ANDRE DENNIS *v.* COMMISSIONER OF CORRECTION (AC 39874)

Keller, Elgo and Eveleigh, Js.

Syllabus

The petitioner sought a writ of habeas corpus, claiming that his trial counsel had provided ineffective assistance by failing to request a stay of execution that resulted in the petitioner's loss of sixteen days of presentence incarceration credits. Pursuant to a plea agreement on various charges under multiple docket numbers in the Waterbury Superior Court, the petitioner admitted to having violated his probation and pleaded guilty under the *Alford* doctrine to criminal violation of a restraining order, criminal violation of a protective order and the crime of assault in the third degree. At the plea and sentencing hearing, the trial court canvassed the petitioner regarding the plea agreement and provided the prosecutor, trial counsel and the petitioner with the opportunity to present any reasons why it should not be accepted. When no reasons were given, the court accepted the plea agreement and sentenced the petitioner in accordance with the state's recommendation. Thereafter, the court inquired whether any other matters needed to be addressed prior to the conclusion of the hearing, and no requests were made. Later that day, however, trial counsel filed a motion for presentence incarceration credits but did not request a stay of execution of the sentence. Approximately three weeks later, the petitioner, pursuant to a separate plea agreement, pleaded guilty under the *Alford* doctrine to various charges in the Meriden Superior Court and was sentenced to a term of incarceration that was to run concurrently with the Waterbury sentence. The habeas court

rendered judgment denying the habeas petition, concluding that the petitioner failed to establish that trial counsel had rendered ineffective assistance. Thereafter, the habeas court denied the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. Contrary to the claim of the respondent, the Commissioner of Correction, the petitioner's appeal was not moot, as practical relief remained available to the petitioner despite that fact that he was no longer incarcerated; if this court reversed the habeas court's judgment, the benefit to the petitioner would be the retroactive modification of his definite sentence so as to incorporate the sixteen days of presentence incarceration credits, thereby advancing his effective release date and reducing the amount of time he is required to spend on special parole.
2. The habeas court abused its discretion in denying the petition for certification to appeal; the resolution of the petitioner's underlying claim that trial counsel rendered ineffective assistance involved issues that were debatable among jurists of reason, could have been resolved by a court in a different manner and were adequate to deserve encouragement to proceed further.
3. The habeas court improperly concluded that the petitioner failed to establish that trial counsel rendered ineffective assistance by failing to request a stay of execution of the Waterbury sentence, as there was no reasonable strategic reason for trial counsel not to request a stay of execution after the sentence had been imposed: although this court deferred to the habeas court's determination that trial counsel credibly testified that his failure to request a stay of execution was the result of a strategic decision to move through the sentencing hearing without incident in order to not jeopardize the trial court's acceptance of the plea agreement, this court, as a matter of law, concluded that trial counsel's decision was not the product of reasonable professional judgment, as it was not reasonable for him to believe that once the court accepted the plea agreement, the petitioner would have been able to withdraw it because he likely would have been barred from doing so pursuant to the relevant rule of practice (§ 39-27), and there was no reasonable basis for trial counsel to believe that the court could have modified the petitioner's sentence, once imposed, in a way that would have jeopardized the plea agreement; moreover, in light of *Gonzalez* v. *Commissioner of Correction* (308 Conn. 463), which held that in the absence of a strategic justification, the failure to request a bond increase that would have allowed the petitioner to earn credit for a period of presentence incarceration constituted deficient performance, the failure of trial counsel here to request a stay of execution of the Waterbury sentence once it had been imposed constituted deficient performance.
4. The petitioner's claim that he was prejudiced by trial counsel's deficient performance in failing to request a stay of execution of the Waterbury sentence because it resulted in his loss of sixteen days of presentence

incarceration credits was supported by the record; the undisputed evidence in the record indicated that the petitioner would have been able to apply sixteen additional days of presentence incarceration credits to his definite sentence had a stay of execution been requested and accepted, and, therefore, the habeas court abused its discretion in denying the amended petition for a writ of habeas corpus.

Argued September 25, 2018—officially released May 7, 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, *Fuger*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Reversed*; *judgment directed.*

Nicholas Marolda, assigned counsel, with whom was *Temmy Ann Miller*, assigned counsel, for the appellant (petitioner).

Lisa A. Riggione, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Rebecca A. Barry*, assistant state's attorney, for the appellee (respondent).

Opinion

EVELEIGH, J. The petitioner, Andre Dennis, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court (1) abused its discretion in denying his petition for certification to appeal and (2) incorrectly concluded that he failed to establish that his trial counsel rendered ineffective assistance when trial counsel failed to request a stay of execution that resulted in the loss of sixteen days of presentence incarceration credits. We agree with the petitioner that the habeas court improperly denied his petition for certification to appeal, and, after considering the merits of his claim, we conclude that

the habeas court incorrectly determined that trial counsel did not render deficient performance when he failed to request a stay of execution of the petitioner's prior sentence. We, therefore, reverse the judgment of the habeas court.

The record discloses the following facts and procedural history. On July 30, 2015, the petitioner, who at the time was represented by Attorney Michael Richards (trial counsel), entered into a plea agreement at the Superior Court in Waterbury on a series of charges resulting in a total effective sentence of three years incarceration, followed by five years of special parole.[1] As part of the Waterbury plea agreement, the petitioner pleaded to the following: Admission of two counts of violation of probation in Docket Nos. CR-12-0410035-S and CR-12-0412661-S, and guilty under the *Alford* doctrine[2] to criminal violation of a restraining order in violation of General Statutes § 53a-223b in Docket No. CR-14-0423367-S, criminal violation of a protective order in violation of General Statutes § 53a-223 and the crime of assault in the third degree in violation of General Statutes § 53a-61 in Docket No. CR-14-0424236-S, and criminal violation of a protective order in violation of § 53a-223 in Docket No. CR-15-0432507-S.

Prior to accepting the pleas, the court canvassed the petitioner with respect to the plea agreement and found

[1] On July 30, 2015, prior to entering into the plea agreement, the petitioner was in court for a violation of probation hearing where he faced a possible ten year period of incarceration. During the hearing, the petitioner notified trial counsel that he wanted to take a prior plea agreement that had been offered by the state in the pending Waterbury cases. Thereafter, the hearing was referred to the court, *Fasano*, *J.*, for resolution of both the plea agreement and the violation of probation.

[2] "Under *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), [a]n individual accused of [a] crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." (Internal quotation marks omitted.) *Garner* v. *Commissioner of Correction*, 330 Conn. 486, 490 n.5, 196 A.3d 1138 (2018).

that it was entered into voluntarily and with the assistance of competent counsel. After accepting the pleas, but prior to imposing sentence, the court asked the petitioner if he would like to address the court. The petitioner stated that he "just want[ed] to make sure all [his] jail credit [would be] applied to all [his] dockets, even for . . . [the] Meriden cases." The court responded that because the petitioner's other cases were pending in a different jurisdiction, it had no control over them, but stated: "What I can do is give you credit for any time you were incarcerated during the pendency of these cases that are in this jurisdiction."[3] The court then sentenced the petitioner to a total effective sentence of three years incarceration, followed by five years of special parole in accordance with the state's recommendation. Prior to the conclusion of the proceeding, the court again asked whether anything else needed to be addressed before the conclusion of the proceeding. Trial counsel thanked the prosecutor and the court but made no further requests. Later that day, trial counsel filed a motion for presentence incarceration credits with the court but did not request a stay of execution of the sentence. On the following day, July 31, 2015, the court granted the motion.

Approximately three weeks later, on August 20, 2015, at the Superior Court in Meriden, as part of a separate plea agreement that stemmed from separate charges, the petitioner was sentenced to a total effective sentence of two years of incarceration, which was to run concurrently with the Waterbury sentence.[4] As part of the Meriden plea agreement, the petitioner entered

[3] After having accepted the plea agreement, but prior to imposing the sentence, the court addressed trial counsel, stating: "Hold it, I haven't imposed [the] sentence."

[4] The petitioner was represented by different counsel at the Meriden hearing. In this appeal, there is no claim that Meriden trial counsel performed deficiently. Accordingly, we restrict our analysis to whether Richards, who was Waterbury trial counsel, performed deficiently.

Alford pleas to the following charges: One count of criminal violation of a protective order in violation of § 53a-223 in Docket No. CR-14-0277421-S and one count each of the crimes of assault in the third degree in violation of General Statutes § 53a-61 and failing to appear in the first degree in violation of General Statutes § 53a-172 in Docket No. CR-13-0275489-S.

On February 25, 2016, the self-represented petitioner filed a petition for a writ of habeas corpus alleging that trial counsel had rendered ineffective assistance in several respects relating to the application of presentence incarceration credits. On August 3, 2016, the petitioner, now represented by assigned counsel, filed the operative amended petition, claiming that trial counsel had rendered ineffective assistance by failing to adequately preserve the petitioner's incarceration credits for time already served and that but for trial counsel's deficient performance, there was a reasonable probability that the petitioner would have a more favorable outcome in the form of a reduced period of special parole.

The petitioner's habeas trial was held on November 9, 2016, before the court, *Fuger*, *J*. During the evidentiary hearing, trial counsel testified that, while he was representing the petitioner at a violation of probation hearing in which the petitioner faced ten years incarceration, the petitioner informed him that he wanted to take the plea agreement that trial counsel had previously negotiated with the Waterbury prosecutor. Later in the hearing, when asked why he didn't ask for a stay of execution, trial counsel testified that the petitioner had been a difficult client who had tried to fire both of his previous attorneys and was unwilling to negotiate with the prosecutor. He further testified that "[the petitioner] kept wavering. There's a long track record of him blowing up, trying to fire everyone that had represented him in the past. I was just trying to get through the canvass

really. . . . [W]e were kind of in the middle of a confusing moment there with the plea. I probably should have [requested the stay]. I'm not sure what the result was that we didn't do it, but again, I thought that his jail credit was a mess in Meriden anyway."

The court also heard from the Meriden trial counsel, who testified that he also did not ask for jail credits at the subsequent sentencing, but stated: "[I]t's something I should've done. I don't really have an explanation for [not doing] it." Furthermore, the petitioner's expert witness testified that defense attorneys in Connecticut have been aware of the issues surrounding jail credit for some time now and have learned through experience that it is necessary to take steps to protect whatever credit there may be. The expert further testified that having a strained relationship with a client and an urge to proceed through a hearing quickly does not justify failing to ask for a stay of execution and that one should always ask, except when it is counter to the client's express wishes. After the conclusion of evidence, the habeas court denied the petition by oral decision, concluding that there was no deficient performance on the part of trial counsel. This appeal followed.

On appeal, the petitioner claims that the habeas court abused its discretion when it found that he failed to prove that trial counsel's failure to request a stay of execution, which deprived him of sixteen days of presentence incarceration credits, constituted ineffective assistance of counsel.[5]

As a preliminary matter, we address the claim of the respondent, the Commissioner of Correction, that the petitioner's appeal should be dismissed as moot. This claim is predicated on the fact that the petitioner is no

[5] The number of presentence incarceration credits that the petitioner would be entitled to, sixteen days, had the court granted a stay of execution on his Waterbury sentence, is not in dispute.

longer incarcerated.[6] The respondent argues, therefore, that this court can afford the petitioner no practical relief. Although the petitioner is no longer incarcerated, the petitioner argues that practical relief still remains available because an order modifying the original sentence to include the sixteen days of presentence incarceration credit would likely lead to the advancement of his release from special parole by approximately that same amount of time. We agree that practical relief remains available to the petitioner, and, therefore, this appeal is not moot.

Our Supreme Court addressed a similar issue in *Murray* v. *Lopes*, 205 Conn. 27, 529 A.2d 1302 (1987). In *Murray*, the petitioner was sentenced to a two year period of confinement, followed by a period of probation. Id., 29. During the pendency of his appeal from the denial of his petition for a writ of habeas corpus, the petitioner was released from confinement and began serving the period of probation. Id., 29–30. In addressing a similar mootness argument, our Supreme Court concluded that the petitioner's appeal was not moot, despite his release from confinement, because, although no longer "confined," he was still serving the probationary portion of his sentence. Id., 31. The court further concluded that it could afford the petitioner practical relief, because an order directing the commissioner to recalculate the petitioner's sentence with the credit sought under General Statues § 18-98d would affect the period of pro-

[6] Specifically, the respondent claims that because the petitioner has completed his term of incarceration, General Statutes § 18-98d, which governs the application of presentence confinement credits, does not apply because it applies only to definite sentences and not to periods of special parole. The respondent further claims that to allow unused jail credit to apply to special parole would essentially encourage bad behavior by allowing defendants to collect credits that would offset punishment for future criminal acts and, therefore, is counter to public policy. Because we conclude that practical relief remains available to the petitioner on a separate ground, we do not reach this issue. See footnote 8 of this opinion.

bation and result in the petitioner completing his probationary period three months sooner by advancing his release date. Id., 30–31; see id., 31 ("[t]herefore, since our resolution of the issue presented in this appeal will affect [the petitioner's] period of probation, the appeal is not moot").

In the present case, although the respondent argues that no relief exists, we note that if the petitioner successfully prevails on his claim and we were to reverse the judgment of the habeas court, the benefit to the petitioner would be the retroactive modification of his definite sentence so as to incorporate the sixteen days of presentence confinement credits, thereby advancing his effective release date from prison and reducing the amount of time he is required to spend on special parole. See id; see also *Gonzalez* v. *Commissioner of Correction*, 308 Conn. 463, 484, 68 A.3d 624 (2013), cert. denied sub nom. *Dzurenda* v. *Gonzalez*, 571 U.S. 1045, 134 S. Ct. 639, 187 L. Ed. 2d 445 (2013); *Ebron* v. *Commisioner of Correction*, 307 Conn. 342, 356, 53 A.3d 983 (2012), cert. denied sub nom. *Arnone* v. *Ebron*, 569 U.S. 913, 133 S. Ct. 1726, 185 L. Ed. 2d 802 (2013).[7] Although, under this scenario, the calculation with respect to the petitioner's period of special parole would be administered by the Department of Correction and not by the court, the modification of the petitioner's definite sentence would, nonetheless, result in the advancement

[7] "[T]he United States Supreme Court in *Lafler* [v. *Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012)] and [*Missouri* v. *Frye*, 566 U.S. 134, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012)] did not expressly indicate what should happen under these circumstances, it appears to us that the court intended that, if the court finds a . . . violation, the court should attempt to place the habeas petitioner, as nearly as possible, in the position that he would have been in if there had been no violation." *Ebron* v. *Commissioner of Correction*, supra, 307 Conn. 363. "If the petitioner was prejudiced because it is reasonably probable that the [more favorable] sentence . . . would have been imposed if not for the deficient performance of counsel, even considering intervening circumstances, it seems reasonably clear that the appropriate remedy is to impose that sentence." Id., 356.

of his effective release date from prison and a reduction in the time he will be required to spend on special parole. See *Gonzalez* v. *Commissioner of Correction*, supra, 490–91 ("The respondent asserts that the petitioner has failed to demonstrate prejudice because presentence confinement credit is an administrative task that takes place after sentencing. This claim is unavailing because the issue herein does not concern whether the respondent properly calculated the petitioner's presentence confinement credit but, rather, involves the failure of the petitioner's counsel to take the necessary and available steps during critical stages of the proceedings to protect his client's statutory right to receive his full presentence confinement credit."). Accordingly, we conclude that practical relief is available to the petitioner and, therefore, conclude that the present appeal is not moot.[8]

I

We now address the petitioner's first claim that the habeas court abused its discretion in denying his petition for certification to appeal from the denial of his amended petition for a writ of habeas corpus. The following standard of review governs our disposition of this claim. "Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, [the petitioner] must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can

[8] Because practical relief remains available to the petitioner, we do not reach the issue of whether § 18-98d impliedly excludes the application of presentence confinement credits to periods of special parole.

show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . . To prove that the denial of his petition for certification to appeal constituted an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification." (Citations omitted; internal quotation marks omitted.) *Sanders* v. *Commissioner of Correction*, 169 Conn. App. 813, 821–22, 153 A.3d 8 (2016), cert. denied, 325 Conn. 904, 156 A.3d 536 (2017).

As we discuss more fully in part II of this opinion, because the resolution of the petitioner's underlying claim that trial counsel rendered ineffective assistance involves issues that are debatable among jurists of reason, could have been resolved by a court in a different manner, and are adequate to deserve encouragement to proceed further, we conclude that the habeas court abused its discretion in denying the petition for certification to appeal from the denial of the amended petition for a writ of habeas corpus.

II

The petitioner's only substantive claim on appeal is that the habeas court incorrectly concluded that he failed to establish that his trial counsel rendered ineffective assistance when trial counsel failed to request a stay of execution of the Waterbury sentence. Specifically, the petitioner claims that trial counsel rendered ineffective assistance because there was no reasonable strategic reason not to request a stay after the sentence had been imposed. In response, the respondent argues that the habeas court correctly determined that trial counsel's choice to forgo a motion to stay the execution of the Waterbury sentence was based on a strategic decision to move through the sentencing without incident in order not to jeopardize the court's acceptance of the plea agreement. We agree with the petitioner.

The following standard of review and the legal principles govern our resolution of the petitioner's ineffective assistance of counsel claim. "The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . Historical facts constitute a recital of external events and the credibility of their narrators. . . . Accordingly, [t]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . 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. . . .

"[I]t is well established that [a] criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. *Strickland* v. *Washington*, [466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. This right arises under the sixth and fourteenth amendments to

the United States constitution and article first, § 8, of the Connecticut constitution." (Internal quotation marks omitted.) *Thomas* v. *Commissioner of Correction*, 141 Conn. App. 465, 470–71, 62 A.3d 534, cert. denied, 308 Conn. 939, 66 A.3d 881 (2013).

"As enunciated in *Strickland* v. *Washington*, supra, 466 U.S. 687, this court has stated: It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: [1] a performance prong and [2] 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. . . . To satisfy the prejudice prong, [the petitioner] must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . The [petitioner's] claim will succeed only if both prongs are satisfied. . . . The court, however, can find against a petitioner . . . on either the performance prong or the prejudice prong, whichever is easier." (Citation omitted; internal quotation marks omitted.) *Salmon* v. *Commissioner of Correction*, 178 Conn. App. 695, 703–704, 177 A.3d 566 (2017).

A

With the foregoing legal framework in mind, we address the petitioner's claim that the habeas court incorrectly concluded that he failed to establish that his trial counsel rendered ineffective assistance by failing to request a stay of execution of the Waterbury sentence pending imposition of the Meriden sentence. Specifically, the petitioner argues that, with the Waterbury sentence already imposed, there was no basis for the claim that the petitioner might act in such a way

that would cause the prosecutor to withdraw the plea agreement or cause the court to alter the sentence. The petitioner further argues that the underlying premise of our Supreme Court's decision in *Gonzalez* v. *Commissioner of Correction*, supra, 308 Conn. 463, applies to the present case, and, therefore, the petitioner is entitled to the effective assistance of counsel with respect to ensuring that he receives all available presentence confinement credit. In response, the respondent argues that it was a reasonable strategic decision to forgo a motion to stay the sentence because the petitioner could have disrupted the plea process prior to the conclusion of the sentencing hearing, given his tendency toward disruptive behavior and changing his mind. Specifically, the respondent argues that the decision by trial counsel was reasonable given the circumstances because the court could have rejected the plea agreement at any point up to the conclusion of the hearing had the petitioner wanted to withdraw the plea agreement or lost his composure. The respondent further argues that the petitioner's reliance on *Gonzalez* is misplaced because that case dealt with an omission that had no strategic value and addressed whether a bond hearing constituted a critical stage in a criminal proceeding and, therefore, is distinguishable from the present case.

In considering the petitioner's claim that there was no reasonable strategic basis for not requesting a stay of execution, we first address the issue of whether the petitioner could have withdrawn his plea after it was accepted by the court. The following legal principles assist in our resolution of this issue. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . [however] strategic choices made after less than complete investigation are [only] reasonable precisely to the extent that reasonable professional judgments

support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland* v. *Washington*, supra, 466 U.S. 690–91. Furthermore, "Practice Book § 39-26 . . . provides: A defendant may withdraw his or her plea of guilty or nolo contendere as a matter of right until the plea has been accepted. After acceptance, [however] the judicial authority shall allow the defendant to withdraw his or her plea [only] upon proof of one of the grounds in [§] 39-27. A defendant may not withdraw his or her plea after the conclusion of the proceeding at which the sentence was imposed." (Internal quotation marks omitted.) *State* v. *Ramos*, 306 Conn. 125, 133–34, 49 A.3d 197 (2012).

Practice Book § 39-27 provides in relevant part: "The grounds for allowing the defendant to withdraw his or her plea of guilty after acceptance are as follows: (1) The plea was accepted without substantial compliance with Section 39-19;[9] (2) The plea was involuntary, or it was entered without knowledge of the nature of the charge or without knowledge that the sentence actually imposed could be imposed; (3) The sentence exceeds that specified in a plea agreement which had been previously accepted, or in a plea agreement on which the

[9] Practice Book § 39-19 provides: "The judicial authority shall not accept the plea without first addressing the defendant personally and determining that he or she fully understands: (1) The nature of the charge to which the plea is offered; (2) The mandatory minimum sentence, if any; (3) The fact that the statute for the particular offense does not permit the sentence to be suspended; (4) The maximum possible sentence on the charge, including, if there are several charges, the maximum sentence possible from consecutive sentences and including, when applicable, the fact that a different or additional punishment may be authorized by reason of a previous conviction; and (5) The fact that he or she has the right to plead not guilty or to persist in that plea if it has already been made, and the fact that he or she has the right to be tried by a jury or a judge and that at that trial the defendant has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him or her, and the right not to be compelled to incriminate himself or herself."

judicial authority had deferred its decision to accept or reject the agreement at the time the plea of guilty was entered; (4) The plea resulted from the denial of effective assistance of counsel; [or] (5) There was no factual basis for the plea . . . .'' (Footnote added.) Furthermore, ''[t]he burden is always on the defendant to show a plausible reason for the withdrawal of a plea of guilty. . . . To warrant consideration, the defendant must allege and provide facts which justify permitting him to withdraw his plea under [Practice Book § 39–27].'' (Internal quotation marks omitted.) *State* v. *Anthony D.*, 151 Conn. App. 109, 114, 94 A.3d 669 (2014), aff'd, 320 Conn. 842, 134 A.3d 219 (2016).

At the Waterbury sentencing hearing, the court presented the petitioner with the various charges against him and inquired whether he had sufficient time to discuss the plea agreement with trial counsel. The court also asked whether the petitioner was satisfied with trial counsel's advice. The petitioner answered in the affirmative to both inquires. The court proceeded to canvass the petitioner in accordance with Practice Book §§ 39-19 through 39-22. The court then asked whether trial counsel or the prosecutor knew of any reason why the plea should not be accepted. No reasons were given by either representative.

The court made a finding that the plea agreement was made voluntarily and with the assistance of competent counsel, and accepted it. After the plea agreement had been accepted, but before the sentence was pronounced, the court asked whether the state or the petitioner wanted to be heard on anything further. The petitioner stated that he ''just want[ed] to make sure all [his] jail credit [would be] applied to all [his] dockets, even for . . . [the] Meriden cases.'' The court explained that because the Meriden cases were pending in another jurisdiction, the court had no control over them. The court further stated: ''What I can do is give

you credit for any time you were incarcerated during the pendency of these cases that are in this jurisdiction." The court then asked if there was anything else. The petitioner asked to be heard a second time and proceeded to apologize to the court for his previous outburst and for any inconvenience that he may have caused to the court, the state, and the victims. The court then pronounced sentence.

In the present case, the sentencing court canvassed the petitioner in conformity with the relevant rules of practice and provided the prosecutor, trial counsel, and the petitioner sufficient opportunity to present any reasons why the plea agreement should not be accepted. Our review of the record fails to disclose any findings or circumstances that would lead us to conclude that the requirements set forth in § 39-27 had been violated.[10] Although we defer to the habeas court's determination that trial counsel credibly testified that his failure to request a stay of execution was the result of a strategic decision, as a matter of law, we conclude that trial counsel's failure to request a stay was not the product of reasonable professional judgment. See *Strickland* v. *Washington*, supra, 466 U.S. 690–91. Trial counsel's concern that the petitioner could withdraw his plea, even after it had been accepted by the court, was not reasonable given that had the court accepted the plea agreement and had the petitioner subsequently sought to withdraw it, he likely would have been barred by

[10] See *State* v. *Anthony D.*, supra, 151 Conn. App. 118–19 (holding that vague allegations without factual predicates about quality of representation is not sufficient ground to permit defendant to withdraw guilty plea once accepted by court) ("Here, there was a vague allegation that the defendant had concerns about his attorney's representation but no specific facts, and, when the defendant was asked if he wanted to say anything before sentence was pronounced, he specifically declined the opportunity. Neither the defendant nor his attorney were denied the opportunity to present a basis for a plea withdrawal. The trial court need not consider allegations that merely are conclusory, vague or oblique." [Internal quotation marks omitted.]).

§ 39-27. Accordingly, we conclude that it was not reasonable for trial counsel to believe that once the court accepted the plea agreement, the petitioner would have been able to withdraw it.

We next address whether the court could have modified the petitioner's sentence on the basis of the petitioner's behavior after the sentence was imposed, but prior to the conclusion of the sentencing proceeding. To begin, we acknowledge the common-law principle that a sentencing court retains jurisdiction over the proceeding and, thus, the authority to modify the sentence, until custody passes to the respondent, unless otherwise permitted by statute. See *State* v. *Ramos*, supra, 306 Conn. 133–34. Moreover, this court has held that a sentencing court can impose a greater sentence than what was originally provided for in a plea, even after a plea has been accepted by the court, upon the presentation of new information. See Practice Book § 39-27 (3);[11] *Ebron* v. *Commissioner of Correction*, 120 Conn. App. 560, 564–65, 992 A.2d 1200 (2010) (following petitioner's rejection of state's plea agreement with specified sentencing recommendation, court accepted open plea and sentenced petitioner to greater period of incarceration than state's recommendation after it reviewed new information in unfavorable presentence investigation report), rev'd in part on other grounds, 307 Conn. 342, 53 A.3d 983 (2012), cert. denied sub nom. *Arnone* v. *Ebron*, 569 U.S. 913, 133 S. Ct. 1726, 185 L. Ed. 2d 802 (2013).

"The critical question in determining whether a court may take action affecting a defendant's sentence following its imposition [then] is whether the requested action

[11] Practice Book § 39-27 (3) provides in relevant part that a defendant can withdraw a plea once accepted if "[t]he sentence exceeds that specified in a plea agreement which had been previously accepted, or in a plea agreement on which the judicial authority had deferred its decision to accept or reject the agreement at the time the plea of guilty was entered. . . ."

is punitive in nature. If the requested action is not punitive in nature, then a defendant's sentence is not affected, and the trial court has jurisdiction to take that action. If it is punitive, [however] then a defendant's sentence is affected, and the trial court lacks jurisdiction to take that action." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Banks*, 321 Conn. 821, 831, 146 A.3d 1 (2016) (considering effects of legislative enactment subsequent to imposition of defendant's sentence that altered aspect of defendant's sex offender reporting obligations).

In the present case, even though the sentencing court retained jurisdiction over the matter prior to the conclusion of the petitioner's sentencing hearing, any subsequent modification of the sentence after imposition would be prohibited if construed as punitive. Had the sentencing court modified the sentence, for example, by withdrawing its acceptance of the plea agreement on the basis of the petitioner's behavior, it would be difficult to see that decision as anything but punitive. We conclude, therefore, that there was no reasonable basis for trial counsel to believe that the court could have modified the petitioner's sentence, once imposed, in a way that would have jeopardized the plea agreement.

Next, the petitioner argues that *Gonzalez* v. *Commissioner of Correction*, supra, 308 Conn. 463, supports his claim and should apply with equal force in the present case. In *Gonzalez*, our Supreme Court affirmed this court's determination that a failure to request a bond increase, which, if granted, would have allowed the petitioner to earn credit for a period of presentence incarceration, was deficient performance because, despite the fact that the ultimate decision of whether to grant the bond increase was discretionary, there was no strategic reason available not to ask for it. Id., 489–91. The petitioner argues that although the present case

deals with facts concerning a different stage of a criminal proceeding, the essential thrust is the same: absent a strategic justification, failure to maximize presentence confinement credits constitutes deficient performance. Under the facts of the present case, we agree with the petitioner.

Although a stay of execution can be a negotiable term in the plea process that may involve strategic considerations and, therefore, is dissimilar to the routine bond increase addressed in *Gonzalez*, the issue here is not whether requesting a stay is strategic in nature or part of some strategic process, but whether trial counsel took the necessary and available steps during critical stages of the proceedings to protect the petitioner's statutory right to receive his full presentence confinement credit. See id., 490.

In the present case, given that we can ascertain no reasonable basis from the record that supports the respondent's claim that trial counsel's failure to request a stay of execution was the product of a reasonable strategic decision, the distinction that the respondent draws between requesting a bond increase and requesting a stay of execution is not persuasive in respect to the issue presented in this appeal. Accordingly, we conclude, on the basis of *Gonzalez*, that trial consel's failure to request a stay of execution once the sentence had been imposed constituted deficient performance. Id.

B

Lastly, we address the prejudice prong of *Strickland*. The petitioner claims that he was prejudiced by trial counsel's failure to request a stay of execution for the Waterbury sentence because he was unable to apply sixteen days of presentence incarceration credits toward his controlling sentence in Meriden that he would have received if not for defense counsel's deficient performance. The petitioner further argues that *Glover* v.

United States, 531 U.S. 198, 121 S. Ct. 696, 148 L. Ed. 2d 604 (2001), and *Ebron* v. *Commissioner of Correction*, supra, 120 Conn. App. 560, support a finding of prejudice because being incarcerated for even more than one additional day is prejudicial. In response, the respondent argues that the habeas court's decision was based solely on the deficient performance prong of *Strickland* and failed to make any findings with respect to the issue of prejudice, and, as a result, the petitioner's analysis of prejudice is irrelevant to the present appeal.[12]

The following legal principles govern our analysis of the petitioner's claim. "The Sixth Amendment requires effective assistance of counsel at critical stages of a criminal proceeding. Its protections are not designed simply to protect the trial, even though counsel's absence [in these stages] may derogate from the accused's right to a fair trial. . . . The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice. This is consistent, too, with the rule that defendants have a right to effective assistance of counsel on appeal, even though that cannot in any way be characterized as part of the trial. . . . The precedents also establish that there exists a right to counsel during *sentencing* . . . . [See *Glover* v. *United States*, supra, 531 U.S. 203–204]. Even though sentencing does not concern the defendant's guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in *Strickland*

[12] Although the petitioner did not file a motion for articulation before filing the present appeal, this court retains the authority under Practice Book § 60-2 (1) to require the trial court to complete the trial record in order to aid in the resolution of a case before this court. Judge Fuger, however, has retired from the bench, thereby, precluding the possibility of a motion for articulation. For the reasons we discuss herein, such additional factual findings by the habeas court are not necessary to our analysis.

prejudice because any amount of [additional] jail time has Sixth Amendment significance. [Id., 203].'' (Citations omitted; emphasis added; internal quotation marks omitted.) *Lafler* v. *Cooper*, 566 U.S. 156, 165, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012); see also *Ebron* v. *Commissioner of Correction*, supra, 120 Conn. App. 581–82 (habeas court properly determined that petitioner suffered prejudice when trial counsel's deficient performance resulted in additional incarceration); see id., 582 (''The petitioner suffered the prejudice of . . . [additional] incarceration as a direct result of [trial counsel's] deficient performance. . . . Further, the outcome of the proceedings was affected directly by the petitioner's counsel . . . and [resulted in] the loss of a lesser sentence.'' [Internal quotation marks omitted.]).[13]

At the habeas trial, during the petitioner's closing remarks, the habeas court asked the following: ''[E]ven assuming for the sake of argument that it was deficient performance not to ask for the stay of execution . . . what evidence, if any, have you presented to this court that such request would have been granted?'' The petitioner answered that, at sentencing, the fact that he requested credits for the time already served and that the court indicated it would give him the maximum amount it could, indicates that the court was amenable to providing the petitioner with whatever credits it could. The petitioner also pointed to the fact that when trial counsel filed a motion for presentence incarceration credits, the trial court granted the request, in toto, the next day. Although the habeas court made no mention of prejudice or whether a more favorable outcome would have been likely had defense counsel acted differently, it acknowledged in its oral decision that ''[t]his

[13] See *Ebron* v. *Commissioner of Correction*, supra, 307 Conn. 364 (affirming this court's prejudice determination).

area of jail credits in Connecticut is extremely confusing. . . .

"I will comment that while what is at issue here is whether [the petitioner] is entitled to receive sixteen days of jail credit and thereby be released slightly over two weeks earlier, that's not insignificant. To [the petitioner] those are two weeks of his life that have—if he spends it in jail, he can never get back. So, I do think this is a significant issue, whether it be sixteen days, sixteen months or sixteen hours."

"[A]lthough it is axiomatic that this court cannot make factual findings, factual conclusions may be drawn on appeal if the subordinate facts found [by the trial court] make such a conclusion inevitable as a matter of law . . . or where the undisputed facts or uncontroverted evidence and testimony in the record make the factual conclusion so obvious as to be inherent in the trial court's decision." (Internal quotation marks omitted.) *Washington Mutual Bank* v. *Coughlin*, 168 Conn. App. 278, 289, 145 A.3d 408, cert. denied, 323 Conn. 939, 151 A.3d 387 (2016); see also *Hickey* v. *Commissioner of Correction*, 329 Conn. 605, 618–19, 188 A.3d 715 (2018).[14] In light of the undisputed evidence in the record that the petitioner would have been able

[14] In *Hickey*, our Supreme Court noted: "[A]fter concluding that the habeas court improperly analyzed prejudice, the Appellate Court should have engaged in a plenary review of the evidence in the record to resolve the commissioner's claim that the petitioner failed to satisfy his burden of proving prejudice as a matter of law, rather than remanding the case for a new habeas trial. . . . Given that the habeas court relied on facts from the criminal trial and its own, undisputed historical factual findings, the Appellate Court had no reason to remand the case to the habeas court to conduct a proper prejudice analysis that the Appellate Court itself could have performed." *Hickey* v. *Commissioner of Correction*, supra, 329 Conn. 618–19; see also *Taylor* v. *Commissioner of Correction*, 324 Conn. 631, 637, 153 A.3d 1264 (2017) ("[t]he application of historical facts to questions of law that is necessary to determine whether the petitioner has demonstrated prejudice . . . is a mixed question of law and fact subject to our plenary review").

to apply sixteen additional days of presentence incarceration credits to his definite sentence had a stay of execution been requested and accepted, we conclude that the record clearly supports the petitioner's argument that he was prejudiced as a result of trial counsel's deficient performance. Accordingly, we conclude that the habeas court abused its discretion in denying the amended petition for a writ of habeas corpus.

The judgment is reversed and the case is remanded to the habeas court with direction to grant the petitioner's amended petition for a writ of habeas corpus and to remand the case to the trial court with direction to modify the petitioner's sentence in accordance with this opinion, so that it reflects the sixteen days of presentence confinement credits that otherwise would have been applied to the petitioner's sentence.

In this opinion the other judges concurred.

NATHANIEL SUTERA *v.* DEBORAH NATIELLO ET AL. (AC 40749)

Lavine, Bright and Pellegrino, Js.

Syllabus

The plaintiff sought to recover damages from the defendants, N and T, for negligence in connection with personal injuries he suffered when, while conducting repairs on a building owned by N, he fell from scaffolding erected on the side of the building. The plaintiff filed a four count complaint wherein he alleged two counts of common-law negligence and separately pleaded two counts pursuant to the doctrine of res ipsa loquitur. In their answers, the defendants denied that they were negligent and, as a special defense, alleged that the plaintiff's own negligence was the proximate cause of his injuries. At trial, the plaintiff requested that the court charge the jury on the theory of res ipsa loquitur, and, over the defendants' objection, the court instructed the jury on that theory. The court also submitted to the jury a single verdict form and a set of interrogatories that did not request separate verdicts as to each count of the complaint. Thereafter, the jury returned a general verdict in favor of the plaintiff, and also found the plaintiff to be 50 percent contributorily negligent. Subsequently, the defendants filed a motion to set aside the

verdict or for remittitur, arguing that the res ipsa loquitur charge was improper and that the jury's verdict had been improperly swayed by its sympathy for the plaintiff. The trial court denied the defendants' motion to set aside the verdict or for remittitur, and the defendants appealed to this court. *Held*:

1. The general verdict rule precluded review of the defendants' claim that the trial court committed harmful error by instructing the jury on the doctrine of res ipsa loquitur; the defendants' claim that the general verdict rule should not apply because interrogatories were submitted to the jury was unavailing, as the defendants failed to provide interrogatories to the jury that disclosed the grounds for its decision and, thus, the fact that interrogatories were submitted to the jury, by itself, was insufficient to preclude application of the rule, and given that the plaintiff's complaint alleged separate counts under premises liability and res ipsa loquitur, that the defendants subsequently denied each of those counts in their answer, that the jury returned a general verdict for the plaintiff, and that the error claimed on appeal implicated only one of the possible routes the jury could have taken in reaching its verdict, the general verdict rule applied.
2. The trial court did not abuse its discretion in denying the defendants' motion to set aside the verdict or for remittitur; the defendants failed to identify anything in the record to support their claim that the jury was influenced by sympathy for the plaintiff, who is a paraplegic as a result of the injuries he sustained, and the fact that the jury found the plaintiff partially responsible for his injuries suggested that it was not swayed by sympathy and that it did not return a compromise verdict.

Argued January 8–officially released May 7, 2019

Procedural History

Action to recover damages for personal injuries sustained as a result of the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New London and tried to a jury before *Bates*, *J.*; verdict for the plaintiff; thereafter, the court denied the defendants' motion to set aside the verdict or for remittitur and rendered judgment for the plaintiff, from which the defendants appealed to this court. *Affirmed.*

Cassie N. Jameson, with whom, on the brief, was *David S. Williams*, for the appellants (defendants).

Dana M. Hrelic, with whom were *Brendon P. Levesque* and, on the brief, *Christopher J. Murray*, for the appellee (plaintiff).

Opinion

PELLEGRINO, J. This appeal arises from a substantial monetary judgment in favor of the plaintiff, Nathanial Sutera, who sustained serious injuries when he fell from scaffolding erected on the side of a three story building owned by the defendant Deborah Natiello. The defendants, Natiello and Timothy Sutera (Timothy S.),[1] appeal following the trial court's denial of their motion to set aside the verdict or for remittitur. On appeal, the defendants claim that (1) the trial court committed harmful error by giving a jury instruction on the doctrine of res ipsa loquitur, and (2) the jury verdict was improperly influenced by sympathy for the plaintiff. We conclude that the first claim is unreviewable and the second claim is without merit. We, therefore, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. In the summer of 2012, the plaintiff agreed to assist Timothy S. in repairing the soffit on the building. Timothy S. supplied the majority of the equipment, including the scaffolding and ladders, needed to make the repairs. Timothy S. repaired the soffit while standing on the scaffolding using materials that the plaintiff had prepared at ground level. At the time of the accident, Timothy S. and the plaintiff had been working on the project for approximately three weeks. The day before the accident, they moved the scaffolding and ladders to the opposite side of the building, but due to the lateness of the hour, they decided to stop working and continue the following day.

Timothy S. and the plaintiff agreed to begin work at approximately 12 p.m. on September 24, 2012, the day of the accident. The plaintiff arrived at the property at the agreed upon time, but Timothy S. was delayed. At approximately 2 p.m., the plaintiff went to lunch because Timothy S. still had not arrived. During his lunch break, the plaintiff consumed one twenty-four

[1] Timothy S. is Natiello's husband and the plaintiff's brother.

ounce beer with his meal. When he finished his meal, he returned to the property and observed that Timothy S. still was not present. The plaintiff elected to climb the ladder to access the scaffolding and examine the soffit that they would be repairing next. While the plaintiff was on the scaffolding, it gave way, and he and the scaffolding fell to the ground. A tenant who heard the crash found the plaintiff lying on the ground. He was taken to the hospital where he was treated for his injuries. A blood test taken at the hospital revealed that his blood alcohol content was between 0.07 and 0.10 percent. As a result of the fall and injuries he sustained, the plaintiff is a paraplegic.

On October 14, 2014, the plaintiff served a four count complaint on the defendants. The first two counts set forth specific allegations of negligence, as to each defendant, regarding how the scaffolding was erected and secured on the premises, and how the defendants failed to train, warn, and supervise the plaintiff regarding use of the scaffolding. The third and fourth counts alleged negligence, again as to each defendant, under the doctrine of res ipsa loquitur. The defendants pleaded a number of special defenses alleging, inter alia, that the plaintiff's own actions were the proximate cause of his injuries and that he failed to exercise proper care when using the scaffolding. During a six day jury trial, the plaintiff and Timothy S. testified that they were uncertain whether the scaffolding was attached securely to the building on the day of the accident. The plaintiff's expert witness, however, testified that, on the basis of a reasonable degree of professional certainty, the scaffolding was not secured at the time of the accident.[2] The expert further testified that he did not "know

[2] The following exchange occurred between the plaintiff's counsel and the plaintiff's expert witness:

"[The Plaintiff's Counsel]: [B]ased on your involvement in this case, your experience as a safety consultant, and your review of the materials in this case, based on a reasonable degree of professional certainty, do you have an opinion as to why the scaffolding fell over?

every single component, exactly at what point [the scaffolding] started to tilt or started to fail, but . . . one way or the other . . . [the scaffolding] was not erected properly or we [would not] be here today."

Before the conclusion of evidence, the plaintiff's counsel requested that the court charge the jury on the theory of res ipsa loquitur in addition to premises liability, stating: "[T]here's testimony from the defendant that he set up the scaffolding and [the plaintiff's] involvement in the setup was relatively minor in that he only brought over pieces of the components and [roped] them up to the defendant, who after receiving the components, put it together. . . . [R]egardless of [the plaintiff's] use of the scaffolding, that's not the cause of why it collapsed. The reason why it collapsed was because it was not secured to the house, so there is sufficient evidence for a res ipsa [loquitur] charge to go to the jury."

The defendants objected to this charge, arguing that an instruction on res ipsa loquitur was inappropriate given the evidence presented at trial. Specifically, they contended that because the plaintiff's expert testified with respect to the cause of the collapse, there was direct evidence of the defendants' negligence presented to the jury sufficient to preclude an instruction on res ipsa loquitur. Despite the defendants' objection, the court included an instruction on the doctrine of res ipsa loquitur, which provided: "[I]n certain circumstances, the very happening of an accident may be an indication of negligence. We have the doctrine called res ipsa loquitur which, in Latin, means the thing speaks for itself. It is a doctrine that infers negligence from the very nature of the injury in the absence of direct

"[The Witness]: Yes.

"[The Plaintiff's Counsel]: And what is your opinion?

"[The Witness]: Starting with the fact it wasn't secured, so it's not a matter of was it secured at the wrong level [or] in the wrong way. [It was] not secured to the building, number one."

evidence in how the defendants behaved. . . . [The] [*p*]*laintiff's voluntary act or neglect contributing to the occurrence*, [*however*], *prevents the inference from being drawn*."[3] (Emphasis added.) After the court instructed the jury, the jury was given a single verdict form and a set of interrogatories that did not request separate verdicts as to each count.[4] The jury returned the following verdict: "[T]he jury finds the issues for the plaintiff, Nathaniel Sutera, as against the defendants, Deborah Natiello and Timothy [S.] . . . . *Comparative fault*. . . . The plaintiff, Nathaniel Sutera, 50 percent; the defendants, Deborah Natiello and Timothy [S.], 50 percent."[5] (Emphasis added.)

After the jury returned the verdict, the defendants filed a motion to set aside the verdict or for remittitur, claiming that the res ipsa loquitur charge was improper because, among other things, direct evidence of the defendants' negligence had been presented at trial. The defendants further argued that the verdict was improperly swayed by sympathy for the plaintiff, resulting in a compromise verdict. The court denied the defendants' motion. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

On appeal, the defendants first claim that the giving of the jury instruction on the doctrine of res ipsa loquitur constitutes harmful error. Specifically, they argue that, among other things, because there was direct evi-

[3] As we discuss more fully in footnote 10 of this opinion, the court's res ipsa loquitur charge did not conform to the law set forth by our Supreme Court in *Giles* v. *New Haven*, 228 Conn. 441, 455, 636 A.2d 1335 (1994).

[4] The first interrogatory listed on the verdict form, which in relevant part mirrored the proposed verdict form submitted by the defendant, provided the following: "Did the plaintiff prove by a preponderance of the evidence that the defendants were negligent in any of the ways he alleged in his complaint?"

[5] The jury awarded the plaintiff $7,208,534.66, in economic and noneconomic damages, which the court reduced by 50 percent, resulting in a net award of $3,604,267.33.

dence of the defendants' negligence presented at trial, the court erred in concluding that the doctrine applied.[6] Moreover, the defendants argue that the instruction on the doctrine of res ipsa loquitur was harmful because it likely misled the jury as to the burden of proof and, at a minimum, must have confused the jury.[7] In response, the plaintiff argues that review of the defendants' claim is barred by the general verdict rule. Specifically, the plaintiff claims that, because the defendants assented to a general verdict form and did not request specific interrogatories with respect to each count, the general verdict rule applies. Under the unique facts of this case, where res ipsa loquitur was pleaded as a separate cause of action, without objection from the defendants, and separate jury interrogatories asking the jury to set forth the basis of its verdict were not provided to the jury, we conclude that the general verdict rule applies and, therefore, the defendants' claim of instructional error is unpreserved and not reviewable.

The following facts and procedural history are relevant to our resolution of the claim. In opposing the defendants' motion to set aside the verdict or for remittitur, the plaintiff argued that the res ipsa loquitur instruction was proper given the underlying facts of the case and, additionally, that review of the defendants' claim

[6] The defendants further argue that, because they did not have direct control of the scaffolding at the time of the accident, the res ipsa loquitur instruction was improper.

[7] The defendants suggest that the court's res ipsa loquitur instruction resulted in an improperly framed premises liability instruction, which compounded the harm created by the improper res ipsa loquitur charge. As the court identified in its memorandum of decision addressing the defendants' motion to set aside the verdict or for remittitur, the defendants were not challenging the legal sufficiency of the premises liability instruction. Moreover, our review of the record does not reveal any timely challenge to the court's premises liability charge. Because the defendants attempt to raise the issue for the first time on appeal as a predicate to their claim that the improper res ipsa loquitur instruction was harmful, we decline to consider it further. See *State* v. *Perez*, 87 Conn. App. 113, 118–19, 864 A.2d 52 (2005) (claim of instructional error on appeal must be one stated at trial).

was barred by the general verdict rule. In its memorandum of decision, the court agreed with the plaintiff and explained that the case law in which the application of the doctrine was deemed improper addressed circumstances where the factual basis for negligence was clear, whereas, in the present case, there were no independent witnesses and the plaintiff had little memory of the event. The court also agreed that, despite any error with respect to the res ipsa loquitur charge, the jury's verdict could be upheld under the proper and unchallenged premises liability theory of recovery. The court stated: "The defendants do not challenge the propriety of the [verdict on the] negligence counts, just the res ipsa [loquitur] counts. Even if the res ipsa [loquitur] counts should have been [stricken] . . . the verdict should be sustained under the general verdict rule."

"The general verdict rule operates to prevent an appellate court from disturbing a verdict that may have been reached under a cloud of error, but is nonetheless valid because the jury may have taken an untainted route in reaching its verdict." (Internal quotation marks omitted.) *Green* v. *H.N.S. Management Co.*, 91 Conn. App. 751, 754, 881 A.2d 1072 (2005), cert. denied, 277 Conn. 909, 894 A.2d 990 (2006). "[A]pplication of the rule [is limited] to the following scenarios: (1) *denial of separate counts of a complaint*; (2) denial of separate defenses pleaded as such; (3) denial of separate legal theories of recovery or defense pleaded in one count or defense, as the case may be; (4) denial of a complaint and pleading of a special defense; and (5) denial of a specific defense, raised under a general denial, that had been asserted as the case was tried but that should have been specially pleaded." (Emphasis added.) *Curry* v. *Burns*, 225 Conn. 782, 801, 626 A.2d 719 (1993). "A party desiring to avoid the effects of the general verdict rule may elicit the specific grounds for the verdict by submitting interrogatories to the jury. Alternatively, if

the action is in separate counts, a party may seek separate verdicts on each of the counts." Id., 786.

In response to the plaintiff's claim that the general verdict rule bars review of their claim on appeal, the defendants essentially argue that the general verdict rule should not apply because interrogatories were, in fact, submitted to the jury, which precludes application of the rule. As this court noted in *Perez* v. *Cumba*, 138 Conn. App. 351, 363, 51 A.3d 1156, cert. denied, 307 Conn. 935, 56 A.3d 712 (2012), however, "[i]t is not the mere submission of interrogatories that enables us to make that determination; rather, it is the submission of properly framed interrogatories that discloses the grounds for the jury's decision. . . . [T]he efficacy of the interrogatories and the preclusion of the general verdict rule [therefore] depends on their being framed in such a way that this court is able to determine the grounds for the jury's decision." (Emphasis omitted; internal quotation marks omitted.) Id., quoting *Fabrizio* v. *Glaser*, 38 Conn. App. 458, 463, 661 A.2d 126 (1995), aff'd, 237 Conn. 25, 675 A.2d 844 (1996). Despite the defendants' claim that application of the rule is inappropriate under the present circumstances, it is not in dispute that the defendants failed to provide interrogatories to the jury that disclosed the grounds for its decision.[8] Accordingly, the fact that interrogatories were submitted to the jury, by itself, is insufficient to preclude the application of the rule.

Next, the defendants claim that, because the doctrine of res ipsa loquitur is not a separate cause of action, thegeneral verdict rule should not apply, despite the fact that the plaintiff pleaded it in separate counts. The following legal principles are relevant to the resolution of the defendants' claim. In *Curry* v. *Burns*, our Supreme Court "reconsidered the applicability of the general verdict rule in an endeavor to make it more

[8] See footnote 4 of this opinion.

certain 'as to when it applies and when it does not.' " *Suarez* v. *Dickmont Plastics Corp.*, 242 Conn. 255, 275 n.16, 698 A.2d 838 (1997), quoting *Curry* v. *Burns*, supra, 225 Conn. 800. In doing so, the court articulated five distinct scenarios wherein the rule would apply. The first of those five scenarios is *the denial of separate counts of a complaint*. In the present case, it is undisputed that the plaintiff's complaint alleged separate counts under premises liability and res ipsa loquitur, and that the defendants subsequently denied each of those counts in their answer. The defendants' claim, therefore, falls squarely within the first scenario contemplated by *Curry*.[9] Given that the jury returned a general verdict for the plaintiff and the error claimed on appeal implicates only one of the possible routes the jury could have taken in reaching its verdict, we conclude, for the aforementioned reasons, that the general verdict rule applies here and, thus, prevents us from reviewing the defendants' claim.[10]

[9] Moreover, had the defendants wanted to avoid any possible ambiguity in the verdict, nothing prevented them from moving to strike the third and fourth count for failure to plead a separate cause of action. They also could have requested separate verdicts for each count or interrogatories asking the jury to explain the grounds for its verdict, as our Supreme Court advised in *Curry*. See *Curry* v. *Burns*, supra, 225 Conn. 786.

[10] Although we decline to review the defendants' claim of instructional error, clarification is needed as to the court's res ipsa loquitur instruction. "[T]he doctrine of res ipsa loquitur . . . when properly invoked, allows the jury to infer negligence based on the circumstances of the incident even though no direct evidence [of negligence] has been introduced. . . . Where there is evidence of specific negligence on the part of the defendant which would support a finding by the jury that such negligence was a proximate cause of the plaintiff's injury, [however], *the jury should not be instructed on the doctrine of res ipsa loquitur*. . . . [A] res ipsa loquitur instruction is not appropriate where the plaintiff is not relying solely on circumstantial evidence, but instead alleges and introduces into evidence specific acts of negligence by the defendant." (Citations omitted; emphasis added; footnote omitted; internal quotation marks omitted.) *Pineau* v. *Home Depot, Inc.*, 45 Conn. App. 248, 257–58, 695 A.2d 14 (1997), appeal dismissed, 245 Conn. 422, 713 A.2d 825 (1998).

Moreover, Connecticut is a modified comparative negligence jurisdiction. See General Statutes § 52-572h. Our Supreme Court has held that compara-

II

The defendant next claims that the jury improperly was influenced by sympathy for the plaintiff given the nature of his injury, as evidenced by its verdict and the resulting award. Specifically, the defendants argue that the jury's finding of comparative negligence is indicative of a compromise verdict. We disagree.

"When reviewing both a motion to set aside the verdict and a motion for remittitur, the trial judge must review the evidence from the viewpoint of sustaining the verdict." *Levine* v. *418 Meadow Street Associates, LLC*, 163 Conn. App. 701, 712, 137 A.3d 88 (2016). "In determining whether to order remittitur, the trial court is required to review the evidence in the light most favorable to sustaining the verdict. . . . Upon completing that review, the court should not interfere with the jury's determination except when the verdict is plainly excessive or exorbitant. . . . The ultimate test which must be applied . . . is whether . . . the verdict so shocks the sense of justice as to compel the conclusion that the jury [was] influenced by partiality, prejudice, mistake or corruption." (Internal quotation marks omitted.) *Munn* v. *Hotchkiss School*, 326 Conn. 540, 575–76, 165 A.3d 1167 (2017). We review a trial court's decision to grant or deny a motion to set aside a verdict as excessive as a matter of law under an abuse of discretion standard. Id., 574.

tive negligence does not preclude the application of res ipsa loquitur. "[W]henever a court can reasonably find that the event is one that ordinarily would not have occurred in the absence of someone's negligence, and that the defendant's inferred negligence was more probably than not a cause of the injury, the doctrine of res ipsa loquitur applies even though the plaintiff's negligence may also have contributed to the injury. If a trial court determines that the doctrine of res ipsa loquitur is applicable, it should thereafter instruct the jury to compare the negligence of the plaintiff, if any, with that of the defendant to decide what percentages to attribute to each party consistent with the comparative negligence statute." *Giles* v. *New Haven*, 228 Conn. 441, 455, 636 A.2d 1335 (1994).

In the defendants' motion to set aside the verdict or for remittitur, they claimed that the jury "clearly found the plaintiff to be responsible for his accident, but instead of turning him away [they] made an award of virtually the full amount . . . argued by his attorney . . . . The jury was unable to do this. . . . [I]t is obvious that the jury chose the amount of damages it endeavored to award . . . and only then sought to find support for that award."

On appeal, the defendants do not direct our attention to any part of the record that supports their claim that the jury was influenced by sympathy for the plaintiff or that its verdict constitutes a compromise verdict, other than to note that the jury found the plaintiff comparatively negligent.[11] The defendants, however, do direct our attention to this court's decision in *Niles* v. *Evitts*, 16 Conn. App. 696, 548 A.2d 1352 (1988), in support of their claim. In *Niles*, this court addressed the nature of the remand in a case where "liability and damages [were] 'inextricably interwoven' "; id., 700; a legal issue materially distinct from the defendants' claim now presented on appeal. In the court's discussion of the issue, however, it made the following relevant observation: "[T]here is little fear that the jury was motivated by sympathy for one party *since it found both parties had been negligent*." (Emphasis added.) Id. In spite of the defendants' general assertion that *Niles* supports their claim that the verdict was affected by improper considerations, *Niles* supports the proposition that when a jury finds a plaintiff comparatively negligent, it also can weigh against any suggestion that the jury was influenced by sympathy. We agree with the court's reasoning in *Niles* and conclude that the fact that the jury found the plaintiff partially responsible for his injuries suggests that the jury was *not* swayed

[11] Connecticut is a modified comparative negligence jurisdiction. See footnote 10 of this opinion. The defendants' claim that a finding of comparative negligence is somehow indicative of a compromise verdict is without merit.

by sympathy and that it did not return a compromise verdict. Consequently, we conclude that the court did not abuse its discretion when it denied the defendants' motion to set aside the verdict or for remittitur.

The judgment is affirmed.

In this opinion the other judges concurred.

DEBRA COHEN *v.* STATEWIDE GRIEVANCE COMMITTEE (AC 40887)

Alvord, Sheldon and Bear, Js.

Syllabus

The plaintiff attorney appealed to the trial court from the decision of the reviewing committee of the defendant, the Statewide Grievance Committee, reprimanding the plaintiff and imposing sanctions on her for violating rules 3.3 (a) (1) and 8.4 (3) of the Rules of Professional Conduct. The plaintiff had been hired as a staff attorney for the Office of the Probate Court Administrator, while at the same time serving as a court-appointed trustee for the sole beneficiary of an estate. After filing a motion to resign as the fiduciary of the estate, a hearing was held before the Probate Court, which ordered, inter alia, that the plaintiff file a final accounting upon the resolution of any interest and penalties due in connection with state and federal tax filings. Subsequently, the plaintiff filed several final accountings with the Probate Court, some of which included fiduciary fees during the time period when she was employed by the Office of the Probate Court Administrator. Thereafter, the plaintiff filed a final accounting without fiduciary fees, which was accepted by the Probate Court. Subsequently, chief disciplinary counsel filed a grievance complaint against the plaintiff. The reviewing committee for the defendant found, by clear and convincing evidence, that the plaintiff violated rule 3.3 (a) (1) of the Rules of Professional Conduct by making a knowingly false statement in her final accounting to the Probate Court regarding fiduciary fees, as well as rule 8.4 (3) of the Rules of Professional Conduct by making a dishonest statement to the Probate Court in her final accounting regarding fiduciary fees owed. Thereafter, the defendant affirmed the decision of the reviewing committee, and the plaintiff appealed to the trial court, which dismissed the plaintiff's appeal. On the plaintiff's appeal to this court, *held:*

1. This court declined to review the plaintiff's claims that the disciplinary counsel violated her due process rights by refusing to conduct an investigation into the allegations of misconduct against her, and by failing to produce any witnesses other than the plaintiff at her hearing before the reviewing committee; the plaintiff raised those claims for the first time on appeal, she provided no analysis or citation to case law as to why the failure to investigate deprived her of her constitutional rights, or as to why disciplinary counsel's reliance on the plaintiff's testimony and documents submitted in support of the additional allegations of misconduct could not constitute clear and convincing evidence that the plaintiff's conduct violated rules 3.3 (a) (1) and 8.4 (3) of the Rules of Professional Conduct, and even if the plaintiff did set forth a constitutional claim, her claims failed under *State* v. *Golding* (213 Conn. 233) because she did not demonstrate that a constitutional violation existed.
2. The plaintiff's claim that the trial court improperly inferred an attorney-client relationship between the plaintiff and the Probate Court was moot; the reviewing committee's finding that an attorney-client relationship existed between the plaintiff and the Probate Court was made in the context of its discussion of rule 1.7 (a) (2) of the Rules of Professional Conduct, and because the reviewing committee did not find that the plaintiff violated that rule, the claim was moot.
3. The trial court properly applied rule 3.3 of the Rules of Professional Conduct to the plaintiff attorney functioning in a fiduciary role: although the plaintiff cited the commentary of the Rules of Professional Conduct to support her contention that rule 3.3 does not apply to attorneys functioning in a fiduciary role, the text of the rule, which does not contain language limiting its application to attorneys acting in the course of an attorney-client relationship, was authoritative, and this court would not import language into the rule to restrict its application to attorney-clients relationships as proposed by the plaintiff; accordingly, the trial court did not improperly expand the scope of the rule by applying it to statements made by an attorney functioning in a fiduciary role.
4. The trial court properly upheld the reviewing committee's determination that an entry in the amended final account filed by the plaintiff constituted a knowingly false statement to the Probate Court in violation of rule 3.3 (a) (1) of the Rules of Professional Conduct and was dishonest in violation of rule 8.4 (3) of the Rules of Professional Conduct; the findings of the reviewing committee, as affirmed by the defendant and the Superior Court, were supported by clear and convincing evidence that the plaintiff violated rules 3.3 (a) (1) and 8.4 (3), and were legally and logically correct and not clearly erroneous.

Argued February 6—officially released May 7, 2019

Procedural History

Appeal from the reprimand issued by the defendant's reviewing committee for the plaintiff's alleged violation of the Rules of Professional Conduct, brought to

the Superior Court in the judicial district of Hartford and tried to the court, *Robaina*, *J.*; judgment dismissing the appeal, from which the plaintiff appealed to this court. *Affirmed*.

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

Brian B. Staines, chief disciplinary counsel, for the appellee (defendant).

Opinion

ALVORD, J. The plaintiff, Debra Cohen, an attorney, appeals from the judgment of the trial court dismissing her appeal from the reprimand imposed by the defendant, the Statewide Grievance Committee, for her violation of rules 3.3 (a) (1) and 8.4 (3) of the Rules of Professional Conduct.[1] On appeal, the plaintiff claims that (1) disciplinary counsel violated her due process rights by refusing to conduct an investigation into the allegations of misconduct against her, (2) disciplinary counsel violated her due process rights by failing to produce any witnesses other than the plaintiff at her hearing before the reviewing committee, (3) the court improperly inferred the existence of an attorney-client relationship between the plaintiff and the Probate Court, (4) the court improperly expanded the application of rule 3.3 to an attorney functioning in a fiduciary role, and (5) the court improperly upheld the reviewing committee's determination that an entry in the amended final account filed by the plaintiff on June 24, 2013, constituted a knowingly false statement to the Probate Court in violation of rule 3.3 (a) (1) and was dishonest

[1] Rule 3.3 (a) of the Rules of Professional Conduct provides in relevant part: "A lawyer shall not knowingly . . . (1) [m]ake a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer . . . ."

Rule 8.4 of the Rules of Professional Conduct provides in relevant part: "It is professional misconduct for a lawyer to . . . (3) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . ."

in violation of rule 8.4 (3). We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of the plaintiff's claims. The plaintiff was hired as a staff attorney for the Office of the Probate Court Administrator on November 14, 2005. As an employee, her duties included court visits and assessments of the probate courts, including audits of random files, to determine whether the required accountings were timely filed and in compliance with applicable law and procedures. The plaintiff also provided support and legal advice to the Probate Court judges and their staff regarding probate matters and required filings.

At the time the plaintiff was hired by the Office of the Probate Court Administrator in 2005, she was serving as a court-appointed trustee for the sole beneficiary of the estate of John DeRosa in the North Central Probate Court (Probate Court).[2] On April 25, 2012, the plaintiff filed a proposed periodic accounting and an affidavit of fees in the DeRosa matter. On May 1, 2012, the chief clerk of the Probate Court sent an e-mail to Attorney Thomas E. Gaffey, chief counsel for the Office of the Probate Court Administrator, inquiring whether an employee of his office was precluded from serving as a fiduciary for an estate or a trust. Attorney Gaffey responded that there was no specific policy or regulation prohibiting employees from serving in a fiduciary capacity.[3] On May 18, 2012, the plaintiff filed a motion to resign as the fiduciary in the DeRosa estate with the Probate Court. Following a hearing before the Probate

[2] In the DeRosa estate, the heir, his daughter, could not be located. The principal asset of the estate was a mortgage on which monthly payments were made. The plaintiff had been appointed trustee for the trust created for the purpose of receiving and holding these payments for the missing beneficiary.

[3] On January 1, 2015, the Office of the Probate Court Administrator adopted a formal policy that prohibited its employees from serving as fiduciaries in Connecticut probate courts unless an employee was serving without compensation as a fiduciary on behalf of a spouse, child or parent.

Court on May 23, 2012, the Probate Court judge, Timothy R.E. Keeney, issued an order requiring, inter alia, the filing of a final account[4] upon the resolution of any interest and penalties due in connection with state and federal tax filings. Judge Keeney further noted that he would consider the plaintiff's motion to resign at the time that the final account was filed.

On April 15, 2013, the plaintiff retained Attorney Timothy Daley to represent her in the Probate Court proceedings. By letter dated April 15, 2013, Attorney Daley submitted a proposed final accounting for the DeRosa matter, which included proposed fiduciary fees for the plaintiff's services. Additionally, Attorney Daley noted the fact that the plaintiff had mistakenly failed to file income tax returns for the trust, which caused the trust to incur tax penalties in the amount of $5531.84. He stated that the plaintiff acknowledged that she had failed to file the returns on behalf of the trust in a timely manner, but that "the [f]iduciary has credit[ed] and paid back the penalties incurred by the [t]rust as set forth in the [d]ebit section of the [f]inal [a]ccounting."

A hearing on the final account was held before the Probate Court on May 15, 2013. At that hearing, the plaintiff filed an amended final account that showed a reimbursement to the estate of $5531.84 for the income tax interest and penalties, and a request for fiduciary fees in the amount of $5980 for the period of January 1, 2012, to April 22, 2013. Following the hearing, Attorney Gaffey instructed the plaintiff that she was not to request or charge fiduciary fees in any Probate Court matter for the time period that she had been employed by the Office of Probate Court Administrator.[5] Accord-

[4] The terms account and accounting, as used in "final account" and "final accounting," are used interchangeably by the parties and this court.

[5] Although the exact date is in dispute, at some point in time, no later than May 16, 2013, Attorney Gaffey instructed the plaintiff to divest herself of all of her fiduciary roles in the probate courts. There is evidence in the record that the plaintiff had served as a conservator and as a limited guardian in various Probate Court matters.

ingly, on May 24, 2013, the plaintiff e-mailed the following message to the chief clerk of the Probate Court: "I am informing the Probate Court that I intend to file an amendment to the final account. I ask . . . the Court not to make a ruling on the account until the amendment is received. The amendment will make no entry for the payment of fees for the fiduciary and will set aside a reserve for the payment of state and federal income taxes and the cost for preparing the final income tax returns. . . ."

On June 1, 2013, the plaintiff filed an amended final account for the period of January 1, 2012, to May 31, 2013. The June 1, 2013 amended final account decreased the fiduciary's contribution to reimburse the estate for income tax interest and penalties to $4283.74, and explained the reduction in footnotes 1 and 2 of the accounting. The plaintiff noted that the Connecticut Department of Revenue Services had "granted amnesty to [the] [e]state for the 2000–2007 tax years [and] the value of the tax pardoned . . . is $1248.10." As represented in her May 24, 2013 e-mail to the Probate Court, the plaintiff did not include an entry for fiduciary fees in the June 1, 2013 amended final account.

By letter dated June 5, 2013, Judge Keeney returned the plaintiff's June 1, 2013 amended final account. He explained in a letter that there were "several outstanding concerns," the primary concern being the reduction of the fiduciary's credit to the estate from $5531.84 to $4283.74. Judge Keeney stated: "From what has been submitted, it appears that the [Connecticut Department of Revenue Services] action is a reduction of tax obligation. Why does the accounting ask for the interest and penalties to be reduced by $1248.10 for the [s]tate for tax years 2000–2007 if there was no tax due for these years?" In a separate paragraph, Judge Keeney "duly noted" that the fiduciary fees totaling $5980 "have now been waived." Because the plaintiff claims that the

court's letter was not clear and that she was confused as to the reason for the return of the June 1, 2013 amended final account, the entire contents of Judge Keeney's June 5, 2013 letter to the plaintiff is reproduced in footnote 6 of this opinion.[6] On the same day, June 5, 2013, Judge Keeney ordered and decreed: "Said

[6] The letter from Judge Keeney to the plaintiff dated June 5, 2013, provides:

"Re: John DeRosa Trust

"Dear Attorney Cohen:

"The court has received your final account dated June 1, 2013. To save time and expenses, this matter should be set for a streamlined hearing. However, with your most recent submission, there are several outstanding concerns that first must be addressed.

"In the previous two final accounts submitted to the court dated May 15, 2013 and April 12, 2013, footnote [1] of each accounting states there was a Connecticut Department of Revenue Services (CT DRS) tax abatement granted for [the] 2000–2007 tax years equal to $1248.10. On the amended final account dated June 1, 2013, footnote 2 states CT DRS granted amnesty to [the] estate for 2000–2007 tax years and the amount pardoned is $1248.10. Was the action taken by CT DRS a reduction of tax obligation for the estate or was it a forgiveness of penalty and interest? From what has been submitted, it appears that the CT DRS action is a reduction of tax obligation. Why does the accounting ask for the interest and penalties to be reduced by $1248.10 for the [s]tate for [the] tax years 2000–2007 if there was no tax due for these years?

"During the March 7, 2013 hearing on the [i]nterim [a]nnual [a]ccounting, it was agreed that the fiduciary would make a contribution to the estate for any penalties and interest due because of delinquent income tax payments. In the previous two accountings filed it states that the amount paid to the [s]tate of [Connecticut] for interest and penalties for 2008–2011 was $202.35, but then a refund was received for $44.55. It also states the amount paid for [f]ederal interest and penalties for 2000–2010 was $5950.66 and a refund received for $576.62. It appears that the actual amount paid for interest and penalties for both state and federal was $6153.01 and a refund of $621.17 which would make the end total for interest and penalties for both state and federal to be $5531.84.

"During the May 15, 2013 hearing, issues related to the [f]iduciary's fees were discussed. It is duly noted that the [f]iduciary fees per [e]xhibit A of the January 1, 2012 to April 22, 2013 [a]mended [f]inal [a]ccount totaling $5980 have now been waived in the [a]mended [f]inal [a]ccount of January 1, 2012 to May 31, 2013.

"From all accounts and information supplied to the court to date it appears that the contribution amount to the [e]state by the [f]iduciary should be $5,531.84. It is for all of the above reasons that the [f]inal [a]ccount dated June 1, 2013, is being returned for further clarification and accuracy.

"Sincerely,

"Timothy R.E. Keeney

"Judge"

accountings cannot be approved as submitted. It is, therefore, ORDERED that this hearing be adjourned until further order of the Court, AND that the fiduciary file an amended account **forthwith** correcting the errors and/or deficiencies." (Emphasis in original.)

On June 24, 2013, the plaintiff filed an amended final account for the period of January 1, 2012, to June 24, 2013. This latest accounting reflected a contribution by the fiduciary to the estate in the amount of $5531.84 for the income tax interest and penalties. The June 24, 2013 amended final account also included, however, an entry for fiduciary fees in a corresponding amount of $5531.84.[7] On July 19, 2013, the chief clerk of the Probate Court sent an e-mail to the plaintiff advising her that the court had not yet set a hearing on the June 24, 2013 amended final account because "the Judge still has some questions/concerns." Thereafter, the plaintiff revised the accounting to remove the entry for fiduciary fees, and the Probate Court approved the estate's final account on September 5, 2013.

On October 31, 2013, the Office of the Probate Court Administrator placed the plaintiff on administrative leave without pay pending a disciplinary hearing before a three judge board to determine whether the recommendation of the Probate Court Administrator to terminate the plaintiff's employment should be adopted. Following a hearing, the board issued its ruling on October 6, 2014, in which it found by clear and convincing evidence that the plaintiff's actions warranted serious discipline, and the board agreed that the plaintiff's termination from employment was an appropriate sanction.

[7] We note that the April, 2013 final account and all of the subsequent amended final accounts submitted by the plaintiff to the Probate Court included the following representation: "The [r]epresentations contained herein are made under the penalties of false statement . . . ."

On January 2, 2015, Patricia A. King, who was chief disciplinary counsel at the time, filed a grievance complaint against the plaintiff with the defendant. The complaint was referred to a grievance panel for the Hartford and New Britain judicial districts, which found probable cause that the plaintiff had violated rule 1.7 (a) (2) of the Rules of Professional Conduct.[8] A hearing was scheduled before a three person reviewing committee on July 9, 2015. On June 25, 2015, the Office of Disciplinary Counsel filed "Additional Allegations of Misconduct"[9] pursuant to Practice Book § 2-35 (d).[10] The additional allegations all were directed to the plaintiff's conduct in the DeRosa matter. Disciplinary counsel alleged that the plaintiff had "committed professional misconduct in violation of [r]ules 3.3 and 8.4 (3) [of the Rules of Professional Conduct] by her refusal to adhere to Probate Court requests and orders in the [DeRosa] case," and attached seventeen documents in support of the additional allegations.

Practice Book § 2-35 (f) provides that a respondent to a grievance complaint is "entitled to a period of not less than thirty days before being required to appear at a hearing to defend against any additional charges of

[8] Rule 1.7 (a) of the Rules of Professional Conduct provides in relevant part: "[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if . . . (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer. . . ."

[9] An "Amended Additional Allegations of Misconduct" was filed on June 29, 2015, to correct "a typo in paragraph 2."

[10] Practice Book § 2-35 (d) provides in relevant part: "Disciplinary counsel may add additional allegations of misconduct to the grievance panel's determination that probable cause exists in the following circumstances: (1) Prior to the hearing before the Statewide Grievance Committee or the reviewing committee, disciplinary counsel may add additional allegations of misconduct arising from the record of the grievance complaint or its investigation of the complaint.. . ."

misconduct." Accordingly, the plaintiff's hearing before the reviewing committee was continued from July 9, 2015, to September 10, 2015. The reviewing committee conducted the hearing on September 10, 2015, and issued its decision on November 13, 2015.

In its decision, the reviewing committee found the following facts by clear and convincing evidence: (1) On May 23, 2012, Judge Keeney ordered the plaintiff to file a final accounting in the DeRosa matter upon the resolution of the interest and penalties owed in connection with the federal and state tax filings; (2) at a hearing before the Probate Court on March 7, 2013, "it was agreed that the [plaintiff] would reimburse the estate for the interest and penalties assessed due to the [plaintiff's] failure to file state and federal income taxes for the years 2000 to 2010"; (3) Attorney Daley, on behalf of the plaintiff, filed a final account on April 15, 2013, requesting approval of the plaintiff's fiduciary fees and, in an accompanying letter, acknowledged that the plaintiff's failure to timely file tax returns caused the estate to incur interest and penalties in the amount of $5531.84; (4) the April 15, 2013 final account filed by Attorney Daley showed a $5531.84 reimbursement to the estate by the plaintiff; (5) at a hearing held before the Probate Court on May 15, 2013, the plaintiff filed an amended final account, showing a reimbursement to the estate in the amount of $5531.84 for the interest and penalties due to the late tax filings and a charge to the estate in the amount of $5980 for fiduciary fees; (6) following the hearing on May 15, 2013, Attorney Gaffey directed the plaintiff not to request or charge any fiduciary fees for the time that she was employed by the Office of Probate Court Administrator; (7) on May 24, 2013, the plaintiff sent an e-mail to the chief clerk of the Probate Court stating that she would be filing an amended final accounting that would not request any fiduciary fees; (8) on June 1, 2013, the plaintiff filed an amended final

account that reduced the plaintiff's contribution to the estate for income tax interest and penalties to $4283.74; (9) as represented in her May 24, 2013 e-mail to the Probate Court, the June 1, 2013 amended final account did not claim any fiduciary fees; (10) Judge Keeney returned the June 1, 2013 amended final account to the plaintiff by letter dated June 5, 2013, instructing her to amend the accounting to reflect a $5531.84 contribution by her to the estate for the income tax interest and penalties; (11) in Judge Keeney's June 5, 2013 letter to the plaintiff, he noted that the plaintiff had waived fiduciary fees in the June 1, 2013 amended final account; (12) on June 24, 2013, the plaintiff filed an amended final account that reflected a contribution of $5531.84 by her to the estate as directed by the court, but which included claimed fiduciary fees in a corresponding amount of $5531.84; (13) on July 19, 2013, the chief clerk of the Probate Court advised the plaintiff that the June 24, 2013 accounting had not been scheduled for a hearing because the judge had some questions and concerns; (14) the plaintiff thereafter revised the final accounting to remove the claim for fiduciary fees, which the Probate Court approved on September 5, 2013; and (15) on October 6, 2014, the plaintiff was terminated from her position as staff attorney with the Office of Probate Court Administrator following a disciplinary hearing before a three judge board.

The reviewing committee further noted in its decision that the plaintiff "maintained that she was confused and made a mistake when she included a reimbursement for fiduciary fees in the June 24, 2013 [a]mended [f]inal [a]ccount. The [plaintiff] contended that all the accountings that she filed were proposed accountings subject to Probate Court approval and, therefore, could not be deemed misleading."

On the basis of the reviewing committee's factual findings, it found by clear and convincing evidence that

the plaintiff had "engaged in unethical conduct." The reviewing committee concluded: "It is clear to this reviewing committee that the [plaintiff] was attempting to off-set the amount she owed to the estate for the income tax interest and penalties with her fiduciary fees. The [plaintiff] maintained that the request for fiduciary fees was a mistake. This reviewing committee does not find the [plaintiff's] statement credible, considering the fact that the amount of the fiduciary fees requested equaled the amount of interest and penalties owed to the estate by the [plaintiff]. Furthermore, the [plaintiff] is an experienced Probate Court attorney who clearly understood the directives of Judge Keeney. We find the [plaintiff's] actions were knowing, deliberate and contrary to her representation to the court in her May 24, 2013 e-mail and June 1, 2013 accounting. Accordingly, we conclude that the [a]mended [f]inal [a]ccount filed by the [plaintiff] on June 24, 2013, constituted a knowingly false statement to the Probate Court, in violation of [r]ule 3.3 (a) (1) of the Rules of Professional Conduct and was dishonest, in violation of [r]ule 8.4 (3) of the Rules of Professional Conduct."[11] After concluding that the plaintiff had violated rules 3.3 (a) (1) and 8.4 (3), the reviewing committee reprimanded the plaintiff and imposed sanctions.

Upon the plaintiff's request for review pursuant to Practice Book § 2-35 (k),[12] the defendant affirmed the decision of the reviewing committee at a meeting held on January 21, 2016. After addressing the plaintiff's arguments set forth in her request to review, the defendant concluded that "the reviewing committee's findings that the [plaintiff] violated [r]ules 3.3 (a) (1) and

[11] The reviewing committee concluded that it was not proven by clear and convincing evidence that the plaintiff engaged in a conflict of interest in violation of rule 1.7 (a) (2) of the Rules of Professional Conduct.

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

8.4 (3) of the Rules of Professional Conduct are supported by clear and convincing evidence and . . . the [plaintiff's] violation of these [r]ules warrants a reprimand and an order that the [plaintiff] attend a continuing legal education course in legal ethics."

Pursuant to Practice Book § 2-38,[13] the plaintiff filed an appeal with the Superior Court. In its September 7, 2017 memorandum of decision, the court made the following determination: "The court does not find the decisions of the reviewing committee or the Statewide Grievance Committee to be clearly erroneous. There is ample support in the record to justify the findings of the [reviewing] committee that the submission of the accountings constituted a false statement to a tribunal. The [reviewing] committee was within its power to reject [the plaintiff's] assertion that the filing of the accountings was a mistake. Not coincidentally, the same assertion was made and rejected . . . in the proceeding before the . . . three judge panel of Superior Court judges. . . . The court also finds that the finding of a violation of rule 8.4 [of the Rules of Professional Conduct] is justified by the record, and is not clearly erroneous." (Internal quotation marks omitted.) The court then reviewed the reprimand imposed and found that "the reprimand falls within proper guidelines." Accordingly, the court dismissed the plaintiff's appeal. From that judgment, the plaintiff now appeals to this court.

Before considering the plaintiff's claims, we first address the standard of review applicable to grievance

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

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

"Additionally, because the applicable standard of proof for determining whether an attorney has violated the Rules of Professional Conduct is clear and convincing evidence . . . we must consider whether the [fact finder's] decision was based on clear and convincing evidence. . . . [C]lear and convincing proof denotes a degree of belief that lies between the belief that is required to find the truth or existence of the [fact in issue] in an ordinary civil action and the belief that is required to find guilt in a criminal prosecution. . . . [The burden] is sustained if evidence induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist." (Citations omitted; internal quotation marks omitted.) *Chief Disciplinary Counsel* v. *Zelotes*, 152 Conn. App. 380, 386, 98 A.3d 852, cert. denied, 314 Conn. 944, 102 A.3d 1116 (2014). "The burden is on the statewide grievance committee to establish the occurrence of an ethics violation by clear and convincing proof." (Internal quotation marks omitted.) *Notopoulos* v. *Statewide Grievance Committee*, 277 Conn. 218, 226, 890 A.2d 509, cert. denied, 549 U.S. 823, 127 S. Ct. 157, 166 L. Ed. 2d 39 (2006).

I

The plaintiff's first claim is that disciplinary counsel violated her due process rights by refusing to conduct an investigation into the allegations of misconduct

against her. Specifically, the plaintiff claims that King, the former chief disciplinary counsel, filed the grievance complaint against her without conducting an investigation because King enjoyed a "cordial relationship" with the Probate Court Administrator and therefore decided to wait until the investigation by the Office of Probate Court Administrator had been completed to avoid duplication of efforts. The plaintiff argues that by failing to speak to Judge Keeney, any Probate Court staff member, or the interested parties, and by neglecting to visit the Probate Court or to review that court's records, "[t]he only information in the disciplinary counsel's file is information cherry-picked and filtered by the [c]omplainant and/or his designees." Further, the plaintiff claims that the additional allegations of misconduct were "merely a repackaging of Attorney King's claim, previously dismissed by the local grievance panel . . . ."

This claim was not raised before the reviewing committee or in the plaintiff's request to review the reviewing committee's decision filed with the defendant. Further, the plaintiff failed to raise this claim in her appeal to the Superior Court or in her brief filed with the Superior Court in support of her appeal. At the hearing held on July 11, 2017, before the Superior Court, the plaintiff argued that the Office of Disciplinary Counsel abused its discretion in filing additional allegations of misconduct, but she did not argue that her constitutional right to due process had been violated by a lack of investigation into her alleged misconduct.

From this review of the record, it is clear that the plaintiff is raising her constitutional claim for the first time in this appeal.[14] Moreover, the plaintiff's main

[14] "Our Supreme Court has previously held that [a] party to an administrative proceeding cannot be allowed to participate fully at hearings and then, on appeal, raise claims that were not asserted before the board. We have made it clear that we will not permit parties to anticipate a favorable decision, reserving a right to impeach it or set it aside if it happens to be against

appellate brief simply states that "[d]isciplinary counsel's decision not [to] investigate the allegations of misconduct against [the] [p]laintiff violates due process of law." There is no analysis as to why the failure to investigate deprived her of her constitutional rights. There is no citation to case law that provides that the failure to investigate under these circumstances, where the plaintiff was provided an opportunity to respond and defend herself at an evidentiary hearing, violates a respondent's due process rights. In her reply brief, the plaintiff argues for the first time that her constitutional claim is reviewable by this court pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989).

Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis omitted; footnote omitted.) Id., as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). "*Golding* review is applicable

them, for a cause which was well known to them before or during the trial. . . . *Dragan* v. *Connecticut Medical Examining Board*, 223 Conn. 618, 632, 613 A.2d 739 (1992) . . . . Furthermore, [t]o allow a court to set aside an agency's determination upon a ground not theretofore presented . . . deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action." (Citation omitted; internal quotation marks omitted.) *Ogden* v. *Zoning Board of Appeals*, 157 Conn. App. 656, 665, 117 A.3d 986, cert. denied, 319 Conn. 927, 125 A.3d 202 (2015).

"Although the statewide grievance committee is not an administrative agency . . . the court's review of its conclusions is similar to the review afforded to an administrative agency decision." (Internal quotation marks omitted.) *Notopoulos* v. *Statewide Grievance Committee*, supra, 277 Conn. 227.

in civil as well as criminal cases." *Lohnes* v. *Hospital of Saint Raphael*, 132 Conn. App. 68, 79–80, 31 A.3d 810 (2011), cert. denied, 303 Conn. 921, 34 A.3d 397 (2012).

The plaintiff argues that the record is adequate for this court's review of this claim and that a due process claim is a constitutional claim. Again, however, there is no authority cited in her reply brief to support her position that disciplinary counsel's failure to "conduct a fair and unbiased investigation into the allegations of professional misconduct levied against [the] plaintiff" violated her due process rights when she had a full evidentiary hearing before the reviewing committee and its decision subsequently was reviewed by the defendant and the Superior Court on appeal. Even if we construe the plaintiff's argument as setting forth a constitutional claim, we conclude that it fails under *Golding* because she has not demonstrated that a constitutional violation exists.

II

The plaintiff's next claim is that disciplinary counsel violated her due process rights by failing to call the complainant or any witness other than the plaintiff to testify at the grievance hearing before the reviewing committee. As with the plaintiff's first claim, she is raising this issue for the first time in this appeal. She cites no authority to support the position that disciplinary counsel's reliance on the plaintiff's testimony and the documents submitted in support of the additional allegations of misconduct could not constitute clear and convincing evidence that the plaintiff's conduct was in violation of rules 3.3 (a) (1) and 8.4 (3) of the Rules of Professional Conduct. Even if we construe the plaintiff's argument as setting forth a constitutional claim, we conclude that it fails under *Golding* because she has not demonstrated that a constitutional violation exists.

III

The plaintiff's next claim is that the Superior Court improperly inferred the existence of an attorney-client relationship between the plaintiff and the Probate Court. Specifically the plaintiff refers to a paragraph in the decision of the reviewing committee, in its analysis of whether the plaintiff was burdened by a conflict of interest in violation of rule 1.7 (a) (2) of the Rules of Professional Conduct, wherein it concluded that an attorney-client relationship existed between the plaintiff and the Probate Court. This determination by the reviewing committee, now challenged by the plaintiff, was raised only in connection with rule 1.7. The reviewing committee concluded, however, that the evidence in the record did not support the allegation that "there was a significant risk that the [plaintiff's] representation of the [P]robate [C]ourt was materially limited by her personal interest in receiving fees as a fiduciary." Accordingly, the reviewing committee did not find a violation of rule 1.7 (a) (2). There was no finding by the reviewing committee that the plaintiff's violation of rules 3.3 (a) (1) and 8.4 (3) occurred in the context of an attorney-client relationship between the plaintiff and the Probate Court.

In her request for review of the decision of the reviewing committee, the plaintiff raised this claim, and the defendant responded as follows: "The [defendant] concluded that the reviewing committee's finding that an [attorney-client] relationship existed between the [plaintiff] and the Probate Court was made in connection with the reviewing committee's determination that the record did not support a finding that the [plaintiff's] representation of the Probate Court constituted a conflict of interest in violation of [r]ule 1.7 (a) (2) of the Rules of Professional Conduct. Accordingly, the [defendant] found that the [plaintiff's] argument that this finding was without a legal or factual basis is moot since the reviewing committee did not find that the [plaintiff]

violated this [r]ule." We agree with the defendant that this claim of the plaintiff is moot given the reviewing committee's disposition with respect to the allegation that the plaintiff violated rule 1.7 (a) (2).

IV

The plaintiff's somewhat related claim is that an attorney-client relationship is necessary in order to find a violation of rule 3.3 (a) (1) of the Rules of Professional Conduct, and that the court improperly expanded the application of rule 3.3 to an attorney functioning in a fiduciary role. The plaintiff raised this issue in her request for review of the reviewing committee's decision. The plaintiff referred to the *commentary* to rule 3.3, which provides in relevant part: "This [r]ule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. . . ." Rule 3.3 (a) (1), however, contains no such limitation.

In its decision affirming the decision of the reviewing committee, the defendant addressed this claim as follows: "Contrary to the [plaintiff's] argument, [r]ule 3.3 [of the Rules of Professional Conduct] is not limited to false statements made by an attorney engaged in an [attorney-client relationship]. Rule 3.3 falls under the set of [r]ules entitled 'Advocate' and not under the [r]ules entitled 'Client-Lawyer Relationship.' In addition, the language of the [r]ule states that '[a] lawyer shall not knowingly make a false statement of fact or law to a tribunal . . . .' The [c]ommentary further clarifies that '[t]he duties stated in subsections (a) and (b) apply to all lawyers . . . .' Rule 3.3 (a) (1) clearly applies to lawyers appearing before a court in a fiduciary capacity. There is no language in the [r]ule limiting its application to only those attorneys representing a client."

The Superior Court agreed with the defendant's conclusion regarding the applicability of rule 3.3 (a) (1) of the Rules of Professional Conduct to the plaintiff's situation. The court concluded: "Further, the [defendant] reviewed the argument that [r]ule 3.3 only applies

to attorneys engaged in an attorney-client relationship and/or serving as advocates. [The plaintiff's] argument in this regard is unavailing. It fails to recognize that the crux of the matter is that the reviewing committee found her actions to be 'not a mistake, but a knowingly false statement and dishonest conduct.' The limitation [the plaintiff] would impose on the rule would lead to the conclusion that an attorney could make a false statement to a tribunal under certain circumstances. There is no support in the [r]ule or in the commentary for that position. Thus the argument was properly considered and rejected."

To resolve this claim of the plaintiff, we must construe the language in rule 3.3 (a) (1) of the Rules of Professional Conduct. "Given that the Rules of Professional Conduct appear in our Practice Book, and given that [t]he interpretive construction of the rules of practice is to be governed by the same principles as those regulating statutory interpretation; *Wiseman* v. *Armstrong*, 295 Conn. 94, 99, 989 A.2d 1027 (2010); we employ our well established tools of statutory construction" to determine the meaning of the relevant language in rule 3.3 (a) (1). (Internal quotation marks omitted.) *Helmedach* v. *Commissioner of Correction*, 168 Conn. App. 439, 459, 148 A.3d 1105 (2016), aff'd, 329 Conn. 726, 189 A.3d 1173 (2018). "The interpretation and application of a statute, and thus a Practice Book provision, involves a question of law over which our review is plenary. . . .

"The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case . . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case . . . . In seeking to determine that meaning . . . [General Statutes]

§ 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . We recognize that terms in a statute are to be assigned their ordinary meaning, unless context dictates otherwise . . . .'' (Citation omitted; footnote omitted; internal quotation marks omitted.) *Wiseman* v. *Armstrong*, supra, 295 Conn. 99–100.

In accordance with § 1-2z, we turn to the relevant language of the rule of practice at issue, rule 3.3 (a) of the Rules of Professional Conduct, which provides in relevant part that ''[a] lawyer shall not knowingly . . . (1) [m]ake a false statement of fact or law to a tribunal . . . .'' This section does not contain language limiting its application to attorneys engaged in an attorney-client relationship. In reviewing other rules of professional conduct, we note, as just one example, that rule 4.1 explicitly states that ''[i]n the course of representing a client a lawyer shall not knowingly . . . (1) [m]ake a false statement of material fact or law to a third person . . . .'' We will not import language into the rule to restrict its application to attorney-client relationships as proposed by the plaintiff. ''Where the language of the statute is unambiguous, we are confined to the intention expressed in the actual words used and we will not search out any further intention of the legislature not expressed in the statute.'' (Internal quotation marks omitted.) *Cornelius* v. *Arnold*, 168 Conn. App. 703, 717, 147 A.3d 729 (2016), cert. denied, 324 Conn. 908, 152 A.3d 1245 (2017).

Further, we note that rule 3.3 (a) (1) of the Rules of Professional Conduct is in the section titled ''Advocate.'' The term ''advocate'' is not defined in the Rules of Professional Conduct. ''The rule [is] that terms in a

statute are to be assigned their ordinary meaning, unless context dictates otherwise . . . .'' (Internal quotation marks omitted.) *Jamison* v. *Commissioner of Correction*, 167 Conn. App. 312, 323, 143 A.3d 1136, cert. denied, 323 Conn. 934, 151 A.3d 383 (2016). We therefore look to the common definition expressed in dictionaries. Black's Law Dictionary defines an ''advocate'' as ''[s]omeone who assists, defends, pleads, or prosecutes for another.'' Black's Law Dictionary (10th Ed. 2014). In this case, the plaintiff was appointed by the Probate Court as the trustee for the sole beneficiary of the DeRosa estate. As the trustee, the plaintiff, in a fiduciary capacity, held in trust the mortgage payments for the benefit of the estate's beneficiary. Given the language of rule 3.3 (a) (1), and the lack of language limiting its application to attorneys acting in the course of an attorney-client relationship, we conclude that the rule clearly and unambiguously applied to the statements of the plaintiff, made in her capacity as a trustee, to the Probate Court.

It is true, as indicated by the plaintiff, that the commentary to the rule provides that ''[t]his [r]ule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal.'' Nevertheless, the preamble to the rules provides that ''[t]he [c]ommentaries are intended as guides to interpretation, but the text of each [r]ule is authoritative.'' Case law is in accord. ''We do not place the same weight on commentaries as we would place on expressed rules.'' *Henry* v. *Statewide Grievance Committee*, 111 Conn. App. 12, 20, 957 A.2d 547 (2008).

For these reasons, we conclude that rule 3.3 (a) (1) of the Rules of Professional Conduct is not limited to statements made in the course of attorney-client relationships, and that the court did not improperly expand the scope of the rule by applying it to statements made by an attorney functioning in a fiduciary role.

V

The plaintiff's final claim is that the court improperly upheld the reviewing committee's determination that an entry in the amended final account filed by the plaintiff on June 24, 2013, constituted a knowingly false statement to the Probate Court in violation of rule 3.3 (a) (1) of the Rules of Professional Conduct and was dishonest in violation of rule 8.4 (3) of the Rules of Professional Conduct. Specifically, the plaintiff argues that "[t]he entry of fiduciary fees on [the] [p]laintiff's June 24, 2013 proposed fiduciary account was not a false statement or dishonest; it was a true and accurate statement of services rendered at a modest hourly rate of $100." She claims that the fact that the entry may have been "inconsistent" with her statement in the May 24, 2013 e-mail to the chief clerk of the Probate Court and entries in other related fiduciary accounts filed with the Probate Court does not make the June 24, 2013 entry a misstatement or dishonest. We disagree.

We note that the plaintiff is not claiming in this appeal, as she did before the reviewing committee, the defendant in her request for review, and the Superior Court, that the entry for fiduciary fees in the June 24, 2013 amended final account was made by mistake or that she had been confused as to the directives of Judge Keeney. Such a claim would not have been availing given the fact that the reviewing committee found her statement that she had been mistaken to be not credible. "[T]he committee, as the fact finder, was free to weigh the plaintiff's evidence and to determine the credibility of [the plaintiff's] testimony." *Machado* v. *Statewide Grievance Committee*, 93 Conn. App. 832, 840, 890 A.2d 622 (2006). "[A]s a reviewing court, [w]e must defer to the trier of fact's assessment of the credibility of the witnesses that is made on the basis of its firsthand observation of their conduct, demeanor and attitude. . . . The weight to be given the evidence and to the

credibility of witnesses is solely within the determination of the trier of fact." (Internal quotation marks omitted.) *Daniels* v. *Statewide Grievance Committee*, 72 Conn. App. 203, 209–10, 804 A.2d 1027 (2002).

Instead, the plaintiff takes the position that because she performed services as the fiduciary of the trust and charged reasonable fees for those services, her inclusion of those fees in the June 24, 2013 accounting cannot be deemed to be a misstatement or dishonest. The plaintiff's argument misses the point. It was not disputed that the plaintiff rendered fiduciary services or that the amount she proposed to charge was reasonable. The plaintiff, in her May 24, 2013 e-mail to the chief clerk of the Probate Court, and in various other accountings submitted to the Probate Court, represented that she would waive her fiduciary fees and remove the entry for such fees from the amended final account. Her actions were inconsistent with her representations. Further, it was apparent that her entry of $5531.84 for fiduciary fees and the credit by her to the estate for income tax interest and penalties in the amount of $5531.84, were fashioned to offset each other in the June 24, 2013 amended final account. Prior to that filing, she had either eliminated an entry for fiduciary fees or requested the amount of $5980 for her services.

Accordingly, the findings of the reviewing committee, as affirmed by the defendant and the Superior Court, are supported by clear and convincing evidence, and the conclusion that the plaintiff violated rules 3.3 (a) (1) and 8.4 (3) of the Rules of Professional Conduct by filing a knowingly false statement with the Probate Court on June 24, 2013, is legally and logically correct and not clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

SANTOS CANCEL *v.* COMMISSIONER OF CORRECTION (AC 40977)

Keller, Prescott and Harper, Js.

Syllabus

The petitioner, who had been convicted of sexual assault in the fourth degree and risk of injury to a child, sought of a writ of habeas corpus, claiming that his trial counsel had rendered ineffective assistance by failing, inter alia, to attend his presentence investigation interview with a probation officer. The petitioner claimed that his counsel's absence from the interview constituted deficient performance and that he was prejudiced by her absence because he made harmful comments during the interview that his counsel, if present, would have advised him not to make and which adversely affected the subsequent sentence he received from the trial court. The petitioner further claimed that because the presentence investigation interview was a critical stage of the proceedings and that his counsel's absence constituted a complete denial of his sixth amendment right to effective assistance of counsel, the trial court should have applied the presumption of prejudice under *United States* v. *Cronic* (466 U.S. 648) that arises when the denial of sixth amendment rights makes the adversary process itself presumptively unreliable. The petitioner had been charged in separate informations, which were joined for trial, in connection with incidents that involved two minors, J and G. At the habeas trial, a forensic psychologist, E, who had reviewed a forensic interview of J, who had developmental issues, testified about the potential for suggestibility in J's forensic interview, but made no determination about J's level of suggestibility or that the forensic interview was improperly conducted. The habeas court rendered judgment denying the habeas petition, concluding, inter alia, that, under *Strickland* v. *Washington* (466 U.S. 668), the petitioner's trial counsel did not render deficient performance as a result of her absence from the presentence investigation interview and that the petitioner failed to prove that he was prejudiced thereby. The court further concluded that the petitioner failed to prove that his trial counsel's representation was deficient as to his other claims of ineffective assistance or that he was prejudiced by any aspect of her allegedly deficient performance. Thereafter, the habeas court granted the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The petitioner could not prevail on his claim that the habeas court erred in concluding that he was not prejudiced by his trial counsel's failure to litigate whether the two underlying criminal cases against him should have been joined for trial: the evidence in both cases was cross admissible, as the crimes involving J and G were not too remote in time, the

petitioner was accused of committing the same crimes in the same manner and location in both cases, with the exception of one charge of which he was found not guilty, because of the similarity of the evidence in both cases, evidence from one case that may have been introduced in the other would have been unlikely to arouse the jurors' emotions, and even if the cases had not been joined, the evidence in one case would have been cross admissible in the other case to prove that the petitioner had a propensity or tendency to sexually assault adolescent girls; moreover, the petitioner's claim that he had a compelling need to testify in the case involving G but not in the case involving J was unavailing, as his testimony in G's case similarly would have been needed in J's case, and because the evidence was cross admissible, there was no reasonable probability that an objection to joinder would have changed the outcome of his criminal trial or that his convictions would have been reversed on direct appeal.

2. The petitioner failed to demonstrate that the habeas court erred in concluding that he was not prejudiced by his trial counsel's failure to object to the opinion testimony of K, a detective, that G was a victim of sexual assault: there was no reasonable probability that, had trial counsel successfully objected to K's testimony, the result of the criminal trial would have been different, as there was overwhelming evidence apart from K's testimony from which the jury reasonably could have concluded that the petitioner sexually assaulted G, including statements that J and G had made to the police, the videotape of J's forensic interview, DNA analysis that revealed the presence of the petitioner's semen on G's underwear and clothing, which contained holes that had been cut between the rear end and genital area, and testimony from J that indicated that there were holes in her underwear; moreover, even if the cases had not been joined, the evidence in both cases was cross admissible as evidence that the petitioner had a propensity to engage in the sexual conduct with which he was charged.

3. The habeas court properly concluded that the petitioner's trial counsel did not render deficient performance by deciding not to present testimony from an expert in forensic psychology regarding the suggestive influence that may have been present in J's forensic interview: trial counsel was aware of J's developmental issues and the role that suggestibility could have in child sexual assault cases, and determined, after she reviewed the videotape of the forensic interview several times and found no suggestibility in the forensic interview, that there was no legitimate reason to retain an expert or to pursue a suggestibility defense strategy because of the overwhelming evidence against the petitioner; moreover, E did not make a determination that J was influenced during the forensic interview or that the forensic interview was improperly conducted, the information obtained from the forensic interview was consistent with information that K had obtained from other witnesses, and the forensic interview conformed to guidelines specified by the

police and was conducted in an impartial manner by an expert in child sexual assault interviews.

4. The petitioner could not prevail on his claim that his trial counsel's absence from the presentence investigation interview constituted a complete denial of his sixth amendment right to the effective assistance of counsel that warranted a presumption of prejudice under *Cronic*: although the habeas court determined under *Strickland* that the petitioner's right to counsel was not violated, this court concluded that his sixth amendment right to counsel was not violated on the alternative ground that he was not entitled to effective assistance of counsel at his presentence investigation interview because a presentence investigation interview is not a critical stage of a criminal proceeding to which the right to counsel applies, as trial courts in Connecticut, which exercise broad, independent discretion in imposing a sentence, enlist the aid of probation officers to investigate and make a report prior to sentencing, and the probation officer, thus, is an extension of the court and not an agent of the government, and because a proceeding must be adversarial in nature to be considered a critical stage, the right to counsel at a critical stage does not extend to nonadversarial proceedings; accordingly, prejudice under *Cronic* could not be presumed as a result of trial counsel's absence from the petitioner's presentence investigation interview.

Argued January 31—officially released May 7, 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, *Oliver*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Vishal K. Garg, assigned counsel, with whom, on the brief, was *Desmond M. Ryan*, for the appellant (petitioner).

Lisa A. Riggione, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Marc G. Ramia*, senior assistant state's attorney, for the appellee (respondent).

Opinion

HARPER, J. The petitioner, Santos Cancel, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court erred in concluding that his trial counsel had not provided ineffective assistance by failing (1) to litigate adequately the issue of

whether the two underlying criminal cases against the petitioner should have been joined for trial, (2) to object to opinion testimony from a witness on an ultimate issue of fact with respect to the criminal charges in one of the underlying cases, (3) to present expert testimony that could have offered an alternative innocent explanation for the sexual assault allegations against the petitioner, and (4) to attend the petitioner's presentence investigation interview with a probation officer. We affirm the judgment of the habeas court.

The following facts and procedural history are relevant to our resolution of this appeal. The petitioner was charged in two cases alleging sexual assault that were joined for trial. After a jury trial, the petitioner was convicted, in both cases, of sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (A), and risk of injury to a child in violation of General Statutes § 53-21 (a) (1) and (2). This court's opinion in the petitioner's direct appeal in *State* v. *Cancel*, 149 Conn. App. 86, 87 A.3d 618, cert. denied, 311 Conn. 954, 97 A.3d 985 (2014), sets forth the following facts:

"The jury reasonably could have found the following facts with respect to the charges in the first case, which involved the victim, J.[1] J was eleven years of age in February, 2009, and resided with her uncle. J's mother resided with the [petitioner] and three of J's maternal siblings, all minors, in a nearby city. Sometime in February, 2009, J went to her mother's residence for an overnight visit. J's mother, the [petitioner], and the three other children were present in the residence during J's stay. On the night of her visit, J went to sleep in her sisters' room, where she shared a bed with two of her siblings. J later awoke to find the [petitioner] sitting on

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

the floor touching her 'front private area.' When the [petitioner] realized that J was awake, he apologized to her. J's mother then called for the [petitioner], prompting him to leave the room. Later that night, the [petitioner] returned to the bedroom. He woke J and instructed her to go to another bedroom in the residence. J proceeded to go into the other bedroom, alone, and went back to sleep. The [petitioner] then entered the other bedroom. He shut the door, positioned himself on top of J and 'went up and down.' The [petitioner] then cut a hole in J's underwear and initiated sexual contact with J's intimate areas. Following her encounter with the [petitioner], J went into the bathroom and felt a 'wet' sensation in and around her intimate parts.

"The next day, J returned to her uncle's home crying and ostensibly nervous. Sometime later, J told her uncle's girlfriend that she was having 'a problem.' J explained how the [petitioner] had 'told her to go to sleep and to lay . . . face down,' and how he had cut her pants. J also told her uncle that the [petitioner] had tried to 'abuse her' the night she stayed at her mother's home. J's uncle subsequently contacted the social worker at J's school. The social worker met with J, and J explained what occurred on the night she stayed at her mother's residence. After meeting with J, the social worker reported the incident to the Department of Children and Families (department). The department, in turn, contacted the police. Thereafter, J and her uncle went to the police station where J explained to the police how the [petitioner] had made inappropriate contact with her on the night she stayed at her mother's residence. The police subsequently initiated an investigation into the incident and sought out J's mother and the [petitioner] for questioning. When the police arrived at the mother's residence, the [petitioner] ran out the back door. J's mother, however, agreed to accompany

the police to the station for questioning. During questioning, J's mother indicated that during J's most recent visit, J had told her that she woke up with holes in her underwear. J's mother also indicated that one of her other daughters had reported waking up with holes in her underwear on several occasions.

"The jury reasonably could have found the following facts with respect to the charges in the second case, involving the victim, G. G was ten years of age in February, 2009, and one of J's siblings. G lived with her mother and the [petitioner] on a permanent basis. After speaking to her mother in connection with J, the police questioned G. G told the police that on certain nights, the [petitioner] would come into her room and tell her to change her sleeping position. In the mornings that followed the [petitioner's] nighttime visits, G woke up to find holes in her underwear and pants, always in the vicinity of her intimate areas. These holes were never present when she went to sleep, but appeared after she woke up the next morning. She was uncertain of what caused the holes to appear, but believed that her cat caused the holes in her clothing because her cat previously had ripped holes in her sister's clothing. She explained that the holes in her clothing appeared only during the time the [petitioner] lived in the residence. She usually would give the underwear to her mother so she could mend them or throw them away. G revealed to police that she was wearing a pair of the mended underwear during questioning and that the dresser at her mother's residence contained many pairs of the underwear that still had holes in them or had been mended by her mother. With the mother's permission, the police took possession of the underwear G wore at the time of questioning. The police subsequently obtained and executed a search warrant on the mother's residence. During the search, the police seized twelve additional pairs of underwear and two pairs of pants

that either had holes in them or appeared to have been mended. In addition, the police seized two pairs of scissors. The thirteen pairs of underwear and two pants seized by the police subsequently were submitted for forensic analysis. The forensic analysis of the clothing revealed that the two pants and six out of the thirteen pairs of underwear had holes consistent with being cut by a sharp blade, not ripped. The holes in each item were located between the rear end and genital area. DNA analysis revealed that the [petitioner's] semen was present on the inside and outside of three pairs of G's underwear and one pair of her pants. The [petitioner] could not be eliminated as the source of semen present on another pair of underwear.

"The [petitioner] was arrested on March 5, 2009.[2] With respect to J's case, the state, in a substitute information, charged the [petitioner] with one count of attempt to commit sexual assault in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-70 (a) (2), one count of sexual assault in the fourth degree in violation of § 53a-73a (a) (1) (A), and two counts of risk of injury to a child in violation of § 53-21 (a) (1) and (2). With respect to G's case, the state, in a substitute information, charged the [petitioner] with one count of sexual assault in the fourth degree in violation of § 53a-73a (a) (1) (A), and two counts of risk of injury to a child in violation of § 53-21 (a) (1) and (2).

"Before trial commenced, the state moved for a consolidated trial on the charges in both cases. The court granted the motion after defense counsel raised no objection. At the conclusion of evidence, the jury found the [petitioner] not guilty of attempt to commit sexual assault in the first degree, but guilty on each of the

[2] The petitioner initially was arrested on the charges stemming from J's case. On August 5, 2009, after further police investigation, the petitioner was arrested on charges stemming from G's case.

remaining charges in J's case. The jury found the [petitioner] guilty of all charges in G's case. The court sentenced the [petitioner] to a total effective term of thirty years of imprisonment." (Footnotes in original.) Id., 88–91. This court affirmed the petitioner's convictions on direct appeal. See id., 103.

On July 31, 2014, the petitioner, in a self-represented capacity, filed a petition for a writ of habeas corpus. On October 12, 2016, the petitioner, represented by counsel, filed the operative amended petition. In the amended petition, the petitioner alleged that Attorney Tina Sypek D'Amato rendered ineffective assistance by failing (1) to adequately investigate, research, and educate herself about the issues unique to child sexual assault cases; (2) to object to the joinder of the two cases for trial; (3) to consult with an expert and present a suggestibility defense or an alternative innocent explanation as supported by expert testimony; (4) to object to testimony from Detective Cathleen Knapp that, in her opinion, G was a victim of sexual assault; (5) to attend the petitioner's presentence investigation interview; (6) to adequately cross-examine, impeach, or otherwise challenge the testimony of J, G, or their uncle; (7) to adequately pursue the production and disclosure of confidential and privileged materials related to J; and (8) to present evidence of a custody dispute between J's mother and J's uncle.

By memorandum of decision issued on August 17, 2017, the habeas court denied the amended petition, concluding that the petitioner did not meet his burden of establishing either deficient performance or prejudice with respect to his first, third, fifth, sixth, seventh, and eighth claims of his operative amended complaint. The court additionally concluded, without determining that deficient performance had been rendered by Attorney D'Amato, that the petitioner did not meet his burden of establishing prejudice as to his second and fourth

claims. On August 31, 2017, the court granted the petitioner's petition for certification to appeal from its decision. This appeal followed.[3] Additional facts will be set forth as necessary.

We begin by setting forth the relevant legal principles and our well settled standard of review governing ineffective assistance of counsel claims. "In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quotation marks omitted.) *Mukhtaar* v. *Commissioner of Correction*, 158 Conn. App. 431, 437, 119 A.3d 607 (2015); see also *Buie* v. *Commissioner of Correction*, 187 Conn. App. 414, 417, 202 A.3d 453, cert. denied, 331 Conn. 905, 202 A.3d 373 (2019).

"To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). . . . In *Strickland* . . . the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction . . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a

[3] On appeal, the petitioner did not raise in his brief the claims relating to: inadequate research, investigation, or education; cross-examination, impeachment, or challenging of the testimony of J, G, or their uncle; pursuit of the production and disclosure of confidential and privileged materials related to J; or the presentation of evidence of a custody dispute between J's mother and J's uncle. Accordingly, these claims are deemed to be abandoned. See *Walker* v. *Commissioner of Correction*, 176 Conn. App. 843, 856–57, 171 A.3d 525 (2017).

[petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong. . . .

"To satisfy the performance prong [of the *Strickland* test] 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. . . . [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. . . .

"With respect to the prejudice component of the *Strickland* test, the petitioner must demonstrate that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. . . . It is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceedings. . . . Rather, [t]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome." (Citations omitted; internal quotation marks omitted.) *Mukhtaar* v. *Commissioner of Correction*, supra, 158 Conn. App. 437–38; see also *Holloway* v. *Commissioner of Correction*, 145 Conn. App. 353, 364–65, 77 A.3d 777 (2013).

Finally, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the

alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Strickland* v. *Washington*, supra, 466 U.S. 697. Guided by these principles, we turn to the specific claims made by the petitioner.

I

We first address the petitioner's claim that the habeas court erred in concluding that he was not prejudiced by his trial counsel's alleged failure to litigate adequately the issue of whether the two underlying criminal cases against the petitioner should have been joined for trial. The petitioner raises three arguments in regard to the court's analysis of prejudice, namely, that (1) the habeas court misapplied the factors outlined in *State* v. *Boscarino*, 204 Conn. 714, 722–24, 529 A.2d 1260 (1987), to this case, (2) he was prejudiced by his trial counsel's failure to litigate adequately the joinder issue regarding his compelling need to testify in the case involving G and his equally compelling need to refrain from testifying in the case involving J, and (3) the court failed to consider that, had the issue been litigated at the petitioner's criminal trial, he would have prevailed in his direct appeal. Because we conclude that the evidence in both cases was cross admissible, these arguments are not persuasive.

The following additional facts are relevant to this claim. The petitioner's trial counsel, Attorney D'Amato, "did not file an objection to the state's motion for joinder between December, 2009, when the state filed it, and September, 2011, the time of the [petitioner's] trial. In addition . . . the parties discussed the motion both in chambers and before the court. In chambers . . . [Attorney D'Amato] had suggested that there would not be a lot of argument regarding the motion. Then, when

the court heard the parties on the motion, [Attorney D'Amato] expressly stated that there was no objection to the motion. After the court granted the motion, [Attorney D'Amato] did not indicate any disagreement with the court's decision. For the remainder of the consolidated trial, [Attorney D'Amato] did not raise the issue of joinder." (Footnote omitted; internal quotation marks omitted.) *State* v. *Cancel*, supra, 149 Conn. App. 101. As a result of the foregoing, this court concluded in the petitioner's direct appeal that he had "waived any constitutional claims he may have had regarding the joinder." Id., 102.

During the petitioner's habeas trial, Attorney D'Amato recalled that she had researched the joinder issue and concluded that there was no good faith basis to challenge joinder because the law at the time provided that the evidence in both cases would have been cross admissible.[4] In addition, it was established during the habeas proceeding that, after his semen was found on G's underwear, the petitioner had told Attorney D'Amato that he had masturbated and used G's underwear to clean himself. Attorney D'Amato testified that no other evidence could provide an explanation for the presence of the petitioner's semen on G's underwear, and that, if G's and J's cases against the petitioner were not joined, it would have been important to allow the petitioner to provide his explanation during G's case. Attorney D'Amato also testified that, in regard to J's case, the petitioner did not want to testify, she did not want the petitioner to testify for fear of him being charged with perjury, and that, in her experience, having an interpreter involved, as would have been necessary during the petitioner's testimony, would have made

[4] If evidence of one incident can be admitted at the trial of another incident, such evidence is said to be cross admissible. See *State* v. *LaFleur*, 307 Conn. 115, 155, 51 A.3d 1048 (2012); *State* v. *Pollitt*, 205 Conn. 61, 68, 530 A.2d 155 (1987).

the petitioner appear insincere. Finally, Attorney D'Amato did not recall whether the petitioner's alleged desire to testify regarding how his semen got on G's underwear, but his desire not to testify in J's case, provided an argument to challenge joinder.

The habeas court relied on the factors set forth in *State* v. *Boscarino*, supra, 204 Conn. 722–24,[5] and concluded that the petitioner failed to prove prejudice as to his joinder claim. Specifically, the court concluded that both cases had distinguishable fact patterns involving two different victims, alleged similar sexual misconduct involving minors, were not so violent or brutal as to impair the jury's ability to consider the charges against the petitioner in a fair manner, and that the joint trial was neither lengthy nor complex.

We begin by setting forth the legal principles relevant to the issue of joinder. "Whenever two or more cases are pending at the same time against the same party in the same court for offenses of the same character, counts for such offenses may be joined in one information unless the court orders otherwise. . . . [Our Supreme Court] has recognized, however, that improper joinder may expose a defendant to potential prejudice for three reasons: First, when several charges have been made against the defendant, the jury may consider that a person charged with doing so many

[5] In *State* v. *Boscarino*, supra, 204 Conn. 722–24, our Supreme Court first articulated the factors that a trial court must consider when deciding whether it is appropriate to join two separate yet factually related cases for trial when evidence in the cases are not cross admissible. The court determined that joinder of such cases is unduly prejudicial to the defendant and, thus, improper, if (1) the cases do not involve discrete, easily distinguishable factual scenarios, (2) the crimes in the cases were of a particularly violent nature or concerned brutal or shocking conduct on the defendant's part, and (3) the trial was lengthy and complex. Since that decision, our Supreme Court consistently has applied the *Boscarino* factors in determining when joinder is proper. See *State* v. *Ellis*, 270 Conn. 337, 375–76, 852 A.2d 676 (2004); see also *State* v. *Payne*, 303 Conn. 538, 550, 34 A.3d 370 (2012).

things is a bad [person] who must have done something, and may cumulate evidence against him . . . . Second, the jury may have used the evidence of one case to convict the defendant in another case even though that evidence would have been inadmissible at a separate trial. . . . [Third] joinder of cases that are factually similar but legally unconnected . . . present[s] the . . . danger that a defendant will be subjected to the omnipresent risk . . . that although so much [of the evidence] as would be admissible upon any one of the charges might not [persuade the jury] of the accused's guilt, the sum of it will convince them as to all." (Citation omitted; internal quotation marks omitted.) *State* v. *Ellis*, 270 Conn. 337, 374–75, 852 A.2d 676 (2004).

At the time of the petitioner's trial, a clear presumption in favor of joinder and against severance existed. See id., 375. In *State* v. *Payne*, 303 Conn. 538, 549–50, 34 A.3d 370 (2012), however, our Supreme Court rejected the presumption in favor of joinder and established the following burden of proof with respect to joinder: "[W]hen charges are set forth in separate informations, presumably because they are not of the same character, and the state has moved in the trial court to join the multiple informations for trial, the state bears the burden of proving that the defendant will not be substantially prejudiced by joinder pursuant to Practice Book § 41-19. The state may satisfy this burden by proving, by a preponderance of the evidence, either that the evidence in the cases is cross admissible or that the defendant will not be unfairly prejudiced pursuant to the *Boscarino* factors." (Footnote omitted; internal quotation marks omitted.)[6] Importantly, "although our

[6] Although our Supreme Court in *State* v. *Payne*, supra, 303 Conn. 550, shifted to the state the burden of proving whether joinder is appropriate in cases in which charges are set forth in separate informations, such as in the present case, the court also noted that this rule of law would not apply retroactively in habeas proceedings. See id., 550 n.10. The petitioner argues, nonetheless, that *Payne* governs the analysis of the issue of joinder that he raised in his direct appeal and, thus, that there was a reasonable probability

Supreme Court rejected the presumption in favor of joinder, the court did not alter the remainder of the substantive law that Connecticut courts apply when determining whether joinder is appropriate." *Rogers* v. *Commissioner of Correction*, 143 Conn. App. 206, 212, 70 A.3d 1068 (2013).

In determining whether joinder is appropriate, it is well established that where the evidence in one case is cross admissible at the trial of another case, the defendant will not be substantially prejudiced by joinder. See *State* v. *Crenshaw*, 313 Conn. 69, 83–84, 95 A.3d 1113 (2014) ("[when] evidence of one incident can be admitted at the trial of the other [incident] . . . the defendant [will] not ordinarily be substantially prejudiced by joinder of the offenses for a single trial" [internal quotation marks omitted]); *State* v. *Payne*, supra, 303 Conn. 549–50 ("[T]he state bears the burden of proving that the defendant will not be substantially prejudiced by joinder . . . . The state may satisfy this burden by proving . . . that the evidence in the cases is cross admissible . . . ." [Citation omitted.]); *State* v. *Sanseverino*, 287 Conn. 608, 628–29, 949 A.2d 1156 (2008) ("[w]e consistently have found joinder to be proper if we have concluded that the evidence of other crimes or uncharged misconduct would have been cross

that, had Attorney D'Amato properly preserved the issue for appellate review, the petitioner's convictions would have been reversed on direct appeal. The petitioner's claim before this court, however, alleges that his trial counsel failed to litigate adequately the joinder issue *at the time of his criminal trial.*

As previously discussed, our case law at the time of the petitioner's criminal trial *recognized a clear presumption in favor of joinder*. See *State* v. *Ellis*, supra, 270 Conn. 375. Attorney D'Amato decided not to object to joinder on the basis of the law as it existed at the time of the petitioner's criminal trial. To conclude, on the basis of *Payne*, that the petitioner was prejudiced by his counsel's alleged failure to adequately litigate the joinder issue at his criminal trial would be tantamount to requiring Attorney D'Amato to have argued legal principles not yet established at the time of that trial. We decline to endorse such a proposition.

admissible at separate trials''), overruled in part on other grounds by *State* v. *DeJesus*, 288 Conn. 418, 437, 953 A.2d 45 (2008), and superseded in part on other grounds after reconsideration by *State* v. *Sanseverino*, 291 Conn. 574, 579, 969 A.2d 710 (2009). Our case law is clear that a court considering joinder need not apply the *Boscarino* factors if evidence in the cases is cross admissible. As such, we do not consider the habeas court's application of the *Boscarino* factors and instead conclude that the petitioner was not prejudiced by his counsel's alleged ineffective performance in regard to joinder because the state would have been able to prove that the evidence in both cases was cross admissible.[7]

At the time of the petitioner's criminal trial, our Supreme Court already had recognized "a *limited* exception to the prohibition on the admission of uncharged misconduct[8] evidence in *sex crime* cases to prove that the defendant had a propensity to engage in aberrant and compulsive criminal sexual behavior." (Emphasis in original; footnote added.) *State* v. *DeJesus*, 288 Conn. 418, 470, 953 A.2d 45 (2008). Generally, in order for the state to introduce any uncharged sexual misconduct evidence against a defendant charged with sex crimes, the state must first demonstrate that such evidence "is relevant to prove that the defendant had a propensity or a tendency to engage in the type of aberrant and compulsive criminal sexual behavior with which he or she is charged. . . . [E]vidence of uncharged misconduct is relevant to prove that the defendant had a propensity or a tendency to

[7] This court may sustain a correct decision although it may have been decided on an incorrect ground. See *Tyson* v. *Commissioner of Correction*, 155 Conn. App. 96, 105, 109 A.3d 510, cert. denied, 315 Conn. 931, 110 A.3d 432 (2015).

[8] "Uncharged misconduct refers to the conduct of the accused that is not charged in the information; it refers to the accused's conduct not related to the trial, whether or not charged in another case." E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 4.15.5 (a), p. 173.

engage in the crime charged only if it is: (1) . . . not too remote in time; (2) . . . similar to the offense charged; and (3) . . . committed upon persons similar to the prosecuting witness. . . .

"Second, evidence of uncharged misconduct is admissible only if its probative value outweighs the prejudicial effect that invariably flows from its admission. . . . In balancing the probative value of such evidence against its prejudicial effect, however, trial courts must be mindful of the purpose for which the evidence is to be admitted, namely, to permit the jury to consider a defendant's prior bad acts in the area of sexual abuse or child molestation for the purpose of showing propensity.

"Lastly, to minimize the risk of undue prejudice to the defendant, the admission of evidence of uncharged sexual misconduct under the limited propensity exception adopted herein must be accompanied by an appropriate cautionary instruction to the jury." (Citations omitted; internal quotation marks omitted.) Id., 473–74.

In the present case, the crimes involving J and G were not too remote in time. J reported her sexual assault in February, 2009, and G reported several instances similar to what J had reported during the relatively short time the petitioner resided in the home. *State* v. *Cancel*, supra, 149 Conn. App. 88–90. Moreover, in both cases, the petitioner was, with the exception of the charge of sexual assault in the first degree in regard to J, accused of committing the same crimes, in the same manner and location, upon the two female minors. See id. Both J and G made statements that the petitioner had come into their rooms alone, and both cases included evidence that the victims had found holes in their underwear and that the holes had appeared during the time the petitioner lived at the

mother's residence. In addition, because of the similarity of the evidence in both cases, evidence from one case that may have been introduced in the other would have been unlikely to arouse the jurors' emotions. See *State* v. *James G.*, 268 Conn. 382, 400, 844 A.2d 810 (2004) (evidence of sexual abuse less likely to unduly arouse jurors' emotions when similar evidence has already been presented to jury).

Finally, although it was not necessary for the court to provide the jury with an instruction regarding the proper use of prior misconduct evidence relating to J or G because the cases were joined, the court did provide the jury with an instruction regarding the proper use of prior misconduct evidence relating to the petitioner's previous sexual assault conviction. Specifically, the court stated in its charge to the jury: "Now, other misconduct. In a criminal case in which the defendant is charged with a crime . . . exhibiting [aberrant] and compulsive criminal sexual behavior, evidence of the defendant's commission of another offense is admissible and may be considered for its bearing on any matter to which it is relevant. . . .

"Now, with regard to [the petitioner's previous conviction], evidence of that offense on its own is not sufficient to prove the [petitioner] guilty of the crime charged in the information. . . . It's very important that you keep that in mind. . . .

"The [previous conviction] is offered to show that the [petitioner] had an unusual disposition, that is, a sexual interest in children. . . . Now, that's all you can use it for . . . . [The conviction] is claimed evidence of a motive for the crime."

The foregoing instructions to the jury were appropriate in the context of the petitioner's criminal trial, and would also have been appropriate had the cases involving J and G not been joined. As such, even if the

cases involving J and G had not been joined, the evidence in one case would have been admissible in the other to prove that the petitioner had a propensity or a tendency to sexually assault adolescent girls.

With this in mind, the remaining arguments that the petitioner makes on appeal in regard to joinder are unpersuasive. The petitioner's argument that he had a compelling need to testify in the case involving G, but did not have a similar need to testify in the case involving J, is belied by the fact that the evidence in both cases was cross admissible. Specifically, the evidence that the petitioner's semen was found on G's underwear could have been introduced in J's case. As such, the petitioner's purported need to testify in G's case to explain how his semen got on her underwear similarly would be needed in J's case.

Additionally, the petitioner's contention that the proper argument and preservation of the joinder issue at his criminal trial would have led to a more favorable outcome in his direct appeal must also be rejected. Because the evidence, as previously described, was cross admissible, there was no likelihood that the petitioner's conviction would have been reversed on direct appeal, even if Attorney D'Amato had objected on the grounds that the petitioner now argues on appeal.

On the basis of the foregoing, we conclude that there is no reasonable probability that an objection to joinder would have changed the outcome of the petitioner's criminal trial.

II

The petitioner next claims that the habeas court erred in concluding that his trial counsel had not provided ineffective assistance in failing to object to opinion testimony from a witness on an ultimate issue of fact

with respect to the criminal charges in one of the underlying criminal cases. Specifically, the petitioner claims that he was prejudiced by Attorney D'Amato's failure to object to Knapp's testimony in which Knapp expressed her opinion that G was a victim of sexual assault. The petitioner argues that this testimony unfairly gave rise to an inference that he was guilty of sexual assault. The respondent, the Commissioner of Correction, argues that the habeas court properly determined that the petitioner had failed to prove that he was prejudiced in light of the substantial circumstantial evidence admitted at trial. We agree with the respondent that the petitioner failed to demonstrate prejudice.[9]

The following additional facts are relevant to this claim. During the state's redirect examination of Knapp, the prosecutor questioned Knapp about her experience in conducting forensic interviews with children in child sexual assault cases. Subsequently, the following exchange occurred:

"[The Prosecutor]: . . . The defense attorney asked you what was in your mind as to whether or not [G] was a victim . . . do you remember those questions?

"[Knapp]: Yes, I do.

"[The Prosecutor]: Now, [G] never says that the [petitioner] did something bad to her, undisputed. Right?

"[Knapp]: That is correct.

"[The Prosecutor]: But in terms of . . . whether or not [G] was a victim, does the fact that the [petitioner] was convicted of having sexual intercourse with a fourteen year old back in 2002 . . . does that inform your thinking about whether or not [G] was a victim?

[9] The habeas court did not make a finding of fact with respect to the deficient performance prong in this claim. Additionally, neither party makes an argument in their respective briefs before this court regarding the performance prong. Accordingly, we do not address it.

"[Knapp]: Yes it does.

"[The Prosecutor]: Okay. And how about the fact that [G's] sister, J, had said, I woke up and somebody was cutting my underwear, the [petitioner], and he put his penis through the hole and then [J] felt wet in [her] butt. Does that inform your thinking as to whether or not [G], who may not know it, is a victim?

"[Knapp]: Yes.

"[The Prosecutor]: And how about the fact that when you go to the house there's all these pairs of underwear with holes cut in the crotch and crop—cut into the butt area and . . . the [petitioner's] semen's in a bunch of those holes; does that inform your thinking as to whether or not you thought [G] was a victim?

"[Knapp]: Yes, the totality of it all was very concerning.

"[The Prosecutor]: As you sit here right now, do you think that [G] was a victim?

"[Knapp]: My personal opinion?

"[The Prosecutor]: That's what you were asked about.

"[Knapp]: Yes

"[The Prosecutor]: Any—

"[Knapp]: —I do.

"[The Prosecutor]: —doubt? Well, I shouldn't ask that. Okay. That's it. Thank you."

The habeas court concluded that the petitioner failed to establish that he was prejudiced by Attorney D'Amato's failure to object to Knapp's testimony without deciding whether that failure constituted deficient

performance.[10] The court found that there was substantial evidence against the petitioner in the underlying criminal case apart from Knapp's testimony. We agree.

In the present case, Knapp was repeatedly questioned during the state's redirect examination regarding whether she believed G was a victim. The petitioner argues that Knapp's testimony was unduly prejudicial because there was no direct evidence of abuse in the case involving G. This argument is similar to that made by the petitioner in his direct appeal before this court. In that appeal, the petitioner raised an insufficiency of the evidence claim and argued that the evidence in G's case "merely establishe[d] that at some point G wore the underwear, at some point a hole was cut in them, and that at some point the [petitioner's] semen was wiped on the underwear. In addition, the [petitioner] contend[ed] that [i]t is only after the state implores the jury to consider J's independent . . . testimony, together with the [evidence of the petitioner's prior misconduct] from ten years earlier, that the state is able to prevail with an argument . . . that the [petitioner]

[10] It is well established that "[n]o witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or reference. . . . In general, [t]estimony is objectionable if it embraces an opinion on the ultimate issue to be decided by the trier of fact. . . . Whether a statement of a witness is one of fact or of conclusion or opinion within the rule excluding opinion evidence is to be determined by the substance of the statement rather than its form. The use of phraseology appropriate to the expression of an inference, such as believe, think, etc., may in fact signify an opinion which renders the statement inadmissible; but the use of such terms is not conclusive that the witness is stating his opinion, for the language may be used merely to indicate that he is not speaking with entire certainty, in which case the evidence may be received for what it is worth." (Citations omitted; internal quotation marks omitted.) *State* v. *Fuller*, 56 Conn. App. 592, 619–20, 744 A.2d 931, cert. denied, 252 Conn. 949, 748 A.2d 298, cert. denied, 531 U.S. 911, 121 S. Ct. 262, 148 L. Ed. 2d 190 (2000). "An opinion, by definition, consists of [e]vidence of what the witness thinks, believes, or infers in regard to facts in dispute." (Internal quotation marks omitted.) *Hayes* v. *Decker*, 66 Conn. App. 293, 301, 784 A.2d 417 (2001), aff'd, 263 Conn. 677, 822 A.2d 228 (2003).

must have had sexual contact with G." (Emphasis in original; internal quotation marks omitted.) *State* v. *Cancel*, supra, 149 Conn. App. 96–97. This court rejected the petitioner's claim and concluded that, in light of the evidence presented at trial, "the jury reasonably could have inferred that the [petitioner] entered G's bedroom at night and cut holes in her underwear for purposes of sexual gratification, just as he did with J. . . . It also was reasonable for the jury to infer that the [petitioner], when he cut holes in the area of G's underwear corresponding to her intimate parts, made sexual contact with G's intimate parts for the purposes of sexual gratification. . . . Moreover, the jury reasonably could have inferred that either depositing semen on a child's underwear or entering a child's bedroom as she slept at night for purposes of cutting [holes in] her underwear constituted a situation likely to impair the morals of a child." (Citations omitted.) Id., 98.

After reviewing the record, we conclude that, apart from Knapp's testimony, there was overwhelming evidence against the petitioner in the underlying criminal case involving G. "It is the province of the jury to draw reasonable and logical inferences from the facts proved. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence. . . . There is no distinction between direct and circumstantial evidence as far as probative force is concerned." (Citations omitted.) *State* v. *Perez*, 183 Conn. 225, 227, 439 A.2d 305 (1981). The jury reasonably could have relied on the statements by both J and G, the DNA analysis that revealed the presence of the petitioner's semen on the inside and outside of G's underwear and clothing, the numerous pairs of G's underwear and pants with holes that had been cut by a sharp object between the rear end and genital area, the independent testimony from J that indicated she also had holes in

her underwear, and the videotape of J's forensic interview, to conclude that the petitioner had sexually assaulted G just as he did with J. Moreover, even if the cases involving G and J had not been joined, as previously discussed in part I of this opinion, the evidence in both cases was cross admissible as evidence that the petitioner had a propensity to engage in the sexual conduct with which he was charged.

Accordingly, because there was no reasonable probability that, had Attorney D'Amato successfully objected to Knapp's alleged opinion testimony that G was a victim of sexual assault, the result of the proceeding would have been different, we conclude that the petitioner failed to prove that he was prejudiced.

III

The petitioner next claims that the habeas court erred in concluding that Attorney D'Amato had provided effective assistance despite failing to present expert testimony that could have offered an alternative innocent explanation for the sexual assault allegations against him. Specifically, the petitioner claims that Attorney D'Amato's failure to consult with a forensic psychologist regarding the suggestive influence that may have been present in J's forensic interview, particularly in light of J's developmental issues and the ongoing custody dispute between J's mother and uncle, constituted deficient performance by which he was prejudiced. The respondent argues that the petitioner failed to prove that Attorney D'Amato's performance was deficient and that he suffered prejudice. We agree with the respondent.

The following additional facts are relevant to this claim. During the petitioner's criminal trial, Knapp testified regarding her initial conversation with J at the Waterbury police station prior to J's forensic interview. From her initial observation, Knapp became aware of J's developmental issues. In obtaining information from

children, the Waterbury Police Department's guidelines called for conducting forensic interviews with children between the ages of three and nine, and typically taking statements from children aged ten and older. Although J was eleven years of age at the time of her complaint, Knapp believed that a forensic interview was necessary for J because of concerns with her cognitive abilities. During their initial conversation, J had stated to Knapp, without prodding, that the reason she was there was because the petitioner had touched her where he was not supposed to. The conversation lasted for approximately twenty-five minutes to one-half hour, and the information that Knapp gleaned from J was consistent with what Knapp had learned from other individuals.

Knapp also testified as to the Waterbury Police Department's general guidelines in conducting forensic interviews and as to how J's interview was conducted. The forensic interview consisted of nonleading, nonsuggestive questions in a one-on-one environment. The interview was conducted in a specialized room within a facility that specializes in the behavioral health of children and families. The forensic interviewer was a child interview expert with the Waterbury Child Abuse Interdisciplinary Team, which oversaw sexual assault cases in the area. The interviewer and J were alone in the room while law enforcement officials, including Knapp, and department officials watched the interview from the other side of a one-way mirror. The interview was videotaped and audiotaped, which was standard practice. Knapp also testified that she spoke with J's mother on the day following the forensic interview, and that she had provided information that was consistent with information that had been elicited during the forensic interview.

During the habeas trial, Attorney D'Amato testified that she did not consult with any expert witnesses in preparation for the petitioner's criminal trial, and that

she knew J had developmental issues and was enrolled in special education classes. Attorney D'Amato had reviewed J's forensic interview, but did not consider consulting with a forensic expert because it did not seem necessary given the overwhelming evidence against the petitioner, including the petitioner's previous criminal history, the scissor cut holes in the underwear, evidence of the petitioner's semen on G's underwear, and the independent statements from J and G. Attorney D'Amato also had understood the role of suggestibility in child sexual assault cases, and recalled that she had seen J's forensic interview several times and that it did not seem to be suggestive or violate any forensic interviewing protocols. Attorney D'Amato also recalled that at the time of the petitioner's trial there had been a custody dispute between J's mother and uncle for custody of J.

The petitioner also presented the expert testimony of Nancy Eiswirth, a forensic psychologist. Dr. Eiswirth defined the concept of suggestibility and how it relates to children, and described how individuals with lower IQs tend to be more suggestible than others. Dr. Eiswirth testified that, generally, suggestibility is relevant in the context of child allegations of sexual assault because it helps with understanding how an allegation came about. Specifically, a review of any preforensic interview contacts that a child may have had is critical to judging whether a question in an interview is leading. Additionally, there is a tendency, particularly among children with low IQs, to want to please or agree with others, or to just answer a question even if they do not understand it. Dr. Eiswirth also reviewed J's forensic interview. Dr. Eiswirth found that J's statements during her forensic interview regarding what may have happened when J was asleep were important because a child may misinterpret what happens when that child is asleep or in a dream state. Dr. Eiswirth also testified

that there was not much questioning during J's forensic interview about people she talked to, but acknowledged that J had stated that she talked to her uncles, her grandmother, and her mother, in addition to other people. Dr. Eiswirth referenced several times that, during the forensic interview, J had exhibited behavior that indicated that she was trying to please the interviewer. Dr. Eiswirth did not recall any questions that would have ruled out suggestibility. Dr. Eiswirth noted several instances that could have been indicative of suggestion, such as J going to her sister's room and talking to her sister, and then subsequently speaking with the department worker. Dr. Eiswirth, however, did not make a determination about J's level of suggestibility.

The habeas court concluded that Attorney D'Amato's failure to present testimony from a mental health expert at the petitioner's criminal trial did not constitute deficient performance and that the petitioner had failed to prove that he was prejudiced by such failure.

"[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. Because of the difficulties inherent in making the evaluation, 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. . . . In reconstructing the circumstances, a reviewing court is required not simply to give [the trial attorney] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he] did . . . ." (Internal quotation marks omitted.) *Bennett*

v. *Commissioner of Correction*, 182 Conn. App. 541, 556–57, 190 A.3d 877, cert. denied, 330 Conn. 910, 193 A.3d 50 (2018).

Our Supreme Court has declined to adopt a bright line rule that defense counsel must present an expert witness in every sexual assault case. See *Michael T.* v. *Commissioner of Correction*, 307 Conn. 84, 100–101, 52 A.3d 655 (2012). Moreover, this court has held in cases involving child sexual assault that trial counsel's decision not to present expert witness testimony in support of an alternative innocent explanation does not necessarily constitute deficient performance when part of a legitimate and reasonable defense strategy. See *Ricardo R.* v. *Commissioner of Correction*, 185 Conn. App. 787, 798, 198 A.3d 630 (2018), cert. denied, 330 Conn. 959, 199 A.3d 560 (2019); *Grover* v. *Commissioner of Correction*, 183 Conn. App. 804, 821, 194 A.3d 316, cert. denied, 330 Conn. 933, 194 A.3d 1196 (2018).

On the basis of our review of the record and relevant case law, we are not persuaded that Attorney D'Amato's decision not to present testimony from an expert witness constituted deficient performance. She was aware of J's developmental issues and of the role that suggestibility could have in child sexual assault cases. After reviewing the videotape of the forensic interview several times and finding no suggestibility present, however, she determined that there was no legitimate reason to retain an expert or pursue a suggestibility defense strategy because of the overwhelming evidence against the petitioner. She found, rather, that the best strategy at trial was to focus on the defense that the petitioner had not sexually assaulted or penetrated anyone, and noted that the defense had obtained a not guilty verdict on the charge of attempt to commit sexual assault in the first degree.

Additionally, although Dr. Eiswirth provided testimony on suggestibility in general and on the potential

for suggestibility in J's forensic interview, she did not make a determination that J was influenced during the interview or that the interview was improperly conducted. Rather, as demonstrated by Knapp's testimony at the petitioner's criminal trial, the interview conformed to guidelines specified by the Waterbury Police Department and was conducted in an impartial manner by an expert in child sexual assault interviews. The information obtained from the interview also was consistent with information that Knapp had obtained from other witnesses. As such, the petitioner has failed to overcome the presumption that Attorney D'Amato's decision not to present the testimony of an expert, in light of the other evidence presented, fell within the wide range of reasonable professional assistance. See *Ricardo R.* v. *Commissioner of Correction*, supra, 185 Conn. App. 800 ("it was incumbent upon the petitioner to overcome the presumption that, under the circumstances, [counsel's] decision not to consult with an expert was done in the exercise of reasonable professional judgment").

Accordingly, we conclude that Attorney D'Amato's decision not to present testimony from an expert in forensic psychology, in pursuit of a theory of suggestibility that supported a not guilty verdict, did not constitute deficient performance. As such, we need not reach the prejudice prong as to this claim.

IV

Finally, the petitioner claims that the habeas court improperly concluded that his right to the effective assistance of counsel was not violated due to Attorney D'Amato's absence from the petitioner's presentence investigation interview with a probation officer, who thereafter prepared a report for the trial court. Specifically, the petitioner claims that his counsel's allegedly

improper absence from the interview constituted deficient performance and that he was prejudiced because he had made harmful comments during the interview that his counsel, if present, would have advised him not to make and which adversely affected the subsequent sentence handed down by the court. The petitioner also claims that prejudice should be presumed because the presentence investigation interview is a critical stage of the proceedings, and his counsel's absence constituted a complete denial of his right to effective assistance of counsel under the sixth amendment. Because we conclude that the presentence investigation interview is not a critical stage of a criminal proceeding, the petitioner was not entitled to the effective assistance of counsel during this interview and, accordingly, we agree with the habeas court's rejection of this claim, albeit on alternate grounds.

Attorney D'Amato provided uncontroverted testimony that she inadvertently was absent from the petitioner's presentence investigation interview because she had gotten lost on her way to MacDougall-Walker Correctional Institution, where the interview took place. During the petitioner's sentencing, however, Attorney D'Amato indicated that she and the petitioner had discussed the interview and that she had reviewed the presentence investigation report. Moreover, Attorney D'Amato asked the court to strike any denials that she believed the petitioner may have made during the interview because she had not been present, even though the petitioner had informed her that he did not make any statements about what had happened during the presentence investigation interview.[11] The court did not

[11] The denial of guilt that the petitioner claims he made during the presentence investigation interview was not made during that interview, but, rather, during a sex offender evaluation interview that took place in October, 2011, after the petitioner was convicted. A report of the sex offender evaluation interview was provided to the probation officer and included in the presentence investigation report.

act on Attorney D'Amato's request or refer to the petitioner's presentence investigation report during sentencing.

After analyzing the petitioner's claims under *Strickland* v. *Washington*, supra, 466 U.S. 687, the habeas court found that trial counsel's absence from the petitioner's presentence investigation interview did not constitute deficient performance and that the petitioner failed to prove prejudice.

A criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all *critical stages* of a criminal proceeding. See id., 686; see also *Gonzalez* v. *Commissioner of Correction*, 308 Conn. 463, 470, 68 A.3d 624 (2013). As previously discussed, "[u]nder the two-pronged *Strickland* test, a [petitioner] can only prevail on an ineffective assistance of counsel claim if he proves that (1) counsel's performance was deficient, and (2) the deficient performance resulted in actual prejudice. . . . To demonstrate deficient performance, a [petitioner] must show that counsel's conduct fell below an objective standard of reasonableness for competent attorneys. . . . To demonstrate actual prejudice, a [petitioner] must show a reasonable probability that the outcome of the proceeding would have been different but for counsel's errors . . . .

"*Strickland* recognized, however, that [i]n certain [s]ixth [a]mendment contexts, prejudice is presumed. . . . In . . . [*United States* v. *Cronic*, 466 U.S. 648, 659–60, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)] . . . which was decided on the same day as *Strickland*, the United States Supreme Court elaborated on the following three scenarios in which prejudice may be presumed: (1) when counsel is denied to a [petitioner] at a critical stage of the proceeding; (2) when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; and (3) when counsel is called

upon to render assistance in a situation in which no competent attorney could do so. . . . This is an irrebuttable presumption." (Citation omitted; internal quotation marks omitted.) *Edwards* v. *Commissioner of Correction*, 183 Conn. App. 838, 843–44, 194 A.3d 329 (2018). In *Cronic*, the court reasoned that such situations indicate that "there has been a denial of [s]ixth [a]mendment rights that makes the adversary process itself presumptively unreliable." *United States* v. *Cronic*, supra, 659.

Our case law has recognized that, once the *Cronic* presumption of prejudice applies, a petitioner has asserted a valid claim of ineffective assistance of counsel and his claim for relief under *Strickland* need not be addressed. See *Davis* v. *Commissioner of Correction*, 319 Conn. 548, 568, 126 A.3d 538 (2015), cert. denied sub nom. *Semple* v. *Davis*, U.S. , 136 S. Ct. 1676, 194 L. Ed. 2d 801 (2016); *Edwards* v. *Commissioner of Correction*, supra, 183 Conn. App. 839 n.1. In *Davis*, our Supreme Court distinguished the effective assistance of counsel analyses done under *Strickland* and *Cronic*. *Davis* v. *Commissioner of Correction*, supra, 556. Specifically, the court reasoned that "specific errors in representation, for which counsel can provide some reasonable explanation, are properly analyzed under *Strickland*," while "[c]ounsel's complete failure to advocate for a defendant . . . such that no explanation could possible justify such conduct," warrants the application of *Cronic*'s presumption of prejudice. Id. The court then turned to the merits of the claim of ineffective assistance before it and conducted an analysis under *Cronic* after concluding, in the habeas context, that a complete breakdown in the adversarial process had occurred. Id., 560–61. Although *Cronic* has been appropriately applied in this manner, our state jurisprudence has recognized that *Cronic* must be interpreted narrowly and applied rarely. See *Taylor* v. *Commissioner of Correction*, 324 Conn. 631, 649, 153 A.3d 1264 (2017).

In the present case, the petitioner claims that Attorney D'Amato's failure to attend the presentence investigation interview constituted a complete breakdown in the adversarial process, as it effectively deprived him of counsel at a critical stage of his criminal proceeding. Thus, he argues that his claim should be reviewed under *Cronic*'s presumption of prejudice. As such, in order to determine whether *Cronic*'s presumption of prejudice applies in this case, we necessarily must determine whether the presentence investigation interview is a critical stage.

"The central question in determining whether a particular proceeding is a critical stage of the prosecution focuses on whether potential substantial prejudice to the [petitioner's] rights inheres in the . . . confrontation and the ability of counsel to help avoid that prejudice." (Internal quotation marks omitted.) *Gonzalez* v. *Commissioner of Correction*, supra, 308 Conn. 479–80. Connecticut courts have not yet considered whether a presentence investigation interview is a critical stage of a criminal proceeding. The petitioner urges this court to rely on the decision of the Vermont Supreme Court in *In re Carter*, 176 Vt. 322, 349, 848 A.2d 281 (2004), which held that presentence investigation interviews are a critical stage. In contrast, the respondent points to a plethora of case law, both state and federal, in which courts have either held that a presentence investigation interview in a noncapital case is not a critical stage or declined to determine that it is. See, e.g., *United States* v. *Archambault*, 344 F.3d 732, 736 n.4 (8th Cir. 2003) (noting that sixth amendment does not apply when defendant voluntarily participated in presentence investigation and that no court has found that sixth amendment right applies to routine presentence interviews); *United States* v. *Tyler*, 281 F.3d 84, 96 (3d Cir. 2002) (same); *United States* v. *Tisdale*, 952 F.2d 934, 939–40 (6th Cir. 1992) ("[b]ecause the probation officer

does not act on behalf of the prosecution . . . a presentence interview in a non-capital case is not a critical stage . . . .'' [internal quotation marks omitted]); *United States* v. *Hicks*, 948 F.2d 877, 885–86 (4th Cir. 1991) (sentencing judges exercise independent discretion in determining defendant's sentence and denial of counsel in this context is constitutionally insignificant); *United States* v. *Cortez*, 922 F.2d 123, 128 (2d Cir. 1990) (even assuming sixth amendment extends to presentence interview, sixth amendment not violated where defendant did not claim counsel was excluded from interview or that defendant was forced to proceed without counsel); *State* v. *Kauk*, 691 N.W.2d 606, 608–10 (S.D. 2005) (defendant's right to counsel not violated where counsel was absent from presentence interview); *People* v. *Cortijo*, 291 App. Div. 2d 352, 352, 739 N.Y.S. 2d 19 (presentence interview does not constitute stage of proceedings at which right to counsel attaches), leave to appeal denied, 98 N.Y.2d 674, 774 N.E.2d 228, 746 N.Y.S.2d 463 (2002).

The cases that recognize that the sixth amendment does not apply to presentence interviews place an emphasis on the voluntary nature of such interviews, the sentencing judge's independent discretion in sentencing, and the probation officer's role in sentence determination. *In re Carter*, supra, 176 Vt. 348, distinguished itself from many of these cases by pointing out that in the federal system, the probation officer is an employee of the judicial branch, while in the Vermont system, the probation officer who prepares the report is an employee of the executive branch. Id. The court reasoned that, unlike in the Vermont system, a probation officer in the federal system ''is insulated from political pressure and answers to no one but the sentencing judge.'' Id. Moreover, in concluding that presentence interviews are a critical stage of the sentencing process, *In re Carter* held that the right to counsel is not limited to adversary proceedings. Id. In reaching

this decision, *In re Carter* states that "no [United States] Supreme Court decision supports the rationale . . . that the right to counsel is limited to proceedings with an adversary character"; (internal quotation marks omitted) id., 346; and notes that federal case law's reliance on *Kirby* v. *Illinois*, 406 U.S. 682, 690, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972), for the proposition that a proceeding must have an adversarial character to be a critical stage is misplaced. *In re Carter*, supra, 346 n.4.

We are not persuaded that the right to counsel at a critical stage extends to nonadversarial proceedings. According to *Kirby* v. *Illinois*, supra, 406 U.S. 689–90, a critical stage of a criminal proceeding, or one in which the sixth amendment right to counsel applies, occurs when "the defendant finds himself faced with the prosecutorial forces of an organized society, and immersed in the intricacies of substantive and procedural criminal law." Id., 689. On the basis of this language, it necessarily follows that a proceeding must be adversarial in nature in order to be considered a critical stage.

Courts that have considered the issue of whether a defendant's sixth amendment right to counsel applies during a presentence interview have concluded that, "[b]ecause [a] probation officer does not act on behalf of the prosecution . . . a presentence interview in a non-capital case is not a critical stage within the meaning of *Kirby*." (Internal quotation marks omitted.) *United States* v. *Tisdale*, supra, 952 F.2d 939; *United States* v. *Woods*, 907 F.2d 1540, 1543 (5th Cir. 1990), cert. denied, 498 U.S. 1070, 111 S. Ct. 792, 112 L. Ed. 2d 854 (1991); *United States* v. *Jackson*, 886 F.2d 838, 844–45 (7th Cir. 1989); see also *In re Carter*, supra, 176 Vt. 346. As such, whether a presentence interview is an adversarial proceeding and, thus, a critical stage, largely appears to rest on the role of the probation officer in conducting the interview and whether the officer acts independently of the prosecuting authority. In Connecticut, trial courts enlist the aid of probation officers to

investigate and make a report prior to sentencing. See *State* v. *Nacsin*, 23 Conn. Supp. 214, 218–19, 180 A.2d 643 (1962) ("The trial court properly enlisted the aid of the family relations officer to make an investigation and report prior to the imposition of sentence. . . . There is a wide field open to the trial judge in obtaining information, after conviction, relevant to mitigation or aggravation of the seriousness of the offense." [Citation omitted; internal quotation marks omitted.). "The sole purpose [of a presentence investigation] is to enable the court, within limits fixed by statute, to impose an appropriate penalty, fitting the offender as well as the crime." (Internal quotation marks omitted.) *State* v. *Patterson*, 236 Conn. 561, 574, 674 A.2d 416 (1996). Moreover, under both federal and Connecticut law, "*a probation officer acts as an arm of the court*" in preparing and submitting presentence reports. (Internal quotation marks omitted.) *Peay* v. *Ajello*, 470 F.3d 65, 69 (2d Cir. 2006).

On the basis of the foregoing, we conclude that there was no denial of the petitioner's sixth amendment right to counsel during his presentence investigation interview. We agree with the weight of authority that holds that a presentence investigation interview is not a critical stage of a criminal proceeding because, as in the federal system, a Connecticut probation officer is an extension of the court and not an agent of the government. Compare *United States* v. *Jackson*, supra, 886 F.2d 844, with *Peay* v. *Ajello*, supra, 470 F.3d 69. Moreover, like federal courts, Connecticut courts exercise broad, independent discretion in imposing a sentence. See *State* v. *Patterson*, supra, 236 Conn. 575 ("[c]ourts . . . are afforded equally broad discretion in imposing a sentence when a [presentence investigation report is] provided"); *State* v. *Nacsin*, supra, 23 Conn. Supp. 219 ("[t]he trial court was not obliged to follow the recommendation of the family relations officer contained in the report concerning the sentences to be imposed by

the court, and the failure to do so is not an abuse of discretion"). As such, we conclude that the presentence investigation interview is not a critical stage of a criminal proceeding, and, thus, do not presume prejudice as a result of Attorney D'Amato's absence from the petitioner's interview.[12]

Accordingly, because we have concluded that the presentence investigation interview is not a critical stage of the petitioner's criminal proceeding to which the petitioner's sixth amendment right to counsel applies, he is not entitled to relief for any alleged ineffectiveness of his trial counsel during the interview.

The judgment is affirmed.

In this opinion the other judges concurred.

BETSY SCALORA *v.* JEFFREY SCALORA
(AC 40641)

Lavine, Keller and Bishop, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court, and the plaintiff cross appealed, from the judgment of the trial court resolving several of the parties' postdissolution motions. The dissolution judgment had incorporated a settlement agreement of the parties, which contained a nonwaiver clause and required the defendant to pay the plaintiff periodic alimony, to pay for certain expenses related to the education and activities of the parties' children, and to maintain at his own expense an insurance policy on his life for the benefit of the plaintiff and the children. The plaintiff filed a motion for contempt, alleging, inter alia, that the defendant had failed to pay the court-ordered alimony and to maintain a life insurance policy, and sought reimbursement for, inter alia, certain expenses incurred for the benefit of the parties' children. The defendant filed three special

[12] Our rules of practice also indicate that counsel's presence at a presentence investigation interview is permitted, not required; see Practice Book § 43-5; and "[o]ur case law establishes . . . that a failure to comply with procedures set forth under the rules of practice or the statutes relating to presentence reports does not necessarily, in and of itself, establish a violation of due process." *State* v. *Parker*, 295 Conn. 825, 846, 992 A.2d 1103 (2010).

defenses, alleging that the motion for contempt was barred by the doctrines of laches and equitable estoppel, and that the plaintiff had waived her right to proceed with the motion. Subsequently, the defendant filed a motion for contempt, alleging that the plaintiff had improperly claimed their younger daughter as a dependent for federal income tax purposes, in violation of the settlement agreement. The defendant also filed a motion for an order requesting that the court give him credit toward any sums found owing to the plaintiff for one half of the cost he previously had paid in connection with the wedding of the parties' older daughter. Following a hearing on the motions, the trial court issued a memorandum of decision rejecting the defendant's defenses and granting in part the plaintiff's motion for contempt with respect to the defendant's nonpayment of alimony and failure to maintain life insurance. The court denied the remainder of the plaintiff's motion for contempt but issued remedial orders requiring the defendant to reimburse the plaintiff for, inter alia, the cost incurred to maintain life insurance coverage on the defendant and for certain expenses related to the education and activities of the parties' children. The court granted in part the defendant's motion for contempt and held the plaintiff in contempt for improperly claiming the dependency exceptions, but denied the defendant's motion for an order claiming credit for one half of the cost of the wedding. *Held*:

1 The defendant could not prevail on his claim that the trial court abused its discretion in rejecting his defenses of laches, equitable estoppel, and waiver without first fully considering the elements of each; that court properly determined that the nonwaiver provision in the parties' separation agreement, which provided that either party's failure to seek enforcement of the agreement would not constitute a waiver of his or her right to do so at any later time, barred all of the defendant's defenses, as that provision entitled the plaintiff to file her motion for contempt at any time without regard to the issue of delay, and the defendant failed to make any claim that the nonwaiver provision was unenforceable or that the parties either occupied unequal bargaining positions or engaged in sharp dealing.

2. The trial court improperly took judicial notice of the reasonable cost of clothing in ordering the defendant to reimburse the plaintiff for expenses she had incurred relating to the parties' younger daughter: although the approximate price range of various categories of clothing may be common knowledge and the actual price of specific articles of clothing may be readily ascertainable, the reasonableness of an allowance for the periodic purchase of such items cannot be deemed so well known that evidence to prove it is unnecessary, as the reasonableness of an allowance for clothing depends on a wide range of factors and is subject to reasonable dispute, and, therefore, whether a particular clothing allowance is reasonable is not within the knowledge of people generally in the ordinary course of human experience and was not the proper subject matter of judicial notice, especially without giving the parties

an opportunity to be heard; moreover, even if it was improper for the court to take judicial notice of the cost of a meal plan at the university attended by the parties' daughter at a point in time outside of her attendance dates, that fact played no role in the court's determination of the defendant's food expense arrearage and could not have prejudiced the defendant.

3. The trial court did not abuse its discretion in denying the defendant's motion for an order seeking credit toward the claimed arrearages for one half of the cost of the wedding of the parties' older daughter; that court's finding that the plaintiff lacked substantial income and therefore had not agreed to share the cost of the wedding was not clearly erroneous, as the plaintiff testified that she had been struggling with significant debt around the time of the wedding and that she was in no position to pay for one half of the cost of the wedding given her annual income at the time, which was the same amount as the cost of the wedding venue alone, and the defendant's claim that the plaintiff induced him to believe that she would credit her share of the wedding toward what the defendant owed her was contradicted by the plaintiff's testimony that she never agreed to allow the defendant to do something else in lieu of making support payments and never agreed to waive any of the defendant's obligations under the separation agreement.

4. The trial court abused its discretion in finding the defendant in contempt for failing to maintain a life insurance policy at his own expense in accordance with the parties' settlement agreement; although the evidence demonstrated that the plaintiff had purchased, with the defendant's consent, an insurance policy on his life when the defendant's own policy had lapsed in 2010, the record was not clear whether the defendant also had maintained his own life insurance policy during the relevant postjudgment period or whether the policy purchased by the plaintiff had supplemented or replaced the defendant's own policy, the trial court expressly acknowledged in its memorandum of decision that there were unanswered questions with regard to the defendant's maintenance of a life insurance policy, and, therefore, the court could not have properly concluded that the plaintiff had sustained her burden of proving by clear and convincing evidence that the defendant had failed to maintain a life insurance policy at his own expense in violation of the settlement agreement.

5. This court declined to review the defendant's claim that the trial court abused its discretion by establishing a schedule for making payments on the arrearage without first obtaining evidence regarding his ability to pay; the parties focused almost entirely on the merits of the motions at the hearing and did not present any evidence regarding their financial circumstances at that time, and neither party filed an updated financial affidavit or made any objection at the time of the orders that the court had not considered their financial circumstances.

6. The defendant could not prevail on his claim that the trial court abused its discretion in declining to award him attorney's fees in connection with his motion for contempt; the defendant's sole argument was that he should be awarded attorney's fees if the plaintiff prevailed in her cross appeal on her claim for attorney's fees, and his claim necessarily failed in light of this court's determination that the plaintiff's claim was not reviewable.

The plaintiff's claims, raised in her cross appeal, that the trial court abused its discretion in declining to award her attorney's fees in connection with her motion for contempt and challenging the trial court's interpretation of a certain provision of the parties' separation agreement were not reviewable, the plaintiff having failed to brief the claims adequately.

Argued December 4, 2018–officially released May 7, 2019

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Hon. John D. Brennan*, judge trial referee; judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Hon. Gerard I. Adelman*, judge trial referee, granted in part the plaintiff's motion for contempt and issued certain remedial orders, and granted in part the defendant's motion for contempt and motion for order, and the defendant appealed and the plaintiff cross appealed to this court. *Reversed in part*; *further proceedings*.

John A. Barbieri, with whom was *Claudia R. Barbieri*, for the appellant-cross appellee (defendant).

Jeremiah J. Morytko, for the appellee-cross appellant (plaintiff).

Opinion

BISHOP, J. In this marital dissolution action, the defendant, Jeffrey Scalora, appeals from the judgment of the trial court resolving several of the parties' postdissolution motions. The defendant claims that the court improperly (1) rejected his defenses to the motion for contempt filed by the plaintiff, Betsy Scalora; (2) took

judicial notice of certain facts not in evidence in ordering him to reimburse the plaintiff for certain education related expenses incurred for the parties' children;[1] (3) denied his motion for an order awarding him credit toward the unreimbursed expenses; (4) found him in contempt for failing to maintain a life insurance policy; (5) ordered him to pay certain sums found owing to the plaintiff without taking into consideration his ability to pay; and (6) declined to award him attorney's fees in relation to his motion for contempt.

The plaintiff cross appeals from the court's judgment, claiming that the court (1) abused its discretion in declining to award her attorney's fees and costs in relation to her motion for contempt and (2) improperly implied a reasonableness standard into the parties' separation agreement, which had been incorporated into the judgment of dissolution. We agree with the defendant's second and fourth claims and decline to address the merits of the plaintiff's claims due to her failure to brief them adequately. Accordingly, we affirm in part and reverse in part the judgment of the trial court.

The following procedural history is relevant to our resolution of the appeal and cross appeal. The court, *Hon. John D. Brennan*, judge trial referee, dissolved the parties' marriage on February 8, 2008. At the time, the parties' two daughters were eighteen and fifteen years old, respectively. The court found that the parties' marriage had broken down irretrievably and accepted, as fair and equitable, their written separation agreement, which it incorporated by reference into the dissolution judgment.

Pursuant to the separation agreement, the defendant was required, inter alia, to pay the plaintiff periodic

[1] In the statement of issues in his principal appellate brief, the defendant asserts, as two separate claims of error, that the court abused its discretion by (1) taking judicial notice of irrelevant facts and (2) failing to give the parties notice of its intent to take judicial notice. For ease of discussion, we address these claims together.

alimony in a prescribed amount, to pay for the plaintiff's medical insurance premiums for a period of time, to pay for certain activity and education related expenses for the children, and to maintain, at his own expense, an appropriate life insurance policy on his life for the benefit of the plaintiff and the children. The agreement also contained a nonwaiver clause providing that either party's failure to seek enforcement of the agreement would not constitute a waiver of his or her right to do so at a later time.

On September 16, 2015, the plaintiff filed a motion for contempt alleging that the defendant had failed to satisfy his obligations under the separation agreement.[2] As clarified in her posthearing brief, the plaintiff claimed, inter alia, unpaid alimony for the period from 2010 up until her remarriage in 2015, reimbursement for her medical insurance premiums, reimbursement for life insurance premiums for a policy she had taken out on the defendant's life from 2010 through 2014, and reimbursement for various activity and education related costs she had incurred for the benefit of the children between 2010 and 2014.

On November 29, 2016, the defendant filed three defenses to the plaintiff's motion for contempt. First, the defendant alleged that the plaintiff was guilty of laches by inexcusably waiting until 2015 to file a motion for contempt for arrearages that had begun to accrue in 2010, thereby prejudicing him. Second, the defendant alleged that the plaintiff was equitably estopped from pursuing her contempt motion because he had relied to his detriment on the plaintiff's forbearance. Finally, the defendant alleged that the plaintiff intentionally had waived her right to enforce the dissolution judgment by failing to do so earlier.

[2] More specifically, the plaintiff alleged nonpayment of alimony, failure to maintain life insurance, and failure to pay the children's education related costs, in the total amount of $174,110.

The matter was heard by the court, *Hon. Gerard I. Adelman*, judge trial referee, over the course of four days between February and May, 2017. Also, on April 20, 2017, the defendant filed a motion for contempt alleging that the plaintiff had improperly claimed the younger daughter as a dependent for federal income tax purposes for the years 2009, 2011, and 2013.[3] The defendant also filed a motion for an order requesting, inter alia, that the court give him credit for one half of the cost of the older daughter's 2014 wedding toward any sums found owing to the plaintiff. By consent of the parties, the court heard the defendant's two motions as part of the proceeding on the plaintiff's motion for contempt on May 9, 2017.

On June 27, 2017, the court issued a memorandum of decision responding to all of the parties' pending motions. The court rejected the defendant's defenses and granted the plaintiff's motion for contempt with respect to the defendant's nonpayment of alimony and failure to maintain life insurance. The court denied the remainder of the plaintiff's motion but issued remedial orders requiring the defendant to reimburse the plaintiff for the cost of her medical insurance premiums, certain education related expenses for the younger daughter, and the children's activity related expenses. As to the defendant's motions, the court found the plaintiff in contempt for improperly claiming the dependency exemptions. The court denied his claim for credit for one half of the cost of the older daughter's wedding.

This appeal and cross appeal followed. Additional procedural history will be set forth as necessary.

[3] The parties' separation agreement provided that, when only one child could be claimed as a dependent, the defendant was entitled to claim the dependency exemption in odd numbered tax years, and the plaintiff was entitled to claim it in even numbered years.

I

THE DEFENDANT'S APPEAL

A

The defendant first claims that the court abused its discretion in rejecting his defenses without having fully considered the elements of each. Because the court properly determined that the defendant's defenses were barred by the nonwaiver clause of the parties' separation agreement, any inadequacy in the court's consideration of the elements of each defense is inconsequential to our analysis. We therefore reject this claim.

Initially, we set forth the applicable standard of review. Ordinarily, the determination of whether a plaintiff's claim is barred by the doctrines of laches, equitable estoppel, or waiver is a question of fact and, therefore, subject to the clearly erroneous standard of review. See *Kasowitz* v. *Kasowitz*, 140 Conn. App. 507, 513, 59 A.3d 347 (2013); *Culver* v. *Culver*, 127 Conn. App. 236, 244–45, 17 A.3d 1048, cert. denied, 301 Conn. 929, 23 A.3d 724 (2011); *Ford* v. *Ford*, 72 Conn. App. 137, 141–42, 804 A.2d 215 (2002). In the present case, however, the court relied on the legal effect of the nonwaiver clause of the parties' separation agreement in rejecting the defendant's defenses. The parties do not claim, and we do not find any basis for concluding, that this clause is ambiguous. Consequently, our standard of review is plenary. See *Dow-Westbrook, Inc.* v. *Candlewood Equine Practice, LLC*, 119 Conn. App. 703, 711–12, 989 A.2d 1075 (2010) ("[T]he interpretation and construction of a written contract present only questions of law, within the province of the court . . . so long as the contract is unambiguous and the intent of the parties can be determined from the agreement's face. . . . [T]he construction and legal effect of the contract [is] a question of law for the court." [Internal quotation marks omitted.]).

Before discussing the legal effect of the nonwaiver clause in the present case, we briefly review the law governing the defenses of laches, equitable estoppel, and waiver. "Laches is an equitable defense that consists of two elements. First, there must have been a delay that was inexcusable, and, second, that delay must have prejudiced the defendant." (Internal quotation marks omitted.) *Kasowitz* v. *Kasowitz*, supra, 140 Conn. App. 513. "Equitable estoppel is a doctrine that operates in many contexts to bar a party from asserting a right that it otherwise would have but for its own conduct. . . . [E]stoppel always requires proof of two essential elements: the party against whom estoppel is claimed must do or say something calculated or intended to induce another party to believe that certain facts exist and to act on that belief; and the other party must change its position in reliance on those facts, thereby incurring some injury." (Citation omitted; internal quotation marks omitted.) *Culver* v. *Culver*, supra, 127 Conn. App. 244. "Waiver is the intentional relinquishment of a known right. . . . Waiver need not be express, but may consist of acts or conduct from which a waiver may be implied. . . . In other words, waiver may be inferred from the circumstances if it is reasonable to do so." (Internal quotation marks omitted.) *Carpender* v. *Sigel*, 142 Conn. App. 379, 388, 67 A.3d 1011 (2013).

In the present case, not only did the parties' separation agreement expressly foreclose waiver by the mere passage of time, it affirmatively granted to each party the right to enforce the dissolution judgment *at any later time*. Pursuant to paragraph 15.1 of the agreement, "[n]o failure to assert any right, or to enforce any provision of [the] [a]greement shall operate as a waiver of such right or provision, *and either party shall be fully privileged to assert or enforce such right or provision at any later time*." (Emphasis added.) On the basis of

the parties' express agreement, the plaintiff was entitled to file her motion for contempt at any time without regard to the issue of delay. Consequently, the defendant's defense of laches necessarily fails.

The defendant's equitable estoppel and waiver defenses similarly must fail. As this court has observed, albeit in the context of commercial agreements, an enforceable nonwaiver clause "bar[s] the application of waiver and estoppel defenses unless a party establishes the existence of unequal bargaining positions or 'sharp dealing.' See *Christensen* v. *Cutaia*, [211 Conn. 613, 619–20, 560 A.2d 456 (1989)]; *S.H.V.C., Inc.* v. *Roy*, [188 Conn. 503, 507, 450 A.2d 351 (1982)]; see also *Webster Bank* v. *Oakley*, 265 Conn. 539, 549–51, 830 A.2d 139 (2003), cert. denied, 541 U.S. 903, 124 S. Ct. 1603, 158 L. Ed. 2d 244 (2004)." *Milford Paintball, LLC* v. *Wampus Milford Associates, LLC*, 137 Conn. App. 842, 853 n.8, 49 A.3d 1072 (2012). The defendant does not contend that the nonwaiver clause in the present case is unenforceable or that the parties either occupied unequal bargaining positions or engaged in "sharp dealing," and the court made no such findings.[4] Consequently, the defendant's waiver and estoppel defenses are barred.

B

The defendant next claims that the court improperly took judicial notice of certain facts in ordering him to reimburse the plaintiff for education related expenses incurred for the benefit of the younger daughter.[5] We agree.

[4] Although the defendant acknowledges in his appellate brief the existence of the nonwaiver clause, he fails to analyze its effect on the viability of his defenses.

[5] The defendant appears to challenge the taking of judicial notice as it pertains to the education related expenses of both children. The court, however, ultimately found that the defendant's transfer of funds to the older daughter "more than covered" her expenses during the relevant time period. The court therefore denied the plaintiff's request for reimbursement of the older daughter's education related expenses. Because the court resolved

We begin by stating our standard of review. "A trial court's determination as to whether to take judicial notice is essentially an evidentiary ruling, subject to an abuse of discretion standard of review. . . . In order to establish reversible error, the defendant must prove both an abuse of discretion and a harm that resulted from such abuse. . . . In reviewing a trial court's evidentiary ruling, the question is not whether any one of us, had we been sitting as the trial judge, would have exercised our discretion differently . . . . Rather, our inquiry is limited to whether the trial court's ruling was arbitrary or unreasonable." (Citation omitted; footnote omitted; internal quotation marks omitted.) *In re Natalie J.*, 148 Conn. App. 193, 207, 83 A.3d 1278, cert. denied, 311 Conn. 930, 86 A.3d 1056 (2014).

"The doctrine of judicial notice excuses the party having the burden of establishing a fact from introducing formal proof of the fact. Judicial notice takes the place of proof." (Internal quotation marks omitted.) *Jacobs* v. *Healey Ford-Subaru, Inc.*, 231 Conn. 707, 730 n.24, 652 A.2d 496 (1995). "There are two types of facts considered suitable for the taking of judicial notice: those [that] are common knowledge and those [that] are capable of accurate and ready demonstration. . . . Courts must have some discretion in determining what facts fit into these categories. It may be appropriate to save time by judicially noticing borderline facts, so long as

this matter in the defendant's favor, he cannot claim to be aggrieved by any errors the court may have made in calculating the older daughter's expenses. See *In re Allison G.*, 276 Conn. 146, 158, 883 A.2d 1226 (2005) ("As a general rule, a party that prevails in the trial court is not aggrieved. . . . Moreover, [a] party cannot be aggrieved by a decision that grants the very relief sought. . . . Such a party cannot establish that a specific personal and legal interest has been specially and injuriously affected by the decision." [Internal quotation marks omitted.]). Consequently, to the extent the defendant's claim on appeal implicates issues relating to the older daughter in particular, he lacks standing to challenge, and we lack subject matter jurisdiction to review, that portion of the claim. See id. Accordingly, we limit our review to the court's taking of judicial notice as it relates to the younger daughter.

the parties are given an opportunity to be heard." (Citation omitted; internal quotation marks omitted.) *Ferraro* v. *Ferraro*, 168 Conn. App. 723, 732, 147 A.3d 188 (2016); see Conn. Code Evid. § 2-1.[6] "Notice to the parties [however] is not always required when a court takes judicial notice. Our own cases have attempted to draw a line between matters susceptible of explanation or contradiction, of which notice should not be taken without giving the affected party an opportunity to be heard . . . and matters of established fact, the accuracy of which cannot be questioned, such as court files, which may be judicially noticed without affording a hearing." (Internal quotation marks omitted.) *Ferraro* v. *Ferraro*, supra, 732; see also Conn. Code Evid. § 2-2 (b).[7]

The following additional procedural history is relevant to our resolution of the defendant's claim. Pursuant to paragraph 3.3 of the separation agreement, the defendant was required to pay for "the post-secondary education in college or for any further learning and training beyond high school for each child, including tuition, room, board, books, fees, clothes and necessary transportation and travel costs." During the proceeding on her motion for contempt, the plaintiff argued that this provision clearly and unambiguously required the defendant to pay, without limitation, for any and all of the children's food and clothing expenses incurred while they were at college or graduate school. The court

[6] Section 2-1 of the Connecticut Code of Evidence provides in relevant part: "A court may, but is not required to, take judicial notice of matters of fact . . . . A judicially noticed fact must be one not subject to reasonable dispute in that it is either . . . within the knowledge of people generally in the ordinary course of human experience, or . . . generally accepted as true and capable of ready and unquestionable demonstration. . . ."

[7] Section 2-2 (b) of the Connecticut Code of Evidence provides: "The court may take judicial notice without a request of a party to do so. Parties are entitled to receive notice and have an opportunity to be heard for matters susceptible of explanation or contradiction, but not for matters of established fact, the accuracy of which cannot be questioned."

disagreed and, instead, imported the notion that such expenses, if subject to reimbursement, must have been reasonable when incurred.

As to food expenses, the court first determined that, in light of the fact that the younger daughter had been enrolled in a meal plan offered by her university, the provision was ambiguous as to whether the use of the term "board" encompassed food purchased outside the meal plan. The court concluded that, "construing the language of the separation agreement in a 'sensible manner' . . . the [defendant] should not be required to reimburse the [plaintiff] for each and every grocery purchase." (Citation omitted.) The court further noted, however, that there may have been instances where, although at university, the younger daughter was not able to utilize her meal plan and therefore required funds with which to purchase food elsewhere, such as while traveling to and from school or when her commitments as part of the university's soccer team prevented her from accessing the campus dining hall. The court found that, "[i]n these situations, it would appear that the [defendant] could reasonably be expected to pay for [her] food pursuant to the terms of the separation agreement."

As to clothing expenses, the court determined that paragraph 3.3 was ambiguous as to whether the "clothes" referenced therein were limited to items normally associated with college living, as opposed to, for example, formal wear to attend family weddings. Construing the relevant contract language in a "fair and reasonable" manner, the court concluded that the defendant's obligation was limited to providing each child "with a reasonable wardrobe for her educational needs."

Having construed paragraph 3.3 as limiting the defendant's obligation to *reasonable* food and clothing costs,

the court next sought to determine what such costs would be. The court first noted that the plaintiff had not offered any evidence on this issue; rather, she had only presented invoices for what she had actually spent.[8] The record reflects, as well, that neither party requested that the court take judicial notice of what might be reasonable expenditures for food and clothing for the relevant time periods.[9] Nevertheless, the court decided that, in order "[t]o reach an equitable resolution of the conflict and in light of the lack of evidence as to what reasonable costs might be for food and clothing, the court [would] take judicial notice as to what such costs might be."[10] The court neither gave the parties notice of its intention to take judicial notice nor provided them with an opportunity to be heard on the subject.

Regarding the younger daughter's food expenses while on campus, the court took judicial notice of the

[8] The plaintiff presented several hundred sales receipts evidencing her actual food and clothing related expenditures, the majority of which were admitted as full exhibits.

[9] At the hearing on April 12, 2017, the court indicated that it was considering applying a "reasonableness test" to the plaintiff's claim for reimbursement of clothing expenses. In an interlocutory order issued later that day, the court requested that the parties offer evidence "as to what each party might consider a reasonable sum to be spent on clothing on a monthly or annual basis." Neither party offered any such evidence, although the defendant, in his posthearing brief, did refer the court to the Internal Revenue Service's 2012 national standards for food, clothing and other items, which, according to the defendant, lists the clothing expense for a family of three as $193 per month.

[10] In support of its decision to decide this issue despite the plaintiff's failure to present evidence regarding reasonableness, the trial court cited this court's statement in *Commissioner of Transportation* v. *Larobina*, 92 Conn. App. 15, 32, 882 A.2d 1265, cert. denied, 276 Conn. 931, 889 A.2d 816 (2005), that, "[w]hen faced with the constraints of incomplete information, a court cannot be faulted for fashioning an award as equitably as possible under the circumstances." We note that, unlike in *Larobina*, the trial court in the present case was presented with a surfeit of evidence regarding the plaintiff's actual food and clothing related expenditures; see footnote 8 of this opinion; but determined that many of these expenditures were unreasonable.

cost of a typical meal plan for the 2016–17 academic year at the University of Pennsylvania,[11] which she had attended from 2010 to 2014.[12] As to her food expenses when off campus, such as when traveling to and from school or while engaged in soccer related activities, the court found that "the sum of $75 weekly as a supplement is reasonable . . . ." As to food expenses when she remained on campus between semesters for athletics, the court found that "perhaps another $600" would be reasonable. As for clothing expenses, the court found that "a clothing allowance of $200 per month [for each child] is . . . more than adequate . . . ." The court did not state the evidentiary basis for these findings. Presumably, the court took judicial notice of these "facts" as matters of common knowledge and, consequently, perceived no need to explicate the basis for its findings. See *Nichols* v. *Nichols*, 126 Conn. 614, 621, 13 A.2d 591 (1940) ("Most matters which the court may notice fall into one of two classes, those which come to the knowledge of men generally in the course of the

[11] Specifically, the court noted that a search of the university's website had disclosed a dining cost of $5086 for the 2016–17 academic year.

[12] The defendant asserts in his appellate brief that the court also took judicial notice of educational expenses at the University of Connecticut and argues that this was improper because neither child attended that university. The defendant misconstrues the court's memorandum of decision. In its decision, the court stated that it could take judicial notice of the cost of a typical college meal plan. In support of this proposition, the court quoted parenthetically from the decision in *Morris* v. *Morris*, Superior Court, judicial district of Fairfield, Docket No. FA-01-0384330-S (May 30, 2006), in which the court stated that it had taken "judicial notice of the published annual rates for undergraduate tuition, fees, room and board for a full-time, in-state student at the University of Connecticut as published on the official [university] website . . . ." It is clear in this context that the court in the present case was relying on *Morris* for a general principle of law—not for any specific, judicially noticed facts. Indeed, the court went on to note that the younger daughter had attended the University of Pennsylvania and proceeded to enumerate the various fees and expenses published on that university's website. Thus, the defendant's argument that the court improperly took judicial notice of the University of Connecticut's fees lacks a factual foundation, and we therefore reject it.

ordinary experience of life, *and are therefore in the mind of the trier*, or those which are generally accepted by mankind as true and are capable of ready demonstration by a means commonly recognized as authoritative. . . . *As to matters falling within the first class, obviously there is no occasion to introduce evidence.* As to those falling within the second class, it may, in some cases, be the duty of counsel to provide the court with a means of ascertaining them . . . ." [Citation omitted; emphasis added.]).

On the basis of these judicially noticed "facts,"[13] the court calculated the younger daughter's annual food expenses beyond her meal plan to be $3900 and her annual clothing expenses to be $1680.[14] Crediting the defendant for funds he had provided directly to the younger daughter,[15] the court determined the defendant's arrearage for food and clothing expenses from 2010 through 2015 to be $13,915.[16]

The defendant first claims that the court abused its discretion in taking judicial notice of the cost of a meal plan at the University of Pennsylvania. The defendant

[13] The court also took judicial notice of the length of each semester at the University of Pennsylvania for the 2017–18 academic year, finding it to be "approximately eighteen weeks, including fall and spring break periods."

[14] Specifically, the court determined that the younger daughter's "food allowance above and beyond the meal plan provided would be approximately $1350 a semester, considering the $75 weekly allowance for the eighteen week semester schedule, plus perhaps another $600 to cover food between semesters when school was not in session and when the daughter remained at college for athletic reasons. That would total approximately $2790 a semester for food and clothing, or $5580 each year." The court did not indicate why it had limited its determination of her food allowance to the cost beyond her meal plan, but the plaintiff does not claim in her cross appeal that this finding was in error.

[15] Specifically, the court found that the defendant had provided her $14,755 in 2010; $100 in 2011; $2920 in 2012; $3645 in 2013; $2220 in 2014; and $5100 in 2015.

[16] Specifically, the court determined that, "[f]or calendar year 2010, the defendant would have overpaid and owes nothing, but for 2011, he would owe $5480; for 2012, $2660; for 2013, $1935; for 2014, $3360; and for 2015, $480." (Footnote omitted.)

argues that it was improper for the court to take judicial notice of the dining cost during the 2016–17 academic year because the younger daughter had attended the university between 2010 and 2014, when such costs were lower.[17] The defendant also argues that it was improper for the court to have taken judicial notice of this fact without first affording the parties an opportunity to be heard. This claim requires little discussion.

Even if we assume, arguendo, that it was improper for the court to take judicial notice of the cost of the university's meal plan at a point in time outside of the younger daughter's dates of attendance, the cost found by the court by judicial notice ultimately played no role in its determination of the defendant's food expense arrearage. In calculating the food expenses for which the defendant was responsible, the court expressly indicated that these expenses were for the cost of food *beyond the meal plan*. Although it is unclear why the court deemed it necessary to take judicial notice of the cost of a meal plan, it is clear that any error the court made in taking notice of it could not have prejudiced the defendant. Consequently, we reject this claim.

The defendant also claims that the court abused its discretion in taking judicial notice of the reasonable cost of clothing.[18] The defendant argues that the court

[17] The defendant asserts in his appellate brief that the trial court took judicial notice of educational expenses for the University of Pennsylvania for the calendar year 2011. The defendant is again mistaken. Nowhere in the court's memorandum of decision does the court mention educational expenses at the university in 2011. The court explicitly stated that it was taking judicial notice of "[t]he costs of attending the University of Pennsylvania for the 2016–2017 academic year . . . ." Thus, the defendant's argument that the court improperly took judicial notice of the university's 2011 dining cost lacks an evidentiary foundation.

[18] The defendant also appears to argue that the court abused its discretion in failing to take judicial notice of the Internal Revenue Service's 2012 national standards for clothing, to which the defendant had referred the court in his posthearing brief. See footnote 9 of this opinion. We disagree. The record reveals that at no time during the hearing did either party ask the court to take judicial notice of any facts. Section 2-1 (b) of the Connecticut Code of Evidence expressly provides that "[a] court may, *but is not*

improperly and arbitrarily found, as a matter of judicial notice, that a reasonable monthly clothing allowance for a college student is $200. He also argues that it was improper to notice such a "fact" without affording the parties notice and an opportunity to be heard.[19] We agree with the defendant's arguments in this regard.

That a particular clothing allowance is reasonable is neither "within the knowledge of people generally in

required to, take notice of matters of fact, in accordance with subsection (c) [of § 2-1]." (Emphasis added.); see also *De Luca* v. *Park Commissioners*, 94 Conn. 7, 10, 107 A. 611 (1919) ("The doctrine of judicial notice is not a hard and fast one. It is modified by judicial discretion. . . . Courts are not bound to take judicial notice of matters of fact. Whether they will do so or not depends on the nature of the subject, the issue involved and the apparent justice of the case." [Internal quotation marks omitted.]). Consequently, even if we assume, arguendo, that the defendant's reference to the national standards in his posthearing brief could be construed as a request for the court to take judicial notice of such standards, the court was under no obligation to do so. Accordingly, we reject the defendant's argument.

[19] Additionally, the defendant argues that the court abused its discretion by making unfounded assumptions regarding when the younger daughter was at school versus at home, as well as when and how often she was unable to utilize her meal plan. Although the defendant frames this issue as one of abuse of judicial discretion in taking judicial notice, in substance, he appears to assert a claim of evidentiary insufficiency, arguing that the plaintiff "failed to present any evidence as to dates or times when the children were home, traveling or at athletic events, except as general testimony as to school years." Contrary to the defendant's assertion, there was evidence presented during the proceeding beyond "general testimony as to school years." The plaintiff testified that, although the younger daughter normally came home for Christmas, "[s]ometimes she was on tournaments." The plaintiff also testified that, although the academic year at the University of Pennsylvania ends in May or June, she "stayed on campus, because she was an athlete" and participated in "soccer camps and whatnot." The plaintiff further testified that the younger daughter's schedule as a collegiate soccer player—which required her to train and practice daily, play in games, and travel—sometimes interfered with her ability to utilize her meal plan. More specifically, she testified that the younger daughter trained and studied until late hours, "and so, a lot of times the cafeteria wasn't available to her, and she wasn't able to get there on time and balance the schedule that she had, so I supplemented her food." According to the plaintiff, the younger daughter was involved in soccer throughout her time at the University of Pennsylvania. The defendant's analysis of this issue is devoid of any discussion of this or any other evidence and fails to include the applicable standard of review or citations to any legal authority. We therefore conclude that this issue is inadequately briefed, and, accordingly, we decline to review it. See *Estate of Rock* v. *University of Connecticut*, 323 Conn. 26, 33, 144 A.3d 420 (2016).

the ordinary course of human experience" nor "generally accepted as true and capable of ready and unquestionable demonstration." Conn. Code Evid. § 2-1 (c). Although the approximate price range of various categories of clothing may be common knowledge and the actual price of specific articles of clothing may be readily ascertainable, the reasonableness of an allowance for the periodic purchase of such items cannot be deemed "so well known that evidence to prove [it] is unnecessary . . . ." (Internal quotation marks omitted.) *Daley* v. *J.B. Hunt Transport, Inc.*, 187 Conn. App. 587, 591 n.5, A.3d (2019). Whether a given allowance is reasonable depends on a wide range of factors and is thus "subject to reasonable dispute." Conn. Code Evid. § 2-1 (c). For example, a person whose profession demands that she wear formal attire that tends to be more expensive than casual attire may reasonably require a relatively larger clothing allowance, but if she already has a substantial wardrobe of suitable clothing, such a large allowance may be unwarranted. Thus, what constitutes a reasonable clothing allowance is not the proper subject matter of judicial notice, "and certainly not without giving the parties an opportunity to be heard." *Moore* v. *Moore*, 173 Conn. 120, 122–23, 376 A.2d 1085 (1977) ("[w]hether a child's clothing expenses increase 'commensurately' with her age is open to argument" and, consequently, "[t]his 'fact' is one of which judicial notice should not be taken"); *Federal Deposit Ins. Corp.* v. *Napert-Boyer Partnership*, 40 Conn. App. 434, 442, 671 A.2d 1303 (1996) ("[W]hether a financial institution is comparable to another financial institution and, based on that comparison, whether a substituted interest rate is reasonable is not the proper subject matter of judicial notice. Those facts are in dispute and the burden is placed on the plaintiff to present evidence showing that substituted rate was reasonable."). Accordingly, we conclude

that the court abused its discretion by taking judicial notice of an amount it deemed to be a reasonable clothing allowance without giving the parties notice of its intention to do so.[20]

We further conclude that this error necessarily was harmful given the court's reliance on this improperly noticed "fact" in determining the amount of the clothing expense arrearage.

C

The defendant next claims that the court abused its discretion in denying his motion for an order seeking credit for one half of the cost of the older daughter's wedding toward the claimed arrearages. We disagree.

We begin by stating our standard of review. "[O]ur courts have recognized that the decision to allow or disallow credit lies within the sound discretion of the trial court." (Internal quotation marks omitted.) *Rostad*

[20] Although it would appear to be similarly improper for the court to take judicial notice of what it deemed to be a reasonable allowance for food beyond the younger daughter's meal plan, the defendant did not challenge this aspect of the court's decision in his principal appellate brief. On the issue of the food expense arrearage, the defendant initially raised only two claims. First, the defendant claimed, in part 2 (a) of his brief, that the court improperly "use[d] information from a school not attended . . . [for] years of attendance which are not the years of school attendance by the minor children." Second, he claimed that the "parties . . . were not notified by the trial court that it intended to use the resources it chose to take judicial notice of, *as set forth in* [*part*] *2*, *above*, and, therefore, were not given an opportunity to refute the information cited." (Emphasis added.) In his reply brief, the defendant claims for the first time that it was improper for the court to take judicial notice of what it deemed to be a reasonable food allowance for the younger daughter while at university between semesters. "[I]t is well established . . . that [c]laims . . . are unreviewable when raised for the first time in a reply brief. . . . Our practice requires an appellant to raise claims of error in his original brief, so that the issue as framed by him can be fully responded to by the appellee in its brief, and so that we can have the full benefit of that written argument." (Internal quotation marks omitted.) *Medeiros* v. *Medeiros*, 175 Conn. App. 174, 190 n.12, 167 A.3d 967 (2017). Accordingly, we decline to review this claim.

v. *Hirsch*, 148 Conn. App. 441, 464, 85 A.3d 1212 (2014), appeals dismissed, 317 Conn. 290, 116 A.3d 307 (2015); accord *Culver* v. *Culver*, supra, 127 Conn. App. 248. "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. . . . Furthermore, [t]he trial court's findings [of fact] are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . 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.) *Merk-Gould* v. *Gould*, 184 Conn. App. 512, 516–17, 195 A.3d 458 (2018).

The following additional procedural history is relevant to our resolution of this claim. At trial, the defendant testified that the plaintiff had told him that "she would be responsible for half of the wedding"—whatever the total cost was—and that she had offered to give him credit for this amount toward his obligations under the separation agreement. The plaintiff, however, testified that she never agreed to pay for any portion of the wedding, let alone share the cost of it with the defendant, and that she never agreed, whether in writing or otherwise, to waive any of the terms of the agreement. Moreover, the plaintiff testified that she had explicitly told the defendant that she could not afford to share the cost of the wedding. Specifically, she testified that, after she and the defendant met with the manager of a prospective wedding venue, which was projected

to cost approximately $25,000,[21] she told the defendant that there was "no way [she could] contribute to this." According to the plaintiff, the defendant responded, "I've got this. Don't worry. I just need to know how much."

In his posthearing brief, the defendant argued that the plaintiff had acknowledged responsibility for one half of the wedding expenses and that, had he known that the plaintiff planned to file a motion for contempt after the wedding, "he would have bargained [for] a reduction in the alimony and child support arrearage in lieu of payment for [the] plaintiff's share of the wedding."[22] On this basis, the defendant claimed a credit for one half of the $60,436 he had purportedly spent on the wedding. In rejecting this claim, the court noted the parties' conflicting testimony and found the plaintiff more credible. Specifically, the court found that, "[g]iven [the plaintiff's] lack of any substantial independent income, it does not seem very plausible that she would have agreed to share the cost of the wedding . . . ."

On appeal, the defendant first claims that the court's finding that the plaintiff lacked "substantial" income is clearly erroneous. We disagree. The plaintiff testified that she had been "struggling with significant debt" around the time of the wedding, having had to resort to credit cards and loans from her parents in order to meet the children's needs after the defendant's support payments became sporadic.[23] The plaintiff further testified that her annual income at the time had been only

[21] The plaintiff testified that the family of the older daughter's fiancé had been willing to pay for half of the cost of the wedding venue. The defendant testified, however, that he had paid the entire cost of the venue, which was in fact $29,260.

[22] We note the apparent inconsistency between this argument and the defendant's testimony that the plaintiff had, in fact, agreed to give him credit for the wedding costs.

[23] The plaintiff testified that she had borrowed a total of $65,000 from her parents between 2010 and 2015.

about $25,000 and that, consequently, she had not been in a position to pay for half of the wedding. Given this testimony and the fact that the cost of the wedding venue alone was anticipated to be $25,000, the court's finding that the plaintiff lacked "substantial" income to share the cost of the wedding is not clearly erroneous.[24]

The defendant also claims that the court abused its discretion "by making the assumption that [the] plaintiff could not credit" him for a share of the wedding costs. The defendant argues that the plaintiff had "intended to induce [him] to believe that she would credit [these costs toward] what he owed her, and [that he had] acted on that belief, to his detriment." We are not persuaded.

Preliminarily, we note the lack of any apparent connection between the defendant's argument and his particular abuse of discretion claim. Even if this connection were readily discernable, however, the claim still fails. Integral to the defendant's argument is his assertion that his "testimony, *which was undisputed by the plaintiff*, clearly articulate[d] that the plaintiff would allow

[24] The defendant also appears to argue that this finding does not reasonably support the court's conclusion—that it was unlikely the plaintiff would have agreed to share the cost of the wedding—because her lack of a substantial income does not necessarily mean that she was "not able to contribute *anything* to the cost of the wedding." (Emphasis in original.) Although there may be some logic to this argument, the defendant's position in the trial court was not that the plaintiff had agreed to contribute to the wedding expenses *to the extent she was financially able*; his position was that she had agreed to be responsible for *one half* of *whatever* he spent on the wedding. Given that the plaintiff's annual income at the time was only $25,000, and that the cost of the wedding venue alone was anticipated to be $25,000, it was reasonable for the court to deem it unlikely that she would have agreed to split the cost of the wedding. Moreover, "[t]he trial judge, as the finder of fact in this case, was the sole arbiter of credibility. [I]t is the exclusive province of the trier of fact to weigh the conflicting evidence, determine the credibility of witnesses and determine whether to accept some, all or none of a witness' testimony. . . . Thus, if the court's dispositive finding . . . was not clearly erroneous, then the judgment must be affirmed." (Internal quotation marks omitted.) *Levinson* v. *Lawrence*, 162 Conn. App. 548, 561–62, 133 A.3d 468 (2016).

a credit for the wedding expenses . . . .'' (Emphasis added.) This assertion is belied by the record. The plaintiff testified that she never agreed to allow the defendant to ''do something else in lieu of'' making support payments and never agreed to waive *any* of the defendant's obligations under the separation agreement. Consequently, this claim also fails.

D

The defendant next claims that the court abused its discretion in finding him in contempt for failing to maintain a life insurance policy at his own expense. The defendant argues that the court improperly determined that the plaintiff had sustained her burden of proof where the court noted in its memorandum of decision that the plaintiff's claim was ''not entirely clear'' and that there remained certain ''unanswered questions'' regarding the claim. We agree with the defendant.

''[O]ur analysis of a judgment of contempt consists of two levels of inquiry. First, we must resolve the threshold question of whether the underlying order constituted a court order that was sufficiently clear and unambiguous so as to support a judgment of contempt. . . . This is a legal inquiry subject to de novo review. . . . Second, if we conclude that the underlying court order was sufficiently clear and unambiguous, we must then determine whether the trial court abused its discretion in issuing, or refusing to issue, a judgment of contempt, which includes a review of the trial court's determination of whether the violation was wilful or excused by a good faith dispute or misunderstanding.

''The abuse of discretion standard applies to a trial court's decision on a motion for contempt. . . . A finding of contempt is a question of fact, and our standard of review is to determine whether the court abused its discretion in [finding] that the actions or inactions of the [party] were in contempt of a court order. . . . To

constitute contempt, a party's conduct must be wilful. . . . Noncompliance alone will not support a judgment of contempt. . . . A finding of indirect civil contempt must be supported by clear and convincing evidence. . . .

"[A] court may not find a person in contempt without considering the circumstances surrounding the violation to determine whether such violation was wilful. . . . [A] contempt finding is not automatic and depends on the facts and circumstances underlying it. . . . [I]t is well settled that the inability of [a] defendant to obey an order of the court, without fault on his part, is a good defense to the charge of contempt . . . . The contemnor must establish that he cannot comply, or was unable to do so. . . . It is [then] within the sound discretion of the court to deny a claim of contempt when there is an adequate factual basis to explain the failure." (Citations omitted; internal quotation marks omitted.) *Bolat* v. *Bolat*, 182 Conn. App. 468, 479–80, 190 A.3d 96 (2018).

The following additional procedural history is relevant to our resolution of this claim. Paragraph 6.1 of the separation agreement provides in relevant part: "By way of additional support, the [defendant] shall obtain and maintain in full force and effect, at his own expense, life insurance on his life in the amount of [$250,000], with the [plaintiff] as the primary beneficiary. The beneficiaries of this policy shall be designated as follows: $125,000 for the [plaintiff]; and $125,000 to a trust for the children with each child to receive an equal share of the life insurance benefit. Upon the youngest living child of the parties reaching the age of twenty-three . . . or completing a college education . . . whichever is the first to occur, the [defendant] may change the beneficiary of $125,000 of the total policy value. Upon the [defendant's] alimony obligation terminating, then

the [defendant] may change the beneficiary on the remaining $125,000. . . .''

During the hearing on her motion for contempt, the plaintiff testified that the defendant had failed to maintain his own life insurance policy, as required by paragraph 6.1 of the separation agreement, for the years 2010 through 2014. She testified that the defendant had admitted to her that he had not complied with this requirement and that, consequently, she took out her own policy on the defendant's life, with his consent.[25] According to the plaintiff, she paid $165.72 for a partial year of coverage in 2010 and then $662.88 annually for the succeeding four years, and the defendant never reimbursed her for any of it. The plaintiff also testified that she had taken out a loan in order to pay for the policy and that she had paid $375 per year in interest on the loan.

During cross examination, the defendant initially appeared not to dispute that he had failed to maintain his own life insurance policy. When asked whether he had maintained the $250,000 policy specified in the separation agreement, the defendant responded that this had been the plaintiff's responsibility and that he had cooperated with her in obtaining the policy by allowing his blood to be drawn. After later conceding that it had been his responsibility under the agreement to maintain an appropriate policy, the defendant appeared to reverse course and suggest that he had, indeed, purchased such policy. More specifically, when again asked whether he recalled ever having purchased the requisite $250,000 policy, the defendant responded, ''[g]reater than that.''

In its memorandum of decision, the court found that ''the defendant [had] acknowledged that the policy he

[25] More specifically, the plaintiff testified that she had told the defendant that he was supposed to be paying for a life insurance policy but that she would pay for it if he would cooperate with her in obtaining the policy.

had at the time of the dissolution of the marriage lapsed in 2010, and that the plaintiff [had] purchased a substitute policy at her expense." The court further found, however, that the plaintiff's claim was "not entirely clear," noting that the defendant had testified that he had "maintained life insurance above the required amount throughout the postjudgment period"[26] but had "offered no specifics [and had admitted that] he allowed the plaintiff to purchase a policy on his life as well." More specifically, the court stated: "It is not entirely clear from the testimony and evidence whether [the plaintiff's] policy supplemented [the defendant's] coverage or was a replacement. If it was a replacement policy, for how long was it necessary if the defendant also had life insurance coverage?" The court then concluded that, "[g]iven some of the unanswered questions on this issue, [the] reduced amount [claimed in the plaintiff's posthearing brief of $2817.24] is a fair claim."[27] Without any further discussion, the court held that "the plaintiff [had] met her burden of proof for a finding of contempt."

We agree with the defendant that the court improperly concluded that the plaintiff had met her burden of proof. Although the plaintiff's motion for contempt did not specify the manner in which the defendant had allegedly violated paragraph 6.1, it is apparent from her

[26] We note that there is no evidence in the record indicating *when* the defendant supposedly purchased this policy. The only reasonable interpretation of the defendant's testimony is that he claimed that he had, *at some point*, purchased a policy in excess of the $250,000 required by the separation agreement.

[27] As the court noted, during the proceeding, the plaintiff appeared to be seeking reimbursement for both the policy premiums and loan interest, which the court calculated as amounting to $5817.24. It is unclear how the court arrived at this figure. Even assuming that the plaintiff had incurred the full $375 of interest for the partial year of coverage in 2010, the most she could claim would be $4692.24. Ultimately, however, the plaintiff did not pursue the claim for interest. In her posthearing brief, she requested reimbursement for the policy premiums only, which amounted to $2817.24.

testimony that her theory of the case was that, during the period at issue, the defendant had failed to maintain any life insurance coverage *whatsoever*.[28] Consequently, the plaintiff, as the party seeking a finding of indirect civil contempt, had the burden of establishing by clear and convincing evidence that the defendant had not had his own life insurance policy in effect during the relevant timeframe. See *Brochard* v. *Brochard*, 185 Conn. App. 204, 221, 196 A.3d 1171 (2018). Although the court credited the plaintiff's testimony that she had purchased her own policy on the defendant's life, it was unable to determine whether her policy replaced a policy that the defendant had allowed to lapse—which would be consistent with her testimony that the defendant had not maintained his own policy during the period in question—or merely "supplemented [the defendant's] coverage"—which, contrary to the plaintiff's testimony, would imply that the defendant had indeed maintained his own coverage during the relevant period, although perhaps not in the amount required by the separation agreement. By characterizing this issue as an "unanswered question," the court, in effect, acknowledged that it was not persuaded by the plaintiff's testimony that the defendant had entirely failed to maintain a life insurance policy of any kind. In light of this implicit acknowledgment, the court could not properly have concluded that the plaintiff had sustained her burden of proving by clear and convincing evidence that the defendant had failed to maintain a life insurance policy at his own expense. The court, therefore, abused its discretion in finding the defendant in contempt for noncompliance with paragraph 6.1 of the agreement. Accordingly, the judgment of contempt

[28] When explicitly asked whether the defendant had kept a life insurance policy in force during the period at issue, the plaintiff responded, "[n]o, he did not." Nothing in her testimony suggested that the defendant had violated paragraph 6.1 of the separation agreement by maintaining an *inadequate* policy.

must be reversed with respect to the issue of life insurance coverage, and the resultant remedial order must be vacated.

E

The defendant next claims that the court abused its discretion by crafting an arrearage payment schedule "without obtaining any evidence of his current or future ability to pay." We decline to review this claim.

The following additional procedural history is relevant to our resolution of the defendant's claim. The court found the defendant in contempt for nonpayment of alimony and failure to maintain life insurance and awarded the plaintiff $80,042 in unpaid alimony and $2817.24 as reimbursement for the expenses she incurred in maintaining her own insurance policy on the defendant's life. The court denied the remainder of the plaintiff's motion but found that the defendant owed her $2929 as reimbursement for the plaintiff's medical insurance premiums, $13,915 as reimbursement for the younger daughter's food and clothing expenses, and $4676.60 as reimbursement for the children's activity related costs. As to the defendant's motions, the court found the plaintiff in contempt for improperly claiming the dependency exemptions and determined that she owed him $2812.50. Offsetting this amount against the defendant's total obligation, the court calculated the net sum owed to the plaintiff to be $101,567.34 and issued remedial orders setting the rate and terms of repayment. More specifically, the court ordered the defendant to make minimum monthly payments to the plaintiff of $1000 beginning August 1, 2017. The court further ordered that, "[i]f the full amount is not paid in full on or before July 31, 2019, a penalty of 10 percent per annum will accrue on the full amount as of August 1, 2017, regardless of what the actual balance due might be and shall continue to accrue as simple interest until

the full amount of the judgment plus any penalty payments are paid in full . . . .'' The court made no finding regarding the defendant's financial capacity to comply with its orders.

''As a general rule, the financial awards in a marital dissolution case should be based on the parties' current financial circumstances to the extent reasonably possible.'' (Internal quotation marks omitted.) *Gervais* v. *Gervais*, 91 Conn. App. 840, 846, 882 A.2d 731, cert. denied, 276 Conn. 919, 888 A.2d 88 (2005). Thus, this court has held it to be an abuse of discretion for a trial court to issue financial orders in a marital dissolution case without considering the parties' financial circumstances where the parties had submitted evidence on the subject; see id. (trial court erred in failing to consider defendant's financial affidavit in ruling on plaintiff's postdissolution motion to terminate, reduce, or modify his alimony obligation to defendant); *Cuneo* v. *Cuneo*, 12 Conn. App. 702, 709, 533 A.2d 1226 (1987) (trial court erred in refusing to consider defendant's updated financial affidavit in issuing orders regarding unallocated alimony and support and division of parties' assets and liabilities); or had been denied the opportunity to do so. See *Szczerkowski* v. *Karmelowicz*, 60 Conn. App. 429, 435, 759 A.2d 1050 (2000) (where court had led parties to believe that it would not make any financial orders in ruling on certain postdissolution motions, it was abuse of discretion to issue financial orders without having before it parties' financial affidavits).

In the present case, neither party filed an updated financial affidavit or offered any evidence of his or her financial circumstances at that time.[29] Nor did the parties make any objection at the time of the orders that

[29] The only financial affidavits in the record are those filed by the parties at the time of the dissolution of their marriage in 2008.

the court had not considered their financial conditions. Thus, both parties effectively invited the court to focus solely on the merits of their motions without reference to their current finances. "If counsel has full knowledge of improper conduct (or what he perceives to be improper procedure) he cannot remain silent, hoping for a favorable ruling, and then be heard to complain when the order is unsatisfactory." (Internal quotation marks omitted.) *Bielen* v. *Bielen*, 12 Conn. App. 513, 515, 531 A.2d 941 (1987). Under these circumstances, we decline to review the defendant's claim.[30] See *Tufano* v. *Tufano*, 18 Conn. App. 119, 124–26, 556 A.2d 1036 (1989) (declining to review plaintiff's claim, that trial court erred in imposing contempt sanctions given her lack of financial ability to purge herself by payment, where she offered no evidence regarding her current financial condition and did not object to court proceeding without such evidence); *Bielen* v. *Bielen*, supra, 515 (declining to review defendant's claim that court improperly refused to consider parties' current financial positions in ruling on postdissolution motion for attorney's fees because, although this normally would constitute error, neither party offered evidence thereon or objected to court proceeding without such evidence).

F

Finally, the defendant claims that the court abused its discretion in declining to award him attorney's fees in relation to his motion for contempt. The defendant's sole argument in support of this claim is that he should

[30] The defendant also appears to take issue with the particular terms of the remedial order. To the extent he intended to raise this as a separate claim, we deem it abandoned. The defendant's discussion of the issue lacks any citation to relevant authority and is limited to a single sentence: "There is no justification for this lump sum award and the penalty." We therefore conclude that this claim is inadequately briefed and, accordingly, decline to review it. See *Estate of Rock* v. *University of Connecticut*, 323 Conn. 26, 33, 144 A.3d 420 (2016).

be awarded attorney's fees if the plaintiff prevails in her cross appeal on her claim for attorney's fees. Because we decline to review the plaintiff's claim; see part II of this opinion; the defendant's claim necessarily fails.

II

THE PLAINTIFF'S CROSS APPEAL

In her cross appeal, the plaintiff claims that the court (1) abused its discretion in declining to award her attorney's fees and costs in relation to her motion for contempt and (2) improperly implied a reasonableness standard into paragraph 3.3 of the parties' separation agreement.[31] We decline to review these claims because they are inadequately briefed.

Regarding attorney's fees, the plaintiff argues that, absent some showing by the defendant that he had been unable to pay the full amount of alimony due, "the plaintiff should have been made whole for having to bring this action to recover alimony . . . ." The plaintiff addresses this claim in less than one page of her appellate brief, provides no citation to authority, and provides no analysis of the claim.

[31] In her appellate brief, the plaintiff appears to claim that the court also improperly implied a reasonableness standard into paragraph 3.2 of the separation agreement, which provides in relevant part: "By way of additional child support, the [defendant] shall be responsible for all activity costs for both of the parties' children . . . until each child reaches the age of twenty-three . . . . Said activity costs shall include but not be limited to all soccer and other athletic expenses, transportation and travel costs, including the purchase of a safe and reliable automobile for each child, all costs of attending a private preparatory school and all other costs for the girls' activities." The plaintiff appears to argue that the court improperly determined this provision to be ambiguous and, therefore, erred in implying a reasonableness standard into it. The plaintiff misconstrues the court's memorandum of decision. In its decision, the court explicitly determined that paragraph 3.2 was unambiguous and required the defendant to reimburse the plaintiff for "*all* activity related expenses" that she had incurred. (Emphasis added.) The court made no mention of any implicit reasonableness requirement. Thus, the plaintiff's claim has no basis in the record, and, accordingly, we reject it.

Regarding the interpretation of paragraph 3.3 of the separation agreement, the plaintiff first challenges the court's determination that this provision was ambiguous. Rather than explicate why the court's underlying reasoning was erroneous or engage in any meaningful analysis of the language of paragraph 3.3, the plaintiff simply cites to the text of the provision, acknowledges the correctness of the court's recitation of the boilerplate law of contract interpretation, and asserts in a conclusory fashion that the agreement clearly and unambiguously made the defendant "responsible [for] virtually every expense the children incurred until age [twenty-three]."

The plaintiff also challenges the court's construction of the separation agreement as limiting the defendant's responsibility to *reasonable* food and clothing expenses. The plaintiff argues that, even if the agreement is ambiguous, the court erred in failing to consider evidence that the defendant had paid every bill received from the plaintiff from the date of dissolution until 2010. According to the plaintiff, this evidence demonstrates that the intent and expectation of the parties was that the defendant was required to perform his obligations "without limitation on the reasonableness of expenses . . . ." The plaintiff devotes one paragraph to this argument and cites no legal authority to support it.

In sum, the plaintiff has failed to brief adequately the claims raised in her cross appeal, and, consequently, we deem them abandoned. "Claims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion. . . . Claims are also inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record . . . ." (Internal quotation marks omitted.) *Estate of Rock* v. *University of Connecticut*, 323 Conn. 26, 33, 144 A.3d 420 (2016). "We repeatedly have stated that [w]e are not required to review issues that have been improperly

presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [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. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited." (Citation omitted; internal quotation marks omitted.) *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016). Accordingly, we affirm the judgment of the trial court with respect to the issues raised by the plaintiff's cross appeal.

The judgment is reversed in part with respect to the arrearage order attributable to clothing expenses and the case is remanded for further proceedings consistent with this opinion; the judgment of contempt is reversed in part as to the defendant's failure to maintain a life insurance policy, and the resultant remedial order is vacated; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

GLENN GILMAN *v.* BRIAN SHAMES ET AL.
(AC 41412)

Sheldon, Moll and Seeley, Js.

Syllabus

The plaintiff appealed to this court from the judgment of the trial court dismissing his action against the defendants, the state of Connecticut and S, a physician who had provided medical care and treatment to the decedent, who was the plaintiff's fiancée and domestic partner. The plaintiff's operative complaint raised claims sounding in bystander emotional distress directed to each of the defendants. The plaintiff alleged, inter alia, that S had administered ineffective treatments to the decedent for approximately eight months and that, notwithstanding the lack of improvement in her condition, S had failed to alter the course of the treatments or to take further diagnostic action as was consistent with

standard practice, which constituted a substantial factor in the decedent's death. The plaintiff additionally alleged that he had been harmed by S' conduct and by the state's breach of its duty to the decedent to ensure that the state's agents, servants or employees acted as reasonably prudent medical professionals. The trial court granted the defendants' motion to dismiss for lack of subject matter jurisdiction, and the plaintiff appealed to this court. On appeal, he claimed, inter alia, that the trial court erroneously concluded that his bystander emotional distress claim directed to S in S' individual capacity was barred by statutory (§ 4-165) immunity. Specifically, he claimed that the facts pleaded in his operative complaint were sufficient to demonstrate that S' conduct was reckless and, thus, that S was not protected by statutory immunity under § 4-165. *Held*:

1. The trial court properly dismissed the plaintiff's claim directed to S in S' individual capacity on the basis of statutory immunity pursuant to § 4-165, as the plaintiff failed to allege facts demonstrating that S acted in a reckless manner; S' conduct in treating the decedent over the course of approximately eight months, during which S allegedly continued to administer ineffective treatment to the decedent and failed to alter the course of treatments or to take further diagnostic action as was consistent with standard practice, even though the plaintiff and the decedent expressed to S that the treatments were not working, did not demonstrate that S acted in a reckless manner, as it did not tend to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger was apparent, and the plaintiff's conclusory use of the terms "reckless" and "recklessly" in describing S' conduct was not sufficient to establish that S' actions were reckless.
2. The plaintiff could not prevail on his claim that the trial court erroneously concluded that it lacked subject matter jurisdiction over his bystander emotional distress claim directed to the state; that court properly determined that the plaintiff's bystander emotional distress claim, which was derivative in nature, was not viable in the absence of a predicate wrongful death action commenced by the decedent's estate, and the plaintiff's claim that the trial court erred in dismissing his bystander emotional distress claim directed to the state on the ground that his failure to join the decedent's estate in the present action deprived the court of subject matter jurisdiction misconstrued the decision of the court, which did not determine that the decedent's estate was an indispensable party but, instead, properly concluded that it could not reach the merits of the plaintiff's derivative claim because it had not been joined to a predicate wrongful death action brought by the decedent's estate.

Argued February 5—officially released May 7, 2019

Procedural History

Action to recover damages for bystander emotional distress, and for other relief, brought to the Superior

Court in the judicial district of New Britain, where the court, *Morgan*, *J.*, granted the plaintiff's motion to substitute the state of Connecticut as a party defendant; thereafter, the plaintiff filed an amended complaint; subsequently, the court granted the motion to dismiss filed by the named defendant et al. and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Glenn Gilman, self-represented, the appellant (plaintiff).

Michael G. Rigg, for the appellees (defendants).

Opinion

MOLL, J. The plaintiff, Glenn Gilman, appeals from the judgment of the trial court dismissing his action against the defendants Brian Shames, M.D., and the state of Connecticut (state).[1] On appeal, the plaintiff claims that the court erred in concluding that it lacked subject matter jurisdiction over his bystander emotional distress claims on the grounds that (1) his claim against Shames, to the extent that the plaintiff was suing Shames in his individual capacity, was barred by statutory immunity pursuant to General Statutes § 4-165, and (2) his claim against the state was derivative of a wrongful death action that had not been brought and, as a result of the expiration of the limitations period set forth in General Statutes § 52-555, could not be brought by the estate of the decedent, Lisa Wenig. We affirm the judgment of the trial court.

The following procedural history and facts, as alleged in the plaintiff's operative complaint or as undisputed in the record, are relevant to our resolution of the appeal. From about December 15, 2014 through August 19, 2015, Shames—who was at all relevant times a physician

[1] For purposes of clarity, we refer to Shames and the state collectively as the defendants and individually by name.

employed by the University of Connecticut Health Center, of which the John Dempsey Hospital (hospital) is a part[2]—provided medical care and treatment to the decedent, who was the plaintiff's fiancée and domestic partner. The decedent died on October 1, 2015.

In June, 2016, pursuant to General Statutes § 4-147,[3] the plaintiff filed a notice of claim with the Office of the Claims Commissioner seeking permission to sue the state for damages on the basis of injuries he claimed to have suffered, including emotional distress and loss of consortium, stemming from medical malpractice allegedly committed against the decedent by Shames and the hospital. By way of a memorandum of decision dated February 23, 2017, the Claims Commissioner, absent objection, authorized the plaintiff to sue the state for damages of up to $500,000 for alleged medical

[2] See General Statutes § 10a-251 ("[i]t is hereby found and determined that the John Dempsey Hospital of The University of Connecticut Health Center is a vital resource of The University of Connecticut and the state").

[3] General Statutes § 4-147 provides in relevant part: "Any person wishing to present a claim against the state shall file with the Office of the Claims Commissioner a notice of claim, in duplicate, containing the following information: (1) The name and address of the claimant; the name and address of his principal, if the claimant is acting in a representative capacity, and the name and address of his attorney, if the claimant is so represented; (2) a concise statement of the basis of the claim, including the date, time, place and circumstances of the act or event complained of; (3) a statement of the amount requested; and (4) a request for permission to sue the state, if such permission is sought. . . ."

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

"(b) In any claim alleging malpractice against the state, a state hospital or against a physician, surgeon, dentist, podiatrist, chiropractor or other licensed health care provider employed by the state, the attorney or party filing the claim may submit a certificate of good faith to the Office of the Claims Commissioner in accordance with section 52-190a. If such a certificate is submitted, the Claims Commissioner shall authorize suit against the state on such claim. . . ."

malpractice by general surgeons or other similar health care providers who constitute state officers and employees, as defined by General Statutes (Rev. to 2015) § 4-141, of the hospital.

On June 26, 2017, the plaintiff, representing himself, commenced the present action against Shames and the hospital. In his original two count complaint, the plaintiff raised claims sounding in bystander emotional distress directed to Shames and the hospital.

On August 25, 2017, Shames and the hospital filed a motion to dismiss the action, which was accompanied by a separate memorandum of law, asserting that the court lacked subject matter jurisdiction over the plaintiff's bystander emotional distress claims. Specifically, they asserted that the plaintiff's claim directed to Shames was barred by sovereign immunity and/or by statutory immunity pursuant to § 4-165, and that the plaintiff could not pursue a bystander emotional distress action in the absence of a wrongful death action commenced by the decedent's estate, which had not brought a wrongful death action or received authorization from the Claims Commissioner to commence such an action. In addition, Shames and the hospital argued that the plaintiff improperly had brought suit against the hospital because the plaintiff had received authorization from the Claims Commissioner to sue the state only. On October 11, 2017, the plaintiff filed a motion to substitute the state as a party defendant in lieu of the hospital, which the trial court granted on October 24, 2017. On October 23, 2017, the plaintiff filed an objection and a separate memorandum of law in opposition to the motion to dismiss. On November 6, 2017, the defendants filed a reply brief,[4] in which they argued

[4] On November 29, 2017, the plaintiff filed a request to file a proposed surreply, which was attached thereto. The court granted the request on February 9, 2018, at which time the surreply was deemed filed.

additionally that the decedent's estate would be time barred from bringing a wrongful death action as a result of the expiration of the subject matter jurisdictional limitations period set forth in § 52-555.[5]

On November 13, 2017, the plaintiff filed his operative two count complaint raising claims sounding in bystander emotional distress directed to each of the defendants. He alleged, inter alia, that Shames had administered ineffective treatments to the decedent for approximately eight months and that, notwithstanding the lack of improvement in her condition, Shames had failed to alter the course of the treatments or to take "further diagnostic action as is consistent with standard practice," which constituted a substantial factor in the decedent's death. The plaintiff additionally alleged that he had been harmed by Shames' conduct and by the state's breach of its duty to the decedent to ensure that the state's agents, servants, and/or employees acted as "reasonably prudent medical professionals." More particularly, the plaintiff alleged that he had sustained injuries stemming from his "contemporary sensory perception of observing and/or experiencing the demise of the decedent, the decedent's suffering, the decedent's health deteriorating, the decedent's pain and suffering,

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

"(b) Notwithstanding the provisions of subsection (a) of this section, an action may be brought under this section at any time after the date of the act or omission complained of if the party legally at fault for such injuries resulting in death has been convicted or found not guilty by reason of mental disease or defect of a violation of section 53a-54a, 53a-54b, 53a-54c, 53a-54d, 53a-55 or 53a-55a with respect to such death."

the administration of life support and, ultimately, [the decedent's] death . . . ."

On December 4, 2017, the court heard argument on the defendants' motion to dismiss. On February 9, 2018, the court granted the motion to dismiss. With respect to the plaintiff's bystander emotional distress claim directed to Shames, the court concluded that (1) to the extent that the plaintiff was suing Shames in Shames' official capacity as an employee of the hospital, which was an agent of the state, the plaintiff's claim was barred by sovereign immunity, and (2) to the extent that the plaintiff was suing Shames in Shames' individual capacity, the plaintiff's claim was barred by statutory immunity pursuant to § 4-165. In addition, without limiting its analysis to the plaintiff's claim against the state, the court concluded that the plaintiff's bystander emotional distress "claims" were derivative claims that were not viable absent a predicate wrongful death action commenced by the decedent's estate, which had not commenced such an action and, as a result of the expiration of the limitations period set forth in § 52-555, could not commence such an action. This appeal followed.

"The standard of review for a court's decision on a motion to dismiss is well settled. A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . In undertaking this review, we are mindful of the well established notion that, in determining whether a

court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *Dubinsky* v. *Reich*, 187 Conn. App. 255, 259, 201 A.3d 1153 (2019).

On appeal, the plaintiff claims that the court erred in concluding that it lacked subject matter jurisdiction to entertain his bystander emotional distress claims. Specifically, the plaintiff asserts that (1) his claim directed to Shames in Shames' individual capacity was not barred by statutory immunity pursuant to § 4-165,[6] and (2) the absence of a wrongful death action brought by the decedent's estate did not deprive the court of subject matter jurisdiction over his claim against the state. These claims are unavailing.

I

The plaintiff first claims that the court erroneously concluded that his bystander emotional distress claim directed to Shames in Shames' individual capacity was barred by statutory immunity pursuant to § 4-165. Specifically, he asserts that the facts pleaded in his operative complaint were sufficient to demonstrate that Shames' conduct was reckless and, thus, that Shames was not protected by statutory immunity under § 4-165. We disagree.

Section 4-165 (a) provides: "No state officer or employee shall be personally liable for damage or injury, not wanton, reckless or malicious, caused in the discharge of his or her duties or within the scope of his or her employment. Any person having a complaint for such damage or injury shall present it as a claim against the state under the provisions of this chapter." "In other words, state employees may not be held personally liable for their negligent actions performed

[6] On appeal, the plaintiff does not challenge the court's ruling that his claim directed to Shames in Shames' official capacity as an employee of the hospital was barred by sovereign immunity.

within the scope of their employment. . . . State employees do not, however, have statutory immunity for wanton, reckless or malicious actions, or for actions not performed within the scope of their employment. For those actions, they may be held personally liable, and a plaintiff who has been injured by such actions is free to bring an action against the individual employee . . . .

"In the posture of this case, we examine the pleadings to decide if the plaintiff has alleged sufficient facts . . . with respect to personal immunity under § 4-165, to support a conclusion that the [defendant was] acting outside the scope of [his] employment or wilfully or maliciously. . . . The question before us, therefore, is whether the facts as alleged in the pleadings, viewed in the light most favorable to the plaintiff, are sufficient to survive a motion to dismiss on the ground of statutory immunity. . . .

"We thus turn to the matter of whether the plaintiff has alleged facts that, if proven, are sufficient to demonstrate that the defendant acted wantonly, recklessly, or maliciously. In applying § 4-165, our Supreme Court has understood wanton, reckless or malicious to have the same meaning as it does in the common-law context. . . . Under the common law, [i]n order to establish that the [defendant's] conduct was wanton, reckless, wilful, intentional and malicious, the plaintiff must prove, on the part of the [defendant], the existence of a state of consciousness with reference to the consequences of one's acts . . . . [Such conduct] is more than negligence, more than gross negligence. . . . [I]n order to infer it, there must be something more than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury to them. . . . It is such conduct as indicates a reckless disregard of the just rights or safety of others or of the consequences of the action. . . .

[In sum, such] conduct tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent." (Citations omitted; internal quotation marks omitted.) *Lawrence* v. *Weiner*, 154 Conn. App. 592, 597–98, 106 A.3d 963, cert. denied, 315 Conn. 925, 109 A.3d 921 (2015). "Claims involving . . . statutory immunity, pursuant to § 4-165, implicate the court's subject matter jurisdiction." (Internal quotation marks omitted.) Id., 597.

In his operative complaint, the plaintiff alleged in relevant part that: Shames treated the decedent from on or about December 15, 2014 through August 19, 2015; Shames' treatments, which included the administration of intravenous fluids to the decedent to fight an infection, did not improve her condition; and despite the lack of improvement in the decedent's condition, as well as the plaintiff and the decedent expressing to Shames that the treatments were not working, Shames continued to administer the ineffective treatments for approximately eight months and "failed grossly negligently and/or recklessly" to alter the course of treatments or to take "further diagnostic action as is consistent with standard practice." In paragraph thirty-seven of his operative complaint, the plaintiff alleged: "[Shames'] continuous and repeated grossly negligent treatment of [the decedent], cumulatively over the course of almost eight (8) months, constitute[d] a conscious disregard for the substantial likelihood of misdiagnosis and concomitantly of injury arising therefrom, and [was] thereby reckless." In its decision granting the defendants' motion to dismiss, the court determined that because the plaintiff's operative complaint, construed in the light most favorable to the plaintiff, failed to allege facts establishing that Shames' conduct "rose to the level of egregiousness necessary to be considered

wanton, reckless, or malicious," Shames, in his individual capacity, was immune from suit pursuant to § 4-165.

We agree with the court that the plaintiff failed to allege facts demonstrating that Shames acted in a reckless manner. Shames' conduct in treating the decedent over the course of approximately eight months, as pleaded by the plaintiff in his operative complaint, did not "[tend] to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent." (Internal quotation marks omitted.) *Lawrence* v. *Weiner*, supra, 154 Conn. App. 598. In addition, the plaintiff's conclusory use of the terms "reckless" and "recklessly" in describing Shames' conduct was not sufficient to establish that Shames' actions were reckless. See, e.g., *Dumond* v. *Denehy*, 145 Conn. 88, 91, 139 A.2d 58 (1958) ("Simply using the word 'reckless' or 'recklessness' is not enough. A specific allegation setting out the conduct that is claimed to be reckless or wanton must be made."). Thus, the court properly dismissed the plaintiff's claim directed to Shames in Shames' individual capacity on the basis of statutory immunity pursuant to § 4-165.

II

The plaintiff next claims that the court erroneously concluded that it lacked subject matter jurisdiction over his bystander emotional distress claim directed to the state on the basis that, as a derivative claim, his claim could not be raised in the absence of a predicate wrongful death action commenced by the decedent's estate. Specifically, he asserts that (1) his claim against the state was viable as a freestanding claim and was not dependent on the existence of a predicate wrongful death action commenced by the decedent's estate, and (2) the court's dismissal of his claim was improper because his failure to join the decedent's estate in the

present action did not implicate the court's subject matter jurisdiction.[7] We are not persuaded.

A

We first turn to the plaintiff's contention that his bystander emotional distress claim against the state was not dependent on the existence of a wrongful death action brought by the decedent's estate but, rather, was viable as a freestanding claim. The defendants argue that the plaintiff's bystander emotional distress claim against the state was a derivative claim that could not be brought in the absence of a predicate wrongful death action commenced by the decedent's estate. We agree with the defendants.

In its decision granting the defendants' motion to dismiss, after concluding that the plaintiff's bystander emotional distress claim directed to Shames was barred by sovereign immunity and by statutory immunity, the court stated: "Turning to [the plaintiff's] bystander emotional distress claims, the defendants argue that the court lacks subject matter jurisdiction over these claims because they are derivative of the wrongful death [action] that was not brought, and due to the expiration of the statute of limitations established by [§ 52-555], now cannot be brought on behalf of [the decedent's] estate. The court agrees with the defendants. Like a loss of consortium claim, a claim for bystander emotional distress is a derivat[ive] claim. *Squeo* v. *Norwalk Hospital Assn.*, 316 Conn. 558, 564, [113 A.3d 932] (2015). Consequently, it cannot be brought as a freestanding claim where there is no valid underlying predicate

[7] The plaintiff also asserts that the court implicitly ruled that his bystander emotional distress claim was barred by the doctrine of res judicata on the basis that the decedent's estate had not commenced a predicate wrongful death action. He contends that the court's implicit ruling was erroneous because no judgment has been rendered that would bar his bystander emotional distress claim. This claim is without merit, as the court's ruling contains no language to suggest that it was based on res judicata principles.

action. See *Jacoby* v. *Brinckerhoff*, 250 Conn. 86, [88–95], [735 A.2d 347] (1999) (husband cannot maintain derivative action of loss of consortium where his wife failed to sue defendant [psychiatrist] for malpractice); see also *Voris* v. *Molinaro*, 302 Conn. 791, 798–801, [31 A.3d 363] (2011) (holding that settlement of predicate injury claim extinguishes derivative loss of consortium claim). Neither *Squeo* v. *Norwalk Hospital Assn.*, supra, 558, nor any other Connecticut appellate authority holds otherwise. [The plaintiff's] failure to join his deriv-at[ive] bystander emotional distress action with a valid action brought on behalf of [the decedent's] estate is fatal to his claim. Absent a valid underlying predicate action brought on behalf of [the decedent's] estate, the court does not have subject matter jurisdiction to adjudicate [the plaintiff's] bystander emotional distress claim."[8]

We observe that "[b]ystander emotional distress is a derivative claim, pursuant to which a bystander who witnesses another person . . . suffer injury or death as a result of the negligence of a third party seeks to recover from that third party for the emotional distress that the bystander suffers as a result." *Squeo* v. *Norwalk Hospital Assn.*, supra, 316 Conn. 564. "[B]ystander emotional distress derives from bodily injury to another . . . . [B]ecause emotional distress, by itself, is not a bodily injury, it can be compensable only if it flows

[8] In their respective appellate briefs, the parties interpret the court's decision as dismissing the plaintiff's bystander emotional distress claim directed to Shames solely on the basis of sovereign immunity and statutory immunity, and dismissing the plaintiff's bystander emotional distress claim directed to the state on the ground that his claim was not viable in the absence of a wrongful death action brought by the decedent's estate. We can think of no reason why the absence of a predicate wrongful death action brought by the decedent's estate could not serve as an independent ground upon which the plaintiff's claim directed to Shames could have been dismissed. Nevertheless, because neither party argues that the court dismissed the claim against Shames on that ground, we do not opine on this issue further.

from the bodily injury of another person. . . . This is because but for the bodily injury to [another], the plaintiff would not . . . [suffer] any emotional injuries. In other words, the plaintiff's injuries are the natural and probable consequence of . . . having witnessed the accident . . . . Therefore, the measure of the plaintiff's recovery is not governed by the fact that his separate damages arose out of the same accident, but by the fact that they *arose out of* the same bodily injury . . . . Given the but-for relationship between the underlying injury and the derivative injury of bystander emotional distress, the bystander's emotional distress is causally connected to the underlying injury. Bystander emotional distress, therefore, by its very nature, results from and arises out of the underlying personal injury or death." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Velecela* v. *All Habitat Services, LLC*, 322 Conn. 335, 340–41, 141 A.3d 778 (2016).

The parties have not cited any appellate authority, and we are aware of none, specifically addressing whether a bystander emotional distress claim may be pursued without being joined to a predicate claim asserted by the injured principal. Our Supreme Court's decision in *Jacoby* v. *Brinckerhoff*, supra, 250 Conn. 86, which analyzed the viability of a plaintiff's loss of consortium claim in the absence of a predicate action commenced by the plaintiff's former spouse, is instructive, however. In *Jacoby*, the plaintiff brought an action against the defendant, a psychiatrist, asserting, inter alia, a loss of consortium claim on the basis of allegations that the defendant's treatment of the plaintiff's former spouse constituted a failure to render proper care.[9] Id., 88. The plaintiff's former spouse did not commence an action against the defendant, and she refused

[9] The plaintiff named a second defendant in the action, but he later withdrew his claims against that defendant. *Jacoby* v. *Brinckerhoff*, supra, 250 Conn. 88 n.1.

to join the plaintiff's action. Id., 88–90. The trial court, in granting a motion to strike filed by the defendant, struck all counts in the plaintiff's operative complaint and subsequently rendered judgment in accordance with its ruling thereon. Id., 89. The plaintiff appealed from that judgment to this court, and our Supreme Court transferred the appeal to itself. Id., 89 n.3.

On appeal in *Jacoby*, the plaintiff argued in relevant part that he was entitled to pursue his loss of consortium claim without joining it to a predicate claim brought by his former wife because the former wife's refusal to participate in his action rendered such joinder impossible. Id., 89–90. Our Supreme Court rejected that argument. Observing that in a prior case it had stated, in dictum, that a loss of consortium claim would be barred when the injured spouse's action had been terminated by settlement or by an adverse judgment on the merits, the court determined that it could "discern no viable distinction between precluding a consortium claim when the injured spouse has settled with the alleged tortfeasor and precluding it when the injured spouse, as in this case, has declined altogether to sue the alleged tortfeasor. [Our Supreme Court's] statement reflects the premise, which the plaintiff does not challenge, that an action for loss of consortium, although independent in form, is derivative of the injured spouse's cause of action . . . . Although the noninjured spouse has a right to choose whether to bring or to forgo a derivative consortium claim . . . there is logical appeal to linking that right to an existing viable claim by the injured spouse." (Citations omitted; internal quotation marks omitted.) Id., 91–92.

Without deciding whether the failure to join a predicate claim by an injured spouse with a derivative loss of consortium claim would be excusable under certain circumstances, the court concluded that the plaintiff's

failure to join his loss of consortium claim with a predicate action brought by his former spouse was fatal. The court stated: "It is inherent in the nature of a derivative claim that the scope of the claim is defined by the injury done to the principal. The party pursuing a derivative cause of action may have a claim for special damages arising out of that injury, but he may not redefine the nature of the underlying injury itself. In the ordinary physical injury case, a person pursuing a derivative claim may be unable to proceed if the injured spouse's rights were compromised by that spouse's comparative responsibility for the injury. . . . It follows that, in the case of medical malpractice, a person pursuing a derivative claim may be barred from bringing suit if the injured spouse gave informed consent to the professional procedure that caused the patient's condition to change." (Citations omitted.) Id., 93–94. The court proceeded to note that the record did not disclose why the plaintiff's former spouse had declined to sue the defendant and surmised that the former spouse, inter alia, may not have believed that the defendant's treatment had injured her. Id., 94. The court stated: "We are not prepared to hold that a derivative cause of action may proceed upon the mere possibility that the plaintiff's spouse may have sustained an injury that resulted from negligent or intentional misconduct on the part of a psychiatrist. . . . A derivative cause of action for loss of consortium does not confer surrogate authority on the noninjured spouse to pursue a claim that does not yet exist. We conclude, therefore, that the plaintiff cannot pursue an action for loss of consortium in the absence of any basis in the record for a finding that his former spouse was injured as a result of her treatment by the defendant." (Citation omitted.) Id., 94–95.

Our Supreme Court's rationale in *Jacoby* guides our analysis. Here, the plaintiff's bystander emotional distress claim against the state, which was derivative in

nature; *Squeo* v. *Norwalk Hospital Assn.*, supra, 316 Conn. 564; was not brought in conjunction with a wrongful death action commenced by the decedent's estate. The record is devoid of any explanation as to why the decedent's estate has not brought a wrongful death action. Relying on our Supreme Court's rationale in *Jacoby*, we conclude that the plaintiff's derivative bystander emotional distress claim against the state is not viable in the absence of a predicate wrongful death action brought by the decedent's estate. See *Jacoby* v. *Brinckerhoff*, supra, 250 Conn. 94–95; see also *Voris* v. *Molinaro*, supra, 302 Conn. 797–801 (concluding that trial court properly granted defendant's motion to strike plaintiff's loss of consortium claim on ground that predicate negligence claim brought by plaintiff's spouse had been settled); *Musorofiti* v. *Vlcek*, 65 Conn. App. 365, 375, 783 A.2d 36 ("a derivative cause of action . . . is dependent on the legal existence of [a] predicate action"), cert. denied, 258 Conn. 938, 786 A.2d 426 (2001). Accordingly, the court correctly concluded that the plaintiff's bystander emotional distress claim directed to the state failed in the absence of a wrongful death action commenced by the decedent's estate.[10]

[10] We note that in *Jacoby* v. *Brinckerhoff*, supra, 250 Conn. 89, the trial court granted a motion to strike the plaintiff's loss of consortium claim and rendered judgment thereon, and our Supreme Court affirmed the trial court's judgment. See also *Voris* v. *Molinaro*, supra, 302 Conn. 797–801 (affirming judgment rendered upon trial court's granting of defendant's motion to strike loss of consortium claim on ground that predicate negligence claim brought by plaintiff's spouse had been settled). The plaintiff does not raise a claim on appeal contesting the defendants' use of a motion to dismiss as opposed to a motion to strike, and we decline to address at this time whether a motion to dismiss is the proper vehicle to challenge a derivative claim based on the absence of a predicate claim that would fail on subject matter jurisdictional grounds. We observe, however, that this court and our Supreme Court have affirmed judgments granting motions to dismiss when, notwithstanding that the motions to dismiss were procedurally improper, the claims at issue were otherwise subject to motions to strike and the deficiencies in the plaintiffs' complaints could not be cured. See, e.g., *Fort Trumbull Conservancy, LLC* v. *Alves*, 262 Conn. 480, 501–502, 815 A.2d 1188 (2003) (affirming, in part, judgment of dismissal when trial court's granting of

B

The plaintiff also contends that the court erred in dismissing his bystander emotional distress claim directed to the state on the basis that his failure to join the decedent's estate in the present action deprived the court of subject matter jurisdiction. Specifically, he asserts that the nonjoinder of a party does not implicate a court's subject matter jurisdiction and, thus, the court erred in dismissing his claim. See *General Linen Service Co.* v. *Cedar Park Inn & Whirlpool Suites*, 179 Conn. App. 527, 532, 180 A.3d 966 (2018) ("It is well settled that the failure to join an indispensable party does not deprive a trial court of subject matter jurisdiction. See General Statutes § 52-108 and Practice Book §§ 9-18, 9-19 and 11-3 . . . . [T]he failure to join an indispensable party results in a jurisdictional defect *only if* a statute mandates the naming and serving of [a particular] party." [Citations omitted; emphasis in original; internal quotation marks omitted.]). The plaintiff misconstrues the court's decision. The court did not determine that the decedent's estate was an indispensable party,[11] whose interests would be affected substantively by its

motion to dismiss, instead of motion to strike, as to certain claims, although procedurally improper, constituted harmless error when nothing in record suggested that plaintiff could amend complaint to state viable claim); *McCutcheon & Burr, Inc.* v. *Berman*, 218 Conn. 512, 527–28, 590 A.2d 438 (1991) (same); *Mercer* v. *Rodriquez*, 83 Conn. App. 251, 267–68, 849 A.2d 886 (2004) (relying on holding in *Fort Trumbull Conservancy, LLC*, to affirm judgment of dismissal when trial court's erroneous conclusion that it lacked subject matter jurisdiction over plaintiff's action was harmless).

[11] "Parties are considered indispensable when they not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such condition that its final [disposition] may be . . . inconsistent with equity and good conscience. . . . Indispensable parties must be joined because due process principles make it essential that [such parties] be given notice and an opportunity to protect [their] interests by making [them] a party to the [action]." (Internal quotation marks omitted.) *Bloom* v. *Miklovich*, 111 Conn. App. 323, 333–34, 958 A.2d 1283 (2008).

adjudication of the plaintiff's bystander emotional distress claim and whose participation in the present case would, therefore, be necessary. Instead, the court properly concluded that it could not reach the merits of the plaintiff's derivative claim because it had not been joined to a predicate wrongful death action brought by the decedent's estate. Accordingly, we reject the plaintiff's argument.

The judgment is affirmed.

In this opinion the other judges concurred.

DE ANN MAURICE *v.* CHESTER HOUSING ASSOCIATES LIMITED PARTNERSHIP ET AL.
(AC 40742)

Bright, Moll and Bear, Js.

Syllabus

The plaintiff sought to recover damages for, inter alia, negligence from the defendants, C Co., M Co., and S Co., in connection with injuries she sustained when she slipped and fell on a patch of snow or ice in the parking lot of certain property owned by C Co. Following a trial, the jury returned a verdict in favor of the defendants. Thereafter, the court denied the plaintiff's motion to set aside the verdict and rendered judgment in accordance with the verdict, from which the plaintiff appealed to this court. *Held*:

1. The trial court did not abuse its discretion in precluding the plaintiff's expert witness, T, from testifying as an expert in the field of snow removal; that court found that the testimony demonstrated that the T's knowledge of snow removal was insubstantial and that it was tangential to his real expertise in building codes and ordinances, T's testimony revealed that his experience in snow removal was a minor part of other jobs and that he had not attended any classes, taught any seminars or read any materials or books on the topic, and it was reasonable for the court to conclude from T's testimony that snow removal was a minor part of his employment over the years and that his experience in snow removal was little more than that common in the construction industry, as the plaintiff's attorney failed to develop T's testimony to show that his vast education in code compliance and ordinance enforcement and his work experience qualified him as an expert in snow removal.

2. The trial court did not abuse its discretion in declining to render a default judgment against C Co. as a sanction for the egregious actions of its general and managing partner, W, in sexually harassing the plaintiff's attorney on two occasions: that court, which awarded the plaintiff attorney's fees and issued an order limiting W's movement in court, had wide discretion to impose a sanction that it deemed appropriate under the circumstances, and although the plaintiff argued that W committed two egregious acts against R, those acts were brought to the attention of the court only after the occurrence of the second act, more than one year following the first act, and R did not ask for a mistrial or an additional continuance; moreover, even though W's conduct was egregious, the record revealed that he ceased such conduct immediately upon the intervention of the court and the court's imposition of attorney's fees and an order limiting W's movement in court, and there was no indication that the conduct continued after the court's intervention.

Argued February 7—officially released May 7, 2019

Procedural History

Action to recover damages for personal injuries sustained as a result of, inter alia, the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New London, where the court, *Vacchelli*, *J.*, granted in part the plaintiff's motion for sanctions; thereafter, the matter was tried to the jury; verdict for the defendants; subsequently, the court denied the plaintiff's motion to set aside the verdict and rendered judgment in accordance with the verdict, from which the plaintiff appealed. *Affirmed.*

Kelly E. Reardon, for the appellant (plaintiff).

Sarah B. Christie, with whom, on the brief, was *Sarah Tischbein Bold*, for the appellee (defendant Something Natural, LLC).

Jay F. Huntington, with whom, on the brief, was *Kelly R. Wall*, for the appellees (named defendant et al.).

Opinion

BRIGHT, J. The plaintiff, De Ann Maurice, appeals from the judgment of the trial court, rendered in favor of the defendants, Chester Housing Associates Limited

Partnership, MJKH Property Services, LLC, and Something Natural, LLC, following a jury trial. On appeal, the plaintiff claims that the court abused its discretion (1) when it did not allow the plaintiff's expert witness to testify as an expert in snow removal, and (2) when, in granting the plaintiff's motion for sanctions, it denied the plaintiff's request that the court render a default judgment as a sanction against Chester Housing Associates Limited Partnership as a penalty for the egregious misconduct of its general and managing partner, Douglas H. Williams.[1] We affirm the judgment of the trial court.

The following facts and procedural history inform our review. The plaintiff filed a second amended complaint alleging separate counts of negligence and private nuisance against each of the three defendants. In her complaint, she alleged that she lived at the Cherry Hill Apartments in the town of Chester (property), which was owned, operated, managed, controlled, and/or maintained by the defendant Chester Housing Associates Limited Partnership (property owner). The plaintiff also alleged that the defendant MJKH Property Services, LLC (property manager), owned, operated, managed, controlled, and/or maintained the property. Further, she alleged that, during times of inclement weather, the defendant Something Natural, LLC (snow removal company), was responsible for the snow and/or ice plowing, removal, clearing, and maintenance of the property, including all walkways, parking areas, common areas, and/or sidewalks.

[1] The plaintiff also makes a passing claim in her appellate brief that the court erred in denying her motion to set aside the verdict. The plaintiff's appellate brief contains no standard of review for the denial of a motion to set aside the verdict, and it contains no legal analysis regarding such a claim. Rather, she sets forth the statement that the court erred in denying the motion to set aside the verdict, with little more. Accordingly, we deem any claim related to the court's denial of her motion to set aside the verdict abandoned. See *Stacy B.* v. *Robert S.*, 165 Conn. App. 374, 376 n.1, 140 A.3d 1004 (2016) (claim merely raised in passing, deemed abandoned).

The plaintiff further alleged that on December 12, 2013, as she walked from her apartment to her vehicle, which was in the parking lot of the property, she slipped and fell on a patch of snow and/or ice, and suffered injuries and an increased risk of future harm. The plaintiff claimed her injuries were caused by the negligence and the private nuisance caused or created by each of the defendants. Following a trial, the jury returned a verdict in favor of the defendants. The plaintiff, thereafter, filed a motion to set aside the verdict, which the court denied. The court, subsequently rendered judgment in accordance with the jury's verdict. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The plaintiff first claims that the court abused its discretion when it did not allow the plaintiff's expert witness, Mark Tebbets, to testify as an expert in the field of snow removal. She argues that she established, during voir dire, that Tebbets "had engaged in commercial and residential snow removal, including removing snow from apartment complexes . . . [and that] his qualifications were sufficient to render him an expert in the field of snow removal . . . ." She further contends that "the court's decision to preclude [Tebbets'] testimony about snow removal, but allow his testimony regarding building codes, was clearly harmful to the plaintiff . . . ." We are not persuaded.

The following additional facts are relevant to this claim. The plaintiff disclosed Tebbets as an expert in the fields of "building codes, fire codes, [Americans with Disabilities Act (ADA)] accessibility, fall prevention, and safe snow removal." Tebbets' resume reveals that he has a Bachelor of Science degree in education, with a focus on "industrial arts, mechanical, electrical, carpentry and architectural drafting." He also attended

a mechanical engineering program at Thames Valley State Technical College. Tebbets has additional training listed on his resume as follows: International Code Council's master code professional certification since 1998; Connecticut certified building official; Massachusetts building commissioner; property maintenance and housing inspector; certified zoning official of the Connecticut Association of Zoning Enforcement Officials; Occupational Safety and Health Administration (OSHA) and Environmental Protection Agency regulations; Connecticut Building Officials and Code Administrators building code updates; and ADA mandates regarding asbestos and lead abatement. Tebbets' resume also lists his extensive professional experience in: building code consulting and building, safety, and fire code compliance; ADA consulting and compliance; building energy code policies; the drafting of model legislation in support of stronger energy codes; teaching professional development seminars and classes regarding building code and inspection; and enforcement of OSHA regulations.

After the plaintiff called Tebbets to the witness stand, Tebbets discussed his extensive education and experience with codes and ordinances. He then testified about his experience with snow removal. Tebbets testified that he "shoveled snow for [his] mom and dad . . . [and] worked at a marina where . . . [he] plowed there. Eventually, [he] worked for different . . . contractors, [where] in the middle of winter, there's not a whole lot to do except come out in a snowstorm and shovel snow or plow." He testified: "If you look around, in the old days, every carpenter had a plow on the front of his truck, so I learned to plow when I was still in high school . . . ." He also stated that he had a multifamily dwelling that he owned and plowed and that his relatives owned a trailer park where he plowed, thereby

"bec[oming] familiar with it just because it was the off-season and it was the thing you did." The plaintiff, thereafter, offered him as an expert on "snow removal and codes and ordinances."[2] The defendants objected to his testifying as a snow removal expert on the ground that Tebbets had not set forth any expertise on the issue of snow removal. The court stated that, up to that point, it had not heard anything that would rise to the level of expertise in snow removal, but permitted the plaintiff to engage in additional questioning.

The plaintiff then asked Tebbets more questions about his snow removal background. Tebbets explained that he was involved with snow removal for the Mashantucket Pequot Tribal Nation where, although it had a

[2] We note that it is not necessary for a party to ask that the court recognize the witness as an expert before asking the witness to provide an opinion. *Nicholson* v. *Commissioner of Correction*, 186 Conn. App. 398, 420–21, 199 A.3d 573 (2018), cert. denied, 330 Conn 961, 199 A.3d 19 (2019). The proponent of the expert simply must lay the necessary foundation before asking the witness a question that calls for an expert opinion. If there is no objection to the question, the witness may give the opinion. If there is an objection to the witness' qualifications or to whether the witness' testimony will assist the trier of fact, the court can then rule on the objection in the context of the specific questions asked. We believe that this procedure has several advantages over one asking the court to accept or recognize a witness as an expert. First, asking the court to recognize a witness as an expert suggests that the court may refuse to do so even in the absence of an objection. It cannot. Id. Requiring an objection to a question that calls for an opinion and then a ruling from the court is much more consistent with our adversarial system and the manner in which virtually all other evidence is admitted or excluded at trial. Second, accepting counsel's invitation to recognize or accept a witness as an expert risks "influencing the jury in its assessment of the credibility of the witness by announcing that the court is blessing or endorsing the witness." E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 7.4.1, p. 449. Third, the court is in a better position to rule on issues relating to a witness' qualifications and fitness for a particular case when the objection relates to the specific questions that will elicit the opinion to which an objection is raised. It would not be unusual at all for an expert to be qualified to answer one question on a subject, but not qualified to answer other questions on that subject. Consequently, we suggest that litigants abandon the practice of asking trial courts to recognize or accept a witness as an expert. For the same reasons, we encourage trial court judges to decline any such requests from the parties.

public works department that did the actual snow removal, he, as the chief land use inspector, "had to do all the difficult things like figure out where things were supposed to go." He also testified that he "was involved with making sure that the lots, the walks—especially sidewalks with the people walking around—were cleared and properly draining." He testified that he was involved in snow removal while he worked in the construction industry, but he "got tired of using a shovel, so [he] kind of moved more [toward] the technical supervisor roles at that point," and he had begun supervising others who were removing snow and plowing. Further, he stated that when he was the zoning enforcement officer in Groton, he was responsible for reviewing site plans to assess whether plow trucks could move about without obstruction, as well as the appropriateness of the drainage systems being proposed.

The defendants again objected to Tebbets testifying as an expert in snow removal. The court then explained to the plaintiff's attorney that it had not heard anything that would rise to the level of expertise. It asked counsel whether Tebbets had gone to school or attended seminars on snow removal, or whether he had read any books or educational materials on snow removal, or whether he had taught classes or seminars. Counsel, again, was permitted to question Tebbets further.

The plaintiff's attorney then asked Tebbets if he had any training in snow removal or whether there is training or schooling for snow removal. Tebbets answered: "[T]he town of Groton had some, but not being a plow driver there, I didn't have to take their class on plowing. We were always more concerned about where they were plowing and directing them where not to plow." Tebbets then proceeded to explain that he had driven a pickup truck with a snow plow and had driven a big truck with a sander on the back. The plaintiff's attorney

asked him if anyone had taught him how to do those things, and Tebbets said: "Well, they showed me how to drive and then they taught me how to plow and . . . how to plow routes. They taught me . . . [not to] stick [my] hand in the snow blower." The plaintiff's attorney then said: "Unless Your Honor wishes to direct some more questions, I'm not going to waste the jury's time any further, so I will offer him as an expert in snow removal. If Your Honor does not find him to be an expert, we'll just move on." The defendants' attorneys stated that they still objected. The court stated: "Okay. Yeah. I'm not seeing how he has special expertise in it other than having done a little bit of it, and it's somewhat tangential to his real expertise. So I'll sustain the objection, but I will find him to be an expert in codes and ordinances." On appeal, the plaintiff claims this was error. We disagree.

"A witness qualified as an expert by knowledge, skill, experience, training, education or otherwise may testify in the form of an opinion or otherwise concerning scientific, technical or other specialized knowledge, if the testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue." Conn. Code Evid. § 7-2. "The determination of the qualification of an expert is largely a matter for the discretion of the trial court." (Internal quotation marks omitted.) *United Aircraft Corp.* v. *International Assn. of Machinists*, 169 Conn. 473, 482–83, 363 A.2d 1068 (1975), cert. denied, 425 U.S. 973, 96 S. Ct. 2172, 48 L. Ed. 2d 797 (1976); see also *Weaver* v. *McKnight*, 313 Conn. 393, 405, 97 A.3d 920 (2014) ("[w]e review a trial court's decision to preclude expert testimony for an abuse of discretion").

"We afford our trial courts wide discretion in determining whether to admit expert testimony and, unless the trial court's decision is unreasonable, made on untenable grounds . . . or involves a clear misconception of the law, we will not disturb its decision. . . .

Although we afford trial courts significant discretion, [w]here it clearly appears that an expert witness is qualified to give an opinion, the exclusion of his testimony may be found to be [an abuse of discretion]. . . . To the extent the trial court makes factual findings to support its decision, we will accept those findings unless they are clearly improper. . . . If we determine that a court acted improperly with respect to the admissibility of expert testimony, we will reverse the trial court's judgment and grant a new trial only if the impropriety was harmful to the appealing party." (Internal quotation marks omitted.) *Fleming* v. *Dionisio*, 317 Conn. 498, 505, 119 A.3d 531 (2015); see also Conn. Code Evid. § 7-2.

"We also note our standards for admitting expert testimony. Expert testimony should be admitted when: (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues. . . . [T]o render an expert opinion the witness must be qualified to do so and there must be a factual basis for the opinion." (Internal quotation marks omitted.) *Weaver* v. *McKnight*, supra, 313 Conn. 405–406.

We conclude that the court did not abuse its discretion in precluding Tebbets from testifying as an expert in the field of snow removal. The court found that the testimony demonstrated that Tebbets' knowledge of snow removal was insubstantial and that it was "tangential" to his real expertise in codes and ordinances. We agree with this assessment. Tebbets' testimony revealed that his experience in snow removal was a minor part of other jobs, whether in code compliance, ordinance enforcement, or building construction. He had not attended any classes or seminars on the topic,

although he admitted that some were available to people who were employed as snow plow operators by the town of Groton, he had not read any materials or books on the topic, and he had not taught any seminars or classes on the topic. It was reasonable for the court to conclude from Tebbets' testimony that snow removal was a minor part of his employment over the years and that his experience in snow removal was little more than that common in the construction industry. The plaintiff's attorney simply did not develop Tebbets' testimony to show that his vast education in code compliance and ordinance enforcement and his work experience qualified him as an expert in snow removal. We cannot conclude, therefore, that the court abused its discretion when it evaluated the qualifications of Tebbets, as presented, and found that, although he was an expert in code compliance and ordinance enforcement, the plaintiff failed to establish that Tebbets had the requisite expertise to be qualified as an expert in the field of snow removal.[3]

II

The plaintiff next claims that the court abused its discretion when, in granting the plaintiff's motion for sanctions, it denied the plaintiff's request that the court sanction the property owner by rendering a default judgment against it as a sanction for the egregious

[3] We also note that the manner in which the plaintiff presented and the court resolved whether Tebbets was qualified to testify as an expert on snow removal would make it impossible, if the court had erred in concluding that he was not qualified, for us to determine if the plaintiff was harmed by such an error. The plaintiff never proffered a question about snow removal that she wanted Tebbets to answer and never made an offer of proof as to what testimony Tebbets would have offered if permitted to do so. Consequently, there is nothing in the record that would tell us how helpful, if at all, any testimony from Tebbets regarding snow removal would have been to the plaintiff. This problem might have been avoided had counsel simply asked Tebbets for an opinion, requiring the defendants to raise any objection in the context of the specific question asked. See footnote 2 of this opinion.

actions of its general and managing partner, Williams, in sexually harassing the plaintiff's attorney on two occasions. The plaintiff argues that, despite the court's specific finding that Williams' purpose was to cause the plaintiff's attorney "distress for a litigation advantage" and "to try to knock her off her ability to proceed in the case," it "imposed a sanction that failed to adequately penalize Williams for his litigation misconduct." (Internal quotation marks omitted.) The plaintiff further claims that Williams' actions interfered with her attorney's ability to represent her. Although we agree that Williams' conduct was egregious, we are unable to conclude that the court abused its discretion in declining to render a default judgment against the property owner.

The following facts inform our review. On January 15, 2016, at 11:02 p.m., Williams sent an e-mail to the plaintiff's attorney, Kelly E. Reardon. The e-mail stated in relevant part: "Welcome to my web said the spider to the fly. Am I the fly or are you? I think I'm the fly. Fare enough! What would like? What would you want me to do lie? I love women like you because you young girls have a direction that is 250% of what America is . . . about.

"Would you like to meet for coffee? Gee never had that one? Call if you want 860- . . . . The people in the case are not very nice people. This is not for just shits and giggles. Coffee would be great! I have nothing against your people. I think your great. Its just coffee. Have to dive 75 miles just to in joy a cup.

"Guess who is stupid? Me ok! You make my wheels turn. You are one sharp women. Bet your on top of your game. Did some MF say ATTORNEY. Call me to help me please.

"Thank you.

"beauty is in the eye of me, Oh ya.

"Not suppose to say this stuff so I will not say your a fox!!!! But you are. You asked me to call you and you didn't give me your cell.

"Old Goat

"Doug 860- . . . ." (Grammatical and spelling errors in original.)

After receiving the e-mail, Reardon notified her husband, her father, who also is an attorney in her law firm, and the police. The police thereafter warned Williams not to contact Reardon again. Reardon later spoke with the property owner's attorney about the e-mail. Neither the plaintiff nor Reardon informed the court about Williams' e-mail at that time.

More than one year later, immediately before opening statements were to begin on April 27, 2017, while Reardon and others were standing in a hallway outside the courtroom, Williams stated, loud enough to be heard by those present, including Reardon, her father, and at least one additional member of the bar who was not involved in this case, that he wanted Reardon to "sit on his fucking head." Almost immediately, Reardon reported to the court what had transpired, and she made an oral motion for sanctions. The court immediately held a hearing on the motion for sanctions, which then was continued to allow Williams to retain an attorney, thus delaying the start of trial. The January 15, 2016 e-mail also was discussed at the hearing. The plaintiff sought sanctions that included: (1) Williams be removed from the courtroom and sequestered; (2) a default judgment be rendered against the property owner and that the parties proceed to a hearing in damages; and (3) the court impose a financial penalty against Williams in an amount between $10,000 and $50,000.

The court issued an oral decision on May 3, 2017. The trial court specifically found that the purpose of

Williams' e-mail to Reardon "was obviously to threaten her, harass her, intimidate her, which the court believes was done for the purposes of getting some advantage in the case, to rattle her so that she'd do a poor job in representing her client, to scare her to get her to drop the case." As to the statement Williams made in the hallway of the courthouse, the court found that "considering the context and the purpose, which was essentially a sexual harassment of the plaintiff's attorney to try to scare her and rattle her, and obviously had that exact effect because during the April 27 hearing when the motion was made . . . Reardon was obviously very upset . . . and so he accomplished his purpose to try to knock her off her ability to proceed in the case, and to cause her distress for a litigation advantage." The court concluded that "these tactics were without any color of propriety and they were taken in bad faith . . . . There is no excuse for it, as obviously a bad faith tactic which is not condoned or permitted by any stretch of the imagination in court."

The court thereafter granted in part the motion for sanctions, explaining that "something is merited here due to the abusive, egregious behavior, but I don't think a default in a slip and fall case would be the appropriate penalty since we're trying to penalize the person, not the corporation really, even though he was doing it to benefit the corporation." The court then ordered Williams to sit in the back of the courtroom and to have no contact with Reardon, and it awarded attorney's fees to the plaintiff, in an amount to be decided after a hearing.[4]

Another of the plaintiff's attorneys then objected to the court's ruling allowing Williams to remain in the

[4] Williams filed a writ of error after the imposition of the sanctions, which this court later dismissed. *Maurice* v. *Chester Housing Associates Ltd. Partnership*, 188 Conn. App. 21, A.3d (2019).

courtroom and to be in the hallway during recesses. The court explained that it had considered this issue, but that it was standing by its ruling. The attorney then stated that he would ensure that someone, likely security, would be present with Reardon at all times "because we don't have marshals any longer in the courtrooms, which is—unfortunately puts lawyers at risk."

"It has long been understood that [c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution, powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others. . . . For this reason, Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates. . . . These powers are governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. . . .

"[I]t is firmly established that [t]he power to punish for contempts is inherent in all courts. . . . This power reaches both conduct before the court and that beyond the court's confines, for [t]he underlying concern that gave rise to the contempt power was not . . . merely the disruption of court proceedings. Rather, it was disobedience to the orders of the Judiciary, regardless of whether such disobedience interfered with the conduct of trial. . . .

"Because of their very potency, inherent powers must be exercised with restraint and discretion. . . . A primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process. . . . [O]utright dismissal of a lawsuit . . . is a particularly severe sanction, yet is within the

court's discretion. . . . Consequently, the less severe sanction of an assessment of attorney's fees is undoubtedly within a court's inherent power as well." (Internal quotation marks omitted.) *Maurice* v. *Chester Housing Associates Ltd. Partnership*, 188 Conn. App. 21, 25–26, A.3d (2019), quoting *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 43–45, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991).

"It is well settled that the imposition of sanctions . . . rests within the discretion of the trial court and will not be disturbed on review unless there is an abuse of discretion. . . . Generally, a sanction should not serve as a punishment or penalty. Courts should be reluctant to employ the sanction of dismissal except as a last resort. Such drastic action is not, however, an abuse of discretion where a party shows a deliberate, contumacious or unwarranted disregard for the court's authority." (Citations omitted.) *Fox* v. *First Bank*, 198 Conn. 34, 39, 501 A.2d 747 (1985); see also *Emerick* v. *Glastonbury*, 177 Conn. App. 701, 736, 173 A.3d 28 (2017), cert. denied, 327 Conn. 994, 175 A.3d 1245 (2018).

In this case, we are not persuaded that the court abused its discretion in declining to render a default judgment against the property owner on the basis of Williams' misconduct. Although the plaintiff argues that Williams committed two egregious acts against Reardon, those acts were brought to the attention of the court only after the occurrence of the second act. Reardon did not bring to the court's attention the January 15, 2016 e-mail until the end of April, 2017, when Williams made a vile verbal comment to her in the hallway of the courthouse. Nor did she ask for a mistrial or an additional continuance. As egregious as Williams' conduct was, the record reveals that he ceased such conduct immediately upon the intervention of the court and the court's imposition of attorney's fees and an

order limiting Williams' movements in court. Because there is no indication that the conduct continued after the court's intervention, we are unable to conclude that the court abused the wide discretion afforded to it when it imposed a sanction that it deemed appropriate under the circumstances.

The judgment is affirmed.

In this opinion the other judges concurred.

JOSEPHINE S. MILLER *v.* ELISABETH MAURER ET AL.
(AC 40654)

Prescott, Elgo and Harper, Js.

Syllabus

The plaintiff attorney brought an interpleader action to determine the rights to certain proceeds from a legal settlement that were held in escrow. The defendant R previously had retained the law firm of the defendant M, an attorney, to represent her in a federal action seeking damages from her employer for sexual harassment. Prior to the conclusion of the federal action, R discharged M's law firm and retained the plaintiff to represent her in that action pursuant to a retainer agreement that contained a contingency clause entitling the plaintiff to one third of the amount recovered. R thereafter settled the federal action. In ordering distribution of the settlement proceeds, the trial court determined that the plaintiff was entitled to 15 percent of the proceeds pursuant to a subsequent agreement between the plaintiff and R in which the contingency fee had been reduced to 15 percent of any recovery. Accordingly, the trial court rendered judgment ordering 15 percent of the settlement proceeds to be disbursed to the plaintiff and dividing the remaining 85 percent of the proceeds between M and R, from which the plaintiff appealed to this court. *Held*:

1. The plaintiff could not prevail on her claim that the trial court improperly determined that she was entitled to 15 percent of the settlement proceeds; that court's finding was not clearly erroneous and was supported by evidence in the record, as the plaintiff averred in her complaint that she had agreed to reduce her contingency fee due to R's dissatisfaction with the amount of the settlement, the plaintiff expressly testified that she had volunteered to reduce her contingency to 15 percent to convince R to accept the settlement offer, R likewise testified that the plaintiff had agreed to reduce her fee to 15 percent of any recovery, that modified

agreement reducing the contingency to 15 percent was memorialized in a letter that was sent by the plaintiff to R and which was admitted into evidence, and the plaintiff further acknowledged the reduction of the contingency fee to 15 percent in a letter, also entered into evidence, that she had sent to the local grievance panel.

2. The plaintiff lacked standing to challenge the trial court's determinations with respect to M's entitlement to a portion of the settlement proceeds; in light of this court's conclusion that the trial court properly found that the plaintiff was entitled to 15 percent of the settlement proceeds, the plaintiff could not establish a colorable claim of injury resulting from the court's distribution of the remaining 85 percent of the settlement proceeds, as neither the trial court's allocation of the remaining proceeds between M and R, nor the manner by which the court arrived at that allocation, adversely affected any cognizable legal interest of the plaintiff.

Argued January 9–officially released May 7, 2019

Procedural History

Action for interpleader to determine the rights of the parties to certain settlement funds, brought to the Superior Court in the judicial district of Danbury and tried to the court, *Truglia*, *J.*; judgment ordering distribution of the funds, from which the plaintiff appealed to this court. *Appeal dismissed in part*; *affirmed*.

Josephine S. Miller, self-represented, the appellant (plaintiff).

Elisabeth Seieroe Maurer, self-represented, the appellee (defendant).

Opinion

ELGO, J. In this interpleader action, the plaintiff, Attorney Josephine S. Miller, appeals from the judgment of the trial court distributing the proceeds of a legal settlement between the plaintiff, the plaintiff's client, the defendant Lori Rodriguez, and Rodriguez' former legal counsel, the defendant Attorney Elisabeth

Maurer.[1] On appeal, the plaintiff challenges (1) the court's finding that she was entitled to 15 percent of the settlement proceeds and (2) the court's determinations with respect to Maurer's entitlement to a portion of those proceeds. We dismiss the plaintiff's second claim for lack of subject matter jurisdiction, and affirm the judgment of the trial court in all other respects.

As the court found in its oral decision,[2] Rodriguez entered into a valid retainer agreement in 2005 with Maurer's law firm, Maurer & Associates, PC (law firm), which agreed to represent Rodriguez in connection with a sexual harassment complaint against her employer, the Bridgeport Housing Authority, and other defendants. Pursuant to the retainer agreement, Rodriguez agreed to pay the law firm a "contingency fee . . . of one third of any recovery" from that action, plus costs.

The court also found that the law firm commenced a federal action on Rodriguez' behalf, "diligently and professionally represented Rodriguez in her claims against all defendants in that action," and "added good value to Rodriguez' claims by, among other things, commencing the action, successfully defending an early motion to dismiss and diligently prosecuting and responding to discovery requests in that action, including compiling and indexing Rodriguez' . . . medical records in support of her claims." The court further found "no evidence of misconduct or professional negligence by anyone in the [law firm] or in its handling" of the action.

[1] For purposes of clarity, we refer to Lori Rodriguez and Elisabeth Maurer collectively as the defendants and individually by name. We further note that the trial case caption, transcripts, and various pleadings appear to contain a scrivener's error, as Maurer's first name is spelled incorrectly as "Elizabeth" rather than "Elisabeth." As Maurer stated in her answer to the plaintiff's complaint, she is "correctly known as Elisabeth Seieroe Maurer" and is an attorney licensed to practice law in this state.

[2] By order dated July 7, 2017, the court rendered judgment in accordance with the signed transcript of its oral decision delivered earlier that day.

While that action was pending, Rodriguez discharged the law firm in December, 2012, and retained the plaintiff to represent her in that action. In releasing Rodriguez' file to the plaintiff, the law firm claimed a lien thereon. By letter dated January 10, 2013, Maurer notified the plaintiff that the law firm had expended significant resources on Rodriguez' behalf and, thus, was asserting a "lien against the file unless adequate protection of its interest in the case is provided in the form of a letter from you stating that you will hold settlement proceeds in escrow pending resolution of the fee dispute."

Rodriguez subsequently agreed to settle her claims against the Bridgeport Housing Authority and received a payment of $128,151.89 in exchange for the withdrawal of her claims. Upon receipt of those funds, the plaintiff disbursed $27,329 to Rodriguez and $4822 to herself; she later deposited the remaining $96,000 with the clerk of the Danbury Superior Court. This interpleader action followed to determine the proper distribution of the settlement proceeds.

In her complaint, the plaintiff alleged in relevant part that "there exists a genuine dispute regarding ownership of the $96,000 being held" by the court because Maurer "has claimed a lien of $96,000 for work done on the case . . . ." Pursuant to General Statutes § 52-484,[3] the plaintiff therefore requested a judicial determination as to the amount "rightfully owned by each

[3] General Statutes § 52-484 provides: "Whenever any person has, or is alleged to have, any money or other property in his possession which is claimed by two or more persons, either he, or any of the persons claiming the same, may bring a complaint in equity, in the nature of a bill of interpleader, to any court which by law has equitable jurisdiction of the parties and amount in controversy, making all persons parties who claim to be entitled to or interested in such money or other property. Such court shall hear and determine all questions which may arise in the case, may tax costs at its discretion and, under the rules applicable to an action of interpleader, may allow to one or more of the parties a reasonable sum or sums for counsel fees and disbursements, payable out of such fund or property; but no such

party." The defendants filed their respective answers and all three parties thereafter filed a statement of claim. The plaintiff claimed "a one-third share of the funds now held by the court, based upon the retainer agreement [she] had with [Rodriguez]." Rodriguez, by contrast, claimed that she was entitled to "all the monies awarded to [her] from the Bridgeport Housing Authority except for the 15 [percent] owed to" the plaintiff pursuant to their fee agreement. In her statement of claim, Maurer requested a "proportionate share of the contingency fee (i.e. $42,290.12) based on hours invested," in addition to "[out-of-pocket] expenses of $29,922.92."

A two day court trial was held in July, 2017, at which the plaintiff, Rodriguez, Maurer, and Christopher Avcollie, an attorney with the law firm, testified. Following closing arguments, the court delivered its decision from the bench. With respect to the plaintiff, the court found that she had agreed to a 15 percent fee for any recovery received by Rodriguez and thus concluded that the plaintiff was entitled to "15 percent of the gross amount recovered," which "equals $19,222.78." Because the plaintiff already had received $4822 in settlement proceeds, the court held that she was "entitled to an additional $14,400.78."[4] With respect to Maurer, the court found that her law firm was "entitled to an equitable attorney's charging lien on the settlement proceeds" and "reasonable compensation for its services rendered" in the amount of $23,067.34, as well as $20,632

allowance shall be made unless it has been claimed by the party in his complaint or answer."

[4] Following the commencement of this appeal, the trial court granted Maurer's motion to terminate the appellate stay. The plaintiff thereafter filed a motion requesting the release of her $14,400 disbursement by the Superior Court. In its November 26, 2018 memorandum of decision, the court explained that it had "intended that its prior ruling would affect the appellate stay as to all three parties." The court then ordered "[t]he clerk of the court . . . to disburse the remaining settlement proceeds held on deposit . . . in the amount of $14,400.78 to [the plaintiff]. The clerk is ordered to disburse the funds on or before December 17, 2018."

in costs. As a final matter, the court concluded that "[t]he balance of $37,899.88 is to be distributed to [Rodriguez]." From that judgment, the plaintiff now appeals.[5]

I

We first address the plaintiff's claim that the court improperly determined that she was entitled to 15 percent of the settlement proceeds. We disagree.

"It is well established that [i]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses. . . . We afford great weight to the trial court's findings because of its function to weigh the evidence and determine credibility. . . . Thus, those findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . 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.) *De La Concha of Hartford, Inc.* v. *Aetna Life Ins. Co.*, 269 Conn. 424, 431–32, 849 A.2d 382 (2004).

In the present case, the plaintiff introduced into evidence a retainer agreement with Rodriguez dated December 3, 2012, which, the court found, originally entitled the plaintiff to one third of any recovery. The court nevertheless found that the parties subsequently entered into a "later agreement . . . whereby [the plaintiff] agreed to reduce her fee to 15 percent of any recovery." That determination finds ample support in the record before us.

[5] Rodriguez has not filed a brief in this appeal and did not participate in oral argument.

In her complaint, the plaintiff averred in relevant part that "[b]ecause Rodriguez was not satisfied with the $128,000 settlement amount, [the] plaintiff had agreed to reduce her contingency fee."[6] At trial, Rodriguez likewise testified that the plaintiff had agreed to reduce her fee to 15 percent of any recovery. That agreement also is memorialized in a letter that the plaintiff sent to Rodriguez dated October 18, 2016, which was admitted into evidence and captioned "RE: Rodriguez v. Bridgeport Housing Authority Settlement Proceeds." That letter states in full: "Dear [Rodriguez]: This will confirm that, as a courtesy to you, the fractured manner in which this case was handled, and because of the small amount of money that was left under the [Bridgeport] Housing Authority [i]nsurance policy, I agreed to reduce my fee to fifteen (15%). Sincerely, [the plaintiff]." The record also contains a letter that the plaintiff sent to an attorney with the local grievance panel regarding a grievance that Rodriguez had filed, in which the plaintiff states that "[b]ecause [Rodriguez] was not happy with the settlement amount, I voluntarily proposed to reduce my fee from [one third] to [15] percent." Furthermore, toward the end of the two day trial, the court indicated that it was "concerned from your perspective, Attorney Miller, on the 15 percent agreement." In responding to the court's concern, the plaintiff testified that she had volunteered to reduce her fee to 15 percent "in order to get [Rodriguez] to accept the settlement."[7]

[6] Despite that admitted agreement with Rodriguez, the plaintiff further alleged in her complaint that "if [Maurer] now insists upon sharing in the settlement funds, [the plaintiff] reserves the right to claim her full one-third share of any proceeds."

[7] At trial, the plaintiff also alleged that she reduced her fee in part due to Maurer's agreement to waive her claim to a share of the settlement proceeds. The record before us contains no evidence of any such agreement. To be sure, the record contains a letter addressed to the plaintiff dated December 29, 2015, in which Maurer stated in relevant part that she would consider waiving the "lien [on the settlement proceeds] in exchange for a release of claims signed by [Rodriguez]." At trial, Maurer testified that she made that overture because she did not want "to have to face a malpractice

The foregoing evidence substantiates the court's finding that the plaintiff was entitled to 15 percent of the settlement proceeds, and we are not left with a definite and firm conviction that a mistake has been made. We therefore conclude that the court's finding was not clearly erroneous.

II

We next consider the plaintiff's challenge to the court's determinations with respect to Maurer's entitlement to a portion of the settlement proceeds.[8] The plaintiff maintains that the court erroneously found that Maurer was entitled to *any* settlement proceeds. In addition, the plaintiff claims that the court improperly applied the terms of the retainer agreement between the law firm and Rodriguez, rather than "principles of quantum meruit," in calculating the amount of those proceeds.[9] In response, Maurer argues that the plaintiff lacks standing to raise those claims. We agree with Maurer.

claim or a grievance." It nevertheless is undisputed that no release of claims ever transpired; rather, Maurer subsequently had to defend both a grievance complaint (grievance complaint no. 16-0664), which was dismissed for lack of probable cause on January 13, 2017, as well as a malpractice action. See *Rodriguez* v. *Maurer*, Superior Court, judicial district of Danbury, Docket No. CV-16-6019763-S (September 6, 2016). For that reason, the trial court understandably declined to find that Maurer had agreed to waive her legal interest in the settlement proceeds in this case.

[8] To be precise, the court in its oral decision found that the law firm was entitled to a portion of the settlement proceeds. It nonetheless remains that the plaintiff named Maurer, rather than the law firm, as a defendant in this interpleader action, and no meaningful distinction thereafter was drawn between Maurer and the law firm with respect to the proper distribution of settlement proceeds. Because the parties raised no objection at trial and have pursued no claim on appeal regarding that distinction, we do not consider it further.

[9] The plaintiff did not file a reply brief in this appeal, and her principal appellate brief is not a model of clarity with respect to this latter contention. As best we can tell, that claim pertains solely to the court's alleged failure to apply principles of quantum meruit in measuring the extent of *Maurer's* entitlement to settlement proceeds. The caption to her claim broadly states that "the trial court erred in applying the terms of the retainer contracts

It is well established that "a party must have standing to assert a claim in order for the court to have subject matter jurisdiction over the claim. . . . Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . [Our Supreme Court] has often stated that the question of subject matter jurisdiction, because it addresses the basic competency of the court, can be raised by any of the parties, or by the court sua sponte, at any time. . . . [T]he court has a duty to dismiss, even on its own initiative, any appeal that it lacks jurisdiction to hear. . . . Standing . . . is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate

rather than the principles of quantum meruit." The plaintiff quotes *Cooke* v. *Thresher*, 51 Conn. 105, 107 (1883), for the proposition that an attorney may only enforce the provisions of a contingency fee agreement if that attorney "conducts the suit to a favorable conclusion"; id.; and argues that an attorney who is discharged "prior to the occurrence of the contingency is limited to quantum meruit recovery . . . ." (Emphasis omitted; internal quotation marks omitted.) The plaintiff then asserts that "[t]he result obtained by [Maurer] during the course of her handling of [Rodriguez'] action must necessarily be a factor in deciding 'how much she deserved' " before concluding that "[t]he facts and circumstances of [Maurer's] handling of [Rodriguez'] case . . . do not warrant application of the equitable doctrine of quantum meruit."

At no point in her appellate brief does the plaintiff distinctly argue that the court should have applied the doctrine of quantum meruit to determine *her own portion* of the settlement proceeds. Furthermore, the plaintiff never raised that claim before the trial court. To the contrary, the plaintiff specifically averred in her June 2, 2017 statement of claim that she was seeking recovery of settlement funds pursuant to "the retainer agreement that [she] had with [Rodriguez]." She, therefore, is foreclosed from arguing otherwise for the first time in this appeal. See *Lee* v. *Stanziale*, 161 Conn. App. 525, 538–39, 128 A.3d 579 (2015), cert. denied, 320 Conn. 915, 131 A.3d 750 (2016), and cases cited therein.

nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented." (Citations omitted; internal quotation marks omitted.) *Webster Bank* v. *Zak*, 259 Conn. 766, 774, 792 A.2d 66 (2002). "Where a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause." (Internal quotation marks omitted.) *J.E. Robert Co.* v. *Signature Properties, LLC*, 309 Conn. 307, 318, 71 A.3d 492 (2013). Our review of the question of the plaintiff's standing is plenary. See *West Farms Mall, LLC* v. *West Hartford*, 279 Conn. 1, 12, 901 A.2d 649 (2006).

"When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue. . . . Standing requires no more than a colorable claim of injury; a [party] ordinarily establishes . . . standing by allegations of injury. Similarly, standing exists to attempt to vindicate arguably protected interests. . . . Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved. . . . The fundamental test for determining aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the subject matter of the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]. . . . Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Internal quotation marks omitted.) *Smith* v. *Snyder*, 267 Conn. 456, 460–61, 839 A.2d 589 (2004).

The present case involves an interpleader action to determine the proper distribution of the settlement proceeds. In part I of this decision, we concluded that the trial court properly found that the plaintiff was entitled to 15 percent of those proceeds. Accordingly, the court's determinations regarding the distribution of the remaining 85 percent of the settlement proceeds cannot be said to adversely affect any cognizable legal interest of the plaintiff. Even if the plaintiff's claim was successful, any reduction in the amount of Maurer's recovery would inure to the benefit of Rodriguez, and not to the plaintiff. For that reason, the plaintiff cannot establish a colorable claim of injury from either the court's allocation of the remaining proceeds between Maurer and Rodriguez or the manner by which the court arrived at that allocation. We therefore conclude that the plaintiff lacks standing, which deprives this court of subject matter jurisdiction over those claims.

The appeal is dismissed with respect to the plaintiff's challenge to the court's determinations regarding Maurer's entitlement to a portion of the settlement proceeds; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

GORDON MERKEL *v.* MARLENE BALTIMORE HILL
(AC 41352)

Keller, Bright and Beach, Js.

Syllabus

The plaintiff filed a motion to modify orders of custody and visitation concerning the parties' minor child that had been issued in connection with a foreign judgment of dissolution. Thereafter, the plaintiff filed a motion to modify a parental access plan. The plaintiff claimed that the parties' circumstances had changed since the entry of the existing orders and requested that the trial court follow the recommendations contained in a comprehensive evaluation report that had been prepared by a family relations counselor one year earlier. At a short calendar hearing, the trial court and the parties confirmed that the sole motion scheduled to

be heard and decided at the hearing was the motion to modify the parental access plan. Following the hearing, the court issued a memorandum of decision in which it modified the existing orders relating to the parental access plan and custody, and adopted the entirety of the recommendations in the report of the family relations counselor, who had testified at the hearing that because the report was prepared one year prior, the recommendations contained therein were outdated. On appeal to this court, the defendant claimed, inter alia, that the trial court violated her right to procedural due process when it modified the existing custody order without any notice and after a hearing at which it repeatedly was confirmed that the only issue was the modification of the parental access plan. *Held* that the trial court violated the defendant's procedural due process rights when it modified the custody order: that court modified the custody order without providing the parties with notice and a meaningful opportunity to be heard on that issue, as the court and both parties expressly and consistently had confirmed that the sole motion to be heard and decided at the hearing was the motion to modify the parental access plan, and the plaintiff conceded at oral argument before this court that modification of the custody order was improper; moreover, the trial court abused its discretion when it adopted the recommendations in the report of the family relations counselor under the circumstances here, where the recommendations in the report were stale and outdated, the family relations counselor was unable to answer questions about her report because she had not been subpoenaed and was unprepared, and she testified that such reports become outdated six months after completion because of the evolution of child development, and that she could not make present recommendations and would do a disservice to the minor child to say that the recommendations in her report were still valid.

Argued April 10—officially released April 26, 2019*

Procedural History

Motion by the plaintiff for, inter alia, modification of orders of custody and visitation as to the parties' minor child issued in connection with a foreign judgment of dissolution, and for other relief, brought to the Superior Court in the judicial district of Windham at Putnam; thereafter, the plaintiff filed a motion to modify the parties' parental access plan; subsequently, the court, *A. dos Santos*, *J.*, entered orders modifying the parental access plan and custody, and the defendant appealed

* April 26, 2019, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

to this court; thereafter, the court, *A. dos Santos*, *J.*, granted in part the defendant's motion to stay the proceedings, and the defendant filed an amended appeal. *Reversed; further proceedings.*

Pamela S. Bacharach, for the appellant (defendant).

Gordon Merkel, self-represented, the appellee (plaintiff).

Opinion

PER CURIAM. The defendant, Marlene Baltimore Hill, appeals from the postjudgment order of the trial court modifying the existing orders governing the parental access plan and the custody rights of the self-represented plaintiff, Gordon Merkel, with respect to the parties' minor child. On appeal, the defendant claims that the court's modification of the existing custody order violated her right to procedural due process under the United States constitution, and that the court abused its discretion by adopting the recommendations contained in a stale family relations report to modify both the existing custody and parental access plan orders. We agree and, accordingly, reverse the judgment of the trial court.

The record reveals the following undisputed facts and procedural history. The parties, who never were married, have one child, who was born in December, 2008. In April, 2009, the defendant, who lived in Massachusetts at the time, filed a complaint in the Massachusetts Probate and Family Court seeking child support from the plaintiff, who lived in Connecticut. On October 1, 2013, after four years of litigation, the Massachusetts Probate and Family Court rendered judgment in accordance with the parties' stipulated agreement regarding the support, custody, and visitation of their child. Pursuant to that judgment, the defendant was awarded sole physical and legal custody of the child, the plaintiff

was entitled to visitation in accordance with a detailed parental access plan, and the plaintiff was to make biweekly child support payments to the defendant. Sometime thereafter, the defendant moved to Connecticut.

On October 11, 2013, the plaintiff filed a certified copy of the Massachusetts judgment in the Connecticut Superior Court, and the trial court domesticated the Massachusetts judgment. See General Statutes § 46b-71.[1] On May 8, 2014, the plaintiff filed with the trial court a motion for modification of the existing orders relating to custody and visitation. On December 16, 2015, the plaintiff filed another motion to modify the custody and visitation orders. On February 3, 2016, the trial court referred the matter to the family relations division (family relations) of the Superior Court for a comprehensive evaluation. On December 7, 2016, the family relations counselor, Nancy E. Fraser, filed a comprehensive evaluation report (report). In her report, which was filed again on December 30, 2016, she recommended that the parties share joint legal custody of the child, that the defendant maintain primary physical custody, and a revised parental access plan that would increase the plaintiff's visitation with the child.

On September 7, 2017, the plaintiff filed a motion to modify only the parental access plan. In his motion, the plaintiff maintained that the circumstances had changed since the entry of the existing orders in 2013,

[1] General Statutes § 46b-71 provides in relevant part: "(a) Any party to an action in which a foreign matrimonial judgment has been rendered, shall file, with a certified copy of the foreign matrimonial judgment, in the court in this state in which enforcement of such judgment is sought, a certification that such judgment is final . . . .

"(b) Such foreign matrimonial judgment shall become a judgment of the court of this state where it is filed and shall be enforced and otherwise treated in the same manner as a judgment of a court in this state; provided such foreign matrimonial judgment does not contravene the public policy of the state of Connecticut. . . ."

and he requested that the court follow the recommendations of the report on a temporary basis until a full trial could be held. Although there were several other pending motions to modify both the custody and parental access plan orders, and motions for contempt, only the plaintiff's September 7, 2017 motion was scheduled to be heard at the short calendar on October 11, 2017. On October 4, 2017, the plaintiff filed an application for the issuance of a subpoena to compel Fraser's appearance at the short calendar hearing, which was denied by the court on the same date.

At the outset of the October 11, 2017 short calendar hearing, the court identified that there were approximately three to eight motions and objections pending, but the sole motion scheduled to be heard that day was the plaintiff's September 7, 2017 motion to modify the parental access plan. The defendant's attorney agreed that the motion to modify the parental access plan was the only motion scheduled to be heard, and she orally requested a special assignment so that all of the pending motions could be heard on the same day, which the court denied. The court and both parties repeatedly confirmed throughout the hearing that the only motion that was to be heard that day was the plaintiff's motion to modify the parental access plan.

The plaintiff sought to introduce the report at the hearing. The defendant objected on the grounds that the report was stale and that Fraser had not been subpoenaed to be a witness. As to the staleness of the report, the plaintiff testified that "[e]verything has changed," including the child's "behavior, moving, [the defendant's] new job," the defendant's boyfriend, and the location of the police station used as a meeting point. As to the availability of Fraser, the court stated that she was available to testify because she was present in the courthouse at that time, working on other cases. The court overruled the objection and admitted the

report as a full exhibit. After a short recess to permit the defendant's attorney to review the report for the first time, as she represented that it had been provided to prior counsel, the court then asked the plaintiff whether he agreed or disagreed with each of the twenty recommendations contained therein. The plaintiff testified that he agreed to a substantial majority of the recommendations. The defendant's attorney then cross-examined the plaintiff as to, among other things, his relationship with the child, the child's performance in school, and his interactions with the defendant.

Thereafter, the court made Fraser available to testify so that the defendant would have the ability to cross-examine her.[2] Fraser testified as to the general process with respect to the compilation of a report, but she testified that she could not opine as to the particulars of the report at issue because she was not expecting to testify that day regarding the present case, her report had been completed almost one year ago, she had not reviewed the file, report, or notes, and she did not have the file or notes with her in court to refresh her recollection.

In response to a series of questions as to whether the recommendations made in her report were still her present recommendations, Fraser provided the following relevant testimony: "I have no basis for—it's a year old. I—I haven't spoken with anybody. I haven't—I don't know where the minor child, you know—how the minor child is doing. I don't know if the two parties have come to a different agreement. I have nothing to base a recommendation today on. . . . These are recommendations that I made in December of 2016 based on all of the evidence and all of the people that I spoke to at that time. . . . I can't make any recommendations

[2] Pursuant to Practice Book § 25-60 (c), the report was admissible, provided its author, Fraser, was available for cross-examination.

for today." She also testified that she "was always under the assumption that our reports were outdated after six months because of child custody and access, and the child development changing. I mean, child custody and access is a—a living, breathing thing. We all know that. That's part of family law that makes it so difficult. . . . Children grow. Children's needs . . . change. What was in the best interest of a child a year ago may not be in the best interest of a child today. And, unfortunately, I find myself in a very tough predicament because while I wholeheartedly—I will stand by my recommendation and that it was based on good evaluative work, I—I have no basis to say that it's still valid for—for both mom and dad today. I—I would be doing a disservice to the minor child to say that. I can't say that." Thereafter, the defendant testified regarding her relationship with the plaintiff and the child.

On January 26, 2018, the court issued a memorandum of decision in which it modified the existing orders relating to the parental access plan *and custody*, and adopted the entirety of Fraser's recommendations from her stale report, with a few immaterial changes. The court held that Fraser's testimony "validated the report and her recommendations" and that, although her "report should be taken up soon after it [was] completed," the numerous court appearances and motions delayed that occurrence. The court also found that the report was "complete, thoughtful, and credible. No credible evidence was presented that the issues that the child ha[d] at school have been altered or have abated. Finally, the court accepts the family counselor's recommendations contained at the end of her report." This appeal followed. Additional facts will be set forth as necessary.

On appeal, the defendant claims that the court improperly modified the existing orders relating to custody and the parental access plan. In support of her

claim, the defendant first argues that the court violated her right to procedural due process under the United States constitution because it modified the existing custody order without any notice and after a hearing at which it repeatedly was confirmed that the only issue was the modification of the parental access plan. Second, she argues that the court abused its discretion by adopting the recommendations contained in the report because Fraser specifically testified that the report was outdated and that her recommendations contained therein were not current.[3] We agree.

We begin with the standard of review and general principles relevant to the defendant's first argument. Whether the court violated the defendant's constitutional procedural due process rights is a question of law over which our review is plenary. *State* v. *Harris*, 277 Conn. 378, 394, 890 A.2d 559 (2006). "[F]or more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. . . . It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner. . . . [T]hese principles require that a [party] have . . . an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence

[3] The defendant also argues that the court lacked subject matter jurisdiction to modify the existing custody order because there was no motion to modify the custody order scheduled to be heard on October 11, 2017. This claim is without merit. Whether a motion is properly before a court at a particular proceeding at most raises the question of whether the court has authority to consider the motion and does not implicate the court's subject matter jurisdiction to decide the motion. See generally *Reinke* v. *Sing*, 328 Conn. 376, 389–92, 179 A.3d 769 (2018) (delineating principles of subject matter jurisdiction). Further, the defendant claims that the court abused its discretion in denying in part her motion to stay, which was filed with the trial court after she took this appeal; however, she expressly abandoned this claim at oral argument before this court.

orally." (Citation omitted; internal quotation marks omitted.) *In re DeLeon J.*, 290 Conn. 371, 378, 963 A.2d 53 (2009). "A parent's right to make decisions regarding the care, custody, and control of his or her child is a fundamental liberty interest protected by the [f]ourteenth [a]mendment. . . . Before a parent can be deprived of her right to the custody, care, and control of her child, he or she is entitled to due process of law." (Internal quotation marks omitted.) *Barros* v. *Barros*, 309 Conn. 499, 508, 72 A.3d 367 (2013).

In the present case, the court modified the existing custody order without providing notice to the parties and without providing them a *meaningful* opportunity to be heard on that issue. At the October 11, 2017 hearing, the court and both parties expressly and consistently confirmed that the sole motion scheduled to be heard and decided was the plaintiff's motion to modify the parental access plan. Indeed, at oral argument before this court, the plaintiff conceded that the court's modification of the custody order was improper. After thoroughly examining the record in the present case, we conclude that the court's modification of the custody order violated the defendant's procedural due process rights because its decision affected her fundamental right to custody of their child without providing notice to the parties and a *meaningful* opportunity to be heard.

We turn next to the standard of review and general principles relevant to the defendant's second argument. "We utilize an abuse of discretion standard in reviewing orders regarding custody and visitation rights . . . . In exercising its discretion, the court . . . may hear the recommendations of professionals in the family relations field, but the court must ultimately be controlled by the welfare of the particular child. . . . This involves weighing all the facts and circumstances of the family situation. Each case is unique. . . . A mere difference of opinion or judgment cannot justify our

intervention. Nothing short of a conviction that the action of the trial court is one which discloses a clear abuse of discretion can warrant our interference." (Internal quotation marks omitted.) *Lopes* v. *Ferrari*, 188 Conn. App. 387, 393, A.3d (2019).

In making its discretionary determination as to whether to modify an existing order relating to custody or a parental access plan, "the trial court is bound to consider the [children's] *present* best interests and not what would have been in [their] best interests at some previous time." (Emphasis in original; internal quotation marks omitted.) *Collins* v. *Collins*, 117 Conn. App. 380, 391–92, 979 A.2d 543 (2009); see *O'Neill* v. *O'Neill*, 13 Conn. App. 300, 303–304, 536 A.2d 978 (court abused discretion by fashioning order based on past conduct and outdated evidence rather than present ability to parent), cert. denied, 207 Conn. 806, 540 A.2d 374 (1988); compare *Balaska* v. *Balaska*, 130 Conn. App. 510, 518, 25 A.3d 680 (2011) (recognizing that "court's reliance on outdated information and past parental conduct in making or modifying orders concerning parental access may be improper," but concluding that court did not abuse its discretion where adequate current information in record to support orders).

In the present case, the court clearly abused its discretion by adopting the custody and parental access plan recommendations contained in the report, which Fraser testified were stale and outdated. Fraser first filed her report on December 7, 2016, the short calendar hearing was held ten months later on October 11, 2017, and the court's decision was not issued until January 26, 2018. At the hearing, Fraser was unable to answer specific questions about her report because she had not been subpoenaed and had no idea that she was going to testify that day, and, thus, she was unprepared to testify that day. Furthermore, she explicitly stated that she could not make any present recommendations

because she would have nothing on which to base such recommendations, and that she "*would be doing a disservice to the minor child to say that*" her recommendations were still valid at the time of the hearing. (Emphasis added.) She also testified that she believed that reports, such as the one in the present case, become outdated six months after completion because of the constant evolution of child development. Notwithstanding the staleness of the report and the testimony of Fraser that it did not represent her present recommendations, the court surprisingly found that Fraser's testimony "validated the report and her recommendations," and it adopted her stale recommendations as its own. The court's adoption of the recommendations taken from the outdated report constituted a clear abuse of discretion.

Finally, we recognize that the plaintiff has been seeking to modify the existing custody and parental access plan orders for approximately five years, and that the result of our decision will in all likelihood require family relations to conduct an updated or new comprehensive evaluation before a decision can be made on his motion to modify custody.[4] In light of the foregoing, we implore that this report be given priority and be completed as expeditiously as possible, and that a hearing on all motions to modify custody be scheduled immediately thereafter. In the meantime, we order that the court schedule as soon as possible a new hearing on the plaintiff's motion to modify the parental access plan.

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

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[4] The defendant's counsel represented at oral argument before us that the defendant also is seeking to modify custody.