3d 37, cert. denied, 303 Conn. 908, 32 A.3d 961, 962 (2011). With this context in mind, we turn our attention to the plaintiff's claims.[4]

[4] Before the Superior Court, the plaintiff noted that the letter to the plaintiff's counsel indicated, as the first reason for denial: "In accordance with [§] 27.4.1 of [the regulations] it has not been demonstrated that the location, type, character and size of the use will be in harmony with and conform to appropriate and orderly development of the neighborhood, and will not hinder or discourage appropriate development and use of adjacent property or impact its value." The plaintiff argued that there was not a basis in the record to support this conclusion; the commission agreed. Before this court the commission expressly declined to argue on that point. Accordingly, we do not review it.

Additionally, as part of the third reason for denial, both letters to Fitzpatrick indicated in relevant part: "It has not been demonstrated that the proposed use is a permitted use in that there is no evidence that . . . the proposed use is a compliant educational facility." Before this court, the commission conceded that this reason could not constitute an adequate basis for denial, in that Next Steps would qualify as a "[school]" pursuant to § 5.1.4 (d) of the regulations. Accordingly, to the extent that the commission may have based its denial on concerns that Next Steps would not be considered "a compliant educational facility," we conclude that this basis for the commission's denial also has been abandoned.

I

The plaintiff first challenges the court's conclusion that the commission's denial could be upheld on the basis of the neighbors' general traffic concerns. The plaintiff contends that § 27.4.3 of the regulations sets forth specific requirements, which the plaintiff maintains it has satisfied. In comparison, the plaintiff contends that the neighbors' concerns were too generalized to support the commission's purported reasons for denial under § 27.4.3. We agree.

"[W]hen a landowner has submitted an application for a permitted use, the zoning commission may consider off-site traffic conditions only for the limited purpose of reviewing the internal traffic circulation on the site and determining whether the location of the proposed [roads and driveways] would minimize any negative impact of additional traffic to the existing traffic . . . . This is because [t]he designation of a particular use of property as a permitted use establishes a conclusive presumption that such use does not adversely affect the district and precludes further inquiry into its effect on traffic, municipal services, property values, or the general harmony of the district. . . . [Our Supreme Court] has limited the application of these principles, however, to site plan approvals and subdivision applications that involve uses that are permitted as of right within the zoning district. . . .

"In contrast, when a use is not allowed as of right, but only by special exception, the zoning commission is required to judge whether any concerns, such as parking or traffic congestion, would adversely impact the surrounding neighborhood. . . . The reason for this requirement is that, although such uses are not as intrusive as commercial uses . . . they do generate parking and traffic problems that, if not properly planned for, might undermine the residential character

of the neighborhood. . . . Thus, there is no presumption that a specially permitted use, or the traffic that it will generate, necessarily is compatible with any particular neighborhood within the zoning district." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Cambodian Buddhist Society of Connecticut, Inc.* v. *Planning & Zoning Commission*, 285 Conn. 381, 431–33, 941 A.2d 868 (2008).

In the present case, the commission specified that the plaintiff's special exception application did not comply with certain requirements set forth in § 27.4.3 of the regulations.[5] The letter stating the commission's reasons for denial indicated that the plaintiff had not demonstrated that "the streets serving the proposed use shall be adequate to carry prospective traffic and that provisions for entering or leaving the site have been made to avoid undue hazard or congestion." Accordingly, we will review the record as to the adequacy of the streets to carry the prospective Next Steps traffic and will further determine whether the record supports a conclusion that prospective traffic will result in "undue hazard . . . or congestion"; Fairfield Zoning Regs., § 27.4.3; as these concerns are central to the commission's stated reason for denial under § 27.4.3 of the regulations.

The mere fact that a proposal will generate increased traffic volume is not, in itself, an indication that such traffic will result in "undue hazard . . . or congestion"; to determine whether the proposal will result in "undue hazard . . . or congestion," we review the record as to the proposal's projected impact on traffic conditions. See *CMB Capital Appreciation, LLC* v. *Planning &*

[5] Section 27.4.3 of the regulations provides: "[T]he streets serving the proposed use shall be adequate to carry prospective traffic, provision shall be made for entering and leaving the property without creating undue hazard to traffic or congestion and adequate off-street parking and loading shall be provided on the same lot in accordance with [§] 28.0 of [the regulations] . . . ."

*Zoning Commission*, 124 Conn. App. 379, 399, 4 A.3d 1256 (2010) ("while traffic problems and related safety concerns can be a valid reason for a denial . . . there must be more than a traffic increase, and either traffic congestion or an unsafe road design at or near the entrances and exits from the site" [internal quotation marks omitted]), cert. granted on other grounds, 299 Conn. 925, 11 A.3d 150 (2011) (appeal withdrawn September 15, 2011); see also *Daughters of St. Paul, Inc.* v. *Zoning Board of Appeals*, 17 Conn. App. 53, 69, 549 A.2d 1076 (1988) (projected additional twenty vehicles per day not sufficient evidence of detrimental traffic congestion). As our Supreme Court has explained: "[T]he significance of the impact should not be measured merely by the number of additional vehicles but by the effect that the increase in vehicles will have on the existing use of the roads. An increase of 100 vehicles per hour may have a negligible impact at one time or location and a ruinous impact at another time or location. In making this determination, the commission may rely on statements of neighborhood residents about the nature of the existing roads in the area and the existing volume of traffic, and its own knowledge of these conditions." *Cambodian Buddhist Society of Connecticut, Inc.* v. *Planning & Zoning Commission*, supra, 285 Conn. 434.[6]

[6] In *Cambodian Buddhist Society of Connecticut, Inc.* v. *Planning & Zoning Commission*, supra, 285 Conn. 446, our Supreme Court ultimately affirmed the trial court's denial of the application on grounds other than traffic related concerns, stating: "In summary, we conclude that the trial court correctly determined that the record did not contain substantial evidence to support the commission's conclusion that the [plaintiff's] application for a special exception should be denied because . . . the temple would create unacceptable traffic congestion and hazards. . . . We further conclude, however, that the record contained substantial evidence to support the commission's denial of the [plaintiff's] application on the grounds that the level of activity at the proposed temple would not be in harmony with the general character of the neighborhood, that the temple would substantially impair neighboring property values, and that the proposed septic wastewater and water supply systems would create a health or safety hazard."

"[Our Supreme Court has] permitted a commission composed of experts to rely on its own expertise within the area of its professional competence; *Jaffe* v. *State Department of Health*, 135 Conn. 339, 349–50, 64 A.2d 330 (1949); but in that case [the court] recognized as well that expert testimony may be required when the question involved goes beyond the ordinary knowledge and expertise of the trier of fact." (Internal quotation marks omitted.) *Feinson* v. *Conservation Commission*, 180 Conn. 421, 428, 429 A.2d 910 (1980). "If an administrative agency chooses to rely on its own judgment, it has a responsibility to reveal publicly its special knowledge and experience, to give notice of the material facts that are critical to its decision, so that a person adversely affected thereby has an opportunity for rebuttal at an appropriate stage in the administrative proceedings." Id., 428–29. Although "an administrative agency is not required to believe any of the witnesses, including expert witnesses . . . it must not disregard the only expert evidence available on the issue when the commission members lack their own expertise or knowledge." (Citation omitted.) *Tanner* v. *Conservation Commission*, 15 Conn. App. 336, 341, 544 A.2d 258 (1988).

This court's decision in *Gevers* v. *Planning & Zoning Commission*, 94 Conn. App. 478, 486, 892 A.2d 979 (2006), is instructive. In that case, the plaintiffs claimed, inter alia, that the trial court "improperly concluded that substantial evidence supported the commission's finding that the proposed use would not unduly impair pedestrian safety . . . ." Id., 480. In support of their special exception application, the applicants offered an expert traffic study that concluded that "the introduction of traffic generated by [the project] will not disrupt the continuity of traffic flow on the adjacent roadway system. Roadway conditions remain virtually unchanged with the addition of the site-generated traffic." (Internal quotation marks omitted.) Id., 484. An

expert further opined at public hearings on the prospective impact on traffic and pedestrian safety, stating that the project was "going to have a very small impact on the roadway network," and that he did not observe any people walking or "riding of bicycles" during his time studying the area. (Internal quotation marks omitted.) Id. Those opposed to the proposal "presented no traffic studies or expert testimony regarding the issue of pedestrian safety." Id., 485–86. On appeal from that commission's decision granting the special exception, the plaintiffs did not refer this court "to any evidence in the record that contradict[ed] the aforementioned [expert] evidence . . . ." Id., 486. Accordingly, this court concluded that "[u]nless presented with evidence that undermines either the credibility or the ultimate conclusions of an expert, the commission must credit expert testimony." Id., citing *Kaufman* v. *Zoning Commission*, 232 Conn. 122, 156–57, 653 A.2d 798 (1995).

In the present case, the plaintiff's expert traffic engineer, Michael Galante, was the only expert to address any prospective traffic impact.[7] First, Galante estimated that Next Steps would generate the following two-way traffic volumes: for office staff, seven vehicles around 9 a.m. and six vehicles around 5 p.m.;[8] for students, twenty-one vehicles between 10 a.m. and 2 p.m.; and for staff, thirty-six vehicles between 9:30 a.m. and 2:30

[7] Additionally, Philip Teso, an engineer, discussed plans to expand the existing access drive and to renovate the existing parking lot to accommodate teachers and nonprofit office staff.

[8] The commission inquired as to how Galante arrived at seven total vehicles for office staff even though the plaintiff's application contemplated four office staff for six offices, i.e., a total of twenty-four staff. Galante responded that he was only considering traffic conditions during a one hour time period and that staff would not all arrive and depart at the same time. Accordingly, he did not factor in all twenty-four staff at a given time but instead used standardized traffic volume estimates based on office square footage, per the Trip Generation handbook. See footnote 9 of this opinion.

p.m.[9] Galante further noted that around 2 p.m. on weekdays, the time period he described as the "worst case" in terms of traffic volume, both Next Steps and Giant Steps would be dismissing students at the same time. During that time, the schools would generate a two-way traffic volume of 131 vehicles around the Barberry Road and Mill Hill Road intersection.

Galante's traffic impact study did not solely focus on the percentage of increased traffic volume; he additionally assessed vehicle delay and the streets' levels of service.[10] "Traffic engineers have standards for level of service to measure traffic congestion with Service Level A as negligible traffic and Service Level F as serious congestion for signalized and unsignalized intersections. These levels measure the quality of flow of vehicles and delay at intersections . . . . For signalized intersections, Level A has a stopped delay per vehicle of less than five seconds." R. Fuller, 9B Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 49:15, p. 148. Referencing these standards, Galante indicated that traffic delay would be "at most [0.5] seconds per vehicle during [peak] time period[s]," such that the level of service for these roads would remain at level A, which Galante described as "the best condition from a traffic perspective . . . ."

[9] The source of this information was: "(1) 'Trip Generation,' 9th Edition, published by the Institute of Transportation Engineers (ITE), 2012 using General Office Building, Code #710 average rates. The weekday afternoon peak hour rates were used for the weekday [midafternoon] school departures peak hour, to be conservative. (2) Student's site traffic generation for the Next Steps program was developed based on discussions with the [plaintiff]. The program will accommodate up to [twenty-five] students, with [twenty-five] staff to assist each individual. (3) There will be [thirty-six] staff members on site every day. This includes [twenty-five] teachers, café and health care staff. It accounts for [five] staff from Giant Steps also working at Next Steps."

[10] Accordingly, although the precise number of additional vehicles remained a point of contention from both the perspectives of the commission and of several neighbors who appeared in opposition to the proposal, Galante maintained that factoring in additional vehicles would not alter his overall street capacity analysis.

One commissioner observed: "[The plaintiff's proposal] was an example, at least statistically, of one of the least in terms of total impact when you look at the statistical traffic report. . . . [T]he use of the school is small enough that the true [everyday] impact [does not] . . . [rise] to the level of real safety issue." As to safety, there were no reported accidents in the neighborhood between the years 2011 and 2013,[11] and, given such minimal impact on traffic conditions, Galante indicated that he did not have cause for concern as to potential for increased accidents under the plaintiff's proposal. Accordingly, Galante concluded that the roads adequately could accommodate the anticipated additional traffic generated by Next Steps without changing the level of service, and also indicated that "from a traffic engineering perspective the road's not considered congested. It can handle the additional traffic."

Neighbors disagreed with the plaintiff's expert analysis on the basis of their daily experiences with traffic in the neighborhood. Several neighbors indicated that they regularly observe heavy traffic volume[12] and unsafe

[11] Galante's traffic impact analysis report indicated: "Accident data was obtained from the Fairfield Police Department for a period beginning January 1, 2011 through December 31, 2013 for Barberry Road and Juniper Lane. For the intersection of Barberry Road at Mill Hill Road, there were no reported accidents. There were no reported accidents for the section of Barberry Road between Mill Hill Road and Juniper Lane East. There were no reported accidents for the intersection of Barberry Road at Juniper Lane East. There were no reported accidents for the section of Barberry Road between Juniper Lane East and West. There were no reported accidents for the intersection of Barberry Road at Juniper Lane West. There were no reported accidents for the section of Barberry Road between Juniper Lane West and School Access Drive. There were no reported accidents for the section Juniper Lane between Barberry Road North and South."

[12] For example, one neighbor commented that "[r]ight now the streets and single driveway are not adequate for the traffic that's there. . . . Right now the residents on the street have a hard time getting out of their driveways because there's so much traffic going by they can't go out."

drivers in the neighborhood.[13] The neighbors surmised that Next Steps traffic might both result in traffic congestion and further aggravate the unsafe traffic conditions that they claimed to experience.[14]

Connecticut courts have held that public testimony is not to be considered substantial evidence when "it is not supported by anything other than speculation and conjecture on the part of those objecting to the [party's] proposed activities." *Martland* v. *Zoning Commission*, 114 Conn. App. 655, 665–66, 971 A.2d 53 (2009), citing *Bethlehem Christian Fellowship, Inc.* v. *Planning & Zoning Commission*, 73 Conn. App. 442, 463, 807 A.2d 1089, cert. denied, 262 Conn. 928, 814 A.2d 379 (2002). In *Martland*, this court concluded that generalized concerns of two laypersons who opposed the plaintiffs' proposed activities were "not substantial because [their concerns were] not supported by anything other than speculation and conjecture . . . [as

[13] One neighbor observed: "We already have a current problem with the traffic . . . . There are cars speeding . . . around the corners. As you may or may not know, it's not a straight shot. It is a circle with some tough corners, it's very hard to see. . . . I live right around that bend and getting out of my driveway is incredibly tough. Numerous occasions I've been almost clipped. I've had people riding my tail down the street as slow as I go with my blinker on swerving not to hit me as I turn as best I can into my driveway." Another neighbor accounted: "Currently there always seems to be a very high volume of traffic throughout the day. There are times that the traffic is so heavy that I have actually had to get out of my car or have my son get out of the car and stop the traffic and ask them, please, let me get into my driveway so that I can park and get home because the cars just kept coming."

[14] For example, one neighbor specified: "The traffic is my biggest concern right now. And, again, we already have a problem." Other neighbors opined that increased traffic volume would lead to increased traffic parked on the street, which would then result in traffic congestion. One neighbor suggested: "[With increased traffic volume] the more people need to find places to park their cars the more likely that those cars are going to be parked on the road. . . . If people park on either side you're suddenly going to be faced with the inability to bring traffic in both directions." Another neighbor observed: "I will confirm that everything you've heard about the traffic congestion is absolutely true. . . . We have on street parking already and many times there is only one lane going through . . . ."

neither layperson] indicated any type of expertise that would buttress their lay opinion . . . .'' (Citation omitted.) *Martland* v. *Zoning Commission*, supra, 665–66.

In the present case, the neighbors' remarks as to prospective traffic impact suffer from the same deficiency. While the commission could take into consideration the neighbors' concerns and observations as to current road conditions, the neighbors' remarks as to the adequacy of the streets to accommodate traffic and prospective hazards or congestion addressed matters of professional expertise. See *Gevers* v. *Planning & Zoning Commission*, supra, 94 Conn. App. 485–86 (plaintiffs offered no expert traffic analysis rebutting expert conclusions regarding pedestrian safety and traffic impact). The neighbors did not purport to have the training or skills needed to properly assess traffic impact, nor did they offer an expert's opinion on their behalf. Accordingly, their comments amounted to generalized concerns about hypothetical effects of increased traffic.

To the extent the commission relied on the neighbors' remarks, the commission's conclusion under § 27.4.3 of the regulations essentially turned on the mere potential for adverse effects. The mere possibility of an adverse outcome, without more, typically does not constitute substantial evidence. See *AvalonBay Communities, Inc.* v. *Inland Wetlands & Watercourses Agency*, supra, 130 Conn. App. 88–89 (concluding mere ''potential'' adverse effect not substantial evidence [internal quotation marks omitted]). Thus, we conclude that the commission's assigned ground for denial under § 27.4.3 of the regulations is not reasonably supported by the record.[15] Therefore, the commission's conclusion that

[15] Our conclusion on this point is instructive as to the requirement under § 27.4.3 of the regulations, as provided in the commission's reason for denial, that ''provision shall be made *for entering and leaving the property* without creating undue hazard to traffic or congestion . . . .'' (Emphasis added.) The commission's conclusion on this point is baseless given that the record

the plaintiff had not satisfied certain traffic related requirements under § 27.4.3 of the regulations was improper.

II

Mindful that "[t]he reviewing court must sustain the agency's determination if an examination of the record discloses evidence that supports any one of the reasons given"; (internal quotation marks omitted) *AvalonBay Communities, Inc.* v. *Inland Wetlands & Watercourses Agency*, supra, 130 Conn. App. 75; we now address the propriety of the commission's remaining reason for denial. Specifically, the commission concluded: "It has not been demonstrated that the proposed use is a permitted use in that there is no evidence that the proposed offices for charitable institutions will be [nonprofit] entities . . . ." The plaintiff contends that this stated reason for denial is unavailing because it, in effect, requires the plaintiff to identify prospective users, whereas, to satisfy § 5.1.4 (d) of the regulations, the plaintiff need only identify the prospective use. We agree with the plaintiff.

The plaintiff aptly notes that § 5.1.4 of the regulations sets forth no requirements as to the identity of the user. In its special exception application, the plaintiff proposed using the vacant Christ the King preparatory school building as a "[c]ompanion [s]chool (Next Steps) [f]or [y]oung [a]dults" and as "[o]ffices for [nonprofit] [c]orporations."[16] At hearings before the commission, the plaintiff represented that the proposed office use

does not support a finding that the proposal will result in undue hazard or traffic congestion.

[16] During argument before the Superior Court, the plaintiff indicated that the regulations permit a "charitable [institution]" to operate in Residence AA zoning, provided that such institutions are nonprofit. The plaintiff acknowledged that its initial application for a special exception described the proposed occupants as "nonprofits" but maintained that it made clear to the commission that each office would operate as a "charitable [institution]."

would be permitted as a "charitable [institution]" pursuant to § 5.1.4 of the regulations. It further suggested that the commission "should make it a condition of approval . . . that [the occupants] be demonstrated to be [501 (c) (3) nonprofit corporations]."

During public comment, neighbors expressed concern that the nonprofits might operate in a business-like capacity and that a prospective occupant might itself be a for-profit entity.[17] Echoing such concerns, a commissioner suggested that the plaintiff's inability to identify office occupants meant it did not commit to host only nonprofits: "The proposal is to provide leased space to . . . [nonprofits]. We don't know what those are going to be, we don't know what business they are going to be involved in, but they're not going to be charities. There was no commitment that they were going to be charities. Charities can be [for-profit] enterprises." Such concern was reflected in the third reason for denial provided in the initial letter to Fitzpatrick, which read: "It has not been demonstrated that the proposed use is a permitted use in that there is no evidence that the proposed offices for charitable institutions will be [nonprofit] entities . . . ." That conclusion is baseless.

In making its application, the plaintiff has agreed to be bound by a condition that it would lease the office spaces only to 501 (c) (3) nonprofit corporations. This use is consistent with the plain language of § 5.1.4 (d) of the regulations. Despite the plaintiff's express agreement, and the absence of evidence that the proposed

[17] One neighbor expressed concern that a nonprofit is a type of business that would be "operating in our residential neighborhood." The neighbors commonly referred to the proposed nonprofits as "businesses," with one such neighbor suggesting the neighborhood would have "businesses moving into a residential area. I'm sure right now it's part of the school, however, that's not to say that one day those businesses couldn't expand. . . . It could become this big thing they could have. Who knows what you can do."

use would not be a permitted use, the commission denied the application on the basis of a concern that a for-profit entity might operate in the building. Unless and until such event occurs, the commission's denial improperly was based on mere speculation. See *AvalonBay Communities, Inc.* v. *Inland Wetlands & Watercourses Agency*, supra, 130 Conn. App. 75, 78.

The commission had before it no substantial evidence to support its decision to deny the plaintiff's application. Consequently, the only reasonable conclusion for the commission was to grant the application with reasonable conditions. See *Fanotto* v. *Inland Wetlands Commission*, 108 Conn. App. 235, 244–45, 947 A.2d 422 (2008), appeal dismissed, 293 Conn. 745, 980 A.2d 296 (2009).

The judgment is reversed and the case is remanded with direction to render judgment sustaining the plaintiff's appeal and directing the commission to approve the plaintiff's special exception application with reasonable conditions.

In this opinion the other judges concurred.

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## RIITTA LABORNE *v.* JOHN C. LABORNE
## (AC 39650)

Alvord, Bright and Beach, Js.

*Syllabus*

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court issuing certain financial orders and finding in favor of the plaintiff on certain postjudgment motions after the court granted the plaintiff's motion to open the judgment on the basis of fraud. The plaintiff's motion to open the judgment was based on the discovery that the defendant had failed to disclose a pension and individual retirement account on his financial affidavits at the time of dissolution. *Held:*

1. The trial court erred in failing to value the defendant's pension as of the date of the dissolution of the parties' marriage; in the absence of any

exceptional intervening circumstances, the date a dissolution of marriage is granted is the proper time to determine the value of the parties' estate on which to base division, and the trial court improperly considered the dissipation of the asset after the dissolution judgment to constitute such an exceptional circumstance, as a postdissolution diminution of assets caused by market forces is not considered to be an exceptional circumstance, nor could the wilful dissipation of assets by the defendant in the context of the present case be considered such a circumstance.

2. The trial court erred in basing its alimony orders on the parties' gross income, rather than net income; in its memorandum of decision, the court expressed its calculation and award of alimony in terms of gross income, and although it made a finding as to the plaintiff's net income at the time of trial, it did not make a finding as to the defendant's net income and did not consider the plaintiff's net income in its determination of alimony, which should be based on the available net income of the parties, not gross income.

3. This court declined to address the plaintiff's claim that the court erred in concluding that the defendant was permitted to withdraw funds from his retirement account for the purpose of paying alimony; the trial court made that observation in its recitation of the factual history of the case, the subject matter was related to its ultimate finding that the defendant was in contempt, and because the plaintiff did not challenge or claim error in the contempt order, any further discussion would be academic.

Argued October 24, 2018—officially released April 23, 2019

*Procedural History*

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Emons*, *J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Tindill*, *J.*, granted the plaintiff's motion to open the judgment; subsequently, the matter was tried to the court, *Colin*, *J.*; judgment for the plaintiff, from which the plaintiff appealed to this court. *Reversed; further proceedings.*

*Norman A. Roberts II*, with whom, on the brief, was *Tara C. Dugo*, for the appellant (plaintiff).

*Opinion*

BEACH, J. The plaintiff, Riitta LaBorne, appeals from the judgment of the trial court rendered following a postdissolution hearing. The plaintiff claims that the

court erred in (1) failing to value the parties' assets as of the date of the dissolution, (2) basing its alimony orders on the parties' gross income, rather than net income, and (3) concluding that the defendant, John C. LaBorne, was permitted to withdraw funds from his retirement account for the purpose of paying alimony. We agree and reverse the judgment of the trial court.

The following facts and procedural history are relevant to our decision. The parties were married in 1990 and have two sons. During the pendency of the dissolution proceedings, initiated in 2010, both parties submitted financial affidavits. In his affidavits, dated in 2011 and 2012, the defendant listed financial assets not exceeding $2000.

On March 22, 2012, the court, *Emons*, *J.*, dissolved the parties' marriage. In its judgment of dissolution, the court ordered that the parties share legal custody of their minor child. The court ordered the defendant to "pay to the plaintiff 35 [percent] of his gross annual income in excess of $150,000 per year" and to provide the plaintiff "unallocated alimony and child support in the amount of $5500 per month." The court awarded all marital assets to the plaintiff.

In September, 2012, the plaintiff filed a postjudgment motion for contempt in which she alleged that the defendant failed to make that month's required payment. The defendant responded with a motion to modify the orders regarding payments. The plaintiff amended her motion for contempt and alleged that the defendant had violated several additional court orders.

In the course of discovery on the pending motions, the defendant produced a copy of his 2013 income tax return, in which he reported that he withdrew $142,500 from an individual retirement account (IRA). After discovering this asset, the plaintiff filed a motion to open the judgment of dissolution on the basis of fraud. The

plaintiff alleged, in relevant part, that the defendant never disclosed his IRA on any financial affidavit prior to the dissolution judgment, that between 2013 and 2014 the defendant withdrew "more than $300,000 in liquid assets" from his IRA, and that the defendant's alleged failure to disclose the IRA materially affected the court's orders.[1] The plaintiff requested a preliminary hearing and the right to conduct discovery in preparation thereof.

While the motion to open was pending, the plaintiff filed a motion requesting that the court order that the defendant pay Meyers, Harrison & Pia, a forensic accounting firm (accounting firm), for an analysis of the defendant's financial transaction history. On January 12, 2015, the parties entered into a stipulation in which they agreed that the defendant was not to withdraw money from his IRA other than to pay alimony or reimbursable expenses.[2] The court, *S. Richards*, *J.*, approved the stipulation. Thereafter, the court, *Tindill*,

[1] The plaintiff's motion to open the judgment on the basis of fraud alleged, in part: "In conjunction with [the defendant's] motion for modification of alimony, the defendant produced his tax return for 2013, which showed that he withdrew $142,000 from an IRA. Moreover, during 2014, [the] defendant has withdrawn another $196,000 from his IRA . . . . No individual retirement account was disclosed on any financial affidavit submitted to the court; indeed, the defendant submitted financial affidavits and represented to the plaintiff and the court that he was insolvent. [The] plaintiff herself had no knowledge of the existence of an IRA . . . .The failure to disclose the existence of an account [with] more than $300,000 in liquid assets is clearly fraudulent, there is a likelihood amounting to virtual certainty that the existence of this fund, had it been disclosed, would change the result of the court's decision, and the plaintiff has not delayed in filing this motion since learning of the existence of these funds, which were uncovered less than three weeks prior to the date hereof . . . ."

[2] The stipulation provided in relevant part: "The parties agree that the [d]efendant shall not withdraw money from his IRA, with the exception of money used to pay his current alimony obligation to the [p]laintiff and his share of reimbursables as required by the March 22, 2012 orders issued by Judge Emons. . . . The [d]efendant [represents] there is currently $185,423 on hand in the IRA."

*J.*, granted the plaintiff's motion to open the judgment on the basis of fraud. The plaintiff filed a motion for clarification, seeking to limit the scope of retrial to "discovery of and distribution of marital assets as of the date of the dissolution of marriage . . . ." The court denied this motion, stating that "[j]udgment is opened as to all matters."

The plaintiff then filed a new motion requesting an order that there be no withdrawals whatsoever from the IRA prior to the retrial.[3] The plaintiff indicated that at retrial she would seek to have the IRA restored to its value as of the date of the dissolution trial and to be awarded the entire amount of the IRA.

On May 27, 2015, the court held a hearing on the plaintiff's motions for forensic accounting fees and to prohibit any further withdrawals from the defendant's IRA until the issuance of court orders after retrial. After hearing argument from counsel, the court granted the plaintiff's motion for forensic accounting fees. The court then turned to the plaintiff's motion regarding the IRA. The defendant testified as to the current value of his IRA, withdrawals he made from his IRA since entering into the January 12, 2015 stipulation, and the values of his other assets and debts.

The court determined that since the parties entered into the January 12, 2015 stipulation the defendant spent $37,875 from his IRA. The court determined that $20,625 was withdrawn to pay alimony and $4403 was spent on reimbursable expenses. The court further determined that the defendant could not account for the approximately $3450 per month ($13,800 over four months) that he had spent on personal living expenses. The court

[3] The plaintiff's motion requested, in relevant part, a court order that "no portion of [the defendant's IRA] funds shall be withdrawn until the [c]ourt decides to whom it should be awarded at a retrial of this case . . . ."

orally granted the plaintiff's motion to prohibit any further withdrawals from the defendant's IRA until the court ruled on the matter at retrial.

Prior to the retrial of the dissolution financial orders, the plaintiff requested that the accounting firm determine the amount the defendant withdrew from his IRA between June 6, 2013, and December 31, 2015, and to determine what the value of the IRA would have been, had the funds not been withdrawn. The accounting firm detailed its findings in a written report.

On July 29, 2016, the plaintiff filed a motion for contempt alleging that the defendant failed to pay alimony required for the month of July; she further alleged that "the [d]efendant will continue to fail and refuse to make alimony payments to the [p]laintiff until [the] court enters orders with respect to same."

On August 11 and 12, 2016, the court, *Colin*, *J.*, conducted a new hearing regarding the dissolution financial orders and the plaintiff's motions for contempt. The plaintiff entered the accounting firm's report into evidence through one of its authors, Charles Strickland, a certified forensic examiner. The accounting firm reported that the defendant had participated in a pension plan through his employment with Credit Suisse First Boston from May 5, 1986, to March 14, 2008, accruing a single life annuity benefit of $6800 per month beginning at age sixty-five. On May 15, 2013, a little more than one year after the dissolution judgment was entered and when he was fifty-one years old, the defendant elected to receive an early distribution of his pension benefit. Consequently, the defendant's monthly annuity benefit was actuarially reduced from $6800 to $3075.31.

Instead of electing a monthly annuity form of pension payment, however, the defendant elected to receive his benefit in a lump sum of $635,537.41, and on June 6,

2013, the sum of $651,158.76, was deposited into an IRA. Between then and December 31, 2015, the defendant made withdrawals from the IRA totaling $511,050.[4] In addition, the defendant lost $93,638.62 in option trading between June, 2013, and March, 2015. As of December 31, 2015, the balance in the IRA was $47,553.35.

On the basis of the financial affidavits he reviewed, Strickland further opined that, as of the date of dissolution, the defendant had not disclosed his pension to the plaintiff, nor had he disclosed his participation in a 401 (k) plan[5] offered through his employer, Credit Suisse First Boston. The plaintiff testified that she had not discovered that the defendant had a pension and 401 (k) assets until the defendant produced his tax returns in connection with postdissolution proceedings.

The defendant claimed that after the plaintiff became aware of the IRA, he used IRA funds to pay alimony and other reimbursable expenses. He introduced his 2013 tax return, which showed that the defendant received $142,500 in IRA distributions and paid $105,000 in alimony; his 2014 tax return, which stated that he received $226,410 in IRA distributions and paid the plaintiff $67,476 in alimony; his form 1099-R from 2015, which showed that he received $142,140 in IRA distributions; and a list of checks he paid to the plaintiff in 2015, totaling $63,492, of which the defendant claimed $58,450 was used for alimony and reimbursable payments.

[4] The plaintiff, in her brief, notes that, according to the accounting firm's report, in the time period from May 27, 2015, when the court ordered that no further withdrawals be made from the IRA, to December 31, 2015, the defendant made sixteen withdrawals totaling $100,003.

[5] The accounting firm's report does not analyze the 401 (k) account, and the court's memorandum of decision refers to a nondisclosed "smaller 401 (k) account" only in passing. Both the court and the accounting firm's report trace the financial history of the pension entitlement and the succeeding IRA only. The plaintiff has not included in her brief any separate claim as to the 401 (k). We therefore have neither the need nor the record to analyze any issue concerning the 401 (k) plan.

The court, in its memorandum of decision dated August 17, 2016, credited Strickland's testimony and relied on the accounting firm's report. The court found that the defendant withdrew $511,050 from his IRA between 2013 and 2015, and that the defendant's decisions to elect an early retirement benefit and to engage in trading further reduced the value of the IRA. The court also found that the defendant failed to disclose his pension and 401 (k) benefits prior to the parties' divorce in 2012. The court found that although some of the payments to the plaintiff had been derived from the defendant's IRA, the defendant unilaterally had spent the funds and that "the plaintiff can never be made whole for her loss."

The court issued orders as to the division of the remaining IRA funds: "The defendant shall transfer one hundred percent (100%) of the value of his IRA to an account designated by the plaintiff on or before September 15, 2016. The January 12, 2015 court order [prohibiting withdrawals except for alimony] is incorporated by reference into this judgment and shall survive the entry of this judgment." The court ordered alimony based on the gross earning capacities of both parties.[6] The value of the IRA which was transferred was $46,326, the amount remaining at the time of the retrial. As to the motions for contempt, the court found that the defendant had wilfully and intentionally failed to pay alimony for the months of July and August, 2016, and

[6] The memorandum of decision provides in relevant part: "[T]he plaintiff has a gross annual earning capacity of no less than $20,000 and the defendant has a gross annual earning capacity of no less than $100,000. Starting September 15, 2016, the defendant shall pay to the plaintiff, on or before the fifteenth day of each month, the sum of $3000 in alimony until the death of either party. This order is based on the earning capacities set forth above. The defendant shall further pay to the plaintiff an amount equal to thirty-three percent (33%) of the gross amount of any employment income that he earns in excess of $100,000 per year within five business days of his receipt of any employment income in excess of $100,000."

ordered the defendant to pay the plaintiff $8324 by September 15, 2016. This appeal followed.

After filing the appeal, the plaintiff requested that the court articulate, inter alia, the value of the defendant's IRA which was awarded to her and the date of the valuation. The court articulated as follows: "The value of the defendant's accrued benefit in the undisclosed pension as of the date of the initial decree was [$6800] per month starting at the defendant's age [sixty-five]; that benefit was reduced to [$3075.31] per month as a result of the defendant's early retirement, lump sum election. This court credited the testimony of the plaintiff's expert witness. Thus, this court considered the value of the undisclosed asset at the time of the entry of the initial dissolution decree.

"The amount remaining in the defendant's IRA at the time of the trial in August of 2016 was $46,326; that remaining amount was ordered to be transferred in its entirety to the plaintiff. Thus, in addition to considering the value of the pension at the time of the initial decree in 2012, the court also considered the following exceptional intervening circumstances that occurred between the date of the initial decree in 2012 and the 2016 trial before this court; specifically, the defendant's post-divorce early retirement, lump sum election of the previously undisclosed pension, in the amount of approximately $635,000, the conversion of the asset, post-divorce, from a pension to an IRA, and the defendant's payment to the plaintiff, from these funds, in the approximate total amount of $235,968 in the years 2013, 2014 and 2015 (all paid to the plaintiff postdivorce)."

I

The plaintiff's principal claim is that the trial court erred in failing to use the value of the defendant's pension as of the date of their divorce in its determination of the distribution of assets. We agree.

"The standard of review in family matters is well settled. An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . [T]o conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did." (Internal quotation marks omitted.) *Bruno* v. *Bruno*, 132 Conn. App. 339, 345–46, 31 A.3d 860 (2011).

"[W]hether the court properly held that the appropriate date of valuation of the parties' marital assets, for purposes of the distribution of those assets, was the date of its original decree . . . is well settled and is controlled by our Supreme Court's ruling in *Sunbury* v. *Sunbury*, 216 Conn. 673, 676, 583 A.2d 636 (1990), in which the court held that, in a marital dissolution action, the date of valuation of marital assets is the date that the dissolution decree is rendered." *Light* v. *Grimes*, 136 Conn. App. 161, 166–67, 43 A.3d 808, cert. denied, 305 Conn. 926, 47 A.3d 885 (2012).

In *Sunbury*, the plaintiff wife appealed to this court, which remanded the case for a redetermination of financial orders after the trial court had incorrectly calculated the defendant husband's income. *Sunbury* v. *Sunbury*, supra, 216 Conn. 674–75. In the time period following the original dissolution judgment, the value of the husband's profit sharing plan had quadrupled, but the court used the value as of the original dissolution in its financial orders on remand. Id., 675–76. The wife appealed from the trial court's new financial orders,

arguing that the court should have valued the parties' assets as of the date of remand, and not as of the date of dissolution. Id., 675.

In rejecting the wife's claim, our Supreme Court held: "The division of property and the entry of orders of alimony in dissolution proceedings are governed by General Statutes §§ 46b-81 (a) and 46b-82. Section 46b-81 (a) provides in part: '*At the time of entering a decree* . . . dissolving a marriage . . . the superior court may assign to either the husband or wife all or any part of the estate of the other.' . . . Similarly, § 46b-82 provides in part: '*At the time of entering the decree*, the superior court may order either of the parties to pay alimony to the other . . . .' The only temporal reference in the enabling legislation refers us to the time of the decree as controlling the entry of financial orders. It is neither unreasonable nor illogical, therefore, to conclude that the same date is to be used in determining the value of the marital assets assigned by the trial court to the parties. . . . Section 46b-81 (a) involves the assignment of *marital* assets. To the extent that the plaintiff seeks consideration of a postdecree appreciation in the value of property, such appreciation, having occurred after the termination of the marriage, is no longer a marital asset." (Citation omitted; emphasis in original.) Id., 676.

This court has observed that "[i]n the absence of any exceptional intervening circumstances, the date a dissolution of marriage is granted is the proper time to determine the value of the parties' estate upon which to base division. An increase in the value of property following the date of dissolution does not constitute an exceptional circumstance. . . . Logically, there is no reason why the same date should not be used when there has been a decrease in the value of property." (Citation omitted.) *Kremenitzer* v. *Kremenitzer*, 81 Conn. App. 135, 139–40, 838 A.2d 1026 (2004); see *Bruno* v. *Bruno*, supra, 132 Conn. App. 352–55 (dissolution date proper valuation date for bank account even

though account value subsequently decreased); *Watson* v. *Watson*, 221 Conn. 698, 702–703 n.2, 607 A.2d 383 (1992) (dissolution date proper valuation date despite husband subsequently conveying interests in properties).

The accrued pension benefit was marital property until the original dissolution judgment. See *Sunbury* v. *Sunbury*, supra, 216 Conn. 676. The property, a financial asset, was subject to distribution. The plaintiff argues that by declining to fashion orders using the value of the asset as of the dissolution date, the court, in essence, did not account for a substantial amount of the marital assets.[7]

The court, however, suggested that exceptional intervening circumstances justified the decision at the retrial not to follow the prescribed course of valuing the marital asset as of the time of dissolution and then distributing that asset. As previously stated, the court considered the dissipation of the asset after the dissolution judgment to constitute such an exceptional circumstance. A postdissolution diminution of assets caused by market forces is not considered to be an exceptional circumstance. See *Kremenitzer* v. *Kremenitzer*, supra, 81 Conn. App. 139–40. We fail to see how intentional reduction of the asset could qualify. The wilful dissipation of assets by the defendant in the context of the present case does not constitute such a circumstance. The court erred, then, in concluding that the dissipation of assets constituted an "exceptional intervening cir-

[7] On this point, the plaintiff notes that in *Oldani* v. *Oldani*, 154 Conn. App. 766, 108 A.3d 272, cert. denied, 315 Conn. 930, 110 A.3d 433 (2015), this court held that valuation of the couples' jointly held marital home on a date other than the dissolution was not reversible because the plaintiff failed to show how he was harmed by that decision. The plaintiff argues that she, on the other hand, suffered harm as a result of the court's failure to value the IRA as of the date of dissolution. We agree; furthermore, unlike the accrued pension benefit in the present case, which was exclusively held by the defendant, *Oldani* concerned an asset that the parties owned in equal shares. See id., 774–75.

cumstance," and in not entering an order distributing the value of the asset as of the date of the original judgment of dissolution.

II

The plaintiff next claims that the trial court erred in basing its alimony orders on the parties' gross income, rather than net income. We agree.

As indicated previously in this opinion, the court, after a new hearing on the dissolution financial matters, entered the following order as to alimony: "[T]he plaintiff has a gross annual earning capacity of no less than $20,000 and the defendant has a gross annual earning capacity of no less than $100,000. Starting September 15, 2016, the defendant shall pay to the plaintiff . . . the sum of $3000 in alimony until the death of either party. This order is based on the earning capacities set forth above. The defendant shall further pay to the plaintiff an amount equal to 33 percent . . . of the gross amount of any employment income that he earns in excess of $100,000 per year . . . ."

The court had before it the financial affidavits of both parties. In its memorandum of decision, the court expressed its calculation and award of alimony in terms of gross income. The court made a finding as to the plaintiff's net income at the time of trial,[8] but it did not make a finding as to the defendant's net income and did not consider the plaintiff's net income in its determination of alimony.

Ordinarily, net income is the proper basis for alimony orders. "[I]t is well settled that a court must base its child support and alimony orders on *the available net income of the parties, not gross income*. . . . Whether

[8] The court found that the plaintiff's net income at the time of trial was $88 per month. The court based its award of alimony on its finding of a gross earning capacity of no less than $20,000 per year.

an order falls within this prescription must be analyzed on a case-by-case basis. Thus, while our decisional law in this regard consistently affirms the basic tenet that support and alimony orders must be based on net income, the proper application of this principle is context specific. . . . [W]e differentiate between an order that is a function of gross income and one that is based on gross income. . . . [T]he term based as used in this context connotes an order that only takes into consideration the parties' gross income and not the parties' net income. Consequently, an order that takes cognizance of the parties' disposable incomes may be proper even if it is expressed as a function of the parties' gross earnings." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Procaccini* v. *Procaccini*, 157 Conn. App. 804, 808, 118 A.3d 112 (2015). The court in the present case did not calculate the financial orders as a function of gross income but, rather, used only gross income itself. The court erred, then, by basing financial orders on gross income.

III

Finally, the plaintiff asks us to correct a statement made by the trial court in its discussion of facts underlying its conclusion that the defendant was in contempt, even though the plaintiff does not challenge the judgment of contempt. The court, in its memorandum of decision, noted that "the defendant has failed to pay to the plaintiff the alimony of [$4163] per month for July and August of 2016. He has the funds to pay it. He has a court ordered stipulation that authorizes him to pay it from the IRA. He still failed to pay." The plaintiff claims that the defendant was prohibited from withdrawing funds from the IRA for any purpose, so that the court's observation was erroneous. The plaintiff correctly states that Judge Tindill, on May 27, 2015, ordered that the defendant not withdraw money from the IRA for any purpose.

We find it unnecessary to address the merits of the plaintiff's contention. The court made the observation in the course of its recitation of the factual history of the case. The subject matter was related to the court's ultimate finding that the defendant was in contempt, and the court entered orders based on the finding of contempt. The plaintiff does not claim error in the conclusions or orders regarding contempt. The trial court did not modify or negate Judge Tindill's May 27, 2015 order, which remained in effect. Further discussion is academic, because the plaintiff is not appealing from a judgment as to this issue. See General Statutes § 52-263; *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 276 Conn. 168, 194, 884 A.2d 981 (2005) ("the statutory right to appeal is limited to appeals by aggrieved parties from final judgments"); *McCallum* v. *Inland Wetlands Commission*, 196 Conn. 218, 225, 492 A.2d 508 (1985), superseded on other grounds by *Paupack Development Corp.* v. *Conservation Commission*, 229 Conn. 247, 640 A.2d 70 (1994).

The judgment is reversed and the case is remanded for a new trial on the issues of financial orders and property distribution.

In this opinion the other judges concurred.

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## CINDY WATSON *v.* ZONING BOARD OF APPEALS OF THE TOWN OF GLASTONBURY
## (AC 41209)

DiPentima, C. J., and Bright and Beach, Js.

*Syllabus*

The plaintiff appealed to the trial court from the decision by the defendant zoning board of appeals affirming the decision of the defendant zoning enforcement officer, declining to approve the plaintiff's application for permission to conduct a customary home occupation from a home office within her residence. The plaintiff owns and operates a business providing special transportation services off-site to school districts, and

she manages the business from a home office in her residence where she and another employee use computers and make phone calls. Following a complaint, the zoning enforcement officer issued a cease and desist order to the plaintiff, from which she appealed to the board, which agreed to table the matter. Thereafter, the plaintiff filed her application for permission to conduct a customary home occupation, which was also denied, and the board denied the plaintiff's appeal therefrom. The trial court subsequently rendered judgment dismissing the plaintiff's appeal from the board's decision, from which the plaintiff, on the granting of certification, appealed to this court. *Held*:

1. The trial court erred in concluding that the plaintiff needed to prove that her home occupation was customary, in that other people in her town also were managing off-site companies from their home offices, in addition to establishing that she complied with the specific standards set forth in the town building zone regulations; the management of a business from a single room home office, within a person's primary residence, that complies with the specific standards of the regulations, is a customary home occupation that is customarily incidental and subordinate to the actual principal use of the property, the town set forth very specific factors to be employed in its determination of whether an accessory use, in the form of a customary home occupation, is permitted in a residential zone, and there was no separate and distinct test that an applicant must meet in order to satisfy the word "customary."
2. The trial court erred in concluding that the board acted reasonably in denying the plaintiff's application simply because her home occupation was part of a larger business that took place off-site; pursuant to the applicable regulation, the occupation being conducted at the residence must take place either inside of the residence or in an enclosed approved accessory building on the premises, there was nothing in the plain language of the regulation that prohibits a home occupation that is part of a larger enterprise located off-site, it was undisputed that the plaintiff's application contemplated that her entire home occupation would take place within her dwelling and not outside on her property, and, therefore, the board had no evidence on which to deny her application for failing to comply with the regulations.

Argued January 7—officially released April 23, 2019

*Procedural History*

Appeal from the decision of the defendant affirming the decision of the defendant's zoning enforcement officer declining to approve the plaintiff's application for permission to conduct a customary home occupation from a home office within her residence, brought to the Superior Court in the judicial district of Hartford,

where the court, *Robaina*, *J.*, granted the plaintiff's motion to cite in the defendant Peter R. Carey; thereafter, the matter was tried to the court, *Domnarski*, *J.*; judgment dismissing the appeal, from which the plaintiff, on the granting of certification, appealed to this court. *Reversed*; *judgment directed.*

*Kenneth R. Slater*, *Jr.*, for the appellant (plaintiff).

*Andrea L. Gomes*, with whom was *Matthew Ranelli*, for the appellees (defendants).

*Opinion*

BRIGHT, J. The plaintiff, Cindy Watson, appeals from the judgment of the Superior Court dismissing her appeal from the decision of the defendant Zoning Board of Appeals of the Town of Glastonbury (board), in which the board affirmed the decision of the defendant zoning enforcement officer, Peter R. Carey, declining to approve the plaintiff's application for permission to conduct a customary home occupation from a home office within her residence. On appeal, the plaintiff claims that the Superior Court erred in upholding the decision of the board and dismissing her appeal because the court improperly concluded that (1) the plaintiff needed to prove that her home occupation was "customary," in that other people in Glastonbury also were managing off-site companies from a home office, in addition to establishing that it complied with the specific standards set forth in § 7.1 (b) (2) (a) of the Glastonbury Building Zone Regulations (regulations), and (2) the determining factor of whether a specific customary home occupation is allowed under the regulations is by a consideration of the nature of the business to which the home occupation relates and whether any part of that business is conducted off-site. We reverse the judgment of the Superior Court.

The record reveals the following uncontested facts. The plaintiff owns and operates a business, Haven Transportation, LLC (business), which provides special transportation services to school districts, using minivans. The business has forty-one vehicles and forty-nine employees, and it operates a facility in East Hartford, which has an office and a maintenance facility. Many of the business' minivans are stored at this location or at the homes of the employees who drive them.

The plaintiff has managed her business from her residence since 2013, in a single room home office. Prior to November, 2015, drivers using the minivans went to the plaintiff's residence, both for business and for social events. Following a complaint, Carey, on November 18, 2015, issued a cease and desist order to the plaintiff. The order alleged that the plaintiff was operating her business outside of the regulations in that (1) a transportation center was not a permitted use, (2) the plaintiff had not obtained the town's approval for a customary home occupation, and (3) the plaintiff was storing as many as eight commercial vehicles at her residence.

On December 7, 2015, the plaintiff filed an appeal of the cease and desist order with the board. She attached a statement of her reasons for appeal, which set forth, in relevant part: "The [plaintiff] . . . operates a fully compliant customary home occupation in which she manages, by telephone and electronic communications, the logistics of her business, which provides transportation services to students, primarily those with special needs, using vehicles that are the primary vehicles used by [the plaintiff] and her husband, and a third vehicle, such as a passenger van, that is periodically used for the business. . . . As will be demonstrated at the hearing before the [board], the [plaintiff's] home occupation at the [p]roperty is a secondary use to her family's

primary residence and meets all conditions for operating a customary home occupation under the [regulations]."

During the January 4, 2016 public hearing on the plaintiff's appeal from the cease and desist order, her attorney, Kenneth R. Slater, explained that the plaintiff had hired him one month before the cease and desist order was issued, and that the plaintiff was compliant with all regulations by the time that order was issued. Additionally, following discussions with several members of the board during the hearing, Slater agreed that the plaintiff would file an application for permission to conduct a customary home occupation. He explained that they had not filed previously because the application process was unclear.[1] Carey told the board that he would need more information in the form of an application before he could make a decision regarding the merits of such an application. The minutes of this

[1] Section 7.1 of regulations neither sets forth a specific requirement that a person seek approval or seek a permit for an customary home occupation, nor does it contain any direction for obtaining such approval or permit. It also appears that the town has no formal application for someone to fill out. The final subdivision of § 7.1 of the regulations, specifically § 7.1 (b) (2) (a) (12), however, sets forth the following: "The Building Official may, at his discretion, for good cause such as a noncustomary use, potential excessive noise, storage of materials or parking, [refer] any question concerning a customary home occupation to the Town Plan and Zoning Commission for its review and recommendations. The Town Plan and Zoning Commission shall have thirty (30) days from its receipt of the application from the Building Official within which to forward its report of findings and recommendations to the Building Official. Said report of the Town Plan and Zoning Commission shall be advisory only, and the failure of the Town Plan and Zoning Commission to submit its report within the prescribed thirty (30) day period shall not prevent the Building Official from reaching a decision *on the application for the customary home occupation* after the prescribed thirty (30) day time period has expired." (Emphasis added.) There is no indication in the record that Carey, the building official, referred this matter to the Town Plan and Zoning Commission.

Whether the regulations legally required the plaintiff to submit an application for her home office need not be determined in this appeal because the parties agreed that the plaintiff would submit such an application.

hearing also reflect that Carey told the board that he had issued the cease and desist order because he had been instructed to do so "by a higher-up." The board unanimously agreed to table the matter.[2]

Thereafter, on January 8, 2016, the plaintiff submitted her application for permission to conduct a customary home occupation. On January 25, 2016, Carey sent a letter to the plaintiff and her attorney notifying them that he had denied the plaintiff's application, stating, in relevant part: "[Y]ou do not meet the general intent and spirit of the [c]ustomary [h]ome [o]ccupation [regulations], and also don't meet all the standards set forth in [§ 7.1 (b) (2) (a) of the regulations], specifically items 1, 4, and 8. . . . Items 1 and 4 are based on evidence from complaints and testimony and also from your letter dated [January 8, 2016]. The operation of the home occupation doesn't take place entirely within the home, and has changed the character of the neighborhood. Given past practice, it is apparent that Haven Transport vehicles come and go from the property. . . . Item 8 is based on complaints and testimony of past practices. There is evidence that unsightly conditions of the property have existed and will possibly continue in the future. Therefore I am continuing to uphold my cease [and] desist dated November 18, 2015 and [d]eny your application for a [c]ustomary [h]ome [o]ccupation . . . ." (Emphasis omitted.) The plaintiff appealed that denial to the board.

On April 4, 2016, the board conducted what appears to have been a rather contentious hearing on the plaintiff's appeal. During the hearing, in response to some comments by board members, Slater explained to the board

[2] The plaintiff's attorney sent a letter to the board on January 29, 2016, withdrawing the plaintiff's appeal to the board. The board, unaware of this letter, on February 1, 2016, voted to deny the plaintiff's appeal of the cease and desist order. The transcript of the April 4, 2016 hearing reveals that this letter was not seen by the board's chairperson prior to April 4, 2016.

that it was required to conduct a de novo review of the plaintiff's application, rather than merely review the determination of Carey. He then began his presentation to the board. Board chairperson, Timothy Lamb, asked if the business was still being operated out of the residence, and Slater explained that the call center was ongoing, using phones and a computer. Lamb stated that the plaintiff was applying for permission to do something that she already was doing, and that she was acting ahead of her application. Board vice chairperson, Sandra O'Leary, stated that because Carey already had denied the plaintiff's application for permission to have a customary home occupation, she did not understand why the board needed "to go through all of this again." O'Leary also indicated that she had a problem with the plaintiff's operation of the business without the town's permission. Slater stated that the purpose of the hearing was to obtain the town's permission.

Slater proceeded to introduce evidence, but some members of the board appeared frustrated by his presentation, making comments such as "we agree . . . that's [the plaintiff's] home office and that's fine. I mean you don't have to swear on a stack of Bibles," and "what's the point?"[3] Slater attempted to explain that he was trying to show that the plaintiff was in compliance with the regulations regarding customary home occupations. Lamb stated that the board knew that the plaintiff had a home office, and that she had employees who came to visit. Slater disagreed with that, and said there was no evidence that employees were visiting the home office any longer. The plaintiff then explained to the board that she had only one employee who came to her home office, and that this person actually works in

[3] The frustration of some of the members also may have been due, at least in part, to the fact that they did not understand that the plaintiff had withdrawn her appeal from the cease and desist order and was proceeding on a completely new application.

the home office. She denied that any other employees or applicants for employment come to her home office, or that she conducts meetings at her home office. Slater further explained that the plaintiff allows some employees to take the company vehicles home with them, and that some people who work for the plaintiff's business visit her at home in a personal capacity, not for business. Slater then explained that the plaintiff has asked that they no longer use company vehicles for such visits.

Slater stated to the board that the plaintiff has brought her home office into compliance with the regulations and that the presentation to the board was meant to demonstrate "that this business as it's being conducted right now is nothing more than two people in a room making phone calls and [that] one commercial vehicle [which the plaintiff drives on occasion is] being parked [there]. If [the vehicle is] there for longer than driving in and out by [the plaintiff], it is stored in the rear as required by the regulations." Vice Chairperson O'Leary interrupted Slater's presentation and stated, in relevant part: "Well, you know what? It's time for these people to move out. It's not fair for neighbors to see this type of thing. And you know what? There's probably a lot more going on than you're telling us, which I'm—you know, I know it's probably not right for me to say that to you but that's how I feel. We're not attorneys here. You know, we're just volunteers to this [b]oard elected. We try to do a good job for people and try to make everybody happy and make the town good. And I think really it's about time that she realizes that it's just not a good situation to be in in her house." Slater attempted to explain that "the situation is [that the plaintiff] and one woman answer phones and operate—" but O'Leary interrupted and said she had "a hard time believing that." When Slater then asked the board to listen to the evidence, O'Leary responded that Slater

should "move it along, because . . . this is not a court case."

Members of the board then expressed concern to Slater that the plaintiff was operating her home office before getting approval from the town. Slater explained that they were unclear about the regulations and that they had agreed during the January 4, 2016 hearing that they would submit an application for approval of the home office. Additionally, he stated that no one had suggested during that hearing that the plaintiff stop her livelihood during the application process. He also stated: "We said we were going to apply to show that we were in conformance, and we believe we've done that, and we believe the evidence will show that."

Alternate board member, Ed Andreozzi, then stated: "Correct me if I'm wrong, but I thought we [had] decided that they would remove their [appeal] . . . they would reapply to [Carey], he would make a decision based on the new information, based on what we told them they had to do to change their business. They would change their business, reapply under the new standards. Then [Carey] would decide if that was okay or not, and if it was okay, he would give them a pass; if it was not okay, they would be back before us." Lamb stated that was not correct, but others, including Slater, the plaintiff, Andreozzi, and O'Leary stated that Andreozzi was correct. Andreozzi then stated that he believed the board had an obligation to hear Slater and to "make a decision based on what's happening today with the business, not what happened six months ago."

After further discussion with board members, Slater went through all of the requirements set forth in the regulations for a customary home occupation and explained how the plaintiff's office met each one. Slater then questioned one of the road supervisors for the plaintiff's business, Joseph Frederick. Frederick spoke

about the business and how it operates. He spoke about the main office in East Hartford, the parking of vehicles, and that the employees had been instructed not to go to the plaintiff's home. He explained that once the plaintiff knew about what she needed to do to comply with the regulations, they immediately put things into place to ensure compliance.

Slater also questioned Teraya Broaden, the employee who works in the plaintiff's home office. Broaden indicated that no other employees or potential employees come to the plaintiff's residence. She also indicated that, although she occasionally drives a work minivan, she no longer brings that vehicle to the plaintiff's residence.

The board asked if anyone wanted to speak to the appeal, and one neighbor, Kevin Borsotti, spoke. He stated that his primary concern was the safety of his children. Although he admitted that the plaintiff had been in compliance with the regulations since the prior issuance of the cease and desist order, he remained concerned and thought that the plaintiff's prior actions should be taken into consideration by the board. The board then noted that another neighbor, Michael W. Gilmartin, and his wife, Grace C. Gilmartin, had sent a letter in opposition to the plaintiff's appeal. The letter alleged that the plaintiff was conducting maintenance, overnight parking and dispatch of vehicles, employee interviews, hiring, and employee meetings at her residence. Slater contested the allegations in the letter and told the board that it had heard evidence at the hearing that those things were not being done at the residence and that the plaintiff had a separate facility for those things.

The board then asked some questions, including asking Carey whether he could issue another cease and desist order if they granted the plaintiff's appeal and

she thereafter failed to comply with the regulations, which Carey assured them that he could do. As for the specific reasons that Carey cited in his denial of the plaintiff's application, an unnamed board member asked him about the regulation that requires that the "customary home occupation shall be carried on entirely within the dwelling unit or within a completely enclosed permitted accessory business on the same lot as the dwelling." Carey explained that he had always interpreted that to mean that the entire business was operated in one location, that it is "not a small piece of a larger entity." He further explained that his conclusion that the plaintiff's business did not comply with the regulations because it changed the residential character of the neighborhood was based on the manner in which the plaintiff operated the business.[4]

After Lamb closed the public hearing portion of the meeting, board member and secretary, Michael Fitzpatrick, offered a motion to deny the plaintiff's appeal, which was seconded by O'Leary. Alternate board member Robyn Guimont stated for the record that she believed that the plaintiff established that she is in compliance with the regulations and that the board should consider approving her appeal. Board member Nicholas Korns also stated that he believed the plaintiff was in compliance. He urged the board to look at the current state of facts and not to rely on the occurrences from six month ago.

Lamb stated that "a residential neighborhood is not appropriate for a commercial enterprise." He also stated that it was "unfortunate" that there were not as

[4] Although Carey was not asked about the basis for the conclusion in his denial letter that the plaintiff's business violated § 7.1 (b) (2) (a) (8) of the regulations, which requires that a customary home occupation "shall not create any objectionable noise, odor, vibrations or unsightly conditions," his letter rejecting the plaintiff's application stated that his conclusion was based on "complaints and testimony of past practices."

many people present as had been present previously. He opined that "there was a lot of evidence presented that, going forward, it appears that [the plaintiff] may be in compliance. . . . I've had a business, and, you know, I have moved out of my house. You gotta move, you gotta move. I mean, it's good that she's developed a great business, but there comes a time where a residential neighborhood is not the place for a commercial business. And I feel that it's just created a toxic environment in the neighborhood . . . I'm just not—I'm not going to be in favor of it."

Korns reminded the board that the regulations allow for a commercial business to be operated in a residential zone, and he, again, opined that the plaintiff was in compliance with the regulations. He also stated that he disagreed with Carey's statement that the business must be wholly contained in the home office. Lamb acknowledge Korns' statement and agreed that the regulations allow for a commercial business, but he stated that he did not credit the testimony that employees no longer go to the plaintiff's residence and stated that "to [him], it's still a commercial business that's being run in the neighborhood."

Fitzpatrick stated that he was "going to put [his] faith in [Carey] as far as the entirety of the business." He further stated: "I think most of these businesses from what the philosophy of the office is that the building code is that it's a small business, but if it gets beyond that, then you got to move on." Fitzpatrick also voiced concern that the plaintiff did not show global positioning system (GPS) updates to prove no business vehicles had been to her residence.[5] He stated that he would be voting to uphold the decision of Carey for those reasons.

[5] There had been evidence submitted to the board that GPS tracking devices have been installed on all of the business vans.

O'Leary stated: "Okay. I would just like to say one thing, that I'm not in favor of it, and the reason that I'm not in favor of it is because if you look at [the regulations], I do believe a customary home occupation shall not change the residential character of such dwelling, unit and lot. And it definitely has changed the neighborhood drastically. So—and I'm not going to get into who changed it, it's just changed. And so therefore I'm not in favor of it."

Andreozzi then stated: "So I guess I'll just add to that, I am not voting tonight but if I were, I would vote in favor of this.[6] It sounds like we have enough votes to deny this application, which I think is unfortunate. I think that they've made an effort to show they have been compliant tonight, and I think they made a successful effort. You know, we saw no evidence of nonconformity tonight. We had one person actually speak and whether knowingly or not spoke in favor, you know, saying that there was no nonconformity that they were aware of and, you know, I think that in the absence of not having any new evidence over the last several months that they are doing something incorrectly I don't see how you vote against this.

"I don't believe it's a commercial enterprise. I think those are the wrong words to use when it's two people in a room answering phones. I mean there's plenty of people that work on their computer and then have their nanny over, you know, if that's the situation. So I don't see the problem.

[6] Although the propriety of nonseated and nonvoting alternate members participating in the deliberations of the board is not raised as an issue in the present case, we note that such participation, after the close of the public hearing, is improper. See *Komody* v. *Zoning Board of Appeals*, 127 Conn. App. 669, 686, 16 A.3d 741 (2011) (alternate members of board, who are nonseated and nonvoting for purposes of matter under board's consideration, may participate fully in public hearing; those same alternate members, however, may not participate in board's discussion after close of public hearing).

"You know, there's two sides you can error on this. You can vote to shut it down and you're probably permanently shutting down somebody's small business or significantly making it change or moving or making it more expensive or more difficult to operate. Or you can vote for it and we still have [Carey] and his department to monitor the situation and make sure that there is no, you know, falling out of favor with what they're supposed to be doing. So I just leave it at that. I would vote—you know, I would not vote in favor of shutting down somebody's business when we have time to show conformity." (Footnote added.)

Because of some confusion about the negative motion that Fitzpatrick had made, he, thereafter, amended his motion to approve the appeal of the plaintiff. Korns seconded the modified motion. Following more confusion over what a yes vote meant, the board voted two to three against granting the plaintiff's appeal, with Korns and Guimont voting to grant the appeal, and Lamb, O'Leary, and Fitzpatrick voting to deny the appeal. Andreozzi could not vote because he had the nonvoting role of an alternate at the meeting. The board did not set forth a collective statement of the reasons for upholding the denial of the plaintiff's application. On April 7, 2016, the board provided public notice of its decision denying the plaintiff's appeal by publication in the Glastonbury Citizen newspaper by means of a simple denial. Pursuant to General Statutes § 8-8 (b), the plaintiff, thereafter, appealed from the board's decision to the Superior Court.

The Superior Court, after searching the record for the basis of the board's decision, concluded that the board improperly relied on past events, but that it, nonetheless, properly denied the plaintiff's appeal. The court reasoned that (1) the plaintiff's business was not "customary" because there was no proof that other residents of Glastonbury also managed off-site companies from

their residential home offices, and (2) the plaintiff's home occupation did not comply with § 7.1 (b) (2) (a) (1) of the regulations because it was part of a larger enterprise that occurred off-site. This appeal followed.

On appeal, the plaintiff claims that the court erred in upholding the board's decision. Specifically, she claims that the court improperly concluded that (1) the plaintiff needed to prove that her home occupation was "customary," in that other people in Glastonbury also were managing off-site companies from their home office, and (2) the determining factor of whether a specific customary home occupation is allowed under the regulations is by a consideration of the nature of the business to which the home occupation relates and whether any part of that business is conducted off-site. After setting forth our standard of review, we will address each of the plaintiff's claims in turn.

"A zoning enforcement officer acting on an application for a zoning permit has a purely ministerial function. . . . If the application conforms to the requirements of the regulations, he has no discretion but to issue a permit." (Citations omitted.) *Maluccio* v. *Zoning Board of Appeals*, 174 Conn. App. 750, 756, 166 A.3d 69 (2017).

"[F]ollowing an appeal from the action of a zoning enforcement officer to a zoning board of appeals, a court reviewing the decision of the zoning board of appeals must focus, not on the decision of the zoning enforcement officer, but on the decision of the board and the record before the board. . . . [T]he zoning board of appeals makes a de novo determination of the issue before it, without deference to the actions of the zoning enforcement officer. . . .

"[T]he board is endowed with liberal discretion and . . . its actions are subject to review by the courts only to determine whether they are unreasonable, arbitrary

or illegal. . . . The burden of proof to demonstrate that the board acted improperly is upon the party seeking to overturn the board's decision. . . . It is the board's responsibility, pursuant to the statutorily required hearing, to find the facts and to apply the pertinent zoning regulations to those facts. . . . Upon an appeal from the board, the court must focus on the decision of the board and the record before it. . . .

"In reviewing a decision of a zoning board, a reviewing court is bound by the substantial evidence rule, according to which, [c]onclusions reached by [the board] must be upheld by the trial court if they are reasonably supported by the record. The credibility of the witnesses and the determination of issues of fact are matters solely within the province of the [board]. . . . The question is not whether the trial court would have reached the same conclusion, but whether the record before the [board] supports the decision reached. . . . If the trial court finds that there is substantial evidence to support a zoning board's findings, it cannot substitute its judgment for that of the board. . . . If there is conflicting evidence in support of the zoning [board's] stated rationale, the reviewing court . . . cannot substitute its judgment as to the weight of the evidence for that of the commission. . . . The agency's decision must be sustained if an examination of the record discloses evidence that supports any one of the reasons given." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Woodbury Donuts, LLC* v. *Zoning Board of Appeals*, 139 Conn. App. 748, 757–60, 57 A.3d 810 (2012). Where, as here, the board does not state formally the reasons for its decision, "the trial court must search the record for a basis for the board's decision." (Internal quotation marks omitted.) *Moon* v. *Zoning Board of Appeals*, 291 Conn. 16, 25, 966 A.2d 722 (2009).

When applying the specific regulations of a town, "[g]enerally, it is the function of a zoning board or commission to decide within prescribed limits and consistent with the exercise of [its] legal discretion, whether a particular section of the zoning regulations applies to a given situation and the manner in which it does apply. The [Superior Court must] decide whether the board correctly interpreted the section [of the regulations] and applied it with reasonable discretion to the facts. . . .

"A local board or commission is in the most advantageous position to interpret its own regulations and apply them to the situations before it. . . . Although the position of the municipal land use agency is entitled to some deference . . . the interpretation of provisions [of a municipal zoning regulation] is nevertheless a question of law for the court. . . . The court is not bound by the legal interpretation of the [regulation] by the [board]." (Internal quotation marks omitted.) *Lowney* v. *Zoning Board of Appeals*, 144 Conn. App. 224, 228–29, 71 A.3d 670 (2013).

I

The plaintiff claims that the court erred in concluding that she needed to prove that her home occupation was "customary," in that other people in Glastonbury also were managing off-site companies from their home offices, in addition to establishing that she complied with the specific standards set forth in the regulations. She argues that Glastonbury has adopted specific standards in its regulations that govern the location, size, nature of the use, parking, and signage for customary home occupations, and that it has chosen not to list specific authorized home occupations. She contends, therefore, that any home occupation, using a home office, which meets all of the standards, necessarily qualifies as a customary home occupation. Otherwise,

she argues, "customary" would be determined on a case-by-case basis with no relationship to the regulations. This would give a zoning enforcement officer (officer) unfettered discretion to deny an application or to issue a cease and desist order to any resident who has a home occupation that fully complies with every regulation, but who, nevertheless, has a home occupation that the officer thinks is a bit unusual or involves new technology, despite the fact that it has no impact on the residential character of the neighborhood and complies with the specific standards set forth in the regulations. She further argues, however, that even if "customary" is something outside of the strict requirements of § 7.1 (b) (2) (a), her home office is customary in that she uses only computers and telephones to manage her business from a single office in her residence.

The board argues that the plaintiff was required to prove that her home occupation was customary, and, in this case, that meant that she needed to prove, specifically, that managing a transportation company is a customary residential home occupation in Glastonbury. It further argues: "Contrary to [the] plaintiff's assertion, and as held by the [Superior Court], the regulations specify that, in addition to satisfying the twelve performance standards in [§] 7.1 (b) (2) (a) [of the regulations], the plaintiff must also satisfy the definition of customary 'home occupation' in [§] 2.22: 'Home Occupation—A use, not otherwise permitted in the zone, which is customarily and may properly be conducted for compensation as an accessory use on a residential lot (See [§] 7).' . . . The definition of 'home occupation' requires that the use be 'customarily' and 'properly' conducted in a home as an accessory use. An accessory use must also be a use 'customarily incidental and subordinate to the actual principal use . . . .' " (Citation omitted.)

After thoroughly reviewing the regulations at issue, and fully considering the briefs and arguments of the parties, we conclude that the management of a business from a single room home office, within a person's primary residence, that complies with each of the specific standards set forth in § 7, is a customary home occupation that is customarily incidental and subordinate to the actual principal use of the property as a primary residence under the regulations.

"The phrase used in most zoning regulations is that [an accessory] use must be 'customarily incidental to'—not that the use must be 'customary.' If the rule intended that only customary uses could come under the doctrine, then many or most people in the area would have to be doing the same thing before any one of them could (unless they asked government permission first). . . . [W]e would still have horse stables instead of garages in our residential neighborhoods; someone has to be first if a use is ever to become customary." T. Tondro, Connecticut Land Use Regulation (2d Ed. 1992) p. 85. "Several factors . . . are weighed when making an accessory use decision. The relative scale of the accessory use and its usual relationship to the primary use of the property must be considered. Ultimately the decision comes down to balancing an owner's right to use his land for more than simply providing food and shelter, against the neighbors' expectations of what will happen in their neighborhood and the degree of impact the accessory use will have on the neighbors' right to use their land." (Footnote omitted.) Id., 87–88.

"A decision to deny . . . administrative review applications, or to subject them to conditions . . . must be based on sufficiently specific authority in the regulations to support a conclusion that the decision made is in accordance with the policies established by the legislatively acting commission that established the policy in the first place. Much of the litigation over

the approval of one of these applications turns on the degree of specificity required in the governing regulations. . . .

"The requirement that standards be published prior to an agency's action applies even if the agency authorized to grant the administrative approval is the municipal legislative body . . . . [I]t is the function performed rather than the source of power of the board that requires that the board act pursuant to standards. The standards are meant to guide the agency's decisions; it must consider the factors listed in the regulations when making its decision, and only those factors. Moreover, if these standards are satisfied, the permit must be issued. The commission acts in an administrative capacity when issuing an administrative approval, and administrative agencies do not have the discretion to deny an application that satisfies all the criteria established by the legislative body for commission action. This is simply another way of saying that an administrative agency can only base its decisions on criteria in its published regulations." (Footnotes omitted; internal quotation marks omitted.) Id., 188–91.

In the present case, § 2.2 of the regulations defines accessory use as: "A use of land or a portion of a structure or building customarily incidental and subordinate to the actual principal use of the land, structure or building and located on the same lot with such principal use, structure or building."

Section 2.22 of the regulations defines a home occupation as: "A use, not otherwise permitted in the zone, which is customarily and may properly be conducted for compensation as an accessory use on a residential lot (See [§] 7)."

The plaintiff's residence is located in the town's residential zone A, which is governed by § 4.5 of the regulations. Section 4.5.2 lists the permitted accessory uses

in the A zone. Customary home occupation is listed as an accessory use, subject to the provisions set forth in § 7.0 of the regulations.

Section 7.1 of the regulations provides in relevant part: "Accessory uses and structures associated with residential uses located in the residence zones or on lots in non-residence zones on which permitted or non-conforming residential uses are situated shall be subject to the condition that no such use or structure shall [involve] the conduct of a business or sale of a project, or a service, except a home occupation, a boarding, rooming or lodging house or a roadside stand, all as hereinafter limited, and to the following conditions:

"a. Customary Accessory Uses and Structures

"1. Permitted customary accessory uses and structures. Customary accessory uses and structures are permitted in the residence zones and on lots on non-residential zones on which permitted or non-conforming residential uses are situated, and may include but are not limited to: dog house, greenhouse, tool shed or storage building, children's playhouse, tennis court, laundry room, hobby room or mechanical room, playground or recreation area, and garden. . . .

"b. Special Accessory Uses and Structures

"1. Permitted special accessory uses and structures. Special accessory uses and structures are permitted in the residence zones and on lots in non-residence zones on which permitted . . . non-conforming residential uses are situated as set forth in Section 4 of these Regulations and shall be subject to such additional conditions as are set forth herein. Special accessory uses and structures shall include: customary home occupation, garage or carport and the parking of a commercial vehicle, the parking or storage of a boat, trailer or mobile home, guest house, bathing or swimming pool

and bath house, roadside stand, the stabling of horses (and) the keeping and housing of livestock or poultry for domestic purposes on, and traditional professional medical/dental care facility. . . .

"2. Conditions for special accessory uses and structures. In addition, the requirements for height, location and maximum land area for customary accessory uses and structures, special accessory uses and structures shall be subject to the following conditions:

"(a.) Customary home occupation. A customary home occupation shall be subject to the following provisions:

"1. A customary home occupation shall be carried on entirely within the dwelling unit or within a completely enclosed permitted accessory building on the same lot as the dwelling unit.

"2. A customary home occupation shall be carried on by the inhabitants of such dwelling unit and shall involve the employment on the premises of only any member of the immediate family residing in such dwelling unit plus one person, full or part time, not residing in such dwelling unit.

"3. A customary home occupation shall be clearly incidental and secondary to the use of such dwelling unit and lot for residential purposes.

"4. A customary home occupation shall not change the residential character of such dwelling unit and lot.

"5. A customary home occupation, whether contained in a dwelling unit or in an accessory building, shall occupy an area not to exceed twenty-five percent (25%) of the gross floor area of such dwelling unit.

"6. A customary home occupation shall not offer, display or advertise any commodity or service for sale or rental on the premises.

"7. A customary home occupation shall not store any materials or products on the premises outside of the dwelling unit or the permitted accessory building in which it is located.

"8. A customary home occupation shall not create any objectionable noise, odor, vibrations or unsightly conditions.

"9. A customary home occupation shall not create a health or safety hazard.

"10. A customary home occupation shall not create interference with radio and television reception in the vicinity.

"11. Signs associated with customary home occupation shall be limited to one identification sign per dwelling unit, such sign not to exceed [more] than two (2) square feet in area.

"12. The Building Official may, at his discretion, for good cause such as a non-customary use, potential excessive noise, storage of materials or parking, [refer] any question concerning a customary home occupation to the Town Plan and Zoning Commission for its review and recommendations. The Town Plan and Zoning Commission shall have thirty (30) days from its receipt of the application from the Building Official within which to forward its report of findings and recommendations to the Building Official. Said report of the Town Plan and Zoning Commission shall be advisory only, and the failure of the Town Plan and Zoning Commission to submit its report within the prescribed thirty (30) day period shall not prevent the Building Official from reaching a decision on the application for the customary home occupation after the prescribed thirty (30) day time period has expired."

Section 9.0 of the regulations concerns parking. Section 9.11 (a) specifically addresses parking for customary home occupations: "The following off-street parking

standards are minimum requirements for off-street parking and the Town Plan and Zoning Commission may require additional off-street parking for a particular development based on the nature of the development, its location, access and relation to surrounding development, and any unique parking demand which may be associated with such a development. . . .

"a. Customary home occupation: One (1) parking space for each employee plus two (2) parking spaces, such parking spaces to be in addition to any required off-street parking for residential purposes."

The plaintiff contends that a review of the regulations reveals that a "customary home occupation" is one that complies with § 7.1 (b) (2) (a) of the regulations. She argues that requiring her to prove a standard of "customary" that is not set forth in the regulations is improper, especially in light of the specificity of the standards set forth in the regulations regarding customary home occupations. She further argues, however, that even if the word "customary" in the regulations is meant to convey something beyond the specific requirements of § 7.1 (b) (2) (a), her home occupation is customary in that she uses only a computer and telephones to manage her business from a single office in her primary residence. We conclude that a home occupation that satisfies the specific standards set forth in § 7.1 (b) (2) (a) is a customary home occupation under the regulations; there is no separate and distinct test that an applicant must meet in order to satisfy the word "customary." Rather, if an applicant meets the standards, the home occupation is customary under the regulations as adopted by the town of Glastonbury.

"There have always been some who worked in their homes, but there are many more now with the advent of the personal computer and 'telecommuting.' " 6 E.

Yokley, Zoning Law and Practice (4th Ed. 2013) § 44-5, p. 44-27. "[P]ublic interference with a person's hobbies, or with his [or her] preference to work at home, raises sensitive issues on the nature of freedom, in a quite different way from the familiar situation where a businessperson or developer complains that zoning restrictions have abridged his or her freedom to make more money from land." 4 N. Williams, Jr. & J. Taylor, American Land Planning Law (Rev. Ed. 2018) § 79:1. "The principal problem with [accessory uses] is . . . their impact on the residential area nearby—primarily in the traditional terms of the common-law nuisances but also in terms of various other objectionable factors with which residential zoning is normally concerned. . . . Various activities and/or structures may affect the appearance of the neighborhood . . . . The factors found objectionable are sometimes more spiritual in nature . . . . [M]any of these secondary activities, and particularly the non-income-producing ones, involve rights of a personal sort, and such rights involve considerations which are quite different from those involved in the usual cases where a developer wishes to use land for some more profitable activity." Id., § 79:5.

In the present case, the Superior Court concluded that the board properly determined that a home occupation had to be "customary" in the town, and that the establishment of what is "customary" is an additional requirement over and above all of the specific standards set forth in the regulations. Specifically, the court held that "the plaintiff had the burden to establish that home occupations similar to hers are in fact customarily conducted in the zoning district in which the subject property is located. . . . The plaintiff did not present evidence to establish that such activities, related to managing an off-site business, *are actually and customarily* performed at other homes in Glastonbury." (Citation omitted; emphasis in original.) We disagree that the regulations contain such a requirement.

Section 2.2 of the regulations defines an accessory use, in relevant part, as "[a] use of . . . a portion of a structure . . . customarily incidental and subordinate to the actual principal use of the . . . structure . . . ." Section 2.22 of the regulations defines a home occupation, in relevant part, as "[a] use, not otherwise permitted in the zone, which is customarily . . . conducted for compensation as an accessory use on a residential lot . . . ." Section 2.22 then specifically directs the reader to § 7.0 of the regulations. Section 4.5.2 of the regulations sets forth the permitted accessory uses in the town's A residential zone. Customary home occupation is listed as an accessory use, *subject to the provisions set forth in § 7.0 of the regulations*.

Section 7.1 (b) (1) of the regulations specifically allows "[s]pecial accessory uses and structures," specifically including a "customary home occupation . . . ." The specific standards for an acceptable customary home occupation then are set forth in § 7.1 (b) (2) (a), and the parking requirements are set forth in § 9.0 of the regulations.

There is no definition of the word "customary" set forth in the regulations that might indicate that an applicant must comply with something more than the very specific requirements set forth in § 7.1 (b) (2) (a) of the regulations. Rather, the regulations are quite specific and detailed on what requirements an applicant must meet for his or her customary home occupation to be compliant. Although we readily agree with the court and the board that the regulations require that the accessory use be "customarily incidental and subordinate to the actual principal use"; Glastonbury Building Zone Regs., § 2.2; we conclude that, in this case, the factors that are relevant to this determination are set forth with specificity in § 7.1 (b) (2) (a) of the regulations.

To support its argument that the plaintiff must establish that her specific business, namely, the management of an off-site transportation company, must be "customary" in her zone, the board relies in large part on *Lawrence* v. *Zoning Board of Appeals*, 158 Conn. 509, 264 A.2d 552 (1969). In *Lawrence*, the plaintiff sought to keep goats and chickens at his residence, which was located in the residence and agriculture district in North Branford. Id., 510–11. The keeping of goats and chickens, however, was not a principal or accessory use under the regulations. Id., 511. The plaintiff, nevertheless, argued that it was an accessory use. Id. The North Branford zoning ordinance defined an accessory use as "[o]ne which is subordinate and customarily incidental to the main building and use of the same lot." (Internal quotation marks omitted.) Id., 510 n.1. Our Supreme Court explained that the crucial phrase in the regulations at issue was the phrase "customarily incidental," which defined the meaning of an accessory use. (Internal quotation marks omitted.) Id., 511. The court determined that an accessory use must be incidental to the primary use; id., 511–12; and that it must be "usual to maintain the use in question in connection with the primary use of the land." Id., 512. The court concluded that to determine what is "customarily incidental," certain factors must be examined, such as the size of the lot, the nature of the primary use, the use made of the adjacent lots by the neighbors, and the economic structure of the area. (Internal quotation marks omitted.) Id., 511, 513.

We are not persuaded that *Lawrence* is helpful to our analysis. The court in *Lawrence* noted that the analysis it undertook is required "[i]n situations where there is no . . . specific provision in the ordinance . . . ." (Internal quotation marks omitted.) Id., 513. The ordinance at issue in *Lawrence* only defined accessory uses generally, without identifying specific criteria to

consider when determining whether a use complies with the ordinance. See id., 510 n.1. By contrast, in the present case, the town has set forth very specific factors to be employed in its determination of whether an accessory use, in the form of a customary home occupation, is permitted in a residential zone. Unlike in *Lawrence*, there is no need, in the present case, to employ our own factors or anything beyond that which is set forth in the regulations; the regulations, themselves, employ the factors that the town concluded were necessary to its determination. Accordingly, we conclude that a home occupation that satisfies the specific standards set forth in § 7.1 (b) (2) (a) of the regulations is a customary home occupation, and there is no separate and distinct test that an applicant must meet in order to satisfy the word "customary."

II

Having concluded that if the plaintiff met the eleven specific requirements of § 7.1 (b) (2) (a) of the regulations, she was entitled to have her application granted, we turn to whether there was substantial evidence in the record that her application failed to comply with any of those requirements. The trial court concluded that because the plaintiff admittedly was not operating the entirety of her transportation business from her home, it was reasonable for the board to conclude that she was not in compliance with § 7.1 (b) (2) (a) (1). Section 7.1 (b) (2) (a) (1) of the regulations provides: "A customary home occupation shall be carried on entirely within the dwelling unit or within a completely enclosed permitted accessory building on the same lot as the dwelling unit." Carey and the board concluded that this provision means that the home occupation cannot be part of a larger enterprise that is conducted off-site. The court agreed with this interpretation.

The plaintiff claims that the court improperly upheld the board's conclusion that the determining factor of

whether a specific customary home occupation is allowed under the regulations is by a consideration of the nature of the business to which the home occupation relates and whether any part of that business is conducted off-site. The plaintiff argues that the plain language of § 7.1 (b) (2) (a) (1) of the regulations should be construed "as simply protecting the residential character [of] the neighborhood by requiring that all home occupation related activities on the property be confined to within a building and not conducted outside in the yard." Consequently, the plaintiff argues that she could be in violation of that requirement only if she was conducting her home occupation partly in her yard or in some other area on her property. We agree with the plaintiff.

As stated previously in this opinion: "[T]he interpretation of provisions [of a municipal zoning regulation] is . . . a question of law for the court. . . . The court is not bound by the legal interpretation of the [regulation] by the [board]." (Internal quotation marks omitted.) *Lowney* v. *Zoning Board of Appeals*, supra, 144 Conn. App. 229. "Since zoning regulations are in derogation of common law property rights . . . the regulation cannot be construed beyond the fair import of its language to include or exclude by implication that which is not clearly within its express terms. . . . The words employed by the local legislative body are to be interpreted in accordance with their natural and usual meaning . . . and any interpretation that would torture the ordinary meaning of the words to create ambiguity will be rejected. . . . Common sense must be used in construing the regulation, and we assume that a rational and reasonable result was intended by the local legislative body." (Citations omitted.) *Spero* v. *Zoning Board of Appeals*, 217 Conn. 435, 441, 586 A.2d 590 (1991).

In this case, § 7.1 (b) (2) (a) (1) of the regulations specifically provides that "[a] customary home occupation shall be carried on entirely within the dwelling unit

or within a completely enclosed permitted accessory building on the same lot as the dwelling unit." The wording of this regulation is clear. The occupation being conducted at the residence must take place either inside of the residence or in an enclosed approved accessory building on the premises. The occupation, therefore, is not allowed to spill over into the yard, the street, or an unapproved structure or vehicle in the yard.

Furthermore, § 7.1 (b) (2) (a) (1) of the regulations cannot be read in isolation but must be read in context with rest of § 7.1 (b) (2) (a). All of the requirements of that section make clear that the section regulates conduct on the property and how and where it is conducted. Subdivision (1) clearly regulates where on the property the home occupation may take place, just as subdivision (2) regulates who may engage in the home occupation on the property. Had the town intended the interpretation suggested by the board and adopted by the court, subdivision (1) would provide that all business activity associated with a home occupation shall be carried on entirely *on the property*, as opposed to requiring only that the home occupation itself take place entirely *within the dwelling unit or an enclosed permitted accessory building* on the property. Carey's and the board's interpretation of subdivision (1) simply is not reasonable given the express language of the subdivision, particularly when read in the context of the entire section. We conclude that there is nothing in the plain language of the regulation that prohibits a home occupation that is part of a larger enterprise located off-site.

Moreover, the board's interpretation would lead to arbitrary outcomes. For example, the board's interpretation, as more fully explained by its attorney during oral argument before this court, would mean that a solo practitioner law firm operated from a residence would be a permitted home occupation, but a lawyer who

works from home by telecommuting to a firm in Hartford would not be a permitted home occupation.

Presumably, this would be true even if the attorney who operated an entire practice from her home regularly left to go to court or visit clients, even though that would mean her occupation was not conducted entirely on her property. Furthermore, the operation of a law office from one's home, which could include signage and clients coming and going, is more likely to impact the residential character of the neighborhood than would a single attorney anonymously working in her home by telecommuting to her law firm. Similarly, a computer web designer, if found "customary"; but see part I of this opinion; would be allowed under § 7.1 (b) (2) (a) (1) of the regulations, but only if he or she was not telecommuting as part of a larger web design firm, despite the fact that the impact on the residential character of the neighborhood likely would be exactly the same under both scenarios. We disagree that the town intended such a nonsensical interpretation of § 7.1 (b) (2) (a) (1) of the regulations. In fact, allowing customary home occupation to be defined under such a test runs contrary to the detailed specific standards set forth in § 7.1 (b) (2) (a), by which the town determined that home occupations are to be judged.

It is undisputed that the plaintiff's application contemplated that her entire home occupation would take place within her dwelling and not outside on her property. Consequently, the board had no evidence on which to deny her application for failing to comply with § 7.1 (b) (2) (a) (1) of the regulations. For the same reason, the court erred in concluding that the board acted reasonably in denying the plaintiff's application simply because her home occupation is part of a larger business that takes place off-site.[7]

[7] The board also argues in a footnote in its appellate brief that "the record provides substantial evidence from which the [board] and this court may conclude that [the plaintiff] did not satisfy [subdivisions] [3 and 4] of § 7.1

The judgment is reversed and the case is remanded to the Superior Court with direction to render judgment sustaining the plaintiff's appeal and directing the board to approve her application for a customary home occupation under reasonable terms and conditions that are in accordance with its regulations.

In this opinion the other judges concurred.

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## NATASHA B. *v.* DEPARTMENT OF CHILDREN AND FAMILIES*
## (AC 41187)

Sheldon, Keller and Bear, Js.

*Syllabus*

The plaintiff appealed to this court from the judgment of the trial court dismissing her appeal from the decision of a hearing officer of the

(b) (2) (a) . . . ." Subdivision (3) provides that "[a] customary home occupation shall be clearly incidental and secondary to the use of such dwelling unit and lot for residential purposes." Subdivision (4) provides that "[a] customary home occupation shall not change the residential character of such dwelling unit and lot." We are not persuaded by this argument.

As to subdivision (3), neither Carey nor the board ever claimed that the plaintiff was in violation of that section. Nor did the trial court make any reference to subdivision (3) when it affirmed the board. Furthermore, the board does not identify any evidence in the record to support a conclusion that the plaintiff's operation of a home office was anything but incidental and secondary to the plaintiff using her home as the primary residence of her and her family. With respect to subdivision (4), Carey made clear that the basis for his finding that the plaintiff's application violated that subdivision was the plaintiff's past practices that had been the subject of the earlier cease and desist order. We agree with the court that past activities of the plaintiff do not provide substantial evidence to deny the plaintiff's application moving forward. With respect to the application itself, there was no evidence before the board that operating a home office entirely within the plaintiff's dwelling would change the residential character of her dwelling or lot.

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

defendant Department of Children and Families, who upheld the department's decision to substantiate allegations of physical abuse, physical neglect, and emotional neglect by the plaintiff against a minor child and to place the plaintiff's name on its child abuse and neglect central registry. The plaintiff claimed, inter alia, that the trial court improperly concluded that a finding of chronicity was not required to place the plaintiff's name on the central registry. Specifically, the plaintiff claimed that, because the hearing officer made an explicit finding that there was no chronicity, her name could not be placed on the central registry. *Held*:

1. The trial court properly concluded that a finding of chronicity was not required to place the plaintiff's name on the child abuse and neglect central registry; although the hearing officer must consider whether the abuse was chronic, there was no requirement in the state regulations or in the department's policy manual that the hearing officer must find chronicity as a prerequisite to adding a person's name to the child abuse and neglect central registry, and such a requirement would circumvent the legislature's intent to prevent or discover abuse of children, as the department would be left in the anomalous position of being unable to list individuals on the central registry who commit a single severe and intentional violent act against a child.
2. The trial court did not err in concluding that the hearing officer did not improperly shift the burden of proof to the plaintiff when the hearing officer scheduled a second hearing date so that the parties could present evidence regarding whether the plaintiff had demonstrated changed conditions that justified the removal of her name from the child abuse and neglect central registry; although the hearing officer found that the department had proved that the allegations against the plaintiff had been substantiated and that it was appropriate to place her name on the child abuse and neglect central registry, the hearing officer subsequently provided the plaintiff with an opportunity to prove that her name should be removed from the central registry in part by providing documentation showing that, since the time her name was placed on the central registry in 2007, changed conditions warranted the removal of her name from the central registry, and because the plaintiff failed to prove those changed conditions, the hearing officer reasonably concluded that she could not make a finding that changed conditions existed sufficient to modify the department's decision to include the plaintiff's name on the central registry.

Argued January 14—officially released April 23, 2019

*Procedural History*

Administrative appeal from the decision by a hearing officer of the defendant upholding a substantiation of a finding of physical abuse, physical neglect, and emotional neglect by the plaintiff against a minor child and placing the plaintiff's name on the defendant's child abuse and neglect central registry, brought to the Supe-

rior Court in the judicial district of Waterbury, where the matter was transferred to the judicial district of New Britain and tried to the court, *Huddleston*, *J.*; judgment dismissing the appeal, from which the plaintiff appealed to this court. *Affirmed*.

*Dale R. Funk*, for the appellant (plaintiff).

*John E. Tucker*, assistant attorney general, with whom, on the brief, were *George Jepsen*, former attorney general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (defendant).

*Opinion*

BEAR, J. The plaintiff, Natasha B., appeals from the judgment of the trial court dismissing her appeal from the decision of a hearing officer of the defendant, the Department of Children and Families (department), who upheld the department's decision to substantiate allegations of physical abuse, physical neglect, and emotional neglect by the plaintiff against a minor child and to place the plaintiff's name on its child abuse and neglect central registry (central registry). On appeal, the plaintiff claims that the court improperly concluded that (1) a finding of chronicity was not required to place the plaintiff's name on the central registry, and (2) the hearing officer did not improperly shift the burden of proof to the plaintiff to demonstrate changed conditions that would justify removal of her name from the central registry. We affirm the judgment of the trial court.

The following facts, as found by the hearing officer, and procedural history are relevant to this appeal. The plaintiff was employed as a "one to one" worker for a thirteen year old minor child, C, at a residential treatment facility. On July 13, 2007, C was sent to her room after she and other residents began throwing chairs. C attempted to leave her room by forcing open the door while the plaintiff held the door shut from outside the

room. After C forced open the door, the plaintiff pushed C back into the room, where a physical struggle ensued. During the struggle, the plaintiff repeatedly struck C in the face with a closed fist before other staff members separated the plaintiff and C. C was subsequently transported to the hospital after sustaining scratches and bruises to her face. As a result of the incident, the plaintiff was terminated from her position and was charged with risk of injury to a child and assault in the third degree. The charges against the plaintiff were dismissed in 2009 after she satisfied the conditions required for her accelerated rehabilitation.

After its investigation of the incident, the department substantiated allegations of physical abuse, physical neglect, and emotional neglect by the plaintiff against C[1] and placed the plaintiff's name on its central registry. See General Statutes (Rev. to 2007) §§ 17a-101g and 17a-101k.[2] On January 26, 2015,[3] the plaintiff, after being told by a prospective employer that her name was on the central registry, wrote a letter to the department seeking to remove her name from the central registry.[4] After receipt of the letter, the department scheduled a substantiation hearing. At the hearing, the plaintiff, who initially represented herself, testified about the 2007 incident with C and asserted that, since the incident, she had completed court-mandated counseling

[1] The department also substantiated allegations against the plaintiff for physical neglect of another minor child who resided at the facility, but its decision was later reversed by the hearing officer.

[2] Hereinafter, all references to §§ 17a-101g or 17a-101k in this opinion are to the 2007 revision of those statutes.

[3] The plaintiff, in her argument to the trial court, claimed for the first time that the department violated § 17a-101k (b) by failing to notify her before she was placed on the central registry in 2007. The court declined to address this issue because it was not raised before the hearing officer at the plaintiff's substantiation hearing. On appeal to this court, the plaintiff does not raise any claim related to her alleged lack of notice.

[4] The plaintiff attached to her letter three character references and documentation that her criminal case was dismissed.

and community service and that she had not been involved in any other incidents with minor children.

On February 23, 2015, the hearing officer issued a notice to both parties, stating that additional testimony and evidence was required to determine whether the plaintiff's name should remain on the central registry. Specifically, the notice informed the parties that they should be prepared to present evidence regarding whether the plaintiff had demonstrated changed conditions since the incident. Moreover, the hearing officer stated that specific documentation was needed from the plaintiff regarding her claims of completion of community service and counseling requirements, her job history, and confirmation that she had no further incidents with a minor child. The second day of the hearing took place on May 17, 2016.[5]

In her written final decision, the hearing officer upheld the department's decision to substantiate the allegations against the plaintiff for physical abuse, physical neglect, and emotional neglect of C and to place her name on the central registry. The plaintiff appealed to the trial court, which affirmed the decision of the hearing officer and dismissed the appeal.[6] The plaintiff

[5] The hearing was continued several times at the request of the plaintiff, who retained counsel before the second day of the hearing commenced.

[6] The court issued two memoranda of decision. The first memorandum of decision dismissed the plaintiff's appeal from the hearing officer's decision to uphold the department's determination to substantiate allegations of physical abuse, physical neglect, and emotional neglect by the plaintiff against C, but ordered supplemental briefing on the issue of whether to remand the case to the hearing officer for clarification on the allocation of the burden of proof. See *Natasha B.* v. *Dept. of Children & Families*, Superior Court, judicial district of New Britain, Docket No. CV-16-6034252-S (July 13, 2017). The second memorandum of decision addressed the issues of chronicity and the allocation of the burden of proof, which are the issues before this court on appeal. See *Natasha B.* v. *Dept. of Children & Families*, Superior Court, judicial district of New Britain, Docket No. CV-16-6034252-S (December 21, 2017). All references to the trial court's memorandum of decision refer to its second memorandum of decision unless otherwise noted.

then appealed to this court. Additional facts will be set forth as necessary.

I

The plaintiff first claims that the court improperly concluded that a finding of chronicity[7] was not required to place the plaintiff's name on the central registry. Specifically, the plaintiff argues that, because the hearing officer made an explicit finding that there was no chronicity, her name could not be placed on the central registry. We disagree.

We begin our analysis by setting forth the standard of review and legal principles relevant to the resolution of the plaintiff's claim. "[J]udicial review of an administrative agency's action is governed by the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq., and the scope of that review is limited. . . . When reviewing the trial court's decision, we seek to determine whether it comports with the [UAPA]. . . . [R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Conclusions of law reached by the administrative agency must stand if . . . they resulted from a correct application of the law to the

[7] When looking at chronicity, a term that appears in the state regulations relating to the central registry, the department is to consider, inter alia, whether "there is a pattern or chronic nature to the neglect regardless of the measurable impact to the victim"; Regs., Conn. State Agencies § 17a-101k-3 (e) (3); and whether "there was a previous substantiation of neglect by the individual responsible for the current abuse or neglect for an incident or conduct unrelated to the current incident or conduct . . . ." Regs., Conn. State Agencies § 17a-101k-3 (e) (4).

facts found and could reasonably and logically follow from such facts. . . . The court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of [its] discretion." (Internal quotation marks omitted.) *Recycling, Inc.* v. *Commissioner of Energy & Environmental Protection*, 179 Conn. App. 127, 139–40, 178 A.3d 1043 (2018).

"The [central] registry scheme is codified in two sections that work in tandem: General Statutes §§ 17a-101g and 17a-101k. Section 17a-101g sets forth the [department's] responsibilities upon receiving a report of abuse or neglect of a child: classification; evaluation; investigation; and determination of whether abuse or neglect has occurred. General Statutes § 17a-101g (a) and (b). The statute directs that: '[i]f the [C]ommissioner of [Children and Families (commissioner)] determines that abuse or neglect has occurred, the commissioner shall also determine whether: (1) [t]here is an identifiable person responsible for such abuse or neglect; and (2) such identifiable person poses a risk to the health, safety, or well-being of children and should be recommended by the commissioner for placement on the [central registry] established pursuant to section 17a-101k.' General Statutes § 17a-101g (b). The [department] is directed under § 17a-101k (i) to adopt regulations to implement the provision of that statute." (Footnote omitted.) *Hogan* v. *Dept. of Children & Families*, 290 Conn. 545, 568–70, 964 A.2d 1213 (2009).

In accordance with § 17a-101k (i), the department promulgated regulations to implement the central registry. See Regs., Conn. State Agencies §§ 17a-101k-1 through 17a-101k-16.[8] Notably, § 17a-101k-3 (b) of the Regulations of Connecticut State Agencies provides in

[8] These regulations were adopted effective November 7, 2008. See footnote 11 of this opinion.

relevant part: "A person shall be deemed to pose a risk to the health, safety, or well-being of children, and *listed on the central registry, when* . . . (4) the individual responsible for physical or emotional abuse is a person entrusted with the care of a child . . . ." (Emphasis added.) Moreover, § 34-2-8 of the department's policy manual, the operative department policy at the time of the hearing,[9] provided that, once an allegation of neglect or abuse was substantiated, the department must identify the perpetrator, if possible, and make a separate finding as to whether that person should be placed on the central registry. Notably, § 34-2-8 stated in relevant part that "the identified perpetrator *shall* be recommended by investigations staff for placement on the [central registry], and *shall* be confirmed by the [h]earings [o]fficer for placement on the [central registry] when . . . the perpetrator of physical or emotional abuse is a person entrusted with the care of a child . . . ." (Emphasis added.) Furthermore, § 34-2-8 required the department, when determining whether a perpetrator poses a risk to the health, safety, and well-being of children and should be placed on the central registry, to "*look at* factors including the intent of the perpetrator, the severity of the impact and the chronicity of the perpetrator's conduct in making that determination."[10] (Emphasis added.)

In the present matter, the plaintiff argues that a finding of chronicity *must* be made in order to place an individual on the central registry. As stated in the trial court's thorough and well reasoned memorandum of decision, although the hearing officer must *consider* whether the abuse was chronic, there is no requirement

[9] Effective January 2, 2019, the department has updated its policy manual. The current version of the policy manual may now be found in § 22-4.

[10] The updated department policy manual; see footnote 9 of this opinion; clarifies that intent, severity, and chronicity do not all have to be found to place an individual's name on the central registry.

in the regulations or the department's policy manual that the hearing officer must *find* chronicity as a prerequisite to adding a person's name to the central registry.[11] If we were to accept the plaintiff's position that chronicity must be found in each case, the department would be left in the anomalous position of being unable to list individuals on the central registry who commit a single severe and intentional violent act against a child.[12] See, e.g., *State* v. *Peeler*, 267 Conn. 611, 615, 619, 841 A.2d 181 (2004) (defendant murdered seven year old child). This result would clearly circumvent the legislature's intent to prevent or discover abuse of children. See *Hogan* v. *Dept. of Children & Families*, supra, 290 Conn. 572–73 (purpose of central registry is to prevent or discover abuse of children).[13]

[11] The plaintiff raises for the first time in a single paragraph of her reply brief that the court and the department erroneously relied on statutes, regulations, and policy manual sections that were not in effect at the time the incident occurred in July, 2007. "It is also a well established principle that arguments cannot be raised for the first time in a reply brief. . . . *State* v. *Garvin*, 242 Conn. 296, 312, 699 A.2d 921 (1997); see also *SS-II, LLC* v. *Bridge Street Associates*, 293 Conn. 287, 302, 977 A.2d 189 (2009); *Calcano* v. *Calcano*, 257 Conn. 230, 244, 777 A.2d 633 (2001); *Commissioner of Health Services* v. *Youth Challenge of Greater Hartford, Inc.*, 219 Conn. 657, 659 n.2, 594 A.2d 958 (1991). [I]t is improper to raise a new argument in a reply brief, because doing so deprives the opposing party of the opportunity to respond in writing. . . . *Markley* v. *Dept. of Public Utility Control*, 301 Conn. 56, 74, 23 A.3d 668 (2011)." (Internal quotation marks omitted.) *State* v. *Myers*, 178 Conn. App. 102, 106, 174 A.3d 197 (2017). In any event, § 34-2-8 of the department's manual was effective on January 11, 2007, before the incident occurred.

[12] The hearing officer found that the plaintiff had no prior or subsequent incidents similar to that with C, so she determined that the chronicity criterion had not been met.

[13] To bolster her claim, the plaintiff quotes *Sanchez* v. *Katz*, Superior Court, judicial district of New Britain, Docket No. CV-12-66022396-S (July 10, 2014), for the proposition that "[w]ithout a finding that the same problem considered severe is also chronic, the hearing officer's conclusion cannot stand." In *Sanchez*, the trial court upheld the department's substantiation of allegations against the plaintiff for physical neglect and her subsequent placement on the central registry. The trial court took issue with the hearing officer's reliance on one set of acts and omissions to find severity and another set of acts and omissions to find chronicity. Even if we were to

II

The plaintiff next claims that the trial court erred in concluding that the hearing officer did not improperly shift the burden of proof to the plaintiff when the hearing officer scheduled a second hearing date so that the parties could present evidence regarding whether the plaintiff had demonstrated changed conditions that would justify the removal of her name from the central registry. We disagree.

The following standard of review and legal principles are relevant to the plaintiff's claim. "[P]lenary review applies to a question of misallocation of a burden of proof." (Internal quotation marks omitted.) *In re Jason R.*, 306 Conn. 438, 452, 51 A.3d 334 (2012). "[W]e are mindful that an opinion must be read as a whole, without particular portions read in isolation, to discern the parameters of its holding. . . . Furthermore, [w]e read an ambiguous trial court record so as to support, rather than contradict, its judgment." (Citation omitted; internal quotation marks omitted.) Id., 453.

Upon our review of the record and the hearing officer's decision, we conclude that the hearing officer did not improperly shift the burden of proof to the plaintiff. On the first day of the hearing, the hearing officer explicitly stated that the purpose of the hearing was to determine whether the department's decision to substantiate allegations against the plaintiff for abuse and neglect and to place her name on the central registry should be upheld.[14] The record further reveals that, during the first day of the hearing, the plaintiff testified, without providing any documentation, that, since the incident, she had completed counseling and community service

agree with the inference that the plaintiff draws from her reading of *Sanchez* and conclude that its holding required a finding of chronicity to place the plaintiff on the central registry, we are neither persuaded nor are we bound by its reasoning.

[14] The hearing officer's final decision states that at issue in the hearing was whether the department's substantiation decisions and the inclusion of the plaintiff's name on the central registry should be upheld or reversed.

and had not been involved in any further incidents. In light of this testimony suggesting changed conditions *after* the department substantiated allegations against her in 2007, the hearing officer provided the plaintiff with an opportunity to submit specific documentation to corroborate her testimony.[15] See General Statutes § 4-181a (b) ("[o]n a showing of changed conditions, the agency may reverse or modify the final decision, at any time, at the request of any person or on the agency's own motion"). In other words, although the hearing officer found that the department had proved that the allegations against the plaintiff had been substantiated and that it was appropriate to place her name on the central registry, the hearing officer wanted to provide the plaintiff with an opportunity to prove that her name should be removed from the central registry pursuant to § 4-181a (b), in part by providing documentation which demonstrated that, since the time her name was placed on the central registry in 2007, changed conditions warranted the removal of her name from the central registry.

When considering whether the department's decision to place the plaintiff's name on the central registry should be upheld or reversed, the hearing officer, in her final decision, first considered the intent, severity, and chronicity criteria enumerated in § 17a-101k-3 of the Regulations of Connecticut State Agencies and § 34-2-8 of the department's policy manual, in addition to the plaintiff's lack of insight into and failure to accept responsibility for the incident. See *Hogan* v. *Dept. of Children & Families*, supra, 290 Conn. 566 (hearing officer considered plaintiff's failure to accept responsibility in upholding placement on central registry). The hearing officer's findings made it clear that the department had satisfied its burden of proof with respect to

[15] Before the second day of the hearing commenced, the hearing officer stated that the second hearing date was necessary because she "needed additional information to address the issue of the central registry . . . [and] was giving the [plaintiff] the opportunity to submit additional information."

the plaintiff physically abusing C and being placed on the central registry.[16] The hearing officer, however, in a reasonable interpretation of the plaintiff's letter to the department, and in light of the plaintiff's testimony, gave the plaintiff an opportunity to prove the claim that she had raised, i.e., her changed conditions, which, if proved, would obviate the need for her to continue to be listed on the central registry. She failed, however, to prove those changed conditions.[17] The hearing officer,

[16] With respect to the plaintiff's physical abuse of C, the hearing officer found that the department had proved, by a fair preponderance of the evidence, that the substantiation of the plaintiff should be upheld. The hearing officer found that the plaintiff, who repeatedly punched C in the face, had used unreasonable, aggressive, excessive and violent force, and that C had sustained injuries to her head, including bruises, scratches and swelling. The hearing officer also found that the plaintiff had reacted to C's behavior in an unruly, vicious and inappropriate manner. The plaintiff, on appeal, does not challenge these findings. There is, therefore, substantial evidence in the administrative record to support the hearing officer's findings of basic fact and the conclusions she drew from those facts, which are reasonable.

The hearing officer also upheld the substantiation of emotional neglect and physical neglect.

[17] We also agree with the court that the plaintiff was in the best position to provide documentation to support her own testimony regarding her changed conditions. Because the hearing officer essentially treated the plaintiff's testimony as a request to modify or reverse the department's decision in accordance with § 4-181a (b), it logically follows that the plaintiff would need to present evidence to demonstrate those changed conditions. See, e.g., *Brochard* v. *Brochard*, 185 Conn. App. 204, 243–44, 196 A.3d 1171 (2018) (In context of motion to modify custody and child support, "[t]he party seeking the modification has the burden of proving a substantial change in circumstances. . . . To obtain a modification, the moving party must demonstrate that circumstances have changed since the last court order such that it would be unjust or inequitable to hold either party to it. Because the establishment of changed circumstances is a condition precedent to a party's relief, it is pertinent for the trial court to inquire as to what, if any, new circumstance warrants a modification of the existing order. In making such an inquiry, the trial court's discretion is essential." [Internal quotation marks omitted.]).

In its memorandum of decision, the court carefully analyzed the placement of the burden of proof in this case, stating: "In the order for a second day of the hearing, the hearing officer gave the plaintiff the opportunity to provide documentary evidence to corroborate her testimony, which could

therefore, reasonably concluded that she could not make a finding that changed conditions existed sufficient to *modify* the department's decision to include the plaintiff's name on the central registry. Even if the conclusory paragraph of the hearing officer's decision contained ambiguities, as claimed by the plaintiff, a reading of the decision as a whole, in conjunction with an examination of the record, leads us to conclude that the hearing officer did not, at any time, improperly shift the burden of proof to the plaintiff.[18]

The judgment is affirmed.

In this opinion the other judges concurred.

constitute evidence of changed conditions. This was within the hearing officer's discretion. [Section] 4-181a (b) provides that '[o]n a showing of changed conditions, the agency may reverse or modify the final decision, at any time, at the request of any person or on the agency's own motion.'

"It is clear from the decision that the hearing officer correctly held the department to its burden of proof on the facts underlying the substantiation for physical abuse, physical neglect, and emotional neglect. See Record, p. 63 (finding that department 'has proven, by a fair preponderance of the evidence, that its substantiation of the [plaintiff] for the physical abuse of [C] shall be upheld'); and p. 64 (identifying standards that department was required to demonstrate for substantiation of emotional neglect and physical neglect). In the discussion of the [central] registry, the hearing officer clearly and correctly stated the standards the department was required to apply to include a person on the [central] registry. . . . It is clear that the hearing officer found the initial inclusion on the [central] registry to be justified based on the evidence of the severity of the plaintiff's conduct and of her intent, despite [no] showing of previous or subsequent incidents. The hearing officer also considered the plaintiff's lack of insight and failure to accept responsibility for the incident. . . . [T]he hearing officer was not precluded from considering these facts. [Our] Supreme Court has recognized that the failure to accept responsibility for abuse 'reasonably may be considered as an indication that there is a risk that the abuse will continue.' *Hogan* v. *Dept. of Children & Families*, supra, 290 Conn. 566." (Citation omitted.)

[18] The final paragraph of the hearing officer's decision concludes: "Based on the intent and severity, as well as the [plaintiff's] lack of insight gained since the incident and her failure to provide any additional support about whether she has had a successful employment history, it is found that the [plaintiff] does pose a risk to the health, safety and well-being of children. Therefore, the inclusion of the [plaintiff's] name on the department's central registry shall be upheld."

# JASON BREE *v.* COMMISSIONER OF CORRECTION (AC 40933)

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

*Syllabus*

The petitioner, who had been convicted of several crimes in connection with armed robberies at three convenience stores, sought a writ of habeas corpus. He claimed, inter alia, that his trial counsel provided ineffective assistance by failing to present testimony from an audio-video forensics expert to challenge the reliability of closed-circuit television surveillance video that was used to identify the petitioner in one of the robberies. The petitioner challenged his convictions in two of the robberies. In one of the robberies, the petitioner's accomplice, S, had given the police a statement that implicated the petitioner, but S did not identify the petitioner's photograph in an array of photographs that he had been shown by the police. At trial, S gave a nonresponsive reply to a question by the prosecutor and testified that the petitioner's photograph was the number two photograph in the array but that he never picked it out because he did not want to. The petitioner's counsel did not object to or move to strike S's response until the state later presented testimony from a police detective that the petitioner's photograph was the second photograph in the array. The other robbery was captured on videotape by the store's surveillance camera. The police showed the videotape to the petitioner's probation officer, K. At trial, when K testified that the petitioner was the individual on the videotape, the court struck her testimony as inadmissible because it was an opinion on the ultimate issue in the trial. The habeas court rendered judgment denying the habeas petition, from which the petitioner, on the granting of certification, appealed to this court. *Held* that the habeas court properly denied the petition for a writ of habeas corpus, the petitioner having failed to show that his trial counsel rendered ineffective assistance or that he was prejudiced by any of counsel's decisions at trial: trial counsel's reasonable strategic decision not to call an audio-video forensics expert to testify did not fall below an objective standard of reasonableness, as no witness prior to trial had identified or was expected to identify the petitioner in the videotape, counsel made a strategic decision to try to minimize the prominence of K's stricken testimony by not calling an expert to undermine it, and there was no evidence in the record that identified the petitioner in the video; moreover, trial counsel had a reasonable basis for not objecting to S's nonresponsive testimony in which S identified the petitioner, as counsel wanted the jury to hear the part of S's answer in which S stated that he did not identify the petitioner in the photographic array, but did not want to draw the jury's

attention to the unhelpful portion of S's testimony, the testimony was not harmful until the detective was asked to bolster S's testimony that the petitioner's photograph was the second photograph in the array, S's credibility was thoroughly attacked, and additional evidence was presented that identified the petitioner as the perpetrator of the robbery; furthermore, the petitioner could not demonstrate that there was a reasonable probability that the outcome of the trial would have been different had his counsel presented testimony from the petitioner's stepfather, which would have been cumulative of prior testimony by the petitioner's mother.

Argued January 22—officially released April 23, 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, *Cobb*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

*Freesia Singngam Waldron*, assigned counsel, for the appellant (petitioner).

*James M. Ralls*, assistant state's attorney, with whom, on the brief, were *Margaret E. Kelley*, state's attorney, and *Angela R. Macchiarulo*, senior assistant state's attorney, for the appellee (respondent).

*Opinion*

SHELDON, J. The petitioner, Jason Bree, appeals from the judgment of the habeas court denying his amended petition for a writ of habeas corpus, in which he claimed that trial counsel in his underlying criminal prosecution had rendered ineffective assistance in defending him against charges filed in connection with armed robberies of convenience stores in three Connecticut towns. On appeal, the petitioner claims that the habeas court erred in ruling that his trial counsel did not render ineffective assistance by failing (1) to consult with and to present testimony from an expert in audio-video forensics to challenge the reliability of

closed-circuit television surveillance video evidence used by the state to identify him as the perpetrator in one of the robberies; (2) to timely object to and move to strike the nonresponsive testimony of the petitioner's alleged accomplice, Gabriel Santiago, identifying the petitioner's photograph in a photographic array as that of a perpetrator of another of the underlying robberies; and (3) to present the testimony of the petitioner's stepfather, Ronald Riebling, to bolster exculpatory testimony from his wife, Sue Riebling, the petitioner's mother. We disagree with the petitioner's claims and, therefore, affirm the judgment of the habeas court.

The following facts and procedural history are relevant to this appeal. In his underlying criminal prosecution, the petitioner was accused in separate informations of crimes arising from armed robberies at convenience stores in Shelton, Woodbridge and Ansonia. Two of these robberies are at issue in this appeal. The first robbery here at issue took place, as described by this court in affirming the petitioner's convictions on direct appeal, as follows: "On September 27, 2008, at approximately 6:30 a.m., Nalinjumar Patel was working at the Wooster Street Market, a convenience store in Shelton, when Gabriel Santiago entered the store, asked for loose cigarettes and inquired in what town the store was located. When Patel told Santiago that he was in Shelton and informed him that the store did not sell loose cigarettes, Santiago left. Soon thereafter, the [petitioner] and William Torres entered the store. The [petitioner] jumped behind the counter and took approximately ninety cartons of cigarettes while Torres pointed a gun at Patel, demanding his wallet. During the course of the robbery, a regular customer, Anthony Carroll, entered the store, and exclaimed: 'What the hell is going on?' Carroll immediately left the store and telephoned the police. The [petitioner], Torres and Santiago drove away in a sky blue Infiniti." *State* v. *Bree*,

136 Conn. App. 1, 4, 43 A.3d 793, cert. denied, 305 Conn. 926, 47 A.3d 885 (2012).

Surveillance cameras inside and outside of the store captured the robbery on videotape. At the conclusion of their initial investigation, however, the Shelton police had no leads as to the identities of the perpetrators. Detective Benjamin Trabka of the Shelton Police Department thus sent still photographs taken from the store's surveillance video to local newspapers to seek the public's help in identifying the perpetrators. On September 30, 2008, the Shelton Police Department received an anonymous tip that one of the three persons shown in the video was Santiago. Upon being located by the police, Santiago gave a statement implicating the petitioner in the Shelton robbery. When, however, Trabka presented Santiago with a photographic array that included a photograph of the petitioner, Santiago did not make an identification. Through his investigation, Trabka later learned that the petitioner owned a sky blue Infiniti automobile.

The second robbery, as this court described it on the petitioner's direct appeal, took place as follows: "[W]hile Vamsi Makdhal was working at the counter of a Lukoil convenience store in Woodbridge and his cousin, Imran Sarfani, was completing paperwork in a back office, the [petitioner] entered the store. The [petitioner] placed a knife next to Makdhal's stomach and said 'give me the cash.' The [petitioner] briefly held the knife at Makdhal's neck as well. Makdhal went over to the cash register and opened it, but was too frightened to give the [petitioner] the cash, so the [petitioner] took the cash himself. When the [petitioner] asked for cartons of cigarettes, Makdhal informed him that the cartons were kept in the back office. The [petitioner] took Makdhal to the back office. The [petitioner] took a garbage bag from the office, emptied it and told Sarfani to put cartons of cigarettes in the bag. At some point,

the [petitioner] waved the knife at Sarfani. After Sarfani complied, the [petitioner] ran out of the store. Makdhal ran out of the store and was able to see the model of the car that the [petitioner] drove away in, [a Chrysler 300] and [its] partial license plate number." Id., 5–6.

The Woodbridge robbery was also captured on videotape by the store's surveillance camera, and the video was recovered by the police. As in the Shelton case, no witness to the Woodbridge robbery was able to make an identification. Detective Robert Crowther of the Woodbridge Police Department therefore requested that a dispatcher from his department run various permutations of the partial license plate number that the victim had given him in an attempt to match it to a Chrysler 300. He eventually determined that the vehicle was owned by Enterprise Rental Car, which had rented it to the petitioner at the time of the robbery. Upon receiving this information, Crowther questioned the petitioner about the robbery after informing him only that the police knew that a vehicle he had rented had been used in the robbery and that they wanted to speak to him about it. During the course of the interview, the petitioner blurted out: "I don't know anything about putting no knife to anybody's neck." Crowther noted that he had not told the petitioner either what kind of weapon was used during the robbery or how it was used.

Subsequently, Crowther contacted the petitioner's probation officer, Tricia Kolich, and "told [her] that [the police] had [surveillance video] of a robbery, in which they thought [the petitioner] was a suspect, and because [she] had [the petitioner] on probation, they were wondering would [she] be able to identify him in a video." Kolich met with Crowther to view the video and told him that the person depicted in it "[had] a lot of similar characteristics to [the petitioner], that [she recognized] the facial hair . . . the style of dress, and the kind of

strut, or the walk, coming through the store, as being the same as [the petitioner]." After further police investigation, the petitioner was arrested and charged in connection with both robberies and a third robbery that had been committed in Ansonia.

Prior to trial, the petitioner's attorney, Vito Castignoli, filed several pretrial motions, including a motion in limine to preclude Kolich from identifying the petitioner in the store surveillance video of the Woodbridge robbery. He argued that the identification was tainted by the suggestive identification procedure employed by Crowther, who had interviewed Kolich. He claimed, more specifically, that Crowther had asked Kolich to identify the petitioner personally, identifying him by name, rather than asking her more generally if she recognized anyone in the video. Castignoli further argued that Kolich's identification of the petitioner should be precluded because it constituted a lay opinion about the ultimate issue in the case, and, thus, was inadmissible under *State* v. *Finan*, 275 Conn. 60, 68–69, 881 A.2d 187 (2005) (holding that whether defendant was one of two perpetrators of robbery shown on surveillance videotape was ultimate issue of fact in defendant's trial and to admit lay opinion testimony that defendant was shown on videotape was error). At the hearing on the motion, Kolich testified that "the person [in the video] has a lot of similar characteristics to [the petitioner], that [she recognized] the facial hair on [the person], the style of dress, and the kind of strut, or the walk, coming through the store, as being the same as [the petitioner]." The court denied the motion in limine to preclude Kolich's proffered testimony, ruling that (1) the identification procedure was not unnecessarily suggestive, and (2) Kolich's testimony was only that the person in the video looked similar to the petitioner, and, thus, did not constitute a definitive identification

of the petitioner of the sort that was held to be inadmissible under *Finan*.

At trial, however, Kolich went further in her testimony about the person shown on the videotape, stating that "there's a very good possibility that it is [the petitioner]," then adding that she would "bet money [that it was the petitioner in the video], if [she] had to." Upon defense counsel's timely objection to this changed testimony, the court ruled that Kolich's identification was inadmissible under *Finan* because it was an opinion on the ultimate issue in the trial. On that basis, the court ordered that her entire testimony be stricken in relation to the Woodbridge robbery. Defense counsel then moved for a mistrial, which was denied. When the jury returned to the courtroom, the court explained to the jury that it had granted the motion to strike the probation officer's testimony in its entirety and instructed the jury that it was not to "use that [testimony], at all, in [its] deliberations." At the end of the trial, Castignoli noted during the charge conference that he had given it much thought and had decided to request that the court not caution the jury again regarding Kolich's stricken testimony in its final charge.

In its case-in-chief, the state also presented the testimony of Santiago. Santiago testified that the petitioner had robbed the convenience store in Shelton while he, Santiago, was asleep in the petitioner's car. On Castignoli's recross-examination, the following colloquy occurred:

"[Defense Counsel]: Mr. Santiago, on two separate occasions, on one occasion when you told the police that you were not in Shelton at all that night, on the other occasion when you went through the photo spread, you did not tell the police the truth. Correct?

"[The Prosecutor]: Objection. Asked and answered; outside the scope of the redirect.

"[Defense Counsel]: It was brought up on redirect.

"[The Court]: Overruled. You may answer the question. Go right ahead.

"[Santiago]: All right. I didn't—I didn't answer—I didn't— if, okay, if the police lineup, the picture, right, he's number two, if that's what you want to know. He was number two. I never picked it out because I didn't want to. It's not like—" Castignoli did not move to strike Santiago's answer to his question at that time.

Following Santiago's testimony, the state called Trabka, who testified that the petitioner's photograph was indeed the second photograph in the array that he had prepared and presented to Santiago. At that point Castignoli objected, arguing that Trabka's testimony was irrelevant, more prejudicial than probative, and hearsay. He also requested that Santiago's previous nonresponsive testimony that the petitioner's photograph was number two in the array be stricken, arguing that the state was now using Trabka's testimony to bolster Santiago's nonresponsive answer concerning the petitioner's photograph. Counsel's timely objections to Trabka's testimony and belated objection to Santiago's testimony were overruled.

In the petitioner's case-in-chief, he presented the testimony of his mother, Sue Riebling. She testified that when she spoke to detectives investigating the Woodbridge robbery the day after it occurred, they informed her that the perpetrator had held a knife to the neck of the store clerk. Later that day, she spoke to the petitioner on the telephone and relayed to him the information about the robbery that she had received from the detectives. Crowther's interview with the petitioner, in which he blurted out those very details about the robbery, occurred approximately one week after the petitioner's conversation with his mother.

After concluding its deliberations, the jury found the petitioner guilty of one count each of conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-134 (a) (4), larceny in the second degree in violation of General Statutes § 53a-123, conspiracy to commit larceny in the second degree in violation of §§ 53a-48 (a) and 53a-123, illegal possession of a weapon in a motor vehicle in violation of General Statutes § 29-38 (a), and larceny in the sixth degree in violation of General Statutes § 53a-125b, and of three counts of robbery in the first degree in violation of § 53a-134. He was later sentenced to a total effective term of fifteen years incarceration followed by five years of special parole.[1] The petitioner subsequently appealed from his convictions, which were affirmed by this court on June 5, 2012. See *State* v. *Bree*, supra, 136 Conn. App. 24.

The petitioner commenced this habeas corpus action on April 12, 2013, challenging the effectiveness of trial counsel in the underlying criminal prosecution.[2] At the habeas trial, the petitioner presented the testimony of three witnesses: Robert Sanderson, an audio-video forensics expert; Ronald Riebling, the petitioner's stepfather; and Castignoli.

Sanderson testified that he had examined the closed-circuit television surveillance video of the Woodbridge robbery that had been shown to Kolich in order to determine if she could identify the petitioner as one of

[1] The petitioner was sentenced in the Shelton case to fifteen years of incarceration followed by five years of special parole. In the Ansonia case, which is not at issue in this appeal, he was sentenced to a concurrent term of five years of incarceration. In the Woodbridge case, he was sentenced to a concurrent term of fifteen years of incarceration followed by five years of special parole.

[2] A trial was first held on the petitioner's claims on September 8, 2016, which ended in a mistrial due to a conflict of interest with the petitioner's first counsel's firm.

the perpetrators, and stated that it was his expert opinion that the quality of the video was so poor that it was unusable for the purpose of identifying the perpetrator by his facial features or how he moved. Ronald Riebling testified that he had had a private conversation with Crowther regarding the Woodbridge robbery on the same day as his wife, Sue Riebling, and that in that conversation Crowther had likewise identified the weapon used in the robbery and described the manner in which it was used by the robber. Ronald Riebling further testified that he, too, had been available and willing to testify at the petitioner's criminal trial about his conversation with Crowther, and that he had so informed Castignoli, but he was never asked to testify.

Castignoli testified that he did not consider calling an audio-video expert in the petitioner's trial to opine about the quality of the surveillance video of the Woodbridge robbery because no witness had identified the petitioner or was expected to identify the petitioner from the video. He also noted that, after the court had stricken the testimony of Kolich purporting to identify the petitioner in that video, he wanted to minimize the significance of her stricken testimony and not draw any additional attention to it by calling an expert witness to undermine an identification that was no longer in evidence.

Castignoli further testified about his decision not to object during the testimony of Santiago. He conceded that he could have objected to Santiago's testimony at the time his nonresponsive answer was given, but explained that he chose not to do so because he had elicited information in that same answer that he wanted to the jury to hear, to wit: that Santiago did not initially identify the petitioner in the photographic array shown to him by Trabka. Castignoli further explained that he did not find Santiago's nonresponsive answer to be

damaging until Trabka was called to bolster it by confirming that the petitioner's photograph was, as Santiago had stated, the second photograph in the array. When asked whether he considered calling Ronald Riebling to testify at the petitioner's trial to confirm the testimony of his wife about the conversation with Crowther, he stated that he thought such testimony would be cumulative and unnecessary.

In its memorandum of decision, the court denied the petitioner's petition for a writ of habeas corpus, concluding that (1) it was a reasonable strategic decision for counsel not to call an audio-video expert to opine as to the quality of the surveillance video when no witness had been expected to identify the petitioner in the video, and the petitioner was not prejudiced by that decision because Kolich's entire testimony, including her identification of him in the surveillance video, had been stricken; (2) it was a reasonable strategic decision for counsel not to move to strike Santiago's testimony identifying the petitioner in the photographic array in connection with the Woodbridge robbery, and the petitioner was not prejudiced by that decision because there was substantial additional evidence linking the petitioner to that robbery, ensuring that the outcome of the trial would not have been different had the testimony been stricken; and (3) it was a reasonable strategic decision for counsel not to call Ronald Riebling as a witness in the defense's case-in-chief because his testimony would have been merely cumulative. On September 25, 2017, the court granted the petitioner's petition for certification to appeal, and this appeal followed.

We begin by setting forth our standard of review. "The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . The application of the habeas court's factual findings to the pertinent

legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Internal quotation marks omitted.) *Horn* v. *Commissioner of Correction*, 321 Conn. 767, 775, 138 A.3d 908 (2016).

The legal principles that govern an ineffective assistance claim are well settled. See *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. . . . The second prong is . . . satisfied if the petitioner can demonstrate that there is a reasonable probability that, but for that ineffectiveness, the outcome would have been different." (Citation omitted; internal quotation marks omitted.) *Horn* v. *Commissioner of Correction*, supra, 321 Conn. 775–76.

Regarding the performance prong, "[j]udicial scrutiny of counsel's performance must be highly deferential. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Internal quotation marks omitted.) *Spearman* v. *Commissioner of Correction*, 164 Conn. App. 530, 539, 138 A.3d 378, cert. denied, 321 Conn. 923, 138 A.3d 284 (2016).

With these principles in mind, we turn to the petitioner's claims of ineffective assistance. The petitioner first claims that the habeas court erred in finding that Castignoli did not render ineffective assistance by failing to consult with or to present the testimony of an audio-video forensics expert regarding the reliability of the closed-circuit television surveillance video that was used by the state for identification purposes in the Woodbridge case. We disagree.

"We are mindful that, under certain circumstances, the failure to use [an] expert can result in a determination that a criminal defendant was denied the effective assistance of counsel. . . . Nevertheless, the question of whether to call an expert witness always is a strategic decision. . . . [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; [but] strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Arroyo* v. *Commissioner of Correction*, 172 Conn. App. 442, 467, 160 A.3d 425, cert. denied, 326 Conn. 921, 169 A.3d 235 (2017).

We agree with the habeas court's conclusion that Castignoli made a reasonable strategic decision not to call an expert to opine on the quality of the surveillance video for identification purposes because prior to the trial no witness had identified the petitioner or was expected to identify the petitioner in the video. We also note that the petitioner's argument fails to consider that the testimony that the expert would have been called to undermine was stricken from the record. Castignoli explained that he made a strategic decision to try to minimize the prominence of Kolich's testimony once it was stricken by not requesting a second curative instruction during the final jury charge and by not calling an

expert to opine on the quality of the video. We cannot conclude that the decision not to call an expert witness under these circumstances falls below an objective standard of reasonableness. Even if the petitioner met his burden with respect to the performance prong of *Strickland*, he failed to demonstrate that there is a reasonable probability that, but for counsel's alleged ineffectiveness, the outcome of his trial would have been different.

In this regard, the petitioner argues that Castignoli understood the significance of the testimony at issue because he moved to preclude it in his motion in limine, and thus his failure to present the testimony of an audio-video forensics expert left him without a key witness and a viable defense. This argument from the petitioner again fails to consider that the audio-video forensics expert would have been presented to undermine an identification that was ultimately stricken from the record. With no evidence in the record identifying the petitioner in the video, we cannot say that the outcome of the trial would have been different if an expert had been called to discuss the poor quality of that video. For the foregoing reasons, we agree with the court that Castignoli did not render ineffective assistance by failing to call an expert in audio-video forensics.

The petitioner next contends that the court erred in finding that Castignoli did not render ineffective assistance by failing to timely object to and move to strike the nonresponsive testimony of Santiago identifying the petitioner during recross-examination. We disagree. "[T]he decision of a trial lawyer not to make an objection is a matter of trial tactics, not evidence of incompetency. . . . [T]here is a strong presumption that the trial strategy employed by a criminal defendant's counsel is reasonable and is a result of the exercise of professional judgment . . . ." (Citation omitted; internal quotation marks omitted.) *Toccaline* v. *Commissioner*

*of Correction*, 80 Conn. App. 792, 801, 837 A.2d 849, cert. denied, 268 Conn. 907, 845 A.2d 413, cert. denied sub nom. *Toccaline* v. *Lantz*, 543 U.S. 854, 125 S. Ct. 301, 160 L. Ed. 2d 90 (2004).

At the habeas trial, Castignoli gave several cogent reasons why he chose not to object to the nonresponsive testimony of Santiago, including that he wanted the jury to hear part of that same nonresponsive answer, that he did not want to draw the jury's attention to the unhelpful portion of the testimony by objecting to it, and that he did not find the testimony to be harmful until Trabka was asked to bolster it. Because Castignoli articulated a reasonable basis for his decision not to object and, as noted by the habeas court, "[i]n light of the requirement to indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," we agree with the habeas court that "Castignoli's performance was not constitutionally deficient."

Moreover, the petitioner failed to demonstrate that he was prejudiced by counsel's failure to object to Santiago's nonresponsive testimony in light of the entirety of his testimony. On cross-examination, Castignoli attacked Santiago's credibility by inquiring in great detail about his significant criminal history, his drug use, his involvement in and pending case in connection with the robbery at issue, and his inconsistent statements to the police regarding that robbery. Additional evidence was also presented as to the identity of the petitioner as a perpetrator in the Shelton case: specifically, that the petitioner owned a sky blue Infiniti, which matched the description of the vehicle that was seen leaving the store after the robbery was committed, and that he knew details about the robbery that the detectives had not shared with him. Because Santiago's credibility was thoroughly attacked and additional evidence

was presented that identified the petitioner as the perpetrator of the Shelton robbery, we agree with the court that the petitioner failed to establish that the outcome of his trial would have been different had Castignoli timely objected to Santiago's nonresponsive testimony identifying the petitioner.

Finally, the petitioner argues that the court erred in finding that Castignoli was not ineffective for failing to present the testimony of Ronald Riebling. We disagree. "The failure of defense counsel to call a potential defense witness does not constitute ineffective assistance unless there is some showing that the testimony would have been helpful in establishing the asserted defense." *State* v. *Talton*, 197 Conn. 280, 297, 497 A.2d 35 (1985). Where the evidence at issue is merely cumulative, this court has found that the petitioner cannot demonstrate that there is a reasonable probability that, but for the failure to present such evidence, the outcome of the trial would have been different. See, e.g., *Hall* v. *Commissioner of Correction*, 152 Conn. App. 601, 610, 99 A.3d 1200, cert. denied, 314 Conn. 950, 103 A.3d 979 (2014).

As conceded at trial by Ronald Riebling, his testimony would have included the same facts and circumstances that were testified to at the petitioner's trial by Sue Riebling, and he would not have provided any new or additional information to the jury. We thus agree with the habeas court's finding that such testimony would have been cumulative. Castignoli's decision not to present such testimony, therefore, did not constitute deficient performance or prejudice the petitioner.

The judgment is affirmed.

In this opinion the other judges concurred.

# DIANNA BARBABOSA *v.* BOARD OF EDUCATION OF THE TOWN OF MANCHESTER (AC 41304)

Elgo, Bright and Beach, Js.

*Syllabus*

The plaintiff, a school paraprofessional, sought to recover damages from her employer, the defendant board of education, for, inter alia, employment discrimination in violation of statute (§ 46a-60 [b]). The plaintiff claimed that the defendant discriminated against her on the basis of her disability, suspended her without pay for excessive absenteeism and failed to provide her with a reasonable accommodation for her disability. The plaintiff asserted that she was disabled because she suffers from fibromyalgia, anxiety, depression, asthma and rheumatoid arthritis, and had requested certain finite absences as a reasonable accommodation. The plaintiff had long-standing and well documented issues with absenteeism and tardiness throughout her employment. Her performance reviews, which generally provided that she met expectations, stated that she needed to be on time to school, and that her excessive absences affected the management of classrooms, and negatively affected teachers' planning and lessons. The trial court granted the defendant's motion for summary judgment and rendered judgment for the defendant on the plaintiff's disability discrimination and reasonable accommodation claims. The court determined inter alia, that there was no genuine issue of material fact that attendance was an essential function of the plaintiff's position and that she could not perform that essential function with or without a reasonable accommodation. The court further determined that her request for intermittent prospective absences was not a reasonable accommodation because it would eliminate that essential function. On appeal to this court, the plaintiff claimed that the trial court improperly rendered summary judgment because a genuine issue of material fact existed that was common to both her discrimination and reasonable accommodation claims, namely, whether she could perform the essential functions of her position with or without a reasonable accommodation. *Held* that the trial court properly rendered summary judgment in favor of the defendant, as the evidence showed that there was no genuine issue of material fact that attendance was an essential function of the plaintiff's position, and that prior to and at the time of her suspension she was not performing that essential function and was not able to perform it with or without her proposed reasonable accommodation; that court relied on undisputed evidence that attendance was an essential function of a position that mandates interaction with schoolchildren, the plaintiff's generally positive performance evaluations consistently expressed the defendant's concerns with her attendance and tardiness,

and the same evidence that established that there was no genuine issue of material fact that attendance was an essential function of the plaintiff's job also proved that her proposal for intermittent extended leave was not a reasonable accommodation, as a matter of law, because that proposal would have eliminated the essential job function it purported to address, exacerbated her attendance issues and further undermined her ability to maintain regular attendance.

Argued February 7—officially released April 23, 2019

*Procedural History*

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

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

*Alexandria L. Voccio*, for the appellee (defendant).

*Opinion*

BRIGHT, J. In this employment discrimination action, the plaintiff, Dianna Barbabosa, appeals from the summary judgment rendered by the trial court in favor of the defendant, the Board of Education of the Town of Manchester, on the plaintiff's complaint, which alleged that the defendant had discriminated against her on the basis of her disability and had failed to provide her with a reasonable accommodation.[1] On appeal, the plaintiff claims that the court improperly rendered summary judgment because a genuine issue of material fact existed as to a common essential element of both of her claims, namely, whether the plaintiff could perform the essential functions of her job with or without a

[1] The court also rendered summary judgment on the plaintiff's third claim that alleged retaliation for the reason that the claim was inadequately briefed. That aspect of the court's judgment is not challenged on appeal.

reasonable accommodation. We affirm the judgment of the trial court.

The record before the court, viewed in the light most favorable to the plaintiff as the nonmoving party, reveals the following facts and procedural history. In 2007, the plaintiff was hired by the defendant as a full-time one-on-one paraprofessional. A paraprofessional generally is not responsible for initiating lesson plans, but, rather, assists a professional staff member by working directly with the students to meet the students' needs. Between 2007 and 2009, the plaintiff worked as a one-on-one paraprofessional assigned to a single student with autism at the Waddell, Buckley, Keeney, and Bowers schools. Since the fall of 2009, the plaintiff worked as a classroom paraprofessional at Robertson School.

While working at Robertson School, the plaintiff was a member of a union, the Manchester Para/Tutor Association, which had two successive collective bargaining agreements[2] (CBA) with the defendant that outlined certain terms of employment, including working conditions, leaves of absence, and the disciplinary procedures that are relevant to the issues before us. In particular, the CBA provided that paraprofessionals, like the plaintiff, would have three personal days as well as fifteen sick days each year, and other types of leave subject to the defendant's prior approval. An absence that was taken without the available time off was classified as nonpaid leave.

Throughout her employment with the defendant, the plaintiff had long-standing and well documented issues with absenteeism and tardiness. Over the first seven months of her employment, the plaintiff was absent

[2] The first agreement was operative between 2009 and 2013, and the second agreement was operative between 2013 and 2017. For clarity, we hereinafter refer to the two agreements collectively as the CBA.

for thirty days. Twelve of those days accounted for a nonpaid leave of absence that was approved by the defendant, eight days were due to personal illness, five days were absences as a result of her son's broken leg, two days were personal days, two days were unapproved absences without explanation, and one was a professional day. In March, 2008, the plaintiff met with Edward Dillon, the elementary special education supervisor, who discussed the plaintiff's recent unexplained absences and encouraged the plaintiff to follow the proper procedures for taking prospective absences. A letter memorializing this meeting was sent to the plaintiff.

On May 12, 2008, the plaintiff was issued a formal written warning regarding her excessive absences. Therein, Dillon expressed his concern that the plaintiff's excessive absences could "have a negative impact on the academic and behavioral growth of . . . [a particular] student in [its] district wide program for students with autism." In 2008, 2009, and 2010, the plaintiff received overall satisfactory annual performance reviews. Nevertheless, issues relating to her attendance continued to be a concern for the defendant. The plaintiff's 2008 review expressed the concern that she needed to improve her attendance, which "is especially important in order to provide the consistency and continuity important for the children and the program." On March 25, 2010, the plaintiff was issued a verbal warning regarding her tardiness over the several preceding weeks.

Between July 1, 2011, and June 30, 2012, the plaintiff was absent for twenty-two full days and four partial days. On September 12, 2011, the plaintiff received another verbal warning, confirmed by a follow-up letter, about her excessive absences during the past year, and she was directed to follow the proper procedures for taking days off. In 2011 and 2012, the plaintiff received

annual performance reviews that provided that she was meeting expectations, but that she "must improve her attendance," which continued to be an issue. In particular, the plaintiff's January 23, 2012 midyear evaluation gave her an "unsatisfactory" rating for dependability and reliability, and noted that the plaintiff did not "consistently maintain the schedule established for the [two] classrooms that she serves."

Between July 1, 2012, and June 30, 2013, the plaintiff was absent for a total of twenty full days and five partial days. On November 16, 2012, a meeting was held between the plaintiff, a human resources specialist, Terri Smith, and two of the union copresidents, Aaliyah Blade and Kim Colburn, to discuss the plaintiff's continued absenteeism. The parties discussed the negative impact of the plaintiff's attendance on the students, and the plaintiff was instructed that she would have to provide a doctor's note or medical documentation for future absences. She was informed that she was ineligible for leave pursuant to the Family and Medical Leave Act (FMLA); 29 U.S.C. § 2601 et seq. (2012); for the "2012/2013 school year" because she worked less than 1250 hours in the prior twelve months. She also was warned that further violations or unapproved absences could result in suspension. A letter memorializing this meeting was sent to the plaintiff. Although the plaintiff denied receiving the letter, she confirmed that it accurately described what occurred at the meeting.

Between July 1, 2013, and April 7, 2014, the plaintiff was absent for a total of seventeen full days and six partial days. In 2013, the plaintiff received two performance reviews that generally provided that she was meeting expectations, but that she "must arrive at school on time [and] . . . [s]he also must improve her attendance." On December 5, 2013, the plaintiff received another verbal warning, which was confirmed in a letter, about her excessive absences. On December

17, 2013, a meeting was held between the plaintiff, Smith, Blade, Colburn, and another human resources specialist, Nilsa Dorsey, to discuss the plaintiff's continued and excessive absenteeism. The plaintiff was referred to the employee assistance program, and she was warned that further unexcused absences could result in disciplinary action. A letter memorializing this meeting and enclosing the FMLA paperwork was sent to the plaintiff.

On January 21, 2014, the plaintiff filed an FMLA request for intermittent leave from December 23, 2013 through December 31, 2014, on the basis of her claimed serious health condition. She explained that intermittent leave was required because she was suffering from asthma flare-ups that trigger bronchitis, migraine headaches, fibromyalgia that causes excruciating joint and muscle pain with flare-ups, which causes her to not be able to work or move her arms over her head.[3] She attached to her request a certification from her health care provider, rheumatologist Barbara Kage, who detailed that the plaintiff was suffering from numbness in her hands and feet, fatigue, muscle and joint aches, pain and stiffness, and prolonged morning stiffness. Dr. Kage stated that she had referred the plaintiff to physical therapy, and for a psychiatric evaluation for anxiety and depression. Dr. Kage opined that the plaintiff would require time off for appointments and occasional flare-ups, which she estimated would occur one to two times per month. On the same date, the plaintiff's request for FMLA leave was denied because she had not met the hours of service requirement.

[3] The plaintiff wrote this explanation in response to an inquiry on the FMLA form that provides: "If intermittent or reduced-leave schedule is being requested, please explain why it is needed and the proposed leave schedule . . . ." The plaintiff did not provide a proposed leave schedule other than to identify the period for her expected leave to be December 23, 2013 through December 23, 2014.

Also on January 21, 2014, the plaintiff filed a Manchester public schools leave of absence request for five consecutive days or longer. Therein, the plaintiff sought short-term sick leave with pay from August 28, 2013 through June 14, 2014, in which she handwrote "intermittent" on the top of the form and referenced her FMLA request for intermittent leave. On the same date, the plaintiff's leave of absence request was granted by the defendant to the extent of her then remaining sick time. The plaintiff thereafter returned to work and was absent for eight consecutive school days between March 26, 2014, and April 4, 2014.

Between September 17, 2013, and March 31, 2014 the plaintiff submitted to the defendant notes from her health care providers to account for twenty-one absences during that time frame, including one day for taking her son for an evaluation, three days for bronchitis, one day for a follow-up visit, five days for vertigo and a sinus infection, one day for an unspecified illness, one day for a neurological examination, one day for an appointment, and eight days for influenza.

On April 7, 2014, a meeting was held between the plaintiff, Smith, Dorsey, Colburn, and another union copresident, Patricia Balboni. At the meeting, the plaintiff was suspended for thirty days without pay for her excessive absenteeism. A letter memorializing this meeting was sent to the plaintiff. The plaintiff then returned to work after her suspension.[4] In 2014, 2015, and 2016, the plaintiff received performance reviews

[4] On approximately April 8, 2014, the plaintiff filed another FMLA request for intermittent leave as well as another Manchester leave of absence request with the defendant. In both requests, the plaintiff sought retroactive leave for the time period between March 26, 2014, and April 6, 2014. Nevertheless, the plaintiff does not recall receiving a response to these requests and the record before this court is unclear as to the resolution of both requests. As a result of this uncertainty and the parties' reliance on the first set of leave requests filed in January, 2014, we need not address further the April, 2014 requests.

that generally provided that she was meeting expectations, but that she needed to be "[o]n time to school" and that her "excessive absences continue to affect the management of the teachers' classrooms. [T]eachers . . . rely on her . . . . [T]herefore, when she is absent, this affects their planning and the lesson negatively."

On July 20, 2016, after receiving a release of jurisdiction from the Commission on Human Rights and Opportunities, the plaintiff filed the present action against the defendant. In her complaint, the plaintiff alleged that she was disabled because she suffers from fibromyalgia, anxiety, depression, asthma, and rheumatoid arthritis. She alleged that the defendant was aware that she was disabled, and that she requested certain finite absences as a reasonable accommodation for her disability. She also alleged that the defendant had been penalizing her for her disability related absences and had suspended her without pay. In count one, the plaintiff alleged that the defendant had violated General Statutes § 46a-60 (b) (1)[5] because it discriminated against her and suspended her because of her disability. In count two, the plaintiff alleged that the defendant had violated § 46a-60 (b) (1) because it failed to provide the plaintiff with a reasonable accommodation for her disability.

On June 26, 2017, the defendant filed a motion for summary judgment and a memorandum of law in support thereof. In its memorandum of law, the defendant argued, in relevant part, that it was entitled to judgment as a matter of law as to the plaintiff's disability discrimination and reasonable accommodation claims because

[5] General Statutes § 46a-60 was amended by No. 17-118, § 1, of the 2017 Public Acts, which added a new subsection (a) regarding definitions and redesignated the existing subsections (a) and (b) as subsections (b) and (c). Therefore, although the parties and the trial court cite to the earlier version of the statute, for clarity, we refer to the current revision of the statute where applicable. See *Boucher* v. *Saint Francis GI Endoscopy, LLC*, 187 Conn. App. 422, 424 n.1, A.3d , cert. denied, 331 Conn. 905, A.3d (2019).

there was no genuine issue of material fact that the plaintiff could not perform the essential functions of her position with or without a reasonable accommodation. On October 2, 2017, the plaintiff filed an objection and a memorandum of law in support thereof. In her memorandum of law, the plaintiff argued, among other things, that a genuine issue of material fact existed as to whether she could perform the essential functions of her position with or without a reasonable accommodation. Both parties submitted a number of exhibits in support of their respective positions.

On January 11, 2018, the court issued a memorandum of decision in which it granted the defendant's motion for summary judgment. The court determined, inter alia,[6] that the defendant was entitled to judgment as a matter of law as to the plaintiff's disability discrimination and reasonable accommodation claims because there was no genuine issue of material fact that the plaintiff could not perform the essential functions of her job with or without a reasonable accommodation. In particular, the court determined that the undisputed evidence submitted by the defendant established that there was no genuine issue of material fact that attendance was an essential function of the plaintiff's position as a paraprofessional, and that the plaintiff's request for intermittent prospective absences was not a reasonable accommodation because it would eliminate that essential function of her position. This appeal followed. Additional facts will be set forth as necessary.

[6] The court also concluded that a genuine issue of material fact existed as to whether the plaintiff was disabled. The defendant disagrees with the court's conclusion and argues on appeal, as an alternative ground for affirmance, that as a matter of law, the plaintiff failed to establish that she was disabled. Given our conclusion that the court properly held that there is no genuine issue of material fact that the plaintiff is not qualified, we need not reach the defendant's alternative argument. In addition, the court held that the defendant was entitled to summary judgment on the plaintiff's third claim that alleged retaliation. That conclusion is not challenged on appeal. See footnote 1 of this opinion.

On appeal, the plaintiff claims that the court improperly rendered summary judgment. In particular, the plaintiff argues that her generally positive performance evaluations establish a genuine issue of material fact as to whether she was qualified for her position. She also argues that a genuine issue of material fact exists as to whether her requests for an intermittent leave of absence constituted a reasonable accommodation that did not eliminate an essential function of the position. We disagree.

We begin by setting forth the relevant standard of review and legal principles that govern our review. "The standard of review of a trial court's decision granting summary judgment is well established. 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 courts are in entire agreement that the moving party . . . has the burden of showing the absence of any genuine issue as to all the material facts . . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the [nonmoving] party must present evidence that demonstrates the existence of some disputed factual issue. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set

out in the memorandum of decision of the trial court." (Citations omitted; internal quotation marks omitted.) *Lucenti* v. *Laviero*, 327 Conn. 764, 772–73, 176 A.3d 1 (2018).[7]

Section 46a-60 (b) (1) prohibits an employer from refusing to hire, discharging, or otherwise discriminating against any person on the basis of, inter alia, their "present or past history of mental disability, intellectual disability, learning disability, [or] physical disability." To establish a prima facie case of employment discrimination pursuant to § 46a-60 (b) (1) on the basis of either a disparate treatment disability discrimination claim or a reasonable accommodation claim, a plaintiff must establish a common essential element, namely, that he or she is qualified for the position. See *Curry* v. *Allan S. Goodman, Inc.*, 286 Conn. 390, 415, 425–26, 944 A.2d 925 (2008). "In the disability context, a prima facie case for disparate treatment is established under the [*McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)] framework if the plaintiff shows: (1) he suffers from a disability or handicap, as defined by the [applicable statute]; (2) he was nevertheless able to perform the essential functions of his job, either with or without reasonable accommodation; and that (3) [the defendant] took an adverse employment action against him because of, in whole or in part, his protected disability." (Internal quotation marks omitted.) *Curry* v. *Allan S. Goodman, Inc.*, supra, 426. In order to establish a prima facie case for a reasonable accommodation claim, "the plaintiff must produce enough evidence for a reasonable jury to find that (1)

[7] The trial court in its memorandum of decision seemed to suggest that a plaintiff has the initial burden to oppose a motion for summary judgment challenging an employment discrimination claim. We disavow that suggestion because the burden on each party in connection with a motion for summary judgment remains unchanged in an employment discrimination case. See *Feliciano* v. *Autozone, Inc.*, 316 Conn. 65, 72–73, 111 A.3d 453 (2015).

he is disabled within the meaning of the [statute], (2) he was able to perform the essential functions of the job with or without a reasonable accommodation, and (3) [the defendant], despite knowing of [the plaintiff's] disability, did not reasonably accommodate it." (Internal quotation marks omitted.) Id., 415.

In order for an employee to be qualified, he or she must be able to "perform the essential functions of the job with or without a reasonable accommodation . . . ." (Internal quotation marks omitted.) Id.; see *Thomson* v. *Dept. of Social Services*, 176 Conn. App. 122, 128–29, 169 A.3d 256 (same), cert. denied, 327 Conn. 962, 172 A.3d 800 (2017). In determining whether an employee is qualified, "[w]e look to federal law for guidance on interpreting state employment discrimination law, and the analysis is the same under both." *Feliciano* v. *Autozone, Inc.*, 316 Conn. 65, 73, 111 A.3d 453 (2015).

Both this court and "numerous federal courts have recognized that attendance at work is a necessary job function. An employee who is unable to come to work on a regular basis [is] unable to satisfy any of the functions of the job in question, much less the essential ones. . . . [Federal Circuit Courts of Appeals] have also held that regular and reliable attendance is a necessary element of most jobs." (Citations omitted; internal quotation marks omitted.) *Ezikovich* v. *Commission on Human Rights & Opportunities*, 57 Conn. App. 767, 775–76 n.5, 750 A.2d 494, cert. denied, 253 Conn. 925, 754 A.2d 796 (2000); see *Francis* v. *Wyckoff Heights Medical Center*, 177 F. Supp. 3d 754, 768 (E.D.N.Y. 2016) (regular attendance at work is "an essential requirement of virtually all employment" [internal quotation marks omitted]).[8]

[8] To the extent that the plaintiff on appeal maintains that she has the burden of establishing only that she satisfied the minimal qualifications of the position, we disagree. See *Borkowski* v. *Valley Central School District*, 63 F.3d 131, 135 (2d Cir. 1995) ("[a]lthough the phrase 'otherwise qualified' is

The trial court in the present case relied on three federal cases, which we find instructive.[9] In *Pierce* v. *Highland Falls-Fort Montgomery Central School District*, Docket No. 08-civ-1948 (RKE), 2011 WL 4526520 (S.D.N.Y. September 28, 2011), the employee, a special education teacher, had been absent forty-four times and thirty-five times in consecutive school years because he claimed to have suffered from depression, drug addiction, and osteoarthritis. Id., *1–3. Despite the fact that the employee previously had received positive evaluations, he subsequently was suspended on the basis, inter alia, of his excessive absences, and he later took early retirement. Id., *3. The employee then filed an action against his employer, which filed a motion for summary judgment in response. Id. The court granted the employer's motion for summary judgment on the ground that the employee was not qualified because he could not perform an essential function of his employment with or without a reasonable accommodation. Id., *4. In particular, the court held that federal discrimination law "does not require employers to tolerate chronic absenteeism even when attendance problems are caused by an employee's disability . . . [or] to make a reasonable accommodation for an employee who does not attend work, nor does [federal discrimination law] . . . require an employer to retain such an employee." (Internal quotation marks omitted.) Id., *5. It thus held

hardly unambiguous on its face, its meaning in the context of an employment discrimination claim is fairly clear: an individual is otherwise qualified for a job if she is able to perform the essential functions of that job, either with or without a reasonable accommodation"). Indeed, the plaintiff, contrary to the gravamen of her position, explicitly recognizes this principle in her appellate brief, stating that "[t]he trial court was correct to state that [the] plaintiff is obligated to show that she can perform the essential functions of the job with or without a reasonable accommodation of a disability."

[9] Despite the trial court's considerable reliance on these three federal cases, the plaintiff neither references nor attempts to distinguish any of the three cases in her brief on appeal.

that "regardless of whether [the employee] had the necessary teaching skills, he cannot be considered a qualified individual . . . based on his admitted failure to meet the attendance requirements of his employment." Id. The court also held that the employee's request to his employer to permit him to work part-time or to refer him to treatment did not constitute a reasonable accommodation because that proposal "would eliminate the requirement of regular attendance, which is essential to his employment as a teacher." Id., *6.

In *Ramirez* v. *New York City Board of Education*, 481 F. Supp. 2d 209, 213–14 (E.D.N.Y. 2007), the employee, a provisional preparatory teacher, had been absent fifty-two days and forty-two days in consecutive school years because he was suffering from epilepsy, depression, and high blood pressure. Id., 214. The employee received a satisfactory performance review for the first year; however, his employment was terminated after he received an unsatisfactory performance review for the second year. Id., 214–15. Thereafter, the employee filed an action and the employer moved for summary judgment, which was granted by the court because, inter alia, the employee was unable to perform an essential function of that job. Id., 221. In particular, the court, relying on the employer's policy that absences are "disruptive to the school and injurious to the children's education"; (internal quotation marks omitted) id., 222; determined that the employee "ha[d] not demonstrated that he [could] perform an essential function of his employment position—showing up for work. Though all parties agree that [the employee] could perform his duties within the classroom as a teacher, [he] was absent from the classroom for nearly a third of the school year." (Internal quotation marks omitted.) Id., 221. The court also recognized the principle that there could be no reasonable accommodation for a teacher

whose attendance is an essential function of his or her position. Id.

In *Mescall* v. *Marra*, 49 F. Supp. 2d 365, 368–69 (S.D.N.Y. 1999), the employee, a school guidance counselor, claimed to have been disabled because she was suffering from a mental impairment due to stress, depression, and anxiety. The employee was absent forty-one days over the span of two and one-half school years as a result of nondisability related illnesses or injuries. Id., 374 and n.19. Despite the fact that the employee had received two out of three satisfactory annual performance reviews, her employment was terminated because of her excessive absences. Id., 370. She then filed an action against her employer; id., 371; which, in turn, filed a motion for summary judgment. Id., 367. The court granted the employer's motion for summary judgment and, relying on the employer's policies and the employee's testimony, determined that an essential function of her position was to maintain regular attendance, which she failed to do. Id., 374. The court further held that "no reasonable accommodation could have improved [the employee's] attendance record because none of these absences was the result of her alleged mental disability. . . . To the extent that she requests the accommodation of ignoring medically documented sick days when calculating her attendance record, this accommodation is unreasonable as a matter of law because it would eliminate an essential function of the job." (Internal quotation marks omitted.) Id.

In the present case, the defendant's evidence, submitted in support of its motion for summary judgment, established that there is no genuine issue of material fact that attendance is an essential function of the plaintiff's position as a paraprofessional. As the trial court aptly recognized, "there is [an] abundance of evidence that points to attendance being an important essential function of a paraprofessional. The . . . CBA provides

a few examples. The CBA provides a clear delineation of the work year and holidays, work hours, and sick leave for full-time paraprofessionals. . . . The CBA specifically provides that [i]f the student to whom a one-on-one paraprofessional is assigned is absent on any given day, the building administrator or designee shall determine the responsibilities for the one-on-one paraprofessional for any such day. . . . The CBA also provides that, whenever possible, a pregnant paraprofessional should notify the director of human resources well in advance of her delivery date, so that the [defendant] can plan appropriate coverage. . . . Additionally, the CBA highlights that when taking a leave without pay, it is expected that leaves will be arranged so that they are taken at the end of the school term." (Citations omitted; internal quotation marks omitted.) The CBA also provided that the work year for a paraprofessional would increase when the student school year increased, and that the work year would decrease when the student school year decreased. The trial court determined that "[a]ll of these instances discussing attendance serve as evidence that it is an expectation that the paraprofessional will be present at work or obtain proper shift coverage."

The trial court also relied on the deposition testimony of two of the union copresidents, Blade and Colburn, who both "testified to the importance of attendance. . . . Blade testified that 'when you have someone assigned to students and the person doesn't show up, the student digresses in their behavior and becomes more difficult. And that's why it's really critical to have the . . . paraprofessionals to be on the job.' Colburn testified that '[Smith] basically told [the plaintiff] that our children need her to be at work because . . . as [paraprofessionals], oftentimes we work with very special-needs children; that's the reason we have a job. And our children—they need that constant consistency.

They need that—I'll give you an example. We just lost a para[professional] recently to an autistic child, and in the process of hiring a new person for him, this child, literally screaming, and he, literally, would go into the library and doesn't remember his lunch number. That's something he just automatically just punched in the keypad, and he could not—for two weeks, he could not remember his lunch number. He did not have that constant supervision, that constant friend to be with him. . . . When you take that excessive amount [of absences], there's a lack of support for the students, and they can't really, you know—it's like when they go to school, they need to see a familiar face. They need to see teachers there and they need to see the familiar face, but they don't want to go in there not having that consistency.' . . .

"Furthermore, in a letter from . . . Dillon, the elementary special education supervisor, to the plaintiff, dated May 12, 2008, it is stated that the plaintiff's absences 'can have a negative impact on the academic and behavioral growth of a very impacted kindergarten student in [Manchester's] districtwide program for students with autism.' . . . In another letter from Smith to the plaintiff, dated November 20, 2012, it is articulated that the parties 'discussed the importance of [the plaintiff's] regular attendance at work and the success of students at Robertson Elementary School.' . . . Indeed, the plaintiff herself, seems to have understood that attendance was important. In her memorandum in opposition [to the defendant's motion for summary judgment], the plaintiff concede[d] that the students 'need her available and working.' . . .

"Lastly, the evaluations of the plaintiff over the years of her employment as a paraprofessional point to the importance of attendance as well as the plaintiff's longstanding issues with absenteeism and tardiness. The record before the court contains evaluations from 2007

through 2016. . . . Many of the evaluations contain comments such as: '[The plaintiff's] excessive absences continue to affect the management of the teachers' classrooms [and] [t]hey rely on her during center time; therefore, when she is absent, this affects their planning and the lesson negatively'; '[the plaintiff] must arrive at school on time [and] [s]he also must improve her attendance'; '[a]ttendance improved from last year, but still an issue'; '[the plaintiff] needs to follow her work schedule and be in her designated work area, ready to work, in a timely fashion'; '[the plaintiff] must improve her attendance'; 'very high number of absences'; and, '[h]er attendance/absenteeism have been documented and this is an area requiring improvement. This is especially important in order to provide the consistency and continuity important for the children and the program.' " (Citations omitted.) The plaintiff does not dispute any of the evidence relied on by the court for its conclusion that attendance is an essential function of the plaintiff's job. Nor does she dispute the evidence that she failed to perform this essential function in the years leading up to her suspension.

The undisputed evidence the court relied on is comparable to that relied on by the courts in *Pierce*, *Ramirez*, and *Mescall*, which all held that attendance is an essential function of a position that mandates interaction with schoolchildren. We disagree with the plaintiff's argument that her generally positive performance evaluations create a genuine issue of material fact; rather, these evaluations undercut the plaintiff's position because, although the reviews generally provide that she was meeting expectations in terms of performance, they also consistently express the defendant's concerns with the plaintiff's attendance and tardiness. Of the thirteen complete performance reviews that were submitted by both parties in connection with the defendant's motion for summary judgment, ten contain a

concern regarding the plaintiff's attendance or punctuality. Furthermore, the fact that the plaintiff was meeting the defendant's performance expectations while attending work, as also was the case in *Pierce*, *Ramirez*, and *Mescall*, does not create a genuine issue of material fact as to whether her attendance at work was an essential function of her job. Indeed, as the trial court reasoned, "[t]he evaluations of the plaintiff show that she can perform the duties of a paraprofessional *when she goes to work*, but the plaintiff is absent far too often." (Emphasis in original.)

Having concluded that there was no genuine issue of material fact that attendance was an essential function of the plaintiff's position, and that the plaintiff prior to and at the time of her suspension was not performing this essential function, we turn to consider whether there is a genuine issue of material fact as to whether the plaintiff's leave of absence requests constituted a reasonable accommodation that did not eliminate that essential function. The plaintiff filed two leave of absence requests on January 21, 2014, which essentially proposed an extended intermittent leave of absence for an uncertain amount of days for the period of August 28, 2013 through December 31, 2014.[10]

"The plaintiff bears the burdens of both production and persuasion as to the existence of some accommodation that would allow her to perform the essential functions of her employment . . . . To satisfy this burden,

[10] As outlined previously in this opinion, one request was for an FMLA intermittent leave from December 23, 2013 through December 31, 2014, which was supported by a certification from Dr. Kage. This FMLA request was denied on the ground that she was ineligible because she had not met the hours of service requirement. The other request was a Manchester public schools leave of absence request for five consecutive days or longer in which the plaintiff cited her FMLA request and sought short-term sick leave with pay from August 28, 2013 through June 14, 2014. This request was approved by the defendant to the extent that the plaintiff had available sick time.

[the] [p]laintiff must establish both that [her] requested accommodation would enable [her] to perform the essential functions of [her] job and that it would allow [her] to do so at or around the time at which it is sought." (Citation omitted; internal quotation marks omitted.) *Thomson* v. *Dept. of Social Services*, supra, 176 Conn. App. 129. "[A] medical leave of absence is a recognized form of accommodation. . . . Federal courts have held, however, that [t]he duty to make reasonable accommodations does not, of course, require an employer to hold an injured employee's position open indefinitely while the employee attempts to recover . . . ." (Citations omitted; internal quotation marks omitted.) Id., 130.[11] Although "reasonableness is normally a question of fact, summary judgment may be granted in cases where, as here, the plaintiff's proposed accommodation would eliminate the essential functions of the job." (Internal quotation marks omitted.) *Pierce* v. *Highland Falls-Fort Montgomery Central School District*, supra, 2011 WL 4526520, *6.

In *Pierce*, the court determined that the employee's proposed accommodation that he be permitted to work part-time would not be reasonable because it "would eliminate the requirement of regular attendance, which is essential to his employment as a teacher." Id. In *Ramirez*, the court recognized the principle that "[t]here could be no reasonable accommodation [for a

[11] We note that in No. 17-118, § 1, of the 2017 Public Acts, the legislature amended § 46a-60 to add subdivision (a) (2), which provides the following definition for the term "reasonable accommodation" as used in that section: " 'Reasonable accommodation' means, but shall not be limited to, being permitted to sit while working, more frequent or longer breaks, periodic rest, assistance with manual labor, job restructuring, light duty assignments, modified work schedules, temporary transfers to less strenuous or hazardous work, time off to recover from childbirth or break time and appropriate facilities for expressing breast milk . . . ." See footnote 5 of this opinion. Nevertheless, we do not rely on this subdivision because it was not in effect during the periods of time at issue in this appeal.

teacher with a history of excessive absenteeism] because attendance is an essential function of [his] employment." (Internal quotation marks omitted.) *Ramirez* v. *New York City Board of Education*, supra, 481 F. Supp. 2d 221. In *Mescall*, the court determined that "no reasonable accommodation could have improved [the employee's] attendance record because none of these absences was the result of her alleged mental disability. . . . To the extent that she requests the accommodation of ignoring medically documented sick days when calculating her attendance record, this accommodation is unreasonable as a matter of law because it would eliminate an essential function of the job." (Internal quotation marks omitted.) *Mescall* v. *Marra*, supra, 49 F. Supp. 2d 374.

Here, the same evidence submitted by the defendant that establishes that there was no genuine issue of material fact that attendance is an essential function of the plaintiff's job also proves that the plaintiff's proposal for intermittent extended leave was not a reasonable accommodation, as a matter of law, because that proposal would eliminate the very essential job function it purports to address. Put another way, we fail to see how it is possible to perform the essential function of attending work through an accommodation that provides for even more absences from work. As the court aptly noted, "[the plaintiff] has requested finite absences as a reasonable accommodation, and to the extent that this is a request for more days off or perhaps ignoring medically documented sick days when calculating her attendance record, this would be deemed unreasonable, as it would eliminate an essential function of the job." (Internal quotation marks omitted.) In fact, the plaintiff's request to permit her to take intermittent leave, above and beyond that for which she was eligible or already approved, would only exacerbate her existing attendance issues and would further

undermine her ability to perform an essential function of her employment, namely, maintaining regular attendance. It is, thus, not a reasonable accommodation. Consequently, the evidence, viewed in the light most favorable to the plaintiff, establishes that, at the time she was suspended, there was no genuine issue of material fact that she was not able to perform an essential function of her job, either with or without her proposed accommodation. Therefore, we conclude that the court properly rendered summary judgment in favor of the defendant.

The judgment is affirmed.

In this opinion the other judges concurred.

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## MARGARITA O. *v.* FERNANDO I.*
## (AC 42118)

Lavine, Alvord and Elgo, Js.

*Syllabus*

The defendant appealed to this court from the judgment of the trial court granting the application for relief from abuse filed by the plaintiff, his former wife, pursuant to statute (§ 46b-15), and issuing a restraining order against him. The trial court also issued an additional order of protection that required the defendant to stay 100 yards away from the plaintiff, except "when both children are present." *Held*:

1. The trial court did not abuse its discretion in granting the plaintiff's application for relief from abuse and issuing a restraining order against the defendant, as there was sufficient evidence to support a finding that the defendant had subjected the plaintiff to a pattern of threatening; in light of the lengthy, repetitive and hostile nature of the defendant's communications with the plaintiff, which included three e-mails and two text messages, and the trial court's ability to supplement the written exhibits with its observation of the demeanor of the parties at the hearing on the application, that court reasonably could have concluded that the

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

defendant's written threatening communications constituted a pattern of threatening.

2. The trial court's additional order of protection requiring the defendant to stay 100 yards away from the plaintiff except "when both children are present" was clearly erroneous; the order was ambiguous and there was no evidence in the record to support it, as the record revealed that the plaintiff did not request that the restraining order extend to the parties' children, she did not testify at the hearing that she felt as though she was in physical danger except in the presence of both children, and when the court explained that the order did not apply to certain circumstances with "the minor child or when you are also in the presence of the minor child," with no mention of an additional child being present, the plaintiff did not object or express any concern.

Argued January 22—officially released April 23, 2019

*Procedural History*

Application for relief from abuse, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Truglia, J.*, granted the application and issued a restraining order and a certain additional order of protection, and the defendant appealed to this court. *Reversed in part; further proceedings.*

*Fernando I.*, self-represented, the appellant (defendant).

*Kevin F. Collins*, for the appellee (plaintiff).

*Opinion*

ALVORD, J. The self-represented defendant, Fernando I., appeals from the judgment of the trial court granting the application of the plaintiff, Margarita O., for relief from abuse and issuing a restraining order pursuant to General Statutes § 46b-15. The defendant claims that the court erroneously (1) determined that he had subjected the plaintiff to a recent pattern of threatening, and (2) ordered the defendant to stay 100

yards away from the plaintiff except "when both children are present."[1] We conclude that there was no evidence to support the court's order requiring the defendant to "stay 100 yards away from the [plaintiff]" with an exception "for the 100 yard stay away when both children are present." Accordingly, we reverse in part the judgment of the court as to the "stay 100 yards away" order and remand the case for a new hearing with respect to any order of protection, if proven necessary by the plaintiff, in situations where the defendant seeks interaction with his children and the plaintiff is present. We otherwise affirm the judgment of the trial court.

The following facts and procedural history are relevant to our analysis of the defendant's claims. On August 29, 2018, the plaintiff, in a self-represented capacity, filed an ex parte application for relief from abuse, seeking immediate relief against her former spouse, the defendant.[2] In her application, the plaintiff

[1] The defendant also claims that the trial court "should have exercised judicial restrain[t]" and that the restraining order infringes on his parental rights, his right to freedom of speech, and his right to freedom of religion. We decline to review these claims, however, because they are inadequately briefed. See *Tonghini* v. *Tonghini*, 152 Conn. App. 231, 239, 98 A.3d 93 (2014) ("It is well settled that [w]e are not required to review claims that are inadequately briefed. . . . We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed. . . . [A]ssignments of error which are merely mentioned but not briefed beyond a statement of the claim will be deemed abandoned and will not be reviewed by this court." [Internal quotation marks omitted.]).

The defendant additionally claims that the trial court erred by ignoring "the plaintiff's [pattern of] advancing civil claims illegally" and violating his right to due process. Those claims, however, are not supported by the record. See footnotes 3, 5, and 7 of this opinion.

[2] The parties had been divorced since September, 2010. They have three children together, one of whom is a minor.

averred under oath that the defendant had "consistently sent [her] very distressing communications for the past years but in the last few months and weeks (particularly the last [forty-eight] hours) his aggressive electronic communication has been mounting to the point that [she was] very concerned about [her] physical safety." In addition, the plaintiff stated that "[she is] a single woman, [she] work[s] in [New York City] and many nights [she] come[s] back late from work and feel[s] that [she is] exposed [to] potential harm from [the defendant]" and that "[t]he [defendant] has his residence in [New York City] but spends almost every day in Greenwich," which is the town where she resides. The court, *Sommer*, *J.*, denied the plaintiff's application and scheduled a hearing for September 12, 2018, in accordance with § 46b-15 (b).

The parties appeared for the hearing before the court, *Truglia*, *J.*, on September 12, 2018. At the hearing, the court heard testimony from both parties.[3] The plaintiff

[3] On appeal, the defendant claims that, with respect to this hearing, the trial court violated his right to due process. Specifically, he argues that (1) "[he] was not allowed to ponder the veracity, accuracy and completeness of the exhibits admitted by the . . . court, which gave no consideration to the context, timing of the allegation, history of the case, fraud, deceit, false allegations, defamation, and falsehoods of all sorts by the plaintiff," (2) "[he] could not submit any evidence to make his case . . . or to question the [plaintiff] under oath," (3) "[j]udgment was rendered from the bench without proper analysis of [his] timely provided prehearing memorandum," and (4) "[he] was not allowed to review and compare [the plaintiff's] Spanish-English translation . . . and did not even receive copies of the exhibits." The defendant's contentions, however, are not supported by the record.

First, the court specifically asked the defendant whether he had any evidentiary objection to the documents submitted by the plaintiff. The defendant objected on the grounds that the exhibits were selective and that the contents were not relevant. The court responded that the exhibits were relevant and that he would have an opportunity to supplement the copies of the communications provided by the plaintiff. Moreover, the defendant did not, at any point in time, attempt to submit any evidence, nor did he seek to question the plaintiff under oath. The court, therefore, did not deprive him of an opportunity to do so. In addition, with respect to the defendant's prehearing memorandum, the record reflects that the trial court reviewed this document before rendering its decision. Finally, the record reflects

testified in relevant part: "[The defendant] keeps on blaming me for everything that is going on in his life; whether he loses a job, whether he cannot get a job, his life has been destroyed by me. And the reason I'm asking for this order now is because he's more agitated. I think the situation has deteriorated for him quite a bit. He doesn't have a job. He doesn't have any money. Still he blames me for everything that is happening to [him]. . . . In the course of [thirty-six] or [forty-eight] hours, I received three different communications, very disturbing, from him in which some of them he clearly said, you know, like there are implied threats in those communications." The plaintiff also testified that, nine years earlier, the defendant had been arrested twice, "[once] for domestic abuse and [once] for death threats . . . ."[4] The defendant did not dispute the fact of the arrests. The plaintiff explained that she requested relief under § 46b-15 on the basis of a pattern of threatening by the defendant and stated that she believed that she was in physical danger.

The defendant testified in relevant part: "I've been [in the Superior Court] [ten] years, and I lost everything in my life here. . . . [B]ut the good part of it is that her claims were considered false, insufficient, unsubstantiated and rejected by the civil court in the divorce trial, by the criminal court twice, by the Department of Children and Families from the state of Connecticut. I was accused of abuse against my own children. So, I was accused of being mentally insane. I had to undergo

that the defendant did receive copies of the exhibits and was afforded the opportunity to view the certified translation. See footnote 7 of this opinion.

[4] The defendant refers to these incidents as "past false allegations," "false criminal charges" and "illegal arrests," and states that he had been arrested for strangulation, or attempted murder, but the charges "never came to fruition after various witnesses interviewed by the police at the time of [his] arrest corroborated that there never was any violence or threats of any sort from [him] toward the plaintiff."

ten evaluations with independent psychiatrists and psychologists. One was appointed by the court. They all expressed on the record that I'm not a violent man. I never had any history of violence in my life. . . . Furthermore, it was proven . . . and I have all the records. Unfortunately it's [ten] years and maybe a snippet could be portrayed as something lethal, but is, again, false. . . . [T]he plaintiff has a history of deceit, fraud, entrapment, [and] provocations that it goes for years."[5]

In addition to the foregoing testimony, the plaintiff submitted several exhibits, including copies of text messages and e-mails that the defendant had sent her. The text messages and one of the e-mails had been written in Spanish. The plaintiff, therefore, in addition to providing copies of the original communications, submitted as an exhibit during the hearing a certified translation of these communications.

First, on March 29, 2018, the defendant had sent the plaintiff an e-mail, written in English, which stated in relevant part: "I had your associates in [G]reenwich all over me, from firefighters, police officers, public

[5] On appeal, the defendant claims that the court erred by ignoring "the plaintiff's [pattern of] advancing civil claims illegally . . . ." There is, however, nothing in the record to support this claim.

At the beginning of the hearing, the defendant provided the court with a copy of his thirty-five page prehearing memorandum, with attached exhibits. The defendant explained that the exhibits included copies of sworn testimony of the parties from previous proceedings and that the memorandum was intended to provide the court with "the full picture of why this is happening right now; what is the timing, the context, and the falsehood behind it." Moreover, at the hearing, the defendant testified, at length, about what he characterizes as the plaintiff's "modus operandi of advancing civil claims through extortion in the way of false criminal charges and overall defamation . . . ."

Nothing in the record supports the defendant's assertion that the court ignored his testimony or failed to consider his prehearing memorandum. See footnote 3 of this opinion. Rather, at the conclusion of the hearing, the court stated that it had "listened very carefully to the testimony of both parties in this case," and "carefully reviewed the prehearing memorandum submitted by the defendant."

employees . . . . So I refrained myself from confronting the scene, the last thing I wanted was to make a different sort of scene in front of our kids' doctor . . . . But [I'm] telling you for you to think before you and your attorney speak, what our kids should have experienced and must experience is their parents together, in front of them, telling them the very same message, absolutely in sync, with love, clarity and support, and this has not happened because of you, and it's still not happening because of you. You have prevented this from happening for almost [ten] years, against the law, common sense and their [well-being]. . . . And the reason for that to be the case, as I see it, it's that you don't understand that our relationship only exists due to them, as a result of them, because of them. If they were not in this world, after what you've done in my life until now, I wouldn't even know anything about you, whether you exist or not . . . your conduct is irresolute, without changing tracks in anything, without firing the unethical lawyer only you decided to retain, without giving back to me, reimbursing me, what you must in the name of decency and justice . . . . You don't get it. This is inconceivable to me, the fact you don't even understand what sort of man I am. You do what I tell you, and you have a positive response from me. Period. Why? Because what I tell you is no other thing than what you should have done and should do under the law and what's right in itself. And so happens that it is me saying it. Is there some feminist and related belief against it? Stupidities about control and inconveniences. They can go and dominate themselves . . . we've got [ten] years of this already. There's a law to be obeyed, giving me control over what I must control for being a father (natural law and rights), an outstanding father as you said, and a loving one per the opinion of the court. Yet, one who has lost any and all authority because of you, my parental rights have been curtailed and undermined by you, in detriment of our kids . . . ."

On April 27, 2018, the defendant sent the plaintiff another e-mail. The certified translation reads in relevant part: "On Monday I met with a group of friends to pray, etc., and before I had prayed to God, and I was thinking about what your attorney said: 'you lose . . .', after accusing me of being a Nazi, crazy and an abuser . . . . I have God, and the fact that you have cheated me, robbed me, and swindled me in that way and with that type of people, as well as everything that that brought with it in my life for many years already, it is what it is.

"The fact that you have destroyed my life by accusing me of being an abuser and crazy, the inherited good name that your own children bear already stained forever, their father vilified by riffraff of all types, etc., and my own family harmed to an unthinkable extreme . . . . Lack of intelligence and pure evil. . . .

"You lack a minimum conscience to understand that decent people don't do what you did and have been doing, they don't hire attorneys and a certain type of them at that—especially, when it was not necessary, it never was . . . nor do they similarly use the police, firemen, schools and ideologized social structures (in a society fragmented by hate due of concepts of race, social class, origin, religion, and questions of identity) in order to harass and destroy the life of the father of their children. Only someone morally and spiritually sick can do such a thing. It's already been almost ten years of this craziness, exclusively carried on by you, even though several groups have done their part due to their respective motivations. You have decided not to change your course, staying firm in the error, the ignominy and the cheating . . . and as if this were not enough, counter to your legal representations and commitments.

"The only thing I asked for from the beginning was co-parenting, even after you refused to buy my part of

the house and consent to that, and it is specifically what you have refused even until today. And we have all lost so much, but especially on the human level our children, who have not seen their parents greet each other and interact civilly in almost ten years already due to your own decision . . . all their infancy, to the point that it no longer has relevance . . . while at times, for moments and reciprocally you became tired of stupidities like little smiles and that sort of thing in churches and public sites . . . something frankly lunatic. You robbed your children of the opportunity to grow up with two parents, separated but acting civilly toward each other, as ordered by the law according to your own legal representatives.

"What were you expecting? Smiles, welcoming and nothing happened here . . . the subject for me has always been our children, not my relationship with you after everything I lived through. And I find it incomprehensible that you don't understand it. My entire investment of love, time, effort, professional decisions, deprivations of all types and resources provided for our children, you have destroyed. You have robbed and defrauded me. Of course, it is important that such injustices cannot remain unpunished. But the curious thing of everything is that someone could think that they could destroy me and dominate me through my relationship with you, something sincerely demented and an exclusive recipe for tragedy. In this sense, I thanked you and I thank God for the good sense that you have given me.

"It has not been nor is it easy for me, but my greatest success is being happy in spite of this craziness. Contemplating the possibility of my death many years ago, I understood that the only one who loses here, if I allow this to affect me, is me and those who love me. This would be losing and allowing the bad things to mortify me. I chose to be happy, and although I am very tired

and exhausted (deeply exhausted), I am a happy person. The uncertainness of not knowing where I will live tomorrow, in what country, not having a relationship with my daughters and not living with my children as much as I would wish . . . losing contact with them over time . . . having doubts, or if I'm out of work and a roof to live or die under, I don't lose sleep. In one way or another, justice will come, in this life or in the next one. Contemplating eternity, our temporary stay here on earth is ephemeral . . . and we are almost [fifty] years old. Statistically speaking we have less time left than we have lived. . . .

"On the other hand, for the professional that I am, beyond the destruction of my career. And in your case, you only decided to be it seriously—support through the subject of identity policies, which makes me happy for my children—after destroying my life, professional and in general, not when we were married and the family needed it more than ever. You didn't do more than complain that you had to work part-time, and weren't worth anything at home or as a mother. . . . Finally, a very serious mistake, for which I have paid with interest in this world. And what have you gained? Destroying the father of your children, robbing him, and a job that you hate. Not even a mentally retarded person acts that way. As I said, injustices will be paid for. And I hope that you can do it for yourself in time, because otherwise your debt will be eternal before God."

On August 28, 2018, the defendant sent the plaintiff a series of text messages. With respect to the first message, the certified translation reads in relevant part: "Sometimes I wonder how it is possible that a person goes up to receive the Host after what you have been doing and continue doing. For me it's incomprehensible. You have no conscience, that has been the big problem. . . . I don't have a job, I have to assume debts to live

(if I can) and probably I have to do with nothing after your thefts, fraud, social, judicial, and litigious persecutions—litigations that I will continue until justice is done, until I die if necessary. On the other hand, if you knew the garbage that I have had to live with of harassment and the like by the groups connected to your riffraff lawyer, whom I told you that you have to get rid of in order to do things right, so even someone like you would be surprised. You must think that that short time is all it takes, that time heals and stupidities like that. It's been almost [ten] years, since I made you a roadmap of what you would have to do or not do justly, what is right and is correct among good people. That is the only thing that matters. And now the only thing that helps is to return to me what is mine with interest, that you make right all the harm you have done in the proper way, and return to me my relationship with my daughters, in addition to being sorry and asking for forgiveness. You, as you have wrongly taught our daughters, do not know how to ask for forgiveness, something transcendental in life to be a good person, which also means amending the harm caused. I cannot get over my astonishment on seeing you walk to the altar and receive the body of Christ. And you have been doing it for over [ten] years. For me it's something incredible."

In a subsequent text message, the defendant stated in relevant part: "If you don't intend to do what's right, we'll continue in the courts—in one way or another, for my children, I will have justice. And if I have to go, I won't hesitate, I'll go. . . . It seems to me that you and those who advise you don't manage to understand the type of man with which you are dealing with and the consequences of what has been done here."

That same day, the defendant also sent the plaintiff an e-mail, which stated in relevant part: "Despite the fact I am currently forced to leave the country (as things

stand right now) because of you and your lawyer, since I have no employment and savings (only debts, after living paycheck to paycheck) as a result of what you've been doing to me for years, it seems surreal to me. Why don't you do coparenting with me, knowing with full certainty that this is the only path and way for us to have any contact whatsoever in life? Instead, you keep violating the law and generating deep frustration and negativity in me. You tell me post facto of the issues that arise in our children due to your lack of coparenting . . . . It's not only that you can't see it, but you don't seem to comprehend the everlasting irreparable damage in our relationship for it, beyond the defamation, slander and libel that completely destroyed my life because of criminal charges and outrageous allegations of all sorts against me before the police/judiciary and elsewhere. You destroyed my life . . . and severely hurt your own children as well. My power, authority and control as a father over my children have always been reasonable and loving, but you have taken them away from me against court orders and due to the misdeeds uncovered before the judiciary. If you wanted for me to hate you, let me tell you that [you] have done all the right things for that to be the case. Time does not heal anything, it only aggravates things. You need to do what's right. But you don't hear what I say, much less understand the impact of what you do."

At the conclusion of the hearing, the court orally rendered its decision.[6] The court told the defendant: "Sir, I am very sympathetic to your situation. I can see

[6] The record does not reflect that the trial court created a signed memorandum of decision in compliance with Practice Book § 64-1 (a) or that the defendant took measures to perfect the record in accordance with Practice Book § 64-1 (b). The defective record does not hamper our ability to review the issues presented on appeal because we are able adequately to ascertain the basis of the court's decision from the trial transcript of the court's oral decision. See *Princess Q. H.* v. *Robert H.*, 150 Conn. App. 105, 109 n.2, 89 A.3d 896 (2014).

that things have been very difficult. It's been a long, high conflict divorce situation." The court stated that the plaintiff had "carried her burden of proof that she has been subjected to a recent pattern of threats. I think some of the language here does imply . . . does carry implied threats that could be unsettling." When the defendant asked which statement was considered a threat, the court explained: "Plaintiff's Exhibit 2; as I said, injustices will be paid for. Destroying . . . and what you have gained? Destroying the father of your children, robbing [him], and a job that you hate. Not even a mentally retarded person acts that way. As I said, injustices will be paid for."[7] Thereafter, the court explained the various limitations[8] on the rights and privileges of the defendant that were part of its restraining order, which, by its terms, expires on September 12, 2019. In addition, the court ordered the defendant to stay 100 yards away from the plaintiff, except when "both children are present." This appeal followed. Additional facts and procedural history will be set forth as necessary.

[7] The defendant challenges the accuracy of the translation with respect to his single statement "injusticias se pagan" which had been translated into English as "injustices will be paid for." The defendant argues, on appeal, that the correct translation is "injustices *are* paid." (Emphasis altered.) He argues that because "there is no future tense in it," it supports his contention that he made the statement in the context of his religious beliefs.

The defendant argues that "[he] was not allowed to review and compare [the plaintiff's] Spanish-English translation . . . and did not even receive copies of the exhibits," which violated his right to due process. The record, however, reflects that, at the hearing, the defendant was given a copy of the certified translation and provided with the opportunity to review the plaintiff's exhibits.

Moreover, to the extent that the defendant argues that he did not receive advance notice of the plaintiff's certified translation, he does not cite any legal authority that entitles him to such notice nor does he explain how the lack of such prehearing notice amounted to a deprivation of due process. Therefore, we decline to review such a claim. See footnote 1 of this opinion.

[8] As the terms and conditions of protection, the court ordered that the defendant must (1) surrender or transfer all firearms and ammunition, (2) not assault, threaten, abuse, harass, follow, interfere with, or stalk [the

I

The defendant first claims that the trial court erroneously determined that he had subjected the plaintiff to a pattern of threatening. Specifically, he argues that the court erroneously "deemed one single out of context opinion, unsettling or not per third-party views, as an implied threat," and "found no valid allegation of physical abuse, stalking and/or a direct threat of any kind as a result of the plaintiff's spurious application for relief from abuse. Therefore, there is no possibility of arguing a pattern of threats under applicable law." We disagree.

We begin by setting forth the standard of review and legal principles that guide our analysis of the defendant's claim. "[T]he standard of review in family matters is well settled. An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented." (Footnote omitted; internal quotation marks omitted.) *Princess Q. H.* v. *Robert H.*, 150 Conn. App. 105, 111–12, 89 A.3d 896 (2014). "It is within the province of the trial court to find facts and draw proper inferences from the evidence presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action." (Internal quotation marks omitted.) *Powell-Ferri* v. *Ferri*, 326 Conn. 457, 464, 165 A.3d 1124 (2017).

"In pursuit of its fact-finding function, [i]t is within the province of the trial court . . . to weigh the evidence presented and determine the credibility and effect to be given the evidence. . . . Credibility must be assessed . . . not by reading the cold printed record,

plaintiff], and (3) stay away from the home of [the plaintiff] and wherever [the plaintiff] shall reside.

but by observing firsthand the witness' conduct, demeanor and attitude. . . . An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom." (Internal quotation marks omitted.) *Brown* v. *Brown*, 132 Conn. App. 30, 40, 31 A.3d 55 (2011). "Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Our deferential standard of review, however, does not extend to the court's interpretation of and application of the law to the facts. It is axiomatic that a matter of law is entitled to plenary review on appeal." (Citation omitted; internal quotation marks omitted.) *Princess Q. H.* v. *Robert H.*, supra, 150 Conn. App. 112.

Section 46b-15 (a), which governs this case, provides in relevant part: "Any family or household member as defined in section 46b-38a,[9] who has been subjected to . . . a pattern of threatening, including, but not limited to, a pattern of threatening, as described in section 53a-62, by another family or household member may make an application to the Superior Court for relief under this section. . . ." (Footnote added.)

To the extent that the defendant argues that the court erred because its conclusion was based on a *single* statement, namely, his statement that "injustices will

[9] General Statutes § 46b-38a (2) defines a "[f]amily or household member" to include "[s]pouses or former spouses."

be paid for," we are unpersuaded. Although the court responded to the defendant's question with just one example from the evidence in support of its conclusion,[10] the court had before it several written threatening communications that the defendant had sent to the plaintiff, including three e-mails and two text messages.

The defendant also argues that his statements were taken "out of context" and that he had been referring to justice within the legal system and within the context of his religious beliefs. Specifically, he argues that he was "manifesting his longing for justice within the legal system for himself and his children."[11] In addition, he argues that he was referring to "[his] belief in eternal justice, as long as such e-mail was sent after a weekly Christian gathering of men where each of the participants provides his life testimony, and all pray together for themselves and their families in the context of eternal life and justice before the Creator."

We repeat the well established linchpin of our role on appeal: "[W]e do not retry the facts or evaluate the credibility of witnesses." (Internal quotation marks omitted.) *Krystyna W.* v. *Janusz W.*, 127 Conn. App. 586, 591, 14 A.3d 483 (2011). Moreover, as our Supreme Court has repeatedly noted, "trial courts have a distinct advantage over an appellate court in dealing with domestic relations, where all of the surrounding circumstances and the appearance and attitude of the parties are so significant." (Internal quotation marks omitted.)

[10] As previously stated, the defendant, at the hearing, asked the court which of his statements constituted a threat, at which point the court stated: "Plaintiff's Exhibit 2; as I said, injustices will be paid for. Destroying . . . and what you have gained? Destroying the father of your children, robbing [him], and a job that you hate. Not even a mentally retarded person acts that way. As I said, injustices will be paid for."

[11] At the hearing before the trial court, the defendant testified in relevant part: "[I]n other communications simultaneously at the same time that you don't have, what I said is that I'm looking for justice within the legal system. There is no threat of any nature whatsoever."

*Brody* v. *Brody*, 315 Conn. 300, 306, 105 A.3d 887 (2015); see also *Princess Q. H.* v. *Robert H.*, supra, 150 Conn App. 116.

In *Princess Q. H.* v. *Robert H.*, supra, 150 Conn. App. 116, this court viewed the trial court's decision in light of the surrounding circumstances and context of all the evidence presented to the trial court. This court determined that the plaintiff was entitled to a restraining order pursuant to § 46b-15, on the ground of stalking, when the defendant, her former spouse, drove past her house two times.[12] Id., 116–17. The trial court in *Princess Q. H.*, like the trial court in the present case, "heard ample evidence about the parties' stormy relationship and the fact that the plaintiff and the defendant were adverse parties in a civil action at the time of [the conduct giving rise to relief pursuant to § 46b-15]."[13] Id., 116.

This court concluded: "In light of the evidence and the surrounding circumstances, we conclude that the court did not abuse its discretion in concluding in the context of all of the evidence presented to it that the defendant's conduct in driving past her home, turning around, and immediately driving past her home a second time constituted an act of stalking. The [trial] court found after consideration of the evidence that shortly

[12] The trial court had granted the plaintiff relief based, in part, on a pattern of threatening, but, on appeal, this court did not reach the issue of whether the defendant's conduct constituted a pattern of threatening under § 46b-15.

[13] Specifically, in her application, the plaintiff averred under oath that "the defendant had contacted her on the telephone on several occasions in 2012; that over the past several weeks, she had received prank calls from an unknown caller; that the defendant put his hands around her neck 'at one time'; that, when she was married to the defendant, he once told her that 'he can protect himself if he had to'; and that she was fearful that the defendant would try to hurt her or her daughter." *Princess Q. H.* v. *Robert H.*, supra, 150 Conn. App. 107. The trial court recognized that "[t]his is not a case where [the plaintiff] is telling me about a physical threat, or physical pain or physical injury . . . ." (Internal quotation marks omitted.) Id., 110.

before the plaintiff sought relief under § 46b-15, the defendant acted in a manner that constituted stalking as that term is commonly defined and applied. The defendant did not testify as to any contrary explanation for his presence near her home. In light of the foregoing, the court's decision does not contain unsupported findings or reflect a misapplication of the law." Id., 116–17.

In the present case, although the defendant did, in his communications to the plaintiff, refer back to the parties' legal proceedings and his religious beliefs, the defendant also expressed, untethered, his negative feelings, of hatred and anger, toward the plaintiff.[14] Moreover, he repeatedly emphasized, at length, how he felt that the plaintiff had "completely destroyed his life" and was to blame for the hardships he was facing.[15] Thus, in light of the lengthy, repetitive and hostile nature of the defendant's communications, and the trial court's ability to supplement the written exhibits with its observation of the demeanor of the parties at the hearing,[16]

[14] For example, as previously stated, he told the plaintiff: "If you wanted for me to hate you, let me tell you that [you] have done all the right things for that to be the case. Time does not heal anything, it only aggravates things." In addition, he told her that she was "generating deep frustration and negativity in [him.]" He also told the plaintiff that "[her] conduct is irresolute," that she had a "[l]ack of intelligence and [was] pure evil," that "[she] lack[s] a minimum conscience to understand that decent people don't do what [she] did," and implied that she was "morally and spiritually sick."

[15] In addition to stating, several times, that the plaintiff had destroyed his life, the defendant also told the plaintiff that he "had lost any and all authority because of [her]," that she had "cheated [him], robbed [him], and swindled [him]," "defrauded [him]," and had destroyed his career. Moreover, the defendant blamed the plaintiff for his being "forced to leave the country," which he describes, on appeal, as "self-deportation."

At the hearing before the trial court, the defendant's testimony, in a similar fashion, focused on what he viewed to be the plaintiff's "history of deceit, fraud, entrapment, [and] provocations." On appeal, the defendant likewise dedicated a significant portion of his brief to summarizing, what he views to be, the plaintiff's "threats, abuse, deceit, concealment, fraud, and other misdeeds . . . which also include perjury [and] false documentation," as well as the plaintiff's "ulterior motives," and "defamation."

[16] At the hearing, the defendant acknowledged that he may have sounded "frustrated or emotional."

the trial court reasonably could have concluded that the defendant's written threatening communications constituted a pattern of threatening.

Because the record establishes that there was sufficient evidence to support a finding that the defendant subjected the plaintiff to a pattern of threatening, we conclude that the court did not abuse its discretion in granting the plaintiff's application for relief from abuse and issuing a restraining order against the defendant.

II

The defendant also claims that the court erroneously ordered him to stay 100 yards way from the plaintiff except "when both children are present." The defendant, in essence, claims that the effect of the court's order on his desire to have a relationship with his children is to burden unreasonably that relationship in that *both children*[17] have to be present with the plaintiff in order for the exception to apply. Specifically, he argues that "the terms of his restraining order do not allow [him] to attend school events if 'both children' are not present jointly with the plaintiff, namely: curriculum night—standard for children not to be there, sports and school sponsored events, high school graduation, concerts, church, and others. The only exception to the restraining order applies when 'both children are present'—both U.S. students. It is also unclear whether [he] can pick up one, both or none of his children from their home." In other words, if only one, but not both, of his children are with, or within 100 yards of, the plaintiff, he may not have contact with that child. We conclude that there is nothing in the record to support

[17] Although the parties have three children together, their oldest daughter attends college in Spain. Accordingly, the court's order, referring to "both children," presumably refers to the two children who live in the United States with the plaintiff.

the court's additional order of protection as modified by the exception requiring the presence of both children.

The record reveals the following additional facts and procedural history. The parties have three children together. At the time that the restraining order was imposed, on September 12, 2018, one of the parties' children attended college in Spain, and two of the children attended high school and lived with the plaintiff. At the hearing, the defendant explained that, although the plaintiff was not requesting that the restraining order extend to the parties' children, a court order to stay 100 yards away from the plaintiff would affect his ability to see his children: "I could not kiss my children if I happened to be in church. I cannot pick up, still, my children from my own house . . . . I cannot attend my son's high school graduation if she's there. I cannot attend the high school barbecue if she's there." The court responded: "I can always make an exception for that." The court, at the conclusion of the hearing, explained its additional orders of protection that it was going to impose as a result of the restraining order: "The [defendant] is to stay at least 100 yards away from [the plaintiff] at all time[s], however an exception is to be made when the parties are in the presence of both children. So, in other words, the order does not apply [for] pickup and drop-off for the minor child or when you are also in the presence of the minor child, say at a family gathering or church or something like that." In its written additional orders of protection, the court provided that the defendant must stay 100 yards away from the plaintiff, except when "both children are present."

As previously stated, "[i]n determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Appellate review of a trial court's findings of fact is governed by

the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Princess Q. H.* v. *Robert H.*, supra, 150 Conn. App. 111–12.

First, we find ambiguity in the court's additional order of protection. Furthermore, we discern no evidence, set forth in the plaintiff's application or provided at the hearing on September 12, 2018, to support such an order, as modified by the exception requiring the presence of both children. The plaintiff did not request that her restraining order extend to the parties' children. Moreover, she did not testify that she felt as though she was in physical danger except in the presence of "both children." At the hearing, when the court explained that "the order does not apply [for] pickup and drop off for the minor child or when you are also in the presence of the minor child," with no mention of an additional child being present, the plaintiff did not object or express any concern. Accordingly, the court's order requiring the defendant to stay 100 yards away from the plaintiff, and providing an exception only when "both children" are present, has no evidentiary basis.

The judgment is reversed only as to the order requiring the defendant to stay 100 yards away from the plaintiff with an exception when both children are present, and the case is remanded for a new hearing with respect to any order of protection, if proven necessary by the plaintiff, in situations where the defendant seeks interaction with his children and the plaintiff is present. The judgment is affirmed in all other respects.

In this opinion the other judges concurred.

# RONALD F. BOZELKO *v.* STATEWIDE CONSTRUCTION, INC., ET AL.
## (AC 40459)

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

*Syllabus*

The plaintiff, who owned property that abutted property of the defendants, sought to quiet title to a triangular strip of land to which all of the parties claimed title. Following a trial to the court, at which the parties submitted evidence of their chains of title, the trial court found in favor of the defendants, concluding that the defendants are the owners of the parcel and that the plaintiff had no right, title or interest in the disputed parcel. From the judgment of the trial court quieting title in favor of the defendants, the plaintiff appealed to this court. *Held* that the trial court's factual finding that there was a break in the plaintiff's chain of title and, thus, that the plaintiff had no right, title or interest in the disputed parcel was not clearly erroneous; in making that determination, the court credited the conclusions of the defendants' expert witness that the disputed parcel was outside the plaintiff's chain of title, it was not for this court to pass on the credibility of the witnesses, the court's factual finding was supported by the evidence in the record, and the plaintiff, having failed to establish that he has title to the disputed parcel, was not entitled to challenge the court's conclusion that the defendants own the parcel.

Argued November 29, 2018–officially released April 23, 2019

*Procedural History*

Action to quiet title to certain real property, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Hon. Richard E. Burke*, judge trial referee; judgment for the defendants, from which the plaintiff appealed to this court. *Affirmed.*

*Ronald F. Bozelko*, self-represented, with whom, on the brief, was *Ira B. Grudberg*, for the appellant (plaintiff).

*Michael E. Burt*, for the appellees (defendants).

*Opinion*

DiPENTIMA, C. J. The plaintiff, Ronald F. Bozelko, appeals from the judgment of the trial court, rendered following a trial to the court, in favor of the defendants, Statewide Construction, Inc., and Robert Pesapane, in an action to quiet title under General Statutes § 47-31. On appeal, the plaintiff claims that the court's conclusions with respect to his quiet title claim are improper. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to the resolution of this appeal. In 2011, the plaintiff commenced an action against the defendants seeking to quiet title to property known as 105 McLay Avenue in East Haven. In their amended answer, the defendants admitted the allegation in the operative complaint that they may claim an interest in whole or in part in 105 McLay Avenue. The defendants denied the remainder of the allegations in the complaint and did not assert any special defenses or counterclaims, but made a statement in their amended answer, pursuant to § 47-31 (d), that they each owned a portion of 105 McLay Avenue. At trial, the parties submitted evidence of their chains of title. Following trial, the court found in its memorandum of decision that the defendants are the owners of 105 McLay Avenue "in various proportions." This appeal followed.

On appeal, the plaintiff contends that the court erred in its conclusion as to the ownership of 105 McLay Avenue. Specifically, he argues that the evidence he submitted at trial established that he has title to 105 McLay Avenue. We disagree.

We first set forth our standard of review. Section 47-31 (a) provides in relevant part: "An action may be brought by any person claiming title to . . . real . . . property . . . against any person who may claim to own the property, or any part of it . . . adverse to the

plaintiff . . . to clear up all doubts and disputes and to quiet and settle the title to the property. Such action may be brought whether or not the plaintiff is entitled to the immediate or exclusive possession of the property." In *Har* v. *Boreiko*, 118 Conn. App. 787, 986 A.2d 1072 (2010), we stated: "Under § 47-31, the claim for relief calls for a full determination of the rights of the parties in the land. . . . To prevail, the plaintiff must do so on the strength of [his] own title, not on the weakness of the defendants' . . . and by the preponderance of the evidence." (Citations omitted; internal quotation marks omitted.) Id., 795.

"Whether a disputed parcel of land should be included in one or another chain of title is a question of fact for the court to decide. . . . In such a determination, it is the court's duty to accept the testimony or evidence that appears more credible. . . . It is well settled that we review the court's findings of fact under the clearly erroneous standard. We cannot retry the facts or pass on the credibility of the witnesses. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed . . . ." (Citations omitted; internal quotation marks omitted.) *Highstead Foundation, Inc.* v. *Fahan*, 105 Conn. App. 754, 758–59, 941 A.2d 341 (2008).

At trial, both parties agreed that the first deed in the plaintiff's chain of title, a warranty deed recorded in July, 1924, by which Lyman A. Granniss transferred a thirty acre parcel of land known as "Pond Lot" to John H. Howe, included a parcel that would later become known as 105 McLay Avenue. The next deed in the plaintiff's chain of title is an October, 1924 warranty deed by which Howe transferred to Gertrude H. LaBell and Emma G. McLay the parcel of land referenced on a

1924 McLay Heights subdivision map (1924 subdivision map), with the exception of lots one through forty. The plaintiff claimed that the deed from Howe to LaBell and McLay included 105 McLay Avenue, and the defendants disagreed.

The 1924 subdivision map included a street named McLay Avenue. It is not disputed that 105 McLay Avenue is a triangular portion of land that comprises a portion of McLay Avenue as shown on the 1924 subdivision map, and that 105 McLay Avenue appears to have been created in the late 1980s when McLay Avenue was reconfigured. See footnote 2 of this opinion.

The remaining conveyances in the plaintiff's chain of title are as follows. By a judgment of strict foreclosure in 1972, the town of East Haven obtained LaBell and McLay's property. By a quitclaim deed dated January 24, 1985, East Haven conveyed the parcel, which the plaintiff claims included 105 McLay Avenue, to Joseph J. Farricielli, who then transferred that same parcel to Laurelwood Associates, Inc., by warranty deed dated February 22, 1985. In 1985, Laurelwood Associates, Inc., transferred the parcel by quitclaim deed to Edward Coventry and Walter T. Nichols, who conveyed the property back to Laurelwood Associates, Inc., by quitclaim deed in 1986. Laurelwood Associates, Inc., then conveyed 105 McLay Avenue to Chalja, LLC, by a 2005 warranty deed, which company then transferred 105 McLay Avenue to the plaintiff by quitclaim deed in 2010. The defendants submitted evidence of a number of breaks in the plaintiff's chain of title and contended that East Haven had conveyed 105 McLay Avenue to Statewide Construction, Inc., in August, 2005, by quitclaim deed, and Statewide Construction, Inc., subsequently conveyed a portion of 105 McLay Avenue to Pesapane in October, 2005.[1]

[1] The defendants presented evidence indicating that, after the original transfer of the Pond Lot from Granniss to Howe, the deed descriptions in the plaintiff's chain of title did not include 105 McLay Avenue, until the

In its memorandum of decision, the court found that the plaintiff has no right, title, or interest in 105 McLay Avenue. The court found that the defendants had "convincingly assert[ed] that the metes and bounds of the plaintiff's deeds do not reach the triangle known as 105 McLay [Avenue]." Specifically, the court stated that "the map appended to the deed from [Farricielli] to Laurelwood Associates [Inc.] . . . known as map showing property to be acquired by . . . Farricielli from the town of East Haven . . . completely destroys the plaintiff's argument that he is the owner of 105 McLay Avenue," and noted that this finding is supported by the testimony of Attorney Daniel C. Ioime, an expert witness who testified on behalf of the defendants. (Internal quotation marks omitted.)

The deed from East Haven to Farricielli states that the property to be conveyed is bounded northerly "by McLay Avenue (undeveloped), as shown on said map, 303.18 feet . . . ." The map showing the property to be acquired by Farricielli from East Haven, which was revised in 1983 (1983 map), shows the parcel being conveyed as being bounded on the north by McLay Avenue. Ioime marked the 1983 map to show the placement of the parcel that would later become 105 McLay Avenue in relation to the land contained within the description of the deed.[2] Ioime also marked the 1983 map to demonstrate that lots 50, 51, and 52, which correspond to 91, 95, and 99 McLay Avenue, were located on the northerly side of McLay Avenue, and

conveyance from Laurelwood Associates, Inc., to Chalja, LLC. The defendants argue, and we agree, that "one cannot create a title in himself merely by proof of a set of deeds purporting to constitute a chain of title ending with a conveyance to himself." *Loewenberg* v. *Wallace*, 147 Conn. 689, 696, 166 A.2d 150 (1960).

[2] Following the recording of the 1983 map, McLay Avenue was reconfigured and 105 McLay Avenue, otherwise known as town of East Haven excess row, was shown on the Laurelwood Estates subdivision map, revised as of June 25, 1987.

marked the property conveyed as being located to the south of McLay Avenue. The 1924 subdivision map shows lots 50, 51, and 52 as being located on the northerly side of McLay Avenue, and Ioime testified that the parcel drawn in red, which abutted those lots, represented 105 McLay Avenue. Ioime stated that lots 50, 51, and 52 were outside the description in the deed from East Haven to Farricielli.[3]

Ioime testified that 105 McLay Avenue was outside the description of the property conveyed in the quitclaim deed to Farricielli by East Haven. Ioime further testified that the warranty deed from Farricielli to Laurelwood Associates, Inc., which contains the same legal description of the property as the quitclaim deed from East Haven to Farricielli, does not include 105 McLay Avenue. The court credited Ioime's testimony that 105 McLay Avenue was outside the plaintiff's chain of title. "We cannot retry the facts or pass on the credibility of the witnesses." (Internal quotation marks omitted.) *Highstead Foundation, Inc.* v. *Fahan*, supra, 105 Conn. App. 759.

Accordingly, the court's finding that there was a break in the plaintiff's chain of title is not clearly erroneous. See *FirstLight Hydro Generating Co.* v. *Stewart*,

[3] Accordingly, 105 McLay Avenue abutted lots that were on the northerly side of McLay Avenue and the property conveyed was located to the south of McLay Avenue. We note in general that where the description in a deed states that a parcel of land is bounded by a highway, the boundary is to the middle of the highway. See *Stiles* v. *Curtis*, 4 Day (Conn.) 328, 329 (1810); see also *Antenucci* v. *Hartford Roman Catholic Diocesan Corp.*, 142 Conn. 349, 355–56, 114 A.2d 216 (1955) (absent contrary evidence, abutting owner presumed to own fee to center of highway). Although the court made no finding as to whether 105 McLay Avenue extended past the center line of McLay Avenue prior to its reconfiguration, the court is presumed to know the law and to apply it correctly, and the plaintiff has not shown otherwise. See, e.g., *Stratford* v. *Hawley Enterprises, Inc.*, 175 Conn. App. 369, 375, 167 A.3d 1011 (2017). Additionally, the court had evidence before it, namely, the relevant maps and Ioime's testimony, from which it could have determined the location of 105 McLay Avenue on the map and concluded that 105 McLay Avenue was not conveyed pursuant to the deed from East Haven to Farricielli.

328 Conn. 668, 678, 182 A.3d 67 (2018) ("issue [of whether] land [is] included in one or the other chain of title [is] a question of fact for the court to decide" [internal quotation marks omitted]). As a result, the subsequent conveyances in the plaintiff's chain of title did not include 105 McLay Avenue because "[i]t is fundamental that a grantor cannot effectively convey a greater title than he [or she] possesses." *Stankiewicz* v. *Miami Beach Assn. Inc.*, 191 Conn. 165, 170, 464 A.2d 26 (1983). The court's finding that there was a break in the plaintiff's chain of title is not clearly erroneous, as there was evidence in the record to support it and we are not left with the definite and firm conviction that a mistake has been committed.[4]

The plaintiff next makes several additional arguments that challenge the court's conclusion that the defendants own 105 McLay Avenue.[5] Because we conclude

[4] The plaintiff previously had brought an action to quiet title to 105 McLay Avenue against a different defendant. In *Bozelko* v. *Venditto*, Superior Court, judicial district of New Haven, Docket No. CV-11-5033793-S (September 19, 2016), the court determined that the plaintiff did not own 105 McLay Avenue, and found that Jennifer Venditto's warranty deed for 91 McLay Avenue, which property abutted 105 McLay Avenue, extended to the center of McLay Avenue. The appeal to this court was dismissed, and our Supreme Court denied certification for appeal. *Bozelko* v. *Venditto*, 324 Conn. 925, 155 A.3d 754 (2017). We note that "[§ 47-31] requires the plaintiffs to name the person or persons who may claim [an] adverse estate or interest. . . . So that the trial court can make a full determination of the rights of the parties to the land, an action to quiet title is brought against persons who claim title to or have an interest in the land. . . . Only the parties to an action to quiet title are bound by the judgment. . . . The failure to include [parties who may claim an interest] . . . is not error because the decision to join a party in a suit to quiet title is made by the plaintiff." (Citations omitted.) *Swenson* v. *Dittner*, 183 Conn. 289, 292, 439 A.2d 334 (1981). The defendants in this case were not named in *Venditto*, nor was Venditto named in this action.

[5] The plaintiff claims that (1) the evidence submitted by the defendants in support of their chain of title is insufficient, (2) the court erred in finding that McLay Avenue was dedicated as a public street, (3) the court erred in finding that "the property known as 99 [McLay] Avenue, which is owned by Statewide Construction, Inc., extends all the way to the current street line of McLay Avenue and includes to the center of McLay Avenue," (4) General Statutes § 47-33 extinguishes any claim the defendants have to 105

that the court's finding that the plaintiff has no title or interest in 105 McLay Avenue was not clearly erroneous, however, we need not address his remaining claims. Having failed to prove his own title in 105 McLay Avenue, "the [plaintiff is] not permitted to question that of the defendant[s], nor to assign as error the rulings of the trial court relating thereto. . . . This is but an application of the settled rule that in a controversy under . . . § 47-31 over the title to, or an interest in, real estate, a party can prevail, that is, can obtain an adjudication of title or an interest in himself, if at all, only on the strength of his own title or interest as distinguished from the weakness of the title or interest of his adversaries." (Citations omitted; internal quotation marks omitted.) *Marquis* v. *Drost*, 155 Conn. 327, 334, 231 A.2d 527 (1967); see *Ball* v. *Branford*, 142 Conn. 13, 17, 110 A.2d 459 (1954); *Borden* v. *Westport*, 112 Conn. 152, 168, 151 A. 512 (1930); see also *Thomas* v. *Collins*, 129 Conn. App. 686, 691 n.8, 21 A.3d 518 (2011) (plaintiff permitted to contest court's finding that defendants had easement because plaintiff had title to property).

The judgment is affirmed.

In this opinion the other judges concurred.

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McLay Avenue, and (5) Statewide Construction, Inc., failed to comply with § 47-31 (d) and therefore cannot claim title to 105 McLay Avenue by virtue of ownership of 99 McLay Avenue. All of these claims essentially attack the court's ruling that the defendants own 105 McLay Avenue in various proportions.